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Marka B. Fleming, Monica F. Speight, and Gwendolyn McFadden-Wade, <i>To Discipline or Not to Discipline? – That is the Question: Legal Concerns for Universities When Faculty are Punished for Off-Campus Social Media Posts</i> Winner of the 2022 Best Article Award.....	1
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From the Editors...

Welcome to the 32nd volume of the Midwest Law Journal. This is the official publication of the Midwest Academy of Legal Studies in Business. The mission of the Journal is to publish articles of general interest to teachers of business law, the legal environment, and related fields of law.

The Journal has a less than 25% acceptance rate and requires that all prospective journal entries undergo a double-blind peer review vetting process. We would like to say a sincere thank you to our Articles Editor, John Paul, and to the Associate Editors and the Editorial Board that help make the Journal a success. We could not do it without you. As you read this edition, if you have any interest in participating as an editor, please contact any of us and we will get you signed up!

We would like to thank all authors for their submissions this year. This edition contains a great selection of articles that will be interesting to everyone. This year's Best Article Award winner is *To Discipline or Not to Discipline? – That is the Question: Legal Concerns for Universities When Faculty are Punished for Off-Campus Social Media Posts* by Marka B. Fleming, Monica F. Speight, and Gwendolyn McFadden-Wade. Congratulations!

Please remember that the Journal is now published online and is available on the Midwest Academy of Legal Studies in Business website – www.MALSB.org.

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The Journal does not require attendance at the regional conference to be considered for publication. However, you are always welcome and encouraged to attend. Our next annual meeting will be held in Chicago at the Palmer House Hotel in conjunction with the MBAA annual conference in March 2022. Please see www.MALSB.org for more information.

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TO DISCIPLINE OR NOT TO DISCIPLINE? – THAT IS THE QUESTION: LEGAL CONCERNS FOR UNIVERSITIES WHEN FACULTY ARE PUNISHED FOR OFF-CAMPUS SOCIAL MEDIA POSTS

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Monica F. Speight**

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No opinion ... is too challenging or unsettling that it can be banned from the college classroom. Forget the classroom—professors today are fortunate if they can be safe from punishment for an unkind word posted from a home computer on a personal, off-campus blog.¹

I. INTRODUCTION

This article conducts a comprehensive examination of the most current cases related to personal social media posts of university faculty and explores different university social media policies recently implemented throughout the country. Based on this examination, the article concludes with the position that without well-crafted social media policies and proper implementation of these policies, colleges and universities drastically run the risk of violating their faculty's First Amendment and academic freedom rights when punishing them for off-campus social media posts.

Social media² sites, such as Facebook, Twitter, and Instagram, permeate (or penetrate) every realm of our lives, especially those who are in academia.³ Indeed, teacher and pupil, whether in

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¹ Frank D. Lomonte, *A Dangerous Policy*, INSIDE HIGHER EDUC., Jan. 2, 2014, <https://www.insidehighered.com/views/2014/01/02/essay-criticizes-new-kansas-policy-use-social-media-university-employees>.

² For purposes of this article, the term social media will “encompass things such as creating websites for social networking purposes or microblogging, which is — ‘a blog that contains brief entries about the daily activities of an individual or company and is — created to keep friends, colleagues and customers up-to-date.’” Marka Fleming & Angela Miles, *Punishing Employees for Using Social Media Outside of the Scope of Their Employment: What are the Potential Repercussions to the Private Employers*, 13 ALSB LABOR LAW JOURNAL 1 (2012), <http://castle.eiu.edu/~alsb/Spring%202012/Employees%20for%20Using%20Social%20Media%20Outside%20the%20Scope%20of%20their%20Employment.pdf> (citing *Microblog*, DICTIONARY.COM, <http://dictionary.reference.com/browse/microblogging.>).

³ See Susan Park & Patricia Sanchez Abril, *Digital Self-Ownership: A Publicity-Rights Framework for Determining Employee Social Media Rights*, 53(3) ABLJ 537-598 (2016) (“For individuals, social media can be the digital representation of the self-online. Social media profiles are forums for communication, self-expression, identity creation, and relationship-building in front of audiences of few or many.”), chrome-extension://efaidnbmnnibpcajpcgclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fscholarworks.boisestate.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1084%26context%3Dmanage_facpubs&clen=797002&pdffilename=Di

physical or virtual classrooms, have become regular, if not obsessive, users of social media sites.⁴ While these sites can enrich teaching and provide opportunities for networking and socializing, the use of off campus social media sites⁵ also provides fertile ground for litigation. Questions arise as to whether colleges and universities can discipline students for their posts. Clearly, when posts could cause a “substantial disruption to the school environment,” such as those regarding bomb threats on campus or those threatening physical harm to other students,⁶ disciplinary action would be appropriate. Indeed, courts have upheld the university’s right to do so in these types of cases involving students because the First Amendment does not protect “speech that causes a substantial disruption.”⁷

Should faculty expect the same disciplinary treatment when they engage in off-campus social media posts? If so, have the faculty’s First Amendment rights been violated? Similarly, have the faculty’s rights to academic freedom been violated when these posts are made?

gital%20Self-Ownership:%20A%20Publicity-Rights%20Framework%20for%20Determin.pdf; Patricia M. Nidiffer, Comment: *Tinkering with Restrictions on Educator Speech: Can School Board Restrict what Educator say on Social Networking Sites?*, 36 DAYTON L. REV. 115, 117 (2010) (“the use of social networking sites by public school educators has created special concerns among school boards.”); Megan Rogers, *Wired for Teaching*, INSIDE HIGHER EDUC., Oct. 21, 2013 (“A growing number of faculty members are using social media in the classroom and are finding technology to be both a help and a hindrance. . . .”), <https://www.insidehighered.com/news/2013/10/21/more-professors-using-social-media-teaching-tools>.

⁴ See generally Deborah Britt Roebuck & Samia Siha, *Faculty Usage of Social Media and Mobile Devices: Analysis of Advantages and Concerns*, 9 Interdisciplinary J. E-Learning & Learning Objects 171-92 (2013) (“The rapid advance of technology is driving educators to implement tools they may have just learned.”), <http://www.ijello.org/Volume9/IJELLOv9p171-192Roebuck0859.pdf>; see also Cassidy Sugimoto et al., *Friend or Faculty: Social networking Sites, Dual relationships, and Context Collapse in Higher Education*, Volume 20(3) FIRST MONDAY (2015) (“Despite the prevalence of Facebook in contemporary society and the predominance of this platform in academia and adoption by both students and faculty, very little is known about how (or even whether) students and faculty informally interact in this space.”), <https://firstmonday.org/ojs/index.php/fm/article/view/5387/4409>.

⁵ For purposes of this article, off-campus social media means social media posts or activity made through personal social media accounts and not involving university or official social media accounts.

⁶ See, e.g., Clemons v. Guilford Tech. Cnty. Coll., No. 1:16CV482, 1:16CV4822017 U.S. Dist. LEXIS 113587 (M.D. Jul. 20, 2017) (holding that suspending a student for the student sending false texts messages to a professor claiming that her sister died did not violate the First Amendment); Tatro v. Univ. of Minn., 816 N.W.2d 509 (2012) (holding that the University of Minnesota is within its rights to punish a mortuary science student for joking about a cadaver on Facebook); see also R.L. v. Cent. York Sch. Dist., 183 F. Supp. 3d 625 (M.D. Penn. 2016) (holding that the defendants did not violate the high school student’s free speech rights when they disciplined him for publishing the social media post regarding a bomb because it was reasonable for school administrators to forecast that the post would cause a substantial disruption at the school); see also Keefe v. Adams, 840 F.3d 523 (8th Cir. 2016) (holding that the First Amendment did not bar an educator from making the determination that a student was unable to meet the professional demands of being a nurse because his Facebook posts were directed at classmates, involved their conduct in the nursing program, and included a physical threat related to their medical studies); McKinney v. Huntsville Sch. Dist., 345 F. Supp. 3d 1071 (2018) (holding that suspending a high school student for posting to social media a photograph of himself wearing a trench coat and beanie with an assault rifle did not violate the First Amendment); Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379 (2015) (ruling that disciplinary action taken by a school board against a high-school student for a rap song the student recorded off-campus, without the use of school resources, and posted on social networking sites did not violate the student’s First Amendment rights).

⁷ See Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 513 (1969); see also U.S. CONST. amend. I, Part 1 of 8 (“Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

Consider the May 2020 case of Mike Adams. Adams was a tenured sociology and criminology professor at the University of North Carolina Wilmington (“UNCW”) who was noted for his off-color and controversial comments. One such comment posted on Twitter read: “This evening, I ate pizza and drank beer with six guys at a six-seat table top. I almost felt like a free man who was not living in the slave state of North Carolina. Massa Cooper, let my people go!”⁸ The comment, seen as racially insensitive, outraged many people. A public outcry called for his removal from the university.⁹

Adams defended the slave master analogy as an observation about the oppressive action against the citizens of North Carolina by Governor Roy Cooper during the COVID 19 national shutdown period.¹⁰ His comment was not representative of racism, he alleged, because most people immediately understand his COVID comments.¹¹ A spokesperson for UNCW described Adams’ comments as “hateful, hurtful language aimed at degrading others,” which were “contrary to our university values.”¹² Nonetheless, the spokesperson added: “no matter how upsetting and distasteful the comments may be, they are expressions of free speech and protected by the First Amendment.”¹³ Adams retired several months later, but sued UNCW for violating his First Amendment rights when they denied him a promotion because of his comments.¹⁴ He was awarded a \$500,000 settlement for this case.¹⁵

Compare the case of Asheen Phansey, an Adjunct Professor at Babson College, a private university located in Boston, Massachusetts, who, in January 2020, made a post on his personal Facebook account suggesting that Iran should bomb a number of places in the U.S., including the Mall of America.¹⁶ Afterwards, Babson College¹⁷ issued a statement indicating that it condemns

⁸ *UNCW Announces that Controversial Professor Mike Adams to Retire on Aug. 1*, WECT NEWS 6, <https://www.wect.com/2020/06/29/uncw-announces-that-controversial-professor-mike-adams-retire-aug/>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Elisha Fieldstadt, *University of North Carolina Wilmington Professor Behind 'Vile' Racist and Sexist Tweets to Retire*, NBCNEWS (Jun. 30, 2020), <https://www.nbcnews.com/news/us-news/university-north-carolina-wilmington-professor-behind-vile-racist-sexist-tweets-n1232511>.

¹² *UNCW Statement re. Faculty Member’s Comments: June 5, 2020*, UNIVERSITY OF NORTH CAROLINA WILMINGTON (Jun. 5, 2020), <https://uncw.edu/news/2020/06/uncw-statement-re.-faculty-members-comments-june-5,-2020.html> (last visited on May 2, 2022).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *UNCW Reaches \$500,000 Settlement with Mike Adams to Avoid Costly Litigation the School “Might not Win,”* PORT CITY DAILY, Jul. 2, 2020 (“Adams sued the university and won a first amendment retaliation lawsuit that cost UNCW seven years and roughly \$700,000 — \$615,000 of which was spent on Adams’ attorneys’ fees.”), <https://portcitydaily.com/local-news/2020/07/02/uncw-reaches-500000-settlement-with-mike-adams-to-avoid-costly-litigation-the-school-might-not-win/>; *see also Authorities Say UNCW Professor Mike Adams Died by Suicide*, PORT CITY DAILY, Jul. 27, 2020, <https://portcitydaily.com/local-news/2020/07/27/authorities-say-uncw-professor-mike-adams-died-by-suicide/>.

¹⁶ *Massachusetts Professor Fired After Social Media Post Suggesting Iran Bomb Mall of America*, CBS MINNESOTA (Jan. 10, 2020), <https://minnesota.cbslocal.com/2020/01/10/massachusetts-professor-fired-after-social-media-post-suggesting-iran-bomb-mall-of-america/>.

¹⁷ *At a Glance*, BABSON COLLEGE (Babson College is “an independent, not-for-profit institution, Babson is accredited by the Association to Advance Collegiate Schools of Business (AACSB), the New England Association of Schools and Colleges, and the EFMD Quality Improvement System (EQUIS).”), <https://www.babson.edu/about/at-a-glance/> (last visited on May 2, 2022).

“any type of threatening words and/or actions condoning violence and/or hate.”¹⁸ Phansey’s defense was that he was making a joke on his personal social media site and thought “the university, as an institution of higher education would have defended and supported his free speech rights.”¹⁹ His employment was terminated.²⁰

More recently, in October 2021, Collin College, a public community college in McKinney, Texas, did not renew Lora Burnett’s contract ending May 2021, which effectively terminated her employment as an adjunct history professor.²¹ After termination, she filed a lawsuit alleging a violation of her First Amendment rights.²² According to Burnett, her termination was based on two streams of posted tweets.²³ In October 2020, her Twitter post expressed her frustration with the then Vice-President Mike Pence during the vice-presidential debate.²⁴ Specifically she tweeted: “The moderator needs to talk over Mike Pence until he shuts his little demon mouth up.”²⁵ She also “retweeted another users’ post referring to Pence as a ‘scumbag lying sonofabitch.’”²⁶ Later, in January 2021, she tweeted a criticism of the college’s leadership’s response to the COVID 19 pandemic on campus.²⁷ In her complaint, she noted that her termination was not an isolated event.²⁸ Indeed, she alleged the college had a “practice of retaliation against faculty who spoke out about public matters.”²⁹

¹⁸ *Massachusetts Professor Fired After Social Media Post Suggesting Iran Bomb Mall Of America*, CBS MINNESOTA (Jan. 10, 2020), <https://minnesota.cbslocal.com/2020/01/10/massachusetts-professor-fired-after-social-media-post-suggesting-iran-bomb-mall-of-america/>; see also Cleve R. Wootson Jr. & Herman Wong, *After Calling Barbara Bush an Amazing Racists, A Professor Taunts Critics: “I will never be Fired,”* WASHINGTON POST, Apr. 19, 2018 (“Barbara Bush was a generous and smart and amazing racist who, along with her husband, raised a war criminal.”), https://www.washingtonpost.com/news/grade-point/wp/2018/04/18/after-calling-barbara-bush-an-amazing-racist-a-professor-taunts-critics-i-will-never-be-fired/?utm_term=.f3529c80ca9c; Jason Oliveira, *Outspoken Fresno State Professor Randa Jarrar Makes Quiet Return to Campus*, ABC30 (Sept 6, 2018), <https://abc30.com/politics/outspoken-fresno-state-professor-makes-quiet-return-to-campus/4159031/>; Warmbier: Professor Fired for Saying “He got What he Deserved,” BBCNEWS (Kathy Dettwyle, an anthropology professor at the University of Delaware, criticized in a post on her Facebook page Otto Warmbier—a 22 year-old who died in 2017 after he was imprisoned in North Korea. Dettwyle blamed his parents for what happened to him.), <https://www.bbc.com/news/world-us-canada-40408916>.

¹⁹ *Massachusetts Professor Fired After Social Media Post Suggesting Iran Bomb Mall of America*, CBS MINNESOTA (Jan. 10, 2020), <https://minnesota.cbslocal.com/2020/01/10/massachusetts-professor-fired-after-social-media-post-suggesting-iran-bomb-mall-of-america/>.

²⁰ *Id.*

²¹ Burnett v. Collin Coll., Civ. Act. No. 4:21-cv-00857, (E.D. Tex., Oct. 26, 2021), <https://www.documentcloud.org/documents/21092524-burnett-v-collin-college-complaint?responsive=1&title=1>; see also *About*, COLLIN COLLEGE (“The only public college in Collin County, the college offers more than 100 degrees and certificates in a wide range of disciplines, including new Bachelor of Science in Nursing (BSN) and Bachelor of Applied Technology (BAT) in Cybersecurity degrees.”), <https://www.collin.edu/> (last visited on Dec. 7, 2021)

²² See Burnett v. Collin Coll., Civ. Act. No. 4:21-cv-00857, *supra* note 21.

²³ See *id.*

²⁴ See *id.*

²⁵ See Talia Richman, *Collin College again Pushes Out Professor Critical of Administration’s Handling of COVID-19*, Free Speech, THE MORNING NEWS, Feb. 26, 2021 (“The Collin College administration has pushed out another professor, effectively terminating three women in the past month who criticized the college’s COVID-19 response.”), <https://www.dallasnews.com/news/education/2021/02/26/collin-college-again-pushes-out-professor-critical-of-administrations-handling-of-covid-19-free-speech/>.

²⁶ See Burnett v. Collin Coll., Civ. Act. No. 4:21-cv-00857, *supra* note 21.

²⁷ See *id.*

²⁸ See *id.*

²⁹ See *id.*

The three cases cited above are not anomalies.³⁰ An examination of recent media coverage surrounding the social media behavior of faculty³¹ on U.S. college and university campuses over the last five years reveals that many professors have been disciplined and even fired for comments they made on off-campus personal social media sites.³² The increase in the number and frequency of scandals and grievances involving faculty's social media behavior perhaps has prompted some colleges and universities to impose policies governing faculty's social media activity.³³ However, implementation of these policies can be controversial³⁴ because they are apt to meet First Amendment and/or academic freedom challenges by faculty.³⁵ What, then, are the safe harbor rights granted faculty by the First Amendment and the concept of academic freedom?

³⁰ See *The Targeting of Scholars for Ideological Reasons from 2015 to Present*, FIRE ("Scholars have long been targeted for sanction by ideological adversaries. However, some worrying trends are emerging. The current research reveals that since 2015 targeting incidents are on the rise and are increasingly coming from within academia itself—from other scholars and especially from undergraduate students. These targeting incidents take a multitude of forms, including demands for an investigation, demotion, censorship, suspension, and even termination."), <https://www.thefire.org/research/publications/miscellaneous-publications/scholars-under-fire/scholars-under-fire-full-text/#f2>.

³¹ For purposes of this article, faculty will include tenured faculty, tenure-track faculty, nontenure-track full time faculty, visiting professors, guest lecturers, and adjuncts professors. See John C. Duncan, Jr., Article: *The Indentured Servant of Academia: The Adjunct Faculty Dilemma and their Limited Legal Rights*, 74 IND. L.J. 513, 514 (1999) ("In this half of the twentieth century, the academic equivalent of the indentured servant is the adjunct faculty member in higher education. Adjuncts cannot say or do much about their plight. If they try to seek redress, they will simply not be rehired.).

³² See, e.g., *Spanierman v. Hughes*, 576 F.Supp.2d 292 (D.Conn. 2008) (holding that a school that refused to renew a nontenured teacher's contract because of his use of MySpace to communicate with students did not violate his First Amendment rights), *Snyder v. Millersville Univ.*, No. 07-1660, 2008 U.S. Dist. LEXIS 97943 (E.D.Pa. Dec. 2, 2008) (holding that a university that denied an education degree to a student-teacher because of a post on her MySpace page did not violated the student-teacher's free speech rights).

³³ See, e.g., *Code of Ethics and Standard Practices for Texas Educators*, Title 19, Part 7, Chapter 247, § Rule 247.2 Standard 3.9 (Specifically, the Educators' Code of Ethics and Standard Practices for Texas Educators provides the following: "The educator shall refrain from inappropriate communication with a student or minor, including, but not limited to, electronic communication such as cell phone, text messaging, email, instant messaging, blogging or other social networking communications."), [https://texreg.sos.state.tx.us/public/readtac\\$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=19&pt=7&ch=247&rl=2](https://texreg.sos.state.tx.us/public/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=19&pt=7&ch=247&rl=2); see also Jennifer Preston, *Rules to Stop Pupil and Teacher from Getting Too Social Online*, N.Y. TIMES, Dec. 17, 2011 ("Faced with scandals and complaints involving teachers who misuse social media, school districts across the country are imposing strict new guidelines that ban private conversations between teachers and their students on cellphones and online platforms like Facebook and Twitter."), <https://www.nytimes.com/2011/12/18/business/media/rules-to-limit-how-teachers-and-students-interact-online.html>.

³⁴ See Karen Sarita Ingram, *Faculty Fears Social Media Policy Infringes on First Amendment Rights to Free Speech*, THE COLLEGIAN, THE KANSAS STATE COLLEGIAN, Jan. 22, 2014, <https://www.kstatecollegian.com/2014/01/22/faculty-fears-social-media-policy-infringes-on-first-amendment-rights-to-free-speech/>; KU Senate Urges Board of Regents to Suspend Social Media Policy, THE MORAL LIBERAL, Feb. 11, 2014; Richard E. Levy, Article: *The Tweet Hereafter: Social Media and the Free Speech Rights of Kansas Public University Employees*, 24 Kan. J.L. & Pub. Pol'y 78, 82 (2014) ("When faculty members say outrageous things, the public response may have very real consequences for a university, including the possibility that classes will be disrupted, legislators will retaliate, or fundraising efforts will be damaged. In balancing these competing considerations, moreover, public universities must comply with the First Amendment, which limits their ability to take adverse employment actions on the basis of their employees' speech.").

³⁵ See Levy, *supra* note 34 at 82; see also Rosalie Berger Levinson, *Superimposing Title VII's Adverse Action Requirement on First Amendment Retaliation Claims: A Chilling Prospect for Government Employee Speech*, 79 TUL. L. REV. 669, 699 (2005) ("Retaliatory action, including threats, the reduction of discretionary raises, involuntary transfers, negative memoranda placed in a personnel file, internal investigations, public reprimands, suspension with

This article first explores circumstances that prompt a university or college to subject faculty to disciplinary action when they post on their off-campus social media sites. Second, it looks at selected universities' social media policies intended to provide guidance to faculty regarding social media conduct. Third, it examines potential First Amendment challenges to those policies.³⁶ Fourth, the article provides guidance for colleges and universities that are contemplating whether to take adverse actions against faculty who make controversial posts on personal, off-campus social media sites. Finally, the article looks at the concept of academic freedom and its relationship to the protection granted by the First Amendment.

II. WHEN SOCIAL MEDIA POSTS BY FACULTY CROSS THE LINE

The potential impact of faculty's actions on students is not limited to his or her actions within the four walls of the classroom, but in modern society, a professor's power to impact his or her students has expanded outside of the brick and mortar walls into the virtual classroom and, indeed, into the social media world as well.³⁷ The importance of a teacher's role is indisputable and has been significantly emphasized as a result of the COVID-19 pandemic.³⁸

A teacher has historically been described as "a role model, mentor, friend, and/or parental figure."³⁹ Teachers "have an extraordinary opportunity to impact the lives of their students on both the secondary and postsecondary level."⁴⁰ A "professor," one who "teaches or professes special knowledge of an art, sport, or occupation requiring skill,"⁴¹ also must meet certain moral and

pay, or nonemployment related forms of harassment may chill the ordinary person from engaging in speech, even if such would not be considered a material or tangible change in the terms and conditions of employment.").

³⁶ While private universities, unlike public universities, are not bound by the First Amendment, the principles of academic freedom apply to both public and private universities. See Levy, *supra* note 34 at 82; see also Donna R. Euben, *Academic Freedom of Professors and Institutions*, AAUP, May 2002 ("The professional definition of academic freedom, on the other hand, addresses rights within the educational contexts of teaching, learning, and research both in and outside the classroom--for individuals at private as well as at public institutions."), <https://www.aaup.org/issues/academic-freedom/professors-and-institutions>; see also Eric T. Kasper, *Free Speech, Social Media and Public Universities: How the First Amendment Limits University Sanctions for Online Expression and Empowers Students, Staff and Faculty*, 48 MITCHELL HAMLINE L. REV. 407, 449-50 (2022) ("Short of online expression that actually, not just conjecturally, harms co-worker relationships, prevents one from completing duties, or involves false testimony under oath or the disclosure of confidential or sensitive information, expression on matters of public concern is generally protected.").

³⁷ See Kathleen Elliott Vinson, *The Blurred Boundaries of Social Networking in the Legal Field: Just "Face" It*, 41 U. Mem. L. Rev. 355, 382-83 (2010) ("Social networking can blur the boundaries between the private life and professional life of a student and teacher. Professors may never fully separate themselves from their identities as educators, so they still need a modicum of distance and professionalism.").

³⁸ See Glenda Cohen, *Coronavirus Has Shown Us the Vital Role Schools Play, But Will America Listen*, WE ARE TEACHERS ("The coronavirus pandemic has laid bare something that educators have always known. Schools, side by side with hospitals, are the most important institutions in our country's social safety net."), <https://www.weareteachers.com/coronavirus-role-of-schools/>.

³⁹ See Marka B. Fleming et al., *Morals Clauses in Secondary and Postsecondary Schools: Legal Applications and Constitutional Concerns*, 2009 BYU EDUC. & L.J. 67, 69 (2009) (citing Knox County Educ. Assoc. v. Knox Cnty. Bd. of Educ., 158 F.3d 361, 384 (6th Cir. 1998)).

⁴⁰ *Id.*

⁴¹ Nicola A. Boothe-Perry, Article: *The New Normal for Educating Lawyers*, 31 BYU J. PUB. L. 53 (2016); see also, *Professor Definition*, YOUR DEFINITION, <https://www.yourdictionary.com/professor> (last visited on Dec. 7, 2021) ("The definition of a professor is a teacher at a college or a university, or an instructor in a specialized field.").

ethical standards. As stated by the American Association of University Professors’⁴² Statement of Ethics:

[a]s teachers, professors encourage the free pursuit of learning in their students. . . . They hold before them the best scholarly and ethical standards of their discipline. Professors demonstrate respect for students as individuals and adhere to their proper roles as intellectual guides and counselors.⁴³

They too serve as guides and role models for students,⁴⁴ and their actions can greatly impact their students.

When does a faculty’s social media post cross the line from serving as a positive influence to one that is deemed inappropriate and subject to discharge or disciplinary action? Of those covered by the media, there appears to be three specific categories of post that cross the line. Posts that: (1) express a faculty’s personal political views; (2) contains extremely sensitive topics; and (3) are about students.⁴⁵ Examples of each are discussed below. There is no consistency in the approach universities take.

A. POSTS EXPRESSING PERSONAL POLITICAL VIEWS

In 2019, two publicized cases involved criticism of universities faculty for posting personal political views on social media sites.⁴⁶ Jeffrey Klinzman, an adjunct English professor at Kirkwood Community College—a public community college in Cedar Rapids Iowa—was forced to resign after his 2019 Facebook posts criticized “an image of a tweet posted by then President Donald Trump, calling Antifa⁴⁷ “Radical Left Wack Jobs who go around hitting . . . people over the heads with baseball bats.”⁴⁸ Klinzman posted a response to Trump’s tweet: “Yeah, I know who I’d clock with a bat,” while also disclosing his support of Antifa.⁴⁹

⁴² “The AAUP is a nonprofit membership association of faculty and other academic professionals. It has helped to shape American higher education by developing the standards and procedures that maintain quality in education and academic freedom in this country's colleges and universities.” *About the AAUP*, AAUP, <https://www.aaup.org/report/statement-professional-ethics> (last visited on Dec. 7, 2021).

⁴³ See *Statement of Ethics*, AAUP, <https://www.aaup.org/report/statement-professional-ethics> (last visited on Dec. 7, 2021); see also Boothe- Perry, *supra* note 41.

⁴⁴ See *id.*

⁴⁵ See *infra* notes 46-75.

⁴⁶ Aaron Calvin, *Kirkwood Community College Professor Receives Backlash, Removed from Classroom after Voicing Support for Antifa*, THE DES MOINES REGISTER, Aug. 23, 2019, <https://www.desmoinesregister.com/story/news/local/2019/08/23/kirkwood-community-college-professor-voices-support-antifa-jeff-klinzman-donald-trump-anti-fascist/2099475001/>.

⁴⁷ See *id.*; see also *Definition of Antifa*, MERIAM WEBSTER, <https://www.merriam-webster.com/dictionary/antifa> (“a person or group actively opposing fascism.”) (last visited on Dec. 7, 2021).

⁴⁸ Kyle Konigsmark, *Kirkwood Professor who Stated He Supported Antifa Resigns*, 7 NEWS KWNL (Aug. 23, 2019), https://www.kwnl.com/news/cedar-rapids/kirkwood-professor-who-stated-he-supported-antifa-resigns/article_41ed0af4-ed15-5e88-84ed-7656884c09eb.html.

⁴⁹ *Id.*

Kirkwood College alleged that Klinzman was not removed because of his political view rather, the decision was “based solely on their commitment to harboring a safe learning environment” for their students, faculty, and staff.⁵⁰ Regarding Klinzman’s resignation the college stated: “[W]hen the expression of views by . . . any member of our community is perceived as placing public safety in jeopardy, or hampers our ability to deliver on our mission, we will always do what is necessary in service to our students’ pursuit of a higher education.”⁵¹ In April 2020, the college agreed to pay Klinzman \$25,000 to avoid a First Amendment lawsuit.⁵²

The second case involved Fang Zhou, a tenured Associate Professor of History at Georgia Gwinnett College—a public liberal arts college in Lawrenceville, Georgia.⁵³ Zhou’s post on his Facebook account was criticized because it contained phrases such as “ghetto thugs” and “libtards” in reference to illegal immigration and for highlighting the “Deportation of Illegal immigrants” sign in his office.⁵⁴ Specifically Zhou wrote: “I am against political correctness. I speak truth to power in class and my students learn about the financial drain of illegal immigration on the economy and the high crime rates of illegal immigrants. My students are ‘woke’ and are overwhelmingly against illegal immigration after taking my class.”⁵⁵

Georgia Gwinnett College chose not to issue an official statement in response to Zhou’s post.⁵⁶ Instead, a local newspaper inquiring about Zhou’s posts was referred to the college’s academic freedom policy, which states that faculty are free to speak their minds “without fear or censure.”⁵⁷

B. POSTS ABOUT SENSITIVE TOPICS

At times, university faculty have used social media to make comments about sensitive topics such as race, gender or sexual orientation.⁵⁸ In July 2021, Monte Miller, a Social Work Associate

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Eric Stigus, *Georgia Professor’s Immigration Comments on Social Media Cause Stir on Social Media*, THE ATLANTA JOURNAL CONSTITUTION, Jun. 7, 2019, <https://www.ajc.com/news/local-education/georgia-professor-immigration-comments-cause-stir-social-media/17i7NphdnCroxthP0Sz5hJ/>.

