# INTRA VIRES

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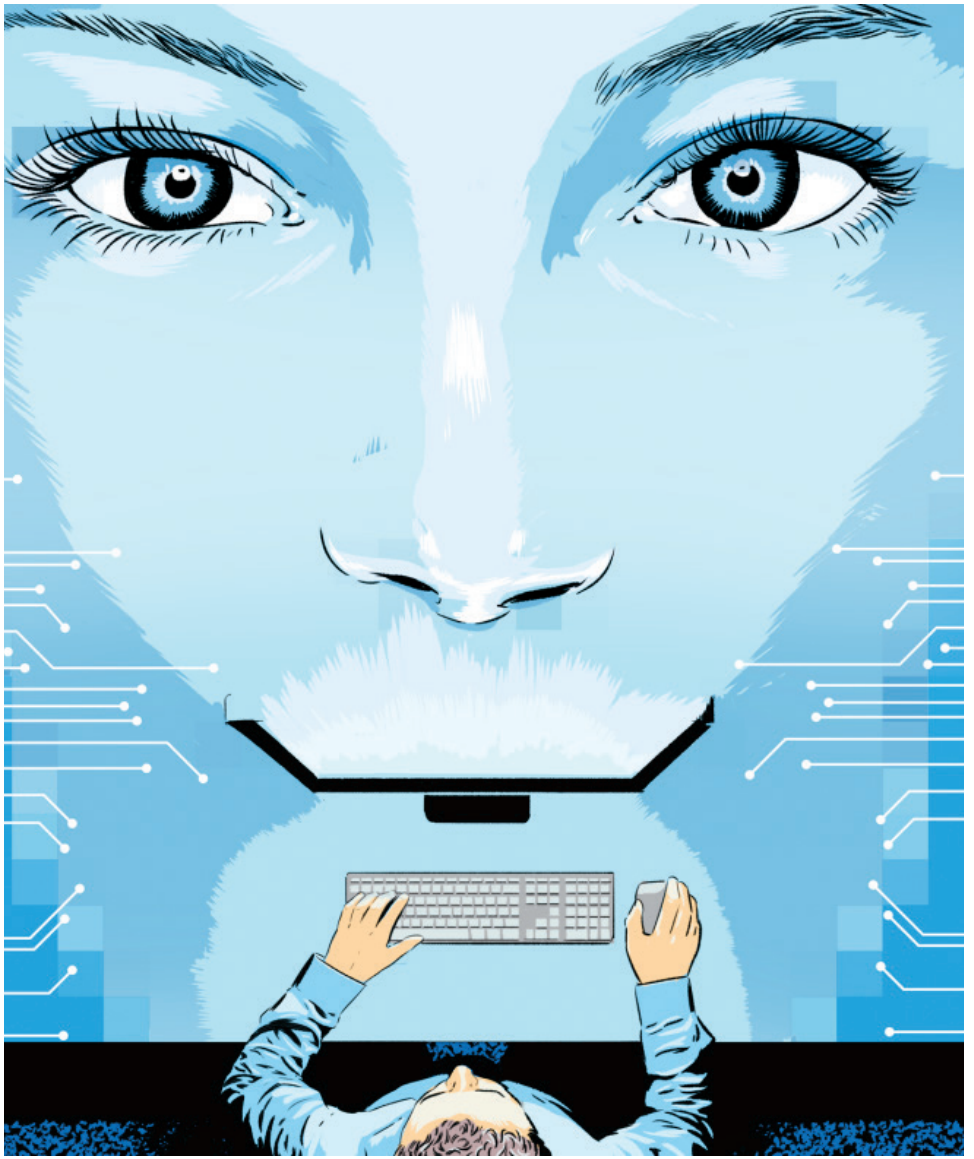
# Contents



# Computers-at-Law

Mira Pijselman

## AN EVALUATION OF LAWYERING IN THE AGE OF INNOVATION

For the first time, the monopoly that lawyers have held over the provision of legal services is being seriously challenged.[1] In the interests of economy, efficiency, and accessibility, legal technology, vendors are offering clients the ability to leverage artificially intelligent systems to draft wills, prepare contracts, and conduct a myriad of routine legal services without the need for extensive interactions with lawyers, if any at all. In the realm of discovery, the document review process, which would have previously been taken on by junior lawyers and articling students, can now be externalized to eDiscovery vendors that employ more technologists than lawyers.[2] On a more complex level, artificially intelligent systems that are capable of natural language processing can assess the value of legal precedents and suggest relevant readings upon which to build legal arguments.[3] These examples of technological disruption in the legal profession give rise to a pressing question: how does one 'lawyer' in the age of innovation and what are the ethical implications of a more digitally integrated legal profession?

This paper will consider how lawyering is being impacted by the growth of digital legal systems, which will be defined as legal technologies that rely on artificial intelligence to execute actions in legal practice. In addition to the effects of digital lawyering systems on lawyers, this paper will evaluate how such systems impact clients and, from a theoretical perspective, how such systems inform contemporary legal ethics. In doing so, this analysis makes three core claims. Firstly, the integration of digital lawyering systems into legal practice is both necessary and unavoidable. These systems are convenient, cost-effective, and have the capacity to process large amounts of data in a fraction of the time that it would take a human lawyer to do the same task. Moreover, the incorporation of such systems promotes legal justice for clients by making legal services more financially accessible and reducing the delay associated with legal proceedings. Secondly, digital lawyering systems have proliferated in response to the law's failure to keep up with societal demands when it comes to consistency, efficiency, and access to justice. Lastly, this analysis considers whether the incorporation of digital lawyering systems into contemporary legal practice represents

a normative shift towards or away from the neutral partisan model of lawyering.

Section 1 details where and how digital lawyering systems are being employed, using John McGinnis and Russell Pearce's robust categorization of the primary legal areas that are experiencing digital disruption. Section 2 evaluates the core benefits, namely timeliness of justice, access to justice, and workflow optimization, that arise when the law embraces digital lawyering systems. Section 3 addresses key refutations to the use of digital lawyering systems including algorithmic bias and black-box thinking. Section 4 considers the normative implications of adopting digital lawyering systems into legal practice. Lastly, this analysis offers recommendations for where future research concerning the nexus of law and technology ought to center, in order to ensure that lawyers and clients alike are protected through the transition towards a more digital legal future.

## Section 1: Digital Lawyering Systems in Focus

Legal scholars McGinnis and Pearce note that digital lawyering systems are being employed predominantly to facilitate "discovery, legal search, document generation, brief and memoranda generation, and prediction of case outcomes".[4] Electronic discovery or eDiscovery refers to "any process […] in which electronic data is sought, located, secured, and searched with the intent of using it as evidence in a civil or criminal legal case".[5] More specifically, eDiscovery represents the digital evolution of the traditional legal process of discovery, whereby relevant evidence to a legal matter is disclosed by the parties. Due to the sheer amount of data that is presently produced by individuals, particularly on an organizational level, eDiscovery has become an essential component of the information management process when it comes to mitigating legal risk and minimizing operational costs.[6] Predictive coding is an example of a digital lawyering system that is presently used in eDiscovery. Instead of paying a fallible lawyer to spend weeks pouring over electronically stored information (ESI) such as messages or emails, predictive coding techniques leverage AI to determine what data within a dataset are relevant to a legal matter within a number of hours.[7] According to a report by Reuters, the eDiscovery industry is growing rapidly and is projected to be worth a whopping $26.51 billion by 2022.[8]

Legal search, the process of sorting through and assessing the value of past legal opinions, is another area of legal practice that is being disrupted by technological innovation. Legal search technology was first synthesized in 1984 by LexisNexis, who compiled legal information into a database that could be searched using basic Boolean operators to find legal precedents using specific key words.[9] Now, LexisNexis and modern legal search vendors such as Westlaw, ROSS Intelligence, and Casetext offer more sophisticated search engines that use artificial intelligence to sift through precedents and retrieve contextually relevant results.[10] The ability for such digital lawyering systems to search for documents based on the nuance of legal arguments, as opposed to simply searching for key words that may be found in indexical text, is a technical capability known as natural language processing.[11] Plainly speaking, natural language processing is the ability to understand context and the intricacies of human speech patterns. For example, when using a legal search system with natural language processing capabilities to search for a legal concept such as absolute liability, the query will present results that contain the term 'absolute liability' in addition to those that discuss the concept of absolute liability but may not explicitly reference the term.

While eDiscovery and legal search technologies make a lawyer's work more efficient, document, brief, and memoranda generation systems reduce the need for lawyers' involvement in legal matters altogether. LegalZoom or Rocket Lawyer, for example, both offer cheaper, faster, and simpler legal services that enable AI to create automated, customizable legal documents for everything from getting divorced to trademarking a company.[12] Document generation systems in their existing form are unlikely to replace lawyers entirely, but do stand to reduce the amount of time and money that businesses and individuals need to spend on legal services. For example, Matt Kesner, a technology officer with Fenwick and West, a law firm that specializes in services for technology and life science startups in Silicon Valley, claimed that document generation systems have "reduced the average time [they] were spending from about 20 to 40 hours of billable time down to a handful of hours".[13]

The last and arguably most controversial legal space that is facing technological disruption is the decision-making and adjudication sectors of the profession. Jesse Beatson differentiates between two types of digital lawyering systems being employed in these sectors: 1) legal expert systems that are "explicitly coded, closed-rule algorithms", and 2) predictive analytics systems that rely on "machine-learning algorithms".[14] The major difference between the two is that while the former application operates by applying pre-defined instructions to data sets to "draw conclusions", the latter "typically exhibit self-learning, rewriting themselves as they run".[15] In the public sector, a recent collaborative report between the International Human Rights Program at the University of Toronto Law School and the Citizen Lab revealed how the Canadian government is presently employing predictive technologies to automate immigration evaluations.[16] In litigation, companies like Lex Machina use prediction software to craft legal strategy. On their website, Lex Machina offers their clients the ability to "[reveal] insights never before available about judges, lawyers, parties, and the subjects of the cases themselves" and makes the argument that litigation data mining "provides lawyers with facts on which to base opinions".[17] Prediction, if accurate, is of essential value to clients and law firms because mak-

ing algorithmically informed legal decisions can mitigate risk and avoid unnecessary costs.

Upon close inspection of the legal sectors currently facing disruption, some key trends can be gleaned. Firstly, digital lawyering systems are ideal for routine transactions that do not require a significant amount of critical thinking. For example, natural language processing is found to "yield imprecise results" during legal searches, especially when the searches being conducted involve convoluted legal inquiries.[18] Second, digital lawyering systems are unsuited to tackle legal problems that may be uncharted territory. As AI-enabled programs rely on past data to predict or create new conclusions, digital lawyering systems are less helpful when it comes to evaluating novel laws or legal arguments. Thirdly, the oral advocacy component of lawyering has been largely untouched by technological disruption. Rostain notes that digital lawyering systems "are not good at tasks that involve human interaction, which requires recognizing a speaker's affect and [an] understanding [of] the larger human context".[19] Consequently, in their present state, digital lawyering systems are not poised to eliminate the societal need for lawyers. However, this should not be an aspiration of legal technology vendors. The nature of digital lawyering systems does not threaten to eradicate the legal profession, but instead offers the opportunity to redefine what it means to be a lawyer.

## Section 2: The Benefits of Digital Lawyering Systems

A cursory analysis of the rise of digital lawyering systems may reveal that the transformation of the lawyering processes is being driven by technological innovation. However, this analysis fails to evaluate the systemic issue pertaining to limited access to justice that has demanded new approaches to lawyering for decades.[20] Technological innovation in the legal profession is a natural response to the legal system's failure to adapt and meet the needs of those in society outside the class of wealthy privileged elites. The rise of digital lawyering systems can be partly attributed to client demands for the legal profession to move away from the billable hour model of pricing towards "alternative fee arrangements such as blended rates, capped fees, fixed prices, value pricing, staged costing, event costing, and success fees".[21] In the private sector, the pressure to change legal pricing from a traditionally time-based framework to an outcome or product-based framework signals that efficiency is propelling the modern legal services market, wherein a time-based payment scale has no place. In areas such as family law, public interest law, and administrative law, the billable hour pricing model has made accessing legal services prohibitively expensive for individuals, particularly those from lower and middle socioeconomic strata.[22]

The use of digital lawyering systems, whether for eDiscovery, legal search, or predictive analytics, provides three key benefits to lawyers, and, by proxy, the clients that they serve: efficiency, accessibility,



and workflow optimization. For example, the time saved using predictive coding to create a defensible set of data during the discovery process allows for increased legal resolution with a lower risk of human error. Furthermore, while such systems often entail hefty transition or set-up costs, they precipitate long-term cost avoidance for firms and clients because associated expenses are "the cost of electricity rather than the cost of lawyer salaries".[23] By reducing legal service fees, retaining a lawyer for a legal matter will, theoretically, become more financially accessible; digital lawyering systems offer clients that have a limited legal budget the opportunity to maximize their resources and acquire essential knowledge to participate in legal spaces while bypassing excessive lawyer fees. As Rostain explains, "for most individuals, the choice is not between a technology and a lawyer. It is a choice between relying on legal technologies or nothing at all".[24] From an access to justice perspective, this may provide clients who were previously financially obstructed from raising a legal claim with the means to do so. It may also give an augmented legal skillset to self-represented litigants, who are increasingly common as a result of the unaffordability of retaining a lawyer. Lastly, lawyers can subsequently dedicate more of their work hours towards qualitative tasks, such as meeting with clients, crafting creative legal strategies, engaging in settlement negotiations, or delivering oral arguments. In other words, lawyers have the opportunity to digitally offload repetitive 'grunt work' and focus on more intellectually fulfilling tasks. This would also enable lawyers to potentially manage a larger portfolio of cases and thereby increase their revenue potential. Furthermore, in addition to increased productivity and career fulfillment, digital lawyering systems may offer lawyers with a way to redress the pervasive lack of work-life balance that has become synonymous with the profession. Since they may no longer be required to spend as much time conducting manual legal searches or drafting routine contracts, lawyers will have more time for non-work pursuits.

