CLASS ACTIVITIES*

Class 1 January 8

Introduction

- Students should introduce themselves / name one thing they are hoping to learn from this class
- Should the law interfere when it comes to our sexual behaviour? Why? Why not?
- Are there sexual behaviours that should be criminalised but are not? Are there sexual behaviours that are not criminalised, but should be?

Class 2 January 17 Law in the news

Read and discuss the following articles

1. What are the articles about?
2. What is your opinion about the content of the articles?
3. What are the legal issues/implications of the stories described in the articles?

FERTILITY DOCTOR SUED BY COUPLE FOR USING HIS OWN SPERM TO IMPREGNATE WOMAN

BY ML NESTEL ON 12/29/18 AT 2:18 PM

A woman’s genetic test results came back with crushing results.

Her parents’ OB-GYN over 40 years ago allegedly switched out sperm samples donated by an unnamed medical student and substituted his own.

Those parents, Peter and Cheryl Rousseau, have filed a civil lawsuit in federal court against Dr. John Boyd Coates, III and the Vermont-based fertility clinic.

“This could not have been done accidentally,” Jerry O’Neill, the attorney who was retained by the Rousseaus, told CBS station WCAS. “It was completely news to them. They had no expectation that this would turn up when their daughter did the research with respect to it.”

The couple who married in 1974 and since relocated to Florida each had a ward from former marriages, but hoped to have a child together, according to the lawsuit, first reported by The Rutland Herald.

What's more, Peter Rousseau states in the lawsuit that he and Cheryl relied on artificial insemination because he had undergone a vasectomy; a procedure that he was told was irreversible, the publication reported.

Dr. Coates III was their gynecologist whose practice was located at Central Vermont Hospital, the former name of CVMC, according to the lawsuit.

But despite the decision to go forward and use an unnamed medical student whose physical features resembled Peter's — the doctor allegedly took it upon himself to use his own sperm.

Cheryl earned she was pregnant back in May of 1977 and gave birth to Barbara in December of that year, according to the court records as reported by the Herald.

The suit contends that Barbara sought out genetic tests from "Ancestry.com" and "23andMe" to gain the curious findings. It also holds Coates and the medical clinic accountable for the sperm switch.

"It's fraud and it's a question of inserting genetic material in a woman -- not of an anonymous donor but rather the physician who is engaging in the conduct itself," O'Neill told the station.

Attempts by the publication and station to get a comment from Coates' attorney or the medical center were unsuccessful.

The incident comes off the heels of a similar case in Idaho.

Back in April, Kelli Rowlette filed a malpractice lawsuit against Dr. Gerald Mortimer for allegedly using his own sperm instead of the sample provided by the man she thought was her father.

When Rowlette submitted a DNA sample to Ancestry.com back in July 2017, Dr. Mortimer turned out to be her biological father, according to the federal lawsuit filed in Idaho's federal court.

Like the Rousseaus, Kelli's parents, Howard Fowler and Sally Ashby attempted to find a college student's sperm with looks (brown hair, blue eyes) and height (around 6-foot-tall) that closely matched Howard's, according to ABC News.

Their daughter learned her parents' doctor was her biological father after surveying a birth certificate, which "had been signed by Dr. Mortimer."

Allegedly, when the couple parted from the doctor, he started sobbing.

The original lawsuit reads: “Dr. Mortimer cried when Ms. Ashby informed him they were moving... Mortimer fraudulently and knowingly concealed his use of his own genetic material in the Procedure."

For his part, Mortimer denied the accusations and through his attorneys, attempted to get the suit tossed citing statute of limitations and for the fact that the daughter, now in her 30s, lacked claim because she wasn't born when the alleged act took place.

But Judge David Nye agreed with the defense that while Kelli wasn't a patient of Dr. Mortimer's, and in an Oct. 25 decision he concluded that the insemination agreement would not involve the doctor's sperm.

And so far from the facts at hand, the judge agreed the case could proceed.

Elon Musk Seeks To Dismiss Defamation Lawsuit

After Calling British Cave Diver 'Pedo Guy'

Elon Musk is seeking to dismiss a defamation lawsuit brought against him by a British cave diver, who Musk called “pedo guy” and a “child rapist,” according to court documents filed Wednesday in U.S. District Court in Los Angeles.

Musk hurled his attacks at Vernon Unsworth last summer during a mission to save 12 young boys and their soccer coach who were trapped in a flooded cave in Thailand. The Tesla CEO made the attacks after Unsworth criticized his proposal to use a small submarine for the rescue mission.

“He can stick his submarine where it hurts,” Unsworth said in a CNN interview. “It just had absolutely no chance of working.”

Unsworth sued Musk in September for libel and slander and is seeking $75,000 in damages. Musk’s lawyers are now trying to dismiss the lawsuit, arguing that the “over-the-top insults” were exaggerated and not intended to be taken seriously, CNBC reported.

“Shocked by Unsworth’s indefensible and baseless attacks, Musk answered to defend himself and the efforts of SpaceX, Tesla, and the Boring Company employees who had given up their days and nights to help find a solution,” the motion to dismiss said. “Musk took to Twitter — a social networking website infamous for invective and hyperbole — to respond.”

The motion also claims that a public apology issued by Musk earlier this year was an attempt to “end the war of words.”

Ex-Disney worker sues after he claims female boss called him a 'stuffy old fart'

An older male former labor analyst at Disney Cruise Line claims his younger female manager created a hostile work environment by bullying him about his age, bragging about sleeping with married men in the office and passing him over for promotions, according to a federal lawsuit.

Anthony McHugh claims in the suit filed last month that his former female manager discriminated against him because of his sex and age, a scenario that legal experts say is rare given the genders of the employee and supervisor.

The unidentified female supervisor called McHugh a "stuffy old fart" in front of staff, moved his office to a windowless space, wouldn't provide him with an iPhone or tablet like she did for staff younger than 40 and passed him over for promotions even though he says he was more senior and qualified, the lawsuit said.

Disney Cruise Line said in a statement that the claims in the lawsuit are without merit and "we will respond to them in court." The Florida-headquartered cruise line is a subsidiary of The Walt Disney Co. and operates four ships.

McHugh's attorney, John Zielinksi, said they wouldn't comment for the time as the lawsuit is being litigated. The lawsuit doesn't say how old the supervisor or McHugh were, other than McHugh was older than 40 and the manager was younger than 40.

Experts in workplace law say it's uncommon for a female manager to be accused of sex discrimination against a male underling and creating a hostile workplace. The vast majority of cases are brought by women.

Rebecca Pontikes, an employment lawyer in Boston, said it is "rare to have this exact scenario."

"It's not rare to have a sexual harassment scenario with male harassed for being gay or a transgender man," Pontikes said in an email. "It's also not unheard of to have a case with male on male sexual harassment where you have this sort of behavior among men."

The law protects workers against discrimination because of their sex, said Stephanie Bornstein, a law professor at the University of Florida.

"That means, if a man believes he was discriminated against or experienced a hostile work environment because he is a man, he can allege sex discrimination," Bornstein said in an email. "'Because of sex' also includes 'because of gender stereotypes' — meaning feminine or masculine dress or behavior."

Complaints of age discrimination have become more common as the workforce has gotten grayer with the aging of Baby Boomers, both Pontikes and Bornstein said. Federal law protects workers age 40 and older from discrimination.

In the complaint, McHugh, a labor analyst who had worked at Disney for 18 years until he was fired last year, said all of the top executives and senior managers in the division he worked in were female and didn't reflect the gender makeup of the division's workforce.

Starting two years ago, his female senior manager bragged about the married men she had slept with to embarrass McHugh and said she booked "sex rooms" on Disney Cruise ships where she would "entertain" partners, according to the lawsuit.

The lawsuit also claims the manager stole drugs McHugh took for attention deficit disorder and anxiety. McHugh said he was fired last year after complaining about his manager's behavior to the human resources department.

The given reason for his dismissal was using illegal substances. He was replaced by a younger woman, and every leader on his work team over age 40 was "either systematically terminated or resigned" during the manager's tenure, according to the lawsuit.

Is Google Making Us Stupid?

What the Internet is doing to our brains

NICHOLAS CARR

JULY/AUGUST 2008 ISSUE

"Dave, stop. Stop, will you? Stop, Dave. Will you stop, Dave?" So the supercomputer HAL pleads with the implacable astronaut Dave Bowman in a famous and weirdly poignant scene toward the end of Stanley Kubrick's *2001: A Space Odyssey*. Bowman, having nearly been sent to a deep-space death by the malfunctioning machine, is calmly, coldly disconnecting the memory circuits that control its artificial " brain. "Dave, my mind is going," HAL says, forlornly. "I can feel it. I can feel it."

I can feel it, too. Over the past few years I've had an uncomfortable sense that someone, or something, has been tinkering with my brain, remapping the neural circuitry, reprogramming the

memory. My mind isn't going—so far as I can tell—but it's changing. I'm not thinking the way I used to think. I can feel it most strongly when I'm reading. Immersing myself in a book or a lengthy article used to be easy. My mind would get caught up in the narrative or the turns of the argument, and I'd spend hours strolling through long stretches of prose. That's rarely the case anymore. Now my concentration often starts to drift after two or three pages. I get fidgety, lose the thread, begin looking for something else to do. I feel as if I'm always dragging my wayward brain back to the text. The deep reading that used to come naturally has become a struggle.
I think I know what's going on. For more than a decade now, I've been spending a lot of time online, searching and surfing and sometimes adding to the great databases of the Internet. The Web has been a godsend to me as a writer. Research that once required days in the stacks or periodical rooms of libraries can now be done in minutes. A few Google searches, some quick clicks on hyperlinks, and I've got the telltale fact or pithy quote I was after. Even when I'm not working, I'm as likely as not to be foraging in the Web's info-thickets'reading and writing e-mails, scanning headlines and blog posts, watching videos and listening to podcasts, or just tripping from link to link to link. (Unlike footnotes, to which they're sometimes likened, hyperlinks don't merely point to related works; they propel you toward them.)

For me, as for others, the Net is becoming a universal medium, the conduit for most of the information that flows through my eyes and ears and into my mind. The advantages of having immediate access to such an incredibly rich store of information are many, and they've been widely described and duly applauded. "The perfect recall of silicon memory," *Wired*'s Clive Thompson has written, "can be an enormous boon to thinking." But that boon comes at a price. As the media theorist Marshall McLuhan pointed out in the 1960s, media are not just passive channels of information. They supply the stuff of thought, but they also shape the process of thought. And what the Net seems to be doing is chipping away my capacity for concentration and contemplation. My mind now expects to take in information the way the Net distributes it: in a swiftly moving stream of particles. Once I was a scuba diver in the sea of words. Now I zip along the surface like a guy on a Jet Ski.

I'm not the only one. When I mention my troubles with reading to friends and acquaintances—literary types, most of them—many say they're having similar experiences. The more they use the Web, the more they have to fight to stay focused on long pieces of writing. Some of the bloggers I follow have also begun mentioning the phenomenon. Scott Karp, who writes a blog about online media, recently confessed that he has stopped reading books altogether. "I was a lit major in college, and used to be [a] voracious book reader," he wrote. "What happened?" He speculates on the answer: "What if I do all my reading on the web not so much because the way I read has changed, i.e. I'm just seeking convenience, but because the way I THINK has changed?"

Bruce Friedman, who blogs regularly about the use of computers in medicine, also has described how the Internet has altered his mental habits. "I now have almost totally lost the ability to read and absorb a longish article on the web or in print," he wrote earlier this year. A pathologist who has long been on the faculty of the University of Michigan Medical School, Friedman elaborated on his comment in a telephone conversation with me. His thinking, he said, has taken on a "staccato" quality, reflecting the way he quickly scans short passages of text from many sources online. "I can't read *War and Peace* anymore," he admitted. "I've lost the ability to do that. Even

a blog post of more than three or four paragraphs is too much to absorb. I skim it."
Anecdotes alone don't prove much. And we still await the long-term neurological and psychological experiments that will provide a definitive picture of how Internet use affects cognition. But a recently published study of online research habits, conducted by scholars from University College London, suggests that we may well be in the midst of a sea change in the way we read and think. As part of the five-year research program, the scholars examined computer logs documenting the behavior of visitors to two popular research sites, one operated by the British Library and one by a U.K. educational consortium, that provide access to journal articles, e-books, and other sources of written information. They found that people using the sites exhibited "a form of skimming activity," hopping from one source to another and rarely returning to any source they'd already visited. They typically read no more than one or two pages of an article or book before they would "bounce" out to another site. Sometimes they'd save a long article, but there's no evidence that they ever went back and actually read it. The authors of the study report:

It is clear that users are not reading online in the traditional sense; indeed there are signs that new forms of "reading" are emerging as users "power browse" horizontally through titles, contents pages and abstracts going for quick wins. It almost seems that they go online to avoid reading in the traditional sense.
Thanks to the ubiquity of text on the Internet, not to mention the popularity of text-messaging on cell phones, we may well be reading more today than we did in the 1970s or 1980s, when television was our medium of choice. But it's a different kind of reading, and behind it lies a different kind of thinking—perhaps even a new sense of the self. "We are not only *what* we read," says Maryanne Wolf, a developmental psychologist at Tufts University and the author of *Proust and the Squid: The Story and Science of the Reading Brain*. "We are *how* we read." Wolf worries that the style of reading promoted by the Net, a style that puts "efficiency" and "immediacy" above all else, may be weakening our capacity for the kind of deep reading that emerged when an earlier technology, the printing press, made long and complex works of prose commonplace. When we read online, she says, we tend to become "mere decoders of information." Our ability to interpret text, to make the rich mental connections that form when we read deeply and without distraction, remains largely disengaged.

Reading, explains Wolf, is not an instinctive skill for human beings. It's not etched into our genes the way speech is. We have to teach our minds how to translate the symbolic characters we see into the language we understand. And the media or other technologies we use in learning and practicing the craft of reading play an important part in shaping the neural circuits inside our brains. Experiments demonstrate that readers of ideograms, such as the Chinese, develop a mental circuitry for reading that is very different from the circuitry found in those of us whose written language employs an alphabet. The variations extend across many regions of the brain, including those that govern such essential cognitive functions as memory and the interpretation of visual and auditory stimuli. We can expect as well that the circuits woven by our use of the Net will be different from those woven by our reading of books and other printed works.
Sometime in 1882, Friedrich Nietzsche bought a typewriter—a Malling-Hansen Writing Ball, to be precise. His vision was failing, and keeping his eyes focused on a page had become exhausting and painful, often bringing on crushing headaches. He had been forced to curtail his writing, and he feared that he would soon have to give it up. The typewriter rescued him, at least

for a time. Once he had mastered touch-typing, he was able to write with his eyes closed, using only the tips of his fingers. Words could once again flow from his mind to the page.

But the machine had a subtler effect on his work. One of Nietzsche's friends, a composer, noticed a change in the style of his writing. His already terse prose had become even tighter, more telegraphic. "Perhaps you will through this instrument even take to a new idiom," the friend wrote in a letter, noting that, in his own work, his "'thoughts' in music and language often depend on the quality of pen and paper."

"You are right," Nietzsche replied, "our writing equipment takes part in the forming of our thoughts." Under the sway of the machine, writes the German media scholar Friedrich A. Kittler , Nietzsche's prose "changed from arguments to aphorisms, from thoughts to puns, from rhetoric to telegram style."

The human brain is almost infinitely malleable. People used to think that our mental meshwork, the dense connections formed among the 100 billion or so neurons inside our skulls, was largely fixed by the time we reached adulthood. But brain researchers have discovered that that's not the case. James Olds, a professor of neuroscience who directs the Krasnow Institute for Advanced Study at George Mason University, says that even the adult mind "is very plastic." Nerve cells routinely break old connections and form new ones. "The brain," according to Olds, "has the ability to reprogram itself on the fly, altering the way it functions."

As we use what the sociologist Daniel Bell has called our "intellectual technologies"—the tools that extend our mental rather than our physical capacities—we inevitably begin to take on the qualities of those technologies. The mechanical clock, which came into common use in the 14th century, provides a compelling example. In *Technics and Civilization*, the historian and cultural critic Lewis Mumford described how the clock "disassociated time from human events and helped create the belief in an independent world of mathematically measurable sequences." The "abstract framework of divided time" became "the point of reference for both action and thought."

The clock's methodical ticking helped bring into being the scientific mind and the scientific man. But it also took something away. As the late MIT computer scientist Joseph Weizenbaum observed in his 1976 book, *Computer Power and Human Reason: From Judgment to Calculation*, the conception of the world that emerged from the widespread use of timekeeping instruments "remains an impoverished version of the older one, for it rests on a rejection of those direct experiences that formed the basis for, and indeed constituted, the old reality." In deciding when to eat, to work, to sleep, to rise, we stopped listening to our senses and started obeying the clock.

The process of adapting to new intellectual technologies is reflected in the changing metaphors we use to explain ourselves to ourselves. When the mechanical clock arrived, people began thinking of their brains as operating "like clockwork." Today, in the age of software, we have come to think of them as operating "like computers." But the changes, neuroscience tells us, go much deeper than metaphor. Thanks to our brain's plasticity, the adaptation occurs also at a biological level.

The Internet promises to have particularly far-reaching effects on cognition. In a paper published in 1936, the British mathematician Alan Turing proved that a digital computer, which at the time existed only as a theoretical machine, could be programmed to perform the function of any other information-processing device. And that's what we're seeing today. The Internet, an immeasurably powerful computing system, is subsuming most of our other intellectual technologies. It's becoming our map and our clock, our printing press and our typewriter, our calculator and our telephone, and our radio and TV.

When the Net absorbs a medium, that medium is re-created in the Net's image. It injects the medium's content with hyperlinks, blinking ads, and other digital gewgaws, and it surrounds the content with the content of all the other media it has absorbed. A new e-mail message, for instance, may announce its arrival as we're glancing over the latest headlines at a newspaper's site. The result is to scatter our attention and diffuse our concentration.

The Net's influence doesn't end at the edges of a computer screen, either. As people's minds become attuned to the crazy quilt of Internet media, traditional media have to adapt to the audience's new expectations. Television programs add text crawls and pop-up ads, and magazines and newspapers shorten their articles, introduce capsule summaries, and crowd their pages with easy-to-browse info-snippets. When, in March of this year, *TheNew York Times* decided to devote the second and third pages of every edition to article abstracts , its design director, Tom Bodkin, explained that the "shortcuts" would give harried readers a quick "taste" of the day's news, sparing them the "less efficient" method of actually turning the pages and reading the articles. Old media have little choice but to play by the new-media rules.

Never has a communications system played so many roles in our lives—or exerted such broad influence over our thoughts—as the Internet does today. Yet, for all that's been written about the Net, there's been little consideration of how, exactly, it's reprogramming us. The Net's intellectual ethic remains obscure.

About the same time that Nietzsche started using his typewriter, an earnest young man named Frederick Winslow Taylor carried a stopwatch into the Midvale Steel plant in Philadelphia and began a historic series of experiments aimed at improving the efficiency of the plant's machinists. With the approval of Midvale's owners, he recruited a group of factory hands, set them to work on various metalworking machines, and recorded and timed their every movement as well as the operations of the machines. By breaking down every job into a sequence of small, discrete steps and then testing different ways of performing each one, Taylor created a set of precise instructions—an "algorithm," we might say today—for how each worker should work. Midvale's employees grumbled about the strict new regime, claiming that it turned them into little more than automatons, but the factory's productivity soared.
More than a hundred years after the invention of the steam engine, the Industrial Revolution had at last found its philosophy and its philosopher. Taylor's tight industrial choreography—his "system," as he liked to call it—was embraced by manufacturers throughout the country and, in time, around the world. Seeking maximum speed, maximum efficiency, and maximum output, factory owners used time-and-motion studies to organize their work and configure the jobs of their workers. The goal, as Taylor defined it in his celebrated 1911 treatise, *The Principles of Scientific Management*, was to identify and adopt, for every job, the "one best method" of work

and thereby to effect “the gradual substitution of science for rule of thumb throughout the mechanic arts.” Once his system was applied to all acts of manual labor, Taylor assured his followers, it would bring about a restructuring not only of industry but of society, creating a utopia of perfect efficiency. “In the past the man has been first,” he declared; “in the future the system must be first.”

Taylor’s system is still very much with us; it remains the ethic of industrial manufacturing. And now, thanks to the growing power that computer engineers and software coders wield over our intellectual lives, Taylor’s ethic is beginning to govern the realm of the mind as well. The Internet is a machine designed for the efficient and automated collection, transmission, and manipulation of information, and its legions of programmers are intent on finding the “one best method”—the perfect algorithm—to carry out every mental movement of what we’ve come to describe as “knowledge work.”

Google’s headquarters, in Mountain View, California—the Googleplex—is the Internet’s high church, and the religion practiced inside its walls is Taylorism. Google, says its chief executive, Eric Schmidt, is “a company that’s founded around the science of measurement,” and it is striving to “systematize everything” it does. Drawing on the terabytes of behavioral data it collects through its search engine and other sites, it carries out thousands of experiments a day, according to the *Harvard Business Review*, and it uses the results to refine the algorithms that increasingly control how people find information and extract meaning from it. What Taylor did for the work of the hand, Google is doing for the work of the mind.

The company has declared that its mission is “to organize the world’s information and make it universally accessible and useful.” It seeks to develop “the perfect search engine,” which it defines as something that “understands exactly what you mean and gives you back exactly what you want.” In Google’s view, information is a kind of commodity, a utilitarian resource that can be mined and processed with industrial efficiency. The more pieces of information we can “access” and the faster we can extract their gist, the more productive we become as thinkers. Where does it end? Sergey Brin and Larry Page, the gifted young men who founded Google while pursuing doctoral degrees in computer science at Stanford, speak frequently of their desire to turn their search engine into an artificial intelligence, a HAL-like machine that might be connected directly to our brains. “The ultimate search engine is something as smart as people—or smarter,” Page said in a speech a few years back. “For us, working on search is a way to work on artificial intelligence.” In a 2004 interview with *Newsweek*, Brin said, “Certainly if you had all the world’s information directly attached to your brain, or an artificial brain that was smarter than your brain, you’d be better off.” Last year, Page told a convention of scientists that Google is “really trying to build artificial intelligence and to do it on a large scale.”

