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**ARTICLE**

**THE ROLE OF THE TEACHING SCHOLAR IN  
POLITICALLY CHARGED TIMES**

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## INTRODUCTION

“These are the times that try men’s souls.”<sup>1</sup> At Evergreen College there were sit-ins after a white professor refused to stay away from campus on a

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<sup>1</sup> “Men’s” is meant in the purely anthropomorphic sense and inclusive of all LGBT, LGBTQ, LGBTQIA, and any other acronymial/gender groups. Facebook has 51, 71, or 78 categories; depending upon which internet source you consult. The author does not wish to begin a piece on how to avoid offense in covering controversial and political issues with an unwitting offense. The author has built a career on equal respect and treatment for all and does not identify students, colleagues, or members of any deanery by label, gender, race, nationality, choice of cologne, metal body parts, or dietary preferences. There was, however, one time when the author referred to a dean as a “swamp troglodyte” for his tenure decision on a faculty member that was unjust, but neither “troglodyte” nor “swamp troglodyte” is one of Facebook’s categories. Rhiannon Williams, *Facebook’s 71 gender options come to UK users*, TELEGRAPH (June 27, 2014), <http://www.telegraph.co.uk/technology/facebook/10930654/Facebooks-71-gender-options-come-to-UK-users.html>; Debbie Herbenick & Aleta Baldwin, *What Each of Facebook’s 51 New Gender Options Means*, DAILY BEAST (Feb. 15, 2014), <http://www.thedailybeast.com/what-each-of-facebook-51-new-gender-options-means>.

The author would consult Facebook, but has steadfastly refused to get involved there for any reason, social or otherwise. Truly, the author intends no offense, but was simply quoting Thomas Paine. THOMAS PAINE, THE CRISIS 1 (1776). After completing the research for this effort, the author is convinced that her days in the academy are numbered. Perhaps even her days here on earth are numbered. The author intended no religious offense in hinting that there could be an afterlife and apologizes for any suggestion of such to atheists lying in wait. Offense, isms, labels, demands, boycotts, revenge, and a host of other emotional reactions are the order of the day and the fates of too many. Actually, the author cannot speak for Mr. Paine, but freedom-loving founder that he was, she is quite sure that he meant no one escapes being tried soul-wise. On the other hand, if Mr. Paine is discovered to have done something considered offensive in present times but that was quite common in his times and is thereby banished from history books, campuses, and edifices named in his honor, the author is truly sorry to have quoted the scoundrel. Historic figures who have, to date been banished, tarnished, subjected to protests, or otherwise scrubbed from buildings, bridges, schools, and trailer parks include John C. Calhoun, former U.S. vice president whose name was removed from one of Yale’s residential colleges pursuant to the university’s guidelines that established the Committee to Establish Renaming Principles. *Yale to Change Calhoun College’s Name to Honor Grace Murray Hopper*, YALE NEWS (Feb. 11, 2017), <http://news.yale.edu/2017/02/11/yale-change-calhoun-college-s-name-honor-grace-murray-hopper-0>. But Princeton did not yield to demands that Woodrow Wilson, former U.S. president and, one of their own as a former president of Princeton, be scratched from the buildings and programs named after him. Nick Anderson, *Princeton will keep Woodrow Wilson’s name on buildings, but also expand diversity efforts*, WASH. POST (Apr. 4, 2016), [https://www.washingtonpost.com/news/grade-point/wp/2016/04/04/princeton-will-keep-woodrow-wilsons-name-on-buildings-but-it-will-take-steps-to-expand-diversity-and-inclusion/?noredirect=on&utm\\_term=.21c2944634ce](https://www.washingtonpost.com/news/grade-point/wp/2016/04/04/princeton-will-keep-woodrow-wilsons-name-on-buildings-but-it-will-take-steps-to-expand-diversity-and-inclusion/?noredirect=on&utm_term=.21c2944634ce);

day designated as one during which no whites would be permitted on campus. He had this wild idea about the importance of holding classes, regardless of professors' race.<sup>2</sup> The Cal-Berkeley riots in response to the planned appearance of conservative author and commentator Ann Coulter, resulted in property destruction and a stand-down order for police officers during the destruction.<sup>3</sup> Graduates of Bethune-Cookman University turned their backs on their commencement speaker, the Secretary of Education, Betsy DeVos.

Ironically, too many colleges and universities have not been bastions of tolerance and meaningful intellectual exchange since the election of President Trump.<sup>4</sup> Professor Olga Perez Stable Cox of Orange Coast

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see also JOANNE TURNER-SADLER, *AFRICAN-AMERICAN HISTORY: AN INTRODUCTION* 100 (2009) ("President Wilson's racist policies are a matter of record.")

<sup>2</sup> Reports did not reflect whether he was also privileged, but one gathers that the two go hand-in-hand. See Peggy McIntosh, *White Privilege: Unpacking the Invisible Backpack* (1989) (containing the original source for the term, "white privilege."). This document appears to be a pamphlet of sorts (one understands why it could not be called a "white paper"), and is available in condensed form through several university websites. The original working paper was "White Privilege and Male Privilege: A Personal Account of Coming To See Correspondences through Work in Women's Studies" (1988), by Peggy McIntosh; available for \$4.00 from the Wellesley College Center for Research on Women, Wellesley MA 02181.

<sup>3</sup> In fairness to the local police, the chief of police explained in a memo to the city council, "Intervention requires a major commitment of resources, a significant use of force, and carries with it the strong likelihood of harming those who are not committing a crime." Jeremy W. Peters & Thomas Fuller, *Ann Coulter Says She Will Pull Out of Speech*, N.Y. TIMES (Apr. 26, 2017), [https://www.nytimes.com/2017/04/26/us/ann-coulter-berkeley-speech.html?smid=fb-share&mtref=t.co&\\_r=0](https://www.nytimes.com/2017/04/26/us/ann-coulter-berkeley-speech.html?smid=fb-share&mtref=t.co&_r=0).

<sup>4</sup> The trend may have existed earlier, but the focus of this piece is on the post-Trump-election era. The author notes that referring to Donald J. Trump as "President Trump" is controversial because of the belief that he is an illegitimate president, electoral college votes aside. "Donald Trump is not my president" is the name of a Facebook site, with 619,000 "likes." Donald Trump is Not My President (@DJTNotMyPresident), FACEBOOK, <http://www.facebook.com/DJTNotMyPresident/> (last visited Mar. 11, 2018). Filmmaker Spike Lee has said, "He is not my president. I call him Agent Orange." Tufayel Ahemd, *Spike Lee: Donald Trump 'Is Not My President, I Call Him Agent Orange,'* NEWSWEEK (May 22, 2017), <http://www.newsweek.com/spike-lee-donald-trump-not-my-president-dancing-clown-613178>. There is a "Not My President" movement that has included protests across the country. A March 2017 University of Chicago poll found that 57% of young people between the ages of 18 and 30 believe that "Donald Trump is an illegitimate president." Laurie Kellman & Emily Swanson, *Poll: Most Young Americans See Trump as an Illegitimate President*, CHICAGO TRIBUNE (Mar. 18, 2017), <http://www.chicagotribune.com/news/nationworld/politics/ct-poll-young-americans-trump->

College told her human sexuality class during a lengthy discourse on the then President-elect explaining that his election was “an act of terrorism.”<sup>5</sup> Sadly, too many professors, those who have been given the tenure protections and privileges of teaching in exchange for their legally unrestricted rights on inquiry and expression, have been involved in some less-than-stellar moments that have given the public pause, if not outrage, because of their unwillingness to tolerate opposing views.<sup>6</sup>

Perhaps the most disturbing of these political disgruntlement events have come when faculty are at the heart of them or allowed their students to mimic behaviors they have been taught or that are sanctioned by faculty members. Ironically, Mrs. DeVos stated that the purpose of her speech was to foster open discussion. “One of the hallmarks of higher education, and of democracy, is the ability to converse with and learn from those with whom we disagree. And while we will undoubtedly disagree at times, I hope we can do so respectfully. Let’s choose to hear each other out.”<sup>7</sup> Not all

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20170318-story.html. However, 62% do not approve of his job performance, so there is a group of 5% of disapprovers willing to acknowledge his status. *Id.*

<sup>5</sup> The student who recorded Professor Cox’s remarks was suspended. Peter Holley & Avi Selk, *A Professor Called Trump’s Win ‘An Act of Terrorism.’ The student Who Filmed Her Got Suspended*, WASH. POST (Feb. 15, 2017), [https://www.washingtonpost.com/news/grade-point/wp/2017/02/15/a-professor-called-trumps-victory-terrorism-a-student-who-recorded-the-monologue-got-suspended/?tid=a\\_inl&utm\\_term=.eb0146a8d2fc](https://www.washingtonpost.com/news/grade-point/wp/2017/02/15/a-professor-called-trumps-victory-terrorism-a-student-who-recorded-the-monologue-got-suspended/?tid=a_inl&utm_term=.eb0146a8d2fc). In addition, the student was required to apologize to the professor and submit an essay about “why you decided to share the video” and the “ensuing damage to Orange Coast College students, faculty, and staff.” Bradley Zint et al., *OCC Suspends Student Who Recorded Professor’s Anti-Trump Comments; Appeal is Filed*, L.A. TIMES, (Feb. 15, 2017), <http://www.latimes.com/socal/daily-pilot/news/tn-dpt-me-occ-student-20170215-story.html>. However, the Coast Community College District board of trustees revoked the suspension on February 22, 2017, and the student was permitted to attend his classes uninterrupted. The professor did not face any discipline. Priscella Vega, *Suspension to be Lifted for OCC Student who Recorded Professor’s Anti-Trump Comments*, L.A. TIMES, (Feb. 23, 2017), <http://www.latimes.com/socal/daily-pilot/news/tn-dpt-me-0224-occ-suspension-revoked-20170223-story.html>. Professor Cox was named faculty of the year at Orange Coast College in March 2017 by the college’s Professional Development Committee. Debra Heine, *Calif. College Prof Who Called Trump’s Election ‘an Act of Terrorism’ Awarded Faculty of the Year*, PJ MEDIA, (Mar. 30, 2017), <https://pjmedia.com/trending/2017/03/30/calif-college-prof-who-called-trumps-election-an-act-of-terrorism-awarded-faculty-of-the-year/>.

<sup>6</sup> Erica L. Green, *Graduates Meet DeVos With Their Backs Turned*, N.Y. TIMES, A18 (Apr. 11, 2017) (reporting graduates heckling Mrs. DeVos).

<sup>7</sup> *Id.* (speaking at the 2017 commencement exercises for Bethune-Cookman University).

educators share Mrs. DeVos' views on educational issues, but few could disagree with her statement about the role of higher education in society.

Refusing to allow speakers, declining to listen to different views, spouting our opinions in the classroom willy-nilly, and using property destruction and violence are not the marks of educated individuals. Regardless of positions on political and ideological spectrums, graduates should be prepared, with knowledge and insights, for civil discourse. Instruction in the skills of reasoning, the joys of intellectual discovery, and the ability to disagree without anger, name-calling, or physical force fade with each blockade and professorial monologue. Graduates should leave our classrooms as articulate advocates for their own views, capable with their powers of persuasion, their mastery of facts, and their insights on consequences. In short, the role of faculty is one of tapping into students' abilities and assisting in their development.<sup>8</sup>

A faculty member's role should not be one of converting students to a political party, individual view, or movement.<sup>9</sup> Faculty members have been entrusted with the daunting task of training minds to think. When those minds are given but one perspective, the respect and protections afforded tenured faculty are abused.

The last three paragraphs conveyed what was once elementary and

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<sup>8</sup> See John W. Teeter, Jr., *Teaching Tips from the Lotus Sutra*, 77 TUL. L. REV. 443, 444 (2002).

<sup>9</sup> The presentation of issues from different perspectives is declining because campuses lack diversity of thought when it comes to ideology and political views. In a survey of 40 institutions of higher learning involving 7,243 faculty members, 3,623 were registered Democratic and 314 were registered Republican for a ratio of 11.5 to 1. Mitchell Langbert, Anthony J. Quain, & Daniel B. Klein, *Faculty Voter Registration in Economic, History, Journalism, Law, and Psychology*, 13 ECON J. WATCH 422 (2016). Among the social sciences professors (economics, history, journalism, law, and psychology) Democrats outnumber Republican voter registrations by 11.5 to one. *Id.* In history, the figure is 33.5:1. *Id.* In law, the ratio is 8.6:1. *Id.* The authors noted that the number of Democratic registrations has been increasing. *Id.* These figures were subsequently changed in a January 2017 article because of the omission of two Florida universities. Mitchell Langbert, Anthony J. Quain, and Daniel B. Klein, *Faculty Voter Registration: Rectifying the Omission of Two Florida Universities*, 14 ECON J. WATCH 55 (2017). The corrected numbers are a 7,629 sample size from 42 universities with 2,204 not registered, 1,190 not affiliated, 3,857 Democratic and 334 Republican. *Id.* The overall 11.5 :1 ratio from the original study remained the same with economics 4.5:1; history 35:1; journalism 18:1; law 8.6:1; and psychology 17.2:1. *Id.* The highest overall ratios were at Brown (60:1), Boston University (40:1); and Johns Hopkins (35:1). *Id.* The lowest ratios were at Pepperdine (1.2:1), Case Western (3.1:1), and Ohio State (3.2:1). *Id.*

rudimentary thinking on college campuses.<sup>10</sup> However, the nature of society and the exercise of everything from freedom of speech to political power have changed. Issue avoidance, one-sided classroom discussions, speaker shout-downs, and physical violence are becoming the norms that reflect campus learning processes.

### I. AN OVERVIEW OF CAMPUS CONTENTION AND THE MISSING COMPONENTS IN DIVISIVE ISSUES

A simple and recent example provides insights into what happens on campuses when politically or emotionally charged issues come calling in the form of a guest speaker or are presented in the classroom with the idea of fostering discussion.

#### A. Charles Murray and Middlebury College

The hunchback of Notre Dame was treated with more dignity than Charles Murray when he went in March 2017 to speak to the students of Middlebury College in Vermont at the request of a faculty member there who disagreed with Dr. Murray's views but hoped to provide students with a differing view.<sup>11</sup> Dr. Murray, with Richard J. Hernstein, published *The Bell Curve* in 1994, concluding blacks, on average, have lower IQs, and that it was "highly likely" that genes played a role in that difference. The outcry was so great and the banishment so absolute that the Harvard-educated PhD was forced to take shelter at the American Enterprise Institute.<sup>12</sup>

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<sup>10</sup> See Conwell G. Strickland, *Students' Rights and the Teacher's Obligations in the Classroom* (1975) in THOMAS H. BUXTON & KEITH W. PRITCHARD, EXCELLENCE IN UNIVERSITY TEACHING: NEW ESSAYS (1975) (outlining the rights of students on campuses, one of which is the right to express their opinions without fear of retribution, and outlining other rudimentary rights such as having a professor who is prepared to teach the subject matter.).

<sup>11</sup> Quasimodo, the Hunchback, was elected Pope of Fools at a festival for his hideous appearance. The one time he ventured out of the cathedral he is mocked. "He therefore turned to mankind only with regret." VICTOR HUGO, *THE HUNCHBACK OF NOTRE DAME* (1833). Dr. Murray perhaps felt the same, mocked and forced to return from whence he came. Middlebury and Paris in the 1800s, particularly in their reception of those who are different physically or in thought, are eerily similar.

<sup>12</sup> Dr. Murray is labeled a "white nationalist" by the Southern Poverty Law Center. Southern Poverty Law Center, *Extremist Files, Charles Murray*, <https://www.splcenter.org/fighting-hate/extremist-files/individual/charles-murray>. Despite the influence he has had on government policy through earlier works, he flew under the

When Dr. Murray arrived at Middlebury in 2017 to speak, he was met with hundreds of angry and vocal protestors. The college was forced to move his lecture. Unruly students, and what some called “outside agitators,” then surrounded Dr. Murray, and he was forced to leave the campus.<sup>13</sup> The *Washington Post* described this part of his visit as follows:

After swarming Murray, a faculty member and a school official, the protesters shouted profanities, shoved members of the group and then blocked them from getting to a vehicle in a nearby parking lot. Witnesses said the confrontation was aggressive, intimidating and unpredictable and felt like it was edging frighteningly close to outright violence.<sup>14</sup>

Dr. Murray noted that following the release of *The Bell Curve*, he was always met with signs and chants when he spoke on campuses. However, as an illustration of what has happened since 1994, Dr. Murray observed, “I’ve never experienced anything like this.”<sup>15</sup> Indeed, Professor Allison Stranger, a Democrat who disagrees with Dr. Murray’s views and who had issued his invitation to campus, explained her purpose was to promote a “free and fair exchange of ideas.”<sup>16</sup> However, she was hurt in the Murray physical ruckus:

Most of the hatred was focused on Dr. Murray, but when I took his right arm to shield him and to make sure we stayed together, the crowd turned on me. Someone pulled my hair,

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radar for decades until a podcast brought his work back into the public eye. Dr. Murray, a political scientist, wrote *LOSING GROUND: AMERICAN SOCIAL POLICY 1950–1980* while at the Manhattan Institute, a book that influenced reforms in government welfare programs.

<sup>13</sup> Peter Holley, *A Conservative Author Tried to Speak at a Liberal College. He Left Fleeing an Angry Mob*, WASH. POST (Mar. 4, 2017), [https://www.washingtonpost.com/news/grade-point/wp/2017/03/04/a-conservative-author-tried-to-speak-at-a-liberal-college-he-left-fleeing-an-angry-mob/?utm\\_term=.e708c42b384d](https://www.washingtonpost.com/news/grade-point/wp/2017/03/04/a-conservative-author-tried-to-speak-at-a-liberal-college-he-left-fleeing-an-angry-mob/?utm_term=.e708c42b384d).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Allison Stranger, *Understanding the Angry Mob at Middlebury That Gave Me a Concussion*, N.Y. TIMES (Mar. 13, 2017), [https://www.nytimes.com/2017/03/13/opinion/understanding-the-angry-mob-that-gave-me-a-concussion.html?\\_r=0](https://www.nytimes.com/2017/03/13/opinion/understanding-the-angry-mob-that-gave-me-a-concussion.html?_r=0).

while others were shoving me. I feared for my life. Once we got into the car, protesters climbed on it, hitting the windows and rocking the vehicle whenever we stopped to avoid harming them. I am still wearing a neck brace, and spent a week in a dark room to recover from a concussion caused by the whiplash.<sup>17</sup>

The president of Middlebury College, Laurie L. Patton, offers a succinct thesis for this present discussion on how to tackle difficult issues on campuses:

Many of us still are processing what happened inside and outside Wilson Hall and McCullough Student Center last Thursday. The protests and confrontations in response to Charles Murray's appearance laid bare deep divisions in our community.

We are also committed to upholding the right to speech, even unpopular speech, especially in times of division or uncertainty. If colleges and universities cannot serve this role, who can?

We must affirm our shared values and goals and hold each other to them, and we must listen differently, helping others to be fully heard and seen.<sup>18</sup>

The difficulty lies in the nature of topics, the power of emotion, and the absence of facts. Faculty can overcome the last two, and in conquering those, may ease the tension around certain topics. For example, in the Murray incident, those who came to protest called and chanted at Dr. Murray, among other things not printable in a journal for the family hour, "Racist, sexist, anti-gay: Charles Murray, go away!"<sup>19</sup>

However, Dr. Murray supports same-sex marriage and is an anti-Trumper.<sup>20</sup> This is but one example of the absence of facts that dominate

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<sup>17</sup> *Id.*

<sup>18</sup> March 6 Statement from President Laurie Patton, MIDDLEBURY.EDU (Mar. 6, 2017), <http://www.middlebury.edu/newsroom/archive/2017-news/node/545978>.

<sup>19</sup> Stranger, *supra* note 16.

<sup>20</sup> *Id.*

campus eruptions, classes, and events. They are the sort of facts that would find students saying, “Really?”<sup>21</sup> Misinformation breeds emotion and blocks discussion on topics. On the nature of the Murray topic, there is an overarching question to explore, which is: Why should we discuss the Murray conclusions about IQ? Because we do not yet have all the facts: Is IQ purely genetic, or are there environmental factors that change IQ? And if there are such environmental factors, wouldn’t we want to be sure all children benefited from having them? There is also the contra research that claims IQ is all the result of environmental factors. There is additional research that shows changing a child’s environment from “hardscrabble” and poor schools through adoption changes IQ as much as the differences Murray found to exist genetically.<sup>22</sup> With discussion, understanding, and research, the mantras of “this is the research of racists who enjoy spouting hatred” can be set aside in favor of deeper exploration. There are actually researchers raising questions, researchers exploring more deeply, and with enough analysis, researchers could potentially address the social issues that affect us in emotional ways.<sup>23</sup> However, if we dismiss and/or censor Dr. Murray as a racist, we lose that possibility.

### *B. Thinking About the Teaching Tools*

The Middlebury events and underlying emotional issues illustrate the challenges faculty face when they attempt to present both sides to controversial questions, with all their political and emotional baggage. There is little written on how to teach such issues in these controversial times. We have seminal articles on our First Amendment rights and protections as professors.<sup>24</sup> The idea that individual academics possess academic freedom grounded in the First Amendment has been called

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<sup>21</sup> Or “No way!”, “Shut up!”, or if they grew up with parents or grandparents who were children of the 50s and 60s, “Get out of town!” There are other phrases of surprise that would perhaps be uttered in this era, but, again, family-hour constraints prohibit their reproduction, even in a footnote.