Digital lawyering systems also represent a way to make the legal profession more accessible and equitable from a feminist perspective. As Constance Backhouse notes, legal professionalism "has been inextricably linked historically to masculinity, whiteness, class privilege, and Protestantism".[25] Captured by the term "collegiality," lawyering has been narrowly constructed to attract and retain a specific type of lawyer: one that epitomizes privilege, conformity, and tradition.[26] In a report detailing the effects of women's employment in the legal profession, Grace Giesel noted that female lawyers tend to work more often as in-house counsel than in private practice due to concerns of workplace discrimination, lack of advancement, and more flexible schedules.[27] The in-house work environment "is attractive if you're concerned about […] quality of life" and "is critical […] if the attorney must retrieve children from childcare or afterschool activities".[28] While this is not to say that childcare should be solely a women's responsibility, it is a statistical

reality that women bear the brunt of childcare and elderly care.[29] Legal professionalism implicitly stigmatizes parenthood because a lawyer's value is linked to the number of hours that they can bill. Digital lawyering systems that optimize workflows would enable private practice to begin to foster an environment that resembles an in-house counsel position, and thus, may also equalize the gender ratio in private practice. Moreover, the growth of in-house counsel positions in relation to those in private practice has been observed because of legal technology growth, which would also contribute to more opportunities for legal positions that emphasis work-life balance.[30] Alongside workplace inclusion initiatives and a redirection away from the billable hour pricing model, digital lawyering systems can help overhaul the existing model of legal professionalism towards one that values inclusion and employee wellbeing. Of course, the advent of more progressive values in the legal profession is contingent on the existence of sufficient socio-political will for change. The possibility exists that digital lawyering systems will merely increase the financial goalposts of lawyers and thereby retain the same levels of stress which are now endemic. Lawyers and law societies must work together to determine which path to the future they want to endorse.

**Section 3: The Drawbacks of Digital Lawyering Systems**

Making the law more accurate, streamlined, and affordable are all desirable goals that digital lawyering systems can offer to the legal profession. However, it is necessary to ask what the costs of such technological integrations are and who bears the weight of such costs. The first and most pressing critique of digital lawyering systems is that the algorithms that power them may yield biased results. As noted by Tarleton Gillespie, algorithms are assumed to be inherently objective and, by association, the "conclusions […] generated by an algorithm wear a powerful legitimacy, much the way statistical data bolster scientific claims".[31] However, many cases have demonstrated that artificially intelligent systems do not always get it right. For example, Google's image-recognition algorithm on Google Photos was found to be racially biased, as it labeled images of black people as gorillas.[32] The Correctional Offender Management Profiling for Alternative Sanctions (COMPAS), a predictive technology that is used in America to "predict a defendant's risk of committing another crime," was similarly found to be racially prejudiced against black people by scoring African Americans as significantly higher crime risks than Caucasians.[33]

Bias can be generated using poor data sets when training AIs, as was the case with the COMPAS program; crime data in America has been notoriously skewed towards viewing African Americans as criminals.[34] However, on a deeper level, algorithmic bias can be generated by having homogenous creators.[35] Like the legal profession, the technology industry is notoriously lacking in diversity. In Canada, a CBC



report indicated that women "represent only one quarter of [the] high-tech workforce".[36] Racial diversity in the technology sector is no better, with the majority of workforces at top companies like Google and Apple having a disproportionately large amount of white employees.[37] If algorithms are created in an incubator of privilege, even where discrimination is not intended, the mere fact that women, people of color, and other marginalized identities are not proportionately included in algorithmic design or the law leaves such systems predisposed to bias.

The accuracy of digital lawyering systems is dependent upon the quality of data sets used to train AIs and the diversity of the teams producing such systems, both of which are stifled by systemic discrimination and intersectional oppression. If this is the case, who ought to be held responsible when an artificially intelligent system makes a mistake? Should the lawyer or firm that made the decision to employ the system be held liable? Are the designers and/or vendors of the legal technology responsible, or is the algorithm itself responsible? Regardless of which entity ought to be held legally and/or morally accountable for failures, it has proven difficult to assess wrongdoing due to what is referred to as the 'black box'. As explained by Firth-Butterfield, the black box refers to the impossibility for humans to understand how artificially intelligent systems reach decisions on an algorithmic level due to their inherent complexity, which makes "transparency […] illusory".[38] Furthermore, even if humans did understand how an artificially intelligent system makes a decision, the code and/or datasets used to create AI may be proprietary information that is subject to intellectual property protections. The black box is especially concerning if decisions are appealed; in these cases, how are defendants able to construct a case if they are not privy to how a digital lawyering system arrived at a conclusion? Fundamentally, questions of accountability are profoundly underdeveloped with regards to digital lawyering systems. The mere fact that 'artificial intelligence' as a concept is complex and not consistently defined means that its legal regulation is not easily accomplished, since the scope of the term is difficult to assess.[39] Increased scrutiny is required in this area of technological development to ensure that people's rights are not being undermined.

Given these concerns, digital lawyering systems are much like human lawyers in that they are imperfect. However, the imperfection of such systems does not mean that there is no place for them in the law. Lawyers that attempt to thwart the proliferation of digital lawyering systems through legal recourse such as unauthorized practice laws are only delaying the inevitable.[40] The benefits of digital lawyering systems outweigh the harms, which lawyers and technologists can work to mitigate. Left unregulated and unexamined, these systems harm all three relevant legal stakeholders examined in this paper: society is harmed by further entrenching bigotry, the legal system and its practitioners withdraw further into the stereotype that the law is a tool by the powerful and for the

powerful, and clients are left with fewer modes of redress.

The Centre for International Governance Innovation, one of the leading technology policy think tanks in Canada, has stated that Canada's regulations of AI are behind those of the global standard with only the Charter of Rights and Freedoms and the federally mandated Personal Information Protection and Electronic Documents Act (PIPEDA) in place.[41] Within the legal profession, the Law Society of Ontario has no substantive framework to address the use of digital lawyering systems within their rules of professional conduct. The rules do contain a competency clause, which demands that lawyers "keep abreast of developments in all areas of law in which the lawyer practices".[42] While this does create a formal duty for lawyers to be proactive about legal education, this rule speaks more to maintaining an understanding of the evolution of legal principles as opposed to the evolution of the functions of lawyering. The implementation of continuing legal education programs specific to digital lawyering systems and mandatory law school courses concentrating upon the use of digital lawyering systems would be good first steps to ensuring that lawyers have an appropriate level of technical knowledge. Lawyers owe it to themselves, their clients, and society to become more digitally literate, a trait that is in high demand in the presently underserviced legal profession.[43]

## Section 4: Digital Lawyering Systems and Legal Ethics

Existing scholarship has confirmed that the use of digital lawyering systems in legal practice has and will continue to have a profound practical impact on the lives of clients, lawyers, and society. However, markedly less scholarly attention has been given to evaluating how technological disruption is normatively impacting the law. The age-old debate on the role that the individual morality of lawyers ought to play in the law has acquired new meaning in the age of information. The prevailing view of just advocacy and professionalism in legal ethics can be referred to as neutral partisanship or zealous advocacy; this concept refers to the idea that lawyers have a responsibility to their clients to dissociate their personal worldviews from the case at hand and do everything in their legal power to advance the interests of their client.[44] However, more progressive legal academics, such as Robert Vischer and Trevor Farrow, have contested the neutral partisanship model on the basis that it "corrode[s] social values by manipulating the law for the benefit of […] clients while paying no heed to the wider impact of their work".[45] Vischer goes on to claim that in order for lawyers to advocate ethically, they must make room for their individual morality in their practice.[46] As digital lawyering systems take on a greater role in the legal system, does the legal profession subsequently draw closer to or further from the neutral partisanship model of lawyering?

It can be argued that the use of digital lawyering systems risks further removing moral decision-making from the lawyering process by limiting where and how lawyers are brought into legal matters. For example, there would be no moral agents involved in this part of the legal process if routine



legal work traditionally conducted by 'journeymen' lawyers, such as estates and standard contracts, becomes completely automated.[47] Digital lawyering systems are the epitome of neutral partisanship because they can be programmed to conduct actions that maximize client interests while being uninhibited by morality, as they are presently incapable of it. Fears over what an absence of moral agents could elicit for the future of the law are heightened when it comes to the use of predictive analytics and automated decision systems, where such systems would not merely be practicing but potentially making law.

While fears of an amoral legal future are startling, the idea that the law will be delivered in the complete absence of human lawyers is a dystopian exaggeration. The reality is that human judgement can 'still add value' to the conclusions reached by digital lawyering systems. The integration of lawyers and digital lawyering systems will provide the best of both worlds: efficiency, accessibility, and creativity.[48] As Simpson notes:

> "[digital lawyering systems] suggest the need to challenge law students to think more critically about law's possibilities rather than to consider themselves legal technicians that robotically apply the law to a set of facts with a given answer […] such approaches to the law lend themselves to algorithmic response and the removal of human practitioners".[49]

Through the elimination of routine components of legal work in favor of more creative, specialized legal analysis, lawyers will be able, if not required, to grapple with more fundamental questions of the law and its impact as an institutional force on society. In effect, such systems will necessitate a departure from neutral partisanship in favor of a legal culture that is more closely aligned with Trevor Farrow's sustainable professionalism, whereby "a plurality of voices and preferences" beyond that of the client ought to be considered in order to lawyer ethically.[50] In essence, the most important skills of a twenty-first century lawyer are creative problem-solving, specialization, and the ability to critically evaluate the application of law, as opposed to traits that facilitate functioning as a mere legal technician.

## Conclusion

Digital lawyering systems are transforming the legal profession and how legal ethics are understood. While there are concerns associated with incorporating such systems due to black-box decision-making and algorithmic bias, the benefits of digital lawyering systems merit their continued monitored proliferation. Legal technology arose because of a societal rejection of exclusionary professionalism, inefficiency, and a lack of access to the means of justice. Consequently, lawyers no longer have an absolute monopoly over the legal services market. Digital lawyering systems will only continue to thrive because of their affordability, efficiency, and simplicity. Moreover, such systems transform the

modern lawyer from a robotic practitioner to a legal analyst and enable the profession to diverge from its neutral partisan origins.

Future research in this area of legal scholarship should center on how to modify law school curriculums to prepare law students for the realities of an increasingly digital workflow. Additionally, interdisciplinary collaborations between technologists, lawyers, and policy makers are required to mitigate bias and consider who ought to be held accountable for the failures of digital lawyering systems, and determine in what contexts it is inappropriate to apply digital lawyering systems from a normative perspective. It is important that new and existing legal professionals begin to adapt their practices to coexist with technology instead of resisting it. With digitally literate humans at the helm, lawyers can work with technologists and regulators to develop policies that protect both clients and the legal system as a whole.



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# The Birds and the Bees, but Not the Butterflies

Layla Pereira DaSilva

## AN ANALYSIS OF THE ONTARIO INTERIM AND PROPOSED* SEX-ED CURRICULUM AS DISCRIMINATORY AGAINST MEMBERS OF THE TRANSGENDER COMMUNITY

*The interim health and physical education curriculum (sex-ed) is a placeholder while the government works through consultations on a final version. Here, it is referred to as the proposed sex-ed curriculum.*

### COY MATHIS

"It became really clear that it wasn't just about liking pink or feminine things," said Kathryn Mathis, "it was that Coy was trying so hard to show us that she was a girl".[1] In 2013, the Colorado Civil Rights Division (CCRD)[2] made a landmark ruling that six-year-old Coy Mathis had the right to use the girls' bathroom in her Colorado school, although she had been assigned a male identity at birth.[3] "Coy Mathis is a girl and has always known herself to be one […] She has an innate female gender identity and has a girls' gender expression," reads the Mathises' rebuttal statement in response to Fountain-Fort Carson School District's position statement.[4] Halfway through kindergarten after consulting with doctors, Coy began to socially transition to her life as a girl. This process included informing Coy's school, Eagleside Elementary School, that Coy identified and should be treated as a girl.[5] "Coy's school understands who she is," continues the rebuttal statement, "her earliest experiences at the school were positive ones that allowed her to flourish".[6] Indeed, Eagleside Elementary initially referred to Coy by her preferred pronoun and permitted her to wear girls' clothing.[7]

Shortly after entering the first grade, however, the Mathises removed Coy from her school after she was told she could no longer use the girls' bathroom. Instead, she was required to use only the staff bathroom, nurse's bathroom, or the boys' bathroom.[8] "As Coy grows older and his male genitals develop along with the rest of his body," the letter from the school's lawyer read, "at least some parents and students are likely to become uncomfortable with his continued use of the girls' bathroom".[9] On February 7, 2013, the Mathises filed a Charge of Discrimination alleging that Coy was "denied her equal terms and conditions of service of goods, services, benefits, or privileges; equal treatment based upon harassment; and the full and equal enjoyment of goods, services, facilities, privileges, advantages or accommodations of

a place of public accommodation due to her sex and gender identity".[10] Particularly poignant were the expressed harmful effects of barring Coy from the girls' bathroom:

> Coy is harmed by the Schools' violation of Colorado [anti-discrimination] law. She wants what every other girl has at school: access to the girls' bathroom because they match her gender identity. The district has treated Coy differently from all other students. She is required to use bathrooms that no other students are required to use, [specifically] no other girl is required to use. Being forced to use different bathrooms from everyone else is inherently stigmatizing. Coy herself knows that she is being singled out and treated differently […] the *Colorado Anti-Discrimination Act* prohibits not just bullying based on transgender status but also systematic exclusion and differential treatment. By restricting her bathroom access, the District is prohibiting Coy from the full and equal enjoyment of the School on the same terms that other girls who are not transgender enjoy.[11]

The courts determined that Coy was a member of a protected class[12] based on her sex and gender identity, and that there was sufficient evidence to find that the Fountain-Fort Carson School District had discriminatorily denied Coy's equal terms and conditions, that Coy was treated less favourably than other individuals, and that the treatment was under circumstances that give rise to an inference of unlawful discrimination based on a protected class.

In part inspired by the Coy Mathis case, the aim of this paper is to analyze the Ontario provincial government's interim and proposed health and physical education (HPE) curriculum, and more specifically, as it pertains to the sexual education (sex-ed) programme. The objective of this investigation is to demonstrate that the interim sex-ed curriculum currently in place discriminates against members (viz., children) of the transgender community as it does not include teachings about gender identity and sexual orientation. Furthermore, the proposed upcoming curriculum, which postpones teachings about gender identity and sexual orientation until eighth grade, are similarly discriminatory against members (viz., children) of the transgender community.