⁵⁵ *Id.*

⁵⁶ Hailey Mason, *Gwinnett Professor Doubles Down on Controversial Immigration Comments amid Backlash*, CBS46, https://www.cbs46.com/news/gwinnett-professor-doubles-down-on-controversial-immigration-comments-amid-backlash/article_b789c9b6-8d7a-11e9-8e08-7b73be575406.html; see also David Krayden, *Georgia Professor Draws Fire For Criticizing Illegal Immigrants, Snubbing Political Correctness*, DAILY CALLER, Jun. 8, 2019 (“Faculty are free to pursue scholarly interests without fear of censure, discipline, or reprisal. This freedom extends to the display, publication, and performance of creative work. Faculty may speak freely on all matters of college governance, and may speak, work, or act as an individual in the public arena without fear of institutional discipline or restraint.”), <https://dailycaller.com/2019/06/08/georgia-professor-fang-zhou-illegal-immigrants/>; *Academic Freedom Policy*, GEORGIA GWINNETT COLLEGE, <https://www.ggc.edu/academics/academic-freedom/> (last visited on Dec. 7, 2021).

⁵⁷ Mason, *supra* note 56.

⁵⁸ See Emma Whitford, *Rutgers Revisits Finding on Professor*, INSIDE HIGHER EDUC., Sept. 4, 2018, <https://www.insidehighered.com/news/2018/09/04/rutgers-revisits-free-speech-decision-after-public-backlash>; see also Pritha Paul, *Rutgers University Professor Michael Chikindas Suspended For Anti-Semitic, Racist Rants On Facebook*, INTERNATIONAL BUSINESS TIMES (“Severe punishments were doled out by the Rutgers University to New Jersey professor, who posted anti-Semitic posts on his Facebook page, according to reports. Michael Chikindas was a professor in the food science department since 1998 — earning tenure in 2007 — and also served as the director of

Professor at East Carolina University, made the following comment about Juneteenth on Facebook: “Hey there. How about F*** Juneteenth!!!”⁵⁹ In response, the university stated that while it is “committed to upholding First Amendment rights,” it “does not endorse or support viewpoints that dismiss, marginalize or disrespect anyone based on race, gender or ethnicity.”⁶⁰ Miller later resigned.⁶¹

Likewise, in November 2019, Dr. Eric Rasmusen, a tenured Professor of Business Economics and Public Policy at Indiana University at Bloomington, posted a line from an article titled “*Are Women Destroying Academia? Probably*” on his Twitter account.⁶² “[G]eniuses are overwhelmingly male because they combine outlier IQ with moderately low Agreeableness and Moderately low Conscientiousness,” he wrote.⁶³ Following complaints about the post, a university official observed that for many years Rasmusen has shared bigoted views on his social media accounts, including statements “that women don’t belong in the workplace, that gay men shouldn’t be in the classroom because they are promiscuous and that black students are academically inferior to others.”⁶⁴ Although the university did not agree with Rasmusen’s statements, the university official indicated that Rasmusen would not be fired because to do so would violate his First Amendment rights.⁶⁵ As an alternative, it provided students with the opportunity to opt out of his class.⁶⁶

Consider also the 2018 post by Dr. James Livingston, tenured Professor of History at Rutgers University.⁶⁷ On his Facebook account, Livingston, a Caucasian, posted: “OK, officially, I now hate white people” calling them “little Caucasian a—holes,” as well as anti-white comments about gentrification.⁶⁸ Initially, Rutgers University found that Livingston’s statements violated the

the Center for Digestive Health at the Institute for Food, Nutrition and Health.”), <https://www.ibtimes.com/rutgers-university-professor-michael-chikindas-suspended-anti-semitic-racist-rants-2626765>; *SCSU Professor Suspended for Allegedly using Racial Slur in Class*, NEWS 8 (Feb. 8, 2018), <https://www.wtnh.com/news/scsu-professor-suspended-for-allegedly-using-racial-slur-in-class/>; *see also The N-Word in the Classroom*, INSIDE HIGHER EDUC., Feb. 12, 2018 (“Two professors on different campuses used the N-word last week. One was suspended and one was backed by his institution, demonstrating academe’s continually fraught relationship with the term.”), <https://www.insidehighered.com/news/2018/02/12/two-professors-different-campuses-used-n-word-last-week-one-was-suspended-and-one>.

⁵⁹ Hayley Fowler, *NC Professor Resigns after Profane Facebook Post about Juneteenth. ‘Sickening,’* NEWS AND OBSERVER, <https://www.newsobserver.com/news/state/north-carolina/article252532443.html>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Enjoli Francis, *Professor under Fire for Posting Racist and Sexist Tweets will not be Fired: Indiana University*, ABCNEWS (Nov. 21, 2019), <https://abcnews.go.com/US/professor-fire-posting-racist-sexist-tweets-fired-indiana/story?id=67202798>; *see also* Colleen Flaherty, *Bigoted View vs. Bigoted Teaching*, INSIDE HIGHER EDUC., Nov. 22, 2019, <https://www.insidehighered.com/news/2019/11/22/indiana-university-condemns-professors-racist-and-misogynistic-tweets-strongest>.

⁶³ Francis, *supra* note 62.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

university's policy prohibiting discrimination.⁶⁹ Upon further investigation, however, the university reversed its finding and concluded that no such violation had occurred.⁷⁰

C. POSTS ABOUT STUDENTS

Faculty have used their social media sites to make offensive comments about students.⁷¹ In April 2017, Judy Morelock, a Sociology Lecturer at the University of Tennessee at Knoxville, made comments on her Facebook page about one of her students, Kayla Parker, a minority student at the university.⁷² A dispute arose when Parker alleged her quiz was incorrectly graded by Morelock.⁷³ After being challenged by Parker, Morelock intimated on Facebook that she was going to sabotage Parker's future as indicated by the following statement:

Ignore the facts, promote a misinformed viewpoint, trash me and I will fight you. Once you spread venomous rumors and try to destroy a person's reputation, you cannot undo the damage . . . After the semester is over and she's no longer my student, I will post her name, her picture and her bio on Facebook, Twitter, Instagram and LinkedIn. Count on it. For now, I'm bound by university rules that grant her more latitude in freedom of speech than I have. After she graduates and I retire, all bets are off. . . . You also will not be forgotten or forgiven #karmawillfindyou," and "She's on LinkedIn trying to establish professional contacts. This will be fun!"⁷⁴

The university responded to Morelock's Facebook posts by terminating her employment.⁷⁵

III. GOVERNANCE OF SOCIAL MEDIA BY COLLEGES AND UNIVERSITIES

To mitigate the potential harmful results that inappropriate social media behavior by faculty may create, both public and private colleges and universities have implemented social media policies governing faculty behavior on platforms such as Facebook, Twitter, YouTube, Instagram,

⁶⁹ *Id.*

⁷⁰ See Letter from Robert Barachi, President of Rutgers University to Dean Peter March dated Aug. 29, 2018, FIRE, <https://www.thefire.org/8-29-18-letter-from-r-barchi/> (last visited on Dec. 14, 2021); see also Emma Whitford, *Rutgers Revisits Finding on Professor*, INSIDE HIGHER EDUC., Sept. 4, 2018, <https://www.insidehighered.com/news/2018/09/04/rutgers-revisits-free-speech-decision-after-public-backlash>; Ryan Stiesi, *Rutgers retracts decision, finds History Professor did not Violate Discrimination Policy*, THE DAILY TARGUM, Nov. 16, 2018, <https://www.dailytargum.com/article/2018/11/rutgers-retracts-decision-finds-history-professor-did-not-violate-discrimination-policy>.

⁷¹ See *infra* notes 72-75; see also *McAdams v. Marquette*, 914 N.W.2d 708, 712 (Wis. 2018).

⁷² *Professor Fired after Retaliating after Student Claims Test Question is Racist*, NEW YORK POST, Jun. 20, 2017, <https://nypost.com/2017/06/20/professor-fired-for-retaliating-after-student-claims-test-question-is-racist/>.

⁷³ *Student gets UT Lecturer Fired after Quiz Dispute*, WMC5, Jun 19, 2017, <https://www.wmcactionnews5.com/story/35696963/student-gets-ut-lecturer-fired-after-quiz-answer-dispute/>.

⁷⁴ *Id.*; see also Shontavia Johnson, *Not Just for Students*, INSIDE HIGHER EDUC., June 28, 2007, <https://www.insidehighered.com/views/2017/06/28/advice-professors-using-social-media-discuss-controversial-topics-essay>.

⁷⁵ *Student gets UT Lecturer Fired after Quiz Dispute*, *supra* note 73.

Flickr, Pinterest, and LinkedIn.⁷⁶ The scope of these policies range from a broad inclusion of all social media by faculty to limitations on posts related to certain topics.

A. SCOPE OF SOCIAL MEDIA POLICIES

Social media policies that have been adopted by colleges and universities throughout the country have varied in their scope.⁷⁷ Generally, these policies can be categorized as: (1) policies containing an actual test to determine the appropriateness of faculty social media post; (2) policies covering social media posts linking faculty to the university; (3) policies covering only social media accounts created for university official business purposes; and (4) policies excluding certain specific activities.

1. POLICIES CONTAINING A TEST OF THE APPROPRIATENESS OF FACULTY POSTS

At one end of the spectrum is Northwest Missouri State University.⁷⁸ Northwest, along with the University of Michigan, and Emerson College, utilize a litmus test, referred to as the “publicity test,” to determine the appropriateness of posts on an off-campus social media site.”⁷⁹ The “publicity test” requires faculty to ask themselves whether or not the content of the message would be acceptable for “face-to-face conversation, over the telephone, or in another medium.”⁸⁰ If the

⁷⁶ See *University of Maine Social Media Policy*, THE UNIVERSITY OF MAINE (Under the policy social media platforms is defined as “technology tools and online spaces for integrating and sharing user generated content in order to engage constituencies in conversations and allow them to participate in content and community creation. Examples are Facebook, Twitter, LinkedIn, and YouTube.”), <https://umaine.edu/socialnetwork/social-media-policy/> (last visited on Dec. 14, 2021); *Social Media Use Policy Guidelines for Faculty, Staff and Students*, NORTHWEST MISSOURI STATE UNIVERSITY (Under the policy social media platforms is defined as “technology tools and online spaces for integrating and sharing user generated content in order to engage constituencies in conversations and allow them to participate in content and community creation. Examples are Facebook, Twitter, LinkedIn, and YouTube.”), <https://www.nwmissouri.edu/policies/personnel/Social-Media.pdf> (last visited on Dec. 14, 2021); *Social Media Guidelines*, ECU (“These Guidelines govern Official and Recognized social media sites and posting to those sites by ECU employees, including student employees, wherever such sites may appear, including, but not limited to, the University computer network and social media sites and platforms such as Facebook, MySpace, Bebo, Friendster, Inner Pirate Network, Instagram, Flickr, YouTube, Vine, Snapchat, Twitter, Yammer, Yahoo! Groups or Google Groups.”), <https://socialmedia.ecu.edu/guidelines/> (last visited on Dec. 14, 2021).

⁷⁷ See Elizabeth M. Heintzelman, Note, *#NCAA vs. Student Athletes: An Empirical Analysis of NCAA Social Media Policies*, 39 HASTINGS COMM. & ENT. L.J. 43, 43 (2017) (“A social media policy should not limit constitutional rights, but rather any policy should educate the youth about important issues such as cyber-bullying, versus limiting constitutional rights.”).

⁷⁸ *Social Media Use Policy Guidelines for Faculty, Staff and Students*, *supra* note 76 (Under the policy social media platforms is defined as “technology tools and online spaces for integrating and sharing user generated content in order to engage constituencies in conversations and allow them to participate in content and community creation. Examples are Facebook, Twitter, LinkedIn, and YouTube.”).

⁷⁹ *Social Media Guidelines*, EMERSON COLLEGE (“If the content of your message would not be acceptable for face-to-face conversation, over the telephone, or in another medium, it will not be acceptable for a social networking site. Ask yourself, would I want to see this published in the newspaper or posted on a billboard tomorrow or 10 years from now?”), <https://www.emerson.edu/policies/social-media-guidelines> (last visited on Dec. 14, 2021); *Guidelines for Social Media Use*, VOICES OF THE STAFF UNIVERSITY OF MICHIGAN, <https://hr.umich.edu/sites/default/files/voices-social-media-guidelines.pdf> (last visited on Dec. 14, 2021).

⁸⁰ *Social Media Use Policy Guidelines for Faculty, Staff and Students*, *supra* note 76.

answer is no, then the content will not be acceptable for the faculty's personal social networking site.⁸¹

In its policy, Northwest advises faculty to be "respectful of the audience" by avoiding "ethnic slurs, personal insults, obscenity, or engag[ing] in any conduct that would not be acceptable in the University's community."⁸² This language is not unique to Northwest. Similar provisions are frequently found in social media policies at other universities.⁸³ For instance, Washington College, a private university in Chestertown, Maryland, advises faculty "to refrain from posting derogatory, false, inflammatory or harassing comments about students, colleagues or former colleagues, alumni, donors, and trustees."⁸⁴ Similar language is depicted in the policy at the University of Wisconsin at Madison, a public university.⁸⁵

2. POLICIES COVERING ANY SOCIAL MEDIA POSTS LINKING FACULTY TO THE UNIVERSITY

Conversely, the scope of social media policies is less broad and more limited at other universities. In some cases, the scope is limited to include only professional activity or personal activity that links the faculty to employment at the university.⁸⁶ For example, the policy at the University of Louisiana at Lafayette advises faculty to always "uphold the university's mission and values."⁸⁷ Additionally, faculty is advised to (1) use good judgment about content and privacy laws, including FERPA; (2) remember that they always represent the university; (3) identify their personal opinions as their own and not the university's; and (4) follow university policies and guidelines when posting on social media.⁸⁸

⁸¹ *Id.*

⁸² *Id.*

⁸³ See *Social Media Guidelines*, EMERSON COLLEGE, *supra* note 79 ("Don't use ethnic slurs, personal insults, obscenity, or engage in any conduct that would not be acceptable in Emerson's community. You should also show proper consideration for others' privacy and for topics that may be considered sensitive, such as politics and religion. You are more likely to achieve your goals if you are constructive and respectful while discussing a bad experience or disagreeing with a concept or person.").

⁸⁴ *College Policies Social Media Policies*, WASHINGTON COLLEGE, https://www.washcoll.edu/people_departments/offices/human-resources/college-policies/washington-college-policies-social-media.pdf (last visited on Dec. 14, 2021).

⁸⁵ See *Social Media*, WISCONSIN AT MADISON ("Don't use ethnic slurs, personal insults, obscenity, profanity or engage in any conduct that would not be acceptable in UW-Madison's community. Do not ridicule, exploit, or demean persons on the basis of their age, color, creed, handicap, national origin, race, religion, sex or sexual orientation."), <https://universityrelations.wisc.edu/policies-and-guidelines/social-media/> (last visited on Dec. 14, 2021).

⁸⁶ See, e.g., *Social Media Policy*, UNIVERSITY OF LOUISIANA AT LAFAYETTE OFFICE OF COMMUNICATIONS AND MARKETING, <https://ocm.louisiana.edu/web-communications/social-media/social-media-policy> (last visited on Dec. 14, 2021); see also *Elon University Social Media Policy* ("This policy applies to Elon faculty and staff who use social media on behalf of the university and/or in their professional communications."), chrome-extension://efaidnbmnnibpcajpcgclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fwww.elon.edu%2Fu%2Funiversity-communications%2Fwp-content%2Fuploads%2Fsites%2F137%2F2019%2F02%2FElon_Social_Media_Policy_6_19_18.pdf&clen=100482&chunk=true (last visited on Dec. 14, 2021).

⁸⁷ *Social Media Policy*, UNIVERSITY OF LOUISIANA AT LAFAYETTE OFFICE OF COMMUNICATIONS AND MARKETING, *supra* note 86.

⁸⁸ *Id.*

An example of other limitations are those aimed at preventing exposure of confidential or proprietary information about the university, employees or students.⁸⁹ For example, the policy at the University of Dallas reflects an offensive and defensive position.⁹⁰ It specifically advises faculty to (1) protect confidential and proprietary information and (2) avoid posting confidential and proprietary information “about the University of Dallas, students, employees or alumni.”⁹¹ The consequences for failing to comply with this guideline could subject faculty to disciplinary action or termination.⁹²

Some policies affirmatively advise employees to refrain from endorsing political candidates and discussing sensitive areas such as politics and religion.⁹³ At the University of Louisiana at Lafayette, for example, employees are specifically advised that they may not use the university’s name to endorse political candidates or promote “opinions, products, services, or causes that might contradict the university’s mission and values,” and to show proper consideration for others’ privacy and for topics that may be considered sensitive—such as politics and religion.⁹⁴ The University of Wisconsin at Madison has an identical provision for its employees.⁹⁵

3. POLICIES COVERING ONLY SOCIAL MEDIA ACCOUNTS CREATED FOR UNIVERSITY OFFICIAL BUSINESS PURPOSES

Still other universities limit the scope of their policies to social media accounts created for official business purposes of the university.⁹⁶ The University of North Carolina at Greensboro’s (“UNCG”) social media policy applies to all social media accounts that are created by university employees and students for official business purposes of the university.⁹⁷ But, the policy does encourage its employees who post about the university on their personal accounts to also observe

⁸⁹ *Social Media Policy*, UNIVERSITY OF DALLAS, <https://udallas.edu/offices/communications/social/social-policy.php> (last visited on Dec. 14, 2021); *University of Maine Social Media Policy*, *supra* note 76 (“Confidential or proprietary University of Maine information or similar information of third parties, who have shared such information with you on the University of Maine’s behalf, must not be shared publicly on official University of Maine social media channels.”); *Social Media Policy*, MARYVILLE UNIVERSITY (“Do not disseminate confidential information. This is especially important in relation to the federal HIPAA and FERPA laws and regulations.”), <https://www.maryville.edu/policies/social-media-policy/> (last visited on Dec. 14, 2021); *College Policies Social Media Policies*, *supra* note 84 (“Do not post confidential or proprietary information about Washington College, its students, its alumni, your fellow employees or yourself. Use good ethical judgment and follow all local, state and federal regulations, such as FERPA and HIPPA and college policies including the Washington College Confidentiality Agreement.”).

⁹⁰ *Social Media Policy*, UNIVERSITY OF DALLAS, *supra* note 89.

⁹¹ *Id.*

⁹² *Id.*

⁹³ See, e.g., *Social Media Use Policy Guidelines for Faculty, Staff and Students*, *supra* note 76; see also *Social Media, WISCONSIN AT MADISON*, *supra* note 85 (“Do not use UW-Madison’s name to promote or endorse any product, cause or political party or candidate.”); *Social Media Policy ADM 14.10*, UNIVERSITY OF MOUNT UNION (“When representing Mount Union, do not endorse any opinion, product, cause, religion, political party or political candidate unless it is related to an officially-approved institutional effort.”), <https://www.mountunion.edu/Documents/Hidden%20Pages/University%20Policies/Administration/Social%20Media%20Policy.pdf> (last visited on Dec. 14, 2021).

⁹⁴ *Id.*

⁹⁵ *Social Media*, WISCONSIN AT MADISON, *supra* note 85.

⁹⁶ See, e.g., *Social Media Standards*, UNCG, <https://uc.uncg.edu/social-media-standards/> (last visited on Dec. 14, 2021).

⁹⁷ *Id.*

the university's guidelines.⁹⁸ Further, university employees are advised not to use their university email or the university's name in their personal social media posts.⁹⁹ Campbell University, a private university in Buies Creek, North Carolina, has summarily excluded private social media accounts from the scope of its social media policy.¹⁰⁰ Campbell's policy states that it does not apply to private social media accounts of its students and employees."¹⁰¹

4. POLICIES EXCLUDING CERTAIN SPECIFIC ACTIVITIES

Finally, other universities restrict the scope of their policies by failing to limit certain articulated activity or specifically excluding certain activity.¹⁰² For example, Stanford University's social media policy applies to the personal use of social media. However, the university's policy does not limit the faculty's right to engage in protected concerted activities related to terms and conditions of employment.¹⁰³ A similar provision is found in the University of Maine's social media policy.¹⁰⁴

B. CONSEQUENCES FOR VIOLATING SOCIAL MEDIA POLICIES

Amazingly, many social media policies implemented by universities do not contain specific consequences for violating the policies.¹⁰⁵ However, some do include provisions warning employees of personal liability for social media comments that result in viable claims such as defamation and libel.¹⁰⁶ The University of Michigan's social media policy imposes a personal liability clause that specifically holds faculty personally responsible for information posted on their

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See, e.g., *Social Media Policy*, CAMPBELL UNIVERSITY ("This policy does not apply to private student or employee social media accounts."), <https://www.campbell.edu/university-communications/social-media/social-media-policy/> (last visited on Dec. 14, 2021).

¹⁰¹ *Id.*

¹⁰² See *infra* notes 103-104.

¹⁰³ *Social Media Guidelines*, STANFORD UNIVERSITY COMMUNICATIONS ("Effective April 10, 2020, do not create or develop social media accounts, profiles or campaigns that focus on novel Coronavirus SARS-CoV-2 and/or the disease COVID-19 on Stanford's behalf without specific, written approval by University Communications."), <https://ucomm.stanford.edu/policies/social-media-guidelines/#:~:text=Effective%20April%2010%2C%202020%2C%20do,written%20approval%20by%20University%20Communications> (last visited on April 18, 2022).

¹⁰⁴ *The University of Maine Social Media Policy* *supra* note 76 ("These policies and guidelines are not intended to govern or restrict personal presence on the web, nor are these guidelines intended to restrict employee rights to engage in concerted, protected activity related to the terms and conditions of their employment.").

¹⁰⁵ See, e.g., *Social Media Policy*, UNIVERSITY OF HOUSTON, <https://uh.edu/marcom/guidelines-policies/social-media/> (last visited on Dec. 22, 2021); *Social Media Policy*, CAMPBELL UNIVERSITY, *supra* note 100; cf., *Social Media Use Policy Guidelines for Faculty, Staff and Students*, *supra* note 76 ("Any violation of this policy should be immediately reported to the User's supervisor, Vice President of Human Resources.").

¹⁰⁶ *Id.* ("Employees and student-representatives of the school are personally liable for anything they post to social media sites."); *College Policies Social Media Policies*, *supra* note 84 ("You are legally liable for what you post on your own site and on the sites of others. Individual bloggers have been held liable for commentary deemed to be proprietary, copyrighted, defamatory, libelous or obscene (as defined by the courts.")); *Guidelines for Social Media Use*, *supra* note 84 ("You are responsible for what you post on your own site and on the sites of others.").

personal site and the sites of others.¹⁰⁷ Similar provisions for personal liability are included in the policies of the University of Dallas, Washington College, and UNCG.¹⁰⁸

In 2013, a more comprehensive approach was adopted by Kansas Board of Regents. The Kansas Board of Regents—in response to a University of Kansas professor’s controversial Twitter post—adopted a social media policy that outlines the consequences of violating the policy.¹⁰⁹ Adopted by The Board of Regents for its 32 public higher education institutions, the policy, directed at the “proper and improper” use of social media, gives the chief executive officer of the individual higher education institution the authority to discipline its faculty for improper use of social media through suspension, dismissal, and termination.¹¹⁰

Improper social media speech subject to discipline described by the Kansas Board of Regents includes: (1) speech that “is directed to inciting or producing imminent violence or other breach of the peace and is likely to incite or produce such action”; (2) speech made pursuant to the employee’s official duties that is contrary to the best interests of the employer; and (3) speech that discloses any “confidential student information, protected health care information, personnel records, personal financial information, or confidential research data” without a lawful purpose for the disclosure.¹¹¹

The policy also provides that improper social media speech includes speech that:

impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impedes the performance of the speaker’s official duties, interferes with the regular operation of the employer, or otherwise adversely affects the employer’s ability to efficiently provide services.¹¹²

What type of speech is subject to discipline by Kansas Board of Regents? A balancing test was imposed—the interest of the employer is balanced against the interest of the employee.¹¹³

¹⁰⁷ *Id.*

¹⁰⁸ See, e.g., *Social Media Policy*, UNIVERSITY OF DALLAS, *supra* note 89; *College Policies Social Media Policies*, *supra* note 84; *Social Media Standards*, *supra* note 96.

¹⁰⁹ See Levy, *supra* note 34 at, 129-30; see also *About Us*, THE KANSAS BOARD OF REGENTS (“The nine-member Kansas Board of Regents is the governing board of the state’s six universities and the statewide coordinating board for the state’s 32 public higher education institutions (six state universities, one municipal university, nineteen community colleges, and six technical colleges.”), <https://www.kansasregents.org/about> (last visited on Dec. 22, 2021); see also *Kansas Board of Regents (KBOR)-Current Social Media Policy*, KANSAS BOARD OF REGENTS POLICY MANUAL at 98-104., http://www.kansasregents.org/resources/062018_Policy_Manual_revised.pdf (last visited on Dec. 22, 2021).

¹¹⁰ See Levy, *supra* note 34 at, 129-130; see also Lomonte, *supra* note 1 (“The context in which the Board of Regents enacted this hurry-up policy cannot be overlooked. It came in response to the suspension of David W. Guth, a University of Kansas journalism professor, for an angry outburst on a personal Twitter account blaming the National Rifle Association for the fatal shooting of 12 employees at the Washington Navy Yard on Sept. 16.”).

¹¹¹ See Levy, *supra* note 34 at, 129-30.

¹¹² See *id.*

¹¹³ *Kansas Board of Regents (KBOR)- Current Social Media Policy*, *supra* note 109 at, 99.

Understandably, the social media policy has been criticized and opposed on grounds that it violates the First Amendment and academic freedom rights of university faculty.¹¹⁴ In response to the widespread criticism, the policy was revised in May 2014 to include language affirming the Board of Regent's commitment to First Amendment and academic freedom concerns.¹¹⁵ The revised policy provides that social media posts, complying with all laws and accepted professional standards, shall not be considered improperly used in the following context: (1) "academic research or scholarly activity"; (2) "academic instruction within the instructor's area of expertise"; and (3) "statements, debates, or expressions made as part of shared governance and in accordance with university policies and processes, whether made by a group or individual employee."¹¹⁶

C. DISCIPLINING FACULTY WITHOUT A SOCIAL MEDIA POLICY

A different strategy was used by two universities in Michigan—the University of Michigan and Central Michigan University. Each attempted to curtail speech through traditional discrimination and harassment policies rather than through social media policies.¹¹⁷ Both attempts failed, however, because the universities did not provide fair notice of the prohibited speech, and the discrimination and harassment policies were held to be constitutionally vague and overbroad in violation of the First Amendment.¹¹⁸

In the 1993 Central Michigan University case of *Dambrot v. Central Michigan University*, Keith Dambrot, head coach of the men's basketball team, used the "N" word during a locker room session with his players and coaching staff.¹¹⁹ The university found that Dambrot's use of the "N" word violated its discriminatory harassment policy and recommended that he be disciplined.¹²⁰ The university's policy stated that discriminatory harassment would not be condoned.¹²¹ Racial and ethnic harassment was defined in the policy as:

any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment by . . . (c) demeaning or slurring individuals through. . . written literature because of their

¹¹⁴ See Levy, *supra* note 34 at, 129-30; see also Lomonte, *supra* note 1; Jennifer Howard, *At U. of Kansas, Social-Media Policy Leads to More Conflict*, THE CHRONICLE OF HIGHER EDUCATION, May 9, 2015, <https://www.chronicle.com/article/at-u-of-kansas-social-media-policy-leads-to-more-conflict/> (last visited on Dec. 14, 2021); see also Ingram, *supra* note 34.

¹¹⁵ See *Kansas Board of Regents (KBOR)-Current Social Media Policy*, *supra* note 109 at, 99; see also Levy, *supra* note 34 at, 81.

¹¹⁶ See *Kansas Board of Regents (KBOR)-Current Social Media Policy*, *supra* note 109 at, 99.

¹¹⁷ See, e.g., *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (1989) (the University of Michigan's anti-discrimination policy was struck down as constitutionally overbroad); *Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993) (overturning on First Amendment grounds university's sanctions on a fraternity for conducting an "ugly woman contest" with "racist and sexist" overtones); see also *UWM Post, Inc. v. Board of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (striking down university speech code that prohibited, *inter alia*, "'discriminatory comments'" directed at an individual that "'intentionally . . . demean'" the "'sex . . . of the individual'" and "'create an intimidating, hostile or demeaning environment for education, university related work, or other university-authorized activity'").