<sup>22</sup> John McWhorter, *Stop Obsessing Over Race and IQ*, NAT’L REV., 27-30 (Jul. 10, 2017) (proposing ideas and questions on whether a discussion of IQ and race is worth having).

<sup>23</sup> That quest has begun. See e.g., Jonathan Haidt, *The Righteous Mind* (2013) (arguing that moral judgements rise from gut feelings rather than reason).

<sup>24</sup> See Philip Lee, *A Contract Theory of Academic Freedom*, 59 ST. LOUIS U.L.J. 461 (2016) (providing an overview as well as references to other works).

“canonical.”<sup>25</sup> Of course there are reverential faculty rights and protections, but the issues that remain unaddressed are the ethical and educational responsibilities within those broad legal protections. What is needed is a process and examples for teaching controversial, politically charged issues in courses that focus on law and/or ethics. The seemingly divisive issues that faculty and institutions banish or limit due to their fears of protests or alienation of donors, applicants, and/or alumni, or concerns about safety are avoided, or, presented in a way that bows to the path of least resistance. The effect is lost opportunities in classes and through campus visitors for teaching and the intellectual development of students. Critical thought is impossible if opposing views are prohibited. If those opposing views are nonsense, then fear is silly. If the opposing views have merit, the exercise of debate hones the very skills college was designed to inculcate.

The Murray example highlights the unresolved issue at hand: the role of faculty in presenting, discussing, and debating controversial issues. There is one overarching question for every legal and/or ethical scholar: Is the role of a faculty member to convert students to a singular viewpoint, or, is it to take divisive issues and use them to teach students how to think, analyze, resolve, and, perhaps, become involved with their resolutions and driving change? Is the role of faculty the advancement of knowledge or retention of power?<sup>26</sup> Is the role of faculty to teach students what to think about legal and ethical issues? Or is the role one of teaching students how to think about legal and ethical issues? And, perhaps, to do so without shout-

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<sup>25</sup> *Id.* at 461. Other terms used to describe the unchallenged freedoms and protections include “conventional wisdom” and “constitutional.” Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV., 1323, 1324 (1988). The definitive tome on the history of professorial freedom is RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* (1955). Suffice it to say that the right was codified in this country in 1915 by the American Association of University Professors in its *Declaration of Principles on Academic Freedom and Academic Tenure. Declaration of Principles on Academic Freedom and Academic Tenure*, (1915), <https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf>.

<sup>26</sup> The battle between knowledge and the exercise of power in suppressing debate or alternate viewpoints has percolated into even the basis for research, i.e., the footnotes and citations. Professors Carrie Mott (Rutgers University) and Daniel Cockayne (University of Waterloo) propose that scholars avoid citing “white, male, cisnormative, heterosexual voices” in order to avoid the promotion of “white, supremacist, patriarchal, and heteronormative paradigms.” Carrie Mott & Daniel G. Cockayne, *Citation Matters: Mobilizing the Politics of Citation Toward a Practice of ‘Conscientious Engagement,’* 24 (7) GENDER, PLACE & CULTURE 954-973 (2017).

downs, backs turned, high dudgeon, or violence?

There are teaching tools for controversial topics that are relatively free from the risk of losing one's teaching position. The examples for the tools are covered here through the use of several controversial issues of the Trump era: The Professorial "Monologue"; Journalism Standards in the Trump Era; Cake Bakers and Florists and Same-Sex Marriage; Immigration Processes and The Role of Courts and the Constitution; and Offensive Tradenames.

## II. THE TEACHING METHODOLOGY FOR THE CONTROVERSIAL ISSUES

### A. *Applying the Model: The Professorial "Monologue"*<sup>27</sup>

If the emotion is removed from the Caleb O'Neil vs. Professor Olga Perez Stable Cox's<sup>28</sup> date with media bombardment, there is one heck of an opportunity for instruction on First Amendment protections, academic freedom, due process, and privacy (including the Internet kind). However, what the introduction's examples reveal is that there is a void when it comes to an orderly process for discussing controversial, emotional, and/or political issues. The process consists of these steps:

1. Get the facts, just the facts. Is there sufficient information about the event or issue? Is there more information needed? Is the information available

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<sup>27</sup> The author uses the term only as a shorthand reference, and passes no judgment nor makes any characterization by use of the term. A professorial "monologue" is one in which the professor professes, but no response is permitted or invited. In many media reports, the professorial monologue is referred to as a "rant." The author is not qualified to judge whether something is or is not a "rant," with the exception of her own discourses, and she remains very aware of her own monologue/rant territory. Over the years, said monologues/rants have resulted from the ire generated by a student who was caught lying to get out of taking the mid-term and then asked, "Is this going to affect my grade?" This particular monologue/rant began, "Now, let's see, you lied to get out of taking a mid-term in your ethics class. What do you THINK should happen to your grade?" Note to reader: No response is permitted or welcomed by the student, hence, the true monologue/rant in action. And the monologue went downhill from there including phrases such as "You got some nerve, buddy." For purposes of this discussion, the term monologue is simply used to refer to a soliloquy type of discourse that presents the professor's views on a political and/or social issue that may or may not be related to the subject matter of the course.

<sup>28</sup> See *supra* note 5.

accurate?<sup>29</sup>

2. Frame the issues properly: What are the legal issues?
3. What is the law and what are the views on those legal and ethical issues?
4. Add the ethical issues, properly framed.

1. Step One: Get the facts, just the facts.<sup>30</sup>

Is there sufficient information about the event or issue? Is there more information needed? Is the information available accurate?

In the Charles Murray example, students had little or no information about Dr. Murray. What little information they had was largely incorrect.<sup>31</sup>

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<sup>29</sup> There are additional sub-questions to help with this part of the model. See notes 39-40 *infra* and accompanying text.

<sup>30</sup> In days gone by, the author would have made reference to Sergeant Joe Friday of television's *Dragnet* fame, "Just the facts, ma'am." However, that generational reference will fall on deaf ears, or ears covered with Beats headphones or filled with AirPods. We're talking 1954 here, but thanks to the AirPodded brilliant youths, we have YouTube evidence. YouTube Movies, *Dragnet('54) – Trailer*, YOUTUBE.COM, (Mar. 2, 2013), <https://www.youtube.com/watch?v=AMIZGrgWOO4>.

<sup>31</sup> For example, one of the chants of the students was, "Racist, sexist, anti-gay, Charles Murray go away." Matthew Dickinson, *Murray and Middlebury: What Happened, and What Should Be Done?*, THE MIDDLEBURY BLOG NETWORK, (Mar. 4, 2017), <https://sites.middlebury.edu/presidentialpower/2017/03/04/murray-and-middlebury-what-happened-and-what-should-be-done/>. Their understanding about Dr. Murray's work was that it was "racist pseudoscience and misleading statistics to argue that social inequality is caused by the genetic inferiority of the black and Latino communities, women and the poor." The quote is from the Southern Poverty Law Center and was used as a description in the *New York Times*, which had to issue the following correction in its article with a description of the protests and background on the events:

*Correction: March 11, 2017*

*An article last Saturday about protests at Middlebury College in Vermont over a speech there by Charles Murray, who wrote "The Bell Curve," referred incompletely to the premise of the book. It argues that while economic and social success in America is partly a matter of genetics, there are other factors, including environment, that play a role; it is not genetics alone.*

There were assumptions, generalizations, and inaccuracies, which, when combined with emotions, turned into irrational behavior.<sup>32</sup> Rational discussions and debates require facts as an indispensable first step. Demanding confirmed facts also demands a willingness to admit that we are missing facts. Without a search for facts, emotions rein and discussion succumbs to those emotions or political views. The chants of the protesting students indicated that the students were not familiar with Dr. Murray's work and were not aware of the reviews of his books, the responding research that followed his work, and the possible benefits of his work.<sup>33</sup> The interaction on the issue became one-sided, hostile, and physically dangerous.<sup>34</sup>

One of the ways to take down the temperature on political and emotional issues is to require students to answer a series of questions about the facts related to that issue. Walking through facts is crucial for both training students how to think and analyze and then proceed with discussion. Often, the absence of facts or clarity about the facts is an opportunity to teach a basic principle of debate and productive discussion: facts must precede conclusions, name-calling, and protests.<sup>35</sup>

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Katharine Q. Seelye, *Protestors Disrupt Speech by 'Bell Curve' Author at Vermont College*, N.Y. TIMES (Mar. 3, 2017), <https://www.nytimes.com/2017/03/03/us/middlebury-college-charles-murray-bell-curve-protest.html>.

<sup>32</sup> See notes 13-20 *supra* and accompanying text.

<sup>33</sup> Charles Murray, *Response to Andrew Gelman*, 41 STATISTICS, POLITICS AND POLICY 65 (2013). The body of work on Charles Murray's works is voluminous, but this exchange by Dr. Murray with a statistician is representative. The salient point is that Dr. Murray made a case for his theories, scholars disagreed, and Dr. Murray responded. In the academic world, such a process is at the heart of knowledge progression.

<sup>34</sup> See notes 35-38 *infra* and accompanying text.

<sup>35</sup> Another example (and a non-Trump one, but one that illustrates that emotion trumps, as it were, facts and can quite nearly eliminate all possible discussion) helps to illustrate the criticality of complete and accurate information. The mantra that came from the 2014 Ferguson shooting death of Michael Brown by a Ferguson, Missouri police officer was, "Hands up, Don't Shoot!" Michelle Ye Hee Lee, *'Hands Up, Don't Shoot' Did Not Happen in Ferguson*, WASH. POST (Mar. 19, 2015), [https://www.washingtonpost.com/news/fact-checker/wp/2015/03/19/hands-up-dont-shoot-did-not-happen-in-ferguson/?utm\\_term=.0dd2899d9503](https://www.washingtonpost.com/news/fact-checker/wp/2015/03/19/hands-up-dont-shoot-did-not-happen-in-ferguson/?utm_term=.0dd2899d9503). The conventional wisdom was that Mr. Brown had been shot in the back and was defenseless. *Id.* The emotion held that the shooting was a senseless act by a racist police officer. *Id.* Many in the media and throughout the country (even in the NFL as African-American players took to the field with their hands raised in the air) believed that Michael Brown was a gentle soul who had his hands up surrendering to a police officer when he was shot and killed. *Id.* The story was

Another simple example from the Trump era illustrates how the rush to report as fact information that actually turns out to be false has been a driver of the emotion and divisiveness that surrounds President Trump. Time magazine White House correspondent Zeke J. Miller reported just after the inauguration that President Trump had removed the bust of Martin Luther King from the Oval Office. The story had legs and carried with it commentary about President Trump's "racism." Mr. Miller allowed unconfirmed information about the bust being removed to go out to the White House press pool where the story spread like a wild fire in the summer. As it turned out, reports of the removal of the bust of Dr. King were greatly exaggerated. The bust had never been moved. Mr. Miller's vantage point did not allow him to see it. He says that a door and a Secret Service agent obscured his view.<sup>36</sup> Perhaps the willingness to believe that Mr. Trump would remove the bust contributed to Mr. Miller's willingness to allow unconfirmed content out to the press pool. What we do know is that those who disliked or disapproved of Mr. Trump used the story as fact

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repeated so often that it was accepted as true. However, the Department of Justice, at that time headed by Obama appointee Eric Holder, concluded,

The autopsy results confirm that Wilson did not shoot Brown in the back as he was running away because there were no entrance wounds to Brown's back. The autopsy results alone do not indicate the direction Brown was facing when he received two wounds to his right arm, given the mobility of the arm. However, as detailed later in this report, there are no witness accounts that could be relied upon in a prosecution to prove that Wilson shot at Brown as he was running away. Witnesses who say so cannot be relied upon in a prosecution because they have given accounts that are inconsistent with the physical and forensic evidence or are significantly inconsistent with their own prior statements made throughout the investigation . . . Those witness accounts stating that Brown never moved back toward Wilson could not be relied upon in a prosecution because their accounts cannot be reconciled with the DNA bloodstain evidence and other credible witness accounts.

U.S. DEPT. OF JUSTICE, DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 7 (2015) [hereinafter DOJ REPORT].

<sup>36</sup> Nancy Gibbs, *The Straight Story*, TIME, 5 (Jan. 24, 2017) (providing that to his credit, Mr. Miller offered the following upon learning of his error, "I did all I could to correct the record, and I apologize to my colleagues, the president and anyone misinformed by my mistake.").

and a data point to support their views. Worse, the speed of Twitter, the Internet, and other forms of instant communication made it impossible to take back the initial incorrect story. The era of Mr. Trump has proved Winston Churchill correct, “A lie gets halfway around the world before the truth can put its pants on.”<sup>37</sup> Attached as Appendix A is a True/False quiz administered in a journalism class with the results reflected to show the extent of misconceptions accepted as fact.

However, there is bipartisanship in false reporting on bust removals from the Oval Office. When President Obama took office, it was widely reported, with great indignation, that he had returned a bust of Churchill to the British. Actually, the underlying facts indicated there are two busts of Churchill and one had been returned to the mother country for repair during the Bush administration, and the kindly Brits sent a substitute for use whilst the repairs were ongoing. When the original repaired bust was returned, then-President Obama returned the borrowed bust, as was agreed to during the Bush administration.<sup>38</sup>

When facing a “monologue” scenario, the beginning point is the application of the general facts question with more specifics following by walking through these questions:

- a. Do we know what the professor actually said (or on events, what actually occurred)?
- b. Do we have the complete context for what was said (or done or written)?

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<sup>37</sup> But, wait! The Yale Book of Quotations says differently: “A lie will go round the world while the truth is pulling its boots on.” Prepositional endings aside, Yale attributes the quote to C.H. SPURGEON, *GEMS FROM SPURGEON* (1859). An earlier version of Spurgeon’s line appeared in the *Portland Maine Gazette* on September 5, 1820, “Falsehood will fly from Maine to Georgia, while truth is pulling her boots on.” Then there is the Jonathan Swift version from *The Examiner* on November 9, 2010, “Falsehood flies, and the truth comes limping after it.” This all comes from the Internet, which, ironically, was the source for the removal of the Martin Luther King story and gave the false story its legs. Fred Shapiro, *Quotes Uncovered: How Lies Travel*, *FREAKONOMICS BLOG* (Apr. 7 2011), <http://freakonomics.com/2011/04/07/quotes-uncovered-how-lies-travel/>.

<sup>38</sup> Glenn Kessler, *Here’s the Real Story About the Churchill Bust in the Oval Office*, *WASH. POST* (Jan. 23, 2017), [https://www.washingtonpost.com/news/fact-checker/wp/2017/01/23/heres-the-real-story-about-the-churchill-bust-in-the-oval-office/?utm\\_term=.99929920fac1](https://www.washingtonpost.com/news/fact-checker/wp/2017/01/23/heres-the-real-story-about-the-churchill-bust-in-the-oval-office/?utm_term=.99929920fac1). It is critical to note that it took only 8 years for the full story to be told.

- c. What are the backgrounds and reputations of the individuals involved?<sup>39</sup>
- d. What are their reputations?
- e. What was the connection between the content of the “monologue” and the course material?<sup>40</sup>

Walking through each question allows a review of the facts as well as the challenges and limitations in ferreting out truth. Now the questions can be applied to the “monologue” example, or any other classroom discussion.

- a. Do we know what was actually said or what events occurred?

In monologue situation, a video made by Mr. O’Neil provides the content of Professor Cox’s comments in Mr. O’Neil’s class. In addition to the “act of terrorism” statement, Professor Cox also said that Trump was a “white supremacist” and that Vice President Pence was “one of the most anti-gay people in the country.”<sup>41</sup> The video is available on YouTube, and

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<sup>39</sup> For example, Michael Brown had just robbed a convenience store and had a record. DOJ Report, *supra* note 35 at p. 25-26. Darren Wilson, the officer involved, had been the subject of allegations, but the DOJ Report concluded that they were not credible and could not be used in court. *Id.* The DOJ also could not find evidence to corroborate the allegations. *Id.*

<sup>40</sup> This question is specific to situations such as this in which there is a classroom monologue or speech.

<sup>41</sup> *OCC Student Suspended For Filming Teacher’s Anti-Trump Rant*, COED (Feb. 17, 2017), <http://coed.com/2017/02/17/caleb-oneil-occ-student-anti-trump-video-professor-full-story-details/>. The definition of anti-gay can be very broad. In some cases, the term refers to those who oppose civil rights for gays and lesbians. In other cases, the definition is broader to include talk-show content. For example, the following introduction to an article on civil rights legislation illustrates the wide swing in the definition of anti-gay.

This nationwide anti-gay assault takes many forms—from hate-mongering talk shows, to anti-gay electoral campaigns, to citizen-sponsored initiatives aimed at repealing civil rights protections and domestic partner benefits programs, and ultimately to those measures which are the subject of this conference—measures that would prohibit future passage of antidiscrimination protections specifically for lesbians, gay men, and bisexuals and repeal any such existing protections.

Although I focus these remarks on the latter measures, which have come to be known popularly as “anti-gay initiatives,” we must bear in mind that these

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initiatives represent the tip of the iceberg in terms of the total organized opposition to lesbian and gay civil rights. Other orchestrated efforts, including programs such as “Project Spotlight,” which seeks to make support for civil protections for lesbians and gay men the death knell of any candidate's campaign for elected office,

Suzanne P. Goldberg, *Facing the Challenge: A Lawyer's Response to Anti-Gay Initiatives*, 55 OHIO ST. L. J. 665 (1994).

Professor Cox's statement produces an excellent opportunity for a discussion of such terms, and this statement may be the one of two factors that connect the monologue to the course material and topic. For the importance of this course tie-in, see *infra* notes 131-134 and accompanying text. In addition, there is room for a fact-based discussion on the meaning of anti-gay and why Vice President Pence has earned that label. Vice President Pence was a member of the U.S. House of Representatives and then the governor of Indiana before being tapped for VP nomination. As a member of the House of Representatives, Mr. Pence argued against marriage equality because of its effects on society. He voted against the Employment Non-Discrimination Act, which would have added sexual orientation as a protected class. The statute passed in the Senate, but failed to pass in the House in 2013. He opposed the elimination of the “Don't ask, don't tell” policy in the U.S. military. As governor he refused to abide by the Obama administration's directive on transgender bathrooms. Also, as governor, he supported Indiana's Religious Freedom Restoration Act (RFRA), a law similar to the federal law, which was signed by then-President Clinton. RFRA laws, promulgated in 21 states, do not permit discrimination on the basis of sexual orientation. RFRAs allow business owners to assert their religious freedom when requested to provide goods or services for same-sex weddings. See *infra* notes 207-214 and accompanying text. Most reports on Mr. Pence's support for the law depicted him as supporting a law that permits discrimination on the basis of sexual orientation. Alexandra DeSanctis, *Mike Pence Is Not a Bigot*, NAT'L REV. (Aug. 4, 2016), <http://www.nationalreview.com/article/440691/mike-pence-not-bigoted>. Again, facts are important to set the stage for a debate on RFRAs. All of these topics could have been discussed and debated as part of a class on expectations regarding the new Trump administration. These kinds of details on Mr. Pence's actions, as opposed to labels are critical facts. As this model for discussion proposes, without facts, discussion is reduced to feelings. The type of label is representative of the emotional rhetoric that results in videos, protests, and precludes policy debates. Policy issues such as these would have been an excellent topic for Professor Cox's class, i.e., where will this administration stand on these types of issues? In a law class, the discussion of these issues should focus on current laws, court decisions, possible legislation, and party and voter support. A unilateral label for Mr. Pence, without the details presented here, does not tee up a policy discussion nor does it advance opportunities for discussion and learning. Perhaps most interesting would be a discussion of how Mr. Trump's positions are different from Mr. Pence's. See Will Drabold, *Here's What Mike Pence Said on LGBT Issues Over the Years*, TIME (Jul. 15, 2016), <http://time.com/4406337/mike-pence-gay-rights-lgbt-religious-freedom/> (Providing sourcing on these positions and more background on these men). This piece includes a link to Mr. Trump's positions, which, in the interest of length, will not be reproduced here. However, Mr. Trump's positions, which are different, would have resulted in a fascinating political and policy discussion on human sexuality and rights.

Mr. O’Neil and others students have verified its content.<sup>42</sup> In addition, Professor Cox discussed who was responsible for the election of Mr. Trump, noting:

One of the most frightening things for me, and most people in my life, is that the people committing the assault are among us. It is not some stranger from some other country coming in and attacking our sense of what it means to be an American and the things that we stand for.<sup>43</sup>

In discussing the Cox-O’Neil situation, the when, where, and what are on the recording. Also, Professor Cox did not deny making the statements on the recording. Professor Cox does not have an extensive interview trail; however, she did issue a statement that appeared in the *Orange County Register*:

“I didn’t say anything wrong or do anything wrong. I didn’t say anything that thousands of Americans weren’t feeling or saying, I don’t regret it.”<sup>44</sup>

The following is a list of quotes from the two-minute video that provides the indisputable part of what was said:

- “I’ve always strived to be a tolerant person and I am and I’ve always worked to tolerate people that are different from me and have different views than I have. But I can’t

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There are more details to be found in Chris Walker, *Here Are Some of Mike Pence’s Most Controversial Stances on Gay Rights, Abortion, and Smoking*, BUSINESS INSIDER (Nov. 14, 2016), <http://www.businessinsider.com/mike-pences-most-controversial-stances-on-gay-rights-abortion-and-smoking-2016-11>. Please note the sourcing on this information includes research from a spectrum of writers with differing views.

<sup>42</sup> *OCC Student Suspended*, *supra* note 41. Mr. O’Neil indicated in his appeal of his suspension letter (see *infra* note 45) that the total length of the monologue was 20 minutes, but that he did not turn on his cell phone until the fear of Professor Cox’s views on his performance of the class arose in his mind. Zint et al., *supra* note 5.