Such an ambition is a natural one, even an admirable one, for a pair of math whizzes with vast quantities of cash at their disposal and a small army of computer scientists in their employ. A fundamentally scientific enterprise, Google is motivated by a desire to use technology, in Eric Schmidt’s words, “to solve problems that have never been solved before,” and artificial intelligence is the hardest problem out there. Why wouldn’t Brin and Page want to be the ones to crack it?

Still, their easy assumption that we'd all "be better off" if our brains were supplemented, or even replaced, by an artificial intelligence is unsettling. It suggests a belief that intelligence is the output of a mechanical process, a series of discrete steps that can be isolated, measured, and optimized. In Google's world, the world we enter when we go online, there's little place for the fuzziness of contemplation. Ambiguity is not an opening for insight but a bug to be fixed. The human brain is just an outdated computer that needs a faster processor and a bigger hard drive.

The idea that our minds should operate as high-speed data-processing machines is not only built into the workings of the Internet, it is the network's reigning business model as well. The faster we surf across the Web—the more links we click and pages we view—the more opportunities Google and other companies gain to collect information about us and to feed us advertisements. Most of the proprietors of the commercial Internet have a financial stake in collecting the crumbs of data we leave behind as we flit from link to link—the more crumbs, the better. The last thing these companies want is to encourage leisurely reading or slow, concentrated thought. It's in their economic interest to drive us to distraction.

Maybe I'm just a worrywart. Just as there's a tendency to glorify technological progress, there's a countertendency to expect the worst of every new tool or machine. In Plato's *Phaedrus*, Socrates bemoaned the development of writing. He feared that, as people came to rely on the written word as a substitute for the knowledge they used to carry inside their heads, they would, in the words of one of the dialogue's characters, "cease to exercise their memory and become forgetful." And because they would be able to "receive a quantity of information without proper instruction," they would "be thought very knowledgeable when they are for the most part quite ignorant." They would be "filled with the conceit of wisdom instead of real wisdom." Socrates wasn't wrong—the new technology did often have the effects he feared—but he was shortsighted. He couldn't foresee the many ways that writing and reading would serve to spread information, spur fresh ideas, and expand human knowledge (if not wisdom).
The arrival of Gutenberg's printing press, in the 15th century, set off another round of teeth gnashing. The Italian humanist Hieronimo Squarciafico worried that the easy availability of books would lead to intellectual laziness, making men "less studious" and weakening their minds. Others argued that cheaply printed books and broadsheets would undermine religious authority, demean the work of scholars and scribes, and spread sedition and debauchery. As New York University professor Clay Shirky notes, "Most of the arguments made against the printing press were correct, even prescient." But, again, the doomsayers were unable to imagine the myriad blessings that the printed word would deliver.

So, yes, you should be skeptical of my skepticism. Perhaps those who dismiss critics of the Internet as Luddites or nostalgists will be proved correct, and from our hyperactive, data-stoked minds will spring a golden age of intellectual discovery and universal wisdom. Then again, the Net isn't the alphabet, and although it may replace the printing press, it produces something altogether different. The kind of deep reading that a sequence of printed pages promotes is valuable not just for the knowledge we acquire from the author's words but for the intellectual vibrations those words set off within our own minds. In the quiet spaces opened up by the sustained, undistracted reading of a book, or by any other act of contemplation, for that matter, we make our own associations, draw our own inferences and analogies, foster our own ideas.

Deep reading, as Maryanne Wolf argues, is indistinguishable from deep thinking.

If we lose those quiet spaces, or fill them up with "content," we will sacrifice something important not only in our selves but in our culture. In a recent essay, the playwright Richard Foreman eloquently described what's at stake:

I come from a tradition of Western culture, in which the ideal (my ideal) was the complex, dense and "cathedral-like" structure of the highly educated and articulate personality—a man or woman who carried inside themselves a personally constructed and unique version of the entire heritage of the West. [But now] I see within us all (myself included) the replacement of complex inner density with a new kind of self—evolving under the pressure of information overload and the technology of the "instantly available."
As we are drained of our "inner repertory of dense cultural inheritance," Foreman concluded, we risk turning into "'pancake people'—spread wide and thin as we connect with that vast network of information accessed by the mere touch of a button."

I'm haunted by that scene in *2001*. What makes it so poignant, and so weird, is the computer's emotional response to the disassembly of its mind: its despair as one circuit after another goes dark, its childlike pleading with the astronaut—"I can feel it. I can feel it. I'm afraid"—and its final reversion to what can only be called a state of innocence. HAL's outpouring of feeling contrasts with the emotionlessness that characterizes the human figures in the film, who go about their business with an almost robotic efficiency. Their thoughts and actions feel scripted, as if they're following the steps of an algorithm. In the world of *2001*, people have become so machinelike that the most human character turns out to be a machine. That's the essence of Kubrick's dark prophecy: as we come to rely on computers to mediate our understanding of the world, it is our own intelligence that flattens into artificial intelligence.

Classes 3 & 4 January 15 & 17

Scenario

Rule

It is the duty of all the members of the campus community to report the existence of any acts which may violate university policy. . . .

Hazing: All forms of hazing such as any action taken or situation created, intentionally, to produce mental or physical discomfort, embarrassment, ridicule, or possibly cause mental or physical harm or injury to any person on or off the university campus.

Facts

The Algoma University Table Tennis Club requires new members to undergo a “training period” before they become full members of the club. During this training period, new members must carry the lunch trays of existing members during lunch in the cafeteria. They are required to carry senior members' trays from the food line to the tables and carefully clean the tables before and after the senior members eat. New members are also told to memorize the names of every person who has ever won an Olympic medal in singles table tennis - 42 names in total. At the end of the training period, new members are required to recite all 42 names from memory at an induction ceremony in front of the entire club. If they do so successfully, they become full members of the club.

Hisham is a new member who feels disrespected when he carries the existing members' trays and cleans their tables. He also has a test the night before the induction ceremony and is extremely stressed about memorizing the Olympic medalists when he needs to study for his test. He complains to an administrator that the Table Tennis Club is hazing him.

You are an assistant to the administrator. Help the administrator decide if the Table Tennis Club has violated the Handbook’s rule on hazing.

Questions

What is the structure of the rule in the Algoma University Student Handbook quoted above? Describe its elements and its result.

Use each of the five forms of legal reasoning to argue either that the Table Tennis Club violated the rule or did not violate the rule.

a. Rule. Label the three parts of your syllogism.

b. Analogy. Use the following facts to craft your argument: Last year, a student complained to Algoma University administrators that prospective members of the Algoma University music club were not allowed to join the club until they participated in the club’s version of Music Idol. Every new member had to sing a song in front of the rest of the club, who then voted on the best singer. Everyone who participated became a member of the club. The student who protested felt embarrassed and uncomfortable being judged on his singing. The Algoma University administration did not find the music club in violation of the hazing rule because they believed that the competition was a legitimate training exercise that helped participants develop musical skills, even if some were made uncomfortable by participating.

c. Policy. In forming your answer, it may be helpful to consider the possible purposes of the hazing rule and the consequences of interpreting the rule narrowly or broadly.

d. Principle

e. Custom.

Read, explain, and brief the following cases.

Focus on the court analysis. How does the court arrive at the conclusion in each case?

1. Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986). How does this case differ from Tinker v. Des Moines Independent Community School District (1969)?
2. W. O. LUCY AND J. C. LUCY v. A. H. ZEHMER AND IDA S. ZEHMER, Supreme Court of Virginia, 1954.
3. United States v. Stitt.
4. R. v. Martineau, [1990] 2 SCR 633, 1990 CanLII 80 (SCC).
5. *CITY OF AUSTIN*, Appellant, v. Kenneth Richard DAVIS, III, b/n/f Kenneth Richard Davis, 693 S.W.2d 31 (1985)

Read the article and discuss the following questions

Judges are more lenient after taking a break, study finds

Prisoners are more likely to be granted parole early in the day or after a break such as lunch, according to researchers

Ben Bryant

The adage that justice depends on what the judge ate for breakfast may not be far from the truth, according to a study of more than a thousand court decisions.

The research, which examined judicial rulings by Israeli judges who presided over parole hearings in criminal cases, found that judges gave more lenient decisions at the start of the day and immediately after a scheduled break in court proceedings such as lunch. Jonathan Levav, associate professor of business at Columbia University, who co-authored the paper, said: "You are anywhere between two and six times as likely to be released if you're one of the first three prisoners considered versus the last three prisoners considered."

The authors of the peer-reviewed paper looked at more than 1,000 rulings made in 2009 by eight judges. They found that the likelihood of a favourable ruling peaked at the beginning of the day, steadily declining over time from a probability of about 65% to nearly zero, before spiking back up to about 65% after a break for a meal or snack.

Levav said the paper had implications for British judgments. He said: "What we're finding here is a basic psychological effect, and there's nothing different between the psychological effect on a British judge and an Israeli one."

The only other variables that influenced a judge's ruling were the number of times a prisoner had been to jail and the presence of a rehabilitation programme. Other factors, such as the severity of the prisoner's crime, prison time, sex and ethnicity tended not to exert an effect on the rulings, according to the paper, which is published in the Proceedings of the National Academy of Science.

The exact reason for the shift from parole approval to a "default" outcome of denial is not clear, but the paper speculates that breaks may replenish mental resources by providing "rest, improving mood or by increasing glucose levels in the body".

Levav said: "I don't measure the judge's mood. I don't measure the judge's glucose level. It's just a very consistent empirical regularity.

"It's a quite robust effect, and it really doesn't matter how you cut the data you get to reproduce it," he added.

1) What is the article about? What did the researchers find?
2) What is your opinion on the findings of this research?
3) Is there a legal theory that would coincide with the findings of this research? Discuss it.
4) What are the implications of this research for the legal profession?
5) Do an online search of other research on how professionals think and make decisions in the legal profession.

Read the article HOW TO READ A CASE by Julie Novkov and watch the video based on the article.

List every part of court cases mentioned in the video and article.

Identify every part of the following case.

693 S.W.2d 31 (1985)

CITY OF AUSTIN, Appellant, v. Kenneth Richard DAVIS, III, b/n/f Kenneth Richard Davis, Sr., et al., Appellees.

Court of Appeals of Texas, Austin.

June 5, 1985.

Rehearing Denied June 26, 1985.

Attorney(s) appearing for the Case

Paul C. Isham, City Atty., Mahon B. Garry, Jr., Asst. City Atty., Austin, for appellant.

Tommy Jacks, Doggett & Jacks, Austin, for appellees.

Before POWERS, KLINGEMAN and GAMMAGE, JJ.

GAMMAGE, Justice.

This case arises from the circumstances surrounding the death of Kenneth Richard Davis' son, Kenny, while admitted to Brackenridge Hospital, an operation of the City of Austin, hereinafter the "City." The City appeals from the judgment of the trial court in favor of Davis. We will affirm the judgment.

Trial to the bench was had upon stipulated facts.

Kenny Davis suffered severe neurological damage resulting from head injuries sustained in a motor vehicle accident. Davis visited his son every day during his six-week hospitalization. At the time of his death Kenny was ambulatory, but was confused and disoriented. He was in danger of injuring himself and others because of his poor judgment and perception. For this reason, he was always either medicated or physically restrained. On the day of Kenny's death, the hospital staff failed to do either. When Davis arrived at the hospital for his daily visit, Kenny was not in his room and the ward staff was unable to locate him, although they were then searching the hospital and surrounding grounds. Davis joined the search, which continued for three hours and included not only the hospital and grounds, but also surrounding **[693 S.W.2d 33]** parks and recreational areas. In his second search of the hospital basement, Davis, accompanied by a hospital security officer, found his son's body at the base of a ten-story air shaft. In wandering around the hospital, Kenny had discovered and entered the air shaft, climbed to the top and fallen to his death. It is herein stipulated that Davis has suffered physical injuries caused by emotional distress inflicted by these circumstances.

Kenny's other statutory beneficiaries settled a wrongful death action with the City, for approximately $93,000. Davis disclaimed any interest in the wrongful death action and prevailed in the trial court in his own suit for mental distress and physical injuries sustained as a bystander to the incident, with stipulated damages of $50,000. In this Court, the City attacks the trial court's judgment on Davis' separate cause of action.

The two issues presented for review are whether Davis has a separate cause of action for his own injuries, and if he does, whether he is a separate "person injured," within the meaning of the Tort Claims Act, Tex.Rev.Civ.Stat.Ann. art. 6252-19 (Supp. 1985).

BYSTANDER INJURY

The courts of this State have long recognized the right to recover for negligently inflicted emotional distress. *Hill v. Kimball*, 76 Tex. 210, 13 S.W. 59 (1890). It is also well settled that a successful plaintiff, in an action of this kind, must prove that his injuries were reasonably foreseeable by the defendant. *Kaufman v. Miller*, 414 S.W.2d 164 (Tex.1967). We have more recently recognized the right of a "bystander" to a shocking event to recover for injury proximately caused by injury negligently inflicted upon another. *See Landreth v. Reed*, 570 S.W.2d 486 (Tex.Civ. App.1978, no writ). The bystander doctrine, as articulated in *Landreth*, generally requires proof of three elements, two of which are pertinent here:

(1) The plaintiff must have been in close proximity to the scene of the incident.

(2) The plaintiff's injuries must have been proximately caused by a contemporaneous perception of the incident.

The rule prescribed in *Landreth* is not inflexible, and is tempered with the caveat that each case must be evaluated on its own merits. *Id.* at 490; *Kaufman, supra.*

The City argues that Davis was not present at the time his son fell to his death, so he therefore did not experience a contemporaneous perception of the incident. The City further argues that there is no proximate cause, because it could not reasonably foresee Davis' injuries. We disagree.

The requirement of a contemporaneous perception of the incident giving rise to the injuries has been liberally construed. In *Landreth* it was held that actual observance of the incident was unnecessary, if there was some perception of the incident other than learning of it from others after it had happened. In *General Motors Corp. v. Grizzle*, 642 S.W.2d 837 (Tex.App.1982, writ dism'd), recovery was allowed, despite the finding that the plaintiff arrived on the scene well after the incident occurred. The court therein stated "[the plaintiff] was brought so close to the reality of the accident as to render her experience an integral part of it." *Id.* at 844; *Landreth, supra.*

Two courts have allowed recovery where the plaintiffs had been rendered unconscious at the precise moment of the incidents, and could not, therefore, have observed the incidents. *Dawson v. Garcia,* 666 S.W.2d 254 (Tex.App.1984, no writ); *Apache Ready Mix Co., Inc. v. Creed,* 653 S.W.2d 79 (Tex.App.1983, no writ). Both courts, after reviewing the facts in each of the individual cases, determined that actual observance was unnecessary, in view of the high degree of involvement each plaintiff had with the incident giving rise to the injuries.

The City's argument essentially rests on the premise that Davis should be denied recovery because he was not at the foot of the airshaft at the moment his son

[693 S.W.2d 34]

fell. We decline to so hold. The premise ignores the remainder of relevant circumstances surrounding the death of Davis' son. It is clear from the stipulated facts that Davis was intensely involved in the search and subsequent discovery of his son. He did not learn of the incident from others, but found his son's body at the bottom of the airshaft. In light of these circumstances and the above cited authorities, we hold that Davis "was brought so close to the reality of the accident as to render [his] experience an integral part of it," and Davis experienced sufficient perception of the incident to satisfy the requirements of the "bystander doctrine." *Grizzle, supra.*

We further hold that the trial court did not err in concluding that the injury to Davis was reasonably foreseeable by the City. Davis had visited his son every day of his extended hospitalization. The City was well aware of this and recognized it in the stipulated facts. The City was further aware that Kenny was capable of injuring others or himself if not properly restrained. Under these facts, a jury could have found that a reasonable person in the City's position, in the exercise of ordinary care, would have foreseen as a reasonable result of the City's negligence that Kenny would injure himself at a time when Davis was present or in close proximity and that Davis would thereby suffer injury. Appellant's first, second and third points of error are overruled.

TEXAS TORT CLAIMS ACT DAMAGE LIMITATION

The City's operation of Brackenridge Hospital is a governmental activity, *Gartman v. City of McAllen,* 107 S.W.2d 879 (Tex.1937), and the City is liable only to the extent that its sovereign immunity has been waived by the Texas Tort Claims Act, Tex.Rev.Civ.Stat.Ann. art. 6252-19, § 3(b) (Supp.1985). The Tort Claims Act, § 3(b) provides in pertinent part for the following limitation of damages recoverable against local government units engaged in governmental activities:

Liability of any unit of local government is limited to $100,000 per person and $300,000 for any single occurrence for bodily injury or death and to $100,000 for any single occurrence for injury to or destruction of property.

Sec. 13 of the Act further provides:

The provisions of this Act shall be liberally construed to achieve the purposes hereof.

See also Salcedo v. El Paso Hospital District, 659 S.W.2d 30 (Tex.1983).

The City contends that Davis is not a separate injured person for the purpose of § 3 above. It argues that Kenny was the only injured person under the Act, and Davis and all the wrongful death beneficiaries are limited to a total recovery of $100,000. Appellant cites as controlling *Madisonville Independent School District v. Kyle,* 658 S.W.2d 149 (Tex.1983). Our review of this authority reveals that it addresses considerations pertinent only to a wrongful death action.

Because Davis satisfies the requirements of the bystander doctrine, discussed above, he may maintain his own cause of action—he need not join the suit of the other wrongful death beneficiaries. His suit is for injuries he personally suffered, as stipulated by the parties, not for damages to which he would have been entitled as a consequence of his son's wrongful death. This bystander suit is not derivative of the statutory wrongful death action. Prior to *Sanchez v. Schindler,* 651 S.W.2d 249 (Tex.1983), the bystander action allowed parents of deceased children to recover for their own emotional injuries even though they could not then have recovered in a wrongful death action. *Bedgood v. Madalin,* 589 S.W.2d 797 (Tex.Civ.App. 1979), rev'd on other grounds, 600 S.W.2d 733 (Tex.1980). In light of these considerations, and the legislative directive that this Act be liberally construed, we hold that Davis is a "person injured" for purposes of the damages limitation. He therefore is entitled to recover up to $100,000 for his own bodily injury. [693 S.W.2d 35]

Appellant's fourth and fifth points of error are overruled. The judgment of the trial court is affirmed.

Following Martin Davies' theory, identify the following in the R. v. McCraw decision

- Units of signification
- Nuclei
- Indices
- Catalyzers
- Informants
- Legal context

R. v. McCraw, [1991] 3 S.C.R. 72
Stephen Joseph McCraw Appellant
v.
Her Majesty The Queen Respondent

Criminal law Threats Rape threat Accused writing letters to football cheerleaders threatening to have sexual intercourse with them even if he had to rape them Whether letters contained a threat to cause serious bodily harm Criminal Code, R.S.C., 1985, c. C 46, s. 264.1(1)(a).

The accused was charged with three counts of threatening to cause serious bodily harm contrary to s. 264.1(1)(a) of the Criminal Code. He had written anonymous letters to three football cheerleaders graphically detailing various sexual acts which he wished to perform upon them and concluded each with a threat that he would have sexual intercourse with them "even if I have to rape you". At trial, the three complainants testified that the letters frightened them to the extent that they no longer felt safe when they were alone. The trial judge found that the threat of rape did not constitute a threat to cause serious bodily harm and acquitted the accused. The majority of the Court of Appeal reversed the judgment and entered a conviction on the three counts.

Held: The appeal should be dismissed.

The trial judge erred in concluding that the threat to rape contained in the letters did not constitute a threat to cause serious bodily harm. For the purposes of s. 264.1(1)(a) of the Code, "serious bodily harm" means any hurt or injury, whether physical or psychological, that interferes in a substantial way with the integrity, health or well being of a victim. To determine whether spoken or written words constitute a threat to cause serious bodily harm an issue of law and not of fact they must be looked at in the context in which they were spoken or written, in light of the person to whom they were addressed and the circumstances in which they were uttered. They should be viewed in an objective way and the meaning attributed to the words should be that which a reasonable person would give to them. A threat to rape may, depending on the context and circumstances, constitute a threat to cause serious bodily harm. Rape is an act of violence, not just a sexual act. It is a crime that is likely to have serious psychological consequences and may, as well, have serious physical effects.

In the present case, the rape threat made by the accused contravenes s. 264.1(1)(a) of the Code. In the context of all the words written and having regard to the person to whom they were directed, there is no doubt that the questioned words would convey a threat of serious bodily harm to a reasonable person. The words used to express the threat were clear and the letters as a whole could have no other meaning than that these three young women would be subjected to rape -- forcible sexual penetration without consent through the use of violence or threats of violence. The evidence of the complainants coupled with a review of the words of the letter inevitably led to the conclusion that the accused had knowingly uttered a threat to cause the complainants serious bodily harm.

APPEAL from a judgment of the Ontario Court of Appeal (1989), 1989 CanLII 7243 (ON CA), 51 C.C.C. (3d) 239, 35 O.A.C. 144, 72 C.R. (3d) 373, allowing the Crown's appeal from the accused's acquittal on charges of threatening serious bodily harm contrary to s. 264.1(1)(a) of the Criminal Code. Appeal dismissed.

Donald B. Bayne, for the appellant.

Carol Brewer and Rosella M. Cornaviera, for the respondent.

//Cory J.//

The judgment of the Court was delivered by

CORY J. -- The appellant wrote anonymous letters to three young women. In those letters he graphically detailed various sexual acts which he wished to perform with them and concluded by stating that he was going to have sexual intercourse with them even if he had to rape them. At issue is whether the letters amounted to a threat to cause serious bodily harm contrary to the provisions of s. 243.4(1)(a), now s. 264.1(1)(a) of the Criminal Code, R.S.C., 1985 c. C-46.