¹¹⁸ See *Dambrot*, 55 F.3d at 1177; see also *Doe*, 721 F. Supp. at 852.

¹¹⁹ 55 F.3d 1177 (6th Cir. 1995).

¹²⁰ *Id.*

¹²¹ *Id.*

racial or ethnic affiliation; or (d) using symbols, [epithets] or slogans that infer negative connotations about the individual's racial or ethnic affiliation.¹²²

Because of Dambrot's use of the "N" word, the university decided to terminate his employment.¹²³ In response, Dambrot filed a lawsuit against the university alleging that the termination of his employment violated his rights to academic freedom and free speech pursuant to the First Amendment.¹²⁴ Upon review of the case, United States Court of Appeals for the Sixth Circuit found that Dambrot's termination was permissible because his use of the "N" word was not protected speech under the First Amendment.¹²⁵ However, the court noted the subjectivity of identifying prohibited speech under the policy and the fact that the policy failed to provide fair notice of the type of speech that constituted a violation the policy.¹²⁶ It concluded that the definition of offensive speech under the policy was completely up to the university.¹²⁷

The 1989 case of *Doe v. Michigan*,¹²⁸ arose after the University of Michigan at Ann Arbor (the University), a state-chartered university, adopted a Policy on Discrimination and Discriminatory Harassment of Students in the University Environment (the Policy) in fall 1988 as an attempt to curb an increase in racial intolerance and harassment on campus.¹²⁹ The Policy's broad language "prohibited individuals, under the penalty of sanctions, from 'stigmatizing or victimizing' individuals or groups on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status."¹³⁰

Doe, a psychology graduate student and not faculty, asserted that certain controversial theories suggesting biologically-based differences between sexes and races might be perceived as "sexist" and "racist" by some students.¹³¹ Doe anticipated a discussion of these theories in class but feared the discussion might be sanctionable under the Policy.¹³² As a result, Doe brought a suit in the District Court claiming that a "right to freely and openly discuss these theories was impermissibly chilled by the Policy, and that the Policy be declared unconstitutional and enjoined on the grounds of vagueness and overbreadth."¹³³ In response, the University questioned Doe's standing to challenge the Policy and indicated that the policy had never been applied to sanction classroom "discussion of legitimate ideas."¹³⁴

In determining whether the Policy was facially overbroad, the District Court in *Doe* did not agree with the university's argument that the Policy was not applied to protected First Amendment

¹²² *Id.* at 1182.

¹²³ *Id.* at 1181.

¹²⁴ *Id.* at 1181.

¹²⁵ *Id.*

¹²⁶ *Id.* at 1183-84.

¹²⁷ *Id.*

¹²⁸ 721 F. Supp. 852 (1989).

¹²⁹ *Id.* at 853.

¹³⁰ *Id.*

¹³¹ *Id.* at 858.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

speech.¹³⁵ The court discussed three instances after the Policy was adopted where the university demonstrated that it considered serious comments made in the context of classroom discussion to be sanctionable under the Policy.¹³⁶

In determining whether the Policy was constitutionally vague, the *Doe* Court stated that “a statute must give adequate warning of the conduct which is to be prohibited and must set out explicit standards for those who apply it.”¹³⁷ The court found that the plain language of the Policy did not distinguish between protected and unprotected conduct.¹³⁸ The court found the phrase “‘stigmatize or victimize’” an individual in the Policy to be general and did not have a precise definition.¹³⁹ Also, the court stated that even if a statement victimizes or stigmatizes an individual this does not mean that the statement loses its protection under the accepted First Amendment.¹⁴⁰ The District Court concluded that the university did not state any means to distinguish sanctionable from protected speech and students were forced to guess at whether a comment about a controversial issue would later be found to be sanctionable under the Policy.¹⁴¹ As such, the District Court found that the Policy was vague and inappropriately applied to speech protected by the First Amendment.¹⁴²

IV. SAFE HARBOR PROTECTION – THE FIRST AMENDMENT

The First Amendment prohibits the abridgment of freedom of speech.¹⁴³ Freedom of speech includes both the right to speak freely and the right to refrain from speaking at all.¹⁴⁴ Professors, like students, do not leave their First Amendment rights at the campus gates.¹⁴⁵ However, not all of a school’s restraints on free speech rights are invalid.¹⁴⁶

The Supreme Court in the 1969 case of *Tinker v. Des Moines Independent Community District*, emphasized a “need for affirming the comprehensive authority of the States and of school officials,

¹³⁵ *Id.* at 864-65.

¹³⁶ *Id.* at 866

¹³⁷ *Id.* (citing *Broadrick v. Okla.*, 413 U.S. 601, 607 (1973)).

¹³⁸ *Id.* at 867.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ U.S. CONST. amend. I, Part 1 of 8.

¹⁴⁴ *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (stating “the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”).

¹⁴⁵ *Johnson-Kurek v. Abu-Absi*, 423 F.3d 590 (6th Cir. 2005) (holding that a university could constitutionally require a professor to provide detailed advice to students about the administrative aspects of a course. Therefore, the supervisor’s request that the professor write to her students and identify the shortcomings in the students’ performance did not implicate the professor’s First Amendment rights.).

¹⁴⁶ See *Downing v. W. Haven Bd. of Educ.*, 162 F. Supp. 2d 19 (D.Conn. 2001) (holding that a teacher’s First Amendment rights were not violated when a teacher appeared at school wearing her tee shirt with a Christian message printed in large letters, and the school told her to cover up the shirt. The teacher’s First Amendment rights while instructing in the classroom necessarily had to yield to Establishment Clause concerns under the circumstances of the case.).

. . . to prescribe and control conduct in the schools.”¹⁴⁷ A school’s ability to control conduct in school includes regulating speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.”¹⁴⁸ And, the school’s ability to regulate speech is not limited to only speech that takes place on school grounds and does not disappear when the speech occurs off campus.¹⁴⁹

Is there a violation of the First Amendment rights when universities and colleges take adverse actions against faculty who post controversial matters on their personal social media sites?¹⁵⁰ As far back as 1957, the US Supreme Court in *Sweezy v. New Hampshire* understood the need to protect the freedom of academia by stating:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.¹⁵¹

These words were written before the age of technology and emergence of social media. *Sweezy* was decided at a much simpler time. Nevertheless, the First Amendment rights of faculty appear to have been endorsed and supported by the United States Supreme Court.¹⁵² What say the court now? The question is posed because it forges into an “emerging area of law” where there are only a few cases to provide guidance, particularly at the United States Supreme Court level.

A. THE LEGAL STANDARD FOR THE FIRST AMENDMENT INQUIRY – US SUPREME COURT CASES

In 1968, 1983, and 2006, the United States Supreme Court decided three major cases that currently provide a foundation for future analysis of the First Amendment issue under review. They focus on public employees and the question of whether the First Amendment protected them against adverse actions by their public employer or stated differently, whether a public employee’s

¹⁴⁷ 393 U.S. 503, 507 (1969) (holding that First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or at the schoolhouse gate.)

¹⁴⁸ *Id.* at 513.

¹⁴⁹ *Mahanoy Area Sch. Dist. v. B.L.*, 549 U.S. ___, 41 S. Ct. 2038, 2045, 210 L.Ed.2d 403, 410 (2021) (holding that a public high school violated a student’s First Amendment rights by suspending her from the cheerleading team because, outside of school hours and away from campus, the student transmitted on social media vulgar language and gestures criticizing the school and its cheerleading team.).

¹⁵⁰ Private universities are not subject to First Amendment claims because there is no governmental entity. See *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) (“The constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state”); *Manhattan Cnty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928c (2019) (“The Free Speech Clause does not prohibit private abridgment of speech.”).

¹⁵¹ 354 U.S. 234, 250 (1957).

¹⁵¹ *Id.*

¹⁵² *Id.*; see also *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (holding that states could not prohibit employees from being members of the Communist Party and New York’s law prohibiting employees from being members of the Communist party was overbroad and too vague).

¹⁵² *Sweezy*, 354 U.S. at 250.

speech is protected under the First Amendment.¹⁵³ Thus, an evolution of these three cases, commonly known as the *Pickering-Connick-Garcetti Public Official* approach, is noteworthy of review since current cases involving faculty social media posts most likely would be subject to this analysis or a variation thereof. Under this three-prong approach, in summary, the “First Amendment protects a public employee’s speech if the employee speaks 1) as a citizen, 2) on a matter of public concern, and 3) not pursuant to the employee’s ‘official duties.’”¹⁵⁴

1. THE PICKERING CASE

In 1968, long before the technology age of social media, the United States Supreme Court rendered a decision in *Pickering v. Board of Education of Township High School District 205*, a case of first impression, on the issue of whether a school teacher’s public criticism of the local school board was protected by the First Amendment speech.¹⁵⁵

Marvin L. Pickering, a high school teacher in Will County, Illinois brought a First Amendment lawsuit against the local school board because he was terminated after sending a letter to a local newspaper.¹⁵⁶ In the letter, Marvin criticized the school board’s allocation of school funds between educational and athletic programs, the manner in which the school board and the school district handled proposals to raise new revenue for the schools, and the superintendent’s attempt to silence teachers from complaining about the revenue issue.¹⁵⁷ At a school board hearing, legislatively mandated after a dismissal, the school board defended its actions by declaring the statements made by Pickering to be false as charged and that publication of the letter to the newspaper was “detrimental to the efficient operation and administration of the schools of the district.”¹⁵⁸

It is well settled that teachers cannot be compelled to relinquish their First Amendment rights, otherwise enjoyed as a citizen, on comments of public interest even when employed by school systems.¹⁵⁹ They have the same First Amendment rights as ordinary citizens.¹⁶⁰ The Supreme Court had already spoken on that matter in prior cases.¹⁶¹ In the *Pickering* case, however, the Court

¹⁵³ See Rachel A. Miller, Non-Symposium Student Piece, *Teacher Facebook Speech: Protected or Not?*, 2011 BYU Educ. & L. J. 637, 640 (2011) (“The First Amendment protects a public official’s speech if she speaks 1) as a citizen, 2) on a matter of public concern, and 3) not pursuant to her “official duties.”); see also Nicole M. Rementer, Comment, *An Imbalanced Public Concern: The Case for Strict Scrutiny of Pure Freedom of Association Cases in Public Employment*, 19 COMM LAW CONSPPECTUS 179, 186 (2010) (“Synthesizing these cases, the Pickering/Connick/Garcetti test emerges to analyze First Amendment claims by public employees for speech protection: (1) the public employee spoke as a citizen; (2) on a matter of public concern; and (3) the First Amendment interests of the employee outweigh the interests of the public employer (Pickering balancing test.”).

¹⁵⁴ *Id.*

¹⁵⁵ 391 U.S. 563 (1968).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 564-65.

¹⁵⁸ *Id.* at 567.

¹⁵⁹ *Id.* at 568.

¹⁶⁰ *Id.*

¹⁶¹ See, e.g., *Wieman v. Updegraff*, 344 U.S. 183 (1952) (holding that Constitutional guarantees of freedom of thought, speech, and press are violated by a state statute which seeks to bar disloyal persons from state employment by requiring employees to disavow membership in or affiliation with specified organization); *Shelton v. Tucker*, 364 U.S. 479 (1960) (holding that to compel a teacher to disclose his every associational tie is to impair his right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society); *Keyishian*, 385 U.S. at 589.

created a balancing test, the first of its kind.¹⁶² The test balances “the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”¹⁶³ Simply put, it balances the interest of the public employee who makes a statement of public concern and the interest of the public employer who must provide public services in an efficient manner.

When applying the test to the facts in the *Pickering* case, the Court concluded that the school system did not have a greater right to limit Pickering than it had in limiting the rights of an ordinary citizen who would voice an opinion in a matter of public concern to the community.¹⁶⁴ The Court also examined the facts and concluded that although some of the teacher’s public statements were incorrect, the statements did not impede the proper performance of Pickering’s daily duties in the classroom or interfere with regular school operations.¹⁶⁵ Accordingly, the United States Supreme Court held that, without proof of false statements knowingly or recklessly made, “a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.”¹⁶⁶ Thus, the Court found that Pickering’s dismissal from his teaching position violated his First Amendment rights.¹⁶⁷ This case was described in the article *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review* as an illustration of the strength of the First Amendment.¹⁶⁸

2. THE CONNICK CASE

In 1983, roughly fifteen years after deciding the *Pickering* case, the Court, in *Connick v. Meyers*,¹⁶⁹ narrowed the scope of the *Pickering* holding. The Court imposed a limit on the First Amendment protection of public officials who make statements involving matters of public concern by focusing on the context, content, and form of their comments.¹⁷⁰ Sheila Meyers, an Assistant District Attorney in New Orleans for five and a half years, worked for District Attorney Harry Connick.¹⁷¹ On October 6, 1980, Meyers learned she was to transfer to a different section of the criminal court.¹⁷² Meyers strongly opposed the transfer.¹⁷³ On that same day, she prepared a “questionnaire soliciting the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns.”¹⁷⁴

¹⁶² *Pickering*, 391 U.S. at 568.

¹⁶³ *Id.* (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

¹⁶⁴ *Id.* at 572-73.

¹⁶⁵ *Id.* at 573.

¹⁶⁶ *Id.* at 574.

¹⁶⁷ *Id.* at 575.

¹⁶⁸ See William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW AND CONTEMPORARY PROBLEMS 79, 105 (1990) (“Pickering is thus an excellent illustration of how things have changed since 1908, and of how much stronger the first amendment has become in a general way.”).

¹⁶⁹ 461 U.S. 138 (1983).

¹⁷⁰ *Connick v. Meyers*, 461 U.S. 138 (1983).

¹⁷¹ *Id.* at 140.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 141.

After preparing the questionnaire, Meyers distributed it to fifteen fellow Assistant District Attorneys.¹⁷⁵ When District Attorney Connick discovered that Meyers had prepared and distributed a questionnaire, she was terminated because Connick believed that the questionnaire constituted insubordination.¹⁷⁶ In response, Meyers filed a lawsuit claiming wrongfully termination based upon her right to free speech.¹⁷⁷

The Court in *Connick* sought to determine whether Meyer's speech was within First Amendment protection by focusing on the content of the speech.¹⁷⁸ The Court stated that “[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.”¹⁷⁹ “[W]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.”¹⁸⁰ Applying this standard to the facts, the Court determined that only one question in Meyer's questionnaire related to a matter of public concern: Do assistant district attorneys “ever feel pressured to work in political campaigns on behalf of office supported candidates?”¹⁸¹ The Court narrowly focused on this question to determine whether District Attorney Connick was justified in discharging Meyers.¹⁸²

The Court flushed out the relevant facts. Relevant to the Court were “the manner, time, and place in which the questionnaire was distributed.”¹⁸³ The facts disclosed that although the questionnaire was prepared and distributed at the office, both Meyers and her coworkers were required to leave their work to complete it.¹⁸⁴ This fact suggested that Meyers did not violate office policy.¹⁸⁵ But, the questionnaire's distribution, on the heels of her transfer, and Meyers' comments in the office supported “Connick's fear that the functioning of his office was endangered” by the questionnaire.¹⁸⁶ Upon review, the Court found that only in a limited sense did the questionnaire touch upon matters of public concern.¹⁸⁷ Rather, Meyers' questionnaire was mainly an employee grievance concerning internal office policy.¹⁸⁸ Thus, the “limited First Amendment interest” involved in the case did not require that “Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships.”¹⁸⁹ As a result, the Court overruled the decision of the lower courts and held that Meyers' discharge did not violate her First Amendment rights.¹⁹⁰

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 146.

¹⁸⁰ *Id.* at 147-48.

¹⁸¹ *Id.* at 149.

¹⁸² *Id.*

¹⁸³ *Id.* at 152.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 153.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 154.

¹⁹⁰ *Id.*

Notably, Professor Cynthia Estlund, in her article *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category* asserts that this ‘public concern test’ established in *Connick* undermines the free speech protection that is important to public discourse.¹⁹¹ She explains that prior to *Connick*, the free speech rights of public employees was not limited to matters of public concern.¹⁹² Estlund also contends that the *Connick* case appears to suggest that an expression arising out of a workplace grievance does not involve a matter of public concern.¹⁹³ Consequently, this “public concern test,” according to Estlund, has an inherent class bias favoring those who can afford a lawyer and tailor the form of their complaints.¹⁹⁴

3. THE GARCETTI CASE

In 2006, the Court in *Garcetti v. Ceballos* rendered a decision, which again impacted the free speech rights of public employees.¹⁹⁵ In this case, the Court’s decision focused on the status of the employee.¹⁹⁶ Richard Ceballos, Deputy District Attorney for the Los Angeles County District Attorney’s Office, had been employed since 1989.¹⁹⁷ As calendar deputy in the office’s Pomona branch, Ceballos exercised certain supervisory responsibilities over other lawyers.¹⁹⁸ In February 2000, a defense attorney contacted Ceballos about a pending criminal case, seeking review of the case in which the defense attorney alleged inaccuracies in an affidavit used to obtain a critical search warrant.¹⁹⁹

After examining the affidavit and visiting the location described therein, Ceballos agreed that the affidavit contained serious misrepresentations.²⁰⁰ Ceballos relayed his findings to his supervisors, followed up the conversation by preparing a disposition memorandum explaining his concerns, and the recommended dismissal of the case.²⁰¹ Despite Ceballos’ actions and concerns, one of Ceballos’ supervisors decided to proceed with prosecuting the case.²⁰² At a hearing before the trial court, Ceballos described the inaccuracies observed in the affidavit.²⁰³

Following the hearing, Ceballos alleged that he was subjected to a series of retaliatory employment actions, including: the re-assignment from his calendar deputy position to a trial deputy position; the transfer to another courthouse; and the denial of a promotion.²⁰⁴ Based on these actions, Ceballos brought a lawsuit against his supervisors claiming that his First

¹⁹¹ Cynthia Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEORGE WASHINGTON LAW REVIEW 1, 3 (1990).

¹⁹² *Id.* at 19.

¹⁹³ *Id.* at 37.

¹⁹⁴ *Id.* at 39.

¹⁹⁵ See *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 413.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 413-14.

²⁰⁰ *Id.* at 414.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 414-15.

²⁰⁴ *Id.*

Amendment rights were violated when his employer retaliated against him because of the disposition memo.²⁰⁵

The Court found that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—thereby distinguishing his case from those in which the First Amendment provides protection against discipline by employers.²⁰⁶ “[S]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.”²⁰⁷ However, when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes.²⁰⁸ As such, the Constitution does not protect them from employer discipline for making such statements.²⁰⁹

B. COURT DECISIONS RESPONDING TO A MOTION TO DISMISS OR A MOTION FOR SUMMARY JUDGEMENT

Although the United States Supreme Court has rendered three foundational decisions relevant to public employees and public employers regarding comments of public concern, as noted above, currently there are no cases, at any level, that have adjudicated the specific issue of whether a university violates a faculty’s First Amendment rights by taking adverse actions against the faculty for off-campus social media posts. Instead, a few courts have ruled on Motions to Dismiss or Motions for Summary Judgement filed by universities when faculty allege First amendment violations.²¹⁰ These cases are discussed below.

1. THE HOWELL V. MILLERSVILLE UNIVERSITY CASE – MOTION FOR SUMMARY JUDGMENT

In *Howell v. Millersville University*,²¹¹ Associate Professor Allan Howell, a tenured music faculty at Edinboro University, a public university in Edinboro, Pennsylvania, began his career in 1996.²¹² In February 2017, on a Facebook group post for his classes, Howell, defending his teaching methods after receiving student criticism posted: “If students want a fluffy class, they need a different teacher and that is certainly their right. They do not have the right, however (no matter how much they paid for their education) to attempt to diminish the academic freedom (i.e., 1st Amendment rights) of their teachers.”²¹³

A post in April 2017, on his Tumblr blog entitled, “On Power in the MU Music Department,” proved to be a pivotal one.²¹⁴ The post stated that he was writing ““to share [his] perspective for

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 421.

²⁰⁷ *Id.* at 419.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ See *Howell v. Millersville Univ.*, 283 F. Supp. 3d 309 (E.D.Pa. 2017); *Salaita v. Kennedy*, 118 F. Supp.3d 1068 (E.D. Ill. 2015); *Snyder v. Millersville Univ.*, No. 07-1660, 2008 U.S. Dist. LEXIS 97943 (E.D.Pa. 2008).

²¹¹ Howell, 283 F. Supp. 3d at 309.

²¹² *Id.*

²¹³ *Id.* at 321.

²¹⁴ *Id.* at 321-22.

the purpose of making a positive contribution to the future success of the department.”²¹⁵ Nevertheless, Howell also discussed problems he had with the leaders of the Music Department, which included Micheál Houlahan, Chairperson of the Music Department, and Phillip Tacka, a colleague in the Music Department.²¹⁶ Howell accused the Chairperson and his colleague of “heavy-handed micromanagement of faculty designed to maintain control of the Department.”²¹⁷ Howell contended Chairperson Houlahan tried to keep the ratio of tenured faculty to adjunct faculty low because “younger adjuncts have less political clout and thus pose less of a threat to Houlahan’s and Tacka’s control.”²¹⁸

In May 2017, a month after the post, Dean Diane Umble evaluated Howell.²¹⁹ The standard procedure mandated evaluation of retrenchees every three years.²²⁰ Dean Umble decided to schedule an interim evaluation of Howell because she believed he had not sustained scholarship, professional activity, and service to the Department and University.²²¹ According to Howell, an interim evaluation is often the first step in removing a tenured faculty member, arguing such an evaluation imposes a burden upon the faculty member under review.²²² Subsequently, Howell filed a lawsuit against the university asserting, among other things, that the University violated his First Amendment rights by retaliating against him because of his social media posts.²²³

The University filed a Motion for Summary Judgment, in response.²²⁴ First, the district court, in its analysis, reviewed Howell’s claim of retaliation because of his Tumblr post.²²⁵ Here the court found a lack of direct evidence of defendants, Chairperson Houlahan or colleague Tacka, seeing, or reading the post.²²⁶ Evidence was found of colleague Tacka’s awareness of the post from his students.²²⁷

The evidence was clear the defendants were already directly aware of Howell’s criticism because he made complaints during faculty meetings and during in-person conversations.²²⁸ Yet, Howell produced no evidence that the defendants became aware of any additional criticisms through Tumblr that they had not heard directly or from other sources.²²⁹ Without evidence that the defendants actually saw his Tumblr posts, the court determined that Howell could not prove

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 317-22.

²¹⁸ *Id.* at 321-22.

²¹⁹ *Id.*

²²⁰ *Id.*; see also *Definition of Retrenchment*, MERIAM WEBSTER (Retrenchment is defined specifically as a cutting of expenses), <https://www.merriam-webster.com/dictionary/retrenchments> (last visited on Dec. 21, 2021).

²²¹ Howell, 283 F. Supp. 3d at 321.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 338.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 321.

²²⁹ *Id.* at 338.

this post was a “substantial factor” in his alleged retaliatory action.²³⁰ Therefore, his First Amendment claim based on the Tumblr post lacked causation.²³¹

Next, the court focused on whether the post involved a matter of public concern.²³² In addressing this issue, the court noted that:

precedent suggests that speech touches a matter of public concern if it “relate[s] to broad social or policy issues,” “implicate[s] the discharge of public responsibilities by an important government office, agency, or institution,” “seeks to bring to light actual or potential wrongdoing or breach of public trust on the part of government officials,” or “relate[s] primarily to the way in which a government office [i]s serving the public.”²³³

In effect, the court reasoned that speech involving matters of public concern “add to the debate on matters of public importance.”²³⁴ When this additional standard was imposed, the court determined that the comments on Howell’s Tumblr post did not involve matters of public concern—but instead were characterized as a personal grievance against the Music Department.²³⁵ As such, the court concluded that even if Howell could establish causation for his Tumblr post, his First Amendment retaliation claim would still fail because it did not involve a matter of public concern.²³⁶ Therefore, the court concluded that Howell could not maintain his First Amendment claim based on his Tumblr post.²³⁷

The court then turned to Howell’s claim that his February 2017 Facebook posts was protected by the First Amendment.²³⁸ The court noted that educational institutions, like Millersville University, do have the right to regulate a “teacher’s in-class speech.”²³⁹ Since Howell’s Facebook page was created for one of his classes, the court found this Facebook page to be “a digital extension of the classroom,” and made in direct response to one of his student’s comments in a prior class session.²⁴⁰ As a result, the court found the Facebook post to be “in-class speech.”²⁴¹ Speech characterized as “in-class speech” does not involve a matter of public concern and is not protected under the First Amendment because during class, the teacher acts on behalf of the educational institution.²⁴² Because Howell could not prove that any of the speech—including his 2017 Tumblr post and his February 2017 Facebook post—which formed the basis of his First Amendment claim, was a substantial factor in the defendants’ alleged retaliatory actions against

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 337 (citing *Sanguigni v. Pittsburgh Bd. of Pub. Educ.*, 968 F.2d 393, 397; *Holder v. City of Allentown*, 987 F.2d 188, 195 (3d Cir. 1993)).

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 338.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 338-339.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* at 341.

him, the court granted defendants Chairperson Houlahan and colleague Tacka's Motion for Summary Judgment.²⁴³

2. THE SALAITA V. KENNEDY CASE – MOTION TO DISMISS

Another retaliatory case against a faculty due to a social media post is that of *Salaita v. Kennedy*.²⁴⁴ Dr. Steven Salaita, a professor hired as an associate professor by the University of Illinois to teach American Indian Studies courses, brought a lawsuit against the university.²⁴⁵ The university denied him a new faculty appointment allegedly because he posted controversial statements on his personal Twitter account, regarding a skirmish between Palestine and Israel that resulted in the deaths of “approximately 2,100 Palestinians, including more than 500 children.”²⁴⁶ His tweet contained profane statements criticizing Israel’s actions.²⁴⁷

When Salaita’s tweets began receiving media coverage, the university initially supported him, indicating its policy is to recognize the free speech rights of its employees.²⁴⁸ However, once students, alumni, and donors complained to Chancellor Phyllis Wise, chancellor of the university at that time, the university changed its position.²⁴⁹ On August 1, 2014, Chancellor Wise sent Salaita a letter informing him that she would “not be in a position to appoint him” as a faculty member of the university.²⁵⁰ One month later, the university’s Board of Trustees voted eight-to-one to deny Salaita’s appointment.²⁵¹

Salaita’s lawsuit alleged, among other things, that the university’s actions of denying his faculty appointment based on his Twitter posts was a violation of his First Amendment rights to free speech.²⁵² In response to this claim, the university filed a Motion to Dismiss Salaita’s lawsuit for a failure to state a claim upon which relief could be granted.²⁵³

As a matter of law, to successfully state a First Amendment retaliation claim, a plaintiff must allege that: (1) his speech was constitutionally protected; (2) he suffered a deprivation likely to defer free speech; and (3) his speech was at least a motivating factor in his employer’s action.²⁵⁴ As to the first element, the university conceded that Salaita’s speech was constitutionally protected.²⁵⁵ However, the university argued that even when protected, the university’s interest in providing a safe and disruption free learning environment outweighed Salaita’s free speech interest under the *Pickering* balancing test articulated by the United States Supreme Court.²⁵⁶

²⁴³ *Id.* at 341.

²⁴⁴ 118 F. Supp.3d 1068 (E.D. Ill. 2015).

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 1075.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.* at 1081.

²⁵³ *Id.* at 1076.

²⁵⁴ *Id.* (citing *Massey v. Johnson*, 457 F.3d 711, 716 (7th Cir. 2006)).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

In response to the university's argument, the court found the argument to be premature since the parties had not done any discovery in the case.²⁵⁷ Therefore, the court declined to engage in a "full-fledged" *Pickering* balancing analysis at this "early stage in the litigation process."²⁵⁸ The court also noted that if it were to apply the balancing test at this point it would have to view the facts in Salaita's favor.²⁵⁹ When the plaintiff's speech "more substantially involves a matter of public concern"—as it did in this case—the defendant had to make a "'stronger showing' of potential disruption" because of Salaita's faculty appointment.²⁶⁰ After taking a cursory look at the complaint, the court noted conflicting evidence as to the level of disruption that Salaita's appointment would cause.²⁶¹ Consequently, viewing this evidence in the light most favorable to Salaita, the court concluded that it seemed unlikely the university would win its *Pickering* challenge at the Motion to Dismiss stage.²⁶²

The second element of the test was satisfied.²⁶³ The court determined that termination was enough to constitute a deprivation pursuant to the second element of the First Amendment retaliation claim analysis.²⁶⁴

As to the third element, that is, whether the speech was a motivating factor in the university's action, the university argued it was not motivated by Salaita's content or viewpoint.²⁶⁵ Here, the court paused and found that this argument again was a bit premature, noting that only a summary judgment motion (where discovery is conducted) or a trial (where evidence is presented) would reveal the university's actual motivation.²⁶⁶ But, when facts were viewed in Salaita's favor, there appeared to be enough evidence to support a claim against the university.²⁶⁷ Additionally, the court determined the university fired Salaita because it disagreed with his point of view, and that Salaita's tweets were definitely a matter of public concern, since "the topic of Israeli-Palestinian relations often brings passionate emotions to the surface."²⁶⁸ Based on the circumstances, "it would be nearly impossible to separate the tone of the tweets on this issue with the content and views they express."²⁶⁹ As such, the court concluded that at the Motion to Dismiss stage, there was not enough evidence to find that the university's actions were not at all motivated by the content of Salaita's tweets.²⁷⁰

As a result, the court concluded that the facts in Salaita's complaint, showing that he was not hired because the university disagreed with his personal speech in a public forum on a matter of public concern, were sufficient to survive a Motion to Dismiss.²⁷¹

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* (citing *Connick v. Myers*, 461 U.S. 138, 151 (1983)).