<sup>43</sup> Holley and Selk, *supra* note 5.

<sup>44</sup> Roxana Kopetman, *OCC Instructor: No Regrets Calling Trump’s Election an ‘Act of Terrorism,’* Orange County Register (Jan. 16, 2017), <http://www.ocregister.com/2017/01/16/occ-instructor-no-regrets-calling-trumps-election-an-act-of-terrorism/>.

do that now. I can't. It's just not OK with me.”

- “The decision that I've made for myself right now is that I will not tolerate any person in my life that voted for Trump or those [sic] belief systems.”
- “No one that voted for Trump is allowed in my house. [Our house is a] safe place.”
- “Stay away from people that are spouting out their hateful ideas.”
- “We can't stand being in a Mormon house that voted against people I love.”
- “White supremacists have put out a call to their white brothers.”
- [Promoting Trump protest on Friday at 6pm at 77 Fair Dr.] “I will send you an announcement if any of you want to participate.”
- “Unfortunately, the hateful people are out to harm. That is what they do best.”
- “I know you are stuck in homes, you're stuck in families, you're stuck in places of employment where you're surrounded by people who are hateful and prejudiced.”
- “We are the majority and that makes me feel better.”
- “Orange County is one of the most conservative counties in the nation and the fact that it voted Democrat says a lot and it gives me hope for my neighbors and the people living in this area.”
- [It's] “scary’ [living in Orange County because so many people are so] “hateful.”

- “Unfortunately, the only way Trump can win is to bring together a lot of hateful people and he has done that quite well.”
- “The majority of faculty are on your side and we are all going to do the best we can to be of help and support to you.”
- “I made some phone calls today [to faculty and administration] to make sure that they are ready to support you. And they are.”<sup>45</sup>

However, there were three classes that received the monologue, and there are discrepancies about what was said in the classes in which there was no video recording. For example, in another section, one student indicated that Professor Cox asked all Trump supporters to stand and that he felt bullied.<sup>46</sup> Professor Cox has denied that she asked Trump supporters to stand.<sup>47</sup>

Beyond what was actually said, there were the follow-up events that are a critical part of fact gathering because the discussion of the law hinges on actions taken during and following the monologue. On February 9, 2017, Mr. O’Neil was suspended from Orange Coast College. On that same day he had received a letter from Victoria Lugo, the acting dean of students,<sup>48</sup> explaining that, based on a preponderance of the evidence, Mr. O’Neil had violated Coast Community College District Board Policy 5500 Student

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<sup>45</sup> *Re. Notice of Appeal of Suspension/Disciplinary Sanctions*, Letter from William J. Becker Jr., President of Freedom X, to Doctor Vergara, Dean of Orange Coast College 3 (Feb. 16, 2017) (on file with FreedomX.com), [https://gallery.mailchimp.com/0579eca0bf695b09b40266abc/files/75e8d113-7f7b-4368-be2b-43c7c4211ef0/final.notice\\_of\\_appeal.oneill.021417.\\_wjb.pdf](https://gallery.mailchimp.com/0579eca0bf695b09b40266abc/files/75e8d113-7f7b-4368-be2b-43c7c4211ef0/final.notice_of_appeal.oneill.021417._wjb.pdf) [hereinafter “Appeal”].

<sup>46</sup> The student, unaffiliated with the College Republicans, said Professor Cox made the request so that she could “show the rest of the class who to watch out for and protect yourself from.” *Id.*

<sup>47</sup> These types of factual discrepancies are an important part of learning the law. Witnesses do not always recall events identically. In fact, as in this case, two statements from two people who were both present, one of them making (or not making) the alleged statements are 180-degrees apart. The realization that we may never know what happened absent the video is an important part of understanding controversial issues and being more willing to debate rather than simply conclude that one side was right and the other wrong.

<sup>48</sup> Suspension Letter from Orange Coast College to Caleb O’Neill (Feb. 9, 2017), <http://s3.amazonaws.com/campusreform/8790/Page-1WM.jpg>.)

Code of Conduct, which provides:

43. Unauthorized Tape Recording. Tape recording any person on District Property or at any District function without that person's knowledge or consent. This definition shall not apply to recordings conducted in public, in a commonly recognized public forum.

...

46. Unauthorized Use of Electronic Devices. Unauthorized use of an electronic device on District property or at any District function, including but not limited to, classes, lectures, labs, and field trips.<sup>49</sup>

The sanctions imposed by the letter included suspension for the spring, summer, and fall terms (a one-year suspension), a required reentry process, probation for one semester after reentry, submission of a written letter of apology to Professor Cox for violating the terms of her syllabus in her Psychology 165 class (by February 28, 2017), and a three-page double-spaced essay to the dean of students addressing the following questions/issues:

- Why he recorded his professor knowing that such was a violation of the professor's policy as established in the syllabus
- His thoughts and analysis on why he shared the video with others and how he thought it would affect the professor
- His thoughts and analysis on the impact of the video going "viral" on Orange Coast students, faculty, and staff

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<sup>49</sup> Coast Community College District Board Policy, 5500 Student Code of Conduct, Administrative Procedures, 25-26, [http://ccd.edu/boardoftrustees/BoardPolicies/Documents/Student\\_Services/AP\\_5500\\_Student\\_Code\\_of\\_Conduct.pdf](http://ccd.edu/boardoftrustees/BoardPolicies/Documents/Student_Services/AP_5500_Student_Code_of_Conduct.pdf). Following these events, OCC posted notices in its classrooms about the code of conduct rules on recording. Zint et al., *supra* note 5.

- Other choices you could have made in resolving the situation
- How you will prevent this from happening in the future?<sup>50</sup>

Ms. Lugo also noted in her letter that during her meeting with Mr. O’Neil that he expressed his regret about the impact of his actions on individuals and that the experience would cause him, in the future, to reflect on his actions and their consequences.

As noted earlier, Mr. O’Neil retained counsel and appealed the decision.<sup>51</sup> While the appeal was pending the Coast Community College District Board of Trustees ordered OCC to revoke Mr. O’Neil’s suspension.<sup>52</sup>

A glance back through the pages of facts on the O’Neil-Cox scenario is instructive on how much is missing when classroom discussions focus on a few news sources without really mining the depth of information necessary and available for discussing the issues and why they are emotional and politically charged.

b. Do we have the complete context for what was said?<sup>53</sup>

Oddly enough, fear was a motivator on both sides in this situation. Mr. O’Neil felt that his grade was in jeopardy because Professor Cox was aware of his support for Mr. Trump. He was known for wearing pro-Trump t-shirts to class.<sup>54</sup> There are videos of Mr. O’Neil explaining that his appeal of the sanctions originally imposed on him for making the recording was based on his belief that his description of the monologue might not be sufficient evidence to support his concerns about that impact that his support of Trump might have on his grade because of Professor Cox’s

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<sup>50</sup> Suspension letter, *supra* note 48.

<sup>51</sup> The Coast Community College District Board Policy has adopted the process for student appeals, but that process is discussed in the section on the legal issues. Mr. O’Neil was permitted to continue attending his classes during the appeal process. *Id.*

<sup>52</sup> Vega, *supra* note 5.

<sup>53</sup> In some cases, the facts will be the complete context for what was written. See the discussion of the Sarah Palin/N.Y. Times scenario *infra* notes 152-187 and accompanying text.

<sup>54</sup> Vega, *supra* note 5.

strong feelings.<sup>55</sup> We know that Mr. O’Neil was active with the OCC student Republican group.

Because of privacy rights, the level of Mr. O’Neil’s grade at the time of the monologue is unknown, but at least one report stated that he had a 3.8 GPA as well as an “A” in Professor Cox’s class at the time of the recording and that he did actually earn an “A” in the course.<sup>56</sup> Mr. O’Neil has confirmed passing the recording along to others in an attempt to protect what he believed might be prejudice on the part of Professor Cox in determining his grade because of his Trump support and her anti-Trump feelings.<sup>57</sup> The members of the College Republicans to whom Mr. O’Neil gave the recording are responsible for its posting on YouTube.<sup>58</sup>

The context for Professor Cox’s statements is also important. Her remarks reflected her fears and concerns about a Trump presidency. However, her remarks also reflect fears for her students’ well-being. She has also stated through her remarks to the media after the monologue that she only intended to comfort her students, not create political controversy.<sup>59</sup>

c. What are the backgrounds of those involved?

d. What are their reputations?

These questions on background and reputation are a critical part of understanding the barriers to discussion. Reputation, i.e., previously formed opinions about the individuals or groups involved and their conduct, can introduce bias into the collection and evaluation of facts. For example, Professor Cox disputed some reports in which students said that if they supported Mr. Trump that they were asked to stand up for identification purposes, so that those in the class could see who they were. Professor Cox explained, “What I said was, for those of you who are happy that your candidate won, celebrate. Stand up, cheer. Whatever. It was generic. It wasn’t stand up now. It wasn’t that at all. That didn’t happen.”<sup>60</sup> There are

<sup>55</sup> Holley and Selk, *supra* note 5.

<sup>56</sup> Zint et al., *supra* note 5. Mr. O’Neil stated in his appeal that he was concerned that his grade might decline from an existing “A” at the time of the monologue to a “B.” Appeal, *supra* note 45, p. 5.

<sup>57</sup> *Id.* The president of the Orange Coast College Republicans at the time, Joshua Recalde-Martinez, received the video from Mr. O’Neil and posted it online. Appeal, *supra* note 45.

<sup>58</sup> *Id.*

<sup>59</sup> Kopetman, *supra* note 44.

<sup>60</sup> *Id.*

two views on what happened, and both views may be affected by or resulted from the perceptions and prior views of those involved. Because of what was said on tape, it is possible that some students (those who voted for Mr. Trump) felt that they were being asked to self-identify.

In the O’Neil-Cox situation, depending on personal views, Mr. O’Neil’s views on what happened and his background and activities prior to the incident may result in fact-finders discounting his statements or creating certain attributes to his actions. There was dismissiveness to his expression of fears because of a belief that his affiliation was part of the campus Republican group’s efforts to engage in a “gotcha” effort to catch professors on video to expose publicly what they believed to be radicalism and intolerance.<sup>61</sup> Professor Cox has discussed her belief that she was a victim of a nationwide campaign to intimidate liberal professors in order to silence them.<sup>62</sup>

The learning exercise in gathering facts related to reputation is to have students determine whether they have experienced bias in the initial work of ferreting out the facts and how it affected their collection of information or perception of its importance. In emotionally and politically charged situations, bias against one of the parties can result from their political affiliation or past actions. Professor Cox’s reputation as a good teacher as well as her open classroom philosophy may lead some to conclude that she did not intend to make anyone uncomfortable or fearful for their support of President Trump. Because Mr. O’Neil had already experienced backlash for being a Trump supporter, Professor Cox’s remarks may have been especially unnerving.<sup>63</sup> Mr. O’Neil had experienced physical violence by anti-Trump protestors at an Orange County rally. He was known for his outward evidence of his support for Mr. Trump, wearing pro-

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<sup>61</sup> See [Campusreform.org](http://Campusreform.org) (chronicling professorial actions, student protests, speaker demonstrations, and the Caleb-O’Neil events, along with many other similar events from around the country).

<sup>62</sup> Kopetman, *supra* note 44 (describing her view as follows,

She said the videotaping was premeditated and part of a national campaign to intimidate liberal professors. Her name, which became fodder for conservative talk show hosts such as Bill O’Reilly and Tucker Carlson, now appears on a ‘Professor Watchlist’; a project of a conservative group called Turning Point USA to expose college professors who discriminate against conservative students).

<sup>63</sup> Mr. O’Neil said that he felt as if all eyes in the room were on him because “in the past I have worn Trump gear and my signed Trump hat that I had gotten at the Anaheim rally.” Zint, et al., *supra* note 5.

Trump t-shirts and hats to class.<sup>64</sup> He had three Trump bumper stickers on his car and feared that someone might attack him or his car for his public support of Mr. Trump.<sup>65</sup> Both the perspectives and prior conduct of individuals can influence our own perspectives on the importance and relevance of certain facts involved in the situation being examined.

Professor Cox is known as a good teacher, with even Mr. O’Neil noting that he appreciated her class and her willingness to listen to other views.<sup>66</sup> Professor Cox’s syllabus discussed the components of a safe, respectful classroom:

1. Everyone has a right to be who they are. It is not ok to laugh at, to make fun of, or put down anyone. Mutual respect is a fundamental value of this course. . . . Let’s work towards understanding and acceptance of others[.]
2. It’s ok to disagree. It’s ok to express and hear different opinions. Listen and really hear what others say. Try not to judge others unfairly. We all have a right to our opinions.
  - It’s ok for you to have different opinions from professor [sic][.]

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<sup>64</sup> Roxana Kopetman, *OCC Student Suspended for Recording Teacher*, ORANGE COUNTY REGISTER (Feb. 16, 2017), <http://www.ocregister.com/2017/02/16/occ-student-suspended-for-recording-teacher-speaks-out-files-appeal/> [hereinafter “OCC Student Suspended for Recording Teacher”]. At a rally in Costa Mesa in 2016, “protesters cursed at him because he wore a Trump hat and a ‘Hillary for Prison’ T-shirt. One teenage girl socked him in the back of the head. People were getting in my face and calling me a racist.” Roxana Kopetman, *Suspended OCC Student Felt ‘Bullied’, But Says Instructor in Video Doesn’t Deserve Death Threats*, ORANGE COUNTY REGISTER (Feb. 20, 2017), <http://www.ocregister.com/2017/02/20/suspended-occ-student-felt-bullied-but-says-instructor-in-trump-video-doesnt-deserve-death-threats/> [hereinafter “Suspended OCC Student Felt ‘Bullied’”].

<sup>65</sup> Zint, et al., *supra* note 5; Kopetman, *supra* note 64.

<sup>66</sup> Mr. O’Neil said, “I thought Olga was a good teacher.” One student, who felt that Professor Cox should not have spoken as she did, offered this thought on her reputation, “I think Mrs. Cox is a good teacher when teaching the curriculum and I have enjoyed her class.” Roxana Kopetman, *OCC Student Suspended For Recording Teacher Speaks Out, Files Appeal*, ORANGE COUNTY REGISTER (Feb. 16, 2017), <http://www.ocregister.com/2017/02/16/occ-student-suspended-for-recording-teacher-speaks-out-files-appeal/> [hereinafter “OCC Student Suspended for Recording Teacher Speaks Out”].

- Conflicting opinions do not affect your grade[.]<sup>67</sup>

With these facts in place, Professor Cox seems to be an open and tolerant instructor. Yet, bias may emerge from post-incident statements from one of the parties. For example, in an interview with a reporter following the O'Neil events, Professor Cox reflected strong feelings about her positions and actions, "I didn't say anything wrong or do anything wrong. I didn't say anything that thousands of Americans weren't feeling or saying."<sup>68</sup> When Professor Cox was asked if she could understand how some students might feel threatened by her words, she indicated she could not help how others feel.<sup>69</sup> Her statements seem contradictory to her discussion of class rules and atmosphere in her syllabus. Her views on the monologue seem to run contra to her syllabus-expressed goal of breaking down barriers to understanding. The one-sided nature of the monologue seemed at odds with previous in-class experiences by Mr. O'Neill and other students who felt there was no opening for discussion because of the manner of expression Professor Cox used to offer her views.<sup>70</sup>

However, Mr. O'Neil's background and reputation are also critical facts in any discussion of his actions. As noted, Mr. O'Neil is a 3.8 GPA student who is also a member of the varsity rowing team. Mr. O'Neil's post-incident statements reflect a respect for Professor Cox and her class. His activity with the College Republicans has been noted as relevant to his conduct because the head of that campus group posted the video online.<sup>71</sup>

There is a backdrop to political activities on the OCC campus that

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<sup>67</sup> There were millions who felt the same way and so voted. However, there were millions who also supported Mr. Trump. The comment reflects a failure to acknowledge that there are differing views, even about Mr. Trump. Further, Professor Cox's in-class statements and comments in post-event interviews may not have been in compliance with her syllabus when she expressed her political views on November 15, 2016. Mr. O'Neil's appeal of his sanctions indicates that she encouraged her students to participate in an anti-Trump protest and encouraged her students to avoid relationships with Trump supporters, whom she described as "haters." Notice of Appeal of Suspension/Disciplinary Sanctions from Caleb O'Neil to Orange Coast College 3 (Feb. 16, 2017).

<sup>68</sup> Kopetman, *supra* note 44.

<sup>69</sup> *Id.*

<sup>70</sup> Mr. O'Neil and others noted that there was no opportunity given to respond to Professor Cox's views expressed that day. Appeal, *supra* note 45, at 7. It did not seem to them that disagreement was available or possible.

<sup>71</sup> The group explained that the posting occurred only after the administrators at the college did not move as quickly as the group felt was necessary in handling the situation. Kopetman, *supra* note 44.

emerged in Mr. O’Neil’s appeal of his suspension:

For several months prior to this incident, the Republican Club had legitimate concerns regarding limitations on its members' expressive rights on campus. They questioned the constitutionality of the campus “free speech zone” and sought to clarify the rules relating to permissible speech outside of the zone. They worried about and discussed hostility on campus toward Trump supporters. Its members were assaulted by a male Feminist Group member for celebrating the death of Cuban communist dictator Fidel Castro. As a result, the Republican Club members, including Caleb, reasonably believed that political conservative expression was and is under attack at OCC.<sup>72</sup>

Mr. O’Neil had attended a meeting of the College Republicans earlier in the day of Professor Cox’s monologue. At that meeting, two college officials were present and warned the group about harassment of liberal groups on campus. Also at that meeting, members were encouraged to document their experiences because of the group’s fear of harassment.<sup>73</sup> As Mr. O’Neil’s appeal disclosed, the College Republicans had experienced a series of interactions regarding their rights and the likely result was concern among the members regarding their rights at OCC:

For several months prior to this incident, the Republican Club had legitimate concerns regarding limitations on its

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<sup>72</sup> Appeal, *supra* note 45, at 5.

<sup>73</sup> *Id.* The appeal includes the following additional information about the meeting held earlier in the day on November 15, 2016, prior to Mr. O’Neill attending Professor Cox’s class:

The staff members accused them of harassing the Planned Parenthood club and told them not to do it again. The accusation was false. In fact, the College Republicans had already met with administration officials and established their innocence. After the staff members left the room, two of the College Republican members who left the room when the members arrived returned to the room. They advised Caleb and the others that one of the staff administrators had a reputation for targeting conservative students and that they didn't want to be seen out of fear the individual would target them as guilty by association with Republicans. This was on Caleb's mind when he attended the 6:00 p.m. Human Sexuality class.

Appeal, *supra* note 45, at 4.

members' expressive rights on campus. They questioned the constitutionality of the campus "free speech zone" and sought to clarify the rules relating to permissible speech outside of the zone. They worried about and discussed hostility on campus toward Trump supporters. Its members were assaulted by a male Feminist Group member for celebrating the death of Cuban communist dictator Fidel Castro. As a result, the Republican Club members, including Caleb, reasonably believed that political conservative expression was and is under attack at OCC.<sup>74</sup>

Regardless of the intent of OCC administrators, the backdrop provides some context for Mr. O'Neil's decision to record and report the monologue.

e. What was the connection between the content of the "monologue" and the course material?

Beyond the discussion of the legal issues in the "monologue" scenario is whether professors *should* embark upon freelance discussions of political issues that are not directly tied to course material. The students in Professor Cox's class did not sign up for a course on Trump and/or terrorism, as important at those issues may be. They signed up for a psychology course on human sexuality. Indeed, given the Spicoli nature of many OCC students, it would not be surprising to learn that the students signed up precisely because of the course title.<sup>75</sup> However, there could be a connection between Professor Cox's course and Mr. Trump -- the Billy Bush tapes.<sup>76</sup> The response to this question and this part of the detached analysis crosses over into the legal issues and is discussed in addressing the legal issues because, as it turns out, case law on professorial rights distinguishes between monologues on course topics and monologues on topics extraneous to the course. As will be discussed, monologues beyond

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<sup>74</sup> Appeal, *supra* note 45, at 4.

<sup>75</sup> Jeff Spicoli (Sean Penn) was the surfer/pot head in the movie *Fast Times at Ridgemont High* (1982) famous for quotes such as, "All I need are some tasty waves, a cool buzz, and I'm fine," and "People on ludes should not drive." *Fast Times at Ridgemont High - Quotes*, IMDB, <http://www.imdb.com/title/tt0083929/quotes>.

<sup>76</sup> See *infra* notes 116-34 and accompanying text for discussion of this issue.

course scope can present legal issues.<sup>77</sup>

2. Step Two: Frame the issues properly. What are the legal issues?

3. Step Three: What is the law and what are the views on those legal issues?<sup>78</sup>

The critical tool in teaching issues that are politically controversial at their core is rising above the controversy and focusing on the law. Another example from a different era that was equally politically charged and divisive is helpful. Mr. Trump's politically charged presidency is not our first rodeo when it comes to emotion and divisiveness in the public square. The Clinton-Lewinsky events found a country divided, emotions running high, and should have been framed from a constitutional perspective. Likewise, the Cox-O'Neil legal issues have to be framed to focus on the legal issues. Whether we agree with the views and politics of Professor Cox or Mr. O'Neil is not the issue. If the issues are framed around opinions, the discussion will become a brawl between those who favor Trump and those who believe his election was a terrorist attack, which, by definition favors the anti-Trump folks because who does not want to stop terrorism? The incendiary terms of strong opinions restrict the discussion. In fact, personal opinion should be prohibited in the discussion.