Factual Background

The appellant McCraw was known to follow the Ottawa Rough Rider Cheerleaders and had been seen at their practices. In the Fall of 1987 he phoned some of the cheerleaders using an assumed name and asked them to pose for photographs. During the same period he sent anonymous letters to three of the cheerleaders. In the letters he described sexual acts he intended to perform upon them. He concluded each letter with a threat that he would have sexual intercourse with them "even if I have to rape you" and even if it took until the day he died.

Each letter was personally addressed to one of the three cheerleaders. The letters are so similar that it is sufficient for the purposes of these reasons to set out the contents of one of them:

Sandy

Let me tell you, your [sic] a beautiful woman, I am disapointed [sic] you wernt [sic] in the calendar, you are the most beautiful cheerleader on the squad. I think you should pose nude for playboy. Every time I see you I get an instant erection. I masturbate thinking about you every night. Fucking you would be like a dream come true. I would lick your whole body, starting with your toes, up your legs, then right to your vagina. I would love to taste your juicy vagina. Then I would suck on your perfect, well shaped breasts, I would then turn you over and lick your asshole. Then you would go down and suck my dick. Once I am nice and horny, I would stick my dick in your vagina. Then I would shove my dick into your nice tight asshole. Then you would suck my dick, and I would shoot my sperm all over your face. I am going to fuck you even if I have to rape you. Even if it takes me till the day I die. There should be more beautiful woman [sic] around like you.

See you later and have a nice day!

(Emphasis in original.)

One of the victims received a second letter in the same envelope. In that letter she was told to meet McCraw at a specified time behind the National Arts Centre in Ottawa. The appellant warned the victim that "IF YOU DON'T SHOW UP I WILL GO TO ROCKLAND [her home] AND GET YOU, DON'T FORGET I KNOW WHERE YOU LIVE" (emphasis in original). A list of the Cheerleaders' names and telephone numbers including those of the victims was found in the appellant's possession upon his arrest.

At trial the three recipients of the letters testified. All gave evidence that the threatening letters frightened them to the extent that they no longer felt safe when they were alone. One stated that as a result of receiving the letter she took greater precautions when she went out and had someone with her at all times. She also ensured that no one at her place of work would give out any information about her. Another stated that the letters scared her and that she took steps to always have someone with her wherever she went. The third stated that she became more anxious about going out alone and more cautious about where she went. None of these witnesses were cross-examined. The appellant did not testify and no evidence was called on his behalf.

The Charges and the Relevant Section

The appellant was tried on the following three charges:

1. THAT HE THE SAID STEPHEN JOSEPH McCRAW, between the 1st day of November, 1987 and the 26th day of November, 1987, at the City of Ottawa in the said Judicial District, did knowingly cause to be received a threat to Sandy Kobluk, by letter, to cause serious bodily harm to Sandy Kobluk, contrary to Section 243.4(2) of the Criminal Code of Canada.

2. AND FURTHER, THAT HE THE SAID STEPHEN JOSEPH McCRAW, between the 1st day of November, 1987 and the 26th day of November, 1987, at the City of Ottawa in the said Judicial District, did knowingly cause to be received a threat to Johanne Robillard, by letter, to cause serious bodily harm to Johanne Robillard, contrary to Section 243.4(2) of the Criminal Code of Canada.

3. AND FURTHER, THAT HE THE SAID STEPHEN JOSEPH McCRAW, between the 1st day of October, 1987 and the 30th day of October, 1987, at the City of Ottawa in the said Judicial District, did knowingly cause to be received a threat to Deborah Burgoyn, by letter, to cause serious bodily harm to Deborah Burgoyn, contrary to Section 243.4(2) of the Criminal Code of Canada.

Section 264.1(1), then 243.4(1), the definition section of the offences charged, reads as follows:

264.1 (1) Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat

(a) to cause death or serious bodily harm to any person;
(b) to burn, destroy or damage real or personal property; or
(c) to kill, poison or injure an animal or bird that is the property of any person.

The Courts Below

Trial Judge

The trial judge found as a fact that the statement contained in each letter "even if I have to rape you" constituted a threat of rape and was perceived by the complainants as a threat to rape them. However in his view the central issue was whether the threat to rape constituted a threat to cause serious bodily harm to the complainants. He stated that the court should focus on the plain meaning of the actual words used and should not speculate upon what the accused might have meant. In this regard the trial judge stated:

The tenor of the letters, while immature and disgusting, reveal [sic] more of an adoring fantasy than a threat to cause serious bodily harm.

((1989), 21 Ottawa L. Rev. 201, at p. 203.)

He rejected the Crown's argument that rape necessarily involves physical, emotional or psychological harm amounting to serious bodily harm. He put his position in this way (at p. 203):

In this case, the threat to "rape", to have non-consensual sexual intercourse may or may not involve serious bodily harm. It does not involve it necessarily. . . . Just as the words in Gingras [(1986), 16 W.C.B. 399 (Ont. Dist. Ct.)] are ambiguous and do not expressly or by necessary implication refer to causing serious bodily harm, so too the word "rape" in the case at bar is ambiguous and does not expressly or by necessary implication refer to the causing of serious bodily harm.

He emphasized his conclusion in the following manner at p. 204:

Rape or sexual assault does not of itself necessarily involve any kind of physical harm to the victim. . . .

In this case, we are dealing with "serious bodily harm" which is equated in the section to "death". What we have here is a threat to have sexual intercourse with each of the complainants, with or without their consent. This is quite separate and distinct, in the Court's view, to threatening serious bodily harm. Again, the threat to commit a sexual assault does not necessarily cause serious bodily harm.

The Ontario Court of Appeal

Brooke J.A., Tarnopolsky J.A. concurring, disagreed with the trial judge's conclusion that the threat of rape did not involve serious bodily harm. In his view, the threatened acts contravened the section. He wrote:

The word "serious" is not ambiguous and should be given its ordinary meaning.... Putting aside any question of whether bodily harm includes emotional or psychological harm, does the threat in this case amount to a threat to cause serious bodily harm? In my opinion, it does. The object of this threat is to create fear of such a degree of bodily harm from the application of physical force that the complainant will submit or not resist the sexual assault. The nature of bodily harm which would cause her to submit to such violations of her dignity and her body is not simply a hurt or injury that would interfere with her comfort but rather something serious. In short, resistance means force, perhaps violence, and serious injury. . . .

((1989), 1989 CanLII 7243 (ON CA), 51 C.C.C. (3d) 239, at p. 243.)

Brooke J.A. concluded that the trial judge had erred in his interpretation of the words "serious bodily harm" as they appear in s. 264.1(1)(a) when he held that the threat to commit rape was no more than a threat to have sexual intercourse without the complainant's consent.

However, the dissent found that the letters were simply obscene and did not contain a threat to rape. Accordingly, the letters did not "constitute threats to commit a specific criminal act" (p. 244). As a result, it was unnecessary to consider whether a threat to rape is a threat to cause serious bodily harm. The dissent agreed with the trial judge that "[t]he tenor of the letters, while immature and disgusting, reveal [sic] more of an adoring fantasy than a threat to cause serious bodily harm". Since, the dissenting judge concluded, the trial judge had found as a fact that the appellant did not intend the letters to be taken seriously, no offence could have been committed under s. 264.1(1). Alternatively, the dissent held (at p. 248):

Even if I am wrong in concluding that the trial judge found as a matter of fact that the letters were not intended to be taken seriously, I certainly accept that the language of the letters, while clearly criminal in that it is obscene, is ambiguous as a threat to cause serious bodily harm.

The Sole Question to be Resolved

The trial judge found and the appellant conceded that the words "I am going to fuck you even if I have to rape you" constitute a threat. Thus the only question to be resolved is whether the words constitute a threat to cause serious bodily harm for the purposes of s. 264.1(1)(a) of the Code.

The Meaning of "Serious Bodily Harm" in Section 264.1(1)(a)

Prior to 1985 the Criminal Code prohibited threats made by "letter, telegram, telephone, cable, radio, or otherwise" to cause "death or injury" to any person. The offence was aimed at the prohibition of written threats which were viewed as creating greater fear in the recipient than oral threats. In R. v. Nabis,1974 CanLII 179 (SCC), [1975] 2 S.C.R. 485, this Court interpreted the words "or otherwise", holding that they were not broad enough to include oral threats of death or injury. It followed that oral threats made face to face, no matter how serious, were not prohibited.

In 1985, Parliament took steps to amend the section and to fill the void created by the decision in R. v. Nabis. It replaced the existing section with s. 243.4(1)(a) now 264.1(1)(a). The present section was expanded to include threats made "in any manner" to cause death or "serious bodily harm". The amendment had the effect of including oral threats made to the recipient but as well increased the required threshold of harm from "death or injury" to "death or serious bodily harm". At the same time the offence of uttering threats was moved to that portion of the Criminal Code dealing with offences against the person.

With that background in mind it is now appropriate to consider what meaning should be given to the words "serious bodily harm".

The appellant urged that serious bodily harm is ejusdem generis with death. I cannot accept that contention. The principle of ejusdem generis has no application to this case. It is well settled that words contained in a statute are to be given their ordinary meaning. Other principles of statutory interpretation only come into play where the words sought to be defined are ambiguous. The words "serious bodily harm" are not in any way ambiguous.

It is true that the phrase is not defined in the Code. However "bodily harm" is defined in s. 267(2). That definition is as follows:

For the purposes of this section [assault with a weapon or causing bodily harm] and sections 269 [unlawfully causing bodily harm] and 272 [sexual assault with a weapon, threats to a third party or causing bodily harm], "bodily harm" means any hurt or injury to the complainant that interferes with the health or comfort of the complainant and that is more than merely transient or trifling in nature.

That definition of "bodily harm" can I think be properly applied to those words as they appear in s. 264.1(1)(a).

There remains the question then of how the word "serious" ought to be defined. The

Shorter Oxford English Dictionary (3rd ed. 1987) provides the following definition of "serious":

Serious . . . Weighty, important, grave; (of quantity or degree) considerable. b. Attended with danger; giving cause for anxiety.

Giving the word "serious" its appropriate dictionary meaning, I would interpret "serious bodily harm" as being any hurt or injury that interferes in a grave or substantial way with the physical integrity or well-being of the complainant. Thus "serious bodily harm" does not require proof of the same degree of harm required for aggravated assault described in s. 268 of the Code; that is to say the wounding, disfiguring or endangering of the life of the complainant. Yet it requires greater harm than the mere "bodily harm" described in s. 267; that is hurt or injury that interferes with the health or comfort of the complainant and that is more than merely transient or trifling in nature.

Does the phrase encompass psychological harm? I think that it must. The term "bodily harm" referred to in s. 267 is defined as "any hurt or injury". Those words are clearly broad enough to include psychological harm. Since s. 264.1 refers to any "serious" hurt or injury then any serious or substantial psychological harm must come within its purview. So long as the psychological harm substantially interferes with the health or well-being of the complainant, it properly comes within the scope of the phrase "serious bodily harm". There can be no doubt that psychological harm may often be more pervasive and permanent in its effect than any physical harm. I can see no principle of interpretation nor any policy reason for excluding psychological harm from the scope of s. 264.1(1)(a) of the Code.

In summary the meaning of "serious bodily harm" for the purposes of the section is any hurt or injury, whether physical or psychological, that interferes in a substantial way with the physical or psychological integrity, health or well-being of the complainant. With that definition of the phrase in mind, it is now appropriate to review the approach to be taken when a court is considering whether the questioned words constitute a threat of serious bodily harm. As a first step some consideration should be given to the aim and purpose of s. 264.1(1)(a).

The Aim of Section 264.1(1)(a)

Parliament, in creating this offence recognized that the act of threatening permits a person uttering the threat to use intimidation in order to achieve his or her objects. The threat need not be carried out; the offence is completed when the threat is made. It is designed to facilitate the achievement of the goal sought by the issuer of the threat. A threat is a tool of intimidation which is designed to instill a sense of fear in its recipient. The aim and purpose of the offence is to protect against fear and intimidation. In enacting the section Parliament was moving to protect personal freedom of choice and action, a matter of fundamental importance to members of a democratic society.

The true nature of the offence was recognized by this Court in R. v. LeBlanc, 1989 CanLII 56 (SCC), [1989] 1 S.C.R. 1583. There the Court approved the trial judge's ruling that whether the threatener intends to carry out the threat is irrelevant to determining if a conviction can be maintained. It is the element of fear instilled in the victim by the issuer of the threat at which the criminal sanction is aimed. Section 264.1 provides that the threat must be knowingly uttered or conveyed by the accused. Thus the Crown is required to establish that the accused intended to threaten the victim with serious bodily harm. However the determination as to whether there was such a subjective intent will often have to be based to a large extent upon a consideration of the words used by the accused. In those cases where the accused does not testify or call evidence the determination must be made on the basis of the words used. But if, for example, evidence was led that the accused simply copied words that he did not understand on the direction of another different considerations would apply. The next step is a consideration of the questioned words.

The Approach That Should be Taken to Determine if Words Contravene Section 264.1(1)(a)

At the outset I should state that in my view the decision as to whether the written or spoken words in question constitutes a threat to cause serious bodily harm is an issue of law and not of fact. How then should a court approach the issue? The structure and wording of s. 264.1(1)(a) indicate that the nature of the threat must be looked at objectively; that is, as it would be by the ordinary reasonable person. The words which are said to constitute a threat must be looked at in light of various factors. They must be considered objectively and within the context of all the written words or conversation in which they occurred. As well, some thought must be given to the situation of the recipient of the threat.

The question to be resolved may be put in the following way. Looked at objectively, in the context of all the words written or spoken and having regard to the person to whom they were directed, would the questioned words convey a threat of serious bodily harm to a reasonable person?

Does the Threat to Rape Contained in These Letters Demonstrate an Intent to Inflict Serious Bodily Harm?

A) Generally

Let us consider a threat to rape in general terms, without reference to the specific language of the letters. Violence is inherent in the act of rape. The element of sexuality aggravates the physical interference caused by an assault. Sexual assault results in a greater impact on the victim than a non-sexual assault. This has been reflected in the penalty provisions for sexual assault which are significantly higher than for non-sexual assault offences. In addition, this is emphasized by the fact that the definition of a "serious personal injury offence" in s. 752 of the Code includes the commission of sexual assault or an attempt to commit that offence. Thus Parliament has recognized the gravity of sexual assault.

It seems to me that to argue that a woman who has been forced to have sexual intercourse has not necessarily suffered grave and serious violence is to ignore the perspective of women. For women rape under any circumstance must constitute a profound interference with their physical integrity. As well, by force or threat of force, it denies women the right to exercise freedom of choice as to their partner for sexual relations and the timing of those relations. These are choices of great importance that may have a substantial effect upon the life and health of every woman. Parliament's intention in replacing the rape laws with the sexual assault offences was to convey the message that rape is not just a sexual act but is basically an act of violence. See K. Mahoney, "R. v. McCraw: Rape Fantasies v. Fear of Sexual Assault" (1989), 21 Ottawa L. Rev. 207, at pp. 215-16.

It is difficult if not impossible to distinguish the sexual component of the act of rape from the context of violence in which it occurs. Rape throughout the ages has been synonymous with an act of forcibly imposing the will of the more powerful assailant upon the weaker victim. Necessarily implied in the act of rape is the imposition of the assailant's will on the victim through the use of force. Whether the victim is so overcome by fear that she submits or whether she struggles violently is of no consequence in determining whether the rape has actually been committed. In both situations the victim has been forced to undergo the ultimate violation of personal privacy by unwanted sexual intercourse. The assailant has imposed his will on the victim by means of actual violence or the threat of violence.

Violence and the threat of serious bodily harm are indeed the hallmarks of rape. While the bruises and physical results of the violent act will often disappear over time, the devastating psychological effects may last a lifetime. It seems to me that grave psychological harm could certainly result from an act of rape.

The psychological trauma suffered by rape victims has been well documented. It involves symptoms of depression, sleeplessness, a sense of defilement, the loss of sexual desire, fear and distrust of others, strong feelings of guilt, shame and loss of self-esteem. It is a crime committed against women which has a dramatic, traumatic impact. See D. J. Giacopassi and K. R. Wilkinson, "Rape and the Devalued Victim" (1985), 9 Law and Human Behavior 367; R. v. Billam (1986), 8 Cr. App. R.(S.) 48 (C.A.), at pp. 49-50; P. Marshall, "Sexual Assault, The Charter and Sentencing Reform" (1988), 63 C.R. (3d) 216, at p. 221; A. W. Burgess, "Rape Trauma Syndrome" (1983), 1:3 Behavioral Sciences and the Law 97; C. H. Herd, "Criminal Law: Kansas Recognizes Rape Trauma Syndrome" (1985), 24 Washburn L.J. 653. To ignore the fact that rape frequently results in serious psychological harm to the victim would be a retrograde step, contrary to any concept of sensitivity in the application of the law.

In my view there can be no conclusion other than that rape can cause serious bodily harm. It follows that the threat to rape may well, depending on the context and circumstances, constitute a threat to commit serious bodily harm contrary to the provisions of s. 264.1(1)(a) of the Code. Indeed it would be ludicrous and contrary to the purpose of s. 264.1 to interpret the section as criminalizing the threat to damage a piece of property or a pet while permitting a threat to rape a woman on the grounds that it did not constitute a threat to commit serious bodily harm.

B) The Words Used to Express the Threat

In this case quite apart from the effect of the letters as a whole the words set out earlier "I am going to fuck you even if I have to rape you" constitute a threat of serious bodily harm. The letters are addressed to young women. The threat is to have sexual intercourse with the woman to whom the letter is addressed or as underlined in the letter to rape her. How would that wonderful fictitious legal character the ordinary reasonable person understand the word rape, bearing in mind that at least 50 percent of the ordinary reasonable people in our society are women? The Shorter Oxford English Dictionary defines rape as the "[v]iolation or ravishing of a woman". Rape is non-consensual sexual intercourse. It is the violation of the bodily integrity of a woman. It is hard to imagine a greater affront to human dignity. As noted earlier, rape is a crime that is likely to have serious psychological consequences and may, as well, have serious physical effects. Surely to every fair minded woman and man the threat of rape constitutes a threat of serious bodily harm. Neither the one uttering or writing the threat to rape nor the person to whom it is directed could have any doubt as to the meaning of the word rape.

The appellant argues that the threat to rape is no more than a threat to have non-consensual sexual intercourse and not a threat to cause serious bodily harm. It is argued that non-consensual sexual intercourse may or may not involve death or serious bodily harm depending upon the varying circumstances of each incident of rape and of each victim. It is said that the Criminal Code provides for a separate offence when a sexual assailant carries, uses or threatens to use a weapon or causes bodily harm to the complainant (s. 267). It is a separate offence when the sexual assailant wounds, maims, disfigures or endangers the life of the complainant (s. 273). It is then argued that when the letters were received in 1987 the expressed rape threat constituted a threat to do no more than commit sexual assault simpliciter and could not refer to the other two sections of the Code which refer to actual or threatened violence.

I cannot accept this argument. The particular legal classification of the assailant's threatened act should it be carried out, is completely irrelevant to the determination of whether the words in question constitute a threat to cause serious bodily harm. We are not, for the purposes of s. 264.1(1)(a) concerned with the legal definition of rape. In determining whether the letters contained a threat to cause serious bodily harm the term rape must be construed as it would be by the average reasonable person.

People outside the legal profession simply do not communicate to each other in the language of the Criminal Code. It would be a rare case indeed if an assailant would threaten his victim in words such as "Madam, if you don't comply with my requests, I'm going to sexually assault you and cause you bodily harm" or "I'm going to commit aggravated sexual assault upon you". It is equally unlikely that a threat would refer to the specific circumstances which must exist in law for those offences to be made out.

In reality neither the man issuing the threat nor the woman to whom it is directed are concerned with legal definitions. Here the appellant threatened rape. Neither he nor any of the young women could have had any doubt as to what the word meant. It would be understood to mean sexual penetration without consent achieved by means of violence or threats of violence. The fact that the term rape is no longer used in the present Criminal Code is of no consequence. It does not alter the essential nature of the understanding of the word rape to the ordinary reasonable person. Nor does it affect the nature of the threat implied by the use of that word.

C) Looking at the Letters as a Whole

Looking at the letters as a whole strengthens and emphasizes that there was a threat to inflict serious bodily harm on the three victims. The words "I am going to fuck you even if I have to rape you" are found towards the end of a letter written to young women graphically describing various sexual acts the appellant intended to perform. The clear inference was that rape would be the means of enforcing compliance with the depicted sexual activity. This was not juvenile, puerile sexual fantasizing, it was a threat of grave violence intended to enforce compliance. The words used are not ambiguous; rather they are explicit and clear. Taken in the context of the letter, they threaten serious bodily harm emphasized by the use of the underlined word rape. The letters could have no other meaning than that these three women would be subjected to forcible sexual penetration without consent through the use of violence. The purpose of the threat was to create a fear of such a degree of bodily harm from the application of force that the victims would not resist the sexual acts of the appellant. There could be no conclusion drawn by the victims other than that they would be subjected to violence should they resist the appellant.

In this case it was appropriate to consider the evidence of the complainants as to the effect of the letters upon them as an aid determining what the words would mean to a reasonable person.

These young women were forced to live with the threat of being sexually assaulted and to carry out their activities with the knowledge that they were being stalked by the appellant. No reasonable person looking at the letters could come to any other conclusion than that they constituted a threat to cause serious bodily harm. The threat resulted in the restriction of life style, of movement and of choice of action that the section was designed to alleviate. This is the very type of threat that s. 264.1(1)(a) was designed to combat. The evidence of the complainants coupled with a review of the words of the letter would inevitably lead to the conclusion that the accused had knowingly uttered a threat to cause the complainants serious bodily harm. The facts of this case required a conviction on the three charges.