The analysis will begin by presenting an overview of the context within which this assessment takes place, followed by an explanation of the theoretical framework that will be used to critically examine Ontario's sex-ed curriculum. The powerful moral intuition that motivates this theoretical framework and analysis overall is that the interim and proposed sex-ed curriculum treats members of the transgender community differently, insofar as it fails to treat them as equals vis-à-vis cisgender members of the community. This analysis is informed by a pluralist theory of discrimination that draws largely on the work of Sophia Moreau.[13] In *Faces of Inequality: Wrongful Discrimination in Law and Morality*, Moreau presents three different ways in which a person



can be treated differently based on a certain trait, and thereby be denied treatment as an equal. Differential treatment can occur when one: [a] subordinates some people to others; [b] denies some people deliberative freedoms in circumstances where they have a right to these freedoms; and [c] leaves some people without access to certain "basic" goods that one needs to have access to in a particular society if they are to participate as an equal in said society.[14] In the proceeding section (SIII), the aforementioned theoretical framework is put in dialogue with *The Elementary Teachers' Federation of Ontario v. Minister of Education* (Ontario). This is intended to show that the sex-ed curriculum currently in place, and the one proposed, treats members (viz., children) of the transgender community differently in such a way that it [a] leaves them subordinate to cisgender members of the community; [b] denies them deliberative freedoms in circumstances where they have a right to these freedoms; and [c] leaves them without access to certain "basic" goods that are shown to be needed in order to participate fully as an equal in Ontario. This analysis draws on psychological studies and phenomenological theories in an effort to reify and substantiate key points, and more specifically, to highlight the pernicious effects of the current and proposed upcoming curriculum. As well, this section will briefly consider a possible objection from the standpoint of freedom of religion, wherein cultural traditions and religious beliefs may be in tension with aspects of a sex-ed curriculum that constitute "false teachings" according to different belief systems, (i.e. gender identity and sexual orientation are anathema to certain religious beliefs). The case of *E.T. v. The Hamilton-Wentworth District School Board* will be used to reify the objection raised, and enters the discussion at III.b. To conclude, an "opt-out" policy will be considered as a possible alternative that can assuage the concerns of religious parents who disapprove of sex-ed programmes that include teachings on gender identity and sexual orientation. Given the ample evidence of children transitioning at early ages, it is suggested that the upcoming curriculum should teach gender identity and sexual orientation at a younger age than the proposed thirteen.[15]

## PRELIMINARIES

### Terminology

*Gender identity* refers to an individual's sense of being female, male, or something else. The internal nature of gender identity is such that it is not necessarily visible to others.[16]

*Transgender* is a term that represents people whose gender identity, behaviour, or expression does not align with the medical and legal sex to which they were assigned at birth.[17]

*Cisgender* is a term that represents people who identify with the gender that was assigned to them at birth, and *cisgender privilege* is

the set of conscious and unconscious advantages and/or immunities that people who are – or are perceived as – gender conforming benefit from on a daily basis.[18]

*Transitioning* is the period during which an individual begins to live as their "true" gender. Transitioning is a complex process that can include personal, medical, and legal steps over a long period of time.[19] For the purposes of this analysis, the process of transitioning for children and adolescents is understood as involving interventions that differ according to developmental stages.[20] Affirmative practices may include social transitioning by way of social and legal use of a different name and pronoun, and expression of a different gender through clothing and hairstyle; or may include, fully reversible pubertal suppression via medication often referred to as "puberty blockers".[21]

**Why focus on the transgender community?**

This analysis narrowly focuses on the transgender community as opposed to the LGBTQ+[22] community as a whole because there are disparities in the lived experience of transgender people within the LGBTQ+ community that are exacerbated by the interim and proposed sex-ed curriculum. While stigmatization and harassment remain extant problems for lesbians and gay men, there has been a considerable number of positive changes in society's acceptance of and attitude towards homosexuality. However, this has not been the case for the transgender community, as transgender people continue to experience "everyday transphobia".[23]

**Discrimination law & constitutional equality rights in Canada**

The scope of this analysis is limited to discrimination law as it pertains to the federal and provincial governments' relations with whom they govern. It analyzes from the standpoint of rights held against the Canadian government as encapsulated in the *Canadian Charter of Rights and Freedoms*, as well as rights found in the *Canadian Human Rights Act* and *Ontario Human Rights Code*. Highlighted below are the sections that will be relevant for this analysis:

*Canadian Charter of Rights and Freedoms*

Section 1: The *Charter of Rights and Freedoms* guarantees rights and freedoms set out in its subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[24] This means that equality rights – as outlined in section 15, discussed below – are interpreted by the courts such that in some cases a court may find that a violation of an individual's section 15 right is justified due to other exigent government objectives.

Section 15(1): Every individual is equal before and under the law



and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[25]

Section 15(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[26]

*Canadian Human Rights Act*

Section 3(1): For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.[27]

*Ontario Human Rights Code*

Part 1: Freedom from Discrimination - Services Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.[28]

Duties of Teachers (2): This Act does not apply to affect the application of the *Education Act* with respect to the duties of teachers. R.S.O. 1990, c. H. 19, s. 19 (2).[29] The *Education Act* governs education in Ontario by providing regulations with the intended purpose of providing a strong public education system. Although the Ministry of Education has the authority to set its own education policies, the *Ontario Human Rights Code* has primacy over all other pieces of legislation in Ontario unless otherwise stated.[30] This means that education practices and procedures must be consistent with the *Code*.[31]

## I. WHERE WE STAND: THE BIRDS AND THE BEES, BUT NOT THE BUTTERFLIES

On August 22, 2018, an interim HPE curriculum for grades one through eight was implemented by the Progressive Conservative government, pending province-wide consultations on a new curriculum.[32] The interim programme withdrew the 2015 curriculum, and replaced it with a programme which contained a sex-ed curriculum that had not been updated since 1998.[33] According to the Elementary Teachers' Federation of Ontario (ETFO), the province's repeal of the 2015 HPE cur-

riculum was unconstitutional.[34] In part of their legal challenge against the province, the ETFO stated that

> The effect of this Directive [to implement the interim curriculum] is that sexual health education today is based on a document created prior to the advent of social media, same-sex marriage, and human rights protections for gender identity, to say nothing of contemporary understandings of consent [and as such] constituted a violation of the equality rights of certain groups guaranteed by section 15(1) of the *Charter*.[35]

In particular, as it is germane to the present discussion, the previous 2015 curriculum addressed gender identity and sexual orientation "through a lens of respecting and accepting individual differences, as reflected in both learning expectations and the Curriculum's front matter".[36] Under the 2015 curriculum teachings about sexual identity were introduced in grade three; students were expected to "describe how visible differences," such as skin colour or body size, and "invisible differences," such as gender identity and sexual orientation, "make each person unique, and identify ways of showing respect for differences in others".[37] In grade six, students were to "assess how stereotypes, such as homophobia and assumptions about gender, race, sexual orientation, ethnicity, culture and abilities, can affect how a person feels about themselves, belonging and their relationships with others".[38] In grade eight, students were expected to demonstrate an understanding of "gender identity, gender expression and orientation, and how to identify factors that can help all young people to develop positive personal identities".[39]

In comparison, the 2018 interim curriculum does not include teaching instruction on gender identity and sexual orientation, other than a note to address these topics with sensitivity.[40] Nor does the interim programme include a glossary of concepts such as bisexual, gay, gender expression, intersex, lesbian, sexual health, sexuality, transgender, and transsexual.[41] Cindy Gangaram, speaking on delivering content related to gender identity and expression in her classroom, testified to the problem of teachers lacking knowledge about these topics. As Gangaram stated in her affidavit,

> Providing evidence-based, state of the art, equity-promoting education for her students is central to Gangaram's sense of self as a member of the teaching profession as well as a member of her community. Gangaram believes that she is ethically and professionally obligated to provide a safe and inclusive learning environment for her students, some of whom identify as LGBTQ+ […] Unlike prior versions of the HPE curriculum, the new curriculum's directive violates section 15 of the *Charter of Rights* by perpetuating substantive discrimination against LGBTQ+ students, parents, and members of society by excluding topics related to sexuality, gender identity and same-sex marriage from the approved school curriculum. This exclusion denies LGBTQ+ persons recognition, dignity and acceptance, and designates topics related to their realities and lived experiences as problematic, inappropriate and worthy of exclusion from discussion.[42]

In sum, Gangaram lauded the previous 2015 curriculum for helping teachers to navigate the sensitive topic of gender identity and sexual orientation and trying to achieve the fragile balance between an optimal learning environment for all students and one that is inclusive of diverse ideologies.[43] The crux of the overall argument here is the causal connection between reverting back to the 2015 curriculum and the diminished ability for LGBTQ+ students to deal with sexual and safety issues.[44]

However, the Minister of Education countered that the previous 2015 curriculum had "given rise to widespread and well-publicized expressions of community and parental disapproval" due to concerns that there was "insufficient parental consultation before the curriculum was issued".[45] Moreover, the Minister of Education rejected the allegation that the interim curriculum was discriminatory contrary to section 15 of the *Charter* or the *Human Rights Code*. Specific to the charge of discrimination against LGBTQ+ students, the Minister of Education claimed that

> Teachers were obliged to implement the interim curriculum in a manner that is inclusive and provides equal benefit to all students, including LGBTQ+ students [and that] the 2018 HPE curriculum expectation also illustrates how teachers can and must teach the expectations in an inclusive way. All students, including all LGBTQ+ students, can benefit from learning effective communication skills to deal with relationships and situations, even though each student's own relationships and situations may be different from those of their peers.[46]

On February 28, 2019 the Divisional Court ruled in favour of the Minister of Education, but the decision seemed to hinge on the teacher's *Charter* right to freedom of expression while working inside a classroom.[47] In other words, the Court found that nothing in the interim curriculum prohibited or precluded a teacher from teaching on gender identity and sexual orientation.[48] However, on the charge that the interim curriculum constitutes a violation of the equality rights of certain groups guaranteed by section 15(1) of the *Charter*, the courts concluded that,

> The [ETFO] must demonstrate that (a) the law or policy creates a distinction on the basis of a ground protected under section 15 of the *Charter* or the *Code;* and (b) the distinction is substantively discriminatory because it perpetuates arbitrary disadvantage, prejudice or stereotyping. A section 15(1) *Charter* challenge cannot be based on the removal or omission of learning objectives referable to the 2015 curriculum. Furthermore the [interim] curriculum does not draw any distinctions or require differential treatment of students on the basis of protected grounds to the extent that the omission of certain topics in the curriculum could be said to negatively affect certain groups.[49]

On March 15, 2019, the Progressive Conservative government announced upcoming education reforms that would include a new sex-ed curriculum to supplant the interim one.[50] As of July 2019, the full details of the new curriculum have yet to be released,[51] but the Minister of Education has disclosed that the new curriculum will include teachings on gender identity and sexual orientation. However, these topics will only be taught starting in grade eight. Additionally, parents will have the option to opt-out of having their children taught certain topics in the sex-ed classes.[52]

The Divisional Court's ruling arguably fails to capture the pernicious effects of the interim curriculum that make it wrongfully discriminatory against young members of the transgender community. Even more so, the government's proposed changes do not adequately address the concerns laid out by the ETFO and teachers such as Cindy Gangaram. Is it not the case that leaving transgender children under the age of thirteen with a diminished ability to deal with sexual and safety issues substantively discriminatory because it perpetuates arbitrary disadvantage? Moreover, how is the hermeneutical[53] lacuna created by scant teachings of gender identity and sexual orientation not said to be negatively affecting members of the transgender community? How are children to learn how to foster an inclusive environment when they are not being given the fundamentals to pave the way? These and other questions will be addressed after the theoretical framework of this analysis is explained.

## II. THEORETICAL FRAMEWORK

For the purposes of this analysis, the conceptual account of discrimination concentrates upon direct discrimination (*i.e. person x* discriminates against another *person y* if, because of a protected trait, *x* treats *y* less favourably than *x* treats or would treat others). Considerations of indirect discrimination will be set aside for the time being.[54] Moreover, the term "discrimination" is taken in a moralized way to mean wrongfully drawing a distinction among people based on the presence or absence of some trait.[55] However, the concern here moves beyond a wrongful distinction made on the basis of the presence or absence of some trait. Indeed, this analysis is working from the standpoint that the salient feature of wrongful discrimination that makes it particularly objectionable is that certain people have been treated differently in such a way that it leaves them inferior to others.[56] As Moreau points out, "if what makes acts of wrongful discrimination wrongful is that they fail to treat certain people as equals, then the problem lies more in the impact of the discriminatory act on the discriminatee".[57] By analyzing the negative impact that the interim sex-ed curriculum has had on the transgender community, this analysis aims to show that the interim and upcoming new sex-ed curriculum wrongfully discriminates against members of the transgender community as it fails to treat them as equals



vis-à-vis their cisgender counterparts.

Moreau presents three different ways in which a person can be treated differently based on a certain trait and thereby denied treatment as an equal. That is, differential treatment can: [a] subordinate some individuals to others; [b] deny some individuals deliberative freedoms in circumstances where they have a right to these freedoms; and [c] can leave some individuals without access to certain "basic" goods that one needs to have access to, in a particular society, if they are to participate as an equal in said society.[58] It is from a variation of this tripartite standpoint that this investigation will be initiated.[59]

### a. Subordinates some people to others

One way in which discrimination can wrong people by failing to treat them as equals is by subordinating them to others. Moreau advances an account of subordination that considers the relationship between a social group whose standing in society, as a whole, is lower than that of another social group.[60] Hereafter, "social group" is understood as "an entity that has an existence apart from any particular member" and shares a "socially salient trait, in the sense that others in society take that trait to have implications for the character and behaviour of members of the group, and for the social roles that they are capable of occupying".[61] Members of a *subordinated* social group are understood to have less social and political power and less relative *de facto* authority than members of other groups, across different social contexts.[62] To have *de facto* authority is taken to mean, in this analysis, as having the power to be listened to.[63]

The differentials in power and *de facto* authority are held in place due to a variety of concomitant factors, but for this analysis's present purposes, the following two are of the utmost significance. First, a subordinate social group's trait may become associated with a particular behaviour or action that is perceived as unseemly or valueless, and thus meriting disapproval.[64] These subordinate social groups become stereotyped, and this very stereotype reinforces the disparity in power and *de facto* authority. Second, the differentials in power and *de facto* authority may be held in place by purportedly neutral policies, regulations, and physical structures in society that overlook those members of the subordinate social group and privilege the interests of the dominant group.[65] Moreau refers to this as "structural accommodations," which has the pernicious effect of overlooking the needs of the subordinate group and favouring the needs of their privileged counterpart.[66]

In sum, one way in which discrimination can wrong people by failing to treat them as equals is by subordinating them to others and thus maintaining them in an inferior position relative to others. The discriminatory act can exacerbate the differentials in social and political power and/or relative *de facto* authority by way of perpetuating stereotypes, and/or overlooking the needs of the subordinate group (i.e. mark-

ing a group as inferior and contributing to their lower social standing).

**b. Denies some people deliberative freedoms (where they have a right to them)**

A second way in which discrimination can wrong people by failing to treat them as equals is by denying some people deliberative freedoms in circumstances where they have a right to these freedoms. When conceptualizing "deliberative freedom," Moreau points to the importance we place on having "the opportunity to shape our lives through our own deliberations and choices".[67] Deliberative freedom is then the freedom to deliberate and decide about one's life, without having to factor into the deliberative process a certain personal trait or the assumptions of others about said trait. Thus, deliberative freedom – for the purposes of this analysis – is the freedom to deliberate without having to be repeatedly reminded of a certain trait that one possesses.[68] Additionally, deliberative freedom involves the freedom to act on the decision one has deliberated on.[69] Furthermore, the freedom to deliberate without the constant reminder of one's trait and the freedom to act on one's decisions are enclosed in a person's capacity for autonomy. It is therefore autonomy that becomes the linchpin for assessing whether someone has been denied their right to deliberative freedom.