In all the "campus craziness"<sup>79</sup> that has sprung up following Mr. Trump's election in November, Jonathan Swift's adage summarizes that when stalemates, banishments, and violence become a substitute for

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<sup>77</sup> See *infra* notes 116-34 and accompanying text for discussion of this issue.

<sup>78</sup> For ease of discussion, the law has been presented along with the framing of the issue. For class purposes, the questions would be listed and students would read course materials and research issues to develop points for discussion of the framed issues.

<sup>79</sup> "Campus Craziness" is a term used generically. See, e.g. *Five years of campus craziness in four jaw-dropping minutes of intensity*, COLLEGE FIX, <https://www.thecollegefix.com/bulletin-board/watch-five-years-campus-craziness-four-jaw-dropping-minutes-intensity/>; *'PC Madness Bracket' ranks campus craziness*, CAMPUS REFORM (Mar. 16, 2017), <https://www.campusreform.org/?ID=8932>; Edmund Kozak, *Campus Craziness Reaches Peak Snowflake*, LIFE GAZETTE (Mar. 9, 2017), <https://www.lifezette.com/polizette/campus-craziness-reaches-peak-snowflake/>. The list is long and distinguished if one just Googles "campus craziness." *Id.* However, it is also the name of a feature on the Fox News website and a segment on Tucker Carlson's show for coverage of events such as the Cox-O'Neil kerfuffle and others described in the introduction. *Campus Craziness*, FOX NEWS INSIDER, <http://insider.foxnews.com/tag/campus-craziness>.

discussion, “Reasoning will never make a Man correct an ill Opinion, which by Reasoning he never acquired,”<sup>80</sup> or the modern English version, “You cannot reason someone out of something he or she was not reasoned into.”<sup>81</sup> If Mr. Swift is correct, there is no hope. However, there is the possibility that reasoning and analysis could change thought processes such as those being suggested here and, if sufficient, trump, as it were, the dialogue-curbing emotion. Directing emotions to a confrontation with unassailable facts can produce an awakening. And there is the possibility that students will not be as easily swayed by emotion in future issues and situations that they encounter. Swift’s thoughts aside, directing students to the legal issues in a dispute is critical so that the classroom remains a bastion of learning. Through this model and the provocative nature of the examples being used, students will be motivated to study applicable laws. The lesson of the application of law over emotions remains a challenge for some sitting judges, let alone students studying the law.

Backing away from personalities to legal issues is a necessary step if the classroom is to remain an environment for study and learning. Courts do not (perhaps should not) base decisions on whether they like the plaintiffs or defendants and their views.<sup>82</sup> Courts should make decisions on the basis of constitutional principles, laws, regulations, and precedent.<sup>83</sup> During the

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<sup>80</sup> JONATHAN SWIFT, A LETTER TO A YOUNG GENTLEMAN, LATELY ENTER’D INTO HOLY ORDER BY A PERSON OF QUALITY 27 (1721).

<sup>81</sup> This and other similar phrases have appeared over the centuries as modified versions of Swift’s original thought. For a full history, see *You Cannot Reason People Out of Something They Were Not Reasoned Into*, QUOTE INVESTIGATOR, <https://quoteinvestigator.com/2015/07/10/reason-out/#note-11618-2>. Verification of facts continues to be important. One can find at least 20 attributions apart from Swift.

<sup>82</sup> An interesting emotional issue to tackle in the classroom would be the lower court decisions on President Trump’s executive order on immigration, followed by the 9-0 U.S. Supreme Court decision that gutted the lower court’s injunctive relief. Having students research just the emotional reactions of the lawyers involved following their lower-court victories would be instructive on detached application of the law. The 9-0 decision of the court, bringing together the blocs of justices who vary significantly on emotional issues is an important way to study reason vs. emotion. *Trump v. International Refugees Assistance Project*, 137 S.Ct. 2080 (2017). For lower court decisions, see 241 F. Supp. 3d 539 (D. Md. 2017); 241 F. Supp. 3d 1119 (D. Haw. 2017); 2017 WL 1167383 (D. Haw. 2017); and 859 F.3d 741 (9th Cir. 2017).

<sup>83</sup> The author cites theory here. In practice, there are a few cases that the author would like to present in class for their consideration of whether courts are indeed making decisions on these bases or whether personality, positions, and views of the parties to a case influence their decisions. See *Hawaii v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017) (determining whether to enjoin the enforcement of the Trump Administration’s Executive Order on

Clinton/Monica Lewinsky days, the focus of the public debate centered on the issues of adultery and the affair between the president and the intern, with two basic schools of thought on the question of whether the then-President's conduct was indeed "nobody's business."<sup>84</sup> A focus on the "nobody's business" theorem yielded binary emotional viewpoints and offered little advancement in learning. An issue framed around opinions on morals yields little learning in the classroom. Sadly, in this issue, emotional and politically charged discussions did not permit the exploration of important legal issues that were underlying the salacious scandal. Discussion of the legal issues made little headway in the classroom, except in the form of opinion generally tied to political affiliation.

Ironically, the affair between Mr. Clinton and Ms. Lewinsky had nothing whatsoever to do with the legal issues that needed to be resolved. The affair was uncovered as a result of a lawsuit filed by a former Arkansas state employee who alleged in her suit that she was sexually harassed by then Governor Clinton.<sup>85</sup> That suit found Mr. Clinton deposed with that

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immigration from certain countries identified by both Obama and Trump's administrations as nations that allowed terrorist activities within their borders). The federal judge resorted to quoting interviews on *Anderson Cooper*, and *Meet the Press*, 360. *Id.* at \*13. It remains unclear why the judge issued the injunction without evidence from Mr. Trump about his intent or the context of his decision. However, the judge concluded, "the Executive Order was issued with a purpose to disfavor a particular religion, in spite of its stated, religiously-neutral purpose." *Id.* at 11. There would be a good legal discussion on everything from evidence to the authority granted to the President by the congress for executive branch control of immigration law enforcement. Immigration and Nationality Act (INA), 8 U.S.C. § 1101 et seq. and § 301 of title 3, United States Code, which provide the executive branch with the authority to protect ". . . the Nation from terrorist activities by foreign nationals admitted to the United States." *Id.* For more thoughts on this issue, see *infra* notes 216-217.

<sup>84</sup> For those of you who were not yet born, were too young to understand, or unconscious during the Clinton presidency, then-President Clinton had an affair with Monica Lewinsky, a White House intern. The affair came to light during a special counsel investigation of Mr. Clinton on various issues, one of which was a lawsuit filed by Paula Jones against Mr. Clinton for sexual harassment. Just having written this description makes the author wish that she had been unconscious during that era.

<sup>85</sup> Since the structured approach requires factual determinations, here are the facts as set forth in the U.S. Supreme Court decision, *Clinton v. Jones*, 520 U.S. 681 (1997): Paula Corbin Jones was an employee of the Arkansas Industrial Development Commission. *Id.* at 684. On the afternoon of May 8, 1991, Ms. Jones was working at official conference held at the Excelsior Hotel in Little Rock, Arkansas. *Id.* at 685. Then-Governor Clinton delivered a speech at the conference. *Id.* Danny Ferguson, part of the governor's security detail, persuaded her to leave her desk and to visit the governor in a business suite at the hotel, where he made "abhorrent" sexual advances that she vehemently rejected. *Id.* She

discovery resulting in the former president making false statements under oath.<sup>86</sup> The underlying legal issues were jurisdictional and constitutional. The historical overarching question these events should have produced for classroom use was: Can you sue a president while he is the president?

This historical example was tailor-made for studying how to proceed with discussion in this politically charged era. Or this discussion was made to use this example because this structured teaching proposal is designed to maintain the focus on facts, laws, and the correct application of the latter to the former in the classroom, despite resistance and attempts to silence. Assuming, *arguendo*, that the entire Clinton/Lewinsky scandal was indeed nobody's business, the underlying legal issues in the situation still remain and can and should be isolated from the venue of personal opinion and feelings venue regarding adultery with an intern and all its salacious accouterment: Can a president be sued civilly while in office for acts a

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said that her superiors at work subsequently dealt with her in a hostile and rude manner, and changed her duties to punish her for rejecting those advances. *Id.* After Mr. Clinton was elected President, Mr. Ferguson defamed Ms. Jones by making a statement to a reporter that implied she had accepted Mr. Clinton's overtures, and various persons authorized to speak for the President publicly branded her a liar by denying that the incident had occurred. *Id.* On May 6, 1994, Ms. Jones filed suit in the United States District Court for the Eastern District of Arkansas by filing a complaint naming Mr. Clinton and Danny Ferguson as defendants. *Id.* at 684. Ms. Jones sought actual damages of \$75,000 and punitive damages of \$100,000. *Clinton v. Jones*, 520 U.S. 681 (1997). *Id.* at 684. The case was eventually settled with Mr. Clinton paying Ms. Jones \$850,000. KEN GORMLEY, *THE DEATH OF AMERICAN VIRTUE* 687 (2010). After paying lawyers and costs, Ms. Jones received \$150,000. *Id.* The bottom line is that had others not brought up the issue and been inaccurate in their descriptions of Ms. Jones and her activities, Ms. Jones would have gone through life living with the harassment.

<sup>86</sup> However, the court's findings were clear on the issue of perjury. In a 32-page memorandum opinion, Judge Susan Webber Wright, the chief judge for the Eastern Federal District in Arkansas concluded that Mr. Clinton, "responded to plaintiff's questions by giving false, misleading and evasive answers that were designed to obstruct the judicial process . . . [concerning] whether he and Ms. [Monica] Lewinsky had ever been alone together and whether he had ever engaged in sexual relations with Ms. Lewinsky." *Jones v. Clinton*, 36 F. Supp. 2d 1118, 1127 (E.D. Ark. 1999). Mr. Clinton took his lumps for the false statements by paying a \$90,000 fine for contempt, but maintained that he did not lie. Memorandum, *Jones v. Clinton*, No. LR-C-94-290 (E.D. Ark.) at 32. His reason for maintaining that he told that truth was that he said that he did not actually have sexual relations with Ms. Lewinsky. *Jones*, 36 F. Supp. 2d at 1130. Mr. Clinton did not include certain forms of sexual activity in his definition of sexual relations. *Id.* Law review articles being of the family-hour genre, no need to spell out the type of relations Mr. Clinton and Ms. Lewinsky engaged in. Apologies for both the prepositional ending and the allusion to some form of sexual activity.

citizen alleges occurred prior to the president becoming president? Can a president have his state bar license suspended by a state court while holding office?<sup>87</sup> Other legal questions that could and should be discussed (within the bounds of course relevancy) include grounds for impeachment, the impeachment process, and the effects of impeachment, all of which became relevant as the facts, discovery, and testimony emerged.<sup>88</sup>

Using the legal framework of contentious, political, and, perhaps, salacious issues, the debate shifts from whether it is “our business” or whether “we are offended” by what someone says. Academic research focuses on defining issues and conducting structured research with conclusions. Those situations or developments that follow original conclusions are revisited to determine whether new fact patterns fit previously applicable analyses. For example, suppose an employee calls in sick. Whether the employee is legally entitled to take a valid sick day depends on the definition of sick under organizational policies and the condition of the employee. Some of the fact gathering could be skewed by circumstances, such as the history of call-ins by the individual and the attitudes and perspectives of managers in the organization who know the employee or are responsible for supervising the employee. But, one overarching question remains: Was this a legitimate use of sick time? The answer to that question will involve a search for facts, reputation, and law. A manager may not be fond of a particular employee, but those feelings are not germane to the resolution of the sick-day issue. Emotion skews facts, how issues are framed, and resolution.

A discussion that shuns political affiliation or motivation and focuses only on carefully defined and generic legal issues is a discussion that teaches. The emotion surrounding the story of the Lewinsky/Clinton affair and the politically charged divisions on that affair take a back seat to the clinical issues raised. The events between Mr. Clinton and Monica Lewinsky happened, now, when and how and what legal issues have resulted?

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<sup>87</sup> The case, its depositions, and allegations, along with the efforts of special prosecutor, Kenneth Starr, unearthed the Lewinsky affair. See *Clinton*, 520 U.S. at 681.

<sup>88</sup> For a summary of the facts and impeachment charges appears in Gemma Mullin, *see Why Was Bill Clinton Impeached and What Was the Monica Lewinsky Sex Scandal?*, THE SUN (June 20, 2017), <https://www.thesun.co.uk/news/3590205/bill-clinton-impeached-monica-lewinsky-sex-scandal-president-trump/>. Also, and referred to as “the definitive account of the most compelling political saga of modern times,” is GORMLEY, *supra* note 85.

The end result of these events, and the underlying Paula Jones lawsuit that brought it all to light, was a U.S. Supreme Court decision in which there were no dissenters that held very simply: (1) The Constitution does not afford the President temporary immunity, in all but the most exceptional circumstances, from civil damages litigation arising out of events that occurred before he took office; (2) The doctrine of separation of powers does not require federal courts to stay all private actions against President until he leaves office; and (3) The District Court abused its discretion in deferring trial until after President left office.<sup>89</sup> That sterile summary of the outcome belies the underlying emotional story and its ferocious political implications. That point is critical for classroom structure in discussing the politically and emotionally charged issues in the news. A focus on these legal issues at the heart of the controversy moves any discussion from opinion and, perhaps monologues, to issues of constitutionality, separation of powers, and citizens' rights.

Which brings us back to the framing of the issues in the Cox-O'Neil incident. In the Cox-O'Neil events, the emotion on one side was Professor Cox's clear view that Mr. Trump's election was a step backwards, a view that easily half of the U.S. population shares. But views on Mr. Trump are not an issue in the monologue situation, except in the context of course relevancy.<sup>90</sup> Perhaps Professor Cox is correct or perhaps she is wrong in her view. The hard truth is that we do not yet know what will happen during a Trump presidency in terms of civil rights, the focus of Professor Cox's remarks. What we can discuss clinically is what Professor Cox is permitted to do, under the law, in her classroom in expressing her views about President Trump.

The emotion on the other side centered on Mr. O'Neil's feeling that he would suffer in his grade in Professor Stable's class because she was aware that he was and is a Trump supporter. He was concerned that he might experience some retaliation because of the emotion with which Professor Cox spoke coupled with her awareness that he was a Trump supporter. Perhaps Professor Cox would have retaliated against Mr. O'Neill for his pro-Trump position. But, again, we do not know because the grading sequence was interrupted by the public exposure of Professor's Cox's reaction to the Trump victory. But, we can discuss Mr. O'Neil's rights vis-

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<sup>89</sup> See *Clinton*, 520 U.S. at 681.

<sup>90</sup> Even in resolution of that issue, feelings about Mr. Trump are irrelevant. The discussion could be in favor of Mr. Trump or against Mr. Trump – the issue is any discussion of the Trump election in a human sexuality class.

à-vis Professor Cox's monologue.

Framing the discussion from what each side fears (the professor fearing Trump and the student fearing the professor because of Trump) introduces emotion and opinion. Framing the discussion as an exercise in studying law, following the search for facts, and in a manner relevant to the course material is the goal. What are the rights of a professor to voice political opinions that are not related to the course content? What are the rights of the students in a class in which they are exposed to one political view that is not relevant to course material?

To accomplish the shift from emotion and politics in the controversial Caleb/O'Neil scenario, frame the issues narrowly, keeping in mind the subject areas of the course being taught:<sup>91</sup>

- a. Does a student have the right to record (without permission) instructor lectures and statements?
- b. Does a student have the right to register complaints about professorial statements and conduct in the classroom?
- c. Does a college professor have the right to express personal and political views in the classroom? i.e., the Parameters of Academic Freedom
- d. Did the imposition of penalties on the student comply with constitutional standards of due process?
  - a. Does a student have the right to record (without permission) instructor lectures and statements?

The discussion of the facts for the O'Neil/Cox scenario provided the pertinent OCC rules. Those rules are clear in their prohibition of recording of lectures and discussions without advance permission.<sup>92</sup> However, the purposes of enforcement standards for the rules do present legal issues.

Mr. O'Neil's counsel raised several legal issues related to the rule in Mr. O'Neil's appeal. One issue was the intent of the prohibition, which was the first issue Mr. O'Neil's lawyer raised. If, he noted, the rules against

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<sup>91</sup> An example that involves another course area beyond just the legal and ethical issues appears *infra* in note 132 and accompanying text.

<sup>92</sup> See *supra* note 49 and accompanying text.

recording were promulgated to protect professors' intellectual property rights, then it may have been overbroad in its scope with the use of "any person."<sup>93</sup> The appeal also noted that the rule, if it was intended to protect the privacy of professors, would be inapplicable in this situation because Professor Cox went public with her views through the monologue. A third reason for the recording prohibition, particularly in a human sexuality class, would be the sensitive nature of the subject matter and the need for protection of the privacy of students who participate in discussions. That purpose also would not have been violated here because of the content of the monologue being limited to political issues. Mr. O'Neil explained his reasons for recording at least a portion of the monologue. He believed that if he had a complaint based on his notes or recollection, he believed that administrators would not have believed him, "Video evidence is better evidence."<sup>94</sup>

The appeal also noted that students routinely recorded the Cox class and others on campus without prior consent with no resulting sanctions. If the rule was valid, for whatever purpose, the standards for enforcement appeared to be lax, something that Mr. O'Neil raised as an OCC policy of selective enforcement. Unfortunately, the process followed in imposing the original sanctions was not documented through recording of proceedings or findings of fact, so the issues raised in Mr. O'Neil's appeal were not addressed.<sup>95</sup> The consistency of enforcement was not something that was addressed in Mr. O'Neil's administrative due process.

In addition, Mr. O'Neil's appeal raised the issue of his having no direct knowledge of the specifics about the recording rule. However, the sanctions letter states that the "no recording" rule was included in Professor Cox's syllabus.<sup>96</sup> there was at least constructive notice of the rule. All OCC students are required to acknowledge their acceptance of the OCC code of conduct, and the prohibition against recording is included there. Further, the code is readily available online, both to the public and to authorized users of proprietary and confidential locations for faculty, staff, and

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<sup>93</sup> Appeal, *supra* note 45, at 2.

<sup>94</sup> Zint, et al., *supra* note 5.

<sup>95</sup> The issues of the nature of the administrative due process are addressed *infra* at notes 136-147 and accompanying text.

<sup>96</sup> Suspension Letter, *supra* note 8. However, there was no listing of findings of fact in the letter – only a statement that the recording prohibition was included in the syllabus. No copy of the syllabus for purposes of verification could be found. Mr. O'Neil's appeal did not mention that the "no recording" rule was in the syllabus.

students.

Contextually speaking, Mr. O’Neil had never recorded Professor Cox’s lectures prior to the monologue nor did he do so following the sanctions and appeal.<sup>97</sup> A discussion issue that accompanies that pattern and practice evidence is whether OCC would recognize an exception to the recording rule in the event of a student’s perceived need for documentation of professorial classroom behavior. In other words, should such recording be permitted to void a “He said, she said” scenario. The question of a public policy, or, perhaps in this case, public safety exception to the rules in the code of conduct is an important one to discuss in relation to these events.

However, the post-event conduct of OCC is revealing about the no-taping rule. As Mr. O’Neil’s appeal notes, following the monologue events, OCC did place posters in the classrooms on campus that emphasized the recording rules and the need for prior consent.<sup>98</sup> OCC’s subsequent correction and public posting could be indicative of the level of awareness - that students were not following or did not know the code provisions.

b. Does a student have the right to register complaints about professorial statements and conduct in the classroom?

OCC does have a generic complaint process for students that provides as follows:

*Service Complaint*

*Orange Coast College and its employees make every effort to serve students and non-students courteously and efficiently, including acting in accordance with college policies and state and federal laws. Individuals dissatisfied with a campus policy or the conduct of a college employee can bring a complaint, a written or verbal notice of dissatisfaction, to the attention of the appropriate faculty, staff, or administrator at any time. If a problem is identified, applicable remedies will be put in place as soon as possible. Before filing a complaint, individuals should make every effort to resolve their dissatisfaction informally with the college personnel immediately involved. If addressing an issue informally does*

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<sup>97</sup> Appeal, *supra* note 45, at 7.

<sup>98</sup> *Id.*

*not lead to satisfactory resolution, the individual may register a complaint with the appropriate supervisor or administrator. If, after contacting the appropriate supervisor or administrator, you are not satisfied with the outcome you may contact that person's supervisor/administrator. Service complaints escalating to this level should be submitted in writing so that the appropriate administrator can investigate your complaint and respond.*<sup>99</sup>

The process outlined consists of the following steps:

1. The complaint can be written or verbal.
2. Preliminarily to the formal complaint process, those involved should “make every effort to resolve the issue informally with the college personnel involved.”
3. If the issue is not resolved, then the individual should “register” a complaint with the appropriate supervisor or administrator.
4. If the issue is still not resolved, the individual should go to the next level of supervision or administration – this is the level when a written statement is required.

The detail provided in the OCC process for registering complaints is indicative of a willingness to listen to faculty, staff, and student concerns. The process is step-by-step and provides individuals with options and a means for taking the issue “up the chain” if resolution is not obtained or satisfactory.

In addition to a general complaint form provided under the service complaint policy, there is a separate complaint process and form for complaints about discrimination and harassment. It is not clear that the formal written complaint report was filed under this section or the general complaint form. However, processes existed for students to register complaints and concerns.

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<sup>99</sup> This policy can be found on the OCC website. *Complaint Process*, ORANGE COAST COLLEGE, [http://www.orangecoastcollege.edu/student\\_services/Pages/Complaint-Process.aspx](http://www.orangecoastcollege.edu/student_services/Pages/Complaint-Process.aspx). The link to the complaint form appears with the policy.