Summary

For the purposes of s. 264.1(1)(a) of the Criminal Code "serious bodily harm" means any hurt or injury, whether physical or psychological, that interferes in a substantial way with the integrity, health or well-being of a victim. To determine whether spoken or written words constitute a threat to cause serious bodily harm they must be looked at in the context in which they were spoken or written, in light of the person to whom they were addressed and the circumstances in which they were uttered. They should be viewed in an objective way and the meaning attributed to the words should be that which a reasonable person would give to them. A threat to rape in and of itself considered in light of the context of the written words or conversation in which the threat was made and of the person to whom the words were addressed may constitute a threat to cause serious bodily harm. In this case the threats contained in the letters constitute a threat to cause serious bodily harm.

Disposition

In the result I would dismiss the appeal and affirm the decision of the majority of the Court of Appeal.

Class 5: January 22 Automation in legal practice

Watch the following video and discuss the following questions

https://www.youtube.com/watch?v=Wgo4-SsDP1k

1. Who is Elon Musk?
2. What is artificial intelligence (AI)?
3. What is the impact of AI in every day life?
4. Can it destroy human civilization? Why or why not?
5. What is Neuralink?
6. What is your opinion of Neuralink's projects?
7. Should AI be regulated? If so, how?
8. Are we smarter because we use smartphones? Why or why not? Can AI make us smarter?
9. What can we do to compete with AI robots in the job market?
10. Read and discuss the International Labour Organization's Research Paper entitled "The economics of artificial intelligence: Implications for the future of work

Prepare a presentation on an aspect of AI and law and/or the legal profession. The following articles and questions may help you prepare for the presentation.

1. What is the future of legal practice in light of the existing and future use of automation, artificial intelligence, and other disruptive technologies?
2. How are AI and machine learning transforming law firms and the legal sector?
3. What is Watson? What can it do in the legal profession?
4. How do robots and AI machines "learn"? Can they "learn" law and how to practice law? Why or why not?
5. Should governments and law societies regulate the use of AI in the practice of law?
6. What are some examples of AI use in the legal practice?

How AI and Machine Learning Are Transforming Law Firms And The Legal Sector

Bernard Marr

Whenever a professional sector faces new technology, questions arise regarding how that technology will disrupt daily operations and the careers of those who choose that profession. And lawyers and the legal profession are no exception. Today, artificial intelligence (AI) is beginning to transform the legal profession in many ways, but in most cases it augments what humans do and frees them up to take on higher-level tasks such as advising to clients, negotiating deals and appearing in court.

What is artificial intelligence?

Artificial intelligence mimics certain operations of the human mind and is the term used when machines are able to complete tasks that typically require human intelligence. The term machine learning is when computers use rules (algorithms) to analyze data and learn patterns and glean insights from the data. Artificial intelligence is a large factor shifting the way legal work is done.

Review documents and legal research

AI-powered software improves the efficiency of document analysis for legal use and machines can review documents and flag them as relevant to a particular case. Once a certain type of document is denoted as relevant, machine learning algorithms can get to work to find other documents that are similarly relevant. Machines are much faster at sorting through documents than humans and can produce output and results that can be statistically validated. They can help reduce the load on the human workforce by forwarding on only documents that are questionable rather than requiring humans to review all documents. It's important that legal research is done in a timely and comprehensive manner, even though it's monotonous. AI systems such as the one offered by ROSS Intelligence leverages natural language processing to help analyze documents.

Help perform due diligence

In law offices around the world, legal support professionals are kept busy conducting due diligence to uncover background information on behalf of their clients. This works includes confirming facts and figures and thoroughly evaluating the decisions on prior cases to effectively provide counsel to their clients. Artificial intelligence tools can help these legal support professionals to conduct their due diligence more efficiently and with more accuracy since this work is often tedious for humans.

Contract review and management

A big portion of work law firms do on behalf of clients is to review contracts to identify risks and issues with how contracts are written that could have negative impacts for their clients. They redline items, edit contracts and counsel clients if they should sign or not or help them negotiate better terms. AI can help analyze contracts in bulk as well as individual contracts. There are several software companies who created AI tools specifically for contract review such as Kira Systems, LawGeex and eBrevia that help sort contracts quicker and with fewer errors than humans.

Predict legal outcomes

AI has the capability of analyzing data to help it make predictions about the outcomes of legal proceedings better than humans. Clients are often asking their legal counsel to predict the future with questions such as "If we go to trial, how likely will it be that I win?" or "Should I settle?" With the use of AI that has access to years of trial data, lawyers are able to better answer such questions.

Automating divorce

A typical divorce settlement can take a year or more and can cost $27,000 on average in the United States. With a goal of "making every divorce amicable,"Wevorce provides couples a self-guided online divorce solution for a fraction of the cost. Couples can define their "optimal outcomes" and the AI-powered machine walks them through five modules and all the critical decisions that need to be made for their particular circumstances. There are also legal experts available to step in to provide guidance when needed.

How will AI impact the legal profession?

According to Deloitte, 100,000 legal roles will be automated by 2036. They report that by 2020 law firms will be faced with a "tipping point" for a new talent strategy. Now is the time for all law firms to commit to becoming AI-ready by embracing a growth mindset, set aside the fear of failure and begin to develop internal AI practices. There are many who believe innovation is the key to transforming the legal profession. That's precisely what NextLaw Labs, "the first legal technology venture created by a law firm," plans to do.

Artificial intelligence

Cover Story

April 3, 2017|Written By Luis Millan

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AI will change the legal profession, just not how you are expecting.

Fernando Garcia is looking forward to the day when he can get his hands on Beagle, an automated contract analysis system powered by artificial intelligence that reads contracts in seconds, highlights key information visually with easy-to-read graphs and charts and gets "smarter" with each reviewed contract. Also on his bucket list is an offering by yet another Canadian legal tech startup, Blue J Legal, that also uses AI to scan legal documents, case files and decisions to predict how courts will rule in tax decisions. At a time when the majority of in-house counsel are under intense pressure to shave costs and run a lean team, such powerful tools are a godsend. "There's always that pressure to do more with less, so when a tool comes along that can provide more efficiency, more risk mitigation and can let you do your job better and focus on providing value added, it is a strategic advantage," notes Garcia, general counsel, government affairs and corporate secretary with Nissan Canada Inc. "It's going to fundamentally change our job."

This fundamental change has been a long time coming. Nearly two decades ago, the former justice of the High Court of Australia, Michael Kirby, remarked with uncanny prescience in a speech before the Bombay High Court in Mumbai that "it would be a bold observer" who would deny the possibility of artificial intelligence to "enhance" lawyering and judicial-making. But even he could not foresee how artificial intelligence is now in many ways already everywhere. Ever since Watson, IBM's AI system, captured the public imagination and blew away the tech industry six years ago when it defeated two champions at the popular television quiz show *Jeopardy*, the technology has been developing at a dizzying pace and has immersed itself into business and in the daily lives of people around the world. Smartphones feature virtual personal assistants such as Siri and Google Now. Large U.S. retailers such as Amazon and Target use AI to anticipate the needs of consumers through the use of predictive analytics. Financial institutions use it for fraud detection. Smart home devices have the ability to learn a person's behaviour patterns by adjusting the settings of appliances or thermostats, while self-driving cars are inching their way to reality. And AI systems are detecting cancers. "It's moving so quickly, it's even a little mind-boggling for us," remarks Aaron

Courville, an AI researcher at the Montreal Institute for Learning Algorithms.

The practice of law, however, has been largely shielded by technological developments over the past 50 years, suffering little more than glancing blows. While the way that legal professionals process and share information has evolved with new technologies — primarily with the emergence of personal computers, email and the Internet — it did not fundamentally transform it.

That may be on the cusp of changing. Fuelled by Big Data, increased computing power and more effective algorithms (a routine process for solving a program or performing a task), AI has the potential to change the way that legal work is done, the way that law firms conduct business and the way that lawyers deal with clients. A number of technologies under the umbrella of artificial intelligence, such as machine learning, natural language processing, experts systems (the ability to emulate decision-making of a human expert) and others, allow computers to perform things that normally require human intelligence. Artificial intelligence systems, also known as augmented intelligence or cognitive computing, can be used to do many of the tasks lawyers routinely perform in areas such as compliance, contract analysis, case prediction, document automation and e-discovery. According to proponents, the emerging technologies will do it cheaper, faster and more efficiently, a development some law practitioners find disconcerting.

“What machines give you is the option to get access to more and more data faster and cheaper — that’s the real core of it,” explains David Holme, chief executive officer and founder of Exigent Group Limited, a global provider of legal process outsourcing services that leverage machine learning technology for discovery and contract processing. “It’s like a searchlight that can look into the corners of the organization. Machine learning and better information will allow experts to make better judgments. And experts must be humble enough to realize that this is a tool that they can use rather than being threatened by it.”

Some law firms are paying heed. A number of Canadian legal tech startups are beginning to draw attention in a market that traditionally has shied away from embracing technology with much enthusiasm. ROSS Intelligence, the brainchild of a group of University of Toronto students, has become the poster boy for illustrating AI’s potential in the legal world. A virtual legal assistant powered by IBM Watson and its own proprietary innovations, ROSS uses natural language processing to understand questions posed by lawyers, sifts through legislation, case law and secondary sources and returns an evidence-based answer. But ROSS does even more. It constantly monitors the law and uses its machine learning capabilities to continuously improve its results, which in turn produces results more quickly. ROSS began by learning bankruptcy law, but the firm layered it on top of that with intellectual property law, “which proved our hypothesis that we could scale ROSS’s learning between practice areas,” says Andrew Arruda, ROSS’s chief executive officer and one of the co-founders. “The goal is to build an entire ecosystem of legal AIs which enhance lawyers’ abilities.”

The firm is also at the preliminary stages of applying ROSS’s “underlying learnings and technology" to internal firm documents, which would represent a "massive step forward" for knowledge management, adds Arruda. That would certainly pique the interest of law firms and legal insurance protection insurers, noted Scott Ferrauiola, associate general counsel at Watson IBM Corporation, at a conference held last fall in Montreal. Law firms and insurers are drawn to the possibility of being able to harness the power of AI to identify, capture, evaluate, retrieve and share all of an organization's information assets, says Ferrauiola. "Who are your experts on certain legal issues? Do they have memos or briefs? Where are they? Can we access them? Can we search them? It's almost a back-office function. It's not quite decision-making, but it helps in decision-making," adds Ferrauiola.

Using machine learning to predict legal outcomes is another area that may sway lawyers to explore the potential of AI, according to experts. Last year, the lord chief justice of England and Wales warned jurists that AI will be better at predicting the outcome of cases than the "most learned Queen's Counsel" as soon as it has better statistical information. That day may have come. In a breakthrough development, computer scientists last fall using AI reached the same verdicts as judges at the European Court of Human Rights in nearly four out of five cases involving torture, degrading treatment and privacy, marking the first time that AI successfully predicted the outcomes of a major international court by analyzing case text. "This can be useful, for both lawyers and judges, as an assisting tool to rapidly identify cases and extract patterns which lead to certain decisions," noted the authors of the study.

Blue J Legal is another player in this area. The Canadian legal tech startup boasts that its AI simulation product, Tax Foresight, a joint initiative with Thomson Reuters (publisher of *Canadian Lawyer*), is able to predict with greater than 90-per-cent accuracy what a court would hold in new circumstances. The tool has the additional allure of being simple to use: The machine learning tool asks questions about the client's situation and then it analyzes thousands of cases produced by the Tax Court of Canada, the Federal Court of Appeal and the Supreme Court of Canada. The AI system then provides a prediction, a tailored explanation and a list of relevant cases for further research. "It will make a prediction based on all of the cases and not just the leading cases," explains Benjamin Alarie, the Osler Chair in business law at the University of Toronto and one of the co-founders of Blue J Legal. He maintains that such technologies will change the nature of litigation as it will increase the likelihood of settlement, while the likelihood of cases going to court will fall, "save perhaps for the most ambiguous," where further legal development will be most valuable. "These are tools that allow people to perform some elements of their jobs better, and these algorithms can do a better job in certain things," says Alarie. "It's a very powerful complement to human judgment."

But law firms are proving to be a hard sell. A recent survey reveals yet again that the vast majority of law firms are uncomfortable being early adopters. According to a 2016 International Legal Technology Association-InsideLegal Technology Purchasing Survey, more than half of all firms (53 per cent) reported larger tech budgets in 2016 than in 2015, but the majority focused their efforts on bolstering cybersecurity, information governance, business continuity or disaster recovery concerns and security compliance requirements. A staggering 87 per cent of respondents said their firms are currently not evaluating or utilizing artificial intelligence technologies or systems.

In many ways, those figures are not surprising. For one thing, the legal industry spends less than one per cent on research and development compared with an average of 3.5 per cent for the typical U.S. business, according to Dan Jensen, head of Nextlaw Labs, a business accelerator focused on investing in, developing and deploying new technologies to transform the practice of law and an autonomous, wholly owned subsidiary of global law firm Dentons LLP.

Even law firms themselves acknowledge that investing in new technologies is a challenge, mainly due to the traditional partnership model. “Law firms are notoriously slow to adopt new technologies,” says Elizabeth Ellis, director of knowledge management at Torys LLP. “Our decision-making process is not what I would call optimal necessarily. We just seem to take a long time to evaluate something, to get all of the views.”

On top of that, most lawyers view AI as a threat instead of seeing it as an opportunity to help deliver better outcomes for clients, said Jordan Furlong, an analyst of the global legal market with Law21. A recent study by McKinsey & Company estimates that 23 per cent of lawyer time is automatable, while similar research by the highly respected AI expert Dana Remus at the University of North Carolina School of Law concludes that just 13 per cent of lawyer time can be performed by computers.

“People don’t have to worry,” says Khalid Al-Kofahi, vice-president, R&D at the Thomson Reuters Centre for Cognitive Computing, a new technology centre that will focus on research in machine perception, reasoning, knowledge management and human-computer interfaces. “Most of the innovations in artificial intelligence and machine learning will introduce automation at the task level, which will allow people to focus on more complex tasks.”

But perceptions run deep, counters Furlong. “When lawyers turn their minds to AI, one of the first questions they are essentially asking is will it replace me,” says Furlong. “That is the wrong question. It’s not about the lawyer. It’s about the client. The question a client will ask is whether using AI will help me get what I need faster, more affordably or more effectively, with a better outcome.”

All of this does not bode well for traditional law firms. A recent global research study by Deloitte concluded that conventional law firms are no longer meeting today’s business needs. The majority (55 per cent) of participants in the study — legal counsel, CEOs and CFOs — have taken or are considering a significant review of their legal suppliers. The study also points out that purchasers of legal services want better and more relevant technologies, to be used and shared on integrated platforms.

Some law firms have seen the writing on the wall. “Our business is actually to make it as easy as possible for clients to solve things in the most practical, efficient way for them, and that’s why I get excited about the role that law firms can play because we should be best positioned to be the problem solver, this re-aggregator of all these different pieces and solutions so that what the client sees at the end of the day is this simple, integrated solution to the different problems that they have," says Matthew Peters, national innovation leader at McCarthy Tétrault.

The risk that some law firms may run into is that they will be seduced by the hype surrounding AI, erroneously believing that it will solve "all sorts of problems," without examining all of their options, adds Peters. Before an AI system is considered, attention should be turned toward legal process improvements, labour arbitrage and employing more efficient work tools, he suggests. A case in point is a new document automation service, complete with e-signatures and a contract management tool, that McCarthys developed in partnership with Exigent that will be rolled out in the near future for its clients. "Let's make sure that we are addressing what the client needs and not make this more complicated than it needs to be," says Peters.

That doesn't mean that Peters is not interested in AI offerings. In fact, he is now testing a series of AI products before settling on one that he intends to launch in a couple of months.

A push to meet the needs of clients also drove Osler Hoskin & Harcourt LLP to examine, try and ultimately implement new technologies, including a couple of AI offerings. Clients were demanding that the law firm provide legal services more efficiently at a lower cost, explains Mara Nickerson, Osler's chief knowledge officer. While exploring different options to meet growing client demands, the focal point throughout the exercise was centred on legal process management.

"The focus needs to be on where you can gain efficiencies in your process and what technology can help you," notes Nickerson. "If it's AI, great; but not AI for the sake of AI."

Osler eventually settled on using an AI e-discovery tool called Relativity, it has been using Kira Systems, a machine learning contract analysis system, since August 2016 and has tested Tax Foresight — all of which have yielded positive results. But even then, Osler determined that in order to get the "maximum value" out of these AI offerings, they would have to be placed in the hands of a dedicated team that spent time to "really" learn how it works so that it could "train" the system.

"The exciting thing about AI is that it is bringing additional functionality and capabilities to technologies that we didn't have before and so bringing exponential efficiencies to our processes in a way that we haven't said," says Natalie Munroe, head of Osler Works – Transactional, a new technology-based platform based in Ottawa to support coverage of corporate deals. But, adds Nickerson, all of these new technologies need oversight by lawyers to review and grasp the nuances of the responses churned out by the machine learning systems.

Implementing new technology, especially involving AI systems, needs to be carefully planned, requires time, ongoing support and buy-in from associates and partners. "You need to continue to evolve your practice as the technology improves, and as you work more closely with the program, you start seeing more opportunities to use the technology that you may have not realized originally," points out Ellis, speaking from her experience overseeing the implementation of Kira. "That all takes time and effort, and that is probably the hardest thing."

Some would argue that the most challenging task is to convince lawyers within the firm or legal department to use the new technology. Buy-in in the middle ranks is critical, says Nextlaw Labs' Jensen. "You have to have buy-in across the board, make sure you can drive the implementation and the integration and put project management skills against it, and then manage expectations about what the tool is and what it's not."

It is also crucial that the AI tool be clean, simple and intuitive; otherwise, lawyers will simply not use it, says Chuck Rothman, director of e-discovery services at Wortzmans, now a division of McCarthy Tétrault. "In order for artificial intelligence to be really adopted in the legal industry, it has to be presented in a way that lawyers can very quickly grasp what the system is saying so that they can use it, because, if they don't understand it, they are not going to trust it and, if they don't trust it, they won't use it."

The drive toward AI, however incrementally, will likely also mean that law firms are going to have to review their traditional billing model, says Furlong. The time when law firms were the only game in town, where lawyers were the "only vehicle" by which legal services could be delivered, is coming to a close, and AI is going to help to put that to an end, he says. "All of these innovations like artificial intelligence are going to reduce the amount of time and amount of effort required to obtain a legal outcome, so the very lax business model of selling time and expertise, rather than outcomes and results, is coming to an end."

Firms such as McCarthys, Osler and Torys are paying attention to the evolving market demands. McCarthys is planning to have 50 per cent of its work charged on a non-hourly basis, while Torys is moving toward a fixed-fee billing model. "The model is changing as we incorporate these new technologies and because of the demands of the client," says Nickerson.

In the meantime, in-house counsel like Garcia are going to likely have to bide their time if they expect to bear witness to a monumental change thanks to AI. As Peters puts it: "For sure, artificial intelligence is going to play a role in the future, but not as soon and not in the way that a lot of people are imagining it now."

Canada: a hub for AI

When AlphaGO, Google's artificial intelligence system, defeated the 18-time world champion in the complex and highly intuitively game of the ancient Chinese board game GO, it was not just a demonstration of yet another computer beating a human at a game. GO, a game with simple rules but profound complexity, has more possible positions than there are atoms in the universe, leading some to describe it as the Holy Grail of AI gaming. It was a remarkable feat because AlphaGo was not taught how to play Go. It learned how to play, and win, by playing millions of games, using a form of AI called deep learning, which utilizes neural networks that allow computer programs to learn just like humans. More than that, the victory showed that a computer is now able to rely on its own intuition, something that was thought only humans could do.

AlphaGO was developed by a group of computing scientists led by University of Alberta grads, underscoring Canada's enviable position as a world leader in AI. The Montreal Institute for Learning Algorithms, the University of Toronto and the University of Alberta are all recognized as pioneers in deep learning. Over the past couple of years, Canada has been cementing its status as an AI hub with the likes of Google flocking to Montreal, the Royal Bank of Canada establishing its machine learning division as part of an initial partnership with the University of Toronto and with Thomson Reuters founding a research lab in the Waterloo region and a technology centre for cognitive computing in Toronto. All of this has touched off an arms race for AI talent, and particularly Canadian machine learning researchers. "There's a lot of poaching of professors that is going on," remarks Aaron Courville, an AI professor with the Montreal Institute for Learning Algorithms. "It's a big problem. It's like you are biting the hand that feeds you in some ways. You are taking professors out and who's going to train the next generation of people with this expertise."

On the other hand, the rapid pace of developments in AI will almost certainly lead to greater collaboration between publicly funded and private research organizations, creating a win-win situation for all researchers, says Khalid Al-Kofahi, vice-president of R&D at the Thomson Reuters Centre for Cognitive Computing. "The rate of change that is now occurring in technology, especially around machine learning and artificial intelligence, significantly exceeds our ability to learn," says Al-Kofahi. "We don't have to collaborate at the application level, but we can collaborate on problems that are pre-application stage."

In the meantime, the Canadian AI scene has spawned a lot of activity such as pioneering legal tech startups such as ROSS Intelligence, Blue J Legal and Beagle, as well as innovative AI offerings. Thomson Reuters' Waterloo lab, which uses data science to look for new insights or analysis in order to solve customer problems, recently developed, in the space of three months, an AI tool that helps employers determine settlement offers in the case of employee termination. The AI product is a "research tool for legal professionals, not a calculator that does the job of a human — and that's the way that the legal profession should view artificial intelligence in the first place," says Brian Zubert, the director of the lab.

The dark side of AI: bias and loss of skills

Algorithms — the set of instructions computers use to carry out a task — have become an integral part of everyday lives, and they are immersing themselves in law. In the U.S., judges in some states can use algorithms as part of the sentencing process. Many law enforcement officials in the U.S. are using them to predict when and where crimes are likely to occur. They have been used for years in law firm recruitment. And with advancements in machine learning, they are also being used to conduct legal research, predict legal outcomes and to find out which lawyers win before which judges.