²⁶¹ *Id.* at 1083-84.

²⁶² *Id.* at 1084.

²⁶³ *Id.* at 1081.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 1082.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 1082-83.

²⁶⁹ *Id.* at 1083.

²⁷⁰ *Id.*

²⁷¹ *Id.*

3. SNYDER V. MILLERSVILLE UNIVERSITY – MOTION FOR SUMMARY JUDGMENT

The case of *Snyder v. Millersville University* involved a student-teacher, rather than a university faculty member.²⁷² The question before the court is familiar. Did the university violate the First Amendment rights of the student-teacher by failing to give her a Bachelor of Science degree after she posted comments about her student teaching experience on MySpace?²⁷³

The plaintiff, Stacey Snyder, enrolled at Millersville University as a full-time student majoring in education during the summer of 2002.²⁷⁴ As part of the university's student teaching program, Snyder was assigned to Conestoga Valley High School and assigned to a cooperating teacher.²⁷⁵ During the student-teaching orientation, student-teachers were warned "not to refer to any students on their personal webpages" and informed that "schools have the prerogative to remove student-teachers from their placements."²⁷⁶ Yet, in May 2006, Snyder posted a comment on MySpace, which was interpreted as a "blatant act of insubordination" against her cooperating teacher.²⁷⁷ After the school officials saw the post, Snyder was barred from completing her student teaching placement and consequently, Millersville University was unable to award her a Bachelor of Science Degree in Education.²⁷⁸

Upon review of the case, the court noted that Snyder's "free speech claim triggers different tests, depending on whether she was a 'teacher' or a 'student' when she created her MySpace posting."²⁷⁹ Weighing the facts before it, the court found that Snyder's role as a student teacher was more "akin to that of a public employee/teacher" than a student.²⁸⁰ Free speech protection exists for public employees like public school teachers if they are speaking about matters of public concern.²⁸¹ This protection, however, can be limited by the employer to the extent that is necessary to operate efficiently and effectively.²⁸² Since, during a non-jury trial, Snyder conceded on her claim for mandatory injunctive relief against the university that her MySpace posting touched on personal matters, and not one of public concern, as a matter of law, the First Amendment did not protect this posting.²⁸³ Consequently Snyder's First Amendment rights were not violated and the university's Motion for Summary Judgment was granted.²⁸⁴

²⁷² *Snyder v. Millersville Univ.*, No. 07-1660, 2008 U.S. Dist. LEXIS 97943 (E.D.Pa. Dec. 3, 2008).

²⁷³ *Id.* at 2.

²⁷⁴ *Id.* at 4-5.

²⁷⁵ *Id.* at 7.

²⁷⁶ *Id.* at 12.

²⁷⁷ *Id.* at 13-14.

²⁷⁸ *Id.* at 16.

²⁷⁹ *Id.* at 38.

²⁸⁰ *Id.* at 39.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.* at 42.

²⁸⁴ *Id.*

C. CAN THE LEGAL STANDARD ARTICULATED BY THE UNITED STATES SUPREME COURT BE APPROPRIATELY APPLIED IN INSTANCES WHERE UNIVERSITY FACULTY POST ON SOCIAL MEDIA?

It is unclear whether a reviewing court will apply the *Garcetti v. Ceballos* holding—that the statements of public employees made pursuant to their official duties are not protected under the First Amendment—to university faculty.²⁸⁵ Notably, the *Garcetti* Court did not apply its holding to academic speech of faculty and staff at public universities.²⁸⁶ In fact, it intentionally declined to decide whether its holding applies to the academic speech of faculty and staff at public universities.²⁸⁷

Other courts, however, have reached varying decisions when addressing this issue.²⁸⁸ For instance, in *Adams v. Trustees of the University of North Carolina-Wilmington*, the United States Court of Appeals for the Fourth Circuit held that *Garcetti* does not apply to academic work of a public university faculty member.²⁸⁹ On the other hand, the United States Court of Appeals for the Seventh Circuit in *Renken v. Gregory* applied *Garcetti* to the academic work of a public university faculty member.²⁹⁰ And legal scholars have reached different conclusions regarding whether *Garcetti* should be understood to limit the First Amendment rights of university faculty engaged in core academic functions such as teaching and scholarship. Professor Lawrence Rosenthal in his article *Does the First Amendment Protect Academic Freedom?* argues that the *Garcetti* case should apply to university faculty in the same manner as the case applies to public employees.²⁹¹ In essence, he argues that university faculty should not be given special First Amendment protections.²⁹² Rosenthal argues that even if the *Garcetti* case applies to university faculty this would not eliminate all of their constitutional protection for classroom or scholarly speech.²⁹³ According to Rosenthal, academics would still retain First Amendment protections for allegations

²⁸⁵ *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006) (“There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”).

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ See *infra* notes 289-90.

²⁸⁹ 640 F.3d 550, 564 (2011) (holding that the district court erred in concluding that an associate professor’s speech, which was protected speech when initially given, was converted into unprotected speech when he listed the speech on his promotion application); *see also* *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014) (holding that *Garcetti* does not apply to speech related to scholarship or teaching, rather, such speech is governed by Pickering); *Meriwether v. Hartop*, 992 F.3d 492, 504–07 (6th Cir. 2021) (“[P]rofessors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship.”).

²⁹⁰ 541 F.3d 769 (2008) (affirming the district court’s finding a professor’s complaints about a university’s grant funding were made as part of his official duties and not protected under the First Amendment); *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332 (6th Cir. 2010) (stating that “the First Amendment does not protect primary and secondary school teachers’ in-class curricular speech.”); *Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 151 (3d. Cir. 2008) (holding that a teacher’s in-class conduct is not protected speech); *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687 (4th Cir. 2007) (holding that a school board did not violate a teacher’s free speech right when he was forced to remove materials he posted on the bulletin board in his classroom).

²⁹¹ Lawrence Rosenthal, *Does the First Amendment Protect Academic Freedom?*, 46 J. COLL. & U. LAW 53, 54-55 (2021).

²⁹² *Id.*

²⁹³ *Id.* at 82.

of teaching or scholarly misconduct that are motivated in retaliation for “partisan or ideological nonconformity.”²⁹⁴

A divergent view of the application of the *Garcetti* case was taken by Professors Bridget R. Nugent and Julee T. Flood in their article *Rescuing Academic Freedom for Garcetti v. Ceballos: An Evaluation of Current Case Law and a Proposal for the Protection of Core Academic, Administrative, and Advisory Speech*.²⁹⁵ Nugent and Flood contend that the Supreme Court should recognize an exception to *Garcetti*’s “official duties” rule for core academic speech.²⁹⁶ They argue that interpreting speech related to scholarship or research as “official duties” under the *Garcetti* standard “runs the risk of inhibiting the free pursuit of unpopular or socially charged ideas—precisely what the First Amendment was designed to protect.”²⁹⁷ The academic speech that Nugent and Flood argue should be given special constitutional protection as a *Garcetti* exception is where faculty are expressing speech relevant to their fields and their positions.²⁹⁸ However, they do not advocate that this protection should be given for faculty speech that is administrative in nature or advisory, such as when a professor serves on a curriculum committee, votes on a departmental budget, interviews a potential colleague, or advises students.²⁹⁹

If the court chooses to apply the *Pickering-Connick-Garcetti* approach, it would most likely conclude that speech on social media made pursuant to the faculty’s official duties—such as speech related to curricular or classes—would not be protected under the First Amendment.³⁰⁰ Also, a court applying the *Pickering-Connick-Garcetti* approach would likely conclude that faculty’s social media speech that does not involve the curricula or matters within the faculty’s “official duties” may be protected under the First Amendment if the faculty is speaking as a citizen regarding matters of public concern.³⁰¹

Based on the cases of *Howell v. Millersville University*, *Salaita v. Kennedy*, and *Snyder v. Millersville University*—all of which involved academic settings where the courts focused on the *Pickering* and *Connick* cases—the remainder of this article will focus on the considerations for universities under the *Pickering-Connick* analysis instead of the *Pickering-Connick-Garcetti* analysis.³⁰²

V. DEVELOPING AND IMPLEMENTING GUIDANCE FOR UNIVERSITIES WHEN DETERMINING WHETHER TO PUNISH FACULTY FOR OFF-CAMPUS SOCIAL MEDIA POSTS

²⁹⁴ *Id.* at 83.

²⁹⁵ Bridget R. Nugent & Julee T. Flood, *Rescuing Academic Freedom for Garcetti v. Ceballos: An Evaluation of Current Case Law and a Proposal for the Protection of Core Academic, Administrative, and Advisory Speech*, 40 J. COLL. & U. LAW 115 (2014).

²⁹⁶ *Id.* at 126.

²⁹⁷ *Id.* at 131.

²⁹⁸ *Id.* at 151.

²⁹⁹ *Id.* at 149.

³⁰⁰ See *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

³⁰¹ See *Pickering v. Board of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138, 151 (1983).

³⁰² See *id.*

Before public universities and colleges decide whether to discipline faculty or take some adverse action against them for their off-campus social media activity, they should consider whether doing so will violate the First Amendment rights of faculty. To make this determination, it is very important for universities to rely on relevant case law.

Examining the cases of *Howell v. Millersville University*, *Salaita v. Kennedy*, and *Snyder v. Millersville University*, it should be noted that the *Howell* and *Salaita* cases involved plaintiffs who were faculty; whereas the *Snyder* case involved a student-teacher.³⁰³ The *Salaita* case involved a motion to dismiss claim where no discovery had been conducted, and the court did not apply the “full-fledged” *Pickering-Connick* standard.³⁰⁴ Nevertheless, the court in *Salaita* did utilize the *Pickering-Connick* standard as a guide in determining whether Salaita’s First Amendment claim should be dismissed.³⁰⁵ In utilizing this standard, the court determined that Salaita’s tweets criticizing Israel’s actions were definitely a matter of public concern.³⁰⁶

Unlike the *Salaita* case, discovery was conducted in both *Howell* and *Snyder*.³⁰⁷ These cases involved defendants’ Motions for Summary Judgment.³⁰⁸ Both courts in *Howell* and *Snyder* determined that the social media posts at issue did not involve matters of public concern and as a result, there was no need to apply the *Pickering-Connick* standard.³⁰⁹ Specifically, the courts in *Howell* and *Snyder* determined that the speech at issue involved personal matters.³¹⁰ Therefore, the courts in these two cases determined that the plaintiffs bringing the First Amendment claim had no constitutional protection.³¹¹

Despite the differences, the three cases seem to make it clear that the legal standard for determining whether faculty’s First Amendment rights are implicated when faculty are disciplined for off-campus social media posts depends on whether the statements relate to matters of public concern. The *Howell* Court recognized that the four elements constituting matters of public concern include: (1) speech related to “broad social or policy issues”; (2) the termination of “public responsibility by a governmental office, agency or institution”; (3) seeking to shed light on “actual or potential wrongdoing” by governmental officials”; or (4) involving the manner in which a “governmental office is serving the public.”³¹² Therefore, when a faculty’s off-campus social media posts involve any of these four categories the posts would likely involve matters of public concern.

³⁰³ See *Snyder v. Millersville Univ.*, No. 07-1660, 2008 U.S. Dist. LEXIS 97943 (E.D.Pa. 2008); *Howell Millersville Univ.*, 283 F. Supp. 3d 309 (E.D.Pa. 2017).

³⁰⁴ See *Salaita v. Kennedy*, 118 F. Supp.3d 1068 (E.D. Ill. 2015).

³⁰⁵ See *id.*

³⁰⁶ See *id.*

³⁰⁷ See *Howell Millersville Univ.*, 283 F. Supp. 3d 309 (E.D.Pa. 2017); *Snyder*, No. 07-1660, 2008 U.S. Dist. LEXIS 97943 at 2.

³⁰⁸ See *supra* note 303.

³⁰⁹ See *id.*

³¹⁰ See *id.*

³¹¹ See *id.*

³¹² *Howell v. Millersville Univ.*, 283 F. Supp. 3d 309, 337 (2017) (quoting *Sanguigni v. Pittsburgh Bd. of Public Educ.*, 968 F.2d 393, 397 (3d Cir. 1992) & *Holder v. City of Allentown*, 987 F.2d 188, 195 (3d Cir. 1993)).

A. APPLICATION OF MATTERS OF PUBLIC CONCERN TO CONTEMPORARY CASES

This definition of matters of public concern will be applied to a few of the contemporary cases discussed earlier in this article. For instance, Judy Morelock's 2017 Facebook posts in which she threatened to sabotage her student's future do not appear to involve any of the four categories constituting matters of public concern outlined in *Howell*.³¹³ Instead, these statements appear to involve a personal grievance between Morelock and the student similar to those statements contained in Howell's 2017 Tumblr post.³¹⁴ Thus, if Morelock's statements had been reviewed by a court, it is very likely that the court would have determined that these statements were not protected under the First Amendment because they do not involve matters of public concern.

On the other hand, Mike Adams' tweet about how North Carolina's Governor Cooper was handling the COVID 19 shutdown would mostly likely be held by a court to involve matters of public concern. It is very likely that the same could be said regarding the following comments: (1) Jeff Klinzman's 2019 Twitter post about Donald Trump; (2) Fang Zhou's 2019 Facebook posts about illegal immigration; and (3) Eric Rasmussen's 2019 Twitter post quoting a controversial article.

If the social media posts of university faculty involve matters of public concern—like Mike Adams' 2020 Twitter post—reviewing court will apply the *Pickering-Connick* approach to determine whether the university's interest in providing a safe and disruption free learning environment outweighs the faculty's First Amendment interests.³¹⁵ This approach was not actually applied in the *Salaita* case because it was too early in the litigation process since the case merely involved a Motion to Dismiss and no discovery had been conducted.³¹⁶ Further, the *Pickering-Connick* approach was not applied in the *Howell* and *Snyder* cases because the speech in those two cases was not protected speech under the First Amendment since the speech involved a personal grievance.³¹⁷

Nevertheless, as was noted in the 2014 law review titled *The Tweet Hereafter: Social Media and the Free Speech Rights of Kansas Public University Employees*, numerous lower courts have applied the *Pickering* balancing test in cases "involving a variety of public employees such as school teachers, police and firefighters, municipal clerks, and in some cases university faculty and staff."³¹⁸ One such case comes from the Seventh Circuit. In the case of *Conner v. Reinhard*, Barbara Conner brought a claim against the city and her supervisor alleging she was terminated

³¹³ See *Howell*, 283 F. Supp. 3d at 337.

³¹⁴ See *id.*; see also *Leverington v. City of Colo. Springs*, 643 F.3d 719 (10th Cir. 2011) (concluding that Pickering did not apply because nurse's allegedly threatening statements to police officer who gave her a speeding ticket were personal matters, not matters of public concern).

³¹⁵ See *Levy*, *supra* note 34 at, 81; see also *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979) (A teacher contended that nonrenewal of her contract violated her right of free speech. The Court held that private expression of one's views was not beyond constitutional protection.).

³¹⁶ See *Salaita v. Kennedy*, 118 F. Supp.3d 1068 (E.D. Ill. 2015).

³¹⁷ See *Howell Millersville Univ.*, 283 F. Supp. 3d 309 (E.D. Pa. 2017); *Snyder*, No. 07-1660, 2008 U.S. Dist. LEXIS 97943 at 2.

³¹⁸ *Id.*

from her job in violation of her right to freedom of speech.³¹⁹ The court in *Conner* articulated the factors to consider in balancing the interests of the public employer and those of the public employee.³²⁰ These factors include: (1) the effect of the employee's "conduct on discipline and harmony among co-workers"; (2) "the need for confidentiality"; (3) whether the conduct impeded the teacher "in competently performing her daily duties"; and (4) "the need to encourage a close and personal relationship involving loyalty and confidence" between the public employer and the public employee.³²¹

Applying the four factors in *Conner* to the social media statements made by Mike Adams, Jeff Klinzman, Fang Zhou, and Eric Rasmussen, it appears that each faculty's interest would outweigh the universities' interests.³²² In other words, it does not appear that any of these social media statements would justify the universities involved taking adverse actions against these faculty.³²³ In essence, none of these social media posts appear to involve insubordination or a violation of confidentiality, impede the performance of the professor's job duties, or effect "the need to encourage a close and personal relationship involving loyalty and confidence" between the university and faculty.³²⁴ Thus, it is very possible that a court in applying the *Pickering-Connick* test would conclude that if the universities took adverse actions against any of these individuals then a First Amendment violation would occur.³²⁵

In fact, the colleges in all of these cases—except for Kirkwood Community College in Jeff Klinzman's case—ultimately decided not to take any adverse employment action against the faculty involved. Although Kirkwood Community College eventually reached a settlement with Klinzman, it did take the adverse action of forcing him to resign. Klinzman was the only one of these four professors who was an adjunct professor without tenure.³²⁶ Could this have accounted for the difference in Klinzman's case? In answering this question, it is important to refer to the United States Supreme Court holding in *Perry v. Sindermann*, where the Court held that a faculty's lack of a contractual or tenure right to re-employment does not allow a university the right to refuse to renew his or her contract based solely on a faculty's exercise of his or her First Amendments rights.³²⁷

The Supreme Court further explained in the case of *Mount Healthy City School District Board of Education v. Doyle* that an employee like

³¹⁹ 847 F.2d 384 (7th Cir. 1988).

³²⁰ *Id.*

³²¹ *Id.* at 389; *see also* *Khuans v. Sch. Dist.* 110, 123 F.3d 1010, 1015 ((1) whether the statement would create problems in maintaining discipline by immediate supervisors or harmony among co-workers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform her daily responsibilities; (4) the time, place, and manner of the speech; (5) the context in which the underlying dispute arose; (6) whether the matter was one on which debate was vital to informed decision making; and (7) whether the speaker should be regarded as a member of the general public.).

³²² *See Conner*, 847 F.2d at 389.

³²³ *See id.*

³²⁴ *See id.*

³²⁵ *See id.*

³²⁶ "Tenure provides only that no person continuously retained as a full-time faculty member beyond a specified lengthy period of probationary service may thereafter be dismissed without adequate cause." Mark Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 CATH. U.L. REV. 67, 70 (2016).

³²⁷ 408 U.S. 593, 596 (1972).

Klinzman—without tenure or a contractual right to renew his or her contract—must show the constitutionally protected behavior—free speech—was a “substantial factor” or “motivating factor” in the employer’s decision not to rehire him.³²⁸ However, if the employer can show “by a preponderance of the evidence” that it would have reached the same decision as to the employee’s re-employment even in the absence of the protected conduct the employee’s claim of a constitutional violation will be denied.³²⁹

Applying this standard to Jeff Klinzman’s case, assuming that a reviewing court found that his Twitter post about Donald Trump involved matters of public concern, as an adjunct professor, he would have to show that these posts were the “substantial” or “motivating factor” in the community college’s decision to fire him in order for a court to determine that the university violated his First Amendment rights.³³⁰ But, if the community college could show that it would have reached the same decision to fire Klinzman in absence of his Twitter post, a reviewing court would very likely find that the college did not violate his First Amendment rights.³³¹

B. APPLICATION OF THE PICKERING-CONNICK APPROACH FOR UNIVERSITIES

In sum, when public universities are deciding whether to discipline or take adverse actions against faculty who post on their personal social media sites, the first consideration is whether the statements involve matters of public concern.³³² If the statements do not involve matters of public concern—such as statements involving personal grievances—the university can discipline faculty without being subject to liability for a First Amendment retaliation claim.³³³

If the statements do involve matters of public concern, the next consideration for the university is whether it is likely that a reviewing court would conclude that the university’s interests outweigh the faculty’s interests.³³⁴ In analyzing this consideration, the university should carefully consider the facts and circumstances present. Specifically, the university should consider whether the facts or circumstances are such that the faculty’s social media posts involve insubordination or a violation of confidentiality, impede the performance of the professor’s job duties, or effect the need to encourage a close and personal relationship involving loyalty and confidence between the university and faculty.³³⁵ If one of the four categories is involved, this may mean that the university’s interests likely outweigh the faculty’s interests under the *Pickering-Connick* standard.³³⁶ Thus, it may be very likely under these circumstances that the university will not be liable for disciplining or taking some adverse employment action against faculty who post controversial statements on their personal social media sites.³³⁷

³²⁸ 429 U.S. 274, 285 (1977).

³²⁹ *Id.*

³³⁰ *See id.*

³³¹ *See id.*

³³² *See Pickering v. Bd. of Educ. of Twp. High Sch. Dist.* 205, 391 U.S. 563 (1968).

³³³ *See id.*

³³⁴ *See Conner v. Reinhard*, 847 F.2d 384 (7th Cir. 1988).

³³⁵ *See id.*

³³⁶ *See id.*

³³⁷ *See id.*

It should be noted that regarding disciplinary actions, professors may be more likely to be disciplined for their speech than other public university employees.³³⁸ This was the contention made by Professors Vikram David Amar and Alan Brownstein in their article *A Close-up, Modern Look at First Amendment Academic Freedom Rights of Public College Students and Faculty*.³³⁹ They reasoned that the type of “government function disruption” that can warrant discipline—“disturbing harmony among coworkers, detrimental impact on close working relationships, interference with the speaker’s performance of duties—are the very kinds of problems that arise often in the higher education setting, where faculty must work closely with and be trusted by students and fellow academics.”³⁴⁰

If none of the four categories—insubordination, violation of confidentiality, impeding the performance of the professor’s job duties, or effecting the need to encourage a close and personal relationship involving loyalty and confidence—are involved, it may be likely that a reviewing court will conclude that the faculty’s interests outweigh the university’s interests.³⁴¹ Here the university may want to tread lightly in reaching a determination to discipline or take some adverse action against faculty who post controversial statements on their social media sites. If the court reaches a conclusion under the *Pickering-Connick* approach that the social media statements involve matters of public concern and the faculty’s interest outweigh the university’s interest, this will likely mean that the social media statements are First Amendment protected speech.³⁴²

If public universities want to discipline or take some adverse employment action against faculty who post First Amendment protected statements on their social media sites, they should contemplate whether this is the sole reason that the action is being taken.³⁴³ If the answer to this question is in the affirmative, they should refrain from taking these actions against the faculty member to limit liability for a First Amendment claim.

However, if the answer to the question of whether the particular university is disciplining faculty solely because of the protected social media statements is negative, they may need to look at whether the faculty involved is a tenured or tenure-track faculty member.³⁴⁴ If the faculty involved is a tenured or tenure-track faculty member, the university should only take adverse employment action against the faculty if there is a justifiable cause for doing so.³⁴⁵

With nontenure-track faculty, like adjunct professor Jeff Klinzman, the university should first determine if there are reasons for wanting to discipline or not rehire the faculty other than the First

³³⁸ Vikram David Amar & Alan Brownstein, *A Close-up, Modern Look at First Amendment Academic Freedom Rights of Public College Students and Faculty*, 101 MINN. L. REV. 1943, 1976, 1977 (2017).

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ See *id.*

³⁴² See *Pickering*, 391 U.S. at 563.

³⁴³ See *id.*

³⁴⁴ See *Mount Healthy City School. District Bd. of Educ. v. Doyle*, 429 U.S. 274, 285 (1977) (holding that an Ohio public school teacher’s dismissal by a school board—which cited conduct that was protected by the First and Fourteenth amendments—would not be unconstitutional if the board could demonstrate that it would have made the decision regardless of the protected conduct.).

³⁴⁵ See *Termination & Discipline*, AAUP, <https://www.aaup.org/issues/appointments-promotions-discipline/termination-discipline-2004> (last visited on Dec. 22, 2021).

Amendment protected social media posts. If there are other reasons, universities can feel relatively assured that they will not unnecessarily be subjected to liability for firing or refusing to rehire this type of faculty member.³⁴⁶ The distinction in treatment between tenured and tenure-track faculty and nontenure-track faculty is based on the protected property interest in their employment that tenured and tenure-track faculty have that nontenure-track faculty do not.³⁴⁷

It tends to be much easier for a university to discipline or refuse to rehire the nontenure-track faculty than a tenured or tenure-track faculty.³⁴⁸ This could mean that universities may be more likely to discipline or refuse to rehire nontenure-track faculty for posting First Amendment protected statements on their personal social media sites. Further, because nontenure-track faculty lack a property interest in their employment, the university would probably have less likelihood of this type of faculty member instituting a lawsuit. And, even if the nontenure-track faculty brought a lawsuit, the university would have more likelihood of success against the nontenure-track faculty than a tenured or tenure-track faculty member.³⁴⁹

VI. ACADEMIC FREEDOM CONCERNS WHEN UNIVERSITIES PUNISH FACULTY FOR OFF-CAMPUS SOCIAL MEDIA POSTS

Aside from First Amendment concerns, when public or private universities discipline faculty for personal off-campus social media posts, questions are raised regarding the faculty's academic freedom.³⁵⁰ Although "academic freedom and freedom of speech share similar values and premises," these concepts are not the same.³⁵¹ Academic freedom creates "a realm of free and open inquiry" for faculty and students and protects them from the university's interference.³⁵²

As Professor William W. Van Alstyne, explains in his article *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, the concept of academic freedom made its "first express Supreme Court appearance in a dissent by Justice William Douglas in the 1952 case of *Adler v. Board of Education*."³⁵³ Also, Van Alstyne discusses the fact that in *Adler*, Justice Douglas viewed academic freedom as a "distinct, identified

³⁴⁶ Bd. of Regents v. Roth, 408 U.S. 564 (1972) (holding that a nontenured state college teacher, hired for a fixed term of one year, has no constitutional right to a statement of reasons or to a hearing on a university's decision not to rehire him for another year, where no reasons have been given for the decision not to retain the teacher).

³⁴⁷ See *id.*

³⁴⁸ See *id.*

³⁴⁹ See *id.*

³⁵⁰ Both public and private universities usually guarantee its faculty academic freedom through contractually guaranteed obligations imposed through letters of appointment or faculty handbooks. See Donna R. Euben, *Academic Freedom of Professors and Institutions*, AAUP, May 2002, <https://www.aaup.org/issues/academic-freedom/professors-and-institutions> (last visited on Dec. 22, 2021).

³⁵¹ See Levy, *supra* note 34 at 81; see also Robert J. Tepper and Craig G. White, *Speak No Evil: Academic Freedom and the Application of Garcetti v. Ceballos to Public University Faculty*, 59 CATH. U.L. REV. 125, 126-27 (2010) ("However the First Amendment contains no express recognition of academic freedom; rather, such freedom is the product of constitutional interpretation and is a 'special concern' of the First Amendment.").

³⁵² Levy, *supra* note 34 at 81.

³⁵³ Van Alstyne, *supra* note 168 at 105 (citing *Adler v. Bd. of Educ. of the City of New York*, 342 US 485, 508 (1952) (Douglas, dissenting)).

subset of constitutional first amendment concern.”³⁵⁴ Fourteen years after the *Adler* case, in 1967, the Court specifically endorsed academic freedom in the case of *Keyishian v. Board of Regents* with the following statement:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.³⁵⁵

As far back as 1940, the American Association of University Professors (AAUP)³⁵⁶ issued a Statement of Principles of Academic Freedom and Tenure indicating that faculty have academic freedom in: (1) research and publication; (2) discussion of their subject matter; and (3) speaking or writing as citizens.³⁵⁷ In this same statement, the AAUP declared that “[t]eachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matters which have no relation to the subject.”³⁵⁸ But later, in 1970, the AAUP added a footnote explaining and clarifying that its position was not attempting to “discourage what is controversial.”³⁵⁹ In fact, the association described controversy as “the heart of the free academic inquiry.”

Professor Frederick Schauer, a prominent First Amendment scholar and legal philosopher, said the following regarding academic freedom: “It is hardly surprising that most American academics believe that academic freedom is important, that there is a right to it, and that the right to academic freedom has constitutional status.”³⁶⁰ Another professor, Professor J. Peter Byrne distinguishes between the terms “academic freedom” and “constitutional academic freedom in his article *Academic Freedom: A “Special Concern of the First Amendment.”*”³⁶¹ Byrne uses the term “academic freedom” as a non-legal term referring to the liberties claimed by professors through professional channels against administrative or political interference with research, teaching, and

³⁵⁴ *Id.* at 107 (“Douglas also employed academic freedom as a distinct, identified subset of constitutional first amendment concern.”).

³⁵⁵ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

³⁵⁶ “The AAUP is a nonprofit membership association of faculty and other academic professionals. It has helped to shape American higher education by developing the standards and procedures that maintain quality in education and academic freedom in this country’s colleges and universities.” *About the AAUP*, AAUP, <https://www.aaup.org/report/statement-professional-ethics> (last visited on Dec. 22, 2021).