Press reports are incomplete, but offer no indication that Mr. O’Neil followed this process formally from the inception. He did not talk with Professor Cox first, as the process suggests. The issue was presented first to the leadership of the College Republicans. Following that group’s involvement, attorney Shawn Steel arranged a meeting with OCC President Harkins. Mr. O’Neil’s appeal indicates that President Harkins said that he would talk with Professor Cox, but that it was her right to express her opinion.<sup>100</sup> The students requested that Professor Cox apologize for using her classroom “as a bully pulpit.”<sup>101</sup> The press reports do indicate that the video was taken to “administrators,” but that no one responded. After the administrative failure to respond, other students, not Mr. O’Neil, posted the video online.<sup>102</sup>

c. Does a college professor have the right to express personal and political views in the classroom?: The Parameters of Academic Freedom

(1) Campus Policies and State Laws

A starting point in the discussion of professorial expressions of personal and political views is whether OCC had any policies on such views and their expression in the classroom. There are OCC policies that relate to political issues, but they are narrow and cover the use of OCC funds, property, and resources for political purposes. The Community College District Board of Trustees (the governing body for OCC) had adopted BP 7370, entitled “Political Activity,” which provides as follows:

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<sup>100</sup> Appeal, *supra* note 45, at 8. The appeal refers to President Harkin, but press accounts refer to President Harkins. OCC Student Suspended for Recording Teacher Speaks Out, *supra* note 66. The OCC website refers to him as Dennis Harkins. There is a matter of plural vs. singular. Being a stickler for facts is at the heart of keeping class discussions under control. This example provides ample warning: Do your homework before discussing politically and emotionally charged scenarios.

<sup>101</sup> Roxana Kopetman, *OCC Student Suspended After Filming Teacher Saying Trump’s Election Was ‘An Act of Terrorism,’* ORANGE COUNTY REGISTER (Feb. 15, 2017), <https://www.ocregister.com/2017/02/15/occ-student-suspended-after-filming-teacher-saying-trumps-election-was-an-act-of-terrorism/> [hereinafter “An Act of Terrorism”].

<sup>102</sup> Kopetman, “No Regrets,” *supra* note 44. The timeline of the report and waiting time are not available. Joshua Recalde-Martinez (president of the Orange Coast College republicans) indicated in one press report that he posted the video online. Zint, et al., *supra* note 5.

Employees shall not use District funds, services, supplies, or equipment to urge the passage or defeat of any ballot measure or candidate, including, but not limited to, any candidate for election to the Board of Trustees. This policy prohibits political activity during an employee's working hours, but shall not be construed to prohibit an employee from urging the support or defeat of a ballot measure or candidate during nonworking time.<sup>103</sup>

The question left open by the policy is: What constitutes political activity that would violate the OCC policy? A review of the state enabling statute is helpful in determining what types of professorial activity would be covered. The state statutory authority for the Board Policy is based on a statute titled "Use of District Property," and prohibits the use of "community college district funds, services, supplies, or equipment shall be used for the purpose of urging the support or defeat of any ballot measure or candidate, including, but not limited to, any candidate for election to the governing board of the district."<sup>104</sup> However, the statute has a second part that outlines activities that are not prohibited related to bond issues:

- (b) Nothing in this section shall prohibit the use of any of the public resources described in subdivision (a) to provide information to the public about the possible effects of any bond issue or other ballot measure if both of the following conditions are met:

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<sup>103</sup> The policy as it exists today is listed as last amended on December 4, 2013. *Policies and Procedures for Review by All Constituent Groups*, ORANGE COAST COLLEGE, [http://www.orangecoastcollege.edu/about\\_occ/office\\_of\\_the\\_president/policies%20for%20review%20by%20all%20constituent%20groups/forms/allitems.aspx?paged=true&pagedprev=true&p%2525255fsortbehavior=0&p%2525255ffileleafref=bp%207337%20fingerprinting%2Epdf&p%2525255fid=76&pagefirstrow=151&view=%7B53f510b4-b742-496e-8ca9-7ebbbf439320%7D](http://www.orangecoastcollege.edu/about_occ/office_of_the_president/policies%20for%20review%20by%20all%20constituent%20groups/forms/allitems.aspx?paged=true&pagedprev=true&p%2525255fsortbehavior=0&p%2525255ffileleafref=bp%207337%20fingerprinting%2Epdf&p%2525255fid=76&pagefirstrow=151&view=%7B53f510b4-b742-496e-8ca9-7ebbbf439320%7D) (last visited June 13, 2018). However, the minutes of the Board of Trustees indicates that approval of a modification to the policy was made at the Board meeting on February 5, 2014. Board of Trustees Coastal Community College District Regular Meeting (Feb. 5, 2014), <http://www.cccd.edu/boardoftrustees/Lists/Minutes/2-5-2014%20Regular%20Meeting%20Signed%20Minutes.pdf>. The California statutory references for the policy are West's Ann. Cal. Educ. Code § 7054 (2017), West's Ann. Cal. Educ. Code § 7056 (2017); and Government Code Section 8314.

<sup>104</sup> West's Ann. Cal. Educ. Code § 7054 (a).

- (1) The informational activities are otherwise authorized by the Constitution or laws of this state.
- (2) The information provided constitutes a fair and impartial presentation of relevant facts to aid the electorate in reaching an informed judgment regarding the bond issue or ballot measure.<sup>105</sup>

The exemption is interesting in that bond issues are often the lifeblood of public schools and community colleges, but also because of the requirement that any such activity be “fair and impartial.”<sup>106</sup>

There is nothing in either the district or OCC policies or California state statutes that address specifically the actions of Professor Cox, which consisted of the expression of political opinion in the classroom.

## (2) Academic Freedom and Precedent

It is an unassailable proposition that Professor Cox had the right to express her views in her area of expertise in her classroom. Academic freedom is critical to the free and open expression of ideas. The U.S. Supreme Court has been loath to curb the free speech of faculty members.<sup>107</sup> However, the rights and protections are not unlimited, and as one author has noted, most of the lofty rhetoric on absolute freedom of expression for faculty members comes from dissenting opinions of the court rather than actual opinions.<sup>108</sup>

There is indeed a great deal of confused rhetoric bandied about when it comes to professorial speech. To reduce it all to simplest terms for

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<sup>105</sup> West’s Ann. Cal. Educ. Code § 7054 (b).

<sup>106</sup> Perhaps most interesting, perhaps ironic, about the exemption wording is its similarity to the former Fox News motto of “Fair and Balanced.” On occasion, “unafraid” was thrown in there. Its motto now (just recently changed) is “Most Watched, Most Trusted.” “We report, you decide,” was another motto. Michael M. Grynbaum, *Fox News Drops ‘Fair and Balanced’ Motto*, N.Y. TIMES (June 14, 2017), <https://www.nytimes.com/2017/06/14/business/media/fox-news-fair-and-balanced.html>.

<sup>107</sup> William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79, 153-54 (1990).

<sup>108</sup> Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 910 (2006).

purposes of discussion and learning, there is institutional academic freedom and there is individual academic freedom.

a) Institutional Academic Freedom

The courts addressed institutional academic freedom in the McCarthy anti-Communism era.<sup>109</sup> Litigation by faculty members during that period involved tenured professors being dismissed either for their affiliations or for their refusals to testify against colleagues, friends, family, and neighbors.<sup>110</sup> These cases resulted in the protections that public universities (and states) hold in making educational decisions. For example, in *Wieman v. Updegraff*, the court held that a state law that prohibited members of subversive organizations from holding public employment was a violation of the First and Fourteenth (due process) Amendments.<sup>111</sup> Felix Frankfurter's concurring opinion provided the seminal language for professorial speech protections:

To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They

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<sup>109</sup> It is safe to say that the challenges universities face today in terms of political and emotional discussions perhaps do not exceed those that arose during this 1950s period that demanded, among other things, pledges of loyalty from faculty members. CHRISTOPHER J. LUCAS, *AMERICAN HIGHER EDUCATION: A HISTORY* 330 (2d ed. 2006).

<sup>110</sup> ROBERT O'NEIL, *ACADEMIC FREEDOM IN THE WIRED WORLD: POLITICAL EXTREMISM, CORPORATE POWER, AND THE UNIVERSITY* 23 (Harvard University Press, 2008).

<sup>111</sup> 344 U.S. 183, 192 (1952).

must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government.<sup>112</sup>

Frankfurter refined that basic philosophy in *Sweezy v. New Hampshire*.<sup>113</sup> Again, appearing in the concurring opinion, the components of academic freedom for the classroom are that the university has the sole right to determine “who may teach, what may be taught, how it shall be taught and who may be admitted to be taught.”<sup>114</sup> The rights outlined here were related to cases of termination of faculty members. There was no action taken against Professor Cox for her in-class monologue, *ergo*, there is not a question of institutional academic freedom or First Amendment issues. OCC administrators did not ask Professor Cox to change her behavior. Certainly Professor Cox experienced a great deal of backlash and had to stay away from the campus and her home for a period of weeks, but that backlash was not created by her employer.<sup>115</sup>

#### b) Individual Academic Freedom

When the focus shifts to legal rights of professors themselves, and not the rights of their institutions, and with specific reference to what professors say and when and where they say it, the applicable law is more nuanced. There various forms of faculty speech, with varying levels of protection. At the heart of the variations is a location component in individual expression.

##### i. Academic Freedom When Academics Act as Private Citizens

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<sup>112</sup> 344 U.S. 183, 196-197.

<sup>113</sup> 354 U.S. 254, 255-67 (1957).

<sup>114</sup> *Id.* at 263.

<sup>115</sup> Kopetman, *supra* note 44. Professor Cox reported that her home address was published and that she and her partner were considering an alarm system. The two women left town in December and returned as the new semester began in January.

The protection of faculty members as private citizens is the same as any other citizen holds. In *Pickering v. Board of Education*, the U.S. Supreme Court held that public employees hold First Amendment protections when they are speaking about matters of public concern in the public square.<sup>116</sup> However, Professor Cox's monologue does not fall into the U.S. Supreme Court's line of cases that involve faculty when voicing opinions outside the classroom, in public forums, through the media, and protest participation.<sup>117</sup> In that arena, the faculty members have been protected, with their terminations being reversed.

ii. Academic Freedom in  
Classroom Expression

The issue in the Cox-O'Neil situation is one that involves the extent of faculty rights in classroom expression.<sup>118</sup> The courts vary in their decisions on classroom speech, with the issue of course relevance being part of a balancing test applied in the classroom, i.e., the speech must be germane to the course content. For example, the case of *Silva v. University of New Hampshire* provides one court's view.<sup>119</sup> Professor Silva, who taught Communications 212 (Technical Writing), used sexual analogies to teach students how to connect their subjects with themselves. In his first class session, Professor Silva said,

I will put focus in terms of sex, so you can better understand it. Focus is like sex. You seek a target. You zero in on your subject. You move from side to side. You close in on the subject. You bracket the subject and center on it. Focus connects experience and language. You and the subject become one.<sup>120</sup>

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<sup>116</sup> 391 U.S. 563, 565 (1968).

<sup>117</sup> *Id.*

<sup>118</sup> The issue of political speech by faculty members in everything from op-ed articles to participation in protests is an important one and could be added to the discussion of the Cox-O'Neil case discussion. For information on those rights, see Lee, *supra* note 24, at 470-471.

<sup>119</sup> 888 F. Supp. 293 (D.N.H. 1994).

<sup>120</sup> *Id.* at 298-299. Interestingly, the student complaints made in this case were based on the university's policy on sexual harassment, which included prohibition of sexually suggestive objects or pictures in the workplace, sexually degrading words to describe a person, and derogatory or sexually explicit statements about an actual or supposed sexual

The court gave this additional factual example, direct from Professor Silva's complaint in his suit against the university:

I used Little Egypt's definition of belly dancing to illustrate how a good definition combines a general classification (belly dancing) with concrete specifics in a metaphor (like jello [sic] shimmying on a plate) to bring home clearly the meaning to one who wishes to learn this form of ethnic dancing. Specifically, Silva stated to his class, "Belly dancing is like jello [sic] on a plate with a vibrator under the plate." Silva explains, I used the definition to catch the attention of my class to gain their attention when they did not comprehend the explanation . . .

Little Egypt's definition of belly dancing is classic in its use of concrete differentia and simple metaphor, i.e. the trembling jello [sic] equates to the essential movements necessary to the dance. It is unlike the dance but also its very essence.<sup>121</sup>

The court held that Professor Silva's statements were not "upon matters of personal interest," but, rather were made for the "legitimate pedagogical purpose of conveying certain principles related to his course."<sup>122</sup>

Precedent puts the discussion of academic expression in the classroom in the realm of this question: What is personal interest vs. what is pedagogy or course-topical? Are faculty members permitted to expound on current political events in their courses? Or, are faculty First Amendment protections limited to subject area? Are there limits to what faculty members can and cannot say in the classroom?

But teaching *stare decisis* requires a look at the contrasting or factually different cases in order to determine Professor Cox's rights. In *Martin v. Parrish*, J.D. Martin, an economics professor was discharged

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relationship. *Id.* Despite the prohibitions, the court went with the First Amendment protections for the professor.

<sup>121</sup> *Id.* at 299.

<sup>122</sup> *Id.* at 316.

based on the language he used in his course.<sup>123</sup> He filed suit in federal court against Midland College for violation of his First Amendment rights.

Professor Martin's speech controversy centered on his use of profanity. Following a formal student complaint, the dean and vice president disciplined Professor Martin in 1983 for his use of profane language, including "hell," "damn," and "bullshit" in class.<sup>124</sup> Professor Martin was warned orally and in writing that if his use of profanity in the classroom continued, that disciplinary action would result with possible suspension, termination or both. Professor Martin continued to curse in class, using words including "bullshit," "hell," "damn," "God damn," and "sucks."<sup>125</sup> Two students filed formal complaints on June 19, 1984, which included the following examples of statements by Professor Martin, "the attitude of the class sucks," "[the attitude] is a bunch of bullshit," "you may think economics is a bunch of bullshit," and "if you don't like the way I teach this God damn course there is the door."<sup>126</sup> Following the complaint, the dean initiated actions to terminate Professor Martin, and after layers of administrative steps, the college's board of trustees approved his termination.

Professor Martin filed suit on the grounds that his termination violated his First Amendment rights. A jury found in his favor, but the federal district judge issued a judgment *NOV*, and Professor Martin

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<sup>123</sup> 805 F.2d 583 (5th Cir. 1986).

<sup>124</sup> *Id.* at 584. As professors go, this language is mild. *See, e.g.,* *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2001) (finding that a community college English professor's in-class use of the word "fuck" and vulgar colloquialisms for genitalia was not protected under the First Amendment where those words were not germane to the subject matter and contravened college's sexual harassment policy). Family hour, again, being what it is, the words used in this classroom will not be reproduced. And in this case, the court found that there was no pedagogical reason for using the language nor were the sexual jokes related to the course topic (English Language and Literature). Funnily enough, however, Professor Cox could have probably used this material. The author makes no warranty, express or implied, that discussing these cases in class will be certifiable as speech protected by the First Amendment. The author has done enough research on this topic to conclude, "Who knows?" Use these examples at your own peril.

<sup>125</sup> *Id.* at 584. Warning: If this example is used in class, simply use the case so that following the teaching suggestions in this article does not result in your suspension or termination or both. Cultural update: From what my children share with me and students report about their other professors, these fightin' words (or at least litigatin' words) in 1984 have lost some of their profanity luster.

<sup>126</sup> *Id.* at 584. As a caring professor, this statement even *sans* profanity is an appalling reflection of what dedicated professors do NOT do in the classroom.

appealed. On appeal, the appellate court affirmed as it provided a clear statement on the content of faculty speech and the extent of the First Amendment protection. The court discussed a particular sensitivity to the fact that students in the classroom are a captive audience. Context, as noted in this model for classroom discussions, is critical.

[W]e hold that the students in Martin's classroom, who paid to be taught and not vilified in indecent terms, are subject to the holding of *Pacifica*,<sup>127</sup> which, like *Cohen*,<sup>128</sup> recognizes that surroundings and context are essential, case-by-case determinants of the constitutional protection accorded to indecent language. Martin's language is unprotected under the reasoning of these cases because, taken in context, it constituted a deliberate, superfluous attack on a "captive audience" with no academic purpose or justification.

The court noted that the educational setting is surely the one place in which there should be shelter from the salty language of offense:

Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavors the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanction.<sup>129</sup>

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<sup>127</sup> *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), which is the George Carlin case (the 7 dirty words case) in which the Supreme Court upheld the authority of the federal agency to prohibit Mr. Carlin's use of the 7 dirty words on the airways (television and radio).

<sup>128</sup> *Cohen v. California*, 403 U.S. 15 (1971), which did not curb profanity in a public park. *Cohen* and *Pacifica* are the bookmarks on profanity, and the distinctions are context and setting.

<sup>129</sup> *Martin*, 805 F.2d at 585 (quoting *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986)). There are other cases involving professorial language that would raise a few eyebrows even when used in this context for teaching the principles of academic freedom. The author suspects that undergraduates in particular would enjoy the exercise far too much, so reliance on the milder *Martin* case may be discretion as the better part of valor writ large. See, e.g., *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2001). In that case, the court found that the profanity used in the classroom was not related to the course material

Professor Cox's syllabus describes the purpose and scope of her course in her syllabus:

It is a scientific analysis of human sexual behavior from the psychological, sociological and physiological points of view. It is designed to provide the academic and theoretical basis for the entire field [sic] of human sexuality. This class will help you to learn more about sexual behavior and sexual health.<sup>130</sup>

For example, Professor Cox could have used her knowledge and course content to focus on the Billy Bush videotapes or the allegations of Trump harassment. Her course on human sexuality would seem to be a forum for using a current event that involves "locker room banter" among

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(freshman English) and that discipline for the professor was appropriate. However, a memo of apology that the professor had written ("Yes, Virginia, Is a Sanity Clause" was its title and, although profane, was quite a well done parody) did address a matter of public concern (his right to use those words in the classroom), and, as such, was protected speech. A usable quote from that case regarding the professor's sexually explicit profanity should suffice:

Speech that rises to the level of harassment—whether based on sex, race, ethnicity, or other invidious premise—and which creates a hostile learning environment that ultimately thwarts the academic process, is speech that a learning institution has a strong interest in preventing. The line drawn as to whether a professor's speech rises to this level is to be decided on a case by case basis, and in the instant case Plaintiff is not challenging the constitutionality of the College's sexual harassment policy. Our task today is to balance the parties' respective interests under the facts of this case and, in doing so, we believe that the College's interest in preserving a learning environment free of sexual harassment, among others, outweighs Plaintiff's claimed free speech and academic freedom interests. As we acknowledged at the outset of this opinion, although this balance is a delicate one, we believe that the College's interests prevail under the facts and circumstances presented here. *Bonnell*, 241 F.3d at 824.

<sup>130</sup> Appeal, *supra* note 45, at 2. *Re. Notice of Appeal of Suspension/Disciplinary Sanctions*, Letter from William J. Becker Jr., President of Freedom X, to Doctor Vergara, Dean of Orange Coast College 3 (Feb. 16, 2017) (on file with FreedomX.com), [https://gallery.mailchimp.com/0579eca0bf695b09b40266abc/files/75e8d113-7f7b-4368-be2b-43c7c4211ef0/final.notice\\_of\\_appeal.oneill.021417.\\_wjb.pdf](https://gallery.mailchimp.com/0579eca0bf695b09b40266abc/files/75e8d113-7f7b-4368-be2b-43c7c4211ef0/final.notice_of_appeal.oneill.021417._wjb.pdf) [hereinafter "Appeal"].

males or the unwanted advances made by powerful men against women.<sup>131</sup> Whether one supports or disdains Mr. Trump is irrelevant if the focus remains on the research, theory, and history related to such conduct. However, the Cox monologue covered political views and encouraged attendance at a rally, both of which were not related to the subject matter of her course and did not advance the educational goals listed in the Cox course syllabus.<sup>132</sup>

There is an additional component to the wide swath approach in terms of faculty monologues in the classroom. The Ninth Circuit has recognized "the needs of educational institutions to protect their employees and students from potentially harmful conduct."<sup>133</sup> However, the case involved the conduct of a conservative student engaged in confronting professors about their political views and writings, something that was a violation of the campus code of conduct.<sup>134</sup>

d. Did the imposition of penalties on the student comply with constitutional standards of due process?

Suspension and expulsion are property rights that require some form of review that allows the student an opportunity to question, respond, and present evidence.<sup>135</sup> In *Goldberg v. Regents of U. of Cal.*, California upheld

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<sup>131</sup> The term "locker-room banter" emerged during the Billy Bush tape coverage as Mr. Trump's explanation for the language he used in discussing women and sexual activity with Mr. Bush. David A. Fahrenthold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST (Oct. 8, 2016), [https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4\\_story.html?utm\\_term=.eb19f0755853](https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4_story.html?utm_term=.eb19f0755853).

<sup>132</sup> Professor Cox had an ideal opportunity in that semester, during the October Billy Bush incident, to hold a fascinating current events discussion about the language on the tapes, the notion of "locker-room banter," and the issues of sexual harassment, sexual advances, groping, and even the distinctions and similarities between Mr. Clinton's conduct and Mr. Trump's. Those types of discussions involve political figures but can, with the guidance of a scholar, bring course material into the discussion in a way that brings the course material to life. These are the types of discussions classroom scholars should be having when political figures highlight course topics and issues.

<sup>133</sup> *O'Brien v. Welty*, 818 F.3d 920, 930-31 (9th Cir. 2016).