Most algorithms are created with good intentions, but questions have surfaced over algorithmic bias at job hunting web sites, credit reporting bureaus, social media sites and even the criminal justice system where sentencing and parole decisions appear to be biased against African-Americans. And the issue is likely to gain traction as machine learning and predictive coding become more sophisticated, particularly since with deep learning (which learn autonomously), algorithms can reach a point where humans can often no longer explain or understand them, says Nicolas Vermeys, assistant director at Cyberjustice Laboratory in Montreal. “We have no idea how they arrived at their decision and, therefore, cannot evaluate whether the decision has value or not,” says Vermeys, whose research institution is studying the issue. “There is a risk to relying completely on machines without necessarily understanding its reasoning.”

No human is completely objective, and so it is with algorithms as they have been programmed by programmers, notes Ian Kerr, a law professor at the University of Ottawa and the Canada Research Chair in Ethics, Law and Technology. Programmers operate on certain premises and presumptions that are not tested by anybody else, which leads to results based on those premises and presumptions that in turn give rise to bias, adds Kerr. On top of that, it is very difficult to challenge such decisions because “whoever owns the algorithms has trade secrets, isn’t likely to show you the source code, isn’t likely to want to talk about the secret source and what makes the algorithm work,” says Kerr. “What justifies the algorithm is its success or perceived success, which is very different from whether or not it operates in biased ways.”

Aaron Courville, a professor with the Montreal Institute for Learning Algorithms, shares those concerns. “We are really in a phase where these algorithms are starting to do interesting things, and we need to take seriously the issues of responsibility,” he says.

Both Kerr and Vermeys are also concerned about artificial intelligence performing more and more legal grunt work. By delegating an increasing amount of tasks to machines, there is a danger that existing skills will atrophy, says Kerr. “We have to be aware of that and make sure we make good judgments about which things to delegate and which things not to.”

Vermeys says there is some merit to performing thankless and menial tasks because it is, in many ways, how lawyers become good and experienced. His institute is also looking into the issue. Lawyers, for instance, should learn how to write contracts, tedious as the work may be, and should do it numerous times to be able to have a solid grasp of it, he says.

“We’re going to try to figure out how these artificial intelligence solutions should be used while not affecting the quality of service lawyers are giving today and will be able to give in five to 10 years.”

Class 6 January 24

Choose one of the following questions and prepare a presentation

1. Do descendants bear moral responsibility for the actions of their ancestors?
2. Do we really have free will?
3. What would "global justice" look like?
4. Is justice a human construct or is it independent of humans?
5. With no laws or rules to influence your behavior, how do you think you would behave?
6. What's the difference between justice and revenge?
7. If it was discovered that personality traits were partly genetic and could be removed with gene therapy, would it be ethical to edit out negative character traits that harm others like extreme aggression, compulsive lying, or cruelty?
8. If scientists could accurately predict who was more likely to commit crimes, what should society do with that information?
9. Do business owners have the right to refuse service to customers?
10. If babies are considered innocent, when do people cease to be innocent?
11. Is it just and right to deny entry to a country when doing so probably means death for the immigrant and their family?
12. How much effort should an individual put into not offending others?
13. Is privacy a right?
14. At what point is overthrowing a government ethical, considering all the violence a revolution usually entails?

Class 7 January 29

Brief the following cases and then analyze them by applying the Sociology of the Case method.

Facts

On October 12, 2009, Abel Lopez was attacked and robbed by a man he later identified as Walter Fernandez. Lopez managed to call 911, and a few minutes after the attack, police and paramedics arrived on the scene. Detectives investigated a nearby alley that was a known gang location where two witnesses told them that the suspect was in an apartment in a house just off the alley. The detectives knocked on the door of the indicated apartment, and Roxanne Rojas answered. The detectives requested to enter and conduct a search, at which point Walter Fernandez stepped forward and refused the detectives entry. They arrested Fernandez and took him into custody. Police officers secured the apartment, informed Rojas that Fernandez had been arrested in connection with a robbery, and requested to search the apartment. Rojas consented to the search verbally and in writing. During the search, officers found gang paraphernalia, a knife, and a gun.

At trial, the defendant moved to suppress the evidence seized in the warrantless search, and the trial court denied the motion. The jury found Fernandez guilty on the robbery charge, and he did not contest the charges for possession of firearms and ammunition. On appeal, the defendant argued that the trial court improperly denied his motion to suppress. The California Court of Appeal for the Second District affirmed and held that the warrantless search was lawful because a co-tenant consented.

Law:

In the United States, warrantless searches are restricted under the Fourth Amendment to the United States Constitution. Fourth Amendment rights, like other constitutional rights, may be waived, and one may consent to a search of his person or premises by officers who have not complied with the Amendment. The Court, however, has insisted that the burden is on the prosecution to prove the voluntariness of the consent and awareness of the right of choice. Reviewing courts must determine on the basis of the totality of the circumstances whether consent has been freely given or has been coerced. Actual knowledge of the right to refuse consent is not essential for a search to be found voluntary, and police therefore are not required to inform a person of his rights, as through a Fourth Amendment version of *Miranda* warnings. But consent will not be regarded as voluntary when the officer asserts his official status and claim of right and the occupant yields because of these factors.

United States v. Flores-Montano. When Manuel Flores-Montano approached the U.S.-Mexico border, U.S. Customs inspectors noticed his hand shaking; an inspector tapped Flores-Montano's gas tank with a screwdriver and noticed that the tank sounded solid; a drug-sniffing dog alerted to the vehicle. After a mechanic began disassembling the car's fuel tank, inspectors found 37 kilograms of marijuana bricks in the tank. Flores-Montano was charged in federal district court in California for importing and possessing marijuana with intent to distribute. Flores-Montano moved to suppress the marijuana finding on Fourth Amendment grounds. He argued that the search that yielded the marijuana finding was intrusive and non-routine and therefore required reasonable suspicion (which, he argued, was not present in his case). Please note that under similar circumstances, the district court agreed that the search was non-routine and thus required reasonable suspicion. The government, the court held, failed to prove that reasonable suspicion prompted its search.

Classes 8 & 9 January 31 & Feb. 5 Legal Interpretation

The Living Constitution

David A. Strauss

September 27, 2010

Do we have a living Constitution? Do we want to have a living Constitution? A living Constitution is one that evolves, changes over time, and adapts to new circumstances, without being formally amended. On the one hand, the answer has to be yes: there's no realistic alternative to a living Constitution. Our written Constitution, the document under glass in the National Archives, was adopted 220 years ago. It can be amended, but the amendment process is very difficult. The most important amendments were added to the Constitution almost a century and a half ago, in the wake of the Civil War, and since that time many of the amendments have dealt with relatively minor matters.

Meanwhile, the world has changed in incalculable ways. The nation has grown in territory and its population has multiplied several times over. Technology has changed, the international situation has changed, the economy has changed, social mores have changed, all in ways that no one could have foreseen when the Constitution was drafted. And it is just not realistic to expect the cumbersome amendment process to keep up with these changes.

So it seems inevitable that the Constitution will change, too. It is also a good thing, because an unchanging Constitution would fit our society very badly. Either it would be ignored or, worse, it would be a hindrance, a relic that keeps us from making progress and prevents our society from working in the way it should.

On the other hand, there seem to be many reasons to insist that the answer to that question-do we have a living Constitution that changes over time?-cannot be yes. In fact, the critics of the idea of a living constitution have pressed their arguments so forcefully that, among people who write about constitutional law, the term "the living constitution" is hardly ever used, except derisively. The Constitution is supposed to be a rock-solid foundation, the embodiment of our most fundamental principles-that's the whole idea of having a constitution. Public opinion may blow this way and that, but our basic principles-our constitutional principles-must remain constant.

Otherwise, why have a Constitution at all?

Even worse, a living Constitution is, surely, a manipulable Constitution. If the Constitution is not constant-if it changes from time to time-then someone is changing it, and doing so according to his or her own ideas about what the Constitution should look like. The "someone," it's usually thought, is some group of judges. So a living Constitution becomes not the Constitution at all; in fact it is not even law any more. It is just some gauzy ideas that appeal to the judges who happen to be in power at a particular time and that they impose on the rest of us.

So it seems we want to have a Constitution that is both living, adapting, and changing and, simultaneously, invincibly stable and impervious to human manipulation. How can we escape this predicament?

The good news is that we have mostly escaped it, albeit unselfconsciously. Our constitutional system, without our fully realizing it, has tapped into an ancient source of law, one that antedates the Constitution itself by several centuries. That ancient kind of law is the common law. The common law is a system built not on an authoritative, foundational, quasi-sacred text like the Constitution. Rather, the common law is built out of precedents and traditions that accumulate over time. Those precedents allow room for adaptation and change, but only within certain limits and only in ways that are rooted in the past. Our constitutional system has become a common law system, one in which precedent and past practices are, in their own way, as important as the written Constitution itself. A common law Constitution is a "living" Constitution, but it is also one that can protect fundamental principles against transient public opinion, and it is not one that judges (or anyone else) can simply manipulate to fit their own ideas.

The bad news is that, perhaps because we do not realize what a good job we have done in solving the problem of how to have a living Constitution, inadequate and wrongheaded theories about the Constitution persist. One theory in particular-what is usually called "originalism"-is an especially hardy perennial. Originalism is the antithesis of the idea that we have a living Constitution. It is the view that constitutional provisions mean what the people who adopted them-in the 1790s or 1860s or whenever-understood them to mean. (There are different forms of originalism, but this characterization roughly captures all of them.) In the hands of its most aggressive proponents,originalism simply denies that there is any dilemma about the living Constitution. The Constitution requires today what it required when it was adopted, and there is no need for the Constitution to adapt or change, other than by means of formal amendments.

There is something undeniably natural about originalism. If we're trying to figure out what a document means, what better place to start than with what the authors understood it to mean? Also, as a matter of rhetoric, everyone is an originalist sometimes: when we think something is unconstitutional-say, widespread electronic surveillance of American citizens-it is almost a reflex to say something to the effect that "the Founding Fathers" would not have tolerated it. And there are times, although few of them in my view, when originalism is the right way to approach a constitutional issue. But when it comes to difficult, controversial constitutional issues, originalism is a totally inadequate approach. It is worse than inadequate: it hides the ball by concealing the real basis of the decision. But if the idea of a living Constitution is to be defended, it is not enough to show that the competing theory-originalism-is badly flawed. You can't beat somebody with nobody. So I will describe the approach that really is at the core of our living constitutional tradition, an approach derived from the common law and based on precedent and tradition.

The Common Law

Pick up a Supreme Court opinion, in a constitutional case, at random. Look at how the Justices justify the result they reach. Here is a prediction: the text of the Constitution will play, at most, a ceremonial role. Most of the real work will be done by the Court's analysis of its previous decisions. The opinion may begin with a quotation from the text. "The Fourth Amendment provides . . .," the opinion might say. Then, having been dutifully acknowledged, the text bows out. The next line is "We"-meaning the Supreme Court-"have interpreted the Amendment to require . . . ." And there follows a detailed, careful account of the Court's precedents.

Where the precedents leave off, or are unclear or ambiguous, the opinion will make arguments about fairness or good policy: why one result makes more sense than another, why a different ruling would be harmful to some important interest. The original understandings play a role only occasionally, and usually they are makeweights or the Court admits that they are inconclusive. There are exceptions, like Heller, the recent decision about the Second Amendment right to bear arms, where the original understandings take center stage. But cases like that are very rare.

Advocates know what actually moves the Court. Briefs are filled with analysis of the precedents and arguments about which result makes sense as a matter of policy or fairness. Oral argument in the Court works the same way. The text of the Constitution hardly ever gets mentioned. It is the unusual case in which the original understandings get much attention. In constitutional cases, the discussion at oral argument will be about the Court's previous decisions and, often, hypothetical questions designed to test whether a particular interpretation will lead to results that are implausible as a matter of common sense.

The contrast between constitutional law and the interpretation of statutes is particularly revealing. When a case concerns the interpretation of a statute, the briefs, the oral argument, and the opinions will usually focus on the precise words of the statute. But when a case involves the Constitution, the text routinely gets no attention. On a day-to-day basis, American constitutional law is about precedents, and when the precedents leave off it is about common sense notions of fairness and good policy.

What's going on here? Don't we have a Constitution? We do, but if you think the Constitution is just the document that is under glass in the National Archives, you will not begin to understand American constitutional law. Our nation has over two centuries of experience grappling with the fundamental issues-constitutional issues-that arise in a large, complex, diverse, changing society. The lessons we have learned in grappling with those issues only sometimes make their way into the text of the Constitution by way of amendments, and even then the amendments often occur only after the law has already changed.

But those lessons are routinely embodied in the cases that the Supreme Court decides, and also, importantly, in traditions and understandings that have developed outside the courts. Those precedents, traditions, and understandings form an indispensable part of what might be called our small-c constitution: the constitution as it actually operates, in practice.That small-c constitution-along with the written Constitution in the Archives-is our living Constitution.

The Two Traditions

There are, broadly speaking, two competing accounts of how something gets to be law. One account-probably the one that comes most easily to mind-sees law as, essentially, an order from a boss. The "boss" need not be a dictator; it can be a democratically-elected legislature. According to this theory, the law is binding on us because the person or entity who commanded it had the authority to issue a binding command, either, say, because of the divine right of kings, or-the modern version-because of the legitimacy of democratic rule. So if you want to determine what the law is, you examine what the boss, the sovereign, did-the words the sovereign used, evidence of the sovereign's intentions, and so on.

Originalism is a version of this approach. As originalists see it, the Constitution is law because it was ratified by the People, either in the late 1700s or when the various amendments were adopted. Anything the People did not ratify isn't the law. If we want to determine what the Constitution requires, we have to examine what the People did: what words did they adopt, and what did they understand themselves to be doing when they adopted those provisions. And we have to stop there. Once we look beyond the text and the original understandings, we're no longer looking for law; we're doing something else, like reading our own values into the law.

The command theory, though, isn't the only way to think about law. The common law approach is the great competitor of the command theory, in a competition that has gone on for centuries. The early common lawyers saw the common law as a species of custom. It would make no sense to ask who the sovereign was who commanded that a certain custom prevail, or when, precisely, a particular custom became established. Legal systems are now too complex and esoteric to be regarded as society-wide customs. But still, on the common law view, the law can be like a custom in important ways. It can develop over time, not at a single moment; it can be the evolutionary product of many people, in many generations.

Similarly, according to the common law view, the authority of the law comes not from the fact that some entity has the right, democratic or otherwise, to rule. It comes instead from the law's evolutionary origins and its general acceptability to successive generations. For the same reason, according to the common law approach, you cannot determine the content of the law by examining a single authoritative text or the intentions of a single entity. The content of the law is determined by the evolutionary process that produced it. Present-day interpreters may contribute to the evolution-but only by continuing the evolution, not by ignoring what exists and starting anew.

Characteristically the law emerges from this evolutionary process through the development of a body of precedent. A judge who is faced with a difficult issue looks to see how earlier courts decided that issue, or similar issues. The judge starts by assuming that she will do the same thing in the case before her that the earlier court did in similar cases. Sometimes-almost always, in fact-the precedents will be clear, and there will be no room for reasonable disagreement about what the precedents dictate. But sometimes the earlier cases will not dictate a result. The earlier cases may not resemble the present case closely enough. Or there may be earlier cases that point in different directions, suggesting opposite outcomes in the case before the judge. Then the judge has to decide what to do.

At that point-when the precedents are not clear-a variety of technical issues can enter into the picture. But often, when the precedents are not clear, the judge will decide the case before her on the basis of her views about which decision will be more fair or is more in keeping with good social policy. This is a well-established aspect of the common law: there is a legitimate role for judgments about things like fairness and social policy.

It is important not to exaggerate (nor to understate) how large a role these kinds of judgments play in a common law system. In any well-functioning legal system, most potential cases do not even get to court, because the law is so clear that people do not dispute it, and that is true of common law systems, too. Even in the small minority of cases in which the law is disputed, the correct answer will sometimes be clear. And-perhaps the most important point-even when the outcome is not clear, and arguments about fairness or good policy come into play, the precedents will limit the possible outcomes that a judge can reach.

Attitudes, not algorithms

This description might seem to make the common law a vague and open-ended system that leaves too much up for grabs-precisely the kinds of criticisms that people make of the idea of a living constitution. When, exactly, can a case be distinguished from an earlier precedent? What are the rules for deciding between conflicting precedents? What are the rules about overturning precedents?

For the most part, there are no clear, definitive rules in a common law system. The common law is not algorithmic. The better way to think about the common law is that it is governed by a set of attitudes: attitudes of humility and cautious empiricism. These attitudes, taken together, make up a kind of ideology of the common law. It's an ideology that was systematically elaborated by some of the great common law judges of early modern England. The most famous exponent of this ideology was the British statesman Edmund Burke, who wrote in the late eighteenth century. Burke, a classic conservative, wrote about politics and society generally, not specifically about the law. But he took the common law as his model for how society at large should change, and he explained the underpinnings of that view.

The first attitude at the basis of the common law is humility about the power of individual human reason. It is a bad idea to try to resolve a problem on your own, without referring to the collected wisdom of other people who have tried to solve the same problem. That is why it makes sense to follow precedent, especially if the precedents are clear and have been established for a long time. "We are afraid to put men to live and trade each on his own stock of reason," Burke said, "because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations." The accumulated precedents are "the general bank and capital." It is an act of intellectual hubris to think that you know better than that accumulated wisdom.

The second attitude is an inclination to ask "what's worked," instead of "what makes sense in theory." It is a distrust of abstractions when those abstractions call for casting aside arrangements that have been satisfactory in practice, even if the arrangements cannot be fully justified in abstract terms. If a practice or an institution has survived and seems to work well, that is a good reason to preserve it; that practice probably embodies a kind of rough common sense, based in experience, that cannot be captured in theoretical abstractions. To quote Burke again: "The science of government being . . . so practical in itself, and intended for such practical purposes, a matter which requires experience, and even more experience than any person can gain in his whole life, . . . it is with infinite caution that any man ought to venture upon pulling down an edifice, which has answered in any tolerable degree for ages the common purposes of society."

Originalism, the common law, and candor

Originalism's trump card-the principal reason it is taken seriously, despite its manifold and repeatedly-identified weaknesses-is the seeming lack of a plausible opponent. "Living constitutionalism" is too vague, too manipulable.

But if the living Constitution is a common law Constitution, then originalism can no longer claim to be the only game in town. The common law has been around for centuries. In non-constitutional areas like torts, contracts, and property, the common law has limited judges' discretion and guided the behavior of individuals. And while the common law does not always provide crystal-clear answers, it is false to say that a common law system, based on precedent, is endlessly manipulable.

A common law approach is superior to originalism in at least four ways.

The common law approach is more workable. Originalism requires judges and lawyers to be historians. The common law approach requires judges and lawyers to be-judges and lawyers. Reasoning from precedent, with occasional resort to basic notions of fairness and policy, is what judges and lawyers do. They have done it for a long time in the non-constitutional areas that are governed by the common law.
The common law approach is more justifiable. The common law ideology gives a plausible explanation for why we should follow precedent. One might disagree, to a greater or lesser extent, with that ideology. Perhaps abstract reason is better than Burke allows; perhaps we should be more willing to make changes based on our theoretical constructions. Sometimes the past is not a storehouse of wisdom; it might be the product of sheer happenstance, or, worse, accumulated injustice. But there is unquestionably something to the Burkean arguments. And to the extent those arguments are exaggerated, the common law approach has enough flexibility to allow a greater role for abstract ideas of fairness and policy and a smaller role for precedent.

Originalists, by contrast, do not have an answer to Thomas Jefferson's famous question: why should we allow people who lived long ago, in a different world, to decide fundamental questions about our government and society today? Originalists do not draw on the accumulated wisdom of previous generations in the way that the common law does. For an originalist, the command was issued when a provision became part of the Constitution, and our unequivocal obligation is to follow that command. But why? It is one thing to be commanded by a legislature we elected last year. It is quite another to be commanded by people who assembled in the late eighteenth century.

The common law approach is what we actually do. Originalists' America-in which states can segregate schools, the federal government can discriminate against anybody, any government can discriminate against women, state legislatures can be malapportioned, states needn't comply with most of the Bill of Rights, and Social Security is unconstitutional-doesn't look much like the country we inhabit. In controversial areas at least, the governing principles of constitutional law are the product of precedents, not of the text or the original understandings. And in the actual practice of constitutional law, precedents and arguments about fairness and policy are dominant. The common law approach is more candid. This is an important and easily underrated virtue of the common law approach, especially compared to originalism. The common law approach explicitly envisions that judges will be influenced by their own views about fairness and social policy. Common law judges have operated that way for centuries. This doesn't mean that judges can do what they want. Judgments of that kind can operate only in a limited area-the area left open by precedent, or in the circumstances in which it is appropriate to overrule a precedent. But because it is legitimate to make judgments of fairness and policy, in a common law system those judgments can be openly avowed and defended, and therefore can be openly criticized.

Originalism is different. An originalist claims to be following orders. An originalist cannot be influenced by his or her own judgments about fairness or social policy-to allow that kind of influence is, for an originalist, a lawless act of usurpation. An originalist has to insist that she is just enforcing the original understanding of the Second Amendment, or the Free Exercise Clause of the First Amendment, and that her own views about gun control or religious liberty have nothing whatever to do with her decision.

That is an invitation to be disingenuous. Originalism, as applied to the controversial provisions of our Constitution, is shot through with indeterminacy-resulting from, among other things, the problems of ascertaining the original understandings and of applying those understandings to the modern world once they've been ascertained. In the face of that indeterminacy, it will be difficult for any judge to sideline his or her strongly held views about the underlying issue. But originalism forbids the judge from putting those views on the table and openly defending them. Instead, the judge's views have to be attributed to the Framers, and the debate has to proceed in pretend-historical terms, instead of in terms of what is, more than likely, actually determining the outcome. Having said all that, though, the proof is in the pudding, and the common law constitution cannot be effectively defended until we see it in operation. But for that, you'll have to read the book.

