

NYSBA

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Perspective



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www.nysba.org/YLS

From the Editor's Desk



Keri Mahoney

The Importance of Asking for Help

One of the most valuable lessons that I have learned as a young lawyer is the importance of asking for help. I am, as many attorneys are, a Type-A overachiever. I am not good at saying no. I am not good at asking for help. Inevitably, by saying yes to everything and never letting anyone help me, I built up a workload that was impossible for me to carry on my own. Obligations began slipping, I started to feel like I was constantly drowning and, worst of all, I was letting other people down in the process. Finally, I sent out a desperate cry to John and the rest of the Executive Committee of the Young Lawyers Section—"I need help! I can't seem to get it together enough to get out an edition of *Perspective* this year!"

I was surprised at how quickly things changed from there. I didn't have to justify my workload or my needs—it was enough that I said I was struggling. Within a week, we had a conference call to find some solutions. Shortly thereafter, Norina stepped up to help keep me on track and to help lighten the load. Not only did this solution help me, it helped the Section as a whole. Norina will be taking over my spot entirely starting with the next edition of *Perspective*; she has the benefit of learning some of the basics from me, which will no doubt lead to a smooth transition and continuity of our publications for our members. There was no judgment following my request for help, only support and encouragement.

So as I sign off to you for my final time as your editor-in-chief, I want to encourage each of you to be honest with yourself about where you are struggling. In that area, ask for help, and then use the help that is given to you.

It has been my pleasure to serve as your editor-in-chief for the past two years. I hope you enjoy this edition of *Perspective*.

**All the Best,
Keri A. Mahoney
The Law Office of Keri Mahoney, PLLC
Editor-in-Chief**

The Importance of Giving Help

Back in November I was made aware of the worst case of child abuse I had ever heard. It was the story of six children ranging in age between 2 1/2 and 16 years old, trying to be permanently removed from their fam-

ily for various abuses. I always pride myself in being a strong person but children are my weakness. It hit me hard. I cried. I was disheartened and losing faith in humanity, knowing that such unspeakable things could happen so close to home. I called my mom and she said I could not change what happened; all I could do is change the future. This, somehow, was reassuring. I thought about it. I read about it. I did some soul-searching. The next day I called the center where some of the children had been placed and I left various messages. I kept calling until I was able to speak to someone and ask: "How can I help?" I was informed of the Berkshire Farms Holiday Angel program, where any one child could be "adopted" for the holidays. The voice on the other end of the telephone said that for many children living at the center, the holidays are the saddest time of the year.

Here was the perfect opportunity to help, I thought. I wanted to help as many children as I could, so I emailed everyone I knew. I posted in the NYSBA communities. I emailed my "mommy community," as well as the Romanian community in Albany. I reached out to my family and all my friends. The response was immediate and overwhelmingly positive. It was exciting to open my email every day and see requests for wish lists come pouring in.

By the end, we were able to help out 64 children in total. It was an amazingly positive and fulfilling experience, knowing that all those children, including the six that fueled my desire to help the center, were receiving their gifts for the holidays. Something that had started off as the worst news I had ever heard developed into one of the largest positive impacts I could make for the community. As the holidays are winding down, I am extremely grateful and appreciative for all the people who helped with this project and who helped change my perspective of the world.

Special thank-you to Samantha Howell, Mary Cipriano-Walter (Prisoners Legal Services, NASW-NYS), Lauren Sharkey (Cioffi Sezlak Wildgrube P.C.), Michael DiFalco (Aiello & DiFalco, LLP), John Christopher (Sahn Ward Coschignano PLLC), all the staff at Solomon and Solomon, P.C., Angela Wu, Caitlin Monjeau, Tanya Davis, Upstate New York Attorneys, LLC, Nancy Delain, Ana Stan, Simona Bulai, and Laura Popa.



Norina Melita

**Respectfully
Norina Melita
Incoming Editor-in-Chief**

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Request for Articles



If you have written an article and would like to have it considered for publication in *Perspective*, please mail or e-mail it to:

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Guidelines

Articles can range from op-eds, current events pieces, short-form law reviews, and articles that highlight certain aspects of law or policy. Articles should be submitted in electronic document format (pdfs are NOT acceptable), and include a brief bio.