<sup>134</sup> *Id.* at 920. The findings of the court were that the student had violated the code of conduct but also focused on the issue of disciplinary tools being used in retaliation against the student for exercising his First Amendment rights.

<sup>135</sup> The original case that imposed due process requirements, although not necessarily a property right, but a privilege was *Dixon v. Alabama State Board of Education*, 294 F.2d

the right of a university to “formulate and enforce rules of student conduct” that are accepted social norms and necessary to maintain an educational environment.<sup>136</sup>

Apart from the general judicial validation of student disciplinary procedures, California has promulgated regulations for student conduct disciplinary actions in California’s state university system. California regulations authorize universities to discipline students for offenses including violations of codes of conduct, harassment, theft, and threats or harassment.<sup>137</sup> Under California’s Code of Regulations, provisions that apply to all universities in the California system include the authority for the Chancellor of that system to “adopt procedures to ensure students are afforded appropriate notice and an opportunity to be heard before the University imposes any sanction for a violation of the Student Conduct Code.”<sup>138</sup> Although OCC is not governed directly by the regulatory provisions, it and other community colleges in the state follow the standards established in the regulations.

The OCC process begins with an administrator charging a student with violations of the student code of conduct with that administrator then determining (following discussions with the student involved) whether there was a violation and what, if any, sanctions, are necessary. The findings letter issued by OCC administration does not include findings of fact and simply states that there was a violation of the code under a standard of a “preponderance of evidence.”<sup>139</sup> If the student appeals the administratively imposed sanctions, a hearing for presentation of evidence by both the student and the college is then held between 10 and 30 days after the appeal is filed. If the student appeals, any sanctions imposed by the initial administrative letter are suspended. As a result, Mr. O’Neil had no interruptions in his educational experience at OCC during the disciplinary process.

Three other students (those in the College Republicans) were under investigation by OCC officials for posting the video online, something that

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150 (5th Cir. 1961). However, students can establish a property right that necessarily imposes due process standards. *Doe v. Alger*, 175 F. Supp. 2d 646 (W.D. Va. 2016).

<sup>136</sup> 248 Cal.App.2d 867 (Cal. App. 1st Dist. 1967).

<sup>137</sup> See 5 CCR §41301. The regulation grants broad authority and covers any “behavior that is not consistent with the Student Conduct Code.” 5 CCR §41301(b). The regulation provides an extensive list of grounds for discipline for conduct beyond what may or may not be covered in the institutions’ codes of conduct.

<sup>138</sup> 5 CCR §41301(c).

<sup>139</sup> Suspension Letter, *supra* note 48.

OCC officials felt would be a violation of the no-recording rule.<sup>140</sup> These additional proceedings began based on information gathered as a result of the initial complaint against Mr. O’Neil. Colleges and universities can begin investigations based on reports, evidence arising in cases against other students, and external public sources, such as police reports and criminal charges.

For purposes of these types of administrative processes that affect rights, the process followed at OCC is typical of the due process afforded at most colleges and universities. The key is that the student must have the right to be heard before the sanctions take effect.

In Mr. O’Neil’s case, the initial disciplinary letter came as a result of an in-office interview between Mr. O’Neil and Victoria Lugo, the acting disciplinary officer. Ms. Lugo then issued her sanction letter but did not include any findings of fact. Rather, the only statement was that she found “by a preponderance of the evidence,” that Mr. O’Neil had violated the student code of conduct. Mr. O’Neil then appealed. However, the appeal hearing was never held because following a special meeting of the Coast Community College District board of trustees, OCC was directed to revoke Mr. O’Neil’s suspension.<sup>141</sup>

In the case of student appeals at colleges and universities, the kinds of missing elements include the failure to permit the presence of counsel for the student, the right to record the proceedings, the refusal to review proper evidence, and the refusal to make university or college officials available for testimony at the student’s hearing.<sup>142</sup>

One of the additional due process issues raised in student disciplinary proceedings is the type of sanctions imposed for student violations of code standards. In his appeal, Mr. O’Neil raised the issue of the sanctions. Even if all agreed that he had violated the OCC code provisions on recording classes without permission, the additional due process issue of the appropriate level of sanctions remains. Under *Goldberg* standards, the sanctions must be appropriate in light of the student’s conduct, norms of social behavior, and necessary in light of the behavior charged.

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<sup>140</sup> Kopetman, *supra* note 44.

<sup>141</sup> Vega, *supra* note 5.

<sup>142</sup> *O’Brien v. Welty*, 818 F.3d 920 (9th Cir. 2016). In this case, the underlying complaint against the student had been altered to say that the student had acted in a threatening or intimidating way. To prevent that information from emerging at the hearing, the officers involved in the alteration were unavailable for the hearing.

Mr. O’Neil’s appeal raised the due process issue of whether the sanctions imposed were reasonable. Mr. O’Neil argued that the punishment imposed was “substantially disproportionate to any harm caused by the videos.”<sup>143</sup> Mr. O’Neil argued in his appeal that the effects of the two-term suspension were “Draconian.”<sup>144</sup> The result was a one-year interruption of the successful academic progress of a 19-year-old student who did not inflict harm on anyone but was punished for seeking what he felt was necessary protection from the clearly expressed negative views of a professor toward anyone who was a Trump supporter. In addition, the suspension would have meant the loss of Mr. O’Neil’s position on the men’s rowing team. With the loss of practice and competition for one year, he would suffer permanent harm in his competitive sports goals.

In addition, Mr. O’Neil questioned the imposition of additional year of probation as well as the requirements for the essay and letter of apology. Mr. O’Neil argued that the sanctions did not serve the purpose of advancing OCC’s educational goals but, rather, appeared to be retaliatory for the resulting national exposure that came from the public disclosure of Professor Cox’s remarks. The essays, the length suspension, the required probation, and the extent of the loss of academic and competitive positions at OCC should be open to debate on whether they were excessive or retaliatory.<sup>145</sup> In addition, if the sanctions imposed appear to be retaliatory of the students, they are prohibited.<sup>146</sup>

Further, Mr. O’Neil argued that the writing requirements imposed in the sanctions were compelled speech that would violate his constitutional rights.<sup>147</sup>

Although these issues of due process raised here were never part of a process in the O’Neil-Cox incident because of OCC’s withdrawal of the sanctions, their character and extent are excellent discussion points for this emotionally charged case.

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<sup>143</sup> Appeal, *supra* note 45, at 11.

<sup>144</sup> *Id.* at 9.

<sup>145</sup> O’Brien v. Welty, 818 F.3d 920 (9th Cir. 2016).

<sup>146</sup> Otherwise, lawful government action may nonetheless be unlawful if motivated by retaliation for having engaged in activity protected under the First Amendment. *See Id.* at 932.

<sup>147</sup> *See* W. Va. State Bd. of Edu. v. Barnette, 319 U.S. 624 (1943). This is the “salute the flag” case, which held that students could not be forced to participate in the daily pledge of allegiance at a public school. The issue with forced essays and apologies is the same. The First Amendment does not permit government entities to compel speech or a certain type of speech from its citizens.

#### 4. Add the Ethical Issues, Properly Framed

Law classes tend to stop at discussion of legal rights with professors feeling: my classroom, my rights, and I am a god in that room. However, a thoughtful professor, truly dedicated to training student development would also delve into the possible constraints ethical standards could have placed on the parties involved. The structure makes a difference in curbing emotions and keeping the trains on the track. Using the model of ethical theory helps to focus student discussion beyond just, “Well, I think . . . “ or “I feel . . . .”

A good beginning point for an ethical discussion of the O’Neil-Cox scenario is stakeholder analysis because the discussion can center on the simple stakeholder question of who is affected by my actions. However, critical to stakeholder analysis is to frame it from the perspectives of both Professor Cox and Mr. O’Neil.

##### a. Stakeholder Perspective of Professor Cox

Who is affected by Professor Cox’s actions in offering a monologue on the newly elected president? The monologue obviously affected Mr. O’Neil, and the impact on him was carefully documented in the facts and discussion of due process, from the suspension to the media deluge. Professor Cox herself was also affected. She received “hundreds of hateful and threatening messages.”<sup>148</sup> Other faculty members are affected by what happened to Professor Cox. Although she was not disciplined for her monologue, other faculty members could be fearful regarding what they discuss in the classroom because of the possibility of recordings, public exposure, or discipline. In other words, one of the effects could be a chilling effect on classroom discussions. Other students were also affected by a professor using the classroom platform to expound political views. They expressed concern about how they would be perceived because their

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<sup>148</sup> Vega, *supra* note 5. One report described the consequences to her, “After weeks of threatening messages in her inbox and voice mail about the video — “Marxist,” “nutcase,” “vile leftist filth” — she became frightened herself. “Now, at 66, I’m paranoid,” she said in December. “I feel like I’ve been attacked by a mob of people all across the country.” Holley & Selk, *supra* note 5.

college was receiving so much negative attention.<sup>149</sup> OCC was affected because the events attracted national media attention and, depending on the viewpoints of those who heard the reports, increased or lessened the college's reputation in the minds of a broad national audience.<sup>150</sup> In addition to this specific reaction of OCC students, there is a larger national effect that these incidents have on student perceptions about their rights on college campuses. Psychiatrist Alan Stone explained, "There is plenty of plain, old-fashioned nastiness to pollute the learning pool. Many students now perceive their professor as not only authoritarian, but destructively aggressive."<sup>151</sup>

b. Stakeholder Perspective of Mr. O'Neil

Who is affected by Mr. O'Neil's decision to record Professor Cox and file a complaint with the administration? The effects on Mr. O'Neil himself, Professor Cox, other professors, OCC, and other students are those documented in the discussion of stakeholder questions from the perspective of Professor Cox. However, there are some additional effects on these stakeholders that Mr. O'Neil's actions had that are different from those effects of Professor Cox's monologue. As documented in the discussion on due process, the rules on recording in class were brought to the surface and appear to be at a heightened state of enforcement. Without further clarification of the rule, any student who is experiencing a dangerous or threatening situation in a classroom may be hesitant to record the events because of the consequences Mr. O'Neil experienced. Because the suspension and other sanctions were dropped, there was not hearing that might have addressed the issue of exception under the no-recording rule. The question of whether there are any exceptions to the rule remains in limbo, but Mr. O'Neil's experience could have a chilling effect on student's willingness to report faculty conduct that needs to be addressed by administrators.

Additional effects that spring from the actions of both Professor Cox

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<sup>149</sup> One student offered, "I just hope it ends as fast as it can, and that this whole thing can be resolved. I don't want the school to look bad at all. I love the school." Suspended OCC Student Felt 'Bullied', *supra* note 64.

<sup>150</sup> *Id.* Mr. O'Neil's lawyer noted that the suspension of Mr. O'Neil was "an attack by leftists in academia to protect the expressive rights of their radical instructors." Holley & Selk, *supra* note 5.

and Mr. O’Neil is that regulations and changes in the code of conduct could be forthcoming. Faculty could seek greater protections for their classroom freedoms. However, one possible positive effects could be discussions about political views being presented in the classroom. One of the purposes of this article is to encourage the scholar teacher to recognize and re-energize the role of instruction, not indoctrination, in the college classroom. Retooling to teach how to think as opposed to what to think could be a positive impact on professors and those in their classrooms.

*B. Applying the Model: Journalism Standards: Sarah Palin, Shootings, Libel, and the New York Times*

Another scenario with challenging emotional and political backdrop allows a shift in gears from the constitutional rights of professors and their speech in the classroom and students and their due process rights to issues of defamation. Enter Sarah Palin,<sup>152</sup> the shootings of several members of congress, and the *New York Times*.

1. Step One: Get the facts, just the facts.

a. Do we know what was actually said or what events occurred?

On June 14, 2017 Steve Scalise, the majority whip in the U.S. House of Representatives and three others were shot as the Republican baseball team held practice in Alexandria, Virginia for an upcoming annual charity game between congressional Republicans and Democrats.<sup>153</sup> James

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<sup>152</sup> If you can lead a classroom discussion on any issue involving Governor Palin (Alaska) without classroom disruption, you have mastered the teaching model. Since the time Senator John McCain announced that Governor Palin would be his running mate in the 2008 presidential election, she has been a lightning rod figure who has been parodied in *Saturday Night Live*, stalked by reporters, and had her children’s lives chronicled in sources ranging from *Dancing with the Stars* through the *National Enquirer* to the *New York Times*. See e.g., Admin., *Sarah Palin Lover Revealed*, NAT’L ENQUIRER (Sept. 24, 2008), <http://www.nationalenquirer.com/celebrity/sarah-palin-lover-revealed/>; Dahvi Shira, *Mark Ballas: Bristol Palin Wouldn’t ‘Step Out of the Box’ on DWTS*, PEOPLE (Oct. 17, 2012), <http://people.com/tv/dancing-with-the-stars-bristol-palin-mark-ballas-eliminated/>; and Jodi Kantor, et al., *Fusing Politics and Motherhood in a New Way*, N.Y. TIMES (Sept. 7, 2008), <https://www.nytimes.com/2008/09/08/us/politics/08baby.html>.

<sup>153</sup> Michael D. Shear, et al., *Congressman Steve Scalise Gravely Wounded in Alexandria Baseball Field Ambush*, N.Y. TIMES (June 14, 2017), <https://www.nytimes.com/2017/06/14/us/steve-scalise-congress-shot-alexandria->

Hodgkinson, the gunman, had traveled from Belleville, Illinois and had been living in the area, staying in his van. He had come to Washington, DC because he was troubled by the election of President Trump. Before he entered the Eugene Simpson baseball park, he asked Representatives Jeff Duncan and Ron DeSantis, who were leaving the practice at about 7:00 AM, whether those practicing were Republicans or Democrats. When Mr. Duncan responded, “Republicans,” Hodgkinson, who Representative Duncan later identified as the gunman, entered the park and began shooting.<sup>154</sup> Congressman Scalise was critically injured by a bullet that entered through his left hip. Mr. Hodgkinson had been a volunteer for the Bernie Sanders campaign and had several posts about the senator’s run for the Democratic nomination for president.

Mr. Hodgkinson was killed by police in a shoot-out at the baseball field. Police and FBI agents confirmed that they had found a list of six members of congress in his pocket who he had targeted.<sup>155</sup>

On June 15, 2017, the *New York Times* ran an editorial about the shootings.<sup>156</sup> The editorial established this information about the assailant:

*The sniper, James Hodgkinson, who was killed by Capitol Police officers, was surely deranged, and his derangement had found its fuel in politics. Mr. Hodgkinson was a Bernie Sanders supporter and campaign volunteer virulently opposed to President Trump. He posted many anti-Trump messages on social media, including one in March that said, “Time to Destroy Trump & Co.”*<sup>157</sup>

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virginia.html?mcubz=1. The three others who were shot and experienced gunshot wounds were Special Agent Crystal Griner, a U.S. Capitol police officer, Zack Barth, a congressional staffer for Rep. Roger Williams, and Matt Mika, a lobbyist for Tyson Foods and the company’s government relations director. There were also two others who experienced minor injuries. Melissa Chan, *Steve Scalise Was Shot at a Congressional Baseball Practice. Here’s What You Need to Know*, TIME (June 14, 2017), <http://time.com/4817818/steve-scalise-alexandria-shooting/>.

<sup>154</sup> *Id.*

<sup>155</sup> Ben Nuckols, *FBI: Gunman Had List of Six Congress Members on Him During Baseball Shooting*, CHI. TRIB. (June 21, 2017), <http://www.chicagotribune.com/news/nationworld/ct-congressional-baseball-shooting-20170621-story.html>.

<sup>156</sup> The Editorial Board, *America’s Lethal Politics*, N. Y. TIMES A22 (June 14, 2017). Note that the print copy of the editorial must be referenced because the N.Y. Times changed.

<sup>157</sup> *Id.*

However, this part of the editorial was followed by analysis and observation:

*Was this attack evidence of how vicious American politics has become? Probably. In 2011, Jared Lee Loughner opened fire in a supermarket parking lot, grievously wounding Representative Gabby Giffords and killing six people, including a 9-year-old girl, the link to political incitement was clear. Before the shooting, Sarah Palin's political action committee circulated a map of targeted electoral districts that put Ms. Giffords and 19 other Democrats under stylized cross hairs.*

Following factual questions and a protest Governor Palin raised on her Facebook page<sup>158</sup> about things that were presented as fact in the editorial, the *New York Times* issued a correction later in the day on June 15th and revised online the original portion of the editorial that referenced Mrs. Palin to read:

*Was this attack evidence of how vicious American politics has become? Probably. In 2011, Jared Lee Loughner opened fire in a supermarket parking lot, grievously wounding Representative Gabby Giffords and killing six people, including a 9-year-old girl. At the time, we and others were sharply critical of the heated political rhetoric on the right. Before the shooting, Sarah Palin's political action committee circulated a map that showed the targeted electoral districts of Ms. Giffords and 19 other Democrats under stylized cross hairs. But in that case no connection to the shooting was ever established.*<sup>159</sup>

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<sup>158</sup> Governor Palin wrote, "Despite commenting as graciously as I could on media coverage of yesterday's shooting, alas, today a perversely biased media's knee-jerk blame game is attempting to destroy innocent people with lies and more fake news." Maxwell Tani, *New York Times Corrects Editorial That Drew Huge Backlash for Blaming Sarah Palin in Gabby Giffords' Shooting*, BUS. INSIDER (June 15, 2017), <http://www.businessinsider.com/new-york-times-corrects-column-gabby-giffords-2017-6>.

<sup>159</sup> The corrected version of the editorial can be found here, *America's Lethal Politics*, N.Y. TIMES (June 14, 2017), <https://www.nytimes.com/2017/06/14/opinion/steve-scalise-congress-shot-alexandria-virginia.html?mcubz=1>.

In the print version on June 16<sup>th</sup>, the *Times* issued the following correction (which was also placed online on June 15th):

***Correction: June 16, 2017***

*An editorial on Thursday about the shooting of Representative Steve Scalise incorrectly stated that a link existed between political rhetoric and the 2011 shooting of Representative Gabby Giffords. In fact, no such link was established. The editorial also incorrectly described a map distributed by a political action committee before that shooting. It depicted electoral districts, not individual Democratic lawmakers, beneath stylized cross hairs.*<sup>160</sup>

The *Times* chief editorial writer issued the following statement:

While it is always agonizing to get something wrong we appreciate it when our readers call us out like this. We made an error of fact in the editorial and we've corrected it. But that error doesn't undercut or weaken the argument of the piece.<sup>161</sup>

Governor Palin filed a libel suit against the *New York Times* in federal district court in New York.<sup>162</sup> Along with the allegations of defamation, the suit also noted that the correction offered was insufficient, "did not approach the degree of the retraction and apology necessary and

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<sup>160</sup> See *id.* for correction.

<sup>161</sup> Erik Wemple, *Sarah Palin Files Convincing Lawsuit Against the New York Times Editorial Board*, WASH. POST (June 27, 2017), [https://www.washingtonpost.com/blogs/erik-wemple/wp/2017/06/27/sarah-palin-files-convincing-lawsuit-against-the-new-york-times-editorial-board/?utm\\_term=.de4830e4758e](https://www.washingtonpost.com/blogs/erik-wemple/wp/2017/06/27/sarah-palin-files-convincing-lawsuit-against-the-new-york-times-editorial-board/?utm_term=.de4830e4758e).

<sup>162</sup> Sydney Ember, *Sarah Palin Sues New York Times, Claiming Editorial Defamed Her*, N.Y. TIMES B4 (June 27, 2017). Governor Palin is represented by Kenneth Turkel and Shane Vogt, the two lawyers who secured a \$115 million judgment for Terry Gene Bollea (Hulk Hogan) in his suit against the Gawker Media Group. That verdict was reduced to \$31 million, an amount that drove Gawker into bankruptcy. Matthew Sheffield, *Judge: New York Times Editor Must Testify in Sarah Palin's Libel Suit*, SALON (Aug. 11, 2017), <http://www.salon.com/2017/08/11/judge-new-york-times-editor-must-testify-in-sarah-palins-libel-suit/>.

warranted by The Times’s false assertion that Mrs. Palin incited murder.”<sup>163</sup>  
The complaint also spelled out issues regarding malice:

At the time of publication, the Times knew and had published pieces acknowledging that there was no connection between Mrs. Palin and Loughner’s 2011 shooting. Moreover, The Times’ false statements about the link between Mrs. Palin and the Loughner shooting stood in stark contrast to how The Times treated speculation about political motives behind Hodgkinson’s rampage: The Times concluded that there was not a connection between Hodgkinson and his professed penchant for Democratic stances sufficient to warrant implicating Democrats or the Bernie Sanders campaign as inciting factors for Hodgkinson’s attack.<sup>164</sup>

The suit also notes that the issued correction did not include Governor Palin’s name, that there was not a full and fair retraction of the editorial or a public apology to Governor Palin.<sup>165</sup>

The *Times* filed a motion to dismiss because: “(1) the complaint fails to state a viable defamation claim because challenged statements are neither “of and concerning” Palin nor actionable as defamation, and (2) Palin has not adequately pled “actual malice” – a required showing given that Palin clearly is a public figure.”<sup>166</sup> U.S. District Judge Jed S. Rakoff heard oral argument and held that the writer of the editorial must testify in court for him to be able to determine whether there was malice when the editorial was written.<sup>167</sup> James Bennet, the editor of the *New York Times*

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<sup>163</sup> *Id.*

<sup>164</sup> *Palin v. The New York Times Co.*, 264 F. Supp. 3d 527 (S.D.N.Y. 2017), [http://online.wsj.com/public/resources/documents/2017\\_0627\\_palin\\_nyt.pdf](http://online.wsj.com/public/resources/documents/2017_0627_palin_nyt.pdf).

<sup>165</sup> *Id.* With this case study, using the editorial, the correction, and the complaint, *i.e.*, the documents in the case, would be the best approach for fact-finding.

<sup>166</sup> The motion and the response of the plaintiff can be found at the scribd.com site, Plaintiff’s Memorandum Of Law In Opposition To Defendant’s Motion To Dismiss, *Palin v. The New York Times Co.*, 264 F. Supp. 3d 527 (S.D.N.Y. 2017). I don’t <https://www.scribd.com/document/354976315/Palin-v-NY-Times-Memo-in-Opposition-Motion-to-Dismiss>.

<sup>167</sup> Sydney Ember, *A Times Editor Testifies in Defamation Suit Filed by Sarah Palin*, N.Y. TIMES (Aug. 16, 2017), <https://www.nytimes.com/2017/08/16/business/media/a-times-editor-testifies-in-defamation-suit-filed-by-sarah-palin.html?mcubz=1>.

editorial page testified on August 15, 2017 that he had not read or did not recall reading articles that dismissed the connection between Governor Palin's political activities and the Giffords shooting.<sup>168</sup> A ruling on the malice issue in the motion to dismiss, based on the testimony, is pending.

b. Do we have the complete context for what was said/written?

The fact that there was a shooting provides the context for the *Times* editorial. Often, following such shocking and tragic events that involve guns, thought processes can be trumped by emotion. The zeal for prevention or perhaps the desire for finding ideological ties has, in the past, resulted in the expression of ideas or reporting that may was not accurate.

For example, in the immediate aftermath of the Sandy Hook Elementary School shootings, the shooter was initially identified as Ryan Lanza, who was not the shooter, but, rather, the brother of Adam Lanza, the actual shooter.<sup>169</sup> Initial reports stated that Adam Lanza's mother was a teacher at the school. She was not; she was lying dead at home, killed by her son.<sup>170</sup> Accompanying that story was the story that the principal had let Adam Lanza in because he was known to the principal. In fact, Adam Lanza physically forced his way into the school.<sup>171</sup> The *New York Times*, in reporting on the inaccuracies that spread about the tragedy, blamed television networks, failing to acknowledge that the *Times* had reported the same information and had to issue its own corrections.<sup>172</sup>

Likewise, in the immediate aftermath of the theater shootings in Aurora, Colorado (the so-called "Dark Night" shootings because it was a

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<sup>168</sup> *Id.*

<sup>169</sup> Max Kutner, *Mass Shootings and News Media: A Connection?*, NEWSWEEK (Oct. 2, 2015), <http://www.newsweek.com/media-reporters-cover-mass-killings-umpqua-shooting-378866>.

<sup>170</sup> David Folkenflik, *Coverage Rapid, And Often Wrong, In Tragedy's Early Hours*, NPR (Dec. 18, 2012), <http://www.npr.org/2012/12/18/167466320/coverage-rapid-and-often-wrong-in-tragedys-early-hours>. Among the news organizations that reported incorrect information following the Sandy Hook tragedy include CBS, the Associated Press, the N.Y. Times, and NPR. *Id.* Yes, NPR, reporting on the inaccuracies was one of the news organizations that reported inaccurate information.

<sup>171</sup> *Id.*

<sup>172</sup> Margaret Sullivan, the paper's public editor at that time, had to run through the inaccuracies in several blog posts. Margaret Sullivan, *Errors in Newtown Shootings Coverage Reflect Growing Pressures*, N.Y. TIMES (Dec. 17, 2012), [https://publiceditor.blogs.nytimes.com/2012/12/17/errors-in-newtown-shootings-coverage-reflect-growing-pressures/?\\_r=0](https://publiceditor.blogs.nytimes.com/2012/12/17/errors-in-newtown-shootings-coverage-reflect-growing-pressures/?_r=0).

premier for the movie of that name), ABC News reporter, Brian Ross, reported the following on-air, “[There is a] Jim Holmes of Aurora, Colorado page on the Colorado Tea Party site as well, talking about him joining the Tea Party last year. Now we don’t know if this is the same Jim Holmes, but this is Jim Holmes of Aurora, Colorado.”<sup>173</sup> Subsequent fact checking found that Mr. Ross had the wrong James Holmes Ross.<sup>174</sup> The real alleged shooter, James Holmes Ross, was not a member of the Tea Party. However, that information had gone out over the Internet like wild fire, with the public believing that a member of the Tea Party was responsible for the horrific shooting.<sup>175</sup> ABC issued an apology.<sup>176</sup> The error became legendary

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<sup>173</sup> Jeff Poor, *ABC’s Brian Ross Suggests Ties Between Aurora Shooter and the Tea Party*, THE DAILY CALLER (July 20, 2012), <http://dailycaller.com/2012/07/20/abcs-brian-ross-suggests-tie-between-aurora-shooter-and-the-tea-party/>. The following is a transcript of the Ross report on *Good Morning America*:

*STEPHANOPOULOS: I’m going to go to Brian Ross. You’ve been investigating the background of Jim Holmes here. You found something that might be significant.*

*ROSS: There’s a Jim Holmes of Aurora, Colo., page on the Colorado Tea Party site as well, talking about him joining the tea party last year. Now, we don’t know if this is the same Jim Holmes. But it’s Jim Holmes of Aurora, Colo.*

*STEPHANOPOULOS: OK, we’ll keep looking at that. Brian Ross thanks very much.*

<sup>174</sup> Dylan Byers, *ABC Draws Possible Tea Party Connections to Alleged Aurora Shooter*, POLITICO (July 20, 2012), <https://www.politico.com/blogs/media/2012/07/abc-draws-possible-tea-party-connection-with-alleged-aurora-shooter-129568>.

<sup>175</sup> ABC News President at that time, Ben Sherwood, was questioned about the inaccurate report at a meeting of the Television Critics Association and responded, “What happened was we put something on the air that we did not know to be true, and the part of it we knew to be true was not germane to the story we were doing and the story we were covering. That was a violation of our standards.” Sherwood was referring to Holmes’ political affiliations. Alyssa Rosenberg, *ABC News President Delivered ‘Stern’ Rebuke To Brian Ross Following Aurora Shooting Errors*, THINK PROGRESS (July 26, 2012), <https://thinkprogress.org/abc-news-president-delivered-stern-rebuke-to-brian-ross-following-aurora-shooting-errors-91d316f5a28c/>.

<sup>176</sup> “An earlier ABC News broadcast report suggested that a Jim Holmes of a Colorado Tea Party organization might be the suspect, but that report was incorrect,” the statement said. “ABC News and Brian Ross apologize for the mistake, and for disseminating that information before it was properly vetted.” THR Staff, *ABC News Apologizes for Linking ‘Dark Knight’ Shooter to Tea Party*, THE HOLLYWOOD REPORTER (July 20, 2012),

once comedian Jon Stewart skewered Mr. Ross on *The Daily Show*.<sup>177</sup>

The emotion and strong convictions regarding gun violence do not excuse inaccuracies. However, the context is important for those in journalism in order to provide self-checks and balances in covering and editorializing these types of stories. This context was important as the editorial for the *Times* was penned. History has demonstrated that inaccuracies in identity, causation, and facts abound in the reporting on mass shootings.

There is the additional context, context that the court focused on when the *Times* editor who inserted the references to Governor Palin, testified. In the immediate aftermath of the Giffords tragedy, Twitter (#blamepalin) and columns were filled with assertions that Governor Palin was responsible for the shooting.<sup>178</sup> Judge Jed Rakoff focused on whether editor James Bennet was aware that the information contained in the editorial contradicted information that had appeared in the news portions of his own newspaper.<sup>179</sup> Although columnists in the *Times* may have been more opinionated,<sup>180</sup> the *Times* news coverage carefully stated that the

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<http://www.hollywoodreporter.com/news/dark-knight-rises-colorado-shooting-tea-party-352470>.

<sup>177</sup> “In a *Daily Show* segment entitled “*What Story Does a Guy Have to Blow to Get in Trouble at ABC?*” Stewart complained that Ross should say he’s “irrevocably sorry to the innocent man that I casually, baselessly and publicly accused of, I don’t know, maybe being a mass murderer?!?” Erin Carlson, *Jon Stewart Skewers ABC’s Brian Ross for Linking ‘Dark Knight’ Shooter to Tea Party*, THE HOLLYWOOD REPORTER (July 24, 2012), <http://www.hollywoodreporter.com/live-feed/jon-stewart-brian-ross-tea-party-james-holmes-353507>.

<sup>178</sup> The theory really took hold when columnist Michael Daly wrote, “And, now that Palin may have the blood of more than some poor caribou on her hands” in the New York Daily News.” Michael Daly, “*Rep. Gabrielle Giffords’ Blood Is On Sarah Palin’s Hands After Putting Cross Hairs Over District*,” N.Y. DAILY NEWS (Jan. 9, 2011), <http://www.nydailynews.com/news/national/rep-gabrielle-giffords-blood-sarah-palin-hands-putting-cross-hair-district-article-1.149099#ixzz1AejDtn3o>.

<sup>179</sup> Sydney Ember, *Editor Says He Didn’t Intend To Blame Palin for Shooting*, N.Y. TIMES B5 (August 17, 2017). From a contextual perspective, an interesting question from one of Governor Palin’s lawyers during the testimony to James Bennet may offer some insight. The lawyer verified that Mr. Bennet is the brother of Michael Bennet, who was a Democratic senator in Colorado. *Id.*

<sup>180</sup> *Krugman’s Toxic Rhetoric*, THE ECONOMIST (Jan. 10, 2011), [http://www.economist.com/blogs/democracynamerica/2011/01/spinning\\_tucson](http://www.economist.com/blogs/democracynamerica/2011/01/spinning_tucson).

targets on the Palin map were districts and not individuals.<sup>181</sup> Three days after the shooting, *Times* coverage indicated the following:

Though there is no evidence that the person charged in the shootings, Jared L. Loughner, was a fan or a follower of Ms. Palin, critics immediately noted that she had released a fund-raising appeal in March using rifle cross hairs to mark the districts where she hoped to defeat a Democrat. One of them represented the district of Representative Gabrielle Giffords of Arizona.

Ms. Giffords's expressions of concern at the time, in an interview on MSNBC in which she said the graphic could have dangerous "consequences," were frequently repeated over the weekend.

In an interview Monday with reporters at The New York Times, former Gov. Tim Pawlenty of Minnesota, considered another contender for the Republican presidential nomination in 2012, defended Ms. Palin, if only to a point. "There's no indication at present that those cross hairs, Fox News, any particular commentator or show or set of remarks or person was a motivating factor in his thoughts," Mr. Pawlenty said of Mr. Loughner.<sup>182</sup>

In addition, since the time of the 2011 Giffords tragedy, facts have emerged that indicate Jared Loughner did not watch television, listen to talk radio, or examine Governor Palin's websites or Facebook. Rather, he was angry with Representative Giffords for not answering his question at a previous rally.<sup>183</sup>

From Governor Palin's perspective, there is an antipathy toward the media because of the nature and amount of coverage that has been directed at her.<sup>184</sup>

## 2. Step Two: Frame the issues properly. What are the legal issues?

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<sup>181</sup> Carl Hulse & Kate Zernike, *Bloodshed Puts New Focus on Vitriol in Politics*, N.Y. TIMES (Jan. 8, 2011), <http://www.nytimes.com/2011/01/09/us/politics/09capital.html?mcubz=1>.

<sup>182</sup> Jim Rutenberg & Kate Zernike, *Palin, Amid Criticism, Stays in Electronic Comfort Zone*, N.Y. TIMES (Jan. 10, 2011), <http://www.nytimes.com/2011/01/11/us/politics/11palin.html>.

<sup>183</sup> The interview with someone who knew Loughner regarding his motivations was available within days of the tragedy. W.W., *Krugman's Toxic Rhetoric*, THE ECONOMIST (Jan. 10, 2011), [https://www.economist.com/blogs/democracyinamerica/2011/01/spinning\\_tucson](https://www.economist.com/blogs/democracyinamerica/2011/01/spinning_tucson).

<sup>184</sup> See note 152 for background on this antipathy.

3. Step Three: What is the law and what are the views on those legal issues?

The case can be used for law, ethics, and journalism courses. The legal issues center on the elements of a defamation case, and are listed below and discussed individually.

- a. Is Governor Palin a public figure? Does her absence from the public eye over the past few years mitigate or eliminate her public figure status as a candidate for national office and then commentator and speaker?
- b. Was the information published about Governor Palin false?
- c. Was Governor Palin harmed by the false information (her character, her reputation, her livelihood)?
- d. Did the *New York Times* publish information knowing that it was not true or with reckless disregard as to whether it was true or false? (i.e., the element of malice)
- e. Does the fact that the information was part of an editorial make a difference in terms of libel cases and liability?
- f. Is the issuance of a correction sufficient to end a libel suit by a public figure?
- a. Is Governor Palin a public figure? Does her absence from the public eye over the past few years mitigate or eliminate her public figure status as a candidate for national office and then commentator and speaker?

If Governor Palin is a public figure, the element of malice comes into play, i.e., establishing that the editorial was published knowing that it was false or with reckless disregard of whether it was true or false.<sup>185</sup> Most experts reach the conclusion with a single sentence, “Clearly, Sarah Palin is

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<sup>185</sup> *New York Times v. Sullivan*, 376 U.S. 254 (1964).

a public figure.”<sup>186</sup> There is the fact that she has been somewhat withdrawn from the public eye because of family demands, but has reinserted herself through endorsements and speeches.<sup>187</sup>

- b. Was the information published about Governor Palin false?
- c. Does the fact that the information was part of an editorial make a difference in terms of libel cases and liability?

The piece was opinion in nature, which gives the *Times* latitude, but the factual portions were inaccurate, as the correction and revision reflect.<sup>188</sup> The issue is not one of characterization, but factual. Even newspapers and websites known for their disdain of Governor Palin lambasted the *Times* for its factual errors.<sup>189</sup>

- d. Was Governor Palin harmed by the false information (her character, her reputation, her livelihood)?

Governor Palin does not carry the popularity ratings that she once

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<sup>186</sup> Gregg Jarrett, *Sarah Palin vs. the New York Times – Five Reasons Why Ex-Governor Might Just Win Her Case*, FOX NEWS (June 28, 2017), <http://www.foxnews.com/opinion/2017/06/28/gregg-jarrett-sarah-palin-vs-new-york-times-five-reasons-why-ex-governor-might-just-win-her-case.html>; see also Danny Cevallos, *Could Sarah Palin Beat the New York Times?*, CNN (June 29, 2017), <http://www.cnn.com/2017/06/29/opinions/sarah-palin-new-york-times-opinion-cevallos/index.html>; George Khoury, *Sarah Palin Sues New York Times for Defamation in Opinion Piece*, FINDLAW (June 29, 2017), [http://blogs.findlaw.com/celebrity\\_justice/2017/06/sarah-palin-sues-new-york-times-for-defamation-in-opinion-piece.html](http://blogs.findlaw.com/celebrity_justice/2017/06/sarah-palin-sues-new-york-times-for-defamation-in-opinion-piece.html).

<sup>187</sup> Justin Wm. Moyer, *Todd Palin in Intensive Care After Snowmobile Accident* WASH. POST (Mar. 15, 2016), [https://www.washingtonpost.com/news/morning-mix/wp/2016/03/15/todd-palin-in-intensive-care-after-snowmobile-accident/?utm\\_term=.ae79889b3bb2](https://www.washingtonpost.com/news/morning-mix/wp/2016/03/15/todd-palin-in-intensive-care-after-snowmobile-accident/?utm_term=.ae79889b3bb2).

<sup>188</sup> *Wilkow v. Forbes*, 241 F.3d 552 (7th Cir. 2001).

<sup>189</sup> See, e.g., Michelle Ye Hee Lee, *The Bogus Claim That a Map of Crosshairs by Sarah Palin’s PAC Caused Rep. Gabby Giffords’s Shooting*, WASH. POST (June 15, 2017), [https://www.washingtonpost.com/news/fact-checker/wp/2017/06/15/the-bogus-claim-that-a-map-of-crosshairs-by-sarah-palins-pac-incited-rep-gabby-giffordss-shooting/?nid&utm\\_term=.e56e411b892c](https://www.washingtonpost.com/news/fact-checker/wp/2017/06/15/the-bogus-claim-that-a-map-of-crosshairs-by-sarah-palins-pac-incited-rep-gabby-giffordss-shooting/?nid&utm_term=.e56e411b892c).

had. Fox News dropped her as a commentator in 2015.<sup>190</sup> Her net favorability rating has been dropping steadily among Republicans and overall.<sup>191</sup> The demographics of the readership of the *New York Times* is such that those readers were perhaps predisposed to negative feelings about Governor Palin prior to the editorial's initial appearance.<sup>192</sup>

The swift retraction by the *Times* somewhat mitigates the damage claim, but the distribution via the Internet and inability to completely eliminate the original information is problematic in this era.

Others have noted that the choice of venue, the heart of New York City, will not yield a particularly favorable group for Governor Palin. The jury pool may not produce the objectivity a plaintiff hopes for in such cases.<sup>193</sup>

- e. Did the New York Times publish information knowing that it was not true or with reckless disregard as to whether it was true or false? (i.e., the element of malice)

While the testimony of editor James Bennet has been given, the judge has the benefit of the full transcript, which is currently unavailable. The ruling on the finding of malice is set for the end of August 2017. However, the *Times* article on the testimony includes the following:

“I did not intend and was not thinking of it as a causal link to the crime,” Mr. Bennet said. During cross-examination, he said he did not know if Mr. Loughner had seen the map and “did not know if the map incited him to his conduct.”<sup>194</sup>

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<sup>190</sup> Erik Wemple, *Fox News Drops Sarah Palin*, WASH. POST (June 24, 2015), [https://www.washingtonpost.com/blogs/erik-wemple/wp/2015/06/24/fox-news-drops-sarah-palin/?utm\\_term=.a6b3e753a6d8](https://www.washingtonpost.com/blogs/erik-wemple/wp/2015/06/24/fox-news-drops-sarah-palin/?utm_term=.a6b3e753a6d8).

<sup>191</sup> Harry Enten, *The Receding of Sarah Palin, In One Chart*, FIVETHIRTYEIGHT (June 24, 2015), <https://fivethirtyeight.com/datalab/the-receding-of-sarah-palin-in-one-chart/>.

<sup>192</sup> *Demographics and Political Views of News Audiences*, PEW RESEARCH CENTER (Sept. 27, 2012), <http://www.people-press.org/2012/09/27/section-4-demographics-and-political-views-of-news-audiences/>.

<sup>193</sup> Mark Grabowski, *Sarah Palin Will Probably Lose Her Libel Suit Against the New York Times, But She Already Has a PR Win*, WASH. EXAMINER (June 28, 2017), <http://www.washingtonexaminer.com/sarah-palin-will-probably-lose-her-libel-lawsuit-against-the-new-york-times-but-shes-already-got-a-pr-win/article/2627302>.

<sup>194</sup> Ember, *supra* note 179.

Because the case is still pending, with no final outcome as in the O’Neil/Cox issue, the legal issues are controlled by factual findings that are still pending. However, the questions provide the structure for the discussion.

f. Is the issuance of a correction sufficient to end a libel suit by a public figure?

In addition to the correction, the *Times* did issue an apology on Twitter:

We got an important fact wrong, incorrectly linking political incitement and the 2011 shooting of Giffords. No link was ever established.

We're sorry about this and we appreciate that our readers called us on the mistake. We've corrected the editorial.<sup>195</sup>

Again, the malice and damage elements cross over into answering this question. Sometimes apologies serve to reinstate the public figure. Sometimes the apology is insufficient to mitigate the damage done. Governor Palin has the burden of proof on both malice and damages and must do so by a preponderance of evidence.

4. Step Four: Add the ethical issues, properly framed.

Applying stakeholder analysis, the question of who is affected by inaccuracies in an editorial article is an important one. Governor Palin and her family are affected because the initial editorial placed the blame for the Giffords tragedy on her. Caution and care in the publication of information, whether part of an editorial or the news sides of the newspapers, are critical for the protection of reputations but also for the credibility and trust of the newspaper and other media outlets. Because of those issues, the staff, readers, and reputation of the *New York Times* are affected. In addition, other media outlets are affected when information put in the public eye turns out to be incorrect.

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<sup>195</sup> NYT Opinion (@nytopinion), Twitter (Jun. 15, 2014, 8:37 AM), <https://twitter.com/nytopinion/status/875376637797441537>.

However, our views on Governor Palin and her family and political views and activities are not the issue. Neither are our feelings about the *New York Times* and its reporting history and practices. The focus is on analyzing an editorial that contained false information. What are the legal issues, rights, and responsibilities of the parties involved? From an ethical perspective, what are the implications of editorials with incorrect information being published? Are we willing to afford the same legal protections to those with whom we may disagree or even those whom we may not respect?

### III. OTHER CONTENTIOUS ISSUES UNDER THE MODEL

Space will not allow the full treatment of other issues that are ideal for bringing into the classroom via the detached structure of the model. However, a brief summary of some examples illustrates the scope of legal issues as well as the fertile training grounds for structured analysis, grounded in facts and framed around legal and ethical issues.

#### A. *Google and the Diversity Memo*

##### 1. Step One: Get the Facts, Just the Facts

As with the Cox/O'Neil and Palin/*New York Times* scenarios, the issue is not whether we agree or disagree with Google's diversity policies, the feelings of an employee revealed in a memo, or the termination of that employee for expressing dissenting views. The goal is solid analysis of what happened and the applicable laws along with any ethical issues that arise. The goal of a class discussion is not to debate our feelings about issues and scenarios, but facts and the law.