David Strauss's book, The Living Constitution, was published in 2010 by Oxford University Press, and this excerpt has been printed with their permission. Strauss is the Gerald A. Ratner Distinguished Service Professor of Law.

- What is originalism?
- What is Living Constitution? Living Text?
- What are David Strauss’ main ideas? Do you agree? Why or why not?
- What are Justice Kavanaugh’s main ideas about constitutional interpretation? Do you agree? Why or why not?
- What is Richard Posner’s main idea? Do you agree? Why or why not?
- How do judges interpret the Constitution in the United States? Do judges make law? Discuss examples that Posner mentions.
- Does the text (Constitution or statute) impose a limit to interpretation? What is free interpretation? Can you find some examples from the Canadian Supreme Court?
- How do judges interpret laws (statutes)? Is there a difference between interpreting laws and the Constitution?
- Is there a difference between the work of Supreme Court judges and other judges?
- Do a web search about the debate around Breyer’s book Active Liberty and Scalia’s book A Matter of Interpretation.
- What is the main thesis of Posner’s book “How Judges Think”? Do a web search.

Class 10 Feb. 7

Analyze these popular sayings. Explain their meaning. Find examples of their application in judicial cases, legal rules, legal publications, etc.

1. A bird in the hand is worth two in the bush
2. An Englishman's home is his castle
3. Beggars can't be choosers
4. Birds of a feather flock together

5. Kill two birds with one stone.
6. A stitch in time saves nine
7. A leopard never changes its spots.
8. An eye for an eye, a tooth for a tooth.
9. A chain is only as strong as its weakest link.
10. The early bird catches the worm.

Class 11 Feb. 12: Intellectual property

Read the article and discuss the following questions.

1) What is the article about?
2) What does hakuna matata mean? What is its origin?
3) What are the main principles and rules of trademark in Canada and the US?
4) What does trademarking the phrase hakuna matata mean? What are some concrete legal implications of trademarking this phrase?
5) What do you think about Disney’s trademarking of hakuna matata?
6) What is cultural appropriation? Give examples.
7) Is trademarking hakuna matata cultural appropriation? Why or why not?
8) Can this T-shirt be an infringement of Disney’s trademark? Why or why not?

Trademarking ‘hakuna matata’ is a tipping point in Disney's portrayal of Africa

Namwali Serpell

Hollywood has long used stereotypical tropes in depicting African culture – but this Lion King move goes too far

Fri 21 Dec 2018 12.08 GMTLast modified on Fri 21 Dec 2018 18.07 GMT

Heckles and eyebrows are rising at the news that Disney Corporation has trademarked the Swahili tagline "*hakuna matata*" from the film The Lion King. First popularised in 1982 in the song Jambo Bwana from the Kenyan band Them Mushrooms, then Disneyfied a decade later, the phrase roughly translates to "no worries". Though Disney applied for the trademark when the movie came out in 1994, a petition was launched asking us to "say no to Disney or any corporations/individuals looking to trademark languages, terms or phrases they didn't invent". It has already received more than 120,000 signatures.

And the resistance is coming from Africa itself. Shelton Mpala, who started the petition, told the BBC: "Growing up in Zimbabwe, I always had an understanding that a culture's language was its richness." Mpala doesn't speak Swahili himself – the language is spoken in Tanzania, Kenya, Uganda, Rwanda, Burundi, Mozambique, and the Democratic Republic of the Congo. But the diaspora has had enough. The post-colonial empire is striking back.

There is backlash to the blacklash, of course. This is just PC nonsense, it's just a song, just an animal movie. But this is precisely the problem with these cultural products: they paint this "Africa" as an imaginary space but nevertheless use broad, stereotypical tropes about the continent (animals and warrior tribes and mangled accents). This inaccuracy is longstanding and pervasive in Hollywood, from Coming to America to Hotel Rwanda. Why is this the tipping point?

Disney is too big to ignore, for one thing. But there is a patent absurdity to the idea that *hakuna matata* would be subject to trademark. It's like copyrighting "goodbye" or "hang loose".

Disney's move feels so rampantly greedy, especially given that the corporation is about to capitalise again via a "live action" Lion King remake. Should they ever be allowed to put money or claims of ownership on to cultural products? As my sister texted me: "OMG American corporations and their efforts to own sh*t that's not even ownable." She and I – mixed-race Zambian migrants to the US – have been chatting a lot about cultural appropriation lately. We're torn. We both tend towards cultural mixing, be it in fashion or in literature. Creolisation makes for the best art, and we all know imitation is the sincerest form of flattery. But the thing is: money matters and so does power.

The film Black Panther has a whole interlude about the appropriation – or rather expropriation – of African cultural products. The anti-hero, Killmonger, stands in a British museum examining a Wakandan pickaxe inside a glass case. It could be a tool or a weapon or a work of art. "How do you think your ancestors got these? You think they paid a full price for it? Or did they take them like they took everything else?" he accosts a curator, then promptly breaks the glass to steal it – or restore it to its rightful owner, that is. This scene has now become a fitting meme to accompany the recent calls for the

European museums to return cultural artworks and artefacts to China, to Easter Island, and to African countries such as Senegal.

How ironic then that Black Panther was recently issued with a lawsuit for allegedly stealing the work of a Liberian-British artist for the set design in the film soundtrack's video (Kendrick Lamar's All the Stars). The Lion King wasn't woke enough in 1994 to theorise its use of African culture, but the new remake has sharpened the stakes of the debate. Just as trademarking *hakuna matata* feels like a parody of Disney's voracity, rendering an animation of animals into photographic realism raises too many questions about what's real. New objections have arisen: why would Beyoncé's black Texan voice be coming from Nala's maw? (But why is it a human voice at all?) I'll be honest. I'm a big fan of Disney films – I have The Little Mermaid and Aladdin practically memorised – but the first and second times I tried to watch The Lion King I fell asleep during the very opening scene.

I finally made it through the film a few weeks ago, but I felt bored and annoyed. This is a picture of Africa I've been resisting my whole life: that we are just one giant safari; that we sing and dance and cavort all day ("no worries!"); that we are only credible as beasts. Not only that, the Lion King can't decide whether lion rules or human rules apply; whether love comes in polygamous prides or monogamous brides; whether kings come to power through bloodlines or bloodshed. The best kind of multicultural art immerses itself in the cultures it's mixing, even the social practices of lions. Cultural appropriation isn't just about freedom within an artistic marketplace: it has to be good in both senses. That means giving the art and the cultures in question figurative and literal credit. *Hakuna matata!* but maybe hire some more Kenyans for your multimillion-dollar film production?

• Namwali Serpell is a writer and associate professor of English at the University of California, Berkeley

Class 12 Feb. 14 Law in the news

Do an online search of news dealing with the legal method and/or Philosophy of Law not discussed before in class. Summarize the articles and critically analyze them. Present them to the whole class.

Classes 13 & 14 Feb 26 & 28

TAKE-HOME TEST

Class 15 March 5

- Prepare a presentation about trial by media and the danger of uncorroborated allegations. Use real examples. Some suggested examples: Amanda Knox, Scott Peterson, David Sorensen, McMartin preschool trial, Robert Thompson and Jon Venables, Justine Sacco.
- Prepare a presentation about witch hunts. Use real examples both historical and contemporary.

How "Trial by Media" Can Undermine the Courtroom

New research explores how media bias impacts the right to a fair trial.
Posted Aug 22, 2018

When security guard Richard Jewell discovered a suspicious-looking backpack as part of his routine search of the Centennial Olympic Park grounds prior to the 1996 Summer Olympics in Atlanta, his quick thinking helped save countless lives. After notifying police, Jewell helped evacuate the park grounds before the backpack, which contained a powerful pipe bomb, could explode. Despite the efforts of Jewell and other guards unfortunately, the bomb still detonated with one fatality and over one hundred people injured. Still, the death count was far lower than it might have otherwise been. But despite being initially hailed as a hero, Richard Jewell found himself being subjected to "trial by media" after the Atlanta Journal-Constitution reported that he was a "person of interest" in the bombing. While the FBI investigation went nowhere, Jewell continued to be roasted by the media and even became the butt of repeated jokes by comedians such as Jay Leno who referred to him as the "Una-doofus." Jewell was eventually vindicated—and he later sued numerous news agencies for their biased coverage (most of these cases were settled for unspecified amounts).

While cases of "trial by media" are hardly uncommon, especially after high-profile crimes, the long-term damage resulting from this kind of publicity is often impossible to measure. But how does this kind of media exposure affect the outcome of criminal trials? Even though the Sixth Amendment of the U.S. Constitution, along with similar laws around the world, are meant to guarantee the right of all defendants to a "fair and impartial jury," ensuring this isn't always possible. Not only are jurors expected to base their decision solely on evidence presented at trial, but the principle of impartiality means that they cannot have *any* prior opinions about the case they're deciding, including whether or not the defendant is guilty.

But, as previous research has demonstrated, news stories about recent crimes are typically skewed and one-sided, often assuming that the defendant is already guilty. To make matters worse, these stories frequently include prejudicial information that is rarely allowed during the actual criminal trial. This kind of evidence can include the accused's past criminal history (whether or not it's relevant to the case), sensationalized descriptions of the crime, and inflammatory statements by arresting officers or prosecutors. Add in the often emotional interviews with relatives of the deceased—most of whom openly state their belief that the accused is guilty—and it can seem like virtually everyone with an interest in the case has their minds made up before the jury is even selected.

Part of the reason this seemingly one-sided media coverage occurs is that most of the evidence presented comes from the police or prosecutors. Not only are defense attorneys reluctant to divulge important information outside of the courtroom, they are also well aware that public opinion is against them.

But what impact does this pre-trial publicity have on the actual jurors? Not surprisingly, research studies have consistently shown that potential jurors often have extremely negative attitudes toward the accused. Along with being more likely to believe that the accused is guilty before the trial even begins, they are also more likely to mistrust any evidence raised by the defense. As a result, they are much more likely to hand down a guilty verdict or recommend against mercy. But this media effect is especially important in capital cases, in which the accused is facing the death penalty. Not only are the stakes much higher for the accused than in regular criminal trials, but the publicity surrounding the case is typically much more heated and emotional.

Even though jurors in capital murder trials are supposed to be as objective as possible, this may be impossible when media coverage consistently describes the accused in the case as "evil" or a "monster" (as is sometimes the case). And, since the pretrial jury selection process usually eliminates anyone unwilling to hand down a capital verdict, the jurors who are selected are going to be much more likely to be convinced of the accused's guilt—which may mean that many jurors are ready to hand down a death sentence even before hearing any evidence.

In theory at least, judges have a wide range of solutions at their disposal that can be used to reduce this kind of bias. This includes applying for a change of venue to another location where jurors are less likely to be biased, postponing the trial until publicity has died down, or extended voir dire (questioning potential jurors more thoroughly about their personal biases). Unfortunately, these options are often hard to use, especially in emotionally charged cases where the public is determined to see justice done. And, considering that capital cases are almost always going to receive enormous amounts of negative publicity, this makes the problem of bias especially difficult to overcome.

All of which brings us to a new study published in the journal Psychology, Public Policy, and Law. Shirin Bakshay and Craig Haney of the University of California, Santa Cruz, examined the impact of pre-trial publicity in a series of capital cases in California. In particular, they focused on twenty cases that took place between 1979 and 2005 in which a change of venue application was made due to concerns over potential bias. In all, the authors examined over 1,381 news articles about the cases (92 articles per case). These articles included news stories, editorials, and obituaries as well as articles published exclusively online.

What they found was that newspaper coverage of the capital crimes remained remarkably consistent over the 26-year period of the study. Essentially, 75 percent or more of the articles studied were negative in tone including sensational descriptions of the crime, negative character statements (such as "cunning sociopath," "walking time bomb," "frightening and lengthy record," "feared by his own family", etc.). The articles also included information that wouldn't be allowed as evidence in the actual trial (i.e., prior criminal history, alleged confessions, and explicit assumptions that the defendant was guilty).

By contrast, only 19 percent of the articles attempted to balance their coverage or present evidence that might favour the defendant. Considering that these were all capital cases, only two percent of all articles argued against the use of the death penalty and usually only in very exceptional cases (such as the defendant being mentally ill, etc.). As for sources quoted in the articles, police officers and/or prosecutors were six times more likely to be cited than defense counsel or other sources favouring the defendant. Articles also devoted considerable attention to "community reaction" to the crime, including how outraged people were and how afraid of crime the offense made them.

As for the actual impact all of this negative publicity had on how each case played out, the study's results seem clear. In virtually all cases featuring extremely negative publicity towards the defendant, requests by defense counsel to have the trial venue changed were denied. And as for the actual verdict in the cases, only one of the cases in which a change of venue request was denied was acquitted. For the rest, the majority received the death sentence—with only a third receiving life sentence instead.

While Bakshay and Haney admit to some significant limitations of their study, including the small number of cases studied, their results still highlight the impact that pre-trial publicity can have on serious criminal cases. Since virtually everyone is going to base their opinion on a case from media coverage, no matter how biased, this means that "trial by media" is often going to affect the way jurors will vote. Given that almost all venue change requests examined in this study were rejected, this may imply that judges can be affected by media bias as well.

And this study doesn't even look at the role that social media is starting to play in how trials are conducted. Twitter, Facebook, and other popular platforms are already being used to spread information (and misinformation) that could seriously bias a jury—though there is still a surprising lack of research in this area.

While sensational coverage of high-profile crimes will continue to attract readers, it is important to recognize how this can undermine the concept of a fair trial. It may be comforting to assume that anyone so charged must automatically be guilty, but this is often not the case in reality. As numerous stories of people railroaded into prison solely on the basis of circumstantial evidence and media pressure have already shown, "trial by media" can be wrong. It may be more important than ever to find a way to balance the public's "right to know" with the basic rights of defendants to a fair trial.

EFFECT OF TRIAL BY MEDIA BEFORE COURTS

Media is regarded as one of the pillars of democracy. Media has wide ranging roles in the society. Media plays a vital role in molding the opinion of the society and it is capable of changing the whole viewpoint through which people perceive various events. The media can be commended for starting a trend where the media plays an active role in bringing the accused to hook.

Freedom of media is the freedom of people as they should be informed of public matters. It is thus needless to emphasis that a free and a healthy press is indispensable to the functioning of democracy. In a democratic set up there has to be active participation of people in all affairs of their community and the state. It is their right to be kept informed about the current political social, economic and cultural life as well as the burning topics and important issues of the day in order to enable them to consider forming broad opinion in which they are being managed, tackled and administered by the government and their functionaries. To achieve this objective people need a clear and truthful account of events, so that they may form their own opinion and offer their own comments and viewpoints on such matters and issues and select their future course of action. The right to freedom of speech and expression in contained in article 19 of the constitution. However, the freedom is not absolute as it is bound by the sub clause (2) of the same article. However, the right it freedom and speech and expression does not embrace the freedom to commit contempt of court.

In India, trial by media has assumed significant proportions. Some famous criminal cases that would have gone unpunished but for the intervention of media are Priyadarshini Mattoo case, Jessica Lal case, Nitish Katara murder case and Bijal Joshi rape case.

The media however drew criticism in the reporting of murder of Aarushi Talwar, when it preempted the court and reported that her own father Dr. Rajesh Talwar, and possibly her mother Nupur Talwar were involved in her murder. The media has again come in focus in its role in Arushi Murder case. The concept of media trial is not a new concept. The role of media was debated in the Priyadarshini Mattoo case, Jessica Lal Murder Case and likewise many other high profile cases. There have been numerous instances in which media has been accused of conducting the trial of the accused and passing the ‘verdict’ even before the court passes its judgment. Trial is essentially a process to be carried out by the courts. The trial by media is definitely an undue interference in the process of justice delivery. Before delving into the issue of justifiability of media trial it would be pertinent to first try to define what actually the ‘trial by media’ means. Trial is a word which is associated with the process of justice. It is the essential component on any judicial system that the accused should receive a fair trial.

Media has now reincarnated itself into a ‘public court’ (Janta Adalat) and has started interfering into court proceedings. It completely overlooks the vital gap between an accused and a convict keeping at stake the golden principles of ‘presumption of innocence until proven guilty’ and ‘guilt beyond reasonable doubt’. Now, what we observe is media trial where the media itself does a separate investigation, builds a public opinion against the accused even before the court takes cognizance of the case. By this way, it prejudices the public and sometimes even judges and as a result the accused, that should be assumed innocent, is presumed as a criminal leaving all his rights and liberty unrepressed. If excessive publicity in the media about a suspect or an accused before trial prejudices a fair trial or results in characterizing him as a person who had indeed committed the crime, it amounts to undue interference with the “administration of justice”, calling for proceedings for contempt of court against the media. Unfortunately, rules designed to regulate journalistic conduct are inadequate to prevent the encroachment of civil rights.

Trial By Media Is Contempt Of Court And Needs To Be Punished [i]
The Contempt of Court Act defines contempt by identifying it as civil and criminal. Criminal contempt has further been divided into three types:

Scandalizing

Prejudicing trial, and

Hindering the administration of justice.

Prejudice or interference with the judicial process:
This provision owes its origin to the principle of natural justice; ‘every accused has a right to a fair trial’ clubbed with the principle that ‘Justice may not only be done it must also seem to be done’. There are multiple ways in which attempts are made to prejudice trial. If such cases are allowed to be successful will be that the persons will be convicted of offences which they have not committed. Contempt of court has been introduced in order to prevent such unjust and unfair trials. No publication, which is calculated to poison the minds of jurors, intimidate witnesses or parties or to create an atmosphere in which the administration of justice would be difficult or impossible, amounts to contempt. Commenting on the pending cases or abuse of party may amount to contempt only when a case is triable by a judge. No editor has the right to assume the role of an investigator to try to prejudice the court against any person.

The law as to interference with the due course of justice has been well stated by the chief justice Gopal Rao Ekkbote of Andhra Pradesh High Court in the case of Y.V. Hanumantha Rao v. K.R. Pattabhiram and Anr. [ii] , where in it was observed by the learned judge that:

“ …… When litigation is pending before a Court, no one shall comment on it in such a way there is a real and substantial danger of prejudice to the trial of the action, as for instance by influence on the Judge, the witnesses or by prejudicing mankind in general against a party to the cause. Even if the person making the comment honestly believes it to be true, still it is a contempt of Court if he prejudices the truth before it is ascertained in the proceedings. To this general rule of fair trial one may add a further rule and that is that none shall, by misrepresentation or otherwise, bring unfair pressure to bear on one of the parties to a cause so as to force him to drop his complaint or defense. It is always regarded as of the first importance that the law which we have just stated should be maintained in its full integrity. But in so stating the law we must bear in mind that there must appear to be ‘a real and substantial danger of prejudice’.”

Fair trial
Parties have a constitutional right to have a fair trial in the court of law, by an impartial tribunal, uninfluenced by newspaper dictation or popular Glamour. What would happen to this right if the press may use such a language as to influence and control the judicial process? It is to be borne in mind that the democracy demands fair play and transparency, if these are curtailed on flimsiest of grounds then the very concept of democracy is at stake.

The concept of ‘denial of a fair trial’ has been coined by authoritative judicial pronouncements as a safeguard in a criminal trial. But what does the concept ‘denial of fair trial’ actually mean:

The conclusions of the judicial decisions can be summed as follows:

The obstruction or interference in the administration of justice Vis a Vis a person facing trial.

The prejudicial publication affecting public which in term affect the accused amount to denial of fair trial.

Prejudicial publication affecting the mind of the judge and Suggesting the court as to in what manner the case should be preceded.

The publisher of an offending article cannot take shelter behind the plea that the trial to which the article relates to isn’t then in progress nor immediately to be begun but it has to occur at a future time. Our law of contempt however does not prevent comments before the litigation is started nor after it has ended. In re P.C.Sen [iii] Justice shah who spoke for the court succinctly put the law as follows:

“The law relating to contempt of Court is well settled. Any act done or writing published which is calculated to bring a Court or a Judge into contempt, or to lower his authority, or to interfere with the due course of justice or the lawful process of the Court, is a contempt of Court : R. v. Gray [iv] . Contempt by speech or writing may be by scandalizing the Court itself, or by abusing parties to actions, or by prejudicing mankind in favor of or against a party before the cause is heard. It is incumbent upon Courts of justice to preserve their proceedings from being misrepresented, for prejudicing the minds of the public against persons concerned as parties in causes before the cause is finally heard has pernicious consequences. Speeches or writings misrepresenting the proceedings of the Court or prejudicing the public for or against a party or involving reflections on parties to a proceeding amount to contempt. To make a speech tending to influence the result of a pending trial, whether civil or criminal is a grave contempt. Comments on pending proceedings, if emanating from the parties or their lawyers, are generally a more serious contempt than those coming from independent sources. The question in all cases of comment on pending proceedings is not whether the publication does interfere, but whether it tends to interfere, with the due course of justice. The question is not so much of the intention of the contemner as whether it is calculated to interfere with the administration of justice.”

The Indian courts have emerged as the most powerful courts in the world with virtually no accountability. But every institution even the courts can go wrong. Every institution including the judiciary has its share of black sheep and corrupt judges. The judiciary are peopled by judges who are human, and being human they are occasionally motivated by considerations other than an objective view of law and justice. It would be foolhardy to contend that none of them, at least some of them, at least some times are motivated by considerations of their own personal ideology, affiliations, predilections, biases and indeed even by nepotistic and corrupt considerations.

In stifling all criticism by the threatened exercise of the power of contempt, the issue in a democratic society is ultimately one of the accountability of the judiciary itself. In order to stifle free speech and comments on the court, even an occasional exercise of this power is enough to deter most persons from saying anything that might annoy their Lordships. Perhaps the most important reason for the lack of reforms in the judiciary is the reluctance of the Press to write about and discuss the state of affairs within it for fear of contempt.