In sum, a second way in which discrimination can wrong people by failing to treat them as equals is by denying some people the freedom to deliberate, decide, and act; as such, it fails to respect them as persons capable of autonomy.[70]

**c. Leaves some people without access to certain "basic" goods they need**

A third way in which discrimination can wrong people by failing to treat them as equals is by leaving some people without access to certain "basic" goods that one needs to have access to in a particular society if they are to participate as an equal in said society. In this sense, "basic" simply connotes a good, resource, or opportunity that is necessary in order to fulfill the following two conditions:

[i] A person is denied a basic good if, and only if, the access to the good is necessary in order to be a full and equal participant in their society.[71] For the purposes of this analysis, what constitutes "necessary" can be deduced in relation to others in a particular society, or identified from the perspective of the discriminatee.[72] Moreover, the good can either be a shared public institution or privately appropriable. The basic good this analysis is most concerned with is access to a shared public institution (i.e. educational resources made possible through the provincial government).

[ii] A good is considered "basic" if access to the good is necessary in order for a person to be seen, by others and themselves, as a full and equal participant in their society.[73] This takes into consideration the



consequent social message of being left without the good, especially for a prolonged period of time. Additionally, then, historical and relevant social facts are factored into the equation.[74]

## III. IN DIALOGUE

**a. Leaves members of the transgender community subordinate to cisgender members**

The transgender community clearly constitutes a social group whose standing in society, as a whole, is lower than that of the cisgender community. As such, one way the interim sex-ed curriculum treats members (viz., children) of the transgender community differently is that it leaves them subordinate to their cisgender counterparts. It does this in the following ways:

*[i] It contributes to their lower social standing & marks them as inferior*

As Laura-Lee Kearns et al. point out in their study of transphobia and cisgender privilege, "schools often serve as contexts where students come to narrowly understand gender roles and expectations;" but the "heteronormativity[75] and rigid gender expectations that shape the school system leave LGBTQ+ youth in schools and society vulnerable to harassment".[76] In line with this finding, Gangaram, too, recognized the problematic impact that the interim curriculum has had on the transgender community in that it:

> perpetuat[es] substantive discrimination against LGBTQ+ students, parents, and members of society […] This exclusion denies LGBTQ+ persons recognition, dignity and acceptance, and designates topics related to their realities and lived experiences as problematic, inappropriate and worthy of exclusion from discussion.[77]

A consequence of designating topics related to transgender peoples' "realities and lived experiences as problematic, inappropriate and worthy of exclusion from discussion" is that it further diminishes their power to be listened to. To this point, this analysis finds that excluding teachings on gender identity and sexual orientation creates a problematic hermeneutical lacuna whereby the transgender community's ability to be heard, as well as their social and political power, are negatively affected. To expand on this, Miranda Fricker suggests that unequal power can negatively affect shared linguistic and conceptual resources integral to understanding and interpretation.[78] The relevance here is that the dominant group's monopoly over the curriculum may result in a skewing of society's collective understanding and ability to interpret the subordinate group. This reality is reflected in Coy Mathis' case inasmuch as the concerns surrounding her use of the girls' bathroom stemmed from a gap in knowledge on gender identity and sexual orientation. The hermeneutical lacuna created by omitting – or delaying until grade-eight – the teachings of gender identity and sexual orientation thus maintains the

transgender group in an inferior position relative their dominant cisgender counterpart.

*[ii] It overlooks the needs of transgender children*

As previously mentioned, the Minister of Education stated that one of the reasons for reinstating the old sex-ed curriculum in the interim was due to the fact that the 2015 curriculum had "given rise to widespread and well-publicized expressions of community and parental disapproval". In this sense, the Directive to return to the 1998 version of the curriculum could be taken as tacitly privileging the cisgender community's beliefs at the expense of the transgender community's inclusion. What is more, this has the unintended effect of marking the transgender community's needs as inferior to those of the cisgender community. A problematic implication of this is that transgender children under the age of thirteen are left with a reduced ability to deal with sexual and safety issues. This seems to be substantively discriminatory because it perpetuates their arbitrary disadvantage.

**b. Denies members of the transgender community deliberative freedoms that they have a right to**

Moreau suggests that the loss of deliberative freedom is part and parcel of the lived experience of people who suffer from systemic discrimination.[79] She uses the example of African-Americans who carry the burden of other people's assumptions wherever they go, such that they are never able to forget about their race.[80] Similarly, transgender people carry the burden of other people's oft-negative assumptions wherever they go, such that they are never able to deliberate without taking into account the assumptions of others regarding their gender identity and expression. However, this analysis will now turn to a possible challenge from the standpoint of freedom of religion.

Certainly, cultural traditions and religious beliefs may be in tension with aspects of the 2015 sex-ed curriculum which may constitute "false teachings". For example, in the 2016 case of *E.T. v. The Hamilton-Wentworth District School Board*, a Greek Orthodox father requested a declaration that he had final authority over the education of his children, and wanted the Board of Education to inform him in advance as to the specific curriculum areas being taught to his children.[81] According to the father, various aspects of the public school curriculum constituted "false teachings," such that it would be a sin for him to fail to provide protection to his children from these teachings.[82] There are likely many religious parents who may share the same view as this father and whose children may adhere to the same beliefs. Exposing them to "false teachings" could thereby lessen religious children's deliberative freedom, insofar as their religion requires them to be excluded from these lessons and perhaps viewed unfavourably by their "more progressive" peers. Conversely, being denied a curricula that covers gender identity and



sexual orientation could lessen the deliberative freedoms of transgender children insofar as they are never able to deliberate without taking into account the assumptions of others – assumptions that could be ameliorated by the very curricula being denied to them.

In both cases, one might be able to find a failure to respect someone as being capable of autonomy. However, what may persuade us in this case is taking into account the fact that transgender groups have historically been – and more importantly, continue to be – treated as second-class citizens. Thus, the ameliorative effect of including teachings of gender identity and sexual orientation in school curricula may be the factor that tips the scale. According to Kearns et al., "The findings of our ongoing work point to the importance of using curriculum as a means to address transgender and gender non-conformity issues and concerns".[83] Thus, the interim sex-ed curriculum wrongs members of the transgender community by failing to treat them as equals insofar as denying them the freedom to deliberate.

**c. Leaves members of the transgender community without access to certain "basic" goods they need**

Education on gender identity and sexual orientation is taken here to be a basic good in the sense that it is a necessary resource for transgender people, especially transgender children. Access to this resource is necessary in order for transgender persons to be full and equal participants in society. Much like in Coy's case, it is possible to imagine what sort of impact denial of such a necessary resource may have on a transgender child. Treating transgender childen differently and intentionally avoiding the invitation to open up a dialogue about their gender identity and expression is inherently stigmatizing and may preclude their ability to participate fully and equally in society both now and in the future. In fact, a study conducted by Julie Fish showed that, "transgender persons are likely to have difficult lives from early childhood […] as a result of social exclusion, discrimination, and violence; transgender individuals tend to experience stigma and psychological distress affecting their health and well-being".[84]

Moreover, access to educational resources on gender identity and sexual orientation – particularly at a younger age – is necessary in order for a transgender person to be seen, by others and themselves, as a full and equal participant in their society. In fact, a study conducted by Kristina R. Olson et al., "refuted the assumption that transgender children are confused by the questions at hand […] data reported here should serve as evidence that transgender children [ages 5 – 12] do indeed exist and that their identity is a deeply held one".[85] In sum, the interim and proposed sex-ed curriculum treats members of the transgender community differently, insofar as it fails to treat them as equals by leaving them without access to early education on gender identity and sexual orientation, which they need to have access to if they are to participate as an

equal in society.

## IV. CONCLUDING REMARKS

Although this analysis has largely criticized the interim and proposed upcoming sex-ed curriculum, the provincial government's "opt-out" policy does seems like the most reasonable compromise to assuage the concerns of religious parents who disapprove of sex-ed programmes which include teachings on gender identity and sexual orientation. However, as mentioned in previous sections (II.c, III.b), it almost seems morally exigent that we implement mechanisms that can foster and promote a more inclusive and welcoming environment when one takes into account the historical injustices that the transgender community has faced and in many ways still face. One such mechanism ought to be a curriculum that includes teachings on gender identity and sexual orientation; however, the government's failure to implement such a curriculum leads to the conclusion that Ontario's interim sex-ed curriculum discriminates against members (viz., children) of the transgender community on the basis that it:

1. Leaves transgender children and youth subordinate to their cisgender counterparts
2. Lessens and/or outright denies the deliberative freedoms of transgender children insofar as they are unable to deliberate without taking into account the assumptions of others regarding their gender identity and expression, (assumptions that could be ameliorated by the very curricula being denied to them).
3. Intentionally avoids the invitation to open up a dialogue about gender identity, which is inherently stigmatizing and may preclude transgender children's ability – now and in the future – to participate fully in society.

Moreover, given the studies presented in this analysis that point to children beginning the process of transitioning as early as five, one can conclude that the proposed upcoming curriculum fails to execute its ameliorative purpose as gender identity and sexual orientation education is put-off until the age of thirteen.[86] Lastly, this analysis asserts that an amended sex-ed curriculum that has gender identity and sexual orientation being taught at a younger age is, all things considered, what ought to be implemented.



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**Endnotes**

[1] Dan Frosch, "Dispute on Transgender Rights Unfolds at a Colorado School," in *The New York Times*, taken from: https://www.nytimes.com/2013/03/18/us/in-colorado-a-legal-dispute-over-transgender-rights.html, (2013).

[2] The Colorado Civil Rights Division (CCRD) is charged with enforcing Colorado's anti-discrimination laws in areas of public accommodations, employment, and housing. The CCRD investigates claims of illegal discrimination.

[3] Department of Regulatory Agencies, "Determination Case no. P20130034X: Coy Mathis by and through Jeremy and Kathryn Mathis v. Fountain-Fort Carson School District 8," (June 2013).

[4] State of Colorado: Colorado Civil Rights Division, "Case no. P20130034X: Rebuttal Statement in Response to Fountain-Fort Carson School District's Position Statement," (February 2013).

[5] Frosch, p. 1.

[6] State of Colorado: Colorado Civil Rights Division, "Case no. P20130034X,"(February 2013): p. 3.

[7] State of Colorado: Colorado Civil Rights Division, "Case no. P20130034X,"(February 2013): p. 4.

[8] State of Colorado: Colorado Civil Rights Division, "Case no. P20130034X," (February 2013): p. 5.

[9] Frosch, p. 2.

[10] Department of Regulatory Agencies, "Determination Case no. P20130034X," p. 2.

[11] Department of Regulatory Agencies, "Determination Case no. P20130034X," p. 3.

[12] A protected class or protected group is a group of people qualified for special protection by law, policy, or similar authority. See, Department of Regulatory Agencies, "Determination Case no. P20130034X," p. 9.

[13] Sophia Moreau, *Faces of Inequality: Wrongful Discrimination in Law and Morality,"* taken from: the Draft Manuscript, (December 2018).

[14] Moreau, p. 8.

[15] Based on the average age of students in grade eight.

[16] Gay & Lesbian Alliance Against Defamation (GLAAD), "Glossary of Terms – Transgender," taken from: https://www.glaad.org/reference/transgender.

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[21] Leeper, p.168.

[22] LGBTQ+ is an acronym for lesbian, gay, bisexual, transgender, and queer (or questioning).

[23] Greta R. Bauer and Ayden I. Scheim, "Transgender People in Ontario, Canada: Statistics from the Trans PULSE Project to Inform Human Rights Policy," (June 2015).

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[34] n.b. The ETFO made a twofold argument that the changes made by the Progressive Conservative government impinged their teachers' freedom of expression, and put students (viz., LGBTQ+ students) at risk, by failing to treat them inclusively. However, for the purposes of this analysis, it focuses on the latter argument.

[35] Ontario Superior Court of Justice Divisional Court, "Court File No. 554/18," p.1.

[36] For example, the 2015 front matter advised that: "When planning instruction and considering class groupings, teachers should be aware of and consider the needs of students who may not identify as "male" or "female", who are transgender, or who are gender-non-conforming. For more information about gender identity, gender expression, and human rights, see the website of the Ontario Human Rights Commission." Ontario Superior Court of Justice Divisional Court, "Court File No. 554/18 – Factum of the Applicants, The Elementary Teachers' Federation of Ontario and Cindy Gangaram : The Corporation of Canadian Civil Liberties Association v. Minister of Education (Ontario) AND BETWEEN The Elementary Teachers' Federation of Ontario v. Minister of Education (Ontario)." (November 2018): p.11.

[37] Ministry of Education Website, "Sex education in Ontario," taken from: https://www.ontario.ca/page/sex-education-ontario. (April 2019).

[38] Ministry of Education Website, p. 1.

[39] Ibid.

[40] Ontario Superior Court of Justice Divisional Court, "Court File No. 554/18 – Factum of the Applicants, The Elementary Teachers' Federation of Ontario and Cindy Gangaram : The Corporation of Canadian Civil Liberties Association v. Minister of Education (Ontario) AND BETWEEN The Elementary Teachers' Federation of Ontario v. Minister of Education (Ontario)." (November 2018): p.12.

[41] Ontario Superior Court of Justice Divisional Court, "Court File No. 554/18," p.12.

[42] Ontario Superior Court of Justice Divisional Court, "Affidavit of Cindy Gangaram," (September 2018): pp. 6-11.

[43] See: Layla J. Kurt and Krystel H. Chenault, "School Policy and Transgender Identity Expression: A Study of School Administrators' Experiences," in *International Journal of Education Policy & Leadership.*

[44] Ontario Superior Court of Justice Divisional Court, "Reasons for Decision," taken from: www.etfo.ca/docs/SCDecisionFeb28-19.pdf.

[45] Ontario Superior Court of Justice Divisional Court, "Court File Nos. 526/18 and 554/18 – Factum of the Respondent, The Minister of Education: The Corporation of Canadian Civil Liberties Association v. Minister of Education (Ontario) AND BETWEEN The Elementary Teachers' Federation of Ontario v. Minister of Education (Ontario)," (January 2019), taken from: ccla.org/cclanewsite/wp-content/uploads/2018/11/Govt-of-Ontario-Factum.pdf.

[46] Ontario Superior Court of Justice Divisional Court, "Court File Nos. 526/18 and 554/18," pp. 2-13.