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A Message from the Section Chair



As my time as chairperson of the Young Lawyers Section comes to an end, it is a good time to reflect on all we have accomplished as a Section in the past year.

The YLS has had an incredibly successful year. Our membership numbers are up, we are financially healthy, and organizationally we have an Executive Committee of well qualified attorneys who are committed to making this

Section all it can be for our members.

In 2016, NYSBA President Claire P. Gutekunst created a two-year “Membership Challenge” for all NYSBA Sections. In summary, in 2017, the goal was for all Sections to increase paid membership by 2 percent, and then an increase of 3 percent for 2018. I am happy to report that the YLS was one of eight Sections to meet the 2017 goal. In fact, we have not only met our 2017 goal but, provided we do not lose any members in 2018, we have already exceeded our 2018 goal as well. Including both paid and free members, the YLS has 12,095 members, making it the largest Section in NYSBA. Counting paid members only, we are the third largest Section—remember that all New York State law students become free members of the Young Lawyers Section through the Pathway to the Profession Program.

Financially, our Section remains in a very good place. We ended the year with a minor deficit of \$999. This modest amount of additional expense will be paid from our Section’s accumulated surplus of \$45,604. I am very confident that the state of our Section’s financial health will allow us to continue to grow as a Section, without compromising member benefits.

The YLS continues to provide top quality programming and events to our members. In June 2017, we held our Supreme Court Admissions Program in Washington D.C., where 39 attendees were admitted to the Supreme Court of the United States. In October, the Section held its first Advanced Trial Academy program at Syracuse University. In addition to these statewide programs, many of our district representatives organized local networking events and CLE programs for our members throughout the year.

The NYSBA Annual Meeting was held from January 22nd to 26th at the Hilton Midtown Hotel New York. This year, the Section held a half-day CLE Program chaired by Natasha Shishov, which covered topics such as “Best Practices for Winning Your Case Before Trial”; “Ethical Considerations for Lawyers in the Digital Age”; and

“Marketing Yourself and Building Your Brand.” Thank you, Natasha, for all of your hard work on this successful program. In addition, each year at Annual meeting, the Section selects one very deserving attorney from a pool of highly qualified nominees for the Outstanding Young Lawyer of the Year Award. This year we were honored to give the Award to Lanessa L. Owens. Lanessa was the standout candidate in a field of over 30 well-qualified young attorneys who were nominated this year. Congratulations again, Lanessa, a well-deserved honor!

Most recently we held our 9th Annual Trial Academy from April 4th to April 8th at Cornell University School of Law. If you are a trial attorney or want to become one, then this program is for you. Trial Academy is the perfect setting to gain realistic trial experience outside of the court room. Trial academy sells out or nearly sells out each year, and this year was no exception, with 55 attendees participating in the program. I want to take this opportunity to thank all of the Trial Academy team leaders, speakers, faculty, volunteers and NYSBA Staff members—without you there would be no trial academy, so thank you for all you do.

Next year marks the 10-year anniversary of the YLS Trial Academy Program and it promises to be a program to remember. The Trial Academy Program dates for 2019 are April 3rd to 7th, so if you think you may be interested in attending, please save those dates now. I have the honor and privilege of co-chairing the 10th Anniversary Program with our current Treasurer and incoming Chair-Elect, Lauren Sharkey, so if you are able to attend, we look forward to seeing you there.

If any Section member has an idea for programming that she or he would like to see in the upcoming year, please let a member of the Executive Committee know, or better yet, come to one of our quarterly Executive Committee meetings and let us know in person.

Our next Executive Committee meeting will be held during our Section Summer Meeting in Saratoga Springs, New York, from June 29-30. Our Executive Committee meeting and a dinner will be held on Friday, with a half-day CLE program on Saturday. The Summer Meeting is a great way for you to meet and network with your fellow YLS members, in an informal, relaxed setting. Registration information for the summer meeting can be found at <http://www.nysba.org/YOUNSU2018/>.

Thank you to all of our members for making my time as Chairperson of the Young Lawyers Section such a memorable time in my life. Without your support, dedication, and hard work, the Section would not be all it is today. If any Section member would like to get more involved in our Section, please do not hesitate to contact me directly. I am more than happy to discuss potential opportunities with you.