In Shalab Kumar Gupta and Ors. v. B.K. Sen and Anr [v] . It was held by the Supreme Court that:

"No doubt it would be mischievous for a newspaper to systematically conduct an independent investigation into a crime for which a man has been arrested and to publish the results of that investigation. This is because trial by newspapers, when a trial by one of the regular tribunals of the country is going on, must be prevented. The basis for this view is that such action on the part of a newspaper tends to interfere with the course of justice whether the investigation tends to prejudice the accused or the prosecution. There is no comparison between a trial by a newspaper and what has happened in this case."

The Ins And Outs Of Media Trial- English View [vi]

High-profile civil litigation is not just decided in the courts; it also is decided in the court of public opinion. Courts and legal commentators are increasingly recognizing that the media, through the way it covers litigation, has a very real impact on the resolution of individual lawsuits. Common sense dictates that it is within a lawyer's role, therefore, to work with reporters on their stories to ensure accurate reporting. Many defense attorneys in high-profile cases, though, flinch at the idea of saying anything to reporters out of concern that such conversations could be misconstrued as an attempt to affect the jury pool or persuade a judge or jury. For this reason, rules and beliefs have developed as to how lawyers may appropriately engage the media to mitigate its impact on their clients.

Pro-Plaintiff Media Bias

Litigation involving well-known companies or individuals always has grabbed the attention of the news media, especially when it involves sensational charges. The magnitude of the coverage and the filter through which the media reports on litigation can create a "clear plaintiff bias in civil cases." While small companies can find themselves under the media spotlight in a particularly novel or "bet the company" suit, the media tends to focus on allegations against established and respected corporate defendants. These larger companies tend to have household names, and allegations against them can make good "copy" – even if the allegations are seemingly spurious, commonplace or unproven. The same is true for litigation involving celebrity defendants

In covering litigation, particularly corporate litigation, the media has an inherent bias that favors plaintiffs. When charges are made public, the media automatically reverts to the basic elements of storytelling and casts the lawsuit in traditional protagonist-antagonist terms. The defendant, simply by being on the wrong side of the "v," becomes the "villain" to the plaintiff's "victim," whether or not the actual charges have any factual basis or legal merit. Reports frequently lead with the plaintiff's injury or allegations and only include the corporate position as a response. These stories rarely are counterbalanced by positive stories about the defending company. Because companies would rather not draw attention to any litigation, they usually do not seek publicity for their victories. Even if they did, reporters often do not see corporate litigation victories as particularly newsworthy. Goliath is supposed to beat David; that is not news.

The Nature of Bias in High-Publicity Cases

A larger issue is the complex nature of juror bias and how that bias predisposes a juror toward one side in a case. It is no secret that we all have biases. The difficulty comes from understanding how those biases may ultimately affect the viewing of evidence and the deliberations in a case. Judges are also Human Beings they too care about the reputation and promotion. That time is gone when judges are not considered as social because it will harm their reputation. Now days Judges are social and being an human being they care about their promotions and remunerations. In high profile cases they tend to be bias and give verdict as per as media reports just to be in lime light . this will surely help them to get a promotion before other competitive judges. Media is so much into our daily life's that judges too can't stay away from it and they usually tend to give verdict as per media reports.

The Additional Pressure on Judges in High-Publicity Trials [vii]
The media create a series of unconscious pressures on a juror in a high-profile trial. Jurors know that they are being watched by the world. They are not only making a decision for themselves, but they are making a statement for their family, co-workers, community, and society as a whole. This elevates their verdict to a level beyond the evidence. In interviewing jurors after the trial of Hollywood madam Heidi Fleiss, many jurors expressed how they hoped that the police would use their resources more wisely than to prosecute victimless crimes. When talking about the testimony of Dr. Irwin Golden, who was the coroner in the Simpson case, juror Marsha Rubin-Jackson said:

But it comes to the point in this particular case where Dr. Golden has made thirty errors. Now, you can't tell me this man has not made errors on previous autopsies . . . . But this just happened to be a case that came to the court as a 'high-profile' case and the problems were brought to everyone's attention

Media as a Watch Dog
Media do play a role as Watch dog and bring the facts as it is there. It act as mirror for the society. It brings only what is happening around and make the legislatures and government answerable for the act of them. In cases media only brings the facts coming from investigating agencies and put it in front of the society, so that society can be aware of the facts happening around them. They have a right to know and express their views on that particular case and media just act as a platform to bring the voice of the society

Conclusion
Though media act as a watchdog and act as a platform to bring people voice to the notice of society and legislatures. But now days media is so much sensationalized and they just do for their salaries and TRP's. there are few reporters those showing only those news for what they have been paid by political parties. From the above account it becomes clear that the media had a more negative influence rather than a positive effect (except for a few exceptions here and there). The media has to be properly regulated by the courts. The media cannot be granted a free hand in the court proceedings as they are not some sporting event..

The most suitable way to regulate the media will be to exercise the contempt jurisdiction of the court to punish those who violate the basic code of conduct. The use of contempt powers against the media channels and newspapers by courts have been approved by the Supreme

Court in a number of cases as has been pointed out earlier. The media cannot be allowed freedom of speech and expression to an extent as to prejudice the trial itself. Certain cases are so hyped for a day or two, so much so that you switch to any channel, they all will be flashing the same story but then when the heat is over there is no following of the case. The news then jostles for space with other stories that are carrying the heat then. Media just sensationalized the case for few days and leave it as they find other “masala” news irrecpective of how much importance earlier news was.

Trial is very much effected by the Media sensation. Judges while making decision start considering Media criticism if they goes opposite from the view of the Media that’s why in mostly high profile cases verdict passes by media becomes the final verdict in trial courts.

LawTeacher. November 2013. EFFECT OF TRIAL BY MEDIA BEFORE COURTS. [online]. Available from: https://www.lawteacher.net/free-law-essays/commercial-law/effect-of-trial-by-media-before-courts-law-essay.php?vref=1 [Accessed 3 March 2019].

Class 16 March 7

Olympics: CAS steps in to stop players heading to Beijing

· Werder and Schalke opt to release Diego and Rafinha
· Fifa 'disappointed' by the ruling
Charlie Nutbrown*and agencies*

Wed 6 Aug 2008 14.13 BSTFirst published on Wed 6 Aug 2008 14.13 BST

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Lionel Messi has been recalled to Barcelona and will not be playing for Argentina in the Olympics. Photograph: Donald Miralle/Argentina

The Court of Arbitration for Sport has ruled that European clubs have the right to prevent their players from travelling to the Beijing Olympics. Barcelona, Schalke 04 and Werder Bremen disputed Fifa's position that it was "mandatory" to release all players aged 23 or under. However, CAS found in favour of the clubs, deciding Fifa's rule was not enforcable as the Olympics is not a featured event on the Fifa official calender.

The governing body has called the decision "disappointing" and appealed to clubs to allow their players to compete in the tournament. In response, German sides Schalke and Werder Bremen announced that they would allow their Brazilian players, Rafinha and Diego respectively, to feature for their countries. Barcelona have failed to make a similar concession for Argentina's Lionel Messi.

"The Court of Arbitration for Sport (CAS) has upheld the appeals filed by Schalke 04, Werder Bremen and Barcelona against the decision issued on July 30 2008 by the single judge of Fifa's players' status committee that consequently has been set aside in its entirety," said CAS in a statement.

CAS decided that although it was an established custom for players to be allowed to travel to the Olympics, the tradition had no legal foundation and could not be enforced against the clubs' wishes.

Consequently, Barcelona, Schalke and Werder Bremen are now legally entitled to recall their players. No other players will necessarily be affected by the ruling as they have joined their Olympic squads with the permission of their clubs. However, other top clubs including Liverpool, who were unhappy about releasing Ryan Babel to the Netherlands, could demand their players return from Beijing.

"Theoretically the clubs could ask their players to go back to Europe because they would be entitled to do so," the CAS secretary-general Matthieu Reeb confirmed. "And if the players do not come back there could be a case of a breach of contract."

The Fifa president Sepp Blatter expressed his organisation's displeasure at the ruling. "Fifa is surprised and disappointed by this decision, but we respect it," Blatter said. "Nevertheless, I appeal to the clubs: let your players take part in the Olympic Games. It would be an act of solidarity in perfect harmony with the Olympic spirit. It would be wonderful for the players, for the fans and for the game itself."

Schalke and Werder Bremen appear to have been swayed by this appeal to their Olympic spirit for, despite being amongst the instigators of a court case which found in their favour, they have decided to forgo their new-found rights and release Rafinha and Diego to play in the tournament.

"We will release Rafinha to play at the Olympic Games if the Brazilian Football Association quickly create the conditions for his involvement", said the Schalke general manager Andreas Muller. Werder's Klaus Allofs issued a statement expressing the same sentiments. The conditions the German clubs are seeking include the provision of adequate insurance against injury. The clubs are in discussions with the Brazilian

Football Federation in an effort to agree mutually acceptable arrangements.

Barcelona are yet to relent and appear intent on recalling Lionel Messi from the Argentinian squad. Argentina's coach Sergio Batista, however, has insisted that Messi wants to play for his country at the Olympics and that, despite the ruling, the coach will select the 21-year-old for the tournament's opening fixture.

"For sure he will be on the start-list for tomorrow from the beginning and I am sure he can be here with us for the rest of the competition," Batista said. "The player will be here and will remain with the team. We have the hope that he will remain with the team for the entire tournament. He told us he wants to stay. He's relaxed and asks the people at Barcelona to understand his situation. The club is relaxed and I was figuring to put Messi in the starting 11."

1) What is CAS?
2) What is this case about? What happened before the case reached CAS?
3) What happened after the CAS decision?
4) Why did the case was appealed to CAS?
5) Find and discuss other CAS cases.

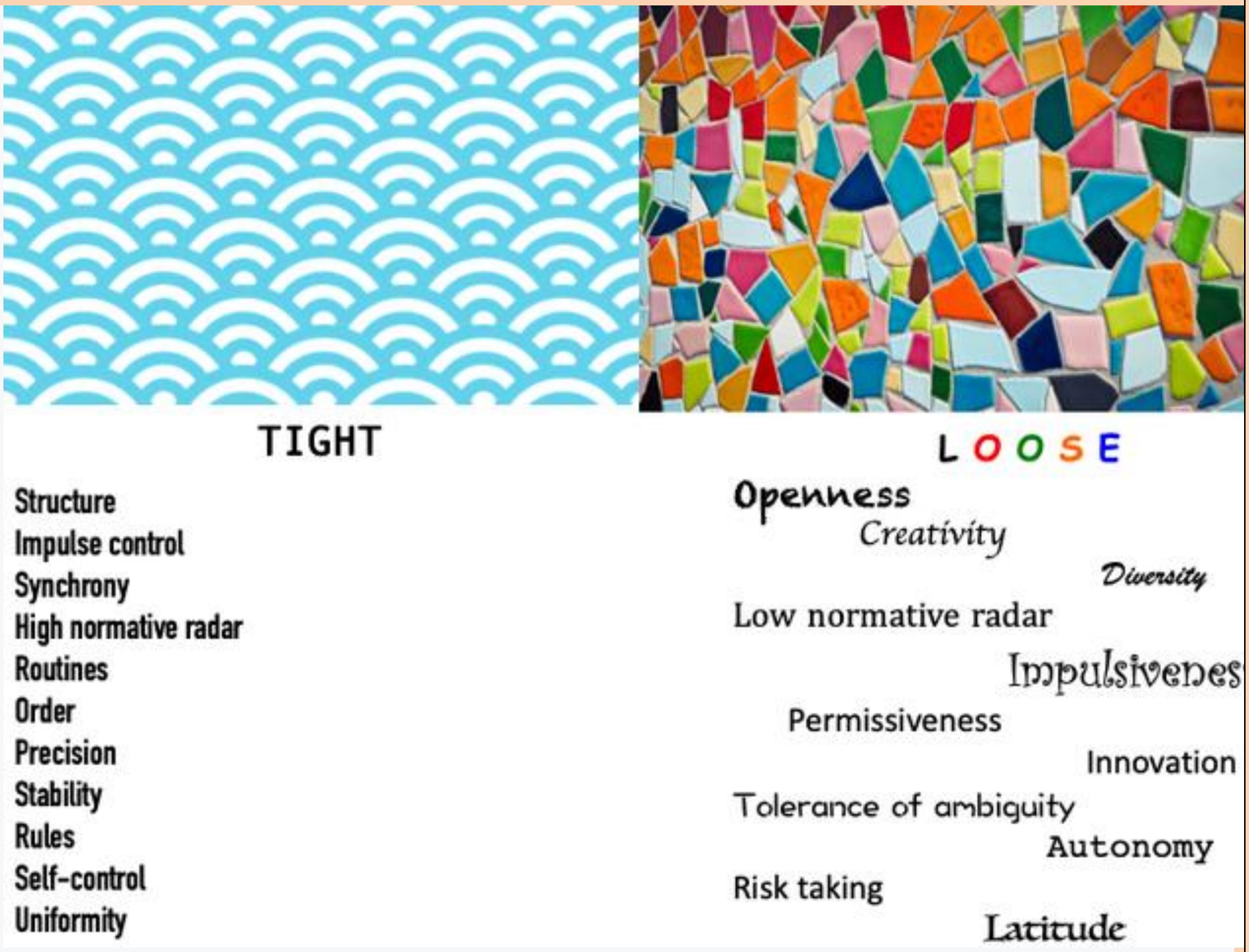
A Big-Picture Look at Social Rules

Research on how people make and break rules can help us understand each other.

Posted Dec 27, 2018

Imagine zooming in from space, close enough to catch a glimpse of earthlings moving about their days. What would you see? Humans driving their cars on roads (sometimes on the left, sometimes on the right); humans walking on gray pavements and leafy trails (sometimes alone, sometimes in groups, sometimes with animals); you'd see them laughing and crying, kissing and hugging; eating – with forks, sticks and hands; shaking hands, holding hands, waving hands; sleeping on beds and floors; celebrating life and grieving death; surviving, achieving, learning, fighting, working and loving.

What would be harder to see is the patchwork of rules that supports this day-to-day movement. We follow these rules on what cultural psychologist Michele Gelfand calls a *normative autopilot* – without giving them much thought. It's when we leave our native lands (or zoom in from outer space) that we suddenly become aware that not only the rules themselves are different around the world, but so is the *strength* with which they are followed. Some cultures are tight. Their patchwork is woven in orderly and uniform stitches that don't leave much space for rule-breaking. Some cultures are loose, with more permissive seams that allow for less strict rule-following.



Source: Michele Gelfand/Marianna Pogosyan

I recently spoke with Gelfand, who in her book *Rule Makers, Rule Breakers* makes a compelling case about the significance of the tight-loose dimension and how recognizing our cultural programming can help us understand each other better – across nations, organizations and families.

What insight has surprised you from your cross-cultural research?

I find it fascinating that the same principle can help explain reality at different levels. In my research, I keep seeing similar patterns of antecedents and consequences of tight-loose at national, organizational, and social class levels. I have even thought about the rising populism in politics and my own parenting style in terms of tight-loose. It helps to reduce the complexity of the world and it's rewarding to see reality differently through a simple lens.

Why is the tight-loose dimension so important in defining cultural differences?

All human groups have rules or unwritten standards of behavior. What's so fascinating about rules is how much we take them for granted. Rules help us predict each other and to coordinate. We are constantly following them without recognizing that we're following rules. For example, we are both wearing clothes to this interview. We obey stop lights. In restaurants, we don't take food off people's plates. In elevators, we don't face backwards. I think rules are among our most important inventions. We all have them. We all need them. But some groups need stronger rules to survive, and that's where I started out with this project.

Why do cultures become tight or loose?

My hunch was that there is no common geography, religion, language or tradition that unifies tight and loose cultures. Rather, it's about ecological and human threat. I looked at how many times nations had been invaded and how many natural disasters they've had. The idea is pretty simple: when groups have threat – whether it's Mother Nature's fury or invasions – then they need stronger rules to coordinate and to survive. By contrast, when we don't have threat, we can afford to loosen up and be a little more permissive. After the Boston bombing, you could see people tightening up. In my lab, if we have people feel a fake threat, they want stronger rules. The reason is because you feel like you can't solve these things on your own, and you want cohesion as a group. You want strong rules and punishments that make people not defect. We saw the same principle in the U.S. election and in France: people who feel threatened feel like their country is too loose and they want stronger leaders, because tightness is associated with the desire for autocratic and independent leaders that are useful in those circumstances. We better take history more seriously, because according to our ethnographies, what we are witnessing presently is historical replication.

What can rule makers and rule breakers learn from each other?

It's important to remember that culture is not random. It arises and evolves for good reasons. Take Singapore, for instance. Singapore's ban on gum is puzzling for many Americans. But when you step back and consider that Singapore is a very threatened place in terms of its ecology and population density (20,000 people per square mile), then it makes sense. People were throwing their gum on the ground and it was causing a big mess and malfunctions of trains and elevators. If you were born in Singapore, maybe you'd support a ban on gum, too. Often, we look at the strengths of our own cultures and the "liabilities" of other cultures. But there is always a tradeoff. For example, tight cultures have more order, synchrony, uniformity, self-regulation, impulse control and less crime. Loose cultures struggle with this. They are disorganized, have little synchrony and self-regulation. But while tight cultures struggle with openness, loose cultures are much more tolerant of a wide range of people, more open to different ideas and change, more creative. We all have deficits and strengths and we can appreciate better what they are once we understand why they have developed. We don't often notice why we are the way we are. We take our values and attitudes for granted. But consider this thought experiment: What would it be like if I happened to be born into this other country? Of course there would be some similarities, but you'd also have different opinions based on how rational they were in that context.

How can your research be beneficial for conflict resolution?

At the individual level, once people understand what kinds of threats others might have had or why they are more likely to have a loose vs. tight mindset, it can help us understand each other better and have more empathy for each other. An intervention we did where we asked Pakistanis and Americans to write daily diary entries demonstrates this. Both countries have extreme stereotypes of each other along the tight-loose lines: Pakistanis think Americans are very loose and Americans think Pakistanis are very tight. We had participants read the diary entries about people's daily lives in Pakistan and the US. It was remarkable to see how this simple intervention reduced the participants' cultural distance. They realized while they do have differences, they weren't nearly as different as they thought they were.
Not stereotyping and having some cultural empathy about why these differences evolved goes a long way in managing conflicts and improving our sense of how we can negotiate with the people around us.

What is a bigger driver of behavior – culture or personality?

They are bottom-up and top-down processes that are difficult to separate. For example, an individual's mindset (tight vs. loose) can help them fit into strong or weak norms. If you live in a country where there are very loose norms, you need to have a lot of tolerance for ambiguity. In tight cultures, it's the opposite: You need to have strong self-monitoring to detect norms. There is a constellation of personality differences that reinforce and maintain the strength of norms, so personality and culture are intricately connected.

How does the Goldilocks principle of avoiding extremes apply to optional functioning and our day-to-day well-being?

People often ask me “What’s better – tight or loose?” and I say: “Neither!” It’s all about (cultural) balance. Groups tend to be tight or loose for good reasons. But as they get extreme, they start having problems. Cultures that start getting really loose become unpredictable. Cultures that start getting extraordinarily tight tend to become repressive. The same is true for companies, and even households. Parents that are too controlling or too laissez-faire produce poorly adapted kids. With kids or teenagers, we can think about the domains that need to be tight and domains where we can cut a little more slack. It’s empowering for kids to understand this.

The Goldilocks principle is found on different levels and has the same implication: We should be able to start diagnosing when groups are veering too much in either direction and then start negotiating. Maybe not every domain needs to be tight or loose and we can negotiate that by engaging in *flexible tightness* – inserting more flexibility, or *structured looseness* – adding more structure into the system.

How can your research findings be applied to improve people’s lives?

We can harness the norms that we develop as a human species to build a better planet by becoming more mindful of this omnipresent force in our lives. For example, for millennia, we have adapted from small groups to dealing with strangers and have figured out social norms for these big social shifts. The same is happening now with the internet. The uncivil behaviors that we witness online happen because people are not monitored face-to-face, which is why I think we need to tighten up the internet while also maintaining a healthy balance of freedom that it affords. Rules and latitude is something we have to learn to balance in all parts of our lives. It’s not easy, but when you start recognizing the patterns in why cultures evolve and what their consequences are, it gives us more power.

People ask me whether we are getting tighter or looser around the world. The answer is: both. Looseness has been increasing in the U.S. over the last 200 years, as we show in an upcoming paper in *Nature Human Behavior*, but at the same time, tightness can be evoked very easily. When we feel threat, whether it’s real or imagined, we can tighten up. And a huge task that we have before us is to discern when our threat is real or imagined.

1. What is normative autopilot?
2. What is a tight culture? Give examples.
3. What is a loose culture? Give examples
4. How can you describe Canadian society in term of loose and tight culture? Why? Be specific. Give examples.
5. What is the Goldilocks principle? What does it mean?
6. Find more information about the book Rule Makers, Rule Breakers.

Class 17 March 12

Foucault

- Prepare a presentation explaining and illustrating Foucault's notion of the surveillance society.
    - Include an explanation and exemplification of hierarchical observation (surveillance), normalizing judgment, and examination.
- Prepare a presentation explaining and illustrating Giles Deleuze's notion of the society of control.

Classes 18 March 14 Law and Morality

Discussion questions

1. Do a web search of, and discuss, the facts of the admissions scandal and its legal implications in the US.
2. What do you think of this problem?
3. Why did it happen?
4. Could it happen in Canada too? Why or why not?
5. If it happened to Canada, what would it be the legal consequences?
6. How can this be prevented in the future?
7. What do you think about "the superrich who donate money to universities"? Is this moral? Why is it legal?
8. What is the relation between law and morality?
9. A parallelism may be drawn between lobbyists and those who bribe to break the law?

10. Discuss the Lobbying Act in Canada.
11. Do an online search of other situations which are legal but not moral.

Class 19 March 19

Read the following article and discuss these questions

1. What is victimhood culture? Why does it occur?
2. What are its consequences?
3. Do you agree with the authors' main arguments? Why or why not?
4. What are microaggressions?
5. What is a culture of dignity?
6. What is the connection, if any, between victimhood culture and free speech? Why?
7. According to sociologists Campbell and Manning, what is the Left's position on microagressions and the victimhood culture? What about the Right?
8. What does Manning argue about CBT and religious teachings in connection to the victimhood culture? Do you agree? Why or why not?
9. Is the "real world" different from university campus? Why or why not?
10. What, if any, is the role of social media?

Two sociologists detail 'The Rise of Victimhood Culture' and how it's used for social control

WILLIAM NARDI - UNIVERSITY OF MASSACHUSETTS BOSTON •JANUARY 3, 2019

Professors offer possible solution too — tout the principles of 'dignity culture'

In 2014, Bradley Campbell and Jason Manning, associate professors of sociology at Cal State Los Angeles and West Virginia University, respectively, published a scholarly article titled "Microaggression and Moral Cultures" that detailed the rise of a "victimhood culture."

Sure enough, a paper that discussed microaggressions in what many perceived as a negative light was denounced as — wait for it — a microaggression.

Critics took umbrage to their "victimhood" terminology, with one reader calling their paper "tenuous and capricious" and that it "is itself a microaggression," actually "closer to a real aggression."

In 2015, the two sociologists filed a solicited op-ed to the online magazine TechCrunch titled "Microaggressions and the Moralistic Internet." The editor they worked with initially praised the column, telling them it would run soon. A month later he told the two professors their column

was spiked.
From what Campbell and Manning could best determine based on correspondence with the editor, "it sounds as if the staff members found our analysis morally offensive in some way."
These two anecdotes are detailed in Campbell's and Manning's co-authored 2018 book "The Rise of Victimhood Culture." The two sociologists have emerged as experts on the subject, maintaining a blog that is updated regularly on the subject as well as writing op-eds and giving interviews.
While the term "victimhood culture" was not coined by the two scholars, they write in their book that they have uniquely classified it as "a moral culture distinct from honor and dignity cultures."
The two approach the topic with a dispassionate and scholarly tone in their nearly 300-page book, but it's clear their take on the subject has riled feathers, with some peers arguing terms such as honor and dignity have positive connotations while victimhood does not.
"Our terminology is intended to help describe what is going on, not to praise or condemn it," they write as a rebuttal.
In addition to updating their blog, "The Victimhood Report," Professor Campbell in November published an op-ed in Quillette titled "The Free Speech Crisis on Campus Is Worse than People Think" that expounded on their theories.
"In honor cultures men want to appear formidable. A reputation for bravery, for being willing and capable of handling conflicts through violence, is important. … In dignity cultures, though, people have worth regardless of their reputations. Because an insult doesn't take away your worth, your dignity, you can ignore others' insults," Campbell wrote.
"But the new culture of victimhood combines sensitivity to slight with appeal to authority. Those who embrace it see themselves as fighting oppression, and even minor offenses can be worthy of attention and action. Slights, insults, and sometimes even arguments or evidence might further victimize an oppressed group, and authorities must deal with them."
In an email interview with The College Fix, Manning said the reaction to this trend has been mixed, and some on the Left are even wary.
"You can see many mainstream liberals expressing criticism of microaggression complaints, expansive definitions of trauma, the idea that words are violence, credulity in the face of hate crime hoaxes, and the like," he said.
But most on the Left do not consider accepting victim status demeaning at all.
"Being recognized as a victim conveys social status. One deserves special consideration and assistance. Those deemed 'privileged' are expected to 'confess' their moral stain and apologize for it. It is they who are demeaned, and this is treated as okay," he said.
Moreover, Manning said the Left has weaponized their self-perceived plight in order to force conservatives into bowing to their worldview.
"It is an increasingly easy way to punish adversaries and gain social status by signalling one's own virtue. The growth of social media and proliferation of bureaucratic authorities contribute [to] this. So does training by educators and administrators that encourages people take offense and report incidents to authorities," he told The Fix.
Faculty and administrators encourage this mentality and have done so for years.
"Some faculty see political activism as a major part of their occupation and identity. Some see activism and scholarship as one and the same, perhaps because they're not clear on the distinction between facts and values and are under the impression that their moral and political preferences are matters of fact," Manning said. "Though I might add that the ideological imbalance is greater among administrators than among faculty, and a lot of student indoctrination

stems from the administration.”
The solution may lie in promoting a culture of dignity.
Manning points to “The Coddling of the American Mind” by Greg Lukianoff and Jonathan Haidt, published last September, as an effort “to convince people that both Cognitive Behavioral Therapy and ancient wisdom of Buddha, Jesus, the Stoic philosophers, and so forth all point [out] that focusing on and magnifying grievances isn’t good for one’s mental health.”
The victimhood book expands on this concept: “Haidt argues that magnifying small offenses goes against much of the traditional advice from philosophy and religion … he points to statements from the Buddha–‘It is easy to see the faults of others, but difficult to see one’s own faults’– and Jesus–‘Why do you see the speck in your neighbor’s eye, but do not see the log in your own eye?’–that caution against obsessing over the minor faults of others.”
In his interview with The Fix, Manning said “passing on such wisdom might help at the margins.”
“Recently, my coauthor Bradley has been arguing that it’s important to be explicit about the principles of dignity culture and why they are valuable. Things that might have [once] been matters of unspoken agreement need to be spelled out, because sometimes those unspoken things get forgotten.”
But that’s not really happening now, and millennials’ and Generation Z’s embrace of victimhood culture may have a grim outlook.
“There’s a common criticism along the lines of ‘wait until these kids get into the real world.’ But of course the ‘real world’ is coming to resemble campuses in some respects, as Google and other large corporations increasingly enforce the same kinds of speech codes and so forth,” Manning said.
Meanwhile, the scholars point out in their book that the appeal to authority to handle perceived microaggressions is a big part of the picture.
“Remember that in a victimhood culture, along with the sensitivity to slight goes a tendency to handle conflicts through appeals to third parties. … [F]or campus activists the focus is often on compelling authoritative action from administrators,” they wrote.
Calling microaggressions “aggressions,” and suggesting they are a pattern of systemic oppression, is a tool used to gain support and validation from authorities. And in the end, it can be likened to a form of social control, the sociologists argue.
Remember you're dealing with grievances and conflicts, morality and partisanship, altruism and interdependence, socialization and culture, intimacy and loyalty, status and power. That's the stuff of social life. It influences law and markets, and social movements to change them.

“In sum, microaggression complainants collect and publicize accounts of minor intercollective offenses, making the case that they are part of a larger pattern of injustice and that those who suffer them are socially marginalized and deserving of sympathy,” the book states.
“The phenomenon is sociologically similar to other forms of social control that involve airing grievances to authorities or to the public as a whole, that actively manage social information in a campaign to convince others to intervene in some way, and that emphasize the dominance of the adversary and the victimization of the aggrieved.”

Free Speech

Read the article and answer the following questions

2018-09-12 MCTU directive:

From: **Training, Colleges and Universities (TCU)** <TCU@ontario.ca>
Date: Wed, Sep 12, 2018 at 11:00 AM
Subject: Upholding Free Speech on Ontario's University and College Campuses / Protection de la liberté d'expression sur les campus des universités et des collèges de l'Ontario
To: Training, Colleges and Universities (TCU) <TCU@ontario.ca>

Memorandum To:	Executive Heads of Ontario Universities Presidents of Colleges of Applied Arts and Technology
From:	George Zegarac Deputy Minister of Training, Colleges and Universities
Date:	September 12, 2018
Subject:	Upholding Free Speech on Ontario's University and College Campuses

I know you share the view that postsecondary education is critical to the future of Ontario and its prosperity in order for all Ontarians to reach their potential. Colleges and universities play a critical role in providing students with the education and training they need to build rewarding careers. They should be places where students exchange ideas and have open and respectful debate.

That is why the Honourable Minister of Training, Colleges and Universities, Merrilee Fullerton recently announced that colleges and universities have until January 1, 2019 to develop, implement and comply with a free speech policy that meets a minimum standard established by the government and to post their policy on their institution's website.

Many of Ontario's postsecondary institutions have already done good work on this issue and have a policy in place on free expression, either as a standalone policy, or as part of a broader policy framework.

The objective of the government's plan is to ensure that all colleges and universities have a strong, clear and consistent free speech policy. The policy will protect free speech, while ensuring that hate speech, discrimination, and other illegal forms of speech are not allowed on campus.

The mandatory minimum standard is based on the principles found in the University of Chicago's Statement on Principles of Free Expression, which has been widely praised and adopted by more than 40 universities in the United States.

Colleges' and universities' policies must apply to faculty, students, staff, management and guests, and as a minimum standard must include:

- A definition of freedom of speech.
- Principles based on the University of Chicago Statement on Principles of Free Expression:
  - Universities and colleges should be places for open discussion and free inquiry.
  - The university/college should not attempt to shield students from ideas or opinions that they disagree with or find offensive.
  - While members of the university/college are free to criticize and contest views expressed on campus, they may not interfere with the freedom of others to express their views.
  - Speech that violates the law or constitutes harassment or a threat is not allowed.
- That existing student discipline measures apply to students whose actions are contrary to the policy (e.g. ongoing disruptive protesting that significantly interferes with the ability of an event to proceed).
- That institutions shall consider official student groups' compliance with the policy as a condition for ongoing financial support or recognition, and encourage student unions to adopt policies that align with the free speech policy.
- That the college/university uses existing mechanisms to handle complaints and ensure compliance. Complaints that remain unresolved may be referred to the Ontario Ombudsman.
- That by September 1, 2019, the institution shall prepare an annual report on implementation progress, publish it online and submit it to the Higher Education Quality Council of Ontario (HEQCO).

If any institution does not comply with this policy direction, the ministry may respond with a reduction in its operating grant funding based on the severity of non-compliance.

The ministry will be sending you additional information in the coming weeks on implementation instructions, including details to support implementation.

I look forward to working with colleges and universities to ensure a smooth implementation of this new policy. In the meantime, please feel free to reach out to my office if you have any questions.

Sincerely,
George Zegarac
Deputy Minister

Algoma University Freedom of Expression Policy

SCOPE

This Policy applies to Algoma University faculty, staff, students, administrators, Board of Governors, and visitors to Algoma University.

PRINCIPLES

• Algoma University values open discussion and free enquiry

• Algoma University does not attempt to shield members of our community or visitors to the University from ideas or opinions with which they may disagree or which they may find offensive

• Members of Algoma University are free to criticize and contest views expressed on campus • Members of Algoma University may not interfere with the freedom of others to express their views

• Speech that violates the law or constitutes harassment or a threat is not permitted.

Freedom of expression is a principle fundamental to open discussion and free enquiry, and is essential to the work of a post-secondary academic institution. Freedom of thought, association, and expression are fundamental principles of an open, fair, and inclusive university, and are core to the discovery, critical assessment, and effective dissemination of knowledge.

Act 80–Algoma University Act (2008), Article 3, defines the objects of the University as: "the pursuit of learning through scholarship, teaching and research within a spirit of free enquiry and expression." Freedom of expression is thus enshrined in our very creation as a University, and it is a fundamental principle underpinning all that we do as an institution.

Algoma University is dedicated to the pursuit of truth, knowledge and wisdom. Algoma University believes the common good of society depends upon the search for truth and its free exposition. The fundamental purpose of a university and its unique contribution are the search for new knowledge and the free dissemination of what is known.

As set out in our Academic Freedom Policy (FA3, 2009), Algoma University affirms that all members of the University are able, within the law, to pursue all avenues of inquiry; to teach and to learn unhindered by external or non-academic constraints; and to engage in full and unrestricted consideration of any opinion without fear of reprisal by Algoma University or any third party. This freedom extends not only to members of the University but to all who are invited to participate in its forum.

Existing agreements, policies and codes set out procedures for addressing any violation of this policy (including but not limited to Collective Agreements, Code of Conduct–Respectful Workplace Policy, Student Code of Conduct–NonAcademic).

Milo Yiannopoulos: Who is the alt-right writer and provocateur?

21 February 2017

Milo Yiannopoulos has been uninvited from speaking at a US conservative conference, which will also host President Donald Trump, after footage emerged of him appearing to condone paedophilia.

Mr. Yiannopoulos has denied the allegations, but is known to thrive on provoking offence and controversy.

Publisher Simon & Schuster has announced it is cancelling his forthcoming book, Dangerous, after the latest outcry.

The writer calls himself the "most fabulous supervillain on the internet". His critics call him a purveyor of hate speech.

Mr. Yiannopoulos blamed "sloppy editing" and "usual blend of British sarcasm, provocation and gallows humour" for creating the wrong impression of his views on paedophilia.

"I would like to restate my utter disgust at adults who sexually abuse minors," the 32-year-old wrote on Facebook.

However, the American Conservative Union (ACU), which organises the influential Conservative Political Action Conference (CPAC) in Maryland, said his response was "insufficient".

ACU chairman Matt Schlapp said the invitation to speak at the CPAC this week had been rescinded.

"We urge him to immediately further address these disturbing comments," he said.

President Donald Trump is speaking at the event on Friday.

Who is Milo Yiannopoulos?

Milo Yiannopoulos is a British writer and editor, based in the US.

Born to a Greek father and British mother, he grew up in Kent in the south of England.

In July 2016, he was banned from Twitter for what the social media company referred to as "inciting or engaging in the targeted abuse or harassment of others".

It came after he took aim at Leslie Jones, a black actress in an all-female Ghostbusters reboot, and she received a barrage of abuse from other Twitter users.

He has also been widely criticised for comments he has made about transgender people, Muslims, Black Lives Matter activism, feminists and gay people, even though he is openly gay.

What else does he do?

He co-founded online technology magazine The Kernel in 2011 and sold it in 2014, after running up large debts and encountering legal battles with writers who sued for unpaid earnings.

In 2015, he was appointed as a senior editor at Breitbart News, a right-wing US website that has been criticised for racist and misogynist content.

Milo Yiannopoulos has written columns titled "Birth Control Makes Women Unattractive and Crazy" and "Would You Rather Your Child Had Feminism or Cancer?"

When presidential candidate Hillary Clinton read those headlines out disdainfully at one of her rallies last year, he considered it a win.

"Little did I realise when I coined the #FeminismIsCancer hashtag that it would end up in the mouth of the Democratic nominee for President," he wrote on Breitbart.com.

This week, footage of a year-old podcast was unearthed, where Mr Yiannopoulos appears to condone paedophilia.

He said relationships between "younger boys" and older men could be a "coming-of-age relationship … in which those older men help those younger boys discover who they are".

Mr. Yiannopoulos has denied the allegations on his Facebook page, blaming the way the clips were edited and his own "sloppy phrasing" for any indication he supported paedophilia. "It is a vile and disgusting crime, perhaps the very worst," he said.

Trump is his 'daddy'

Breitbart News has close ties to the Trump administration. The site's chief executive, Steve Bannon, first headed Mr Trump's presidential campaign and was later appointed as his chief strategist in the White House.

Mr. Yiannopoulos is an avid supporter of President Trump, whom he calls "daddy".

During the Republican National Convention in Cleveland, Ohio last July, Mr Yiannopoulos headlined an event called Gays for Trump.

President Trump criticised the University of Berkeley in California after it cancelled a talk by Mr. Yiannopoulos, following violent student protests earlier this month.

Mr. Yiannopoulos's regular public speaking engagements often lead to protests on university campuses.

Where did he come from?

Mr. Yiannopoulos went to Simon Langton Boys Grammar School in Canterbury, and dropped out of undergraduate courses at the University of Manchester and the University of Cambridge.

However, he came to prominence by playing a key role in an online troll war, known as Gamergate, which critics say is about misogyny in the video game world, but which supporters says is about ethics in games journalism.

He built up a following by being a "troll king", according to technology magazine Wired.

His YouTube channel now has more than 500,000 subscribers.

An alt-right mouthpiece?

Mr. Yiannopoulos is regularly associated with the alt-right, a disparate nationalistic group, which is outspoken against so-called political correctness and feminism. It includes neo-Nazis, white supremacists and anti-Semites.

He says he does not consider himself part of the alt-right, although he has called it "energising and exciting".

During an appearance on US television show Real Time on Friday, he joked about not being

able to fit in as he is a "gay Jew who never shuts up about his black boyfriend".
Mr. Yiannopoulos had a Jewish maternal grandmother.
On the same show, hosted by comedian Bill Maher, he equated feminism with a disease (again) and said transgender people was a disorder comparable to sociopathy.
'Dangerous'
His autobiography, Dangerous, had been due for publication next month.
When the book deal with publisher Simon & Schuster was announced in December 2016, it caused an outcry among his critics, who accused the company of promoting and funding hate speech.
On Monday, Simon and Schuster announced it was cancelling the publication of the book, after more than 100 of the publisher's other authors had protested against it.
Mr. Yiannopoulos reportedly received a $250,000 (£200,000) advance for the book.
In protest at the deal, the Chicago Review of Books had already announced it would not review any Simon & Schuster books in 2017.

1) Who is Milo Yiannopoulos?
2) Why was he banned from many universities?
3) Could Milo be invited to speak at AU under the Freedom of Expression Policy? Why or why not?
4) Would it be a good idea to invite Milo to AU? Why or why not?
5) Do you agree that learning should/could be uncomfortable? Or do you think that universities should prevent students from feeling uncomfortable and feeling offended?
6) What does snowflake mean? Why has this term been used in the context of mostly American universities?
7) What is the Upholding Free Speech on Ontario’s University and College Campuses policy? What do you think of it?
8) What is Algoma University’s response to the policy? Do you think it is adequate? Why or why not?

Class 21 March 21

He went to prison for a crime he did not commit. He was wrongly accused of sexually assaulting his ex girlfriend. He was sentenced to 5 years. After serving his full sentence, he was released from prison. Upon release, he sexually assaulted his ex-girlfriend. He already served a prison sentence for this crime which he hadn’t committed. There is evidence showing that he hadn’t committed the first sexual assault. Should he be sentenced to 5 years in prison? Or shouldn’t he?

Imagine seeing a man kicking a puppy (A) that's chained up to a tree. Most people would be outraged and would even call for his punishment. Now imagine seeing a gang of six men kicking another puppy (B). Would you view each man as equally guilty with the lone man who kicked puppy A? Or would you view each man as deserving an even greater punishment?

Plea bargaining is the common practice whereby someone who is being charged with a criminal offence will agree to plead guilty to a lesser offence in order to avoid the risk of being tried for the more serious offence. Is it ethical/fair to receive a lesser penalty for a crime? What are the common implications and consequences of a plea bargain? What is plea bargaining's Innocence Problem?

Suppose there were an experience machine that would give people any experience they desired. This machine could stimulate their brain so that they would think and feel that they were writing a great novel, making a friend, having sex, or anything they wanted. All the time, the individuals would be floating in a tank, with electrodes attached to their brain. It would also be possible to plug into this machine for life, preprogramming life experiences. Of course, while in the tank people won't know that they are there; they will think that it's all actually happening.

If you were in charge of regulating the legality of this machine, would you approve it? Would you ban it? How would you regulate it?

Imagine that you’re at the controls of a railway switch and there’s an out-of-control trolley coming. The tracks branch into two, one track that leads to a group of five people, and the other to one person. If you do nothing, the trolley will smash into the five people. But if you flip the switch, it’ll change tracks and strike the lone person. What do you do?

Human cloning refers to human reproductive cloning to produce a genetic copy of an existing person.

Research cloning, also known as embryo cloning or therapeutic cloning, is another form of human cloning that produces genetically specific embryonic stem cells. This permits preventing genetic diseases. It will also allow parents to choose certain characteristics of their children such as sex, skin colour, eye colour, and hair.

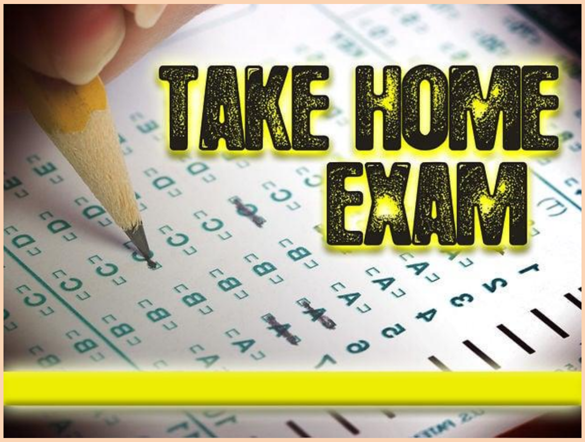
Scientists will likely be able to create a baby from human skin cells that have been coaxed to grow into eggs and sperm and used to create embryos to implant in a womb.

The process, in vitro gametogenesis, or I.V.G., so far has been used only in mice. But stem cell biologists say it is only a matter of time before it could be used in human reproduction — opening up mind-boggling possibilities.

With I.V.G., two men could have a baby that was biologically related to both of them, by using skin cells from one to make an egg that would be fertilized by sperm from the other. Women with fertility problems could have eggs made from their skin cells, rather than go through other lengthy and expensive processes.

Class 22 March 28

Distribution of final take-home



Class 12: April 4

Submission of final take-home

* **TRIGGER WARNINGS**

Some materials in this course may be sensitive. Course materials, including lectures, class activities, hypotheticals, scenarios, examples, court cases, and films shown in class, may have mature content, including violent, sexual, and strong language content. Except for newspaper articles and court cases, all class activities are hypothetical and fictitious. Any resemblance to actual persons, institutions, or events is purely coincidental. The views and opinions expressed in the articles assigned for reading in this course are those of the authors and do not necessarily reflect the position of the course professor. Questions, follow-up questions, examples, and comments made within the context of class activities do not purport to reflect the opinions or views of the course professor. All such articles, comments, questions, examples, and activities are meant solely to facilitate the discussion and study of Law. They are not meant to advocate or promote any crime or unlawful action. Neither are they meant to advance any ideological perspective. Discretion advised before signing up for this course.

Activities prepared with the assistance of Jocelyn Moreau