[47] Subject to reasonable limits as set out in section 1 of the *Charter*.
[48] This is in direct reference to the ETFO's argument that the changes made by the Progressive Conservative government impinged their teachers' freedom of expression, and put students (viz., LGBTQ+ students) at risk, by failing to treat them inclusively. Again, however, for the purposes of this analysis, it focuses on the latter argument. Ontario Superior Court of Justice Divisional Court, "Reasons for Decision," taken from: www.etfo.ca/docs/SCDecision-Feb28-19.pdf.
[49] Ontario Superior Court of Justice Divisional Court, "Reasons for Decision," taken from: www.etfo.ca/docs/SCDecisionFeb28-19.pdf. pp. 20-22.
[50] Shawn Jeffords, "Ontario announces revamped sex-ed curriculum, increase in class sizes for high school," taken from: https://globalnews.ca/news/5059062/ontario-education-class-size/, (March 15, 2019).
[51] Unfortunately, owing to a delay in the release of the new curriculum, this analysis can only examine, at this time, the indicated changes to the sex-ed curriculum as stated in the government's press release.
[52] Shawn Jeffords, "Ontario announces revamped sex-ed curriculum, increase in class sizes for high school," taken from: https://globalnews.ca/news/5059062/ontario-education-class-size/, (March 15, 2019).
[53] Hermeneutics are shared linguistic and conceptual resources integral to understanding and interpretation.
[54] Indirect discrimination: *person x* indirectly discriminates against another *person y*, on the basis of *trait t*, if *person y* has *trait t*, *person y* is disadvantaged by the practices of *person x*, and although the practice does not explicitly single *person y* out because of *trait t* or some related trait, it nevertheless disproportionally disadvantages those who have *t* relative to those who do not (like *person x*).
[55] Guided here by Deborah Hellman, "The Basic Idea," in *When is Discrimination Wrong?* (Cambridge: Harvard University Press, 2008): p. 13.
[56] Guided here by Sophia Moreau, *Faces of Inequality: Wrongful Discrimination in Law and Morality,"* taken from: the Draft Manuscript, (December 2018): p. 4.
[57] Moreau, p. 4.
[58] Moreau, p. 8.
[59] n.b. This is not meant to be a full reconstruction of Moreau's theory, though this analysis does borrow substantially from it and it largely informs the standpoint with which it approaches, it does deviate from or omit entirely some of the intricate details of her theory.
[60] Moreau, p. 37.
[61] Ibid.
[62] Ibid.
[63] Ibid.
[64] Moreau, p. 39.
[65] Moreau, p. 41.
[66] Ibid.
[67] Moreau, p. 60.
[68] Moreau, p. 64.
[69] Moreau, p. 65.
[70] Moreau, pp. 68-69.
[71] Moreau, p. 91.
[72] Moreau, p. 100.
[73] Moreau, p. 91.
[74] Moreau, p. 93.
[75] Heteronormativity denotes or relates to a worldview that promotes heterosexuality as the norm or preferred sexual orientation.
[76] Kearns et al., p. 3.



[77] Ontario Superior Court of Justice Divisional Court, "Affidavit of Cindy Gangaram," (September 2018): pp. 6-11.
[78] Miranda Fricker, *Epistemic Injustice: Power & the Ethics of Knowing*, (Oxford: Oxford University Press, 2007): p. 147.
[79] Moreau, p. 64.
[80] Ibid.
[81] Ontario Superior Court of Justice, "E.T. v. The Hamilton-Wentworth District School Board," (2016).
[82] Ibid.
[83] Kearns et al., pp. 20-21.
[84] Julie Fish, "Conceptualizing social exclusion and lesbian, gay, bisexual, and transgender people: The implications for promoting equity in nursing policy and practice," in *Journal of Research in Nursing*, vol. 15, no. 4, (2010): pp. 307-308.
[85] Kristina R. Olson, Aidan C. Key and Nicholas R. Eaton, "Gender Cognition in Transgender Children," in *Psychological Science*, vol. 26, no. 4. (2015): p. 473.
[86] Based on the average age of students in grade eight.

# “Fast Fashion”

Jessica Greco

## COUNTERFEITING AND INTELLECTUAL PROPERTY LAWS

### I. Introduction

This analysis will explore the following question: based on the ethical and social considerations surrounding the manufacture, sale and purchase of counterfeit and “knock-off” fashion items, should intellectual property laws that protect the US fashion industry be strengthened? It will argue that trademark laws related to counterfeit fashion items and copyright laws related to knock-off fashion items should be maintained in order to to maximize overall social and economic benefits. Firstly, the significance of the practice of counterfeiting and producing “knock-offs” in the fashion industry will be analyzed through ethical and moral lenses. Next, the social implications of these practices, in particular those concerning the environment and human and labour rights, will be discussed. The analysis will then consider various arguments on how to revise the intellectual property laws acting upon the business of fashion in order to argue that the innovation-related concerns pertaining to counterfeiting and copying take precedence over social concerns. Finally, a reply to an objection based on a human rights argument will be offered.

### II. Defining Terms, Trademark Law and Copyright Law

Due to the availability of research that has been done on this topic, this analysis will focus on the intellectual property laws which protect the United States fashion industry. To ensure clarity throughout the paper, “counterfeit” fashion items will be defined and understood as those which feature false labels and intend to deceive others into believing that the product is an authentic version of another product (Howard 2009, 101). A “knock-off” fashion item should be considered as a product which “does not explicitly pass itself off as the original” by including a logo or label, yet “copies the style…of a runway design” (101). Counterfeit fashion is illegal, whereas knock-off fashion goods are legal and “can be purchased at…familiar stores in the local mall” (101).

It is also necessary to define “trademark law” and “copyright law”, and to contextualize how these areas of law act upon the fashion industry. Trademark law is useful as protection from counterfeit items (Elrod

2017, 582). Put differently, trademark law "protects designers' most important asset: their brand" (Howard 2009, 104). While trademark law may protect logos and trademarks, it does not protect against garment replication (105). For this reason, counterfeiters will not infringe a trademark if they copy a design but fail to replicate the logo or trademark (105). Absent a logo, fashion-savvy individuals may nonetheless identify the source of a design; such copying of designs rather than logos underlies the "fast fashion" industry (105). Howard furthermore explains that counterfeiters are not same as those who manufacture knock-offs (2009, 105). For instance, the former infringe trademark protections and criminally sell goods on the black-market (105). On the other hand, the latter may be "substantial multi-national businesses, with deep pockets…selling products in the same mall as the original garment" (105).

The application of copyright law to the fashion industry is controversial (Elrod 2017, 584). Copyright law protects designs that are "pictorial, graphic, or sculptural", and thus do not include fashion as a form of art (584). To further complicate matters, merely functional works do not receive protection (584). To illustrate this concept, Elrod gives the example of a shirt with a picture (584). The picture would indeed receive protection from copyright law, yet the shirt, as a functional item, would not (584). Therefore, the ways in which trademark and copyright law are applied quite narrowly to fashion supports the overall understanding that "apparel designs…[are] outside the domain of IP law" and fail to secure "strong IP protection" (Raustiala and Sprigman 2006, 1689).

## III. Ethical Theory: Utilitarianism, Innovation and the Fashion Industry

To begin, the current intellectual property laws should be maintained because the practice of copying or counterfeiting fashion designs may be justified through ethical and moral lenses on the grounds of its economic and innovational benefits. An appropriate starting point for the discussion is Hilton, Choi and Chen's article "The Ethics of Counterfeiting in the Fashion Industry: Quality, Credence and Profit Issues". The authors argue that it is difficult to make ethical decisions about counterfeiting in fashion in part because of certain characteristics of the industry (352). One significant factor is the condoning of copying by designers (350-351). Although they describe such copying as "endemic" and "a core activity of the industry", they explain that fashion designers condone the practice both because it brings their brand publicity and because it "legitimates their designs as ones that are desirable and worth copying" (351). On the other hand, the article considers several ethical theories that may be applied to intellectual property considerations, which include the moral rights of man, utilitarianism, distributive justice and ethical relativism (Sama and Shoaf 2002 ctd. in Hilton et al. 2004, 348). For instance, the theory of utilitarianism as applied to the intellectual property rights context upholds that it is necessary to protect



intellectual property laws in order to create the incentive for innovation and development (Hilton et al. 2004, 348). Otherwise, society loses the opportunity to benefit as fully as it could from more creative productivity and more welfare (348). Likewise, when making an ethical decision, utilitarianism reasoning contends that "the most ethical decision is one that results in the greatest good for the greatest number of people" (348). Similarly, moral rights approach maintains that it is necessary to respect human rights such as "the rights of citizens to enjoy the fruits of their creative labor" (348).

However, the authors make the compelling point that a utilitarian application could actually justify the copying of fashion designs, as these replicas allow a greater number of people to purchase these otherwise financially inaccessible items (Hilton et al. 2004, 351). Similarly, the moral rights perspective can be applied here such that those creating counterfeit items have the "moral right to benefit from their work", as their work may in many instances serve as a means of survival (349). Thus, even concepts such as encouraging creativity and innovation and the moral rights of designers are not black-and-white when considered in relation to intellectual property laws and their strength within the fashion industry.

To make sense of such contradictory ideas about whether the practice of counterfeiting in the fashion industry is ethical, it is appropriate to discuss the concept of the "Piracy Paradox" as articulated by Raustiala and Sprigman (2006, 1691). Raustiala and Sprigman argue that since the copying of designs does not cause a great deal of harm to designers, the fashion industry does not experience reduced innovation as a result of copying (1691). On the contrary, they contend that copying may benefit the original designers and spur innovation (1691). They acknowledge that the utilitarian argument that is typically used to justify upholding intellectual property rights "is logically straightforward, intuitively appealing, and well reflected in American law" (1689). Nonetheless, their conceptualization of the "Piracy Paradox" stems from the empirical observation that the fashion industry operates in a way that is largely at odds with the standard utilitarian justification (1689). Indeed, although "[c]opying is rampant" in the industry, "[c]ompetition, innovation, and investment…remain vibrant" (1689).

To explain "why the regime of free appropriation is a stable equilibrium", Raustiala and Sprigman describe the economic concepts of "induced obsolescence" (2006, 1718) and "anchoring" (1728). "Induced obsolescence" occurs when low intellectual property protection "accelerate[s] the diffusion of designs and styles" (1722). In other words, when fashion designs are copied, they become obsolete more quickly because they are less "positional", and thus more designs must be made (1722). A good is "positional" when "[its] value is closely tied to the perception that [it is] valued by others" (1718). An example of a "positional good" is a Prada handbag, of which some of the value is

obtained "because fashionable people have it and unfashionable ones do not" (1719). Copying, as a result of low intellectual property protection, more quickly diffuses styles (1722), which reduces the prestige conferred upon those who purchased it first (1719). Thus, extensive copying accelerates the fashion business cycle as designers must create new designs to replace those made obsolete by copying (1722). This concept helps to support the idea that "piracy is paradoxically beneficial for the fashion industry" (1727). Similarly, the concept of "anchoring" refers to the creation of trends, which is further aided by copying (1728-1729). In other words, copying contributes to anchoring, which allows consumers to identify seasonal trends and changes in current styles, stimulating consumption as a result (1729).

The arguments presented by Hilton, Choi and Chen on the one hand and Raustiala and Sprigman on the other help to contextualize the ethical dilemma that surrounds the practice of counterfeiting and copying in the fashion industry. Although copying the work of someone else is usually considered immoral, the authors are correct in articulating that the fashion industry is "atypical" (Hilton et al. 2004, 353) and an "empirical anomaly" (Raustiala and Sprigman 2006, 1689). Thus, evidence that the act of copying in fashion (Hilton et al. 2004, 350-351) and piracy may in fact benefit the business of fashion and the original designers (Raustiala and Sprigman 2006, 1727) encourages us to consider the interests of the fashion industry when making decisions about intellectual property law.

## IV. Social Implications

This analysis will now consider certain social consequences of counterfeiting and copying that may support the need to strengthen the existing intellectual property laws. Fitzgerald attempts to dispel the myth that it is harmless to purchase counterfeit fashion goods (2012, 128) by discussing the ways in which the practice harms the economy (139-140), poses health risks (142-143), and supports crime (140-141) and child labour (142-143). For example, sales of counterfeit fashion represent a loss of tax revenue from the US government through both lost income tax from those selling the original items and lost sales tax of those buying new ones (140). Moreover, in an effort to minimize production costs, counterfeiters manufacture their products with toxic materials that may be harmful to skin (142).

Likewise, Elrod discusses the human rights and labour-related repercussions of a demand for fast fashion (2017, 589-591), namely the perpetuation of lax or unenforced labour laws in countries where such goods are manufactured (590-591). Such concerns include inhumane work hours, the exploitation of children for cheap labour (590), and "catastrophic accidents" in manufacturing facilities whose structural components do not prioritize worker safety (591). Elrod proposes that since the high demand for fast fashion results in these human rights



abuses, strengthening copyright law could help address the problem (591).

Similarly, Elrod discusses the environmental consequences of the fast fashion industry (2017, 576). Unlike counterfeit items, fast fashion goods are "mimicked, cheaper cop[ies]" of couture designs (577) that can be found at retailers such as Zara, Forever 21 and H&M (578). The fast fashion industry allows consumers to purchase couture-inspired items in mimicked forms "often before the original designer's version even hit stores" (577). Elrod provides evidence of the environmental damage caused by the demand for fast fashion that is in line with seasonal styles (586). For instance, treating and dyeing the textiles that are used in these products contributes to water pollution (587). However, more relevantly and in line with the concept of "induced obsolescence" (Raustiala and Sprigman 2006, 1722), consumers are intentionally made to believe that clothing from fast fashion retailers has gone out of style soon after its purchase (Elrod 2017, 588). Fast fashion thus creates extreme waste, as consumers' disposal of these goods contributes to landfill over-crowding (588). Elrod concludes that amendments to copyright law will cut down on the deleterious environmental consequences of fast fashion; contrariwise, low intellectual property protection, ever-changing style trends, and high consumer demand for "knock-offs" are inimical to global sustainability (589). Therefore, an analysis of the social effects of counterfeiting or producing knock-off fashion demonstrates that when proposing amendments to intellectual property laws, we must attempt to balance considerations of industry interests with those of social interests.

## V. Legal Arguments and Analysis

Third, in light of the discussion of the "Piracy Paradox" and the social consequences of both knock-off and counterfeit fashion, and the maintenance of a balance between social and industry interests, the current trademark and copyright laws should be maintained.

Elrod considers the "Piracy Paradox" and its role in justifying opposition to the 2012 *Innovative Design Protection Act* as an example of a legal attempt to use copyright to protect fashion design (2017, 593). She argues that the "Piracy Paradox" or, rather, the idea that innovation in the fashion industry is not impaired by weak IP protection, is *not* sufficient to justify a lack of protection for fashion (593). She explains that the Act would have impeded the fast fashion industry given the prohibition on "copycatting…certain designs" (594). For Elrod, the decision about whether to strengthen the intellectual property laws that protect the fashion industry is *not* about "whether legislation would severely harm designer innovation" (594). Rather, Elrod is motivated by the potential of IP legislation to reduce the indirect consequences of fast fashion, namely "environmental and human rights violations" (594). From an ethical perspective, Elrod's argument appears to imply that the costs

to humans and to the environment of the weak IP climate outweigh any benefits to innovation. Certainly, though Raustiala and Sprigman argue that "copying may actually promote innovation" (2006, 1691), Elrod's argument seems in line with moral intuition that dictates that we should protect humans before we protect fashion.

On the other hand, Holton argues that the balance that currently exists between nonexistent and increased intellectual property protection for the fashion industry must be maintained (2014, 428). One justification she offers in support of her claim is that increased intellectual property protection may increase the price of fashion goods (429). She links intellectual property protection to the creation of monopolies in the fashion market, because designers will not face competition from copiers (429). Consequently, consumers may face barriers to accessing fashionable items (429). Recall, for example, Hilton, Choi and Chen's discussion of utilitarianism (2004, 348). The authors affirm that utilitarian principles may justify the copying of fashion designs, as copies "serv[e] a larger market that would not otherwise be able to afford such items" (351). They extend this reasoning to the context of counterfeits, as counterfeit products also serve those who cannot financially access high-end designer goods, thus contributing to "the welfare of society as a whole" (349). This appears to be an argument on equality grounds, as the authors acknowledge the possible existence of a right to "wear a fashionable item of clothing regardless of [one's] income" (352). Though achieving equity in fashion may seem trivial, stores such as Forever 21 and Zara allow individuals of all income levels to express themselves, to partake in current trends and to feel confident in both professional and social contexts. Nevertheless, a study on the motivations of individuals in purchasing counterfeit fashion items in the United Arab Emirates unexpectedly found that "fashion consciousness", defined as "the extent to which a consumer is caught up with fashion styles or clothing" (Fernandes 2013, 87) was unrelated to how likely the subjects of the study were to buy counterfeit goods (92).

To summarize thus far, three main features of the debate surrounding whether the intellectual property laws protecting the fashion industry should be strengthened have been explored: the "Piracy Paradox" by which an absence of strong intellectual property protection benefits the fashion industry (Raustiala and Sprigman 2006, 1727), the social harms of counterfeiting and copying designs (Elrod 2017 and Fitzgerald 2012), and the idea that copying leads to greater welfare and accessibility in the fashion industry (Hilton et al. 2004, 348-349). Though Elrod argues that the fashion industry requires stronger intellectual property protection to curtail harms to the environment and to human rights (2017, 594), it is not clear that simply disallowing companies from creating copies will reduce their usage of materials and will change labour practices. Indeed, clothing is still a necessity that must be purchased, and reducing production in one single industry may not guarantee a



noticeable or desired effect on the environment. Therefore, the implementation of wider-reaching practices might be necessary to deal with these environmental concerns beyond issues relating to counterfeiting or knock-off production. On the other hand, the "Piracy Paradox" shows that when designs are copied, the process advantages innovation (Raustiala and Sprigman 2006, 1691). Similarly, theories of utilitarianism can also be interpreted to imply that intellectual property laws should *not* be strengthened, as "[copying] serves a larger market" than the original goods (Hilton et al. 2004, 351). Thus, while the beneficial effects of strengthening intellectual property laws on the environment or on human rights are minimal, the effects on innovation and on economic welfare of maintaining intellectual property laws appear greater. Thus, if we are to balance these competing rights to maximize overall benefits, the intellectual property laws protecting the US fashion industry should be maintained as they currently are.

## VI. Objection and Reply

Although this analysis has demonstrated why trademark laws related to counterfeit fashion items and copyright laws related to "knock-off" fashion items should be maintained, a counter-argument must be considered. The objection is drawn from Howard's article, in which she emphasizes that while counterfeit and knock-off fashion goods may be legally distinct, "[l]ogically, both amount to profiting from the creativity of another" (2009, 101). Recall as well that the rights of man perspective supports "the rights of citizens to enjoy the fruits of their creative labor" (Hilton et al. 2004, 348). Thus, the objection is that while "piracy is paradoxically beneficial for the fashion industry" (Raustiala and Sprigman 2006, 1727), designers nonetheless have "basic human rights" (Hilton et al. 2004, 348) that may be "paramount" (349) to economic or innovational concerns.

This objection is weak if one considers the idea of "human rights" as an international legal concept intended to prevent physical or psychological harm to individuals. One can take into consideration as an example concept the human rights conferred by the *Canadian Charter of Rights and Freedoms*, which guarantees "the right to life, liberty and security of the person" (*Canadian Charter of Rights and Freedoms* 1982, s. 7). This provision is intended to prevent harm, both physical harm to one's "life" or "security", and emotional harm to one's "liberty". Similarly, Parfit's *Consent Principle* states that "[i]t is wrong to treat people in any way to which they could not rationally consent in the act-affecting sense, if these people knew the relevant facts, and we gave them the power to choose how we shall treat them" (Parfit 2011, 3).

An illustrative case to consider the objection in detail is the recent decision of the Canada Goose winter parka company to expand to the Chinese market, where there is "a proliferation of knockoffs" of these products ("Canada Goose" 2018). The company believes it may reduce

the prevalence of imitation Canada Goose coats in China by "selling [them] directly to customers" ("Canada Goose"). Similarly, an analyst from Kantar Worldpanel explains that when consumers unknowingly buy a Canada Goose imitation, "they learn more about the brand and this helps spread the name" (Zhao qtd. in "Canada Goose" 2018). Therefore, if the Canada Goose company "knew the relevant facts" (Parfit 2011, 3), namely that "lookalikes…may also be an effective marketing tool" for their brand (Zhao ctd. in "Canada Goose" 2018), it is likely that they would rationally consent to the sale of imitation products in China due to the positive effects on how their designs are valued as they expand their brand overseas. Therefore, in reply this analysis affirms that design copying, such as in the Canada Goose case, is not an affront to the human rights of the designer because it does not meet the harm-preventing objective of human rights-related laws.

## VII. Conclusion

In conclusion, this analysis has explored whether the intellectual property laws that protect the US fashion industry should be strengthened. First, an ethical and moral lenses was used to shed light on the significance of Raustiala and Sprigman's "Piracy Paradox". Second, the social implications of the practices of counterfeiting and copying, namely those related to the environment and to human and labour rights, were considered. Then, through the balancing of legal arguments about whether or not intellectual property laws such as trademark law and copyright law should be strengthened, it was argued that the business-related aspects of the issue are paramount to the relevant social concerns. Finally, an objection based on human rights in relation to intellectual property was rebuked with a general analysis of what human rights should mean in this context. Ultimately, the provisions of trademark law protecting counterfeit fashion items and those of copyright law protecting knock-off fashion items should be maintained, as this choice will most effectively maximize the overall benefit to society and to the fashion industry.

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# Understanding the Roman Jurists

Shelby Martin

## DEMYSTIFYING METHODS OF REASONING

Though the interpretations and jurisprudence gathered from the Roman Jurists has undoubtedly influenced the contemporary body of law, the nature of their reasoning largely remains a mystery. It is important to acknowledge that while the Jurists were considered experts in the field of law, their decision-making was not bound by a systematized or algorithmic method of reasoning. There is no apparent framework by which Jurists had to think and make judgements, and there are many instances where the various Jurists expressed strikingly different interpretations of the same statutes. Responsible for assisting in the drafting of legal documents, advising in procedural matters and responding to questions of the law, the Jurists were only observably impacted by the Lex Aquilia, a foundational Roman law (Schiller 1226).

Nevertheless, perhaps the Roman Jurists did indeed reason in accordance, albeit unconsciously, with certain shared principles throughout their discussions and investigations of hypothetical circumstances. Through the examination of cases taken from Bruce Frier's *A Casebook on the Roman Law of Delict*, this analysis asserts that the approach to reasoning employed by the Jurists was in essence intuitive and encapsulated a synthesis of deductive and inductive methods of interpretation. In addition to intuitive motivations, the Jurists tended to exercise analogous reasoning in determining whether actions may be brought under the Lex Aquilia, or if an action in factum (*actio in factum*) is more appropriate. Moreover, it seems as though the Jurists engaged in sociological jurisprudence, since they reasoned in such a way that accounted for a variety of social outcomes and the manner in which the law impacts society. These various methods of reasoning worked together within the mind of each individual Jurist, guiding them through their readings and manifesting within their arguments. The interplay of these modes of reasoning is evident upon careful consideration of the opinions put forward by the Jurists, coalescing in such a way that makes them difficult to identify in and of themselves.

## Uncovering the Approach to Reasoning Employed by the Jurists

### *Intuitive Reasoning Using a Synthesis of Inductive and Deductive Methods of Interpretation*

Intuitive reasoning involves the use of feelings to determine what is true. As such, one may argue that something is right or wrong without the use of conscious reasoning. Intuition inherently plays off of our moral inclinations, making it a universal process that occupies a subjective form. This moralistic, feeling-based way of passing judgement may work to legitimize itself within the framework of pre-existing methods of interpretation such as inductive and deductive formulas. It appears that much of the thinking conducted by the Jurists is derived from their individual intuitions and is structured in a way that acknowledges the logical connection between the general principle and the hypothetical premises. This hypothesis would account for the variation between Jurists' interpretations of the same statute or imagined situation.

Consider Case 8: The Meaning of "To Rend", as well as Case 9: Sowing Wild Oats; Pouring Out Wine. The hypothetical discussed in Case 8 concerns an individual pouring out wine that does not belong to him, while Case 9 presents a situation where an unpleasant neighbor sows oat into the field of her enemy, ruining the crop of grain. On Case 8, Jurist Gaius explains:

> …For if anything is burned or rent or broken, an action is established in this Section; but the term "rent" (*ruptum*) could suffice for all these cases. For a thing is construed as "rent" (*ruptum*) when it is "spoiled" (*corruptum*) in any way. Hence this word includes not only things burned or rent or broken, but also things torn and dashed and poured out and in any way harmed or destroyed and (so) made worse.

Of interest here is the difference between the use of verbs between the cases. Gaius submits that when a thing is "rent" or *ruptum*, it follows that that thing is "spoiled" or *corruptum*; however, within the context of Case 9 Jurist Celsus brings attention to the Lex Aquilia as it uses *ruperit* to denote "rends". This is interesting, as *ruptum* can be translated into "invalidated" whereas *ruperit* translates into "tear". While these translations do not mean the same thing, they are both accepted as being synonymous with the word "spoils", which encompasses a much larger range of damages. This decision to change the wording of the Lex Aquilia from the relatively narrow "rent" to the broad "spoiled" – even though Gaius interprets "rent" as *ruptum*, and Celsus as *ruperit* – signifies an intuitive decision made by Republican Jurists to broaden the scope of the Aquilian statute. Also consistent with intuitive reasoning is the fact that the Jurists did not articulate how they reasoned that *ruptum* be read as *corruptum*. It seems that they merely felt that one replaced the other.

Further, Gaius seems to argue that the pouring out of one's wine fall under the meaning of *corruptum*, and so an Aquilian action may be



taken. Celsus too takes *corruptum* to include the tampering of wine; however, he does not believe that it extends to the sowing of wild oats as it does not "alter" the object, but merely makes separation difficult. He elaborates that changing or spoiling an object falls within the scope of the Lex Aquilia. However, this raises the question of how pouring wine onto the ground causes a change in the wine, when really the wine maintains its properties, merely becoming more difficult to separate from the ground. In this way, the instance parallels that of wild oats and grain. Here, Celsus is presenting an interpretation that does not seem to fit within the agreed upon definition of *corruptum*, offering no logical reason for his different treatment of the oats and wine under the newly interpreted Lex Aquilia. Celsus' reasoning is driven by his intuition of what he feels to be right, attempting to deduce that his categorization of wine versus oats logically follows the relevant Aquilian statute.

Further, Case 7: Physical Directness sees Gaius reason that an Aquilian action may be taken against anyone who "gives loss with his own body", otherwise only an *actio in factum* may apply. In his examples, however, Gaius appears to contradict himself. He states that if someone encloses a slave or herd animal in a room so that they starve to death, there is no Aquilian action, but if someone pushes another off a bridge into a body of water and they drown, then that person may be liable under the Lex Aquilia for he used his own body to cause loss when he pushed him. Again, it may be concluded that just as easily as someone uses their body to inflict loss by pushing another off of a bridge to their death, they are also using their body to inflict loss when they push a door shut, locking another in a room with no resources. This inherent inconsistency points to intuitive reasoning given the absence of logic in distinguishing the two. Interestingly, the underlying intuition that guides Jurists' interpretations is disguised by their invocation of inductive and deductive modes of reasoning, which offer the arguments logical structure that works to distract from potential inconsistencies.

### *Analogous Reasoning in Distinguishing an Aquilian Action from an Action in Factum*

Analogous reasoning was popular amongst the Roman Jurists, appearing throughout many of their arguments in order to aid in the understanding of similarities between situations. Analogous reasoning also attempted to persuade others into accepting a logical connection between two or more situations. By engaging in analogous reasoning, Jurists look towards precedents to support their claims and help in creating a codification that discerns actions that fall under Lex Aquilia from actions in factum. The Lex Aquilia provides legal remedy for a situation, whereas an *actio in factum* provides equitable remedies. An *actio in factum* is based upon Praetorian edict, which allows the formula to be altered so as to account for the facts and circumstances unique to the case that withhold it from being tried under the Lex Aquilia. Thus, the

interpretations and opinions offered by the Jurists on such matters provide knowledge regarding the characterization of various actions they may qualify as a legal issue or an issue of equity.

A reading of Case 72: A Neighbor Destroys Bees brings attention to the use of analogies in determining whether there is liability under the Lex Aquilia. Celsus and Proculus disagree, as Celsus argues that if a neighbor burns up your bees when they are passing through their property, the neighbor has acted wrongfully under the Lex Aquilia because it deprives the neighbor of profit through the destruction of their property. Jurist Proculus, on the other hand, maintains that the bees are not property because they can neither be domesticated nor sufficiently enclosed. Through the use of analogy, Celsus suggests that the bees are no different from doves insofar as even if they escape, they will always return home. Celsus attempts to liken bees to another animal that may be either domesticated or wild. In doing so, he hopes that the argument may be read with "doves" replacing "bees" in order to garner support and strengthen the claim for an Aquilian action. In doing so, regardless of foreseen success, Celsus acts intelligibly to distract from the arguable absurdity of his request.

Another interesting case to analyze in order to distill the Jurists' modes of reasoning is Case 14: Damage to Buildings. The case reads:

> If someone destroyed or broke open the door of my building, or if he demolished the building itself, he is liable under the Lex Aquilia (32). If someone demolishes my aqueduct, although the demolished materials are mine, nonetheless because I do not own the land over which I am bringing water, the better solution is to say that an analogous action (*action utilis*) should be given.