John P. Christopher

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The Legal Profession—Attorneys and Courts—Bulwark Against Injustice

By Michael L. Fox

Articles have been written about the importance of attorneys and judges in our civil, democratic society. Speeches have been given. Protests have been held. Yet, to this day, attorneys are often scorned, and judges derided, by our citizenry, by our politicians, by our comedians—that is, *until they are needed*.

In 1788, Founding Father and fellow New Yorker Alexander Hamilton¹ wrote the following in defense of the newly proposed Constitution's provisions on the judiciary: "there is no liberty, if the power of judging be not separated from the legislative and executive powers."² Secretary Hamilton, although concerned about the potential weakness of the judiciary compared to the other two branches of government (lacking a military, lacking legislative authority), did speak of the judiciary and its unique position in government as being "the citadel of the public justice and the public security."³ Furthermore,

[t]he complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such for instance as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. *Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.*

....

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.⁴

The watch-fires of the gatekeepers and stewards of the law must never dampen, but rather must continue to burn brightly. Judges and attorneys ensure that the actions of the other two branches of government remain in check, and remain constitutional. Never more than now has a nobler mission been required in this Nation. The rulings on the law and under the law protect the rights of the people of our nation, and preserve the Constitution and its protections for all.



In the early 2000s, during commencement ceremonies at Columbia University in the City of New York, each of the college deans would stand and request that the University President confer upon their graduating students the degrees earned, with all attendant rights and privileges. In May 2003, when then-School of Law Dean David Leebron stood, he requested that the President confer upon the Doctors of Law their degrees so they could go out into the world to preserve and protect the rights and privileges granted to all of the other graduates, in addition to protecting all members of society. Dean Leebron's sentiments should be mirrored by a larger audience.⁵

Certainly, the bench and bar exist not to advance the interests of only the powerful or the majority. They exist to protect the rights and privileges of all—including the minority, and those with unpopular views. The U.S. Constitution itself was designed to protect both the majority and the minority. Look no further than at how the Founders, in their eminent wisdom, constructed a representative legislature that ensured representation of the populous states (in the House), and equal representation of the small and large states (in the Senate), following something in the Constitutional Convention that appears sadly lacking in government today—*compromise*.⁶ There have always been political disagreements and differences, but compromise often leads to a greater good.

One of the most offensive statements often uttered against attorneys is also most often taken out of context—William Shakespeare’s infamous line: “The first thing we do, let’s kill all the lawyers.”⁷ A review of the full context of this line would indicate that the characters who were speaking were plotting to overthrow the king and the whole order of society. To succeed, the anarchists knew that the first thing they would have to do was “kill all the lawyers.” The legal profession—the lawyers, and from their ranks the judges—was recognized as one of the bulwarks of an ordered society. Before the ordered society could be successfully challenged, any potential challenger would first have to kill all the lawyers because they are the guardians of law and justice.⁸

Beyond the physical violence against members of the legal profession, which although rare, has been seen in nations struggling with democracy and self-rule,⁹ a different danger has emerged. In the United States, legislation has been introduced in several states to limit or eliminate the role of the judiciary in the system of co-equal branches and “checks and balances”;¹⁰ and baseless derogatory comments aimed at undermining and weakening the judiciary and judicial system—or certain members thereof who render what are deemed “unpopular decisions”—have been uttered by those holding the highest offices of our society.¹¹ These items serve only one dangerous goal—a threat to the sanctity and stability of the Constitutional Republic that is the United States.

The very foundation of democratic society has been the Rule of Law. The checks and balances of the three branches of government are the hallmark of the United States. Historically, attorneys had great influence on the drafting of the Declaration of Independence and the U.S. Constitution (as well as the Constitutions of the several States). It seems that the first doctoral degree awarded in the course of human history was a doctorate in civil law in the 1100’s, in Bologna, Italy.¹² Members of the legal profession should be proud of their professional lineage and shared historical roots.

In today’s political environment, President Franklin Delano Roosevelt’s words should resonate: “The test of our progress is not whether we add more to the abundance of those who have much, it is whether we provide enough for those who have too little.”¹³

Going forward in uncertain times, the Legal Profession and the Nation should recall the closing words of the Second Inaugural Address of President Abraham Lincoln. While the current state of affairs do not rival the horrors of the Civil War, