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COLLEGE OF PROFESSIONAL STUDIES

OFFICES OF ADMINISTRATION AND FACULTY
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FOREWORD



Welcome to the sixth edition of *The Legal Apprentice*. Over its life, the journal has now published twenty-six student articles through a process that is more rigorous than peer review. The *Legal Apprentice* Advisory Board are faculty members from several different disciplines. Good writing is highly prized in most every field, law, business, computer science, advertising and journalism. Good writing is not a gift that is bestowed on individuals but progresses

as a result of hard work in writing, re-writing and editing under the guidance of an experienced teacher or mentor.

The Legal Apprentice should inspire not only students to continue to write but our faculty as well. We learn when we teach and learning is a life-long endeavor. I thank the students for their articles which were crafted over and over again under the supervision of Professor Noe. As they travel through their professional journeys they will take with them *The Legal Apprentice* and the pride that always accompanies a published work. It is an inspiration and source of great pride for all of us.

I also thank Judge William H. Pauley III of the United States District Court, Southern District of New York. He has graciously taken the time from a busy court schedule to provide us with insight into the craft of writing.

A handwritten signature in cursive script that reads "Katia Passerini".

Katia Passerini
Dean
College of Professional Studies

A Note from the Editor

Every December I am reminded that it is time to start working on the student's articles for the next edition of The Legal Apprentice. It is a time consuming project and I often wonder about the benefits. And then I will get an email from one of my former students, in law school or recently graduated from law school that will tell me the wonderful impact of the writing class and the pride of having published an article. I am always amazed that after all of the courses the students have endured, it is the pride of publication that they remember. I am humbled and honored they write to me long after they left my classroom. It re-energizes me to continue to work with the students and support them through their learning process. Writing classes are more than just correcting grammar or sentence structure. It's providing the student with the faith to believe in themselves. It's not false praise but the patience to provide positive feedback and the opportunity to submit multiple drafts that builds their confidence. They can write!

I offer to you some wonderful articles from some very hard-working students.

I thank Judge William H. Pauley III, United States District Court, Southern District of New York for his contribution to this edition and acknowledge that judges are great craftsmen of writing because of their hard work and close attention to the meaning of words.

Professor Mary Noe

SOME REFLECTIONS ON WRITING

JUDGE WILLIAM H. PAULEY III[†]

One of the overlooked ways to become a good writer is to spend time reading great prose. During my undergraduate years, I read many of the so-called “great books.” Without realizing it, I was learning how some of the finest writers and thinkers in Western civilization used language to express their ideas and engage the reader.

To this day, I make a habit of reading novels, periodicals, op-eds, book reviews, and collections of articles deemed by editors to be worth reading, like *Longreads*. As a district judge, I try to keep abreast of developments in politics, finance, science, technology, and even popular culture. Reading a wide variety of writing in different subject areas not only expands your mind; it refines and refreshes your writing. I often find that phrases and literary devices I come across in newspapers and magazines wind up in my judicial opinions, making them more accessible to the public.

Of course, writing is an introspective process that encompasses much more than a physical act or a toolbox of techniques. Before starting to write, you should think about what you want to say. That does not mean closeting yourself in a cork-lined room like Marcel Proust, but it helps to be alone and contemplate your assignment before putting pen to paper. By the same token, listening to yourself as you read what you have written will give you a sense of the piece’s cadence. And returning to edit a piece that you put aside can only make it better—as Blaise Pascal observed, “I would have written a shorter letter, but I did not have the time.” Practice may not make perfect, but it will improve your writing.

So here are a few guideposts that have served me well over the years:

1. Take the time to make whatever you write simpler and shorter. Supreme Court Justice Oliver Wendell Holmes—a pre-eminent legal writer—authored opinions spanning two or three pages that cut to the heart of the issue and resolved it.

[†] Senior United States District Judge, United States District Court, Southern District of New York; A.B. Duke University; J.D. Duke University School of Law.

2. Listen to the cadence of your writing. For example, say out loud the opening eight syllable sentence of Thomas Paine’s *The American Crisis*: “These are the times that try men’s souls.” Its cadence is lyrical, and its simplicity gives it power.

3. Beware of adjectives, adverbs, and the passive voice because they detract from the force of your statements.

4. Minimize or eliminate footnotes because they distract the reader from the flow of your narrative. Footnotes weigh a piece down with gratuitous marginalia. Remember, if it is not important enough to be in the text, it is probably not worth bringing to the reader’s attention.

5. Lead with your strongest point because the reader will never be fresher than at the beginning of your piece. As Supreme Court Justice Antonin Scalia observed, “when the first taste is bad, one is not eager to drink further.” The corollary is to leave out your weaker points because they offer only noise and distraction.

6. Make your argument symphonic. Points should build off one another and themes reiterated in variations, just like Beethoven’s *Symphony No. 5*. The logic of your piece should communicate a certain inevitability akin to the final note in a piece of music.

These techniques are just illustrative. At bottom, the more good writing you read, the more these—and other effective techniques—will seep into your subconscious and become part of your voice.

COMPUTERS AND FRAUD

ELIZABETH FLINT[†]

Imagine for a moment that one of the most controversial anti-hacking laws was actually inspired by an 80's movie. Well, you don't have to imagine because that is exactly how the Computer Fraud and Abuse Act (CFAA)¹ was born. Officially enacted by Congress in 1984, the Computer Fraud and Abuse Act is a federal statute originally designed to combat computer crime. This law was specifically targeting "hacking" or other unlawful access into computer systems inspired by the movie *War Games* about a teenage hacker.² Congress hoped to stop hackers from accessing computers used by government employees or other agencies. Without a law in place, Congress feared hackers would be able to sell or use government information to their advantage. Under the CFAA, individuals are committing a crime when they intentionally access a computer without the proper authority or go beyond their employment clearance to access information from a Federal department or agency.³

The interpretation of this law might seem very simple. However, because of the broad terminology "without authorization" and "exceeds authorized access," it has been interpreted many different ways by prosecutors and the courts alike. Furthermore, with the popularity of computer usage, the CFAA laws have continued to expand. All of these changes to the CFAA have caused some to question whether certain facts can be prosecuted under the statute. This research paper will discuss the complexities of the CFAA and what could be done to correct it and two cases, *U.S. v. Gilberto Valle*.⁴ and *U.S. v. Lori Drew*.⁵

[†] Elizabeth Flint is a graduating with a B.S. majoring in Legal Studies. She is on the College of Professional Studies Honor Society and has been on the Dean's 2017-2018.

¹ 18 U.S.C. §1030.

² Peters, Justin. "The Law Against 'Online Crime' Is Based on Imaginary Problems. Congress Still Isn't Fixing It." *Slate Magazine*, 24 Apr. 2015, www.slate.com/articles/technology/technology/2015/04/aaron_s_law_why_it_s_needed_to_fix_the_horrendously_bad_cfaa.html.

³ 18 U.S.C.A §1030(a)(2)(B).

⁴ *U.S. v. Valle*, 301 F.R.D. 53; 2014 WL 2980256, (S.D.N.Y. 2014).

⁵ *U.S. v. Lori Drew*, 259 F.R.D 449 (C.D. Cal. 2009).

U.S. v. GILBERTO VALLE

On paper, Gilberto Valle seemed like an ordinary man. He was married and had a newborn baby girl living in Forest Hills. Gilberto Valle was an officer with the New York City Police Department starting in 2006. In September of 2012 Valle's wife Kathleen installed spyware on the family computer and discovered that her husband was part of an Internet fetish community called the "Dark Fetish Network." Valle's wife found that he had engaged in various disturbing chats. These chats included fantasies of kidnapping, torturing, and cannibalizing multiple women, including his wife. After finding these chats and photos on her husband's computer Kathleen took her daughter, moved out of the marital residence and contacted federal authorities. Valle was fired from the police department when authorities discovered that Valle had accessed the department's database to search for personal information on potential victims.⁶ There was no evidence Valle had met with his chat friends or effectuated a plan to carry out his fantasies.

One month later in October 2012, Valle was arrested and charged with conspiracy to kidnap and in violation of the CFAA. The prosecution alleged that Valle violated the CFAA when he used his access to the police department's database for personal reasons. In 2013 a trial was held at the United States District Court in New York City. After a thirteen day trial, Valle was found guilty on both counts of kidnapping and in violation of the CFAA. However, in a rare instance and surprising move the presiding Judge Gardephe decided to overturn one of the jury's convictions. In his opinion, Judge Gardephe overturned the conspiracy to kidnap charge citing insufficient evidence to sustain a conviction of conspiracy to kidnap because there was no evidence of an overt act and inadequate evidence of intent to kidnap, rather the evidence suggested that the defendant was engaged in "fantasy role playing."⁷

As for the CFAA conviction, Valle claimed that he had authorization to access the database because he was a police officer.⁸ However, the Court reasoned that even though the term "exceeds authorized access" is very broad, Valle did not have permission to access the Department's Omnixx Force Mobile (OFM), a restricted database for non-law enforcement purposes according to the department's computer use policy.⁹ So, by searching the database for personal reasons, Valle violated the department's policy. The Judge sentenced Valle to 12 months in prison, one year of supervised release, and a \$25 special assessment.

⁶ *U.S. v. Valle*, 807 F.3d 508 (2nd Cir. 2015).

⁷ *Supra* see note 4.

⁸ *Id.*

⁹ *Id.*

The Government appealed the Judge's acquittal on the conspiracy count and Valle appealed his conviction on the violation of the CFAA.

The outcome of appeal proved just how tricky this law can be.

Editor's Note

The Circuit Court found the fantasy to commit a crime is not a crime without any action. There was no evidence Valle knew the real names of his Internet parties or even inquired about the names of the others. Valle's Internet exchanges were considered "role playing."

EXCEEDS AUTHORIZED ACCESS

In May of 2015, the U.S. Circuit Court of Appeals heard Valle's appeal and debated the exact terms of the statute. For example, the term "exceeds authorized access" was added to the 1986 amendments in order to cover instances of trespassing into computers to gain information. The definition is to "access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled to obtain or alter."¹⁰ It is important to note, the prosecution did not allege Valle altered any information he found within the database, but rather questioned whether he had authorization to access that information. However, since the enactment of the statute, the courts have found the language complicated and confusing to interpret. The reason is the statute does not define the term "authorization." Also, the statute does not explicitly state if "exceeds authorized access" includes the access to the entire computer or just access to particular files on the computer.

Furthermore, the statute's language seems to be more suited for hackers who fraudulently obtain access to a computer than those who have access to the computer but view documents and files outside their authorization.

In this case Valle admitted during his trial that he violated the Department's policy by using the computer database for personal reasons, but never "used his access to obtain any information he was not entitled to obtain."¹¹ This is one of the problems with the language of the CFAA. Does violation of an agency's computer use policy constitute criminal liability? In Valle's case, the Court of Appeals said "no." The Court decided to overturn Valle's conviction because given the broad nature of the statute, the Court did not want to criminalize the every day conduct of individuals who use their computer authorization for personal reasons.¹²

¹⁰ *Supra* see note 6.

¹¹ *Id.*

¹² *Id.*

Editor's Note

The Court noted that there was a Circuit split on the interpretation of "exceeds authorized access." Additionally, since the Government and the defense proposed two plausible interpretations, the Court is obligated to accept the one most favorable to the defendant.

U.S. v. LORI DREW

Unfortunately, Valle's case is not the only one that brought the CFAA statute into the spotlight. In *U.S. v. Drew*, the court also wrestled with whether violating MySpace's terms of service agreement is in fact a crime under the CFAA statute. In 2006, Lori Drew, a mother from O'Fallon, Missouri set up a fake MySpace account in order to bully 13-year-old Megan Meir. Drew was upset with Meir after she was no longer her daughter's friend. Drew decided to make a fake MySpace page pretending to be a teenage boy in order to flirt and ridicule Meir. Shortly thereafter, Meir committed suicide. In a move that outraged many, state prosecutors in Missouri decided not to prosecute Drew for any wrongdoing in Meir's death, citing not enough evidence. However, the U.S. Attorney for the Central District of California decided to bring charges against Drew in violation of the CFAA.¹³

Similar to Valle's case, the prosecution contended that by creating the fake MySpace page and harassing Meir, Drew violated the terms of service agreement. According to the MySpace website a person cannot, "use any profile for purpose of impersonation, deception or confusion."¹⁴ The prosecutors contended at her trial that Drew had "unauthorized access" under the CFAA statute. The jury convicted Drew on a lesser charge. However, Judge Wu of the United States District Court set aside the misdemeanor conviction in part because the statute itself is vague, and the statute does not state that violating a terms of service contract is criminal activity.¹⁵ Furthermore, both judges in Valle and Drew's cases point out that criminalizing what would normally be considered a breach of contract would turn many computer users into criminals.

¹³ *Supra* see note 5.

¹⁴ "Myspace Services Terms of Use Agreement." *Myspace*. Accessed April 21, 2018.
<https://myspace.com/pages/terms#9>.

¹⁵ *Supra* see note 5.

ABUSE AND POSSIBLE SOLUTION

The vague construction of the CFAA statute is not the only problem. As noted in both *Valle* and *Drew*, both defendants were not actually charged with any state crimes. In both cases an outraged community was appeased by the prosecutors' indictment of the defendants. This is where the CFAA statute came in. In an article by the *Washington Post*, author Orin Kerr explains when discussing the *Valle* case: "Prosecutors brought the CFAA count because they were looking for a reason to charge Valle for other things he did."¹⁶ In *Drew's* case, the prosecutors needed a reason to punish *Drew* for *Meir's* suicide. Unfortunately, this causes prosecutors to misuse the CFAA in order to pursue some sort of criminal liability where there is none.