While this case emphasizes the nature of property and ownership as it does a connection to the land, it introduces an interesting hypothetical that engages with the categorization of remedies. Since the aqueduct does not reside wholly on his property, he is not able to exercise complete property rights over the structure itself. However, since he owned the materials that composed the duct, he can be considered the owner of the debris on the basis of this criteria. The problem is seen as existing beyond the third section of the Lex Aquilia given that the parts individually constitute as one's property but the whole structure does not. Jurist Ulpian suggests an *action utilis,* which offers the plaintiff the ability to file a complaint not on the basis of having a right to the aqueduct itself as property, but on having a claim on the duct's utility. In essence, because the person technically owns the stones, or the object that was altered in a way that rendered it useless, they still have reason to formally complain about the occurrence. Here, analogy is used to polarize the two examples, making one obviously worthy of legal remedy (breaking the door of my building) and the other obscure in its rights (destroying my aqueduct). Again, analogy proves to be powerful in its ability to seamlessly slot hypotheticals into pre-existing categories to be



dealt with accordingly.

Moreover, a case that clearly illustrates the potential of analogy and its importance as a method of reasoning is Case 35: Lunatics and Minors. The issue presented is whether there is an action under the Lex Aquilia if a lunatic (*furiosus*) inflicts loss. The Jurist Pegasus argues that a person who is out of their mind lacks *culpa,* or fault, and thus an Aquilian action will fail. He proceeds by comparing a person out of their right mind inflicting loss to that which is inflicted by a herd animal, a falling rooftile, or a young child. Ulpian and Jurist Labeo seem to take *culpa* as an awareness of guilt and play off of this element of awareness in drawing connections to animals, as well as inanimate objects. Since the person lacks an awareness, they cannot be said to have inflicted loss wrongfully (*iniuria*) which is a principle requirement for Aquilian action. The Jurists were extremely clever for invoking the examples and analogies that they do, for in doing so they rather effectively create a rational connection between the instances. This makes it difficult for one to argue in favor of Aquilian action on the basis of the facts of Case 35 given the implication that they would have to accept as a result an inanimate rooftile as sentient and capable of self-awareness or attempt to discern two things that lack consciousness on the principle of anatomy, which carries further implications and complications.

### *Engagement with Sociological Jurisprudence*

Upon careful engagement with many of the cases discussed by the Jurists, one can observe an underlying regard for social life that seems to guide the Jurists' reasoning. The Jurists notably apply a sociological lens to various circumstances, explicating the law as to consider how their interpretations will affect the citizenry and accounting for the possibility that a literal interpretation may unjustly impact the social. As elaborated by Schiller (1238), the Jurists recognized the conflicting social interests present within society and reasoned accordingly. They appeared to think critically about the people and their relationship with the law, understanding that a body of law that does not represent nor protect the citizens that comprise the society is unjust and in need of reinterpretation. Honore (65) explains that the values of society were filtered through the laws, and the laws in turn absorbed the values of the people. Many would argue that a well-functioning body of law is representative of the population in which it exists, and it seems that the Jurists shared in this appreciation. Because of the ambiguous language and limited number of statutes in the Lex Aquilia, the Jurists were able to recognize the need for these laws to be applied to various hypothetical situations. In doing so, they could effectively manipulate the laws to provide the *praetor*, or Roman magistrate, with more robust resources. This ability to reason with society in mind allowed for the possibility of *exceptios* that allowed defendants to have extenuating circumstances and unique fact patterns reflected in the *formulae* to then be recognized

during adjudication, thus protecting them from the broad sweeping arm of the Lex Aquilia.

The opinion offered in Case 39: Picking Grapes accounts for the Jurists' attention to social and economic consequences of the law. Ulpian explains that if one "picks unripe olives or cuts unripe grain or grapes, he will have an Aquilian liability; but if they are ripe, the Aquilian action fails, since there is no wrongfulness (*iniuria*) when he saves you the expenses that are made on gathering fruits of this kind." Thus, Ulpian interprets the Aquilian action not in a literal fashion, but in such a way that does not punish citizens for doing something that benefits another. If the fruit is ripe, then it is due to be harvested; this means that if one gathers the ripe grapes at no financial expense to the property owner, then he has benefitted the property owner, and the law surely would not want to punish someone who helped another collect his yield. Ulpian eludes to the importance of intent, explaining that if upon harvest the individual takes the crop then he is liable for theft (*furtum*). This interpretation protects both the property owner as well as the citizen insofar as it recognizes where actions come from and what constitutes being helpful versus being malicious. As such, the interpretation allows for economic growth and the strengthening of social relationships while encouraging the cultivation of beneficial relationships. This is representative of a sociological interpretation because it recognizes that the law should function so as to not to punish advantageous actions and vilify good Samaritans.

An interesting example that works to appreciate social variation between people and promote a basic knowledge of consequential action is Case 49: A Sick Slave. Ulpian writes, "but if a person lightly strikes a sick slave who then dies, Labeo rightly holds that he is liable under the Lex Aquilia, since different things are fatal for different people." In doing so, Ulpian notes that within each individual society there exists much variation amongst people; some differences are observable, while others are hidden and individualistic. In promoting an application of law that protects all people from any sort of harm or action that may result in death, the Jurists demonstrated that they understood subjective harm. Where a light blow might not injure a healthy slave, the same application of force may be fatal to a sick slave. While this case does not address foreseeability, its opinion encourages people to be cognizant of one another and to refrain from striking any individual whose particular set of circumstances are unknown, thus promoting a healthy and well-functioning society. In contrast, if the statute did not extend to protect the sick and weak then it would effectively inform those of ill-health that they are not of value. This reading would negatively impact the citizenry by classifying man as a generalizable, objective, and universal creature of good health; thus, any man who expresses characteristics that do not fit within this classification does not deserve protection. Labeo's reasoning then seems characteristic of sociological



jurisprudence.

A compelling case that demonstrates the influence of social interests and values on Jurists' reasoning and interpretation of the law is Case 43: Associated Loss. Ulpian launches an inquiry into the creation of financial evaluations on the basis of loss. He asks whether under the Lex Aquilia if one considers merely the worth of the slave at the time of his death, or if one must also account for the interest in his life or his potential to generate value. This distinction is important because it considers the economic market and the potential appreciation in value of the slave owner's investment. Jurist Paul writes that:

> Therefore, if you slew a slave whom I had promised to deliver under a stipulation, this trial includes his usefulness to me (1). Likewise circumstances related to the body are evaluated if somebody slays a man or woman from a troupe of actors or musicians, or one from a set of twins or a chariot team or a pair of mules. For not only must evaluation be made of the destroyed body, but also account should be taken of how the other bodies are lowered in values.

Through its consideration of the remedy set out within the Lex Aquilia, the case accounts for complex social circumstances and interests. Paul here suggests that a person's individual interests be taken into account, and that they have the right to determine how they use their property to cultivate economic growth. In utilizing the musical group as an example, Paul brings attention to the way that different parts work to create an integrated whole, and that if one of those parts is not able to perform the whole dissolves and loses its value. If one of the members of this group was slain, this prevents the group from performing and so diminishes the value of not only the individual but the whole group as well. Paul argues that this evaluation should consider not only the interests of the individual, but the interests of those who also derive profit from that person. This line of reasoning considers peoples' social interests as well as their ability to partake in mutually beneficial social relationships, arguing that these relationships should be honored and so evaluated accordingly. Sociological jurisprudence understands that conflicting social interests have to be positioned as to align with one another in order to represent the entire social body as opposed to the few. Through much of their argumentation, the Jurists demonstrate a nuanced understanding of this framework, by consistently considering the individual through rejection of the generalizable human condition.

## An Illustration of These Modes of Reasoning Within One Jurist's Assessment

The various methods of reasoning that guide the arguments and opinions of the Jurists appear simultaneously within Case 56: A Second Mortal Wound (Julian's View). Jurist Julian employs intuitive reasoning, inductive and deductive reasoning, analogy and a consideration of society and the social effects of law.

The case discusses a situation where a slave was so severely wounded that death was imminent. Yet before he could succumb to his injuries, he was struck once more by another individual and died. Julian asks whether an Aquilian action can be brought against both men for the slaying. He responds to this question by saying that "a person has "slain" when he furnishes the cause of death in any manner", claiming that under the Lex Aquilia a person is liable only when he furnishes the cause of death through the application of force. Julian extends his interpretation to contain the action of the individual who enacted the initial blow, asserting that both men are liable under the Lex Aquilia because both have acted to apply force in a manner that "slayed".

This line of thought undertakes a presumptuous interpretation of causality, namely by failing to consider how one is to know whether their blow would certainly kill somebody when that person does not die upon impact. Through his explanation, Julian treads around this causal supposition, glossing over it through his use of deductive reasoning which immediately takes the reader from his Aquilian interpretation to the *culpa* of the two men. With this, he illustrates the interplay between intuition – that both men must be liable because what each of them did was wrong and resulted in a life lost – and deductive reasoning as a legitimizing force.

Julian then moves to cite another case where Republican Jurists ruled that if several men wounded one slave and it was unclear which blow caused his death, then all were liable under the Lex Aquilia. Interestingly, Julian states that from his conclusion of liability falling on both men in the case of the mortal and fatal wound, this situation adjudicated by the Republican Jurists logically follows. Here he uses analogy, arguing that the Republican Jurists set a precedent and that the fact pattern of the case at hand is in essence equivalent. Additionally, his use of language, such as "logically follows", excuses him from completely justifying this analogy which does not fit as seamlessly as he leads the reader to believe. The initial case makes clear that the second aggressor brings about death, while the analogous case states that the fatal blow cannot be attributed to any of the men in particular.

From this point, he reasons inductively from his conclusions that the men will owe substantially different amounts based upon the temporal period and circumstances surrounding the two slayings. His final statement about each man having slayed at different times and under different circumstances does not quite seem to fit this scenario, for a man cannot be slayed twice; if the slave had been slain by the first aggressor, then the second man would not have been able to slay, and vice versa. In a clever manipulation of structure and argument, Julian nonetheless continues to alternate between deductive and inductive reasoning in a manner that implies logical succession. In fact, however, it is absent given his invocation of morally fueled intuitive reasoning and distorted comparisons. Furthermore, Julian applies a sociological framework



while simultaneously engaging in moral shaming when he argues:

> But if someone thinks that my decision is preposterous, let him consider that it would be far more preposterous if neither was liable under the Lex Aquilia, or just one, since it ought not to be that misdeeds go unpunished and it cannot easily be determined which one is rather liable by statute…For it can be proved by countless examples that many rules which have been received in the Civil Law (*ius civile*) are contrary to legal choice but benefit the common good.

Julian clearly acknowledges the social impact of the verdict, arguing for the mitigation of any laws that work against the common good. He situates himself as a Jurist devoted to the citizenry and maintenance of a healthy society, emphasizing the importance of prioritizing the common good over what may be logical in a legal sense. With this, he not only demonstrates his interest in sociological jurisprudence, but also makes a further appeal to morality and the sense of what is "right". This sociological emphasis in combination with a moral plea makes for a more extreme appeal to humanity that works to guilt the reader, who may consequentially abandon rationality and instead surrender to the intuitions and authority of the Jurist.

## Conclusion

To conclude, it is clear that the Jurists' reasoning did not follow a particular procedure. The Jurists did not reason methodically and in accordance with precise guidelines, instead taking a more pragmatic and casuistic approach. As Stein argues (1541), the Jurists appear to have their interpretations guided by unwritten moral laws, not those that qualify under the Lex Aquilia or other written statutes. While it holds that the Jurists did not consciously follow such systematic reasoning practices, it is evident that they did have in common the same basic guiding principles. Across the many cases, patterns of intuitive reasoning, inductive and deductive interpretation, analogies, and employment of sociological jurisprudence are apparent as driving forces behind the Jurists' argumentation and reasoning. Therefore, let it be put forth that the nature of the Jurists' reasoning under the Lex Aquilia is not necessarily confined to a single form, but was rather an interplay of the aforementioned modes of analysis. Some cases, like Case 56, quite blatantly make visible these methods, demonstrating excellently how a Jurist may consult all the strategies in investigating one hypothetical, whereas others may highlight one mode in particular. Regardless, every case finds its reasoning modelled after at least another. Influenced by both the written statutes contained within the Lex Aquilia and the internal values and intentions of the individual Jurist, the nature of their reasoning may not be as apparently inexplicable as one may initially believe.

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# The Tenth Case in a Long Freedom Struggle

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*Editor's Note: This essay was written for a course in response to Professor Mayo Moran's blog post titled "Ten Cases That Changed the World" written on May 14, 2014. In order to comply with the assignment's guidelines and advance a case for Grutter v. Bollinger to be included on this list, the author must also justify removing one case. Section III addresses this further.*

Litigated over a period of six years from 1997 – 2003, *Grutter v. Bollinger* ignited a fierce debate over affirmative action in the United States. In a landmark decision, the United States Supreme Court upheld that "student body diversity is a compelling state interest that can justify the use of race in university admissions" (Opinion of the Court, *Grutter v. Bollinger*, 2003, p. 13). *Grutter* appears to promise a future where diversity is celebrated as providing key benefits for a multitude of actors in education, business, and the pursuit of a socially just and pluralistic society. By expanding on the hard-won rights to legal personhood and racial equality established by cases like *Somerset v. Stewart* and *Brown v. Board of Education*, this analysis argues that *Grutter* deserves recognition as one of ten cases that changed – and continues to change – the world.

This analysis unfolds in four sections. Section I contextualizes *Grutter* as part of a long freedom struggle in line with *Somerset*, *Brown*, and more recent jurisprudence concerning affirmative action in the United States. Additionally, arguments of opposing camps on the affirmative action debate will be canvassed with reference to key actors from the *Grutter* litigation. Section II investigates the broad impacts that *Grutter* is posited to have first in its intended domain of higher education and later in more imaginative spaces like the employment and jury contexts. By adding *Grutter* to the list of "Ten Cases That Changed the World," this analysis is burdened with removing the South African *AZAPO* judgment from the list in Section III.

**Section I: Situating the Demand for Diversity in Historical Context**

In 1996, Barbara Grutter was waitlisted and then rejected by the University of Michigan Law School with a 3.8 grade point average and a 161 LSAT score. The law school adhered to a holistic admissions

policy that sought to promote diversity by taking into account factors such as an applicant's race, paying special attention to applicants from historically disadvantaged backgrounds. Ms. Grutter, a white applicant, alleged that the Law School discriminated against her on the basis of her race in violation of the Fourteenth Amendment, which guarantees "equal protection of the laws" (Opinion of the Court, *Grutter v. Bollinger*, p. 3-4). At the level of the District Court, the use of race as a factor in admissions decisions was found to be unlawful. At the Court of Appeals this judgment was reversed (Opinion of the Court, *Grutter v. Bollinger*, p. 8). Ultimately, when delivering the majority opinion of the Supreme Court Justice Sandra Day O'Connor held that in light of the educational and professional benefits that flow from having a diverse study body, "student body diversity is a compelling state interest that can justify the use of race in university admissions" (Opinion of the Court, *Grutter v. Bollinger*, 2003, p. 13).