James Damore, a young engineer who worked for Google, circulated a memo (which eventually went public and viral) that raised issues and questions regarding the reasons Google and the Silicon Valley were struggling with gender diversity.<sup>196</sup> Titled, "Google's Ideological Echo Chamber," and written after Mr. Damore had attended a company diversity training seminar, the memo raised the possibility that not all disparities

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<sup>196</sup> The memo can be found at Kate Conger, *Exclusive: Here's The Full 10-Page Anti-Diversity Screed Circulating Internally at Google*, GIZMODO (August 5, 2017), <http://gizmodo.com/exclusive-heres-the-full-10-page-anti-diversity-screed-1797564320/amp> [hereinafter Memo].

between men and women were the result of discriminatory treatment.<sup>197</sup> He wrote, “differences in distribution of traits between men and women may in part explain why we don’t have 50% representation of women in tech and leadership.”<sup>198</sup> He suggested that placing people in jobs for which they are not well suited in order to meet diversity goals means that the individual will struggle or the work would suffer. He urged Google to challenge current thinking by looking to “the science of human nature.”<sup>199</sup> He wrote that managerial goals for increased diversity have resulted in discrimination.<sup>200</sup>

Mr. Damore was fired by Google for violating the company’s code of ethics by “advancing harmful gender stereotypes in our workplace.”<sup>201</sup> The Google code of ethics does not contain the language on gender stereotypes referenced in the company’s termination of Mr. Damore. The code has provisions that prohibit discrimination, harassment, and bullying, but the stereotype issue is not discussed in the code.<sup>202</sup>

The Damore memo became the focus of a national debate and an embarrassment for Google because of its efforts to present itself as a diverse company. The company had to cancel a meeting to discuss diversity issues because of fears about safety for employees.<sup>203</sup> There was disagreement within Google about Mr. Damore’s termination. However, Google’s CEO, Sundar Pichai, said, “We strongly support the right of Googlers to express themselves, and much of what was in that memo is fair to debate, regardless of whether a vast majority of Googlers disagree with it.”<sup>204</sup>

## 2. Step Two: Frame the issues properly. What are the legal issues?

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<sup>197</sup> Heather MacDonald, *Don’t Even Think About Being Evil*, WALL ST. J. A15 (Aug. 15, 2017).

<sup>198</sup> Memo, *supra* note 196.

<sup>199</sup> *Id.*

<sup>200</sup> The best approach for the facts in this case may be to have the students simply read the Damore memo, the Google code of ethics, and the responses of both the Google CEO and vice president of diversity. The online sources are provided in the footnotes.

<sup>201</sup> James Damore, *Why I Was Fired by Google*, WALL ST. J. C2 (Aug. 11, 2017). Google’s vice president of diversity wrote a memo in response to the Damore memo, found here. Maya Rhodan, *Read Google’s Response to An Employee’s Controversial Diversity Memo*, FORTUNE (Aug. 7, 2017), <http://fortune.com/2017/08/07/google-diversity-memo/>.

<sup>202</sup> *Google Code of Conduct*, ALPHABET INVESTOR RELATIONS, <https://abc.xyz/investor/other/google-code-of-conduct.html> (last updated Apr. 5, 2018).

<sup>203</sup> See Jack Nicas, *Google Cancels Meeting on Diversity*, WALL ST. J. B1 (Aug. 11, 2017) (explaining that employees had been harassed online).

<sup>204</sup> *Id.*

3. Step Three: What is the law and what are the views on those legal issues?

The legal issues include the following:

- a. Was there an employment contract involved?
- b. If there was no employment contract, what are the rights of an employee-at-will?
- c. What are the grounds for termination of an employee-at-will?
- d. Was there documentation to support the termination?
- e. What does Google's code of ethics contain? Is there a specific prohibition that includes the language used in the explanation of the grounds for Mr. Damore's termination?
- f. Is violation of the code of ethics automatic grounds for termination?
- g. What rights or remedies does Mr. Damore have?
- h. There are underlying factual questions that are at the core of the emotional reactions to the Google diversity memo, such as whether gender differences are a function of oppression and sexism or whether there are genetic differences.<sup>205</sup>

4. Step Four: Add the ethical issues, properly framed.

A shorthand stakeholder analysis offers some insights into how to steer the discussion of this case away from opinion and emotion to science

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<sup>205</sup> Holman W. Jenkins, Jr., *Memo to a Google Engineer*, WALL STREET J. A13 (Aug. 9, 2017) (thoroughly raising the biological questions and giving that would apply in the Damore situation).

and law. Who is affected by the actions of Mr. Damore? Mr. Damore, other Google employees, Google (whether it will be stalled in its diversity efforts), and other companies and industries working on diversity policies and environments.

The case raises interesting questions about ethical infrastructure and public policy issues on firing employees who raise concerns about their companies' practices, procedures, products, and more. There is a fundamental question as to whether Mr. Damore's actions were a form of whistleblowing and whether he is entitled to the protections given to those who raise public policy issues in the workplace. The impact of the termination on Google's culture in terms of employee willingness to raise questions and concerns is a topic for discussion in terms of ethical culture. Mr. Damore's swift termination because he raised questions about what he calls the Google "ideological echo chamber" is a powerful cultural signal.<sup>206</sup> Such terminations could have a chilling effect on the willingness of employees to raise issues or concerns.

### B. *The Cake Bakers and the Florists and Same-Sex Marriage*

#### 1. Step One: Get the Facts, Just the Facts

Jack Phillips went to the U.S. Supreme Court because he does not want to bake a cake.<sup>207</sup> Mr. Phillips owns a bakery, the Masterpiece

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<sup>206</sup> Damore, *supra* note 201.

<sup>207</sup> *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Commission*, 370 P.3d 272 (Colo. App. 2015), *cert. granted*, 137 S. Ct. 2290 (2017). The Colorado Supreme Court had denied *certiorari*. On June 4, 2018, the U.S. Supreme Court found in favor of Mr. Phillips. 138 S.Ct. 1719 (2018). There are other cases pending around the country that may make their way to the U.S. Supreme Court, but this case was chosen because *certiorari* has been granted. The other cases are *State of Washington v. Arlene's Flowers & Gifts, Inc.*, 389 P.3d 543 (Wash. 2017), in which Barronelle Stutzman, the owner of Arlene's flowers refused to arrange flowers for her friend's same-sex marriage, a friend with whom she had done business for 9 years. The Washington Supreme Court held that Arlene's had violated the Washington Law Against Discrimination despite Stutzman's argument that she refused to do the flowers for their friend's wedding because of her "relationship with Jesus Christ." The case has been docketed for *certiorari*. In *Lexington Fayette Urban County Human Rights Commission v. Hands On Originals, Inc.*, 2017 WL 2211381 (C.A. Ken. 2017), Blaine Adamson, the owner, was found guilty of discrimination on the basis of sexual orientation because of his refusal to print t-shirts for the gay pride celebration. He appealed and the trial court found no violation, but held that even if there were a violation that the ordinance was unconstitutional. The Kentucky Court of Appeals affirmed with a dissenting

Cakeshop, Inc. in Lakewood, Colorado. Mr. Phillips makes his business decisions based on his religious beliefs. He will not decorate Halloween cakes, lewd bachelor party cakes, and/or bake cakes with alcohol in them.<sup>208</sup> Customers must look elsewhere for their “Boo!”s and booze.<sup>209</sup>

In July 2012, Charlie Craig and David Mullins visited Masterpiece, a bakery in Lakewood, Colorado, and requested that Mr. Phillips design and create a cake to celebrate their same-sex wedding. Mr. Phillips declined, telling them that he does not create wedding cakes for same-sex weddings because of his religious beliefs, but told them that he would be happy to make and sell them any other baked goods. The following day, Mr. Craig's mother, Deborah Munn, called Mr. Phillips, who explained that Masterpiece did not make wedding cakes for same-sex weddings because of his religious beliefs and because Colorado did not recognize same-sex marriages.<sup>210</sup>

Mr. Phillips is known as a darn good cake baker, with a skill for elaborate cakes; the cakes are an art form for him, and high demand indicates a solid customer base.<sup>211</sup> However, as a Christian of 35 years, Mr. Phillips believes that he should not do anything in his business that would displease God.

Messrs. Craig and Phillips filed a complaint with the Colorado Civil Rights Commission alleging violations of Colorado's Antidiscrimination Act.<sup>212</sup> The statute provides, in relevant part:

It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an

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opinion. The opinion is an unpublished opinion and there is no record currently of an appeal. Interestingly, Mr. Adamson has the support of several gay employees in his refusal to print the shirts based on his religious beliefs. Mark Hemingway, *Wicked Ways*, WEEKLY STANDARD 8 (Aug. 7, 2017). The New Mexico Supreme Court has held that the refusal to do the photography at a same-sex wedding is a violation of the New Mexico Human Rights Act. *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013).

<sup>208</sup> Ryan T. Anderson, *The Continuing Threat to Religious Liberty*, NAT'L REV. 32 (Aug. 14, 2017).

<sup>209</sup> Completing the obvious tripartite here was inappropriate and not suitable for the family hour.

<sup>210</sup> Messrs. Craig and Mullins planned to be married in Massachusetts because Colorado did not recognize same-sex marriages at the time, but they planned to hold their celebration in Colorado. *Craig*, 370 P.3d at 277. The case was brought prior to the U.S. Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) in which statutes that prohibited same-sex marriage were declared unconstitutional.

<sup>211</sup> *Masterpiece Cakes*, WWW.MASTERPIECECAKES.COM (last visited Mar. 3, 2018).

<sup>212</sup> Colo. Rev. Stat. Ann. §24-34-601(2) (2015).

individual or a group, because of . . . sexual orientation . . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation. . . .

In 2012, Mr. Phillips was found guilty of violating Colorado's anti-discrimination statutes and required to comply with the following provisions of the Commission's cease and desist order:

(1) take remedial measures, including comprehensive staff training and alteration to the company's policies to ensure compliance with CADA; and (2) file quarterly compliance reports for two years with the Division describing the remedial measures taken to comply with CADA and documenting all patrons who are denied service and the reasons for the denial.<sup>213</sup>

He used religious freedom as his defense, a defense that was dismissed by the Colorado Civil Rights Commission with the conclusion that "freedom of religion . . . has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the Holocaust."<sup>214</sup> He appealed the decision and the Colorado Court of Appeals affirmed. The Colorado Supreme Court did not grant *certiorari* and the U.S. Supreme Court held in Mr. Phillips's favor.<sup>215</sup>

2. Step Two: Frame the Issue Properly. What are the legal issues?

3. Step Three: What is the law and what are the views on those legal issues?

Although the statutes vary among this case and the others that are winding their way through state court systems, the legal issues are the same. The issues in discussion are not centered on personal beliefs about same-sex marriage. They are centered on the statutory and constitutional issues, which are as follows:

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<sup>213</sup> *Craig*, 370 P.3d at 277.

<sup>214</sup> Mark Hemingway, *Wicked Ways*, THE WEEKLY STANDARD 8 (Aug. 7, 2017).

<sup>215</sup> *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Commission*, 370 P.3d 272 (Colo. App. 2015), 2018 WL 2465172, \_\_\_\_ U.S. \_\_\_\_ (2018).

- a. Does the application of Colorado Antidiscrimination Act (CADA) sanctions to a business owner violate the First Amendment constitutional right of free exercise of defendants?
- b. Are refusals to make cakes for other occasions that violate a defendant's religious tenets a violation of CADA?
- c. Is the refusal to create a wedding cake for a same-sex couple discrimination on the basis of sexual orientation and, therefore, a violation of CADA?
- d. Is the willingness to provide other services apart from wedding cakes evidence of non-discrimination under CADA?
- e. Is requiring a bakery owner to bake a cake for a same-sex wedding a form of compelled speech?

The opinion of the court does not really provide the answers to these questions. The U.S. Supreme Court decision is focused on a very narrow issue which is the unconstitutionality of a state statute or determination that targets an individual's faith. Mr. Phillips argued that he was an artist who expressed himself through his cakes and that requiring him to produce art for an event that would require him to set aside his religious beliefs was a violation of his First Amendment protections.

The court did not quite reach the baker-as-artist question, but did examine the hostility of the Commission to Mr. Phillips's faith. The court quoted one of the commissioners:

I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be —I mean, we— we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their

religion to hurt others.<sup>216</sup>

The court held such treatment by the Commission of Phillips's case violated the Colorado's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.

The decision is a narrow one that left addressing the broader constitutional issues related to commercial speech for another time. The outcome of the case provides an opportunity for discussion of emotions and feelings resulting in a violations of another's rights. "Phillips was entitled to the neutral and respectful consideration of his claims in all the circumstances of the case."<sup>217</sup> Respectful consideration is the goal of the teaching model and the decision in favor of Mr. Phillips confirmed the role of fair consideration in judicial and regulatory proceedings.

The unanswered questions that remain for another case provide an opportunity for students to explore both how such a case could come about and how states should proceed with enforcement of laws such as that in Colorado.

#### 4. Step Four: Add the ethical issues, properly framed.

Beyond the resolution of the legal issues in this case and the others described, there is an overarching ethical issue from stakeholder analysis: Who is affected by the imposition of this legal requirement? Mr. Phillips because of his inability to hold to the religious principles he has held and has incorporated his beliefs into the smallest of decisions in his business – adhering to his faith and foregoing business by self-limiting what types of cakes he will make. Other businesses will be affected by the case. Photographers to tuxedo rental stores to limousine services will all find themselves in the same types of dilemmas. The stakeholders in this decision and any future ones are significant.

Yet another question in ethical analysis is: Whom could your decision injure? While there is often a legal right to do something, the ethical mind asks the question: Am I harming someone else? Mr. Phillips has a history of adherence to his convictions and has based his business on the idea that he would honor his God. The demand for service, however legally sound that right, does create a conflict for the baker.

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<sup>216</sup> 2018 WL 2465172, at p. 9.

<sup>217</sup> 2018 WL 2465172, at p. 9.

If the harm question is posed from the other side, a couple cannot have a cake made by what is known to be a top-tier talent in the world of celebratory cakes. Because of who they are, they cannot have a cake that others can attain. No matter what the legal outcome, there are deeply personal feelings in these conflicting rights situations.

The purpose of class discussions in this sensitive area should be to help students understand the impact of legalities on the principles and emotions of the parties involved. The clinical aspect of the law does not resolve the people issues in situations and the question remains on both sides – would you feel comfortable seeing someone punished because of their convictions. And from the other side, would you feel comfortable denying customers one of your artistic cakes because of their beliefs and convictions? The goal of the ethical discussion is to see the question of rights from all perspectives.

### *C. Consider These Additional Possibilities*

In these emotionally and politically charged times, there is no shortage of controversial topics that could be tackled using the model.

Some of the interesting scenarios that could be developed using the model include the Trump immigration executive order.<sup>218</sup> What can be developed in using that scenario is the extent of executive power, the role of the courts with regard to that executive power, and the impact of a 9-0 U.S. Supreme Court decision that reversed all the lower federal court decisions.<sup>219</sup> The emotion surrounding the executive order on immigration procedures resulted in nationwide protests. But, a discussion of the litigation permits an opportunity for understanding the laws on immigration as well as an exploration of the extent of executive authority. The immigration issue can be detached from the exploration of these legal issues. If the discussion focuses on the scope of executive authority, the emotions of the immigration debate can be put on hold. The end result of the litigation, the 9-0 decision opens up procedural and judicial philosophy questions. Why are some U.S. Supreme Court decisions 9-0 and why some are split along ideological grounds. In other words, the discussion can ask the question: Are U.S. Supreme Court justices influenced by their personal views and emotions in particular cases?

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<sup>218</sup> *Trump v. Int'l Refugee Assistance Project*, 137 S.Ct. 2080 (2017).

<sup>219</sup> *Id.* (*vacating Hawaii v. Trump*, 2017 WL 1011673 (Haw. 2017); *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017)).

Another example that defies the ideological split vote comes through the case of *Matai v. Tam*, in which the court ruled 8-0 that the Asian-American rock band could call itself “The Slants” despite the U.S. Patent office denial because of its offensive nature.<sup>220</sup> The case provides a solid look at statutory interpretation, executive branch authority, the First Amendment, and the constitutionality of a trademark law, devoid of the emotion that sometimes controls the public debate.<sup>221</sup> In fact, a review of the U.S. Supreme Court’s record on votes in cases is an educational experience for students in dismissing emotion and focusing on the law.<sup>222</sup>

### CONCLUSION AND INSPIRATION

During the course of developing this article, more news continued to emerge about what to expect as the fall semester begins at colleges around the country. For one thing, colleges have developed new rules to cope with the emotional reactions. For example, at Cal Berkeley, students have to inform the university at least 8 weeks in advance of planned speaker events.<sup>223</sup> The advance notice is required in order to mobilize police forces from around the California university system to be present for the events. There will also be buffer zones around events. There are also denials being issued to some speakers, not for “words or ideas,” as administrators explain, but because of the likelihood of “violence and potential injury.”<sup>224</sup> The International Association of Campus Law Enforcement Administrators will be holding training sessions across the country to prepare campus officers for civil unrest.

A student, in response to the Berkeley requirements observed, “I think the university’s desire to exercise control in this manner is going to

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<sup>220</sup> 137 S. Ct. 1744 (2017).

<sup>221</sup> With this decision, the court was able to effectively end the great Washington Redskins debate. Emotion was driving its elimination, but the court saw the law and its protections differently. See Michael McCann, *Why the Redskins Scored a Victory in the Supreme Court’s Ruling in Favor of the Slants*, SPORTS ILLUSTRATED (June 19, 2017), <https://www.si.com/nfl/2017/06/19/washington-redskins-name-slants-trademark-supreme-court>.

<sup>222</sup> For a summary of the notable cases for the 2016-2017 term, along with the votes of the justices, see *How the Supreme Court Ruled in Notable Cases in 2016-17*, WALL ST. J. A5 (June 27, 2017).

<sup>223</sup> Dana Goldstein, *Colleges Brace for More Clashes as Right-Wing Speakers Seek Venues*, N.Y. TIMES A11 (Aug.17, 2017).

<sup>224</sup> *Id.*

have the unintended consequence of restricting student speech.”<sup>225</sup> These are the words of wisdom from Mike Wright, a Berkeley senior. This young man gets it – the college campus and its classrooms should be the one safe haven for the exchange of ideas, not brickbats. The deprivation of a forum for dissent is the beginning of the end of free speech.

John Stuart Mill in *On Liberty* wrote,

But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error. . . .<sup>226</sup>

We can serve as bystanders, reading the news, shaking our heads, and failing to sound our barbaric yawps. We watch the protests. We see the denials of speakers, discussion, and dissenting views. Or we can rise above the din, the protests, the monologues, and misguided analyses and assumptions and let our students join us in objective and factual analyses. As humorist James Lileks has written, “Do you want to get out of this clown car we’re stuck in together and help push it off the cliff? No, the answer isn’t ‘Depends who’s in it.’ We’re all in it.”<sup>227</sup>

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<sup>225</sup> *Id.*

<sup>226</sup> JOHN STUART MILL, ON LIBERTY 2, <https://www.utilitarianism.com/ol/two.html>.

<sup>227</sup> James Lileks, *Shakespeare in the Dark*, NAT’L REV. 33 (July 10, 2017).



## APPENDIX A

## MEDIA CLASS SURVEY

The number of students (in a national media journalism class of 207 students (totals vary because not all students answered all questions) choosing a particular answer follows that answer. The correct answer is underlined.

1. Who earned higher grades in college?
  - a. John F. Kerry: 61
  - b. George W. Bush: 40
  - c. Edward M. (Ted) Kennedy: 106
  
2. Who spent more money on the New Orleans' levees?<sup>228</sup>
  - a. George W. Bush (43): 61
  - b. William Jefferson Clinton: 97
  - c. George H. W. Bush (41): 44
  
3. What president championed the Americans with Disabilities Act (ADA)?
  - a. Jimmy Carter: 57
  - b. Ronald Reagan: 95
  - c. George H.W. Bush: 16
  - d. William Jefferson Clinton: 39
  
4. Which party cast the most "yes" votes for passage of the Civil Rights Act?
  - a. Republicans: 81
  - b. Democrats: 123

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<sup>228</sup> This was the month of Katrina and the resulting floods in New Orleans.

5. There have been more hurricanes in this decade (1995 to 2005) than during any decade since records have been kept(1950s).
  - a. True 152
  - b. False 53
  
6. You would have made more money from the recycled cans if you had taken \$1,000 and purchased beer instead of buying Enron stock.
  - a. True 169
  - b. False 36
  
7. Who said it?

*“Scoops are what it’s all about. It’s what we strive for every week. It’s what you pay me for”*

  - a. Matt Drudge, *The Drudge Report*: 37
  - b. Tim Russert, *Meet the Press*: 50
  - c. Rush Limbaugh: 65
  - d. Michael Isikoff, *Newsweek*: 55
  
8. Who broke the story on Monica Lewinsky and Bill Clinton?
  - a. *The Washington Post*: 82
  - b. *Newsweek*: 35
  - c. *The National Enquirer*: 64
  - d. *The New York Times*: 25
  
9. Who is Thomas Jefferson?
  - a. *Third president of the U.S.*
  - b. Some guy
  
10. Who is Alexander Hamilton?<sup>229</sup>
  - a. *First Secretary of the Treasury and owner of the New York Post*
  - b. President of the United States

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<sup>229</sup> One suspects that given the success of the Broadway play, *Hamilton*, and the road show that the knowledge level would today be higher.