To combat the misuse of the statute, there have been calls for reform. One example is "Aaron's Law," which is named after Aaron Swartz. In 2013 Swartz who was an activist for the tech community, committed suicide after he was charged with violating the CFAA for allegedly stealing documents from the website JSTOR.¹⁷ "Aaron's Law," was introduced to the House of Representatives in June of 2013 which would have changed the term "exceeds authorized access" to "access without authorization." The definition would be "obtaining information on a protected computer that the accesser lacks authorization to obtain by knowingly circumventing one or more technological or physical measures that are designed to exclude or prevent unauthorized individuals from obtaining that information."¹⁸ Also, the amendment would have provided a more detailed definition to "unauthorized access" and exclude violations of terms of service agreements.¹⁹ Unfortunately, the amendment did not have support and failed to pass through Congress.

OPINION

In my opinion, the Computer Fraud and Abuse Act which was enacted before the Internet became a crucial part of society is a very complicated statute to interpret. I believe in 1980's Congress could not have imagined what the Internet and technology would be like today. Without reform,

¹⁶ Kerr, Orin. "The CFAA Meets the "Cannibal Cop" in the Second Circuit - and Maybe beyond." *The Washington Post*. May 13, 2015. https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/13/the-cfaa-meets-the-cannibal-cop-in-the-second-circuit-andmaybebeyond/?noredirect=on&utm_term=.5a93933b0303.

¹⁷ Zetter, Kim. "Hacker Lexicon: What Is the Computer Fraud and Abuse Act?" *Wired*. June 03, 2017. <https://www.wired.com/2014/11/hacker-lexicon-computer-fraud-abuse-act/>.

¹⁸ Lofgren, and Zoe. "H.R.2454 - 113th Congress (2013-2014): Aaron's Law Act of 2013." *Congress.gov*. July 15, 2013. <https://www.congress.gov/bill/113th-congress/house-bill/2454>.

¹⁹ *Supra* see note 17.

prosecutors can potentially bring federal charges against anyone who violates a terms of service agreement. This should worry anyone who not only uses a computer but is also a frequent visitor of social media websites. How many of us actually read those agreements before signing on to Facebook or any site for that matter? How many of us realize we are committing a federal crime when we give out our Netflix password? My guess is not many. In order to truly protect computer information and everyday users, the CFAA needs to make it explicitly clear what actions constitute a crime, otherwise, we leave the judgment up to prosecutors, who as previously shown want a conviction.

CONCLUSION

The Computer Fraud and Abuse Act when enacted was meant to punish hackers for stealing information from a computer. However, given the vague and outdated nature of this statute the misuse of this law has done more harm than good. Hopefully, Congress will soon realize that a change is needed. Otherwise, innocent people might find themselves charged with a federal crime for simply checking their Instagram feed at work.

ARE POLICE PREPARED TO RESPOND TO THE MENTALLY ILL

EMELYBEL VASQUEZ[†]

INTRODUCTION

In today's society, it is clear that police use of excessive force has led to the unjustified and unnecessary deaths of many innocent individuals. What is not always clear is the reason why excessive force is used by police officers. The fault lies in systematic deficiencies which cause or contribute to officers using excessive force. Recently, a jury found the New York City Police Department liable for use of excessive force against a mentally disabled individual.

This paper will summarize the case of *Bah v. City of New York*,¹ provide research from a U.S. Department of Justice investigation of the Albuquerque Police Department and suggest remedies for police departments that I believe would decrease the number of excessive force incidents.

BAH V. CITY OF NEW YORK

On the evening of September 25, 2012 Mohamed Bah's mother called the police for an ambulance to take her emotionally disturbed son to the hospital. The NYPD 26th Precinct responded to the call and knocked on the apartment door. Bah opened the door slightly.

One officer saw Bah standing naked holding a large knife while saying unidentified words in a "grunting tone." At that point the officer called the NYPD Emergency Service Unit (ESU) to the scene and informed them about the knife. The ESU officers brought equipment with them which included a ballistic shield, an Arwen gun, which fires non-lethal projectiles, two Tasers, a water cannon, and a Y-bar to hold individuals in place.

The ESU officers attempted to observe Bah by inserting a pole camera into the apartment through the slightly opened door. The officers could see Bah pacing back and forth holding the knife through the pole camera. When

[†] Emelybel Vasquez is graduating in May 2019 with a B.S. major in Legal Studies completing her degree in three years. She is a member of the CPS Honor Society. She has been on the Dean's list 2016-2019.

¹ *Bah v. City of New York*, 319 F.Supp. 3d 698, (S.D.N.Y. 2018).

the officers removed the pole camera and opened the door, the ESU Lieutenant, Michael Licitra gave them the order to “go [in].”

When entering the dark apartment, Officer Edwin Mateo saw Bah. Officer Kress proceeded to fire his Taser at Bah. Mateo then fired one or two rounds from the Arwen. Bah was not attacking anyone when Mateo fired the Arwen. After firing the Arwen, Sergeant McCormack hit Mateo who then fell to the ground. When Mateo hit the ground, most of his body fell outside of the apartment. The left side of his body hit the floor and he remained laying there in that position. Mateo incorrectly believed Bah was coming at him and stabbed him. Mateo was about arms-length from Bah who was a foot away from the barrel of the Arwen when Mateo fired his gun.

Officers Kress, Green, and Mateo fired at Bah. Kress shot Bah three times in the torso. Green fired twice at Bah and Mateo fired five times. Five of those seven bullets hit Bah. Bah was killed instantly.

Bah’s estate brought a civil action against New York City and eight officers alleging that the officers used excessive force against Mohamed Bah in violation of federal statute 42 U.S.C. §1983. The jury found two officers liable after the trial. The defendants requested the court set aside the judgement as a matter of law or for a new trial.

Editor’s Note: Detective Edwin Mateo of ESU was liable for the excessive use of force and battery claims. Lieutenant Michael Licitra of ESU was liable for failure to supervise. The jury awarded compensatory damages of \$2,215,000. Mateo and Licitra requested the court find that the evidence was insufficient and therefore the judgment should be vacated or a new trial should be convened. They also requested the court find that they had qualified immunity from such a lawsuit because their actions were protected as part of their job with NYPD.

The issues before the court were whether the plaintiff failed to meet the burden of proof in establishing that Mateo used excessive force; whether the defendants are entitled to judgement as a matter of law; whether defendants are entitled to a new trial or judgement on the grounds of qualified immunity.

The Court denied Matteo’s requests but granted Licitra’s requests.

The Court concluded that the jury reasonably differentiated the actions of Mateo from the actions of the other defendants on the excessive force claims.

The Court gave instructions to the jury on excessive force based on

precedent from *County of Los Angeles v. Mendez*.² An officer's belief could be mistaken as long as it is a reasonable belief. The jury was told that the probable cause standard must evaluate the totality of the circumstances. The jury was told that the officers were not required to be certain or correct about their beliefs. Their beliefs should just be reasonable.

The Court decided that a reasonable jury would find in favor of the plaintiff on the excessive force claim against Mateo. The Court denied the defendant's motion for judgment that Matteo was not liable as a matter of law or for a new trial.

The Court next addressed whether Mateo would be entitled to qualified immunity if his actions did not violate laws which have been clearly established.

According to *Outlaw v. City of Hartford*³ qualified immunity is considered an affirmative defense. The defendant has the burden of proof in an affirmative defense which includes that the police acted reasonably under the circumstances.

Qualified immunity was not raised during the trial and therefore was not addressed by the jury. Therefore, it could not be raised after the trial. The qualified immunity affirmative defense for Mateo was denied by this court.

The Court then provided the reasoning for dismissing the claims against Licitra.

According to *Grice v. McVeigh*⁴ in order to establish a liability claim of a supervisor, the actions of both the subordinates and the supervisor must be clearly established under the law.

At trial the officers proved that they truly believed Bah was in need of medical assistance. The jury determined the officers's decision to enter Bah's apartment and to use their training in order to resolve the problem in the event "force became necessary" and was objectively reasonable. Neither the plaintiff nor the Court found similar cases that could establish such actions under the law. The plaintiff's expert witness also testified that it "would be impossible" to train officers how to respond to every situation they might encounter.

The plaintiff's claims against Lieutenant Licitra were dismissed by the court.

² *County of Los Angeles v. Mendez*, — U.S. —, 137 S.Ct. 1539, 1546, 198 L.Ed.2d 52 (2017).

³ *Outlaw v. City of Hartford*, 884 F.3d 351, 367 (2d Cir. 2018).

⁴ *Grice v. McVeigh*, 873 F.3d 162, 169 (2d Cir. 2017).

RESEARCH

In 2012 hundreds of Albuquerque residents took to the streets and protested against police use of excessive force.⁵ There was a recent incident where the police shot and killed an innocent homeless man.⁶ The protests became a news story and the United States Department of Justice (USDJ) began an investigation. They wanted to learn why the residents reacted so strongly to one incident. The results were shocking.

On April 10, 2014 the Acting U.S. Attorney of the District of New Mexico and the Acting Assistant Attorney General from the Civil Rights Division of the USDJ sent the Mayor of Albuquerque a forty-six-page letter explaining the results of the investigations.⁷ The letter included the reason why they took such actions, the methods and legal standards used, their findings and remedial measures that could be taken to improve the Police Department.

The most prevalent shortfall of the Albuquerque Police Department (APD) was the failure to conduct thorough and objective reviews of officers' use of force.⁸ Regardless of intervention programs, many police department supervisors view reasonable what most would consider excessive force. Supervisors encouraging such behavior makes it difficult for the public to trust police officers.

The APD policy regarding the use of excessive force states that officers should only use the force that is reasonably necessary to protect individual lives and liberties according law.⁹

The United States Department of Justice (USDJ) Civil Rights Division found the APD has been unsuccessful in living up to their policies. The APD failed to implement their policies by having (1) doubtful internal accountability, (2) insufficient training on use of force, and (3) policy deficiency.¹⁰

The APD had questionable internal accountability which contributes to the practice of excessive force. The supervisory reviews are often riddled with misleading documentation of force used by their officers and sketchy implementation of the Department's internal review procedures. The USDJ

⁵ "Albuquerque's long history of police abuse, cover-up and scandal", https://www.washingtonpost.com/news/the-watch/wp/2014/04/14/albuquerque-long-history-of-police-abuse-cover-up-and-scandal/?noredirect=on&utm_term=.c0772c50fbf8.

⁶ *Id.*

⁷ "Re: Albuquerque Police Department" by Jocelyn Samuels and Damon P. Martinez, https://www.justice.gov/sites/default/files/crt/legacy/2014/04/10/apd_findings_4-10-14.pdf.

⁸ *Id.*

⁹ APD Procedural Order 2-52, <https://www.cabq.gov/police/documents/2-52-use-of-force-general-draft-june-2018.pdf>.

¹⁰ *Supra* see note 3.

investigated several cases that were found to be problematic and no supervisor had reported use of excessive force in these cases.

From 2010-2013, the APD reported 1,863 uses of force. Only 14 of these reports were considered to be “excessive.”¹¹ From 2010-2011, the APD only found two incidents in which their officers violated their own policy of excessive force.¹² The USDJ investigation disclosed that there were about 30 incidents of excessive force that were not initially reported by the supervisors. The majority of officers using excessive force from 2010-2014 were supported by supervisors claiming that the force was “reasonable.”¹³ Taking all this information into consideration, it is clear that the internal accountability in the APD was inadequate.

The APD’s insufficient training on use of force contributes to the unreasonable use of force. The most prevalent deficiency in terms of training is that officers’ training focuses on “using force, especially weapons, to resolve stressful encounters.”¹⁴ The training does not focus on de-escalation techniques that would result in a better outcome for both the police officers and the civilian.

Another deficiency regarding training is that there is no way to confirm that the training received by the APD officers mirrors the Department’s use of force policies. The individuals who conduct the training sessions at the APD are not required to submit lesson plans or classroom materials.¹⁵ This makes it impossible for the Department to authorize or alter what is being taught to the officers. This deficiency also makes it possible for different sets of officers to learn different things at training since there is no set curriculum.

The APD’s deficient training leads to unreasonable uses of force by their officers. These deficiencies start with the Department’s ambiguous definition of the word “force.”¹⁶ If the word were clearly defined it would be easier for officers to know when they are doing more than the definition allows them to do.

Another unclear definition used in the policy is “police action.” Its meaning could include giving someone a ticket or shooting and killing an individual. This gives officers indiscriminate freedom when responding. If the word were properly defined, officers would know exactly how to act when encountering a specific situation.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

OPINION

Although this research focuses solely on the Albuquerque Police Department, it is only one example of the problems with internal practices that result in complications with use of excessive force. The use of excessive force has led to the deaths of many innocent people including Mohamed Bah. Something needs to be done to fix this.

In order to reduce officer use of excessive force, police departments have to be more honest and credible when recording their officer's use of excessive force when it was not necessary. If this is done, it makes clear that the supervisors are holding their police officers accountable for their faulty actions.

More adequate training for officers should be available. Those who conduct the training should be told exactly what should be taught during their training sessions. An alternative for this would be to have a set curriculum for the training sessions shared with all the states' police departments. This would make it possible for all officers of that state to have the same information and the same training.

Lastly, policies should be revised so that they are clear and unambiguous. Words that could be interpreted with several meanings should be clearly defined. Words such as "force" and "police action" should be defined so that all officers as well as supervisors understand the meaning.

If all these remedies are taken the use of excessive force by police officers will decrease. It all starts at the roots.

DISABILITY PROBLEMS AND THE NEW YORK STATE BAR

AULONA MURATI[†]

INTRODUCTION

Imagine the following scenario: you just graduated law school and are sitting for the Bar Examination but you have a mental or physical disability. An average person would think that under the Americans with Disabilities Act (ADA), the New York State Board of Law Examiners would automatically provide you with test accommodations. This is not necessarily true. There are many cases where the New York State Board of Law Examiners do not provide appropriate test accommodations to applicants.

This paper will review two opinions on the subject of disabilities and New York State Bar Examination accommodations,¹ and The New York State Board of Law Examiners Test Accommodations Handbook.

T.W. v. NEW YORK STATE BOARD OF LAW EXAMINERS

While plaintiff T.W. was a Harvard law student, she requested and Harvard provided her with special accommodations for test taking due to her anxiety and other mental conditions that made it difficult for her to solve abstract questions. Harvard provided her with three accommodations for test taking: 50 percent extra time, rest breaks, and an individual testing room.

After graduating Harvard, T. W. took the New York State Bar Examination in July 2013. When T.W. registered for the exam she requested the Board of Examiners (Board) provide similar accommodations that she received at Harvard with one exception, double time in place of the “off clock” breaks. The Board denied the request and T.W. appealed. The Board eventually agreed to give T.W. the breaks and a smaller testing room instead of a private room but denied the time extension completely. T.W. failed the

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¹ *T.W. v. New York State Board of Law Examiners*, 2017 WL 4296731 (E.D.N.Y. 2017). *Bartlett v. New York State Bd. of Law Examiners*, 970 F.Supp. 1094 (S.D.N.Y. 1997) aff’d in part, vacated in part, 156 F.3d 321 (2d Cir. 1998), cert. granted, judgment vacated, 527 U.S. 1031, 119 S.Ct. 2388, 144 L. Ed. 2d 790 (1999), and aff’d in part, vacated in part, 226 F.3d 69 (2d Cir. 2000).

July 2013 Bar Examination. She took a leave of absence from the law firm she was working at to study for the next July exam. In July of 2014 T.W. again requested the Board provide her with 50 percent extra time, “off clock” breaks, and an individual testing room. On this occasion, the Board granted the extra time, provided a smaller but not private testing room, but refused to grant the “off clock” breaks.

T.W. did not pass the July 2014 Bar Exam and eventually was fired from her job.

T.W. took the next exam in February 2015. She requested the same accommodations but was only granted 50 percent extra time. This time T.W. passed. She commenced a lawsuit against the Board claiming violations of Title II and III of the Americans with Disabilities Act (42 U.S.C. § 12101, et seq.)(ADA); violations of New York City Human Rights Law (N.Y.C. Admin. Code § 8-107) and violations of Section 504 of the Rehabilitation Act, (29 U.S.C. § 794). T.W. also requested the Court conceal her name and identify her simply as T.W.

The Court granted the Board’s request to dismiss the plaintiff’s claims of violations of Title III American with Disabilities Act and NYC Human Rights violations.

The remaining issue before the Court involved whether the New York State Board of Examiners possessed sovereign immunity from Title II of the ADA and Section 504 of the Rehabilitation Act. In order for T.W. to prevail on this claim, she was required to successfully prove one of two claims; that Title II of the ADA is in compliance with Congress’ authority under Section 5 of the Fourteenth Amendment or that the Board waived their sovereign immunity by accepting federal funds.

Title II of the ADA was passed in accordance with Congress’s authority under Section 5 of the Fourteenth Amendment along with the Commerce Clause. Under 42 U.S.C. §12202, a state or state department such as the Board is not immune under the Eleventh Amendment from an action in federal court for a violation of Title II of the ADA if the department accepts federal funds. According to *Seminole Tribe of Fla. v. Florida*,² Congress can pass statutes, but it cannot revoke a state’s sovereign immunity.

Section 504 of the Rehabilitation Act declares that states forfeit immunity when they accept federal funds. Under 42 U.S.C. §2000d-7 a state is not entitled to immunity under the Eleventh Amendment if Section 504 of the Rehabilitation Act is invoked.

T.W. argued that the Board waived its sovereign immunity by receiving federal funds from a voucher program for veterans who register for the Bar

² *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

Examination. The Board contended that the only funds received are from the “Attorney Licensing Fund” which is accumulated through registration fees from lawyers in New York. Defendant also argued that the voucher program for veterans is a form of reimbursement from the federal government to aid veterans taking the exam. Defendant claimed that this reimbursement is intended solely for the veterans and the Board received none of the funds. The Court determined that the question of whether the Board “receives federal funding is a fact that is only in the possession of the defendants” and therefore plaintiff was permitted limited discovery into the matter.

During the limited discovery, T.W. was granted the opportunity to request the Board share federal funding records. Upon the close of discovery, if plaintiff was able to show that the Board received federal funding they waived their sovereign immunity and she can continue to pursue her claim in federal court.

In concealing the name of the parties, the Court referred to a Second Circuit Court of Appeals case *Sealed Plaintiff v. Sealed Defendant*.³ The Second Circuit listed ten factors for courts to consider when deciding to grant parties anonymity. A court must balance the plaintiffs’ anonymity against the public’s interest of disclosure and potential prejudice toward the defendant. One of the ten factors states “whether the identification of the person causes mental or physical harm to the party requesting the anonymity.”

The District Court in the *Sealed Plaintiff* case agreed with the defendants that, thus far, the case proceeded with plaintiff’s full name and that one of the ten factors was “whether the plaintiff’s identity has thus far been kept confidential.” The Court nevertheless found that this was just one factor out of ten that the Court must consider and it is not conclusive and determined that concealing plaintiff’s name was proper. The Court noted T.W.’s mental health condition including anxiety and panic attacks as well as continuing harm to her reputation. The Court also concluded that there would not be any prejudice to the defendant if the case were to continue with anonymity for the Plaintiff.

The Court declined T.W.’s request to seal certain documents because of the public interest in accessing these findings. The Court ordered the clerk to seal only plaintiff’s name by using her initials and to temporarily seal other publicly filed documents to protect T.W.’s privacy.

³ *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185 (2d Cir. 2008).