Although decided in the 21st century, *Grutter* is one milestone in a longer freedom struggle for legal personhood and racial equality extending as far back as 1772, when *Somerset v. Stewart* rocked England and its colonies by establishing that "the air of England was too pure for slavery" (*Somerset v. Stewart,* 1772, p. 501). Nearly 200 years after *Somerset* was decided, and almost 100 years since the abolition of slavery in the United States, *Brown v. Board of Education* famously overturned the doctrine of "separate but equal" and signaled the demise of Jim Crow in 1954 (*Brown v. Board of Education*, 1954, p. 4).

In the *Grutter* decision, Justice O'Connor acknowledges a connection to *Brown*, crediting the Supreme Court with having recognized in *Brown* that "education…is the very foundation of good citizenship" (*Brown v. Board of Education*, quoted in Opinion of the Court, *Grutter v. Bollinger*, 2003, p. 19). O'Connor goes on to write: "for this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity" (Opinion of the Court, *Grutter v. Bollinger*, 2003, p. 19). Others writing on the *Grutter* decision have also situated it squarely in line with "the promise of *Brown*" (Goldstein, 2004, 899). As Harry T. Edwards, Circuit Judge for the U.S. Court of Appeals, observes, "Through the ideal of diversity, *Grutter* reaffirmed Brown's commitment to racial equality" (Edwards, 2004, p. 946).

Growing naturally albeit slowly out of *Somerset* and *Brown*, *Grutter* is generally recognized to have emerged out of three affirmative action cases decided in the late 70s, 80s, and early 2000s. First, *Regents of the University of California v. Bakke* (1978) "established that 'quotas' are unconstitutional in higher education admissions" (Igwebuike, 2006, p. 192). Second, *City of Richmond v. J. A. Croson Co.* (1989) held that "for an affirmative action program to be constitutional […] the university must demonstrate a compelling need to use race in its decisions" (Igwebuike, 2006, p. 192). Thirdly, the court in *Grutter*'s companion



case *Gratz v. Bollinger* (2003) found that "achieving diversity was a proper admissions goal, [nevertheless] Michigan's point-conferral plan to achieve that diversity [was] impermissible—analogous to the *Bakke* seat-allocation scheme" (Igwebuike, 2006, p. 193).

*Grutter* was litigated against this backdrop while two different strategies regarding the "salience of diversity" were emerging. As Lee Bollinger, the former University of Michigan President named in the suit explains:

> We really decided to set out to prove the fundamental premise of *Bakke*, that race is a significant factor in American life, and that significance gives it salience in an educational setting. That is, it is intimately related to our educational goals, and that people really are affected in their education by being in a diverse environment. (Green, 2004, p.738).

As for the litigation strategy adopted by the Center for Individual Rights (CIR), the organization that represented Barbara Grutter, director of legal and public affairs Curt Levey explains:

> Our position, and we believe it's also the position of the Supreme Court, is that racial preferences, explicit racial preferences, can only be justified as a remedy for an institution's own past discrimination. And they can't use it to achieve the right racial balance on campus (Green, 2004, p. 739).

Justice Clarence Thomas expresses a similar concern to Levey in his opinion on *Grutter* about the role of Law Schools in seeking "a façade" whereby it "is sufficient that the class looks right, even if it does not perform right" (Opinion of Thomas J. *Grutter v. Bollinger*, 2003, p. 19). Ultimately, the notion that "explicit racial preferences can only be justified as a remedy for an institution's own past discrimination" was rejected by the majority (Green, 2004, p. 739), who held instead that "attaining a diverse student body is at the heart of the Law School's proper institutional mission" (Opinion of the Court, *Grutter v. Bollinger*, 2003, p.17).

## Section II: Transformations to Higher Education and Beyond

*On the Benefits of Student Body Diversity*

Having provided a thorough overview of *Grutter's* history, the purpose of this second section is to illustrate the promise and impact of this decision. At the heart of *Grutter* is the notion that a diverse student body can transform and transcend the classroom. The Court found that student body diversity works to promote "cross-racial understanding." As its name suggests, this skill helps students to "better understand persons of different races" and assists them with "break[ing] down racial stereotypes" (Opinion of the Court, *Grutter v. Bollinger*, p. 17). The Court held that the application of this skill results in "livelier, more spirited, and simply more enlightening and interesting" classroom discussions and translates meaningfully beyond the classroom to equip students for a diverse workforce (Opinion of the Court, *Grutter v. Bollinger*, p. 18).

Although "important and laudable" as the Court suggests, these benefits – or what this analysis has interpreted as the *skill* of "cross-racial understanding" – do not automatically arise from recruiting a diverse student body (Opinion of the Court, *Grutter v. Bollinger*, p. 18). Instead, these benefits or skills must be fostered and facilitated through a re-design of institutional spaces. As they currently stand, these spaces place students of colour into complex relationships with silence. According to Carole J. Buckner (2004), "when minority students in law school classrooms are isolated, alienated, or silenced, the educational benefits of diversity diminish correspondingly" (p. 877-878). It appears that when minority students suffer, all students are adversely affected. Consequently, maximizing the educational benefits of diversity depends upon the ability of these institutions to create and sustain opportunities for students to have "diverse interactions," which empower every student to speak and be heard (Buckner, 2004, p. 877).

*Grutter* is transformative because it challenges institutions of higher education to rethink the structure and composition of their classrooms and properly incentivizes them to implement change. Prior to *Grutter*, the practice of affirmative action was perceived in terms of both righting and creating wrongs. From the perspective of minority students, affirmative action presented itself as a way to atone for past-discrimination from institutions of higher learning. In practice, efforts to attain justice for these students were thwarted by the fact that admissions of guilt from these institutions were not forthcoming and discrimination was not otherwise easy to prove (Greenberg, 2003, p. 1618). From the perspective of students in the majority, affirmative action presented itself as an undue or unearned way to level the playing field for minority students, consequently threatening the majority's color and class privilege. Accordingly, pre-*Grutter* rhetoric surrounding affirmative action posed barriers for minority students to accessing justice and created a sense of loss for their relatively privileged peers. Cognizant of these challenges, *Grutter* embraced a strategy that emphasized how everyone can benefit from membership in a racially diverse classroom, *especially* white students like Barbara Grutter who feel that they have been wronged. In this way, reframing the goals of affirmative action through the ideal of diversity has worked to make a seemingly revolutionary outcome – namely more minority students in the classroom – more palatable. If affirmative action was perceived as reactionary and as a remedy for past-discrimination, then *Grutter* – through the ideal of diversity – has transformed the perception of this practice into something that is forward-looking, proactive, and necessary for securing America's future.

The *Grutter* decision demonstrates that the benefits of diversity extend beyond the classroom to create more socially conscious and successful business professionals and political leaders. To convince the Court of this, the respondents in this case established the *Diversity Initiative of the Business-Higher Education Forum* and solicited the



support of political leaders, most notably former U.S. President Gerald Ford. Associate Vice President and Deputy General Counsel Elizabeth Barry for the University of Michigan described the *Forum* as "a coalition of higher education institutions and American businesses who [came] together to talk publicly about the educational benefits of diversity and why that's important to the domestic economy … [and] to the success of businesses on several levels" (Green, 2004, p. 744). The Court responded in kind to this *Forum* by noting how "American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints" (Opinion of the Court, *Grutter v. Bollinger*, p. 18).

Regarding the transition from the classroom to the political arena, Justice O'Connor acknowledges universities and law schools as the "training ground" for many national leaders and suggests that "in order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity" (Opinion of the Court, *Grutter v. Bollinger*, p. 20). Going beyond the societal effects that Justice O'Connor explores in her opinion, Greenberg (2003) suggests that *Grutter* helps illuminate the path to leadership particularly for black students who may not otherwise be motivated, responsive, or open to applying to college or graduating from high school (p. 1619). *Grutter* does so by creating opportunities for these students to observe others like them gain admission into intuitions of higher learning and access upwards social-mobility (Greenberg, 2003, p. 1620).

### *Applying the Diversity Rationale to the Employment Context*

Inspired by the aspirational language of *Grutter*, legal scholars have imagined the diversity rationale to justify the use of race in hiring decisions both within and outside institutions of higher learning (Igwebuike, 2006, p. 195; White, 2003, p. 264; Robinson, 2007, p. 44). Closely related to the interest universities have in admitting a diverse student body is the interest these institutions have in hiring a diverse faculty. Igwebuike (2006) makes this argument with reference to a number of studies, which conclude "having a heterogeneous faculty also yields beneficial outcomes to all learners," (p.196). It stands to reason that among these benefits is the promotion of cross-racial understanding. Employing a more diverse faculty naturally lends itself to the goal of re-designing institutional spaces so as to empower minority students and unlock the potential of learning in a diverse environment. Additionally, having a more diverse faculty creates more opportunities for minority students to benefit from mentorship. As Edwards (2004) is apt to note, "African Americans do not benefit from mentoring and networking to the same degree as their non-Black peers" (p. 972). Consequently, the absence of diverse mentors can work against students who stand to

gain the most from holistic admissions policies.

While the interest employers outside the education context have in promoting diversity is less benevolent, it is nonetheless demonstrable. Still, the extent to which increased profits present itself as a compelling justification for the use of race in employment decisions remains questionable in the eyes of the Court. White (2003) puts the point nicely with an example:

> That a car dealer could sell more cars with a racially diverse workforce than with a more racially homogenous one is unlikely to convince a court that the employer is entitled under the statute to prefer members of one race over another when hiring new additions to its sales staff (p. 277).

To use the language of the Court, businesses must be able to show a more "important and laudable" motive to benefit from *Grutter* directly rather than through the trickle-down effects of increased student body diversity (Opinion of the Court, *Grutter v. Bollinger*, p. 18).

*Creating Community-Reflective Juries*

Perhaps the most imaginative extension of the reasoning employed in *Grutter* relates to the jury context. Just as Buckner (2004) showed that classroom experiences improve with the facilitation of diverse interactions (p. 879-880), Wilkenfeld (2004) contends that the efficacy of juries improves with added diversity (p. 2307). Accordingly, the benefits of added diversity help juries to counterbalance bias, assist with interpretation in fact finding, aid the collective with remembering and understanding material, and communicate in a more creative and effective manner (Wilkenfeld, 2004, p. 2307-2311). In the same vein as Justice O'Connor, Wilkenfeld (2004) also underscores the role of diversity in enhancing public perceptions of institutional legitimacy. He explains: "Communities view demographically balanced juries as more legitimate than those that are unreflective. The presence of balanced juries, then, engenders greater respect for the justice system and its verdicts" (p. 2314). Returning to the concern of Justice Thomas, the creation of community-reflective juries that not only look right but also preform right is an urgent and substantial goal that *Grutter* broadly promises to facilitate.

## Section III: Rationalizing the Decision to Replace AZAPO

Both the concrete and anticipated implications of *Grutter* for promoting diversity and securing the rights to legal personhood and racial equality historically achieved through *Somerset* and *Brown* earn *Grutter* recognition as one of ten cases that changed and continues to change the world. With the addition of *Grutter*, this analysis is burdened with removing the *Azanian Peoples Organization (AZAPO) v. President of the Republic of South Africa* case, hereafter referred to as the *AZAPO* judgment from this list.



The *AZAPO* judgment seeks to justify the model of transitional justice adopted by South Africa in the aftermath of apartheid. The legal issue at hand was whether section 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995 ("the Act"), which outlines the procedures and consequences of granting amnesty, was in fact constitutional (*Azanian Peoples Organization (AZAPO v President of the Republic of South Africa*, 1996, p. 10). As Chief Justice Ismail Mahomed explains in the Opinion of the Constitutional Court:

> The Committee on Amnesty is given elaborate powers to consider applications for amnesty. The Committee has the power to grant amnesty in respect of any act, omission or offence to which the particular application for amnesty relates, provided that the applicant concerned has made a full disclosure of all relevant facts and provided further that the relevant act, omission or offence is associated with a political objective committed in the course of the conflicts of the past (p. 6).

Importantly, those granted amnesty under the Act would be absolved of all criminal and civil liability for their actions. Ultimately, the Court upheld the constitutionality of section 20(7) and defended the decision of Parliament to frame the Act in the way that it did. To this end, Justice Mahomed writes,

> I am satisfied that the epilogue to the Constitution authorized and contemplated an "amnesty" in its most comprehensive and generous meaning so as to enhance and optimize the prospects of facilitating the constitutional journey from the shame of the past to the promise of the future (*AZAPO v President of the Republic of South Africa*, 1996, p. 44).

The journey he makes reference to is imagined to take place across an "historic bridge" leading away from the injustice of the past towards a society characterized by peace and equal opportunity for all regardless of color, race, class, belief, or sex (*AZAPO v President of the Republic of South Africa*, 1996, p. 3).

However, the laudable, aspirational language employed in *Grutter* and *AZAPO* both work to mask objectionable compromises. In *Grutter*, truth is scarified for justice; institutions of higher learning need not make admissions of guilt for past discrimination by promoting the ideal of diversity. Conversely, the *AZAPO* judgment sacrifices justice in the form of criminal and civil liability in exchange for the whole unfettered truth of applicants seeking amnesty. In both cases, these sacrifices were negotiated by the state who was sensitive to the needs of the victims in the minority but more attuned to placating the wants of the majority. While *Grutter* is narrowly tailored to the education context, the breadth and scope of the amnesty compromise for affected individuals in South Africa is vast. As Justice Mahomed proclaims regarding the latter of these cases, "an amnesty to the wrongdoer effectively obliterates such [fundamental] rights" held by the person wronged, in particular to the

right to life and the protection of dignity, and the right to not be subjected to torture (*AZAPO v President of the Republic of South Africa*, 1996, p. 11). These rights are fundamental and inalienable, not chips for Parliament to bargain away. As this judgment positions wrongdoers to potentially gain more and lose less relative to their victims by benefiting from confession, avoiding deprivation of liberty, and suffering no monetary loss, this analysis is inclined to remove *AZAPO* from the list of ten cases that changed the world on this basis.

### Section IV: Reflections on Education in a Post-*Grutter* World

*Grutter* provides the opportunity to be both equal parts inspired by the power of its implications and uncomfortable with the way it assigns instrumental value to the experiences and knowledge of diverse students. The place of minority students on campus should not be justified by their purported ability to help break down racial prejudice or spark lively classroom debates. Nevertheless, *Grutter* does advocate a "valuing our identities" approach that promises to initiate real change (Edwards, 2004, p. 959). Such an approach is particularly important to develop in the midst of a period of uncertainty where the hard won rights gained through other world-changing cases like *Roe v. Wade* are being threatened. Thus, *Grutter's* capacity to protect the rights of more marginalized members of society and to reflect an ideal of diversity helps ensure that those with decision-making power are reflective of our diverse world and committed to helping advance others who may look and think unlike themselves.



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