³⁵⁷ See 1940 *Statement of Principles of Academic Freedom and Tenure*, AAUP (1970), <https://www.aaup.org/sites/default/files/1940%20Statement.pdf> (last visited on Dec. 22, 2021); see also Jason Shepherd & Katherine Culver, Article: *Culture Wars on Campus: Academic Freedom, the First Amendment, and Partisan Outrage in Polarized Times*, 55 San Diego L. Rev. 87, 121 (2018).

³⁵⁸ See AAUP, *supra* note at 357.

³⁵⁹ *See id.*

³⁶⁰ Frederick Schauer, *The Thirteenth Ira C. Rothgerber, Jr., Conference on Constitutional Law: “Horowitz, Churchill, Columbia—What Next for Academic Freedom”: Is there a Right to Academic Freedom*, 77 U. COLO. L. REV. 907, 907 (2006).

³⁶¹ See J. Peter Byrne, Article: *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 289-293 (1989) (discussing the origins of academic freedom and the fact that *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) is the first court decision to suggest that academic freedom is protected by the First Amendment.).

governance.³⁶² He uses the term “constitutional academic freedom” as the insulation of scholarship and liberal education from extramural political interference.³⁶³ Professor Byrne argues that the term “constitutional academic freedom” should not include a professor’s right to participate in off-campus political activity on his or her own time without institutional reprisal.³⁶⁴ He reaches this conclusion by relying on a position that that “academic freedom should be understood to include only rights unique or necessary to the functions of higher education.”³⁶⁵

A. THE MCADAMS V. MARQUETTE CASE

Only one court case has addressed this specific issue of whether a university violates a faculty’s academic freedom by disciplining faculty for personal off-campus social media activity.³⁶⁶ This case is the case of *McAdams v. Marquette*.³⁶⁷ In *McAdams*, Dr. John McAdams, a tenured faculty, was suspended by Marquette University because of a blog post.³⁶⁸ McAdams brought a breach of contract claim against the university arguing that the contract between the parties guaranteed the right to be free of disciplinary repercussions for engaging in activity protected by the doctrine of academic freedom.³⁶⁹

Conversely, the university argued that the court should not question its decision to suspend McAdams as long as it did not abuse its discretion, infringe upon any constitutional rights, act in bad faith, or engage in fraud.³⁷⁰ The Milwaukee County Circuit Court concluded that it must defer to the university’s resolution of McAdams’ claims.³⁷¹ The Wisconsin Supreme Court reversed, determined that the university’s internal dispute resolution process is not a substitute for McAdams’ right to sue in Wisconsin courts, and held that the university breached its contract with McAdams when it suspended him for engaging in activity protected by the contract’s guarantee of academic freedom.³⁷²

In his blog, McAdams criticized Cheryl Abbate, a faculty member and graduate student, for the way she dismissed another student’s inquiry about whether the ethics course she was teaching would cover same-sex marriage.³⁷³ Apparently, Abbate had informed the student that there would be no discussion on the topic because “everybody agrees on this, and there is no need to discuss it.”³⁷⁴ She added, “some opinions are not appropriate, such as racist opinions, sexist opinions, [and that] you don’t have a right in this class to make homophobic comments.”³⁷⁵ Further, she informed the student that he had the option of dropping the class if he was not happy.³⁷⁶

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ Byrne, *supra* note 361 at, 263.

³⁶⁵ *Id.* at 264.

³⁶⁶ See, e.g., *McAdams v. Marquette*, 914 N.W.2d 708, 712 (Wis. 2018).

³⁶⁷ *Id.* at 712.

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.* at 717.

³⁷² *Id.* at 739-40.

³⁷³ *Id.* at 713.

³⁷⁴ *Id.* at 713.

³⁷⁵ *Id.*

³⁷⁶ *Id.* at 713.

Thereafter, the student told McAdams about the conversation, and he also shared with McAdams a recording that he had made of the exchange with Abbate.³⁷⁷ After the student shared this information with him, McAdams took to his blog and posted the comments that Abbate made to the student.³⁷⁸ He also posted his opinion that Abbate had “employed a tactic typical among liberals now, namely that ‘[o]pinions with which they disagree are not merely wrong, are not to be argued against on their merits, but are deemed ‘offensive’ and need to be shut up.’”³⁷⁹ In addition to posting Abbate’s comments, McAdams also posted a link to Abbate’s contact information, and to her “publicly-available website.”³⁸⁰

In response, Abbate filed a formal complaint against McAdams.³⁸¹ As media exposure of McAdams’ blog post grew, Abbate began receiving offensive and threatening communications from third parties.³⁸² Pursuant to her complaint, the university convened a Faculty Hearing Committee (“FHC”) to investigate the matter and recommend action against McAdams.³⁸³ After their proceeding, the FHC recommended that the university suspend McAdams.³⁸⁴ The president of the university then suspended McAdams without pay and said that his reinstatement would be contingent upon his signing a letter that—among other things—acknowledged his blog post “was reckless and incompatible with the mission and values of Marquette University.”³⁸⁵ McAdams refused to sign the letter and thus remained suspended.³⁸⁶ He filed suit, seeking reinstatement and back pay.³⁸⁷

On appeal from summary judgment in favor of the university, the Wisconsin Supreme Court concluded that McAdams’ blog post constituted an extramural comment (or comments made in a personal capacity as a member of the community) protected by the doctrine of academic freedom.³⁸⁸ The university faculty handbook extended the protection of academic freedom to the professor’s blog post via Section C, which provided:

- c. The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he/she speaks or writes as a citizen, he/she should be free from institutional

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² *Id.* at 714.

³⁸³ *Id.*

³⁸⁴ *Id.* at 715.

³⁸⁵ *Id.* at 715–16.

³⁸⁶ *Id.* at 716.

³⁸⁷ *Id.*

³⁸⁸ *Id.* at 735 (“The definition of ‘extramural comment’ recognizes that a professor occupies a ‘special position in the community,’ one that comes with ‘special obligations.’ In the original definition in the 1940 Statement, and in the definition above, these special obligations included the duty to ‘exercise appropriate restraint,’ to ‘show respect for the opinions of others,’ and to ‘make every effort to indicate that they are not speaking for the institution.’”); see also Pepper Hamilton, *Wisconsin Supreme Court Provides Guidance to Private Universities on Faculty Discipline and Academic Freedom* JDSUPRA, Jul. 11,2018 (“The Supreme Court then recognized that academic freedom encompasses three concepts: research, teaching and extramural comments (or comments a faculty member makes in his or her personal capacity or as a member of the community.”)).

censorship or discipline, but his/her special position in the civil community imposes special obligations. As a man/woman of learning and an educational officer, he/she should remember that the public may judge his/her profession and institution by his/her utterances. Hence, he/she should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he/she is not an institutional spokesperson.³⁸⁹

The faculty handbook followed the AAUP's 1940 Statement of Principles on Academic Freedom and Tenure, which delineates three categories of conduct entitled to academic freedom: teaching; research; and extramural comments.³⁹⁰ Both parties agreed that McAdams' blog post constituted an extramural comment.³⁹¹ In analyzing the limits of the protection for extramural comments, the court referred to the AAUP's interpretive rulings, which provides a two-step process for determining whether academic freedom has been lost: (1) whether the comment itself demonstrates that the faculty is unfit to serve; and, (2) if the comment demonstrates unfitness to serve, then the university may proceed to a review of the faculty's entire record as a teacher and scholar.³⁹²

Applying this test, the court held that McAdam's comment did not establish that he was unfit to serve the university.³⁹³ McAdams had merely posted comments shared with him by a student.³⁹⁴ McAdams had played no role in obtaining the recording of Abbate's comments.³⁹⁵ McAdams simply listed Abbate's name and contact information on his post, which was also publicly available on her site.³⁹⁶ And, nothing contained in McAdams' comments attacked Abbate personally or invited others to attack her.³⁹⁷

Having failed to establish that his extramural comments rendered McAdams unfit to serve the university, the court ruled that the second prong of the analysis, examining the professor's entire record, should not be considered.³⁹⁸ Both parties had agreed that McAdam's comments constituted an extramural comment as described in Section C of the university handbook.³⁹⁹ The provisions of the faculty handbook and the protections contained therein were incorporated into the professor's contract by reference.⁴⁰⁰ Therefore, the doctrine of academic freedom protected the blog post, and the University breached the contract when it suspended McAdams.⁴⁰¹ The court directed the university to reinstate McAdams to the faculty of Marquette University with

³⁸⁹ *Id.* (citing Faculty Handbook, III.C. (Rights and Responsibilities, Academic Freedom) (emphasis added)).

³⁹⁰ McAdams, 914 N.W.2d at 735.

³⁹¹ *Id.*

³⁹² *Id.* at 732-733.

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

unimpaired rank, tenure, compensation, and benefits.⁴⁰²

B. PRACTICAL APPLICATION OF THE MCADAMS CASE

Generally, the idea of academic freedom for extramural comments is the faculty's right to express their opinion no matter how controversial.⁴⁰³ It is important to note that in order for faculty's comments to be protected under their contractually protected right to academic freedom these comments do not have to be within the faculty's expertise or particular discipline.⁴⁰⁴ In fact, there appears to be support for the position that if faculty make controversial or false statements concerning their particular discipline there may be less protection than if faculty make controversial statements concerning matters outside their particular discipline.⁴⁰⁵ An example of this given in an article titled *Unacademic Freedom* is as follows:

If, for example, a physics professor declared on Twitter that the Sept. 11 attacks were a hoax, AAUP would advocate for the professor's right to free speech in extramural utterances (it doesn't distinguish between free speech in person or online). But if the physics professor declared that the world is flat, denying all scientific evidence to the contrary, that could call into question his or her professional fitness.⁴⁰⁶

In other words, if university faculty makes a controversial or false statement about his or her particular expertise, this statement may not be protected under academic freedom since the statement is within the faculty's particular expertise.⁴⁰⁷

The view that a faculty's protection under academic freedom is based on whether the controversial or false statements relate to the faculty's particular discipline is not the only view that is used in determining whether a faculty's posts will be protected under their right to academic freedom.⁴⁰⁸ Another view regarding whether faculty is protected for controversial or false statements under academic freedom depends on whether the statements are actually made on the professor's own time and not connected to their work.⁴⁰⁹ Under this view, if faculty posts opinions about matters related to or unrelated to their teaching during their personal time, these statements should be protected by their academic freedom rights.⁴¹⁰ However, when faculty are teaching

⁴⁰² *Id.*

⁴⁰³ Valerie Strauss, *Does 'Academic Freedom' Protect Professors who Promote Outrageous Falsehoods*, WASHINGTON POST, Mar. 7, 2016, <https://www.washingtonpost.com/news/answer-sheet/wp/2016/03/07/does-academic-freedom-protect-professors-who-promote-outrageous-falsehoods/> (last visited on Dec. 22, 2021).

⁴⁰⁴ See Colleen Flaherty, *Unacademic Freedom?*, INSIDE HIGHER EDUC., Mar. 2016, <https://www.insidehighered.com/news/2016/03/01/does-academic-freedom-protect-falsehoods> (last visited on Dec. 22, 2021); see also Aaron Barlow, *Faculty Rights and Responsibilities: Academic Freedom in a Changing Cultural Climate*, ONE FLEW EAST, Feb. 2017; Keith E. Whittington, *Academic Freedom and the Scope of Protections for Extramural Speech*, AAUP (2019), <https://www.aaup.org/article/academic-freedom-and-scope-protections-extramural-speech#.XmkKyahKiUk> (last visited on Dec. 22, 2021).

⁴⁰⁵ See Flaherty, *supra* note 404.

⁴⁰⁶ *See id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ Strauss, *supra* note 403.

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

students they have “a responsibility to teach content grounded in scholarship, evidence and research.”⁴¹¹

No matter which view is used in determining whether faculty’s personal social media posts are protected, it can be surmised that both public and private universities must be cognizant of the fact that their faculty’s social media posts related to extramural statements may very well be protected under their contractually guaranteed right to academic freedom. As a matter of fact, it should be noted that the *McAdams* case involved Marquette university, a private university.⁴¹² This is significant because this case illustrates the fact that public universities are not the only universities faced with the dilemma of determining the appropriate action that should be taken when their faculty posts controversial comments on their personal social media sites.⁴¹³ Although private universities will not be subject to First Amendment claims when they inappropriately punish or take adverse actions against faculty for off-campus social media posts, they may very well be subject to claims that they violated their faculty’s rights to academic freedom.⁴¹⁴ Therefore, private universities must also prudently approach each case involving the question of whether they should discipline or take adverse action against their faculty for personal off-campus social media posts.

VII. CONCLUSION

Because of the increasing number of cases where faculty have been disciplined for statements that they have made on their personal social media sites, numerous universities and colleges throughout the country have implemented social media policies providing guidance to their faculty regarding appropriate social media behavior.⁴¹⁵ Depending on the social media policies implemented and the particular course of action, questions may arise as to whether the universities have violated the faculty’s First Amendment rights or their rights to academic freedom. Although these questions are emerging areas of law, universities and colleges must carefully draft their social media policies. And, in implementing these policies, they must meticulously weigh decisions of whether to punish faculty for their personal off-campus social media posts to avoid violating their First Amendment or academic freedom rights.

⁴¹¹ *Id.*

⁴¹² *See id.*

⁴¹³ *See id.*

⁴¹⁴ *McAdams v. Marquette*, 914 N.W.2d 708, 712 (Wis. 2018).

⁴¹⁵ *See supra* notes 78-116.

DEVELOPING THE POLITICAL ASTUTENESS OF IN-HOUSE COUNSEL

Evan A. Peterson

Organizational politics is an inevitable facet of organizational life. Both general counsel and in-house counsel¹ face increasing expectations to apply a diverse array of modern business tools and techniques in managing their departments,² including strategic planning,³ crisis management,⁴ information technology,⁵ and budgeting/cost control measures.⁶ These expectations, alongside the demands placed on counsel to meet growing challenges with a “more-for-less” philosophy,⁷ fuel the scarcity and power relations that drive organizational politics between departments within the organization.⁸ Changes to legal department practices, in step with these evolving expectations, have prompted a greater need for legal departments to embrace proactive law perspectives. Proactive law centers on using law as an empowering mechanism for sponsoring legal awareness within the organization, generating legal solutions best aligned to organizational needs, and implementing suitable legal tools in response to business risks.⁹

Any endeavor to promote proactive law perspectives within the legal department may represent a substantial change from past and present departmental practices. Most efforts to create change fail and can do so based on any number of factors, including lack of time, poor coordination, anxiety and stress, insufficient training or support, and a number of other internal and external

¹ In this paper, the term “general counsel” is used to refer to the attorney in charge of an in-house legal department and “in-house counsel” to refer to attorneys working in an in-house legal department who are not the general counsel.

² Lucy Fato & Mitchell J. Auslander, *The Relationship Between the Legal Department and the Corporation*, in *SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL* § 17:1 (Robert Haig ed., 2022).

³ Michael J. Sharp & Nader H. Salehi, *The Planning Process, Strategic Planning and Risk Analysis after Outside Counsel is Selected*, in *SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL* § 10:18 (Robert Haig ed., 2022).

⁴ Robert Waterman & Bruce E. Yannett, *Crisis Management, Objectives, Concerns, Preliminary Considerations*, in *SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL* § 85:2 (Robert Haig ed., 2022).

⁵ Scott M. Wornow & Richard F. Langan, Jr, *Technology, Preliminary Considerations*, in *SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL* § 28:2 (Robert Haig ed., 2022).

⁶ Oscar Romero et al., *Budgeting and Controlling Costs, Preliminary Considerations*, in *SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL* § 28:2 (Robert Haig ed., 2022).

⁷ Markus Hartung & Arne Gärtner, *The Future of In-House Legal Departments and Their Impact on the Legal Market: Four Theses for General Counsels, and One for Law Firms*, in *LIQUID LEGAL* 275-286 (Kai Jacob, Dierk Schindler, & Roger Strathausen ed., 2017).

⁸ LEE G. BOLMAN & TERENCE DEAL, *REFRAMING ORGANIZATIONS: ARTISTRY, CHOICE, AND LEADERSHIP* 178 (2017).

⁹ Gerlinde Berger-Walliser, *The Past and Future of Proactive Law: An Overview of the Development of the Proactive Law Movement*, https://www.researchgate.net/profile/Gerlinde_Berger-Walliser/publication/273440662_The_Past_and_Future_of_Proactive_Law_An_Overview_of_the_Proactive_Law_Movement/ (last visited Jan. 12, 2022); *Welcome to the Website of the Nordic School of Proactive Law*, NORDIC SCHOOL OF PROACTIVE LAW, <http://www.juridicum.su.se/proactivelaw/main/> (last visited Jan 12, 2022).

factors.¹⁰ Prior research has revealed concerns among general counsel regarding the feasibility of legal departments engaging in a range of practices connected to the proactive law perspective, including performance metrics, departmental revenue generation, and business process engagement by in-house counsel.¹¹ It is therefore critical, when contemplating legal department changes involving proactive law, to consider and address unreceptivity from within the department itself.

Organizational politics fall at the center of efforts to address unreceptivity to proactive law perspectives by the legal department's general counsel. This positioning reflects the practical reality that it is impossible to eliminate political behavior within the organization, but individuals can learn to understand, manage, and harness political dynamics in the workplace.¹² A major challenge, however, rests on the fact that in-house counsel may be severely lacking in the necessary preparation, ability, and comfort to effectively engage in, or even recognize the applicability of, influence tactics in the context of legal department dynamics.¹³ The situation is further complicated in that there are increased challenges in attempting to persuade superiors to alter their positions on major policy decisions as compared to attempts by superiors to influence subordinates. The purpose of this paper is to provide in-house counsel with influence tactics and techniques needed to support efforts of promoting proactive law perspectives within legal departments in the face of unreceptivity by general counsel.

This article contains three main sections. Section I explores the foundational purposes of the in-house legal department, change roles and responsibilities of in-house counsel, core elements of proactive law, and challenges to departmental changes based on differences in in-house counsel. Section II provides an overview of foundational management concepts related to organizational change and organizational politics, specifically the relationship between power, decision-making, and influence tactics in the context of in-house legal departments. Section III concludes with a summary of the implications presented by this article along with opportunities for future research.

I. LEGAL DEPARTMENTS

The foundational purposes of the legal department encompass the avoidance of value destruction and the promotion of value creation. Legal departments realize these foundational purposes through sponsoring legal awareness within the organization, generating legal solutions best aligned to organizational needs, and implementing suitable legal tools in response to business risks.¹⁴ Behind the scenes, legal departments are increasingly being run with business discipline as they embrace pertinent best practices from other business functions.¹⁵ In-house counsel now

¹⁰ Lisa C. Barton & Veronique Ambrosini, *The Moderating Effect of Organizational Change Cynicism on Middle Manager Strategy Commitment*, 24 INT'L J. HUM. RESOURCE MGMT. 721, 721 (2013).

¹¹ Evan A. Peterson, Building Consensus Among General Counsel to Address Managerial Legal Strategy Perspectives (Nov. 2017) (unpublished Ph.D. dissertation, Walden University) (on file with ProQuest Dissertations Publishing).

¹² Bolman & Deal, *supra* note 8, at 183-184.

¹³ Janet Weinstein, Linda Morton, Howard Taras & Vivian Reznik, *Teaching Teamwork to Law Students*, 63 J. L. EDUC. 36 (2013); Jillian Trezza, *Army Lessons for Lawyer-Leaders*, 32 REV. LITIG. 240 (2013).

¹⁴ Pauleau et al., *Key Performance Indicators (KPIs): Run Legal with Business Metrics: Will the Legal of the Future Measure Everything It Does?* in *Liquid Legal* 111-128 (Kai Jacob, Dierk Schindler, & Roger Strathausen 1 ed. 2017).

¹⁵ Liam Brown et al., *Running the Legal Department with Business Discipline: Applying Business Best Practices to the Corporate Legal Function*, in *Liquid Legal* 397-421 (Kai Jacob, Dierk Schindler, & Roger Strathausen 1 ed. 2017).

play greater roles in sustaining organizational strategic value and shoulder increased roles and responsibilities in step with the growing recognition of law as a source of organizational value creation.¹⁶ In-house counsel are serving as strategic planners and crisis managers in greater numbers,¹⁷ requiring new levels of understanding toward organizational strategic objectives and the solutions best aligned with achieving those objectives.¹⁸

Growing transformations to the responsibilities of in-house counsel prompt a greater need for legal departments to consider proactive law perspectives. Proactive law, compared to the traditional, reactive perspective that relegates law to the status of growth encumbrance, centers on using law as an empowering mechanism to cultivate value and manage risk.¹⁹ The aim of the proactive law perspective is to foster the future-oriented integration of proactive law principles into guiding policies and action plans in support of the company's competitive strategy.²⁰ Proactive law encompasses the development and cultivation of practices, skills, and knowledge needed to identify: (a) legal problems in time to take future-oriented preventive action; and (b) business opportunities in time to exploit conceivable benefits.²¹ Proactive law includes the following core elements:²²

- supporting compliance with applicable legal rules and regulations;
- minimizing the risks, problems, and losses associated with non-compliance;
- eliminating the chief causes of compliance failures;
- lawyers serving as strategic advisors;
- assisting in the attainment of mutual goals and objectives;
- maximizing the positive benefits and outcomes of upcoming business opportunities;
- driving impending business success factors; and
- promoting the involvement of lawyers in cross-professional collaborative teams.

Proactive law envisions a new relationship between the legal department and the organization. This relationship may represent a significant departure from current or past practices of many legal departments. In contemplating any changes involving proactive law, it is critically important to consider the possible reactions from within the legal department.

Prior research on behavioral differences among corporate counsel and in-house counsel provides some explanation as to the variation in receptivity to proactive law perspectives among in-house counsel. Robert L. Nelson and Laura B. Nielsen identified and classified different types of in-house counsel within major business corporations. They defined three ideal types of in-house

¹⁶ David Orozco, *Strategic Legal Bullying*, 13 N.Y.U. J. L. & Bus. 137 (2016).

¹⁷ Constance E. Bagley & Mark Roellig, *The Transformation of General Counsel: Setting the Strategic Legal Agenda*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2201246.

¹⁸ Bjarne P. Tellmann & Susan R. Sneider, *The Relationship Between the Legal Department and the Corporation, The Evolving Role of the General Counsel*, *SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL* § 16:2 (Robert Haig ed., 2022).

¹⁹ Berger-Walliser, *supra* note 9.

²⁰ George J. Siedel & Helena Haapio, *Using Proactive Law for Competitive Advantage*, AM. BUS. L. J. 641 (2010).

²¹ Berger-Walliser, *supra* note 9.

²² Gerlinde Berger-Walliser & Paul Shrivastava, *Beyond Compliance: Sustainable Development, Business, and Proactive Law*, 46 GEO. J. INT'L. L. 418, 434 (2015).

counsel based on: (a) the degree to which roles and responsibilities are restricted to gatekeeping functions; (b) the scope of offered advice; and (c) the nature of claimed knowledge.²³ Claimed knowledge was defined as the degree to which in-house counsel claim authority based exclusively on legal knowledge contrasted with authority claimed through a combination of legal knowledge, experience, sound judgment, and company knowledge.²⁴ These differences led to the identification of three different types of in-house counsel – cop, counsel, and entrepreneur.

- *Cop* is concerned primarily with policing business clients' conduct – disinclined to provide advice of a non-legal nature even in situations where opportunities arise.
- *Counsel* plays key role in placing lawyers within business activities – most often confines provided advice based on legal knowledge and maintains broader relationship with business actors that affords opportunities to provide advice of a non-legal nature (based on business, ethical, and situational concerns).
- *Entrepreneur* places strong emphasis on business values – views law as more than an accompaniment to corporate functions, views law as a source of profits, perceives role as going far beyond providing legal advice.

The respective classifications provided by Nelson and Nielsen should not be viewed as static, mutually exclusive categories. Different general and in-house counsel may occupy different roles, or multiple roles, in different circumstances.²⁵ What the classifications do reveal, however, are variations in perspectives and approaches that may obstruct efforts to build the necessary momentum and consensus for the greater consideration of proactive law perspectives within the legal department.

My prior research involving general counsel provides some context for the issues and perspectives change agents contemplating proactive change would face within the legal department. The study focused on building consensus among a panel of in-house general counsel regarding techniques for altering unreceptive managerial viewpoints toward the strategic value of law within the corporate setting.²⁶ A key dimension of the academic literature in support of the study's focus centered on the use of the proactive law perspectives as a driving force for deriving competitive advantage from legal strategy.²⁷ The study results indicated the panelists had significant concerns regarding the feasibility of legal departments:

- adding strategic value by finding innovative ways to generate revenue;
- adding strategic value by adopting and meeting appropriate performance metrics;
- integrating legal considerations with company business processes by employing in-house counsel who possess business skills and business knowledge;
- improving collaboration between in-house counsel and managers by helping managers to view lawyers as valued partners rather than deal killers; and

²³ Robert L. Nelson & Laura B. Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 L. & SOC. REV. 457, 468 (2000).

²⁴ *Id.*

²⁵ *Id.*

²⁶ Peterson, *supra* note 11 at 8.

²⁷ *Id.*

- integrating legal considerations with company business processes by fostering the joint use of information technology and other support tools by managers and in-house counsel.

Comments provided by panelists in connection with the study offer a wealth of data on the differences in views among in-house counsel across a variety of topics connected to the proactive law perspective, including performance metrics, revenue generation by the legal department, business process engagement, and the business skills/knowledge of in-house counsel. With respect to legal department performance metrics, for example, one panelist expressed skepticism regarding the ability to put performance metrics on the role of counsel. Another panelist indicated that asking legal department members to hit performance metrics seemed counter-intuitive and confused the basic role(s) of the legal department. Regarding the generation of revenue by the legal department, one panelist expressed concern that adding responsibility for revenue generation could very easily lead to conflicts and cloud professional judgment. Another panelist indicated that legal departments are cost centers and that buying into the myth of revenue generation marginalizes the risk control and cost avoidance prophylaxis of a strong legal department. Yet another panelist expressed doubts about the possibility of any scenario where the legal department could or would want to generate revenue. The panelists, in commenting on engagement in business processes by in-house counsel, cited receptivity by the business team to legal involvement and the need for proactive advice as areas of concern. Speaking to the employment of in-house counsel with business skills and business knowledge, one panelist remarked that many lawyers lack business aptitude given the disconnect between the legal and business worlds.

The comments and other collective data supplied by the panelists, though not representative of all general counsel, showcase potential variations in the receptivity to proactive law perspectives among members of the legal department. If proactive law perspectives are to take hold within a potentially unreceptive legal department, a means for generating consensus and uniting the department around the pursuit of proactive law is needed.

II. FOUNDATIONAL MANAGEMENT CONCEPTS

A. ORGANIZATIONAL CHANGE

Any endeavor to promote proactive law perspectives within the legal department may represent a substantial change from past and present departmental practices. Most efforts to create change fail for a number of reasons, including lack of time, poor coordination, anxiety and stress, insufficient training or support, and other internal and external factors.²⁸ Resistance, in the form of organizational conflict, is also a significant factor in failed change.²⁹ Organizational change, or the strategy to modify values, beliefs, attitudes, or structures within an organization in response to shifting conditions,³⁰ is indispensable to addressing the inevitable resistance to change initiatives.³¹

²⁸ Barton & Ambrosini, *supra* note 10.

²⁹ Afzalur M. Rahim, *Toward a Theory of Managing Organizational Conflict*, 13(3) INT'L J. CONFLICT MGMT. 206, 206 (2002). Organizational conflict ensues in instances where the following driving forces are present: (a) unshared attitudes, values, skills, behaviors, or goals that direct another person's behavior; (b) obligations to perform an action that is unrelated to a person's needs; or (c) different behavioral preference in regard to a collective action.

³⁰ WARREN G. BENNIS, *ORGANIZATIONAL DEVELOPMENT: ITS NATURE, ORIGINS, AND PROSPECTS* (1969).

³¹ TOM E. BURNS & G.M. STALKER, *THE MANAGEMENT OF INNOVATION* (1961).

John P. Kotter's eight stages of change model is one of the foremost and well-regarded models for addressing the challenges connected to organizational change.³² The central elements of Kotter's change model are as follows.

Stage 1: Establish a sense of urgency – (a) examining market/competitive realities, (b) identifying crises (actual or potential) or major opportunities, and (c) communicating such crises/opportunities broadly and dramatically to motivate aggressive cooperation.

Stage 2: Create guiding coalitions – (a) pulling together group with sufficient power to steer change and (b) making group work together as team.

Stage 3: Develop vision and strategy – (a) creating vision to direct change efforts and (b) cultivating strategies to achieve vision.

Stage 4: Communicate change vision – (a) using all possible tools to communicate new vision and strategies persistently and (b) ensuring guiding coalition models expected behaviors.

Stage 5: Empower broad-based action – (a) removing obstacles, (b) altering systems/structures that inhibit change vision, and (c) encouraging risk taking and nontraditional ideas.

Stage 6: Generate short-term wins – (a) planning for wins (i.e., visible improvements in performance), (b) producing wins, and (c) visibly recognizing or rewarding those who make wins possible.