RESEARCH

The New York State Board of Law Examiners Test Accommodations Handbook is the main source of information outlining who, when, and for what reason test accommodations for the Bar Examination may be requested. The ADA defines a person with a disability as someone with a physical or mental impairment that “substantially limits one or more major life activities as compared to most people in the general population.”⁴ The New York State Board of Law Examiners provides reasonable test accommodations for people who are disabled and qualify under the definitions of the ADA and follows ADA regulations as to testing accommodations. The ADA provides civil rights protections to individuals with disabilities analogous to those provided to individuals on the basis of race, sex, national origin, and religion. It guarantees equal opportunity for individuals with disabilities.

According to the New York State Board of Law Examiners, the purpose of test accommodations is to provide “adjustments,” and therefore, provide equal access to the Bar

The accommodations require modifications to the standard testing conditions in relation to the applicant’s physical or mental impairments. Test accommodations are designed to assist applicants by providing the necessary modifications that are consistent with respective impairments. Nonetheless, test accommodations are not a guarantee of improved performance, test completion or a passing score and are determined on a case-by-case basis. An applicant must provide sufficient documentation which varies depending on the type of disability. Documentation sufficient in other testing situations may not be sufficient to support a request for accommodations on the New York State Bar Examination.

BARTLETT V. NEW YORK STATE BOARD OF LAW EXAMINERS

The ruling of *Bartlett v. New York State Board of Law Examiners*,⁵ commenced an eight year litigation with the New York State Board of Law Examiners that lead to an appeal to the U.S. Supreme Court and two appearances before the U.S. Court of Appeals for the Second Circuit.

This case involved Supreme Court Justice Sonya Sotomayor, then sitting as a District Court Judge, ruling that Marilyn Bartlett’s disabilities should be accommodated under the ADA because they “substantially limited a major life activity of reading when compared to most people.”

In *Bartlett*, plaintiff failed the Bar Examination five times due to her severe dyslexia. When she was provided testing accommodations, she

⁴ <http://www.nybarexam.org/Docs/ADAHandBook.pdf>.

⁵ *Supra* see note 1.

passed and was able to succeed in her profession. Judge Sotomayor concluded that the Board viewed people with learning disabilities in a suspicious manner and that the defendants implied plaintiff might be “faking” her disability. Judge Sotomayor found the plaintiff was entitled to testing accommodations due to her disability under ADA and §504 of the Federal Rehabilitation Act and awarded Bartlett \$2,500 for each of the five times she took the Bar exam.

The Second Circuit affirmed the District Court’s decision in part and remanded the case for further proceedings. The Supreme Court later granted certiorari and vacated the judgment of the Second Circuit. The Supreme Court also remanded the case to the Second Circuit for reconsideration holding that corrective devices and mitigating measures must be considered in determining whether an individual is disabled under the ADA. The Second Circuit then remanded the case back to Judge Sotomayor for further findings as to whether Bartlett was limited in a major life activity of employment. Judge Sotomayor upheld her original decision that “. . .the effect of plaintiff’s reading impairment on her life is profound.” Judge Sotomayor decided it was for the Court to discern “between mitigating measures plaintiff uses that affect her ability to read and those that merely assist her in functioning in her daily life.” She added that plaintiff’s prior study groups, dictation devices, and other accommodations only helped Bartlett function on timed exams and they did not mitigate her disability.

Due to her disability, plaintiff used different coping strategies to read such as using her finger to read from line to line or punching holes in index cards to assist with sounding out large words. Defendants argued that no matter how difficult it was for plaintiff to read, that alone did not substantially limit her ability because she scored average on a range of reading tests. Judge Sotomayor rejected any reading test evaluation put forth by the Board because a clinical judgment was needed and reading tests are subjective. The Court stated that the Board must not rely on psychometric test scores to determine if someone had a disability or not, but must also take other matters into consideration such as the application evaluation reports. Judge Sotomayor concluded that the Board’s failure to provide test accommodations was a significant factor in plaintiff’s failing five Bar Examinations times even though she possessed sufficient knowledge to pass it.

Judge Sotomayor stated that the Board was fixated on test scores and was suspicious over doctor reports leading to more suspicion regarding learning disabilities. Even though the Board is concerned with its integrity, it cannot turn genuine concerns into negative bias about learning disabilities. Finally, Sotomayor was convinced that if Bartlett was given extra time to

complete her Examination it would simply level the playing field and accommodate her disability without giving her an advantage over others.

The Court ruled that Ms. Bartlett would be given four days to take the exam, the use of a computer, permission to circle the multiple choice answer in the test book directly and the text would be printed in large font.

CONCLUSION

The Court in *T.W. v. New York State Board of Law Examiners* deferred the defendant's motion to dismiss the plaintiff's claims until T.W. was granted limited discovery to prove whether the New York State Board of Law Examiners received federal funding. If during limited discovery T.W. is able to prove that the Board received federal funding, this would remove sovereign immunity as a defense. Without this defense, the New York State Board of Law Examiners would have to follow the regulations of the ADA and the Rehabilitation Act. The New York State Board of Law Examiners is obligated to follow the rules of the ADA in regards to providing reasonable test accommodations that are appropriate with the disability of the applicant. I agree with Judge Sotomayor's prior decision because the New York State Board of Law Examiners must comply with the ADA regulations and accommodate applicants who identify as disabled.

ENDANGERED SPECIES IN UNITED STATES

BRENNAN O’GORMAN[†]

INTRODUCTION

The Endangered Species Act of 1973¹ was enacted with the goal of conserving and protecting threatened plants and animals. The main federal agencies involved with the Act are the U.S. Fish and Wildlife Services (FWS) and the U.S. National Oceanic and Atmospheric Administration (NOAA). The FWS created a universal list of endangered species, including birds, mammals, fish, insects, flowers, and trees. The injuring, killing or destroying of these species are subject to penalties. The purpose of the Act is to ensure that the human population does not subject endangered species to further extinction. This is done through specific, outlined punishments listed within the Act for offenses that violate its terms.² This paper will focus on the Endangered Species Act and how it is applied in different regions of the country.

Killing an endangered species and therefore violating the Endangered Species Act is considered a petty offense. The maximum sentence for such a crime is only six months in prison and a \$25,000 fine. The killing of an endangered species violates section 1538(a)(1)(G) of the Act, making all terms of section G punishable only by the aforementioned maximum sentence and defines it as a petty offense.³ In comparison, section 1538(a)(1)(A) through (F) of the Act involve the importation, exportation, transportation, possession, and stealing of an endangered species. Violation of this section is considered a much more serious offense, with the maximum prison sentence of one year and a \$50,000 fine.⁴ Therefore, violations of the Endangered Species Act lead to punishments that range from petty to serious, depending on the specific section that is violated.

There are numerous elements that determine the decisions of cases that violate the Endangered Species Act. Section 1538(a)(1)(G) states that it is

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¹ 16 U.S.C. § 1531.

² U.S. Fish and Wildlife Service/Endangered Species Program. (2017, November 1). Endangered Species Act Overview. www.fws.gov/endangered/laws-policies/.