Stage 7: Consolidate gains and producing more change – (a) changing systems, structures, and policies that do not fit transformation vision, (b) attracting, retaining, and promoting those who can implement change vision, and (c) reinvigorating process with new projects, themes, and change agents.

Stage 8: Anchor new approaches in culture – (a) creating better performance through behaviors focused on customers and productivity, improved leadership, and more effective management, (b) expressing connections between new behaviors and organizational success, and (c) developing tools to ensure leadership development and succession.

A central challenge in implementing Kotter's eight stages of change model lies in finding a suitable mechanism for considering the diverse viewpoints that accompany the change process. As noted by Lee G. Bolman and Terrence Deal, there are structural, human resource, political, and symbolic dimensions (frames) to any proposed change.

- *Structural* encompasses role played by social architecture in organizational functioning.³³
- *Human Resource* examines what happens when people and organizations interconnect.³⁴
- *Political* showcases competition of individuals/groups in pursuit of respective interests in face of power struggles, limited resources, and conflicting viewpoints.³⁵
- *Symbolic* outlines organizational culture as expressed in core symbolic elements and displays its essential role in shaping performance.³⁶

Bolman and Deal further note that although the stages of Kotter's model implicate the four frames to varying degrees, all four frames are critical to the overall success of any change

³² John P. Kotter, *Leading Change: Why Transformation Efforts Fail*, 73 HARV. BUS. REV. 59, 61 (1995).

³³ Bolman & Deal, *supra* note 8 at 48.

³⁴ *Id.* at 118.

³⁵ *Id.* at 184.

³⁶ *Id.* at 241.

initiative.³⁷ The next section will introduce the concept of organizational politics in greater detail through the lens of Bolman and Deal's political frame, outline the sources of political power, and lay the groundwork for connecting influence tactics to the promotion of proactive law perspectives within legal departments.

B. ORGANIZATIONAL POLITICS

Organizational politics is an unavoidable component of legal department affairs. Assumptions underlining the tenets of the political frame include:³⁸

- an organization is a coalition of diverse interest groups and individuals;
- coalition members perceive reality in different ways and possess diverse values, beliefs, and interests;
- important decisions often include decisions involving the allocation of scarce resources;
- conflict is the epicenter of day-to-day dynamics due to challenges posed by scarce resources and enduring differences; and
- goals and decisions arise from bargaining/negotiation between competing stakeholders competing for their interests.

Divergent interests, scarcity, and power relations, not myopia and selfishness, are the driving forces of organizational politics.³⁹ As these driving forces will always be present in organizations, organizational politics can never be fully eliminated.⁴⁰ All organizational players, including in-house counsel, must learn to recognize, comprehend, and manage the unavoidable dynamics posed by organizational politics.⁴¹

C. POWER AND DECISION-MAKING

Power and organizational politics go hand in hand. The central emphasis of power and organizational politics focuses on the techniques competing groups use to articulate their preferences and mobilize power to get what they want.⁴² Bernard M. Bass defined power as an agent's inferred potential to cause another person (the target) to perform according to the agent's desires.⁴³ Viewing organizational politics through Bolman and Deal's political frame serves as an important reminder that position power, the authority derived from one's job title, represents only one form of power.⁴⁴ John R. P. French and Bertram Raven identified the following sources of power:

³⁷ *Id.* at 381.

³⁸ *Id.* at 184.

³⁹ *Id.* at 183.

⁴⁰ *Id.* at 183-184.

⁴¹ *Id.*

⁴² *Id.* at 190.

⁴³ BERNARD M. BASS, BASS AND STOGDILL'S HANDBOOK OF LEADERSHIP: THEORY, RESEARCH, AND MANAGERIAL APPLICATIONS, (1990).

⁴⁴ Bolman & Deal, *supra* note 8 at 190.

- *legitimate power* based on prerogatives, obligations, and responsibilities connected to formal positions in organizations;⁴⁵
- *referent power* based on target's identification with agent.⁴⁶
- *expert power* based on expertise, ability, and/or knowledge of agent;⁴⁷
- *reward power* based on agent's capacity to reward target;⁴⁸ and
- *coercive power* based on agent's ability to punish target or prevent target from obtaining desired rewards.⁴⁹

As noted by Gary Yukl, legitimate power, coercive power, and reward power derive from opportunities inherent in one's formal position in the organization, while referent power and expert power derive from one's personal and interpersonal attributes.⁵⁰

The skilled use of influence tactics embodies the essence of power. The remaining sections of this paper will focus on the application of power via influence tactics to the promotion of proactive law perspectives within legal departments.

D. INFLUENCE TACTICS AND POLITICS

Influence tactics involve efforts to alter other's perspectives and actions. Summarizing the seminal research by Bernard Bass, John Kotter, and others on the roles of influence processes in organizations, Cecilia Falbe and Gary Yukl noted that influence processes help foster understandings of: (a) why organizations adopt some innovations but not others; (b) the likelihood of implementing strategies and policies successfully; and (c) decision-making in organizations. There are two types of influence strategy, upward influence (subordinates toward superiors) and downward influence (superiors toward subordinates).⁵¹ Organizational goal attainment is characterized by a shared relationship between subordinates and superiors, each person maintaining the capacity to influence the other in support of proper functionality.⁵²

Scholars have categorized influence tactics in several ways. The works of: (a) David Kipnis, Stuart Schmidt, and Ian Wilkinson; (b) David Kipnis and Stuart Schmidt; and (c) Cecilia Falbe and Gary Yukl represent three seminal works on the topic. The categorization of influence tactics in organizational settings proposed by Kipnis, Schmidt, and Wilkinson encompasses eight tactics.⁵³

⁴⁵ John R. P. French & Bertram Raven, *The Bases of Social Power*, in STUDIES IN SOCIAL POWER (D. Cartwright ed., 1959).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ GARY YUKL, LEADERSHIP IN ORGANIZATIONS (1989).

⁵¹ Chad A. Higgins et al., *Influence Tactics and Work Outcomes: A Meta-analysis*, 24 J. ORG. BEHAV., 89, 103 (2003).

⁵² *Id.*

⁵³ David Kipnis, et al., *Intra-organizational Influence Tactics: Explorations in Getting One's Way*, 65 J. APPLIED PSYCH., 440–452 (1980).

- *Assertiveness* – getting what one wants through forceful manner.
- *Ingratiation* – increasing target person's positive views of influencer to get what one wants.
- *Rationality* – justifying requests with logical arguments based on data and information.
- *Sanctions* – gaining compliance through punishment (or threat of punishment).
- *Exchange* – offering to do something for target person in exchange for target's support.
- *Upward appeals* – enlisting assistance of superiors (chain of command) to get one's way.
- *Blocking* – impeding progress of the target person to stop them from undertaking an action.
- *Coalitions* – enlisting support of others to assist in persuading target person.

Kipnis and Schmidt distinguished three main categories of influence behavior.⁵⁴

- *Hard strategy* – efforts to gain compliance using direct, assertive requests, manipulative threats, and aggression.
- *Rational strategy* – offering alternatives to target person that maximize value of outcome(s) important to the target, on condition(s) that target comply with influence request(s).
- *Soft strategy* – gratifying and empathizing with target person to achieve compliance in a polite, friendly, or humble manner.

Falbe and Yukl identified nine influence tactics covering a wide range of influence behaviors:

- *Inspirational appeal* – arousing enthusiasm by boosting target person's confidence that they can perform requested action(s) or by appealing to target person's values, beliefs, or interests.
- *Consultation* – seeking participation in planning action(s) for which target person's support is needed, as well as modifying proposal(s) to accommodate target person's input and worries.
- *Rational persuasion* – using logical arguments and factual evidence to convince target person of action's value.
- *Ingratiation* – seeking to elevate the target person's mood or view toward person making request(s).
- *Personal appeal* – guiding target person to perform action(s) as special favor by appealing to target person's feelings of loyalty and friendship.
- *Exchange tactics* – offering exchange of favors, reciprocation at later date, or shared benefits if target person completes action(s).
- *Pressure tactics* – using ultimatums, coercion, or constant reminders to influence target person.
- *Legitimating tactics* – legitimizing request(s) by asserting authorization or by asserting consistency with organizational policies.
- *Coalition tactics* – enlisting aid or endorsement of others to influence target person.

⁵⁴ Stuart Schmidt & David Kipnis, *The Language of Persuasion*, 4 PSYCHOL. TODAY, 40, 40 (1985).

Falbe and Yukl, building on the research of Kipnis and colleagues, noted that hard tactics tend to be used in impersonal and manipulative ways.⁵⁵ They noted that soft tactics, in comparison, tend to encompass the use of power sharing and personal power.⁵⁶ Numerous factors shape the usage of influence tactics in organizations.

As summarized by Chad A. Higgins and his research collaborators, the contextual factors and individual differences governing the deployment of influence tactics include direction and objective of the influence attempt, political skill of the influencer, and relative power of the parties.⁵⁷ Falbe and Yukl noted the importance of the relationship between the influencer and the target person, as well as the target person's prior attitudes and perceptions about the requested action, in connection with decisions regarding the usage of influence tactics.⁵⁸ Combined research on the usage and effectiveness of influence tactics sheds lights on potential applications for such tactics in real-world practice. Superiors tend to use hard strategies toward subordinates, while subordinates tend to use soft strategies toward superiors.⁵⁹ Falbe and Yukl cautioned against the assumption that certain influence tactics, or the combination of certain influence tactics, will have the desired (or undesired) effect on the target person.⁶⁰

E. INFLUENCE TACTICS AND THE LEGAL DEPARTMENT

The final piece of the puzzle involves the application of influence tactics to create change within the legal department. Although the application of specific tactics, and the success of those tactics, may differ based on a variety of factors as noted above, several key takeaways may support efforts to narrow down a list of effective strategies for influencing general counsel to embrace proactive law on a case-by-case basis. Although the specific context for this paper centers on applying influence tactics to promote proactive law perspectives among unresponsive general counsel, in-house counsel may apply the influence tactic described below to virtually any situation involving change within the legal department. The use of influence tactics by the head of the legal department to influence change, combined with the use of position power, will be covered in future papers.

The direction and objective of the influence attempt is a fundamental consideration in the choice and use of influence tactics. As this paper centers on the use of tactics by subordinate in-house counsel to influence the general counsel to embrace proactive law perspectives, the tactics presented herein are done so through the lens of an upward-focused direction. The general counsel, as the most senior member of the legal department, possesses various degrees of legitimate power, coercive power, and reward power over other members of the legal department by virtue of that position. It unlikely that in-house counsel seeking to influence the general counsel will rely on hard tactics including the use of sanctions, blocking, assertiveness, and other pressure tactics. It is within the realm of possibility, however unlikely, that in-house counsel seeking to increase their reputation and visibility within the organization will engage in an upward appeal (subverting chain of command) and go over the general counsel's head to push proactive law.

⁵⁵ Cecilia M. Falbe & Gary Yukl, *Consequences for Managers of Using Single Influence Tactics and Combinations of Tactics*, 35 ACAD. MGMT. J., 638, 644 (1992).

⁵⁶ *Id.*

⁵⁷ Higgins, et al., *supra* note 52 at 90.

⁵⁸ Falbe & Yukl, *supra* note 56 at 640.

⁵⁹ DAVID KIPNIS, THE POWERHOLDERS (1976).

⁶⁰ Falbe & Yukl, *supra* note 56 at 650.

The relationship between the in-house counsel seeking the change and the general counsel is also a critical factor. Influence tactics involving sanctions, blocking, assertiveness, and other pressure tactics may have a low likelihood of use and success given the sources of legitimate power, coercive power, and reward power inherent to the position of general counsel. Referent power and expert power, however, derive from one's personal and interpersonal attributes and are not connected to one's formal position.⁶¹ In-house counsel with a strong relationship with general counsel may find higher success with inspirational appeals, consultation, and personal appeals. In-house counsel with a weaker relationship with general counsel may use coalition tactics, enlisting the aid of others in the department, who do have a strong relationship with general counsel. A combination of coalition tactics and ingratiation tactics may also help to build strength into the relationship between general counsel and in house counsel. It is important to note, of course, that labels connected to departmental positions and hierarchy are not dispositive of the relationship between the general counsel and other members of the legal department. The general counsel, despite having formal position power authority over the legal department, may in practice act more like a peer than a superior.

The general counsel's attitudes and perceptions of proactive law are also key considerations. General counsel characterized as *entrepreneurs*, following the classifications of in-house counsel identified by Nelson and Nielsen,⁶² are likely more amenable to tactics including consultation, rational persuasion, and legitimating tactics. General counsel fitting the *counsel* archetype may also express a similar openness to consultation, rational persuasion, and legitimating tactics, but possibly only in combination with other tactics such personal appeals, coalition tactics, and inspirational appeals. General counsel playing the *cop* role are likely to express feelings of unreceptivity toward proactive law and will present the greatest challenge from an influence perspective. Consultation, rational persuasion, and exchange tactics, even in combination with ingratiation and personal appeal, may not be enough. Engaging in an upward appeal, as discussed above, represents one of the few possible means to push for proactive law in the face of such resistance.

III. CONCLUSION

Organizational politics is an inevitable facet of organizational life. In-house legal teams face growing pressures to apply modern business tools and techniques to departmental operations, fueling the scarcity and power relations that drive organizational politics. These changes to legal department practices have prompted a greater need for legal departments to embrace proactive law perspectives. Embracing proactive law perspectives, however, may often represent substantial changes from past and present departmental practices. Given the expressed resistance by general counsel toward practices connected to proactive law, it is critical that legal department changes involving proactive law incorporate measures to consider and address unreceptivity from within the department itself. Organizational politics fall at the center of efforts to address such unreceptivity. Individuals can learn to understand, manage, and harness political dynamics in the workplace. The purpose of this paper was to provide in-house counsel with influence tactics and

⁶¹ Yukl, *supra* note 51.

⁶² Nelson & Nielsen, *supra* note 24.

techniques needed to support efforts of promoting proactive law perspectives within legal departments in the face of unreceptivity by general counsel.

As a variety of factors governing the deployment of influence tactics, the success or failure of influence attempts may differ dramatically from situation to situation. It unlikely that in-house counsel seeking to influence the general counsel will rely on hard tactics including the use of sanctions, blocking, assertiveness, and other pressure tactics, due to the direction and objective of influence attempts to promote proactive law perspectives. Depending on the individual, consultation, rational persuasion, and legitimating tactics may have the greatest chance of success in influence tactics be successful in promoting proactive law perspectives in unreceptive general counsel. The use of influence tactics by the head of the legal department to influence change, combined with the use of position power, will be covered in future papers.

THE UNREASONABLENESS OF REASONABLE ROYALTY DETERMINATIONS

Suneel Udpa

ABSTRACT

Determining damages in most patent infringement cases requires the determination of reasonable royalty. The commonly employed framework to determine reasonable royalty is through the use of a “hypothetical negotiation” between a willing licensor and a willing licensee at the time the infringement commenced using the fifteen factors established in *Georgia Pacific Corp. v. United States Plywood Corp.* However, the framework has proven to be impractical and unreliable. The hypothetical negotiation requires the court to make assumptions about the convictions, intentions, and knowledge of the two parties which is impractical since these are abstract and unobservable. The use of the fifteen Georgia-Pacific factors is problematic as well. The Georgia-Pacific framework provides no guidance on the relative importance of the factors or how to balance them in the determination of reasonable royalty. This paper makes a case for the use of the Nash Bargaining Solution, a game-theoretic approach, as a more rigorous and scientific alternative for determining reasonable royalty. The paper examines the Nash Bargaining Solution approach to determine reasonable royalty, addresses the common criticisms of the approach, offers suggestions on how to apply it to the relevant facts and circumstances of the particular case at issue, and on how to adequately explain the methodology to the trier of fact.

I. INTRODUCTION

Under U.S.C. §154, the inventor has exclusive rights to the patented technology for a term beginning on the date on which the patent was granted and ending 20 years from the date on which the patent application was filed. The patent gives the inventor the right to exclude others from making, using, and selling the invention throughout the United States of America. The patentee can sue the alleged infringer of the patent in federal court. Once patent validity and infringement have been confirmed, the final step is the determination of damages to be paid by the infringer of the patent.

35 U.S.C. §284 governs the damages to be paid for patent infringement. It states: “Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.”¹ The courts in interpreting this statute have bifurcated damages into two categories – lost profits and reasonable royalty.

¹ 35 U.S.C. § 284 (2006).

Under the lost profits doctrine, the patentee is entitled to the additional profits that would have been earned in a hypothetical world where the infringement did not occur. That is, the patentee is entitled to receive damages to compensate it for the pecuniary loss it suffered from the infringement; however, it is not entitled to all of the infringer's profits. To claim lost profits the patentee must prove a causal relation between the infringement and the loss of profits.² As established in the benchmark case, *Panduit Corp. v. Stahlin Bros. Fiber Works*, an award for lost profits is appropriate when it can be determined that "but for" the infringement, the patentee would have made the sale.³ Under *Panduit*, in order to recover lost profits, a patentee must prove (i) Demand for the patented product, (ii) Absence of acceptable non-infringing substitutes, (iii) The patentee's manufacturing and marketing capabilities to exploit the demand, and (iv) The amount of profit the patentee would have made.⁴ If all the four *Panduit* factors are satisfied, it can be inferred that the patentee probably would have made the sale but for the infringement. The *Panduit* factors have been applied to prove "but for" causation in many cases; however, the *Panduit* factors are difficult to apply in some real-world situations. In such situations, the courts and attorneys have developed alternate methodologies, including reconstructing the market and using economic theory, to show "likely outcome with infringement factored out of the economic picture."⁵

Patentees who don't use the patent to manufacture and sell products, such as non-practicing entities (NPEs), patentees who cannot prove lost profits, and patentees who do not want to risk disclosing proprietary information necessary to calculate lost profits can recover under the reasonable royalty doctrine.⁶ The reasonable royalty doctrine establishes the patentee's minimum damages award as indicated by the statute's language in 35 U.S.C. §284, "but in no event less than a reasonable royalty."

Typically, patentees want to claim damages by proving lost profits, since the measure captures the monopoly value of excluding competitors from the market and results in damage awards that are usually higher than those obtained from a reasonable royalty analysis. After all, as the statute notes, reasonable royalties exist as a minimum threshold for patentees. However, reasonable-royalty-only-awards continue to be the type of damages most frequently awarded in patent cases. According to the 2018 PriceWaterhouseCoopers Patent Litigation Study, for the period from 2008-2017, 60% of the cases in which courts awarded damages to practicing entities, the courts awarded reasonable royalties.⁷ In 19% of the cases, the courts awarded lost profits only, and in 21% of the cases, the courts awarded lost profits and reasonable royalties.⁸ Damages awarded to NPEs almost always consist of reasonable royalties rather than lost profits. Although for the period from 1998-2017, NPEs had a consistently lower success rate than practicing entities, the median damage award to NPEs of around \$10 million was double the median award to practicing entities.⁹

² See BIC Leisure Prods., Inc. v. Windsurfing Int'l, Inc., 1 F.3d 1214, 1218 (Fed. Cir. 1993) ("[A] patent owner must prove a causal relation between the infringement and its loss of profits.").

³ *Panduit Corp. v. Stahlin Bros. Fiber Works*, 575 F.2d 1152 (6th Cir. 1978).

⁴ *Id.* at 1156

⁵ *Shockley v. Arcan, Inc.*, 248 F.3d 1349 (Fed. Cir. 2001) (citing *Grain Processing Corp. v. American Maize-Products*, 185 F.3d 1341 (Fed. Cir. 1999)).

⁶ Non-practicing entities are typically firms, individual inventors, universities, and other nonprofits.

⁷ Landan Ansell *et al.*, PriceWaterhouseCoopers LLP, 2018 Patent Litigation Study, <https://www.ipwatchdog.com/wp-content/uploads/2018/09/2018-pwc-patent-litigation-study.pdf> at 6

⁸ *Id.* at 6

⁹ *Id.* at 9

There is significant confusion and controversy in patent law regarding the methodologies employed for determining reasonable royalty.¹⁰ If the patentee has licensed the patent-in-suit to other parties, information about the royalty base and royalty rate that was negotiated provides information that can be used to establish damages. An established royalty refers to a royalty that is sufficiently settled and accepted so as to provide an objective licensing fee for the patent-in-suit. To qualify as an “established royalty,” a royalty rate must have been (1) paid prior to the infringement at issue, (2) paid by a sufficient number of persons as to indicate the reasonableness of the rate, (3) uniform, (4) not set under the threat of a lawsuit or in settlement of litigation, and (5) covering a comparable set of rights or uses as are at issue in the litigation under consideration.¹¹ In practice, the standard for establishing the existence of an established royalty is very high and is seldom satisfied.¹² In addition, if there is no history of the patentee licensing the patent-in-suit there is no established royalty.

In the absence of an established royalty rate, the most commonly employed technique to determine reasonable royalty is through the use of a “hypothetical negotiation” between a willing licensor and a willing licensee at the time the infringement commenced. The determination of reasonable royalty based on the hypothetical negotiation typically relies on the fifteen factors established in *Georgia Pacific Corp. v. United States Plywood Corp.*¹³ The appropriate weights for each of these factors depend on the particulars of the case. While there are other methodologies, the courts have most frequently used the hypothetical negotiation framework using the Georgia-Pacific (GP) factors.

The hypothetical negotiation approach using the fifteen GP factors has proven to be impractical and unreliable. The hypothetical negotiation framework requires hypothesizing an imaginary negotiation between the patentee and the infringer to determine a reasonable royalty for the use of the patented invention at the time of the infringement. The imaginary negotiation requires the court to make assumptions about the convictions, intentions, and knowledge of the two parties which is impractical since these are abstract and unobservable. As a result, the hypothetical negotiation approach is necessarily speculative and provides a measure of damages that is uncertain and not replicable.¹⁴

The use of the fifteen GP factors is problematic as well. The GP framework provides no guidance on the relative importance of the factors or how to balance them in the determination of reasonable royalty. The courts have applied the framework inconsistently. Some courts have included only a subset of the factors in their jury instructions whereas others have used all the fifteen factors and more without any guidance on how to apply the factors. Judge Richard Posner, who sits by designation as a trial judge in patent infringement cases, has called the GP factors “baloney” and has asked rhetorically, “Could a judge or jury really balance fifteen or more factors

¹⁰ The paper focuses on the determination of reasonable royalty. The calculation of lost profits is beyond the scope of this paper.

¹¹ *Mobil Oil Corp. v. Amoco Chems. Corp.*, 915 F. Supp. 1333, 1342 (D. Del. 1994).

¹² John C. Jarosz & Michael J. Chapman, *The Hypothetical Negotiation and Reasonable Royalty Damages: The Tail Wagging the Dog*, 16 STAN. TECH. L. REV. 769, 774 (2013).

¹³ *Georgia Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970).

¹⁴ Arthur J. Gajarsa, William F. Lee & A. Douglas Melamed, *Breaking the Georgia-Pacific Habit: A Practical Proposal to Bring Simplicity and Structure to Reasonable Royalty Damages Determinations*, 26 TEX. INTELL. PROP. L.J. 51 (2018).

and come up with anything resembling an objective assessment?”¹⁵ Furthermore, reasonable royalty deliberations of juries are not public and not subject to meaningful appellate review. Typically, courts do not set aside a jury’s damage determination unless the amount is grossly excessive.¹⁶ Expert witness testimonies on the GP factors are not very useful to the trier of fact. Expert witnesses identify and utilize only those factors that weigh in their favor. Typically, a baseline reasonable royalty is identified by the expert witness, and the GP factors are evaluated and assigned an “up”, “down”, or “neutral” tally to adjust the baseline up or down. At the end of the testimony, like a conjuring trick, a reasonable royalty determination mysteriously emerges from the expert’s analysis.¹⁷

This paper examines the hypothetical negotiation approach using the GP factors and other approaches suggested by academic scholars and practitioners including the 25% rule of thumb; the analytical method; and the game-theoretic approach, the Nash Bargaining Solution (NBS). We conclude that of these methodologies, the game-theoretic approach is the most objective, reliable, and replicable methodology yielding fair reasonable royalty damages. The paper examines the NBS approach to determine reasonable royalty, addresses the common criticisms of the approach, offers suggestions on how to apply it to the relevant facts and circumstances of the particular case at issue, and on how to adequately explain the methodology to the trier of fact.

II. REASONABLE ROYALTY AND THE HYPOTHETICAL NEGOTIATION

In contrast to lost profits damages for which eligibility has to be demonstrated, reasonable royalty damages may be available to a wronged patentee even if it is unable to prove any actual loss as a result of the alleged infringement.

The birth of reasonable royalty damages can be traced to the early twentieth century when some courts recognized the difficulty a patentee faced in meeting the evidentiary burdens of lost profits.¹⁸ The courts reasoned that just because a patentee was unable to prove a causal link between the infringement and loss of profits, it did not mean that the patentee should not be compensated. The courts conceived the concept of reasonable royalty damages to provide compensation to a patentee who had proven infringement but was unable to provide adequate proof of actual damages.¹⁹

¹⁵ David A. Haas, John R. Bone & Bruce W. Burton, *An Interview of Judge Richard A. Posner on Patent Litigation*, STOUT RISIUS ROSS (July 10, 2013), <https://www.stout.com/en/insights/article/interview-judge-richard-posner-patent-litigation>.

¹⁶ Revolution Eyewear, Inc. v. Aspex Eyewear, Inc., 563 F.3d 1358, 1372 (Fed. Cir. 2009) (“a jury’s supportable finding of the amount of damages must be upheld unless the amount is grossly excessive or monstrous.”).

¹⁷ J. Gregory Sidak, *Bargaining Power and Patent Damages*, 19 STAN. TECH. L. REV. 1, 10 (2015)

¹⁸ Adam Friedman, *Damages Control: Returning Royalties to Their Reasonable Roots*, 15 THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW 827, 829 (2016).

¹⁹ The term “reasonable royalty” is a bit of a misnomer. As Judge Denison noted: “This damage or compensation is not, in precise terminology, a royalty at all, but it is frequently spoken of as a ‘reasonable royalty’; and this phrase is a convenient means of naming this particular kind of damage. It may also be well called ‘general damage’; that is to say, damage not resting on any of the applicable, exact methods of computation but upon facts and circumstances which permit the jury or the court to estimate in a general, but in a sufficiently accurate, way the injury to plaintiff caused by each infringing sale. The entire thrust of this non-royalty is better viewed as an exercise of the court opting to use its equitable powers to ensure a sufficient recovery to further the patent-objective of innovation.” U.S. Frumentum Co. v. Lauhoff, 216 F. 610, 617 (6th Cir. 1914).

Reasonable royalty is typically calculated by multiplying the royalty base by the royalty rate. The royalty base is the volume of sales and is expressed either as a monetary value, such as net sales revenue in dollars, or in units of the infringing products sold. The process of determining the royalty base has become increasingly complex in recent years in cases involving complex multicomponent products. The challenge is to correctly “apportion” the value of a multicomponent product between the litigated patented technology and other non-patented contributors of value such as non-patented technologies, marketing capabilities, and distribution networks. The rules concerning apportionment in reasonable royalty damages have undergone considerable evolution in recent years. To date, courts have articulated two rules relating to apportionment: the “entire market value” (EMV) rule and the “smallest salable patent-practicing unit (SSPPU) rule. Under the EMV rule, the entire market value of the multicomponent product is the royalty base if the patentee can prove that the patented component is the basis for customer demand. Under the SSPPU rule, the royalty base should reflect the value added to the smallest salable component implementing the litigated invention. The logic behind the SSPPU rule is that the royalty base should reflect the incremental value that the patented technology adds to the end product. There is significant controversy regarding the EMV and SSPPU rules and the courts have not applied them consistently.²⁰

The royalty rate is applied to the royalty base to determine reasonable royalty damages and is expressed either as a percentage royalty that is applied to the royalty base expressed in monetary value or as a units royalty rate that is applied to the royalty base expressed in the number of units. In some cases, reasonable royalty damages are determined as a lump-sum amount that may not have been derived by multiplying the royalty rate to the royalty base.²¹

Current law provides no clear guidance on the determination of either the royalty base or the royalty rate. The most common framework used in courts is the hypothetical negotiation or the “willing licensor-willing licensee” approach. This approach attempts to determine the royalty upon which a willing licensor and a willing licensee would have agreed had they successfully negotiated an agreement just before infringement began.

From a logical and economic point of view, the maximum royalty that an infringer would pay is the difference between the profit it would earn from infringing the patent and the profit it would earn from the next best alternative.²² This is because a rational infringer will not pay more for the use of a patent when there is a lower-cost alternative available. Therefore, the upper bound of the reasonable royalty bargaining range is the incremental profit of the infringer as a result of using the infringing product. The lower bound of the bargaining range is the minimum royalty the

²⁰ Michael J. Chapman, *The Incremental Value of Apportionment in Reasonable Royalty Patent Damages Analysis*, 29 FED. CIR. B.J. 49 (2019).

²¹ See VirnetX, Inc. v. Cisco Sys., Inc., 767 E3d 1308, 1326 (Fed. Cir. 2014) (“A reasonable royalty may be a lump-sum payment not calculated on a per unit basis, but it may also be, and often is, a running payment that varies with the number of infringing units. In that event, it generally has two prongs: a royalty base and a royalty rate.”).

²² See Roger D. Blair & Thomas Cotter, *Rethinking Patent Damages*, 10 TEXAS INTELL. PROP. L.J. 1, 40 n.194 (2001) (“the maximum payment that a willing licensee would pay is the difference between the maximum profit he would earn from using the invention and the maximum profit he would earn without the invention”); MARK GLICK, LARA A. REYMANN & RICHARD HOFFMAN, *INTELLECTUAL PROPERTY DAMAGES: GUIDELINES AND ANALYSIS* 157-58 (John Wiley & Sons 2003) (providing a hypothetical where infringer will not pay a greater licensing fee than the difference in profit between infringing the patent and using the next best alternative).

patentee would be willing to accept. The minimum royalty the patentee will accept is the income that the patentee can earn by not licensing the patent-in-suit to the would-be infringer but instead pursuing alternative licensing and other opportunities. Therefore, economic logic suggests that the reasonable royalty that a willing licensor and a willing licensee would agree to in a hypothetical negotiation would be within this bargaining range with the actual reasonable royalty depending on the bargaining power of the two parties.

There are several deficiencies with the hypothetical negotiation framework for determining reasonable royalty. The courts, including the Federal Circuit, have not consistently applied the economic logic behind the bargaining range. In some instances, the courts have expressly stated that the reasonable royalty need not be capped by the infringer's incremental profits.²³ In some cases, the patentee may not want to be the willing licensor or the infringer may not want to be the willing licensee and there may be no overlap in the parties' respective bargaining ranges.²⁴ Nevertheless, the hypothetical negotiation framework requires that a hypothetical license be granted and a reasonable royalty be determined.

Even if a valid bargaining range exists and can be correctly determined, there is no objective mechanism to determine where within the bargaining range the parties would be expected to agree during the hypothetical negotiation. If the bargaining range is narrow, resolving where within the range the parties might agree may not have a significant impact on the damage award. However, if the bargaining range is wide, determining the point of agreement could have a significant impact on the damage award.

Two key factors impacting the point of agreement within the bargaining range are the profits that the two parties would reasonably have anticipated had they agreed to the licensing agreement and the bargaining power of the parties.²⁵ Courts have typically, but not always, in their attempt to create a "real-world" licensing negotiation at the time the infringement began, allowed the consideration of only ex-ante information.²⁶ However, the principle of only allowing ex-ante information available at the time of infringement makes the task of determining the profits that the two parties would reasonably have anticipated had they agreed to a licensing contract challenging. It requires the court to make assumptions about the convictions, intentions, and knowledge of the

²³ See, *inter alia*, Douglas Dynamics, LLC v. Buyers Prod. Co., 717 F. 3d 1336, 1338 (Fed. Cir. 2013).

²⁴ "Determination of a 'reasonable royalty' . . . rests on a legal fiction. Created in an effort to 'compensate' when profits are not provable, the 'reasonable royalty' device conjures a 'willing' licensor and licensee, who like Ghosts of Christmas Past, are dimly seen as 'negotiating' a 'license.' There is, of course, no actual willingness on either side, and no license to do anything." Panduit Corp. v. Stahlin Bros. Fiber Works, Inc., 575 F.2d 1159 (6th Cir. 1978).

²⁵ Some commentators have argued that reasonable royalty damages should not depend on the bargaining power of the two parties. They argue that there is no reason to believe that a party with a stronger bargaining position is more injured as a result of the infringement and, therefore, deserves higher reasonable royalty damages. See Jarosz & Chapman, *supra* note 12, at 801-03.

²⁶ The Federal Trade Commission agrees with this approach noting: "The finder of fact must assume that the hypothetical negotiation takes place at the time the infringement began. This timing determines the information available to the parties during the negotiation. Thus, in setting a reasonable royalty rate, considerations such as the infringer's expected profit and available alternatives are to be determined not on the basis of a hindsight evaluation of what actually happened, but on the basis of what the parties to the hypothetical license negotiations would have considered at the time of the negotiations." See FED. TRADE COMM'N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION (2011), <http://www.ftc.gov/os/2011/03/110307patentreport.pdf>.

two parties. However, these attributes are abstract, unobservable, and manipulatable and the resulting measure of anticipated profits is necessarily speculative and unreliable.

The relative bargaining power of the patentee and the infringer will determine the distance and direction the point of agreement would be from the midpoint of the bargaining range. If the patentee had greater bargaining power, it would be able to negotiate a royalty above the midpoint and if the infringer had greater bargaining power, it would be able to negotiate a royalty below the midpoint. Although the relative bargaining power of each party can be estimated, in the context of the hypothetical negotiation, there is no objective methodology available to the finder of fact to help decide on how the relative bargaining power of the two parties would determine how far from the midpoint the point of agreement would be.

Legal scholars and economists have suggested various methodologies that attempt to determine the royalty upon which the parties would have agreed had they engaged in a hypothetical negotiation just before the infringement began. The most common approach adopted by the courts, including the Federal Circuit, is the hypothetical negotiation through the use of the GP factors.²⁷

III. THE GP FACTORS

In *Georgia Pacific Corp. v. United States Plywood Corp.*, the court established fifteen factors that should be considered in determining reasonable royalty.²⁸ The court noted that a jury or court should view reasonable royalty as the royalty that the infringer and the patentee would agree to in a hypothetical arms-length negotiation outside of litigation. Each factor affects a different aspect of the hypothetical negotiation construct. Some factors help establish the upper and lower bounds of the bargaining range whereas others help determine the point of agreement within the bargaining range. The Court did not prioritize the various factors. The final factor, factor 15, brings together the other fourteen factors into a hypothetical negotiation framework.²⁹

²⁷ Determination of the reasonable royalty under the “willing licensor-willing licensee” approach is often done through use of the GP factors, although use of the GP factors is not required. See, e.g., *Whitserve, LLC v. Computer Packages, Inc.*, 694 F. 3d 10, 31 (Fed. Cir. 2012); *Energy Transp. Group, Inc. v. William Demant Holdings A/S*, 697 F.3d 1342, 1357 (Fed. Cir. 2012).

²⁸ *Georgia Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970)

²⁹ *Id.*, 318 F. Supp. at 1120-21. The fifteen factors are:

- (1) The royalties received by the patentee for the licensing of the patent in suit, proving or tending to prove an established royalty.
- (2) The rates paid by the licensee for the use of other patents comparable to the patent in suit.
- (3) The nature and scope of the license, as exclusive or non-exclusive; or as restricted or non-restricted in terms of territory or with respect to whom the manufactured product may be sold.
- (4) The licensor's established policy and marketing program to maintain his patent monopoly by not licensing others to use the invention or by granting licenses under special conditions designed to preserve that monopoly.
- (5) The commercial relationship between the licensor and licensee, such as, whether they are competitors in the same territory in the same line of business; or whether they are inventor and promoter.
- (6) The effect of selling the patented specialty in promoting sales of other products of the licensee; the existing value of the invention to the licensor as a generator of sales of his non-patented items; and the extent of such derivative or convoyed sales.
- (7) The duration of the patent and the term of the license.

Factor one states that if the patentee has licensed the patent-in-suit to other parties, data about the royalty base and royalty rate negotiated provides information that can be used to establish damages. This factor essentially gives rise to the concept of “established royalty.” An established royalty refers to a royalty that is sufficiently settled and accepted so as to provide an objective licensing fee for the patent-in-suit.³⁰ If there is no history of licensing the patent-in-suit, then this factor is not relevant in determining reasonable royalty.

A narrow interpretation of factor two indicates that royalty paid only by the licensee for other patents comparable to the patent-in-suit can be used. In practice, licensing agreements of patents that are comparable to the patent-in-suit may be used.³¹ However, past licensing agreements may not be truly comparable to the patent-in-suit if industry conditions have changed, the financial conditions of the parties involved are different from that of the patentee and infringer, and if the patent-in-suit is unique.³²

Factors three through seven identify the contractual provisions of the patent that are key determinants of the reasonable royalty damages. These include the nature and scope of the license, the licensor’s policies to maintain its patent monopoly, the commercial relationship between the licensor and licensee, the value of the patent in generating derivative or convoyed sales, and the duration of the patent.

Factors eight, nine, and ten are factors that affect the intrinsic value of the patent and include the established profitability, commercial success, and popularity of the product made under the

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- (8) The established profitability of the product made under the patent; its commercial success; and its current popularity.
 - (9) The utility and advantages of the patent property over the old modes or devices, if any, that had been used for working out similar results.
 - (10) The nature of the patented invention; the character of the commercial embodiment of it as owned and produced by the licensor; and the benefits to those who have used the invention.
 - (11) The extent to which the infringer has made use of the invention; and any evidence probative of the value of that use.
 - (12) The portion of the profit or of the selling price that may be customary in the particular business or in comparable businesses to allow for the use of the invention or analogous inventions.
 - (13) The portion of the realizable profit that should be credited to the invention as distinguished from non-patented elements, the manufacturing process, business risks, or significant features or improvements added by the infringer.
 - (14) The opinion testimony of qualified experts.
 - (15) The amount that a licensor (such as the patentee) and a licensee (such as the infringer) would have agreed upon (at the time the infringement began) if both had been reasonably and voluntarily trying to reach an agreement; that is, the amount which a prudent licensee—who desired, as a business proposition, to obtain a license to manufacture and sell a particular article embodying the patented invention—would have been willing to pay as a royalty and yet be able to make a reasonable profit and which amount would have been acceptable by a prudent patentee who was willing to grant a license.

³⁰ Jarosz & Chapman, *supra* note 12, 774.

³¹ Proprietary databases, such as RoyaltyStat.com, RoyaltySource.com, and KtMINE, and publications issued by the Intellectual Property Research Association have information on specific licensing transactions.

³² Steven J. Shapiro, *Pitfalls in Determining the Reasonable Royalty in Patent Cases*, 17 J. LEGAL ECON. 75 (2010).

patent; the utility and advantages of the patent over the old modes or devices; and the benefits to those who have used the invention.

Under factor eleven, the extent to which the infringer has made use of the invention suggests the maximum royalty the infringer is willing to pay. Data on the sales and profits associated with the use of the patent by the infringer can be used as evidence.

Factors twelve and thirteen further refine the calculations associated with factor eleven. Factor twelve requires the isolation of the portion of the profit or the selling price due to the use of the patent. Factor thirteen focuses on the incremental economic benefit created by the patented component relative to the overall value of the product. Factor fourteen concerns the testimony of qualified damage experts. The last of the GP factors, factor fifteen, is a description of the hypothetical negotiation approach to determining reasonable royalty.

For a reader who is unfamiliar with how the GP factors are actually applied to determine reasonable royalty damages, it is instructive to examine, as an illustration, its use in *Proctor & Gamble v. Paragon Brands Inc.*³³

IV. APPLICATION OF THE GP FACTORS – AN ILLUSTRATION

Proctor & Gamble (P&G) brought an action on January 20, 1994, against Paragon Trade Brands, Inc. (Paragon) alleging that Paragon manufactured and sold Ultra diapers that infringed directly on P&G's Lawson Patent No 4,685,278 (Claims 17, 21, 27, and 28) and the Dragoo Patent No 4,795,454 (Claims 1, 3, 17, 18 and 21) and under the doctrine of equivalents.³⁴

The Lawson patent addressed a problem wherein feces leaked out of the gaps between the diaper and the baby's leg or waist mainly because the feces were not immediately absorbed within the diaper. The Lawson invention employed a Barrier Leg Cuff (BLC) that acted as a restraint against leakage. The Dragoo invention extended each BLC to the side edge of the diaper and terminated at a point inside the side edge of the diaper. This further helped in the prevention of leaks.

After a very detailed analysis, the Court concluded that Paragon's Ultra diapers which contained the BLC feature directly and literally infringed claims 17, 21, 27, and 28 of the Lawson patent.³⁵ In addition, the Court concluded that the accused diapers directly and literally infringed claims 1, 3, 17, 18, and 21 of the Dragoo patent.

Paragon's total amount of sales of infringing diapers from January 1992 through December 1994 was 42,409,028 units. P&G asserted that it is entitled to lost profits, reasonable royalties, and interest through December 31, 1994.

³³ *Procter & Gamble Co. v. Paragon Trade Brands, Inc.*, 989 F. Supp. 547 (D. Del. 1997).

³⁴ The doctrine of equivalents is a legal rule that allows a patentee to raise a claim of infringement even though the infringing device or process does not fall within the literal scope of a patent claim, but nevertheless is equivalent to the claimed invention.

³⁵ The reader is encouraged to refer to the opinion for a detailed analysis of the inner workings of an infant disposable diaper. You will never mindlessly wrap a diaper around your child's bottom ever again.

This illustration focuses on the determination of reasonable royalty on the balance of infringing Ultra sales to which a lost profits analysis did not apply. Based on his analysis of the GP factors, the expert for P&G opined that the reasonable royalty rate at the time of infringement would have been 2.5% of Paragon's unit selling price. The expert for Paragon opined that the rate would have been only 0.2% of net sales of the infringing diapers.

The following is the Court's application of the hypothetical negotiation to the facts of this case.

Factor 1: At the time of the hypothetical negotiation, there were no licenses for the patent-in-suit. However, P&G did grant one license under the patent after the date of the hypothetical negotiation. On November 15, 1996, P&G granted a license under the Lawson and Dragoo patents to Confab, Inc. for a royalty rate of 2% on the net sales price. Because there were no licenses under the Lawson and Dragoo patents at the time of infringement, both experts concluded that factor one would have had a neutral impact on the hypothetical negotiation. Although the Court agreed with this conclusion, the Court noted that it would consider the Confab license in making its determination as to the appropriate royalty rate.

Factor 2: The expert for P&G testified that there were no licenses between two competitors within the United States diaper industry; whereas, the expert for Paragon discussed several license agreements which suggested low royalty rates. However, the Court found these licenses of limited probative value since none of them involved licenses between two competitors in the disposable diaper industry.

Factor 3: The experts for both sides testified that P&G and Paragon would have negotiated a nonexclusive license that was not restricted to any particular part of the United States. Therefore, this factor would have a negative impact on the overall royalty rate.

Factor 4: The expert for P&G testified that P&G had a general policy of not granting licenses under its patented technology. The expert for Paragon disagreed, citing the Finley license, a cross-license between P&G and Kimberly Clark. The Court ruled that the Finley license did not represent a major innovation in the disposable diaper industry on the level of the Lawson and Dragoo patents and concluded that P&G did maintain a policy of not granting licenses covering major innovations in the disposable diaper technology. This policy weighed in favor of granting a higher royalty payment.

Factor 5: The expert for P&G opined that P&G and Paragon were direct competitors, while the expert for Paragon disagreed. The Court

agreed that P&G were direct competitors and since P&G bargaining power would be greater this factor would call for a higher royalty rate.

Factor 6: The Court agreed with the experts that there was no evidence that the sale of P&G's or Paragon's diapers led to the sales of other products. Hence, this factor would have a neutral effect on the royalty rate.

Factor 7: The Lawson patent expired on September 22, 2004, and the Dragoo patent expired on January 3, 2006. Regardless of the duration of the patent, both experts agreed that new features in the diaper disposable industry did not last long and that this factor would have a neutral impact on the royalty rate.

Factor 8: The Court concluded that diapers containing the Lawson and Dragoo BLC patents were very popular with consumers and a commercial success, which weighed in favor of a higher royalty rate. However, the Court found that although P&G's net profits were positive for diapers covered by the patents, the rate of return and the present value for the BLC feature were negative. Similarly, it noted that although Paragon's actual profits increased significantly as a result of its record sales of diapers containing the patented feature, the actual profitability of diapers containing the BLC feature was negative. Therefore, the Court concluded that the profitability aspect of this factor would have a negative impact on the negotiated royalty.

Factor 9: The Court noted that it was clear that diapers containing the BLC feature covered by the two patents have substantial advantages over prior art diapers. Hence, this factor weighed strongly in favor of a higher royalty.

Factor 10: The Court had already referred to the technical benefits of the patent in discussing factor 9. The Court further concluded that there were economic benefits from the patents as well and that this factor weighed in favor of a higher royalty rate.

Factor 11: The expert for P&G testified that Paragon had extensively used the patent and that the vast majority of Paragon's sales infringed the Lawson and Dragoo claims at issue. The expert for Paragon testified that there was no evidence that was probative of the value of this feature to Paragon. The Court strenuously disagreed with Paragon's witness claiming the plethora of evidence suggested Paragon's use of the BLC invention. The Court concluded that this factor would weigh in favor of a higher royalty rate.

Factor 12: The expert witnesses for both parties did not testify as to the customary profit percentages used to set royalty rates. However, the

Court discussed the “25% rule-of-thumb” approach where royalty rates are calculated at 25% to 33.33% of the operating profit margin of the infringer. Applying this rate to Paragon’s average operating margin of 7.9% yielded a royalty rate between 1.975% and 2.6% of its operating profit margin. The Court noted that although it would consider the “rule-of-thumb” analysis, it would not receive substantial weight.

Factor 13: The expert for P&G argued that this factor would have a positive impact on the rate because there was evidence that the patented feature increased sales and profitability. However, the expert for Paragon opined that this factor weighed in favor of a lower royalty rate since there were numerous features that were required to make a diaper a successful product, and BLC was just one element. The Court agreed with Paragon’s expert witness and found that this factor negatively impacted the royalty rate.

Factor 14: The Court noted the following relating to this factor, “In determining the weight accorded to each expert’s testimony, the Court looked not only at the demeanor, credibility, and qualifications of the expert, but also at the factual basis for the expert’s testimony.”

Factor 15: The Court concluded, “Accordingly, after careful consideration of all the factors as well as the entire record, in this case, the Court finds that if P&G and Paragon had engaged in a hypothetical negotiation in March of 1991 to determine the appropriate rate for a patent license for all the rights infringed in this case, the parties would have settled on a royalty rate of 2.0% of the net sales price. The Court further finds that this rate is adequate to compensate P & G for Paragon’s infringing sales that are not subject to lost profits damages.”³⁶

As this illustration demonstrates, but for the established royalty rate of 2% on net sales price on a license that was entered six years after the date of infringement, the hypothetical negotiation framework using the GP factors does not provide much guidance to the finder of fact in the determination of reasonable royalty. Furthermore, the invention involved in the P&G litigation was relatively uncomplicated. Given the technological revolution, recent patent litigation involves multicomponent products with increasingly complex technologies. In such an environment, the hypothetical negotiation framework using the GP factors is impractical, outdated, and unreliable leading to reasonable royalty damages that are widely divergent. The adversarial nature of patent litigation proceedings further exacerbates these differences. Opposing expert witnesses claim to apply the fifteen GP factors to the same set of facts yet reach damage estimates that widely differ.

Compounding the problem is the trend of reasonable royalty determinations increasingly being made by juries. In most cases, juries are simply given a list of the fifteen factors as part of the jury instructions without any guidance on the relative importance of the factors and how to balance them. Furthermore, since jury deliberations are not public and since it does not document how it

³⁶ *Procter & Gamble*, 989 F. Supp. 547 (D. Del. 1997) at 615.

weighted the various factors, its royalty determination is not subject to meaningful appellate review.³⁷ In fact, most reasonable royalty determinations made by juries are affirmed by the court, unless they are egregiously large.

Under the Federal Rules of Evidence, expert testimony should be the product of reliable principles and methods. Under the *Daubert* standard, factors that may be considered in determining whether the expert testimony is valid include whether the theory or technique can be tested with a known potential error rate.³⁸ The core problem with the hypothetical negotiation construct is that it is not an intellectually rigorous framework that yields replicable and testable results. The challenge of using the GP factors within such a construct is that there is not a decision tree or a rubric that the finder of fact can follow.

V. THE 25 PERCENT RULE OF THUMB

The 25 percent rule of thumb proposes that the infringer of a patent should pay 25 percent of its operating profits from the use of the patent. The rule rests on the evidence-based study of licenses from 1990 to 2000 by Goldschieder, Jarosz, and Mulhern.³⁹ They found that the median royalty rate as a percentage of operating profits across industries was 26.7 percent. However, the study also indicated that the royalty rate varied from 8.5 percent to 79.7 percent of operating profit. The variation in royalty rates is not surprising since the rates depend on a number of factors including the incremental value of the patent, investment risk, and the bargaining power of the parties.

The 25 percent rule is often used by experts as a starting point in applying the GP factors. Twenty-five percent of the infringer's profit from the use of the patent is the starting point adjusted up or down as each Georgia Pacific factor is considered. However, in *Uniloc vs. Microsoft*, the Federal Circuit noted: "This court now holds as a matter of Federal Circuit law that the 25% rule of thumb is a fundamentally flawed tool for determining a baseline royalty rate in a hypothetical negotiation. Evidence relying on the 25 percent rule is thus inadmissible under *Daubert* and the Federal Rules of Evidence because it fails to tie a reasonable royalty base to the facts of the case at issue."⁴⁰

VI. THE ANALYTICAL APPROACH

The methodology, which was later referred to as the analytical approach, was first applied in the *Georgia-Pacific Corp. v. U.S. Plywood-Champion Papers*, the same case that at the district level had generated the fifteen GP factors.⁴¹ In its appeal, Georgia Pacific challenged the "reasonableness" of the district court's royalty rate award of \$50 per thousand square feet of striated plywood resulting from the application of the hypothetical negotiation between a willing buyer and willing seller using the fifteen GP factors. Georgia Pacific argued that at that royalty

³⁷ James Elacqua, et al., *Trial Lawyer Panel*, CONFERENCE ON EVOLVING DAMAGES LAW HOSTED BY THE BERKELEY CENTER FOR LAW & TECHNOLOGY & THE FEDERAL CIRCUIT BAR ASSOCIATION 28-30 (Oct. 18, 2010), available at <http://www.law.berkeley.edu/files/bcltPatentDamagesTrialAttorneysPanel.ppt>.

³⁸ *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 US 579 (1993).

³⁹ Robert Goldscheider, John Jarosz & Carla Mulhern, *Use of the 25 per cent rule in valuing IP*, LES NOUVELLES 37.4 (2002).

⁴⁰ *Uniloc USA Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1315 (Fed.Cir. 2011).

⁴¹ *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 446 F.2d 295 (2d Cir. 1971), *cert. denied*, 404 U.S. 870 (1971).

rate it made virtually no profit from the sale of the product. Georgia Pacific provided evidence that one thousand square feet of striated plywood sold for \$159.41. After deducting costs, its expected profit was \$50. Thus, if it had to pay a royalty award of \$50, it would be left with no profit. Georgia Pacific argued that such a royalty award was “unreasonable” since no rational licensee in a voluntary negotiation would agree to a royalty rate that would leave it with no profit. Ironically, the Second Circuit agreed with Georgia Pacific’s argument suggesting that the application of the GP factors led to an indefensible and unreliable result.⁴² Georgia Pacific’s average profit margin over all of its products was approximately 9 percent. The Court argued that Georgia Pacific would have been willing to pay a royalty which, after payment of its other costs, would leave it with a 9 percent profit on sales of the licensed item. Accordingly, it reduced the royalty rate award of \$50 by 9 percent of the sale price of \$159.41, or \$14.35, resulting in a royalty rate award of \$35.45.

The term, “analytical approach,” was first used in *TWM Manufacturing Co. v. Dura Corp.*⁴³ In that case, the Federal Circuit referring to the special master’s report, which was adopted by the district court in *toto*, noted: “The special master, citing *Georgia Pacific* and *Tektronix*, used the so-called ‘analytical approach,’ in which she subtracted the infringer’s usual or acceptable net profit from its anticipated net profit realized from sales of infringing devices.”⁴⁴

The analytical approach attempts to measure the incremental returns that the infringer earns as a result of the infringed patent by deducting the company’s or industry’s normal net profit margin from the net profit margin earned by the infringer from the use of the infringed patent. However, there are several problems with this approach. The first issue is the frequent use of the industry’s normal profit margin to proxy for the normal profit margin of the infringer. There is no reason to believe that the normal profit margin of the industry to which the firm belongs is the normal profit margin of the firm. There are wide variations in the net profit margins of firms in an industry due to differences in size, market share, competitive advantages, quality of management, and modes of operation. The proper approach to calculate the normal profit of the firm is to analyze the financials of the firm for a period of time, say a three-year period, and then calculate the average net profit margin after removing the impact of abnormal events. However, if the firm is a diversified company that operates in several unrelated segments with different normal profit margins, it would be appropriate to use the normal profit margin of the segment to which the infringing product belonged, rather than the overall net profit margin of the diversified company.

Even if one could accurately measure the normal profit of the firm, it is not entirely clear that the difference between the profit margin as a result of using the infringed patent and the normal profit of the firm measures the incremental value of the infringed patent. While the infringing technology contributes to the profit margin of the infringer, the higher profit margin could be the result of many factors such as marketing of the product, the brand name of the infringer, and innovations in the product other than those from the infringing technology. Legal scholars and economists have suggested that the more appropriate approach is to measure the incremental value of the patent as the difference between the profits made by the infringer with the infringement and

⁴² Mark Glick and David Mangum, *The Economics of Reasonable Royalty Damages: The Limited, Proper Role of the So-Called “Analytical Method”*, 49 J. MARSHALL L. REV. 1 (2015).

⁴³ TWM Mfg. Co., Inc., v. Dura Corp. & Kidde, Inc. 789 F.2d 895, 229 U.S.P.Q. (BNA) 525.

⁴⁴ *Id.* at 899.

the profit the infringer would have made had it not used the infringing technology, but instead use the next best available substitute for the infringing technology.⁴⁵

VII. THE GAME-THEORETIC APPROACH

The hypothetical negotiation between a willing licensor and willing licensee is essentially a bargaining problem in which two or more rational economic agents decide on how to share a surplus they can jointly generate. Game-theoretic approaches provide a useful mechanism to model the bargaining process and provide a reliable and replicable solution.

There are broadly two game-theoretic approaches to obtaining a solution for the bargaining problem: the axiomatic approach and the strategic approach.⁴⁶ The axiomatic approach relies on certain axioms and premises inherent in the bargaining process and establishes the existence of a unique solution that satisfies all the axioms and from which neither party has an incentive to deviate. The strategic approach models the dynamics of the bargaining process in which the two parties make alternating offers and counteroffers on how to divide the available surplus and then solve for a noncooperative equilibrium solution.

While the two approaches may appear to be different, they are, in fact, complementary.⁴⁷ Since bargaining processes can differ significantly in their details, any useful model under the strategic approach must be based on a few guiding principles that will hold over a wide range of bargaining processes. The axiomatic approach, on the other hand, codifies a set of such principles as axioms upfront and then proposes a solution that satisfies all the axioms.⁴⁸

NASH BARGAINING SOLUTION

In the 1950 article, *The Bargaining Problem*, John Nash proposed a solution to the bargaining problem in which two parties “have the opportunity to collaborate for mutual benefit.”⁴⁹ After making certain assumptions (axioms) about the two participants and the bargaining process, Nash derived a solution, often called the Nash Bargaining Solution (NBS), where the bargaining outcome depended on two variables – each negotiator’s alternative to negotiating and the potential benefits of cooperation. The NBS, therefore, requires the estimation of the profits each party expects to make if the negotiation fails, the “disagreement” profits, and the total profits from the licensing agreement. Once these variables are estimated, the model yields a unique and efficient solution.

The NBS explicitly considers the possibility that both parties in the negotiation, the patentee and the licensee, could have profitable alternatives to negotiating. The disagreement profits are

⁴⁵ Mark Glick and David Mangum, *supra* note 42, at 26-27.

⁴⁶ In game theoretic literature, the two approaches are referred to as the cooperative approach and the noncooperative approach respectively.

⁴⁷ For instance, it has been shown that the outcome of the Rubinstein Bargaining Solution (an example of the strategic/noncooperative approach) converges to the outcome of the Nash Bargaining Solution (an example of the axiomatic/cooperative approach). See Ken Binmore, Ariel Rubinstein, & Asher Wolinsky, *The Nash Bargaining Solution in Economic Modelling*, 17 RAND J. ECON. 176 (1986).

⁴⁸ John Sutton, *Non-Cooperative Bargaining Theory: An Introduction*, 53 REV. OF ECON. STUD. 709 (1986).

⁴⁹ John Nash, *The Bargaining Problem*, 18 ECONOMETRICA 155, 155 (1950).

indicative of each party's relative bargaining position in the negotiation. Consider, for example, a situation in which the patentee has a patent XYZ that the licensee wants to license. If the licensee obtains the license for XYZ, it expects to increase its profits by \$100. Alternatively, it can obtain another license from another patentee and increase its profits by \$30. In this situation, the disagreement profit for the licensee is \$30. If we assume that the patentee of the XYZ patent has no other opportunities to license the patent, its disagreement profit is zero. In this situation, the "surplus" that results from the negotiation is \$70. Nash's solution to the bargaining situation is that the bargaining parties would jointly maximize the surplus generated by a successful bargain. Since NBS assumes both parties have equal bargaining power and skill, the maximization occurs when the two bargaining parties evenly split the surplus. The NBS, in our example, is the splitting of the surplus of \$70 between the patentee and the licensee; that is, the patentee agrees to license the XYZ patent to the licensee for \$35.

It is crucial to note that the surplus that results from the negotiation (\$70) and not the expected payoff (\$100) is evenly split. For instance, if the licensee could have increased its profits by \$60, instead of \$30, by obtaining a license from another patentee, its disagreement profit would be \$60, which indicates that its bargaining position relative to the patentee has gotten stronger. The surplus resulting from negotiation is now \$40, and the royalty paid by the licensee is \$20.