³ 16 U.S.C. § 1531(a)(1)(G).

⁴ 16 U.S.C. § 1538(a)(1)(A) through (F).

considered unlawful to, “violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Agency pursuant to authority provided by this chapter.”⁵ Therefore, the penalties that follow the killing of an endangered animal arguably depend on the location of the court where the case is brought. The varying species that are considered endangered pursuant to the Act are also only found in given regions, making the cases presented in each subject to varying procedures and outcomes. For instance, the killing of a grizzly bear in Montana could result in a different decision than that of the killing of a dusky gopher frog in Louisiana. In addition, the severity of the punishments given can vary based on the number of endangered species that have been subject to violations of the Act. Therefore, logically one may be subject to harsher punishments if a mass extermination or threat of extermination of an endangered species occurs rather than harm done to a sole animal of such species.

With respect to the aforementioned influences on decisions involving the Endangered Species Act, one should consider the demographic in which a case occurs first before formulating opinions on such cases. In this paper, I will outline one case from two different states within the United States and indicate the variations of each case’s decision. This will demonstrate the influence a region has on the application of the Endangered Species Act 1538(a)(1), with respect to the varying severity of the violations that occur within each case.

MONTANA

The case of *The United States of America v. Brian F. Charette* involves the violation of the Endangered Species Act by the defendant, Brian F. Charette, brought by the U.S. government on one count of the unlawful taking of a threatened species.⁶ This violation of the Act and subsequent court decisions occurred in Montana, which is considered the Midwestern region of the nation. Following a motion for acquittal, the defendant was sentenced to six months in prison and ordered to pay \$5,000 in restitution. Mr. Chrette’s violation was considered a petty offense pursuant to section 1538(a)(1)(G) of the Endangered Species Act.⁷

The facts were as follows: on the morning of May 11, 2014, a grizzly bear and two cubs were outside the Charette’s home in Ronan, Montana. The defendant and his wife woke up because of the noise. According to the

⁵ *Supra* see note 3.

⁶ *U.S. v. Charette*, 242 F.Supp.3d 1125 (9th Cir. 2017).

⁷ *Supra* see note 3.

defendant, the grizzly bear proceeded to stand on its hind legs and mount the horse pasture fence on the property in an aggressive state. The defendant fired at the bear with his .270 rifle, resulting in its immediate death. The corpse of the animal was dragged to the back of the property for disposal. The defendant's wife at the time testified that the bears were chasing the horses in their pasture, but posed no direct threat to the house itself. Another witness, the defendant's stepfather, was also on the property at the time and claims to have seen the bear chasing a dog when two gunshots were fired resulting in the death of the bear. The Tribal Fish and Game for the Confederated Salish and Kootenai tribes launched a search for the animal's carcass on several occasions with no luck in locating it. Once brought before the court, the defendant attempted to plead guilty on two occasions to the offense. Magistrate Lynch refused to accept these pleas on the grounds that the defendant waivered on whether his intention in the shooting of the bear was for self-defense or the defense of others. There was a bench trial before the Magistrate. The defendant was found guilty of one count of the unlawful taking of an endangered species.

The trial occurred in March of 2017, at which the grizzly bear was on the list of endangered species. In June of the same year, just three months following the defendant's sentence, the grizzly bear was removed from the list due to its rapid population growth.⁸ The subsequent oral motion for acquittal filed by the defendant's attorney was ultimately denied, and the defendant was sentenced to six months in prison and required to pay \$5,000 in restitution.⁹

There are many controversial aspects of the case that are unrelated to the application of the Endangered Species Act, such as the defendant's use of the Rule 29 motion in appeal.¹⁰ However, it is critical to examine the influence the region in which the case occurred may have effected the outcome.

The midwestern area of the United States is known to have a large population of grizzly bears. The defendant's sentence was consistent with a petty offense because the killing of a grizzly bear violates 1538(a)(1)(G) of the Endangered Species Act as opposed to the more serious offenses outlined in 1538(a)(1)(A) through (F).¹¹ Although only one animal was killed, the Magistrate did not waiver on his decision to lessen the sentence.

⁸ Robbins, J. (2017, June 22). Yellowstone Grizzly Bear to Lose Endangered Species Protection. <https://www.nytimes.com/2017/06/22/science/yellowstone-grizzly-bear-endangered-species-list.html>.

⁹ *Supra* see note 6.

¹⁰ Fed. R. Crim. P. 29.

¹¹ 16 U.S.C. §1538.

The close proximity of time in the bear's transition from endangered to not indicates that it was already widely known that the bears were close to removal from the list, and therefore the judge should not have been as harsh in his sentencing. However, one can argue that the inherent respect for grizzly bears that exists in Montana influenced the decision of the case, proving that the region does play a significant role in the application of the Endangered Species Act.

HAWAII

The case of *The United States of America v. Daryl Nuesca* involves another violation of the Endangered Species Act section 1538(a)(1)(G) by the defendant Daryl Nuesca, brought by the United States government.¹² The defendant was originally convicted of the misdemeanor of taking two green sea turtles from a Hawaiian beach. The decision was affirmed. The sentence was five days of imprisonment. This case was especially controversial for the Endangered Species Act due to the defendant's use of several arguments that revolved around the supposedly necessary exemption of native Hawaiians from the Act. The grounds for his reasoning were rooted in the idea that native Hawaiians hunt green sea turtles for sustenance purposes and therefore his actions were justified. Ultimately the court found this to be invalid and affirmed the correct application of the Endangered Species Act, which is arguably due to the region in which the case occurred.

Daryl Nuesca was charged with the violation of 1538(a)(1)(G)¹³ and 1540(b)¹⁴ of the Endangered Species Act on November 29, 1989 following his taking of two green sea turtles from their natural habitat in Hawaii. Nuesca was found guilty following a jury trial and immediately appealed his conviction. He felt he had the right to remove the turtles because he was a native Hawaiian and had "aboriginal rights"¹⁵ that originate in a trust relationship between Hawaiian natives and the U.S. government. He contended that this relationship is no different than that of the relationship between the federal government and American Indians who are exempt from some laws within the Endangered Species Act. He specifically referenced Alaskan natives, as they are an exception to the majority of the rules of the Act. This exception is based on the necessity for sustenance in that region that can only be provided through the hunting of some animals protected

¹² *U.S. v. Nuesca*, 773 F.Supp. 1388 (U.S. Dis. Court. 1990).

¹³ *Supra* see note 3.

¹⁴ 16 U.S.C. § 1540(b.)