To utilize the NBS to calculate reasonable royalty damages and apply it effectively to the specific facts of the case, one needs to understand the five axioms underlying the model.⁵⁰

The five axioms of the NBS are:

1. Pareto optimality or Pareto efficiency: None of the parties can be made better-off without making at least one party worse-off. A simple example of Pareto efficiency is the equal or unequal distribution of an entire pie among three participants. An example of Pareto inefficiency is the allocation of a quarter of a pie to each participant with the remaining quarter discarded. Pareto efficiency is a well-understood and widely accepted requirement in economics.
2. Symmetry: If the parties are indistinguishable, then the agreement should not discriminate between them. This axiom is innocuous and simply requires that identical parties realize identical bargaining outcomes.
3. Individual rationality: No party will agree to accept a payoff lower than the one guaranteed to it under disagreement. This axiom requires that the parties must collectively behave in a rational manner. In the context of NBS, it means that neither party agrees to get less from the solution to the bargaining problem than they could have gotten in disagreement. Most economic models are based on the assumption that individuals are rational economic beings. It is

⁵⁰ In addition to the five axioms, the NBS assumes risk neutrality, complete information, and equal bargaining skills. Several models have been developed relaxing these assumptions. Their discussion is beyond the scope of this paper.

true that the rationality of individuals has been questioned in the behavioral economics literature; however, how can one develop models with viable solutions if one has to account for all possible variances from rational behavior.

4. Scale independence: The solution is independent of numerical specification; that is, if we change the way payoffs are measured, the solution to the bargaining problem changes accordingly so that the outcome remains the same. This again is a logical assumption to make since changes in the scale of the payoffs and disagreement profits should not change the outcome of the bargaining process.
5. Independence of irrelevant alternatives: If an individual faces a choice between X and Y and prefers X to Y, then the individual must also prefer X to Y, if faced with a choice between X, Y, and Z.⁵¹ In plain English, if an individual prefers rum to whisky, the individual will not change his preference between rum and whisky, if he is offered vodka as well. Although this axiom is at the foundation of economic theories of rational choice, it is the most controversial of all of the axioms.

Nash mathematically demonstrated that the only solution that satisfies all the axioms is the one obtained by solving the following constrained maximization problem:⁵²

$$\max_{\pi_1, \pi_2} (\pi_1 - d_1)(\pi_2 - d_2) \dots \quad (1)$$

subject to the following conditions:

$$\pi_1 \geq d_1 \dots \quad (2)$$

$$\pi_2 \geq d_2 \dots \quad (3)$$

$$\pi_1 + \pi_2 \leq \Pi \dots \quad (4)$$

where:

π_1 = payoff of the patentee/licensor from licensing

π_2 = payoff of the infringer/licensee from licensing

d_1 = disagreement payoff of the patentee/licensor

d_2 = disagreement payoff of the infringer/licensee

Π = total profit from licensing

⁵¹ Another way to interpret this axiom is as follows: If an individual faces a choice between X, Y, and Z and prefers X to Y and Z, then the individual must continue to prefer X to Y, if faced with a choice between just X and Y; that is, Z is irrelevant.

⁵² William Choi and Roy Weinstein, *An Analytical Solution to Reasonable Royalty Rate Calculations*, 41 J.L. & TECH. 49, 51 (2001).

The maximization occurs when:⁵³

$$\pi_1 - d_1 = \pi_2 - d_2 \dots \quad (5)$$

$$\pi_1 + \pi_2 = \Pi \dots \quad (6)$$

Solving equations (6) and (7), yields the payoffs for the licensor and the licensee:

$$\pi_1 = d_1 + \frac{1}{2}(\Pi - d_1 - d_2) \dots \quad (7)$$

$$\pi_2 = d_2 + \frac{1}{2}(\Pi - d_1 - d_2) \dots \quad (8)$$

Equations (7) and (8) can be interpreted as follows: when the licensor and licensee bargain on how to partition the total expected payoff (Π), they first agree to give each other their respective disagreement profits (d_1 and d_2) and then split the remaining payoff ($\Pi - d_1 - d_2$) equally. Thus, if the bargaining is successful, the party with the higher payoff is the party with the higher disagreement profit; that is, the party with better outside opportunities if the bargaining is not successful.⁵⁴

The bargaining will be unsuccessful if the total expected payoff is less than the sum of the disagreement profits. In such a situation, at least one of the parties can receive a higher disagreement payoff than the payoff they could gain from bargaining. The negotiation would fail and each party would pursue other opportunities.

ADAPTING NBS TO REASONABLE ROYALTY DETERMINATIONS

Choi and Weinstein (2001) were the first to suggest using NBS to calculate reasonable royalty damages in patent infringement cases.⁵⁵ They applied NBS to two simple situations.

The first situation (Case 1) is one in which the patentee/licensor is a non-practicing entity (NPE) and the infringer/licensee is the only entity with the manufacturing capabilities to exploit the patent. Since the patentee is an NPE it has no alternative but to earn income from licensing as it does not have the manufacturing capabilities to exploit the patent. Furthermore, since the infringer is the only entity with the manufacturing capabilities, the patentee can only earn income by licensing the patent to the infringer. Therefore, if the negotiations fail, the patentee earns no income and its disagreement profit (d_1) is zero. The disagreement profit (d_2) of the infringer depends on the alternatives available to it other than licensing the patent from the NPE. The joint profits from licensing are equal to the monopoly profit of the infringer. Applying the NBS, Choi and Weinstein determine the royalty rate as:

$$r = \frac{1}{2}(P - AC) - \frac{d_2}{2Q} \dots \quad (9)$$

⁵³ For a graphical explanation of the maximization solution, see Sebastian Zimmeck, *A Game-Theoretic Model for Reasonable Royalty Calculation*, 22 ALB. L.J. SCI. & TECH. 357 (2012).

⁵⁴ William Choi and Roy Weinstein, *supra* note 52, at 55.

⁵⁵ *Id.* at 56-60.

where:

r = per-unit royalty rate

P = profit-maximizing price per unit for the licensee in a monopoly market

AC = licensee's average cost per unit

d_2 = disagreement profit of the licensee

Q = profit-maximizing quantity sold by the licensee in a monopoly market.

The total royalty paid by the licensee to the patentee is:

The example provided earlier regarding the XYZ patent is an illustration of Case 1, where d_1 is zero; d_2 is \$30; and profits from licensing, $(P - AC) \times Q$, is \$100. Solving for rQ , yields a royalty payment of \$35.

The second situation (Case 2) is one in which the patentee possesses the manufacturing capabilities to exploit the patent but has not initiated production at the time of the infringement. The disagreement profit for the patentee is nonzero and is equal to the profit it could earn as the sole producer of the patented product.

where:

d_1 = disagreement profit of the patentee

P' = profit-maximizing price per unit for the patentee in a monopoly market

AC' = patentee's average cost per unit

Q' = profit-maximizing quantity sold by the patentee in a monopoly market.

When the patentee has the manufacturing capabilities to produce the patented product, the infringer will only have an incentive to negotiate a license for the patent and pay a royalty if at least one of the following conditions holds. One, the infringer is able to serve markets that the patentee is unable to access; two, the infringer is able to charge a higher price for the patented product due to its superior brand name or another competitive advantage; and three, the infringer is able to manufacture the patented product at a lower marginal cost.⁵⁶

⁵⁶ To understand the logic of this assumption, suppose that the patentee is the low-cost producer of the patented product for the entire market. In such a situation, the patentee can make more profits by manufacturing and selling the patented product than by licensing it over any range of output, and thus will have no incentive to license to the infringer. The hypothetical negotiation construct requires us to make this assumption and presume that the license will benefit both the patentee and the infringer. The construct necessitates this assumption despite the fact that the parties themselves did not arrive at a mutually acceptable licensing agreement.

Assuming that the patentee does not possess a comparative advantage in production or sales and decides it is in its best interest to license the entire market to the licensee, Choi and Weinstein apply the NBS to derive the royalty rate as:

$$r = \frac{1}{2}(P - AC) - \frac{1}{2Q}(d_1 - d_2) \dots \quad (12)$$

where:

r = per-unit royalty rate

P = profit-maximizing price per unit for the licensee in a monopoly market

AC = licensee's average cost per unit

d_1 = disagreement profit of the patentee

d_2 = disagreement profit of the licensee

Q = profit-maximizing quantity sold by the licensee in a monopoly market.

The total royalty paid by the licensee to the patentee is:

$$rQ = \frac{1}{2}[(P - AC) \times Q - (d_1 - d_2)] \dots \dots \dots (13)$$

Extending the illustration of patent XYZ, if the disagreement profit of the patentee (d_1) is nonzero and equal to \$20, the disagreement profit of the licensee (d_2) is \$30, and profits from licensing, $[(P - AC) \times Q]$, is \$100, solving for rQ , yields a royalty payment of \$45. The royalty payment is higher in this situation compared to Case 1 because the patentee is in a stronger bargaining situation and can walk away from the negotiation and still earn a payoff of \$20.

The profits from licensing depend on the market in which the patented product is sold. In both the situations described in Choi and Weinstein, the infringer was expected to be the sole producer and seller of the patented product; therefore, the profits from licensing were monopoly profits. Sebastian Zimmeck extends the analysis by examining the profits from licensing assuming three other basic market models: perfect competition, monopolistic competition, and oligopoly.^{57, 58}

⁵⁷ Zimmeck, *supra* note 53, at 377-394.

⁵⁸ Perfect competition is a market in which there are numerous, well-informed buyers and sellers and the market price of a commodity is beyond the control of individual buyers and sellers. Monopolistic competition is a market in which many sellers compete with products that are differentiated (for example, by their brand names) and, therefore, not perfect substitutes. In monopolistic competition, a firm takes the prices charged by its competitors as given and ignores the impact of its own prices on the prices charged by other firms. Oligopoly is a market where two or more firms have market control and together they are able to dictate prices and supply but are unable to influence the market on their own.

NBS WITH UNEQUAL BARGAINING POWER

NBS can be extended to account for the unequal bargaining strengths of the parties. The bargaining strength of a party reflects its influence in the negotiation and determines how the parties divide the surplus. In the original NBS, the bargaining strengths of the two parties were assumed to be equal; hence, they equally divided the surplus.

If we denote the bargaining power of the licensor relative to the licensee by α , then the bargaining power of the licensee is $1-\alpha$, where $0 \leq \alpha \leq 1$. In this case, the solution is obtained by solving the following constrained maximization problem:⁵⁹

$$\max_{\pi_1, \pi_2} (\pi_1 - d_1)^\alpha (\pi_2 - d_2)^{1-\alpha} \dots \quad (14)$$

subject to the following conditions:

$$\pi_1 \geq d_1 \dots \quad (15)$$

$$\pi_2 \geq d_2 \dots \quad (16)$$

$$\pi_1 + \pi_2 \leq \Pi \dots \quad (17)$$

The maximization occurs when:

$$\alpha (\pi_1 - d_1) = (1 - \alpha) (\pi_2 - d_2) \dots \quad (18)$$

$$\pi_1 + \pi_2 = \Pi \dots \quad (19)$$

Solving equations (18) and (19), yields the payoffs for the licensor and the licensee:

$$\pi_1 = d_1 + \alpha(\Pi - d_1 - d_2) \dots \quad (20)$$

$$\pi_2 = d_2 + (1 - \alpha)(\Pi - d_1 - d_2) \dots \quad (21)$$

MEASURING THE PARAMETERS FOR NBS

To use the NBS to determine reasonable royalty damages in patent infringement cases, the following parameters need to be measured from the facts of the case: the total profits anticipated from the licensing agreement (Π); the disagreement profit of the patentee (d_1); the disagreement profit of the infringer (d_2); and the relative bargaining strengths of the patentee and infringer (α , $1 - \alpha$).

TOTAL PROFITS ANTICIPATED FROM LICENSING

The total profits anticipated from the licensing agreement may be in the form of higher sales revenues from the sale of the infringing product or from the incremental cost savings as a result of the patented technology. In a hypothetical negotiation, the patentee and infringer would have negotiated a royalty based on the expected profit the infringer could realize from licensing the

⁵⁹ Abhinay Muthoo, BARGAINING THEORY WITH APPLICATIONS 35 (1999).

patent. The incremental sales revenues the infringer expects from licensing the patent depend on the market in which the patented product is expected to be sold. The market is characterized by the number of suppliers of the product and the ability of the customers to differentiate between the products of various suppliers. The incremental cost savings are the cost savings that could be gained by manufacturing using the patented technology instead of manufacturing using the old technology.

To estimate the anticipated profit from the licensing of the patents at the time of the hypothetical negotiation, either from incremental sales revenues or cost savings, the actual profit of the infringer from the use of the infringing patent could be considered.⁶⁰ The Federal Circuit has held that “[e]vidence of the infringer’s actual profits generally is admissible as probative of his anticipated profits.”⁶¹ GP factor eight allows the use of the established profitability of the product made under the patent, its commercial success, and its current popularity. GP factor eleven permits consideration of the extent to which the infringer has made use of the invention and any evidence indicating the value of that use.

The Federal Judicial Center’s Pocket Guide on Compensatory Damages Issues in Patent Litigation notes, “[a]ctual profits are like evidence of post-negotiation license agreements, in that the relevance of the infringer’s actual profits depends on whether the circumstances under which those profits were made were comparable to what the negotiating party would have anticipated or expected.”⁶² It further notes, “[t]hat an infringer actually made unexpectedly low profits, or even lost money, from its infringing use may have little or no relevance, and a reasonable royalty may exceed the infringer’s actual profit.”⁶³ The infringer’s actual profits may not just be a function of the market and the infringer’s cost structure. The infringer may intentionally sell the infringing product at prices lower than what the market can bear to gain market share or achieve some other business objective. For instance, the infringer could decide the infringing product to be its “loss leader” so as to promote its more profitable non-infringing products and services. An infringer, say a telecommunications company, could give away the infringing product for free as a promotion to increase its base of subscribers. In all such instances, the infringer’s actual profits are not probative of the infringer’s anticipated profits.

When the patent covers the entire infringing product, the anticipated profits from licensing should be based on the sales revenues from the sale of the infringing product.⁶⁴ However, when it

⁶⁰ A strict implementation of the hypothetical negotiation construct suggests that only ex-ante facts and expectations are allowed for consideration. From this perspective, the patentee should receive damages equal to the amount the parties would have negotiated based on the information that was available at the time of the hypothetical negotiation. However, in actual patent litigation, ex-post facts, such as the actual sales and profits of the infringer, are routinely considered.

⁶¹ *Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc.*, 750 F. 2d 1552, 1568 (Fed. Cir. 1984) (citing *Locklin v. Switzer Brothers, Inc.* 235 F. Supp. 904, 906, 143 USPQ 233, 238 (N.D. Cal. 1964)); 5 CHISUM, PATENTS § 20.03[3][b][iv].

⁶² FEDERAL JUDICIAL CENTER, POCKET GUIDE ON COMPENSATORY DAMAGES ISSUES IN PATENT LITIGATION 24 (2nd ed.).

⁶³ *Id.* at 24.

⁶⁴ Courts have allowed the use of sales revenues of the entire infringing product when: a) the scope of the relevant patent covers the entire infringing product; b) the relevant product is the basis for consumer demand for the infringing product; c) there is market evidence indicating the contribution of the patented technology to the infringing product as a whole; or d) the use of the patent generates substantial indirect/synergistic value. See *Intell. Prop. Owners Ass’n, Apportionment in Determining Reasonable Royalty Damages: Legal Principles, Practical Considerations and*

is a multicomponent product and the hypothetical license pertains to only some of its components, the anticipated profits from licensing should not be based on the sale of the entire product. In such situations, in order to ensure that the reasonable royalty damages reflect the incremental value generated by the patented technology, only the incremental profits associated with the use of the patented technology should be considered as the anticipated profits from licensing.

DISAGREEMENT PROFITS OF THE PATENTEE AND INFRINGER

The disagreement profits of the patentee and infringer are their respective opportunity costs. Opportunity cost is the benefit that could have been derived from the next best opportunity or alternative available. The opportunity cost for the patentee is the amount of profit it could earn by manufacturing the patented product itself or by licensing to a third party, other than the infringer. The resulting disagreement profit for the patentee cannot be higher than the profit it would have obtained licensing the patent to the infringer; otherwise, it would have not entered into negotiations with the infringer. The opportunity cost to the infringer is the amount of profits it would have made by commercializing the next-best alternative technology available. The resulting disagreement profit for the infringer cannot be higher than its share of the anticipated total profits from licensing; otherwise, it would have commercialized the next-best alternative technology. The determination of disagreement profits for the patentee and infringer requires the economic construction of markets in which both the patentee and infringer would have pursued their respective next best alternatives.

It is important to note that the anticipated profits from licensing and the disagreement profits of the patentee and infringer should be measured in today's dollars. The present values are calculated by discounting the expected payoffs from the time the infringement began until the time the infringement ceases or the patent expires, whichever is earlier. The discount rate used to discount the expected payoffs should reflect the investment risk associated with licensing the patented technology and the next best alternatives.⁶⁵

RELATIVE BARGAINING STRENGTHS OF THE PATENTEE AND INFRINGER

There are several approaches to measuring the relative strengths of the patentee and infringer. The easiest approach is to use the disagreement profits of the patentee and infringer. This approach is based on the logic that if each party has an alternative option to the hypothetical negotiation, each party's bargaining strength is determined by the value of its alternative. Under this approach

Countervailing Viewpoints 21 (Dec. 18, 2018). <https://www.ipo.org/wp-content/uploads/2019/01/Damages-committee-white-paper-1.pdf>

⁶⁵ The Capital Asset Pricing Method (CAPM) can be used to derive the appropriate discount rates. The CAPM methodology incorporates the premium that investors demand for assuming the risk associated with a particular investment.

Another approach is to postulate that the relative bargaining strengths are dependent on the relation between the hypothetical number of licensors and licensees in the market.⁶⁶ If the patentee would have had other hypothetical licensees at the time of the hypothetical negotiation, apart from the infringer, then that would increase the bargaining strength of the patentee. Similarly, if the infringer would have had other hypothetical licensors from whom it could have licensed an acceptable substitute, then that would have increased the bargaining strength of the infringer. Under this approach

$$\alpha = 1 - \min \left[1, \frac{\text{Number of licensors}}{\text{Number of licensees}} \right] \dots \quad (24)$$

$$1 - \alpha = \min \left[1, \frac{\text{Number of licensors}}{\text{Number of licensees}} \right] \dots \quad (25)$$

In the above equations, the number of licensors includes the patentee and the number of licensees includes the infringer. When the patentee has the capacity to manufacture the patented product, the number of licensees would include the patentee.

An alternative approach is to qualitatively determine the relative bargaining strengths by examining a list of factors that would take into account the ‘real-world’ bargaining position of the patentee and infringer. The list could include factors such as each party’s need for liquidity, the bargaining skills of the parties involved, the time left before the patent expires, and the economic circumstances, market share, size, and risk preferences of the two parties.

NBS IN THE COURTS – THE FEDERAL CIRCUIT’S RULING IN *VIRNETX*⁶⁷

Prior to the Federal Circuit's ruling in *VirnetX* in 2014, district court opinions regarding the use of NBS or variations of NBS have been mixed. Most courts have excluded its use by damage experts.⁶⁸ A few have allowed its use, especially when used in conjunction with other methods.⁶⁹

In *VirnetX*, the Federal Circuit emphatically rejected the use of NBS by the damage expert to determine reasonable royalty. On August 11, 2010, VernetX Inc. brought an action against Apple Inc. alleging the infringement of its virtual private network (VPN) and its secure domain name service (DNS) patents. The VPN patent describes a method of transparently creating a virtual private network between a client computer and a target computer. The DNS patent describes a method to ensure data integrity and source authentication. Mr. Roy Weinstein, the expert witness for VernetX, estimated the incremental profits that are associated with the use of the patented technology and then used NBS to evenly split the incremental profits between VernetX and Apple. Finally, to determine the reasonable royalty damages, he adjusted the 50/50 split suggested by NBS to 45/55 in favor of Apple to reflect the stronger bargaining power of Apple. Judge Leonard

⁶⁶ Zimmeck, *supra* note 53, at 404-405.

⁶⁷ VirnetX, Inc. v. Cisco Sys., Inc., 767 F.3d 1308 (Fed. Cir. 2014).

⁶⁸ See Robocast, Inc. v. Microsoft Corporation, 21 F. Supp. 3d 320 (D. Del. 2014); Dynetix Design Solutions Inc. v. Synopsys, Inc., No. 11-CV-05973 PSG (N.D. Cal. Feb. 28, 2013); Oracle America, Inc. v. Google Inc., 872 F. Supp. 2d 974 (N.D. Cal. 2012); and Suffolk Technologies LLC v. AOL INC., 910 F. Supp. 2d 850 (E.D. Va. 2012).

⁶⁹ See Mformation Techs., Inc. v. Research in Motion Ltd., 830 F. Supp. 2d 815 (N.D. Cal. 2011); Gen-Probe Inc. v. Becton Dickinson and Co., 899 F. Supp. 2d 971 (S.D. Cal. 2012); and Amakua Development LLC v. Warner, 411 F. Supp. 2d 941 (N.D. Ill. 2006).

Davis of the U.S. District Court for the Eastern District of Texas allowed Weinstein's use of NBS, noting:

Mr. Weinstein adequately supported his alternative damages theory. First, he calculated the contribution of the "Face-Time" feature to Apple's total profits by estimating the price differential between the accused product and the last previous version of the product not capable of supporting the feature. Mr. Weinstein then reduced this revenue by the percentage of the revenue associated with the addition of the "FaceTime" feature. In this analysis, Mr. Weinstein relied on the price of the camera, because the addition of the camera enabled the feature. Additionally, Mr. Weinstein accounted for the 45%-55% profit split in his analysis, explaining that VirnetX would have been in a weaker bargaining position at the time of the negotiation because of its financial situation. Accordingly, Apple would have benefitted from this inequity in bargaining positions, and Mr. Weinstein modified the profit split to reflect this. Contrary to Apple's assertions, VirnetX did provide substantial evidence to supports its alternative damages theory.⁷⁰

Apple appealed the ruling, arguing that the invocation of a 50/50 starting point based on the NBS was akin to the "25 percent rule of thumb" that was rejected by the Federal Circuit in *Uniloc* as being insufficiently grounded in the specific facts of the case. On review the Federal Circuit agreed, ruling:

We agree with the courts that have rejected invocations of the Nash theorem without sufficiently establishing that the premises of the theorem actually apply to the facts of the case at hand. The use here was just such an inappropriate rule of thumb. The Nash theorem arrives at a result that follows from a certain set of premises. It itself asserts nothing about what situations in the real world fit those premises. Anyone seeking to invoke the theorem as applicable to a particular situation must establish that fit because the 50/50 profit split result is proven by the theorem only on those premises. The expert did not do so. This was an essential failing in invoking the Solution. Moreover, we do not believe that the reliability of this methodology is saved by attempts to account for the unique facts of the case in deviating from the 50/50 starting point.⁷¹

While the Federal Circuit rejected the expert's specific application of the NBS in VernetX, it did not reject the use of NBS as an alternative to the hypothetical negotiation. We believe that NBS provides a useful alternative to the hypothetical negotiation using the GP factors construct if the expert addressed the criticisms of NBS made by the Federal Circuit and district courts. The most common criticisms of the NBS are: a) The NBS is a theoretical framework based on certain assumptions that may not hold in the real world and that may not apply to the particulars of the

⁷⁰ VirnetX, Inc. v. Apple, Inc., 925 F. Supp. 2d 816, 839 (E.D. Tex. 2013).

⁷¹ VirnetX, Inc. v. Cisco Sys., Inc., 767 F.3d 1308, 1332 (Fed. Cir. 2014).

case in question, b) The 50/50 split of the surplus suggested by the NBS was as arbitrary as the 25% rule of thumb that was rejected by the Federal Circuit in *Uniloc* in 2011, and c) The NBS is too mathematically complex for the trier of fact to comprehend and apply it to the particulars of the case.⁷²

One of the main criticisms of NBS is that damage experts do not establish that the premises underlying NBS apply to the specific facts of the case. In order to model the bargaining process, it is necessary to make assumptions, as in any economic model, about the bargaining process and the behavior of the parties involved. Many of the assumptions evolve from the notion that individuals are rational economic agents who act in their self-interest and consider options and decisions within logical structures of thought, as opposed to involving emotional, moral, or psychological elements.⁷³ In economics, assuming individuals are rational is an established approach to model and predict human behavior. While it is true that human beings are motivated by cognitive biases, many of which they are not aware of, it is impossible to model irrational human behavior and reach reliable conclusions.⁷⁴ All the parameters required to apply NBS to reasonable royalty determinations – the total profits from licensing, the disagreement profits of the patentee and infringer, and the relative bargaining strengths of the two parties – are calculated using data specific to the patentee and infringer involved in the hypothetical negotiation.

There are several key differences between the 25% rule of thumb and the 50/50 split suggested by NBS. The 25% rule of thumb presumes that a licensee in a hypothetical negotiation would be willing to pay a royalty rate of 25% of the profits from the product that incorporated the patent at issue. However, in *Uniloc USA, Inc. v. Microsoft Corp.*, the Federal Circuit rejected the rule as a “fundamentally flawed tool for determining a baseline royalty rate in a hypothetical negotiation.”⁷⁵ The court reasoned that evidence relying on the 25 percent rule of thumb is thus inadmissible under *Daubert* and the Federal Rules of Evidence because it fails to tie a reasonable royalty base to the facts of the case at issue.⁷⁶ The NBS does not suggest a 50/50 split of the infringer’s profit from the sale of the patented product; instead, it suggests a 50/50 split of the bargaining surplus. The key insight of the NBS is that the values of the alternatives to negotiating for the patentee and infringer determine the surplus, that is, $(\Pi - d_1 - d_2)$, in equation (7). The NBS then allocates this surplus equally between the two parties because in the original NBS proposed by Nash the bargaining strengths and skills of the two parties were assumed to be equal. The unequal bargaining strengths of the two parties can easily be incorporated into the original NBS as shown in equations (20) and (21).

The final criticism of the use of NBS in determining reasonable royalty is that it is too mathematically complex for the trier of fact to understand and apply it to the particulars of the case. Economists use mathematical models as a tool to gain insights into economic issues and

⁷² See Oracle Am., Inc. v. Google Inc., 798 F. Supp. 2d 1111, 1120 (D. Cal. 2011) (“No jury could follow this Greek or testimony trying to explain it. The Nash bargaining solution would invite a miscarriage of justice by cloaking a fifty-percent assumption in an impenetrable facade of mathematics.”).

⁷³ See Milan Zafirovski, *Human rational behavior and economic rationality*, ELECTRONIC J. OF SOC. 7.2 (2003), https://sociology.lightningpath.org/ejs-archives/vol7.2/02_zafirovski.html.

⁷⁴ The burgeoning field of behavioral economics applies insights from the field of psychology and cognitive science to explain decision-making.

⁷⁵ *Uniloc USA Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1315 (Fed.Cir. 2011).

⁷⁶ *Id.*

analyze economic problems. Much of current economic theory is presented in the form of mathematical models. Mathematics allows economists to construct clear, testable propositions about complex economic issues and draw specific conclusions. Although the mathematics involved in deriving the NBS is complex, its conclusions are intuitive and easily understandable; that is, in a bargaining situation the values of the alternatives available to each party will impact the amount each party will accept. The axioms underlying the NBS can be easily explained to the trier of fact in plain English instead of in mathematics. Mathematical economics is routinely used in modern litigation in several practice areas such as antitrust, securities law, contracts, product liability, and intellectual property, such as the determination of lost profits. Just because the derivation of the NBS is mathematically complex, does not mean that its robust results should be excluded.

VIII. CONCLUSION

Providing adequate patent protection to inventors requires that courts provide clear guidance and predictable, reliable assessments of damages. The current, widely used hypothetical negotiation approach using the GP factors is not an intellectually rigorous approach and results in reasonable royalty damages that are neither reliable nor replicable. Furthermore, under this approach, juries are tasked with balancing the many GP factors without any guidance on the relative importance of the factors and how to balance them. The Federal Rules of Evidence 702 and *Daubert* require that damage expert's testimony apply a coherent and intellectually rigorous methodology to the facts and data of the case.

This paper makes the case for allowing the use of NBS in determining reasonable royalty damages. The NBS is well supported by economic theory and is widely used to investigate a wide range of bargaining situations such as labor market negotiations, bandwidth allocation, power distribution, insurance risk redistribution, supplier-buyer negotiation, and intellectual property negotiations. Since NBS was first introduced by John Nash in 1950 using the axiomatic approach, its conclusions have been repeatedly validated using alternate strategic approaches that model the dynamics of the bargaining process. The NBS provides a rigorous scientific alternative to the more subjective GP analysis. The results from the NBS are verifiable, replicable, and reliable. It is the responsibility of the damage experts to adequately explain the theory and results of the NBS to the trier of fact and to correctly estimate the parameters needed for the NBS using the specific facts of the case. For its part, the courts must allow the use of the NBS in determining reasonable royalty in patent infringement cases.



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