¹⁵ *Id.*

under the Act.¹⁶ He argued that his intention to consume the animals was ample justification for their removal from the beach and therefore the Act should not apply to him. However, the Appellate Judge felt differently, mostly due to the fact that the Endangered Species Act applies to “any person subject to the jurisdiction of the United States.”¹⁷

The defendant’s appeal was ultimately denied and he was charged with the violations. This affirmation can also be discussed in the context of the geographical region in which this case occurred. Nuesca utilized his origin as a Hawaiian native as the reason for his appeal, emphasizing the influence the region has on his perspective of animals, specifically the green sea turtle species. Although a small number of regions allow for its native people to be exempt in some cases from the rules within the Act, Hawaii is not one of them, making the Judge’s ruling well founded.

OPINION

Following my close examination of the prior two cases, I believe geographical location is a major influence in the decision of court cases involving the application of the Endangered Species Act section 1538(a)(1). In the Montana case, the sentence was somewhat severe for the killing of just one animal, however the emphasis the region places on the survival of grizzly bears was obvious by the court’s decision.

In the Hawaiian case, the sentence may have been arguably light, however the judge’s decision to disregard the defendant’s argument that Hawaiian natives use green sea turtles for sustenance is incredibly fair. He considered the regions wherein American Natives are exempt from the Act on grounds of necessity, and deemed native Hawaiians are not the same. It is hard to deny that both decisions exemplify the effect a region has on its subsequent court cases. This research is specifically in regards to the Endangered Species Act, however one could argue that this notion goes beyond this one area of application in that geography has an influence on the justicial system.

¹⁶ Wildlife Service. (2013, July 15). Working with Tribes Frequently Asked Questions. <https://www.fws.gov/endangered/what-we-do/tribal-faq.html>.

LIMITED PUBLIC FORUM

KAROL SKRZYPA[†]

The First Amendment of the United States Constitution provides for freedom of speech. The speech in public streets or parks may be regulated by the government under certain circumstances. These circumstances are called limited public forums.

This paper will first summarize the case of *Perry Education Association v. Perry Local Educators' Association*.¹ I will also present a question whether the First Amendment, which is applicable to the States by virtue of the Fourteenth Amendment, was violated when Perry Education Association was elected by the Board of Education as the exclusive bargaining representative. As the representative they were granted access to certain communication, while such access was denied to a rival union. This paper will also focus on limited public forum and if individual's rights are violated through state laws by examining cases where such types of laws have been enforced.

PERRY EDUCATION ASSN. V. PERRY LOCAL EDUCATORS' ASSN.

In the collective bargaining agreement between the Board of Education of Perry Township, Indiana and Perry Education Association (PEA) the Association was designated the exclusive bargaining representative for the School District's teachers. As a result PEA had access to the interschool mail system and teacher mailboxes in the Perry Township schools. The agreement also stated that no other union such as Perry Local Educators' Association (PLEA) would have access to the mail facilities. As a result, PLEA filed a lawsuit in Federal District Court against PEA and the School Board members. The claim was that the collective bargaining agreement violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment because it gives preferential access to internal mail system solely to PEA. They sought injunctive and declaratory relief and

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¹ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

damages. Upon cross-motions for summary judgment, the District Court entered judgment for the defendants PEA.²

The Court of Appeals for the Seventh Circuit reversed the District Court's decision. The Court stated that once the School District "opens its internal mail system to PEA but denies it to PLEA, it violates both the Equal Protection Clause and the First Amendment."³

The Court reasoned that the differential access of the rival unions constituted impermissible content discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

The case was appealed to the Supreme Court. The Court rejected this dispute and stated that PLEA did not have a First Amendment right or any other right to access the inter-school system. Granting such access to PEA does not burden a fundamental right of PLEA. Consequently any decision to grant such powers to PEA would reach a strict scrutiny standard.⁴

Editor's Note: The proper standard is a rational basis and not strict scrutiny. A strict scrutiny standard is applied when there is both content-based and speaker-based discrimination.

The school District's policy need only rationally further a legitimate state purpose. That purpose is clearly found in the special responsibilities of an exclusive bargaining representative. Therefore, the First Amendment was not violated when PEA was elected by the Board of Education as the exclusive bargaining representative and granted access to certain means of communication and PLEA was denied access.

DAVISON V. PLOWMAN

In the case of *Davison v. Plowman*,⁵ the defendant, Plowman, was Loudoun County's Commonwealth Attorney. His office had an official Facebook page which he supervised. As the official Loudoun County social media website, the Facebook page was subject to the County's Social Media Comments Policy. On December 18, 2015, plaintiff, Davison, left a comment on the defendant's office Facebook post. The comment criticized defendant's office for failing to appoint a special prosecutor in connection with a specific instance of alleged malfeasance. At the end of the comment the plaintiff wrote "delete/censor this post, and then we can all go before a

² *Perry Local Educators' Assn. v. Hohlt*, IP 79-189-C (SD Ind., Feb. 25, 1980).

³ *Id.* at 1290.

⁴ *San Antonio Independent School District v. Rodriguez*, 411 U. S. 1, 17 (1973).

⁵ *Davison v. Plowman*, No. 1:16CV180 (JCC/IDD), 2017 WL 105984, (E.D. VA. JAN. 10, 2017).

federal judge in a 42 USC 1983 claim about free speech.”⁶ The defendant deleted the comment. When the plaintiff discovered that his comment was deleted, he also realized that he was blocked from making any additional comments. After several unsuccessful requests from the plaintiff to restore his ability to post comments the plaintiff filed suit and took the position that the official Facebook page of the Loudoun County Commonwealth’s Attorney’s Office constituted a limited public forum under the First Amendment.

The Court concluded that Loudoun County’s Social Media Comments Policy, as applied to the Commonwealth’s Attorney’s Facebook page, created a limited public forum under the First Amendment. “Limited public forums were characterized by ‘purposeful government action’ intended to make the forum ‘generally available’ for certain purposes.”⁷

Plaintiff was therefore entitled to summary judgment on that issue.⁸ In determining whether the County designated the Commonwealth Attorney’s Facebook page a limited public forum, the Court looked to “the policy and practice of the government.”⁹

ANALYSIS

Limited public forum allows the government to open a nonpublic forum or limit a traditional public forum. The law states that if particular types of speech are within the categories for which the forum was designated, limitations are allowed. This further illustrates that limited public forums allow the government to control the discourse. Many times limited public forums are established to allow only certain topics to be discussed. I believe this limits an individual’s freedom of speech. The Supreme Court in *Perry Education Association v. Perry Local Educators’ Association* stated “the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”¹⁰ I disagree with this statement. The state is not a private owner of a property. Property owned by the government obliquely belongs to its citizens and citizens should have the freedom to express their opinion even in places established as limited public forums by the government.

⁶ *Id.*

⁷ *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067 (4th Cir. 2006) (quoting *Goulart v. Meadows*, 345 F.3d 239, 250 (4th Cir. 2003)).

⁸ *Id.*

⁹ *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

¹⁰ *Supra* see note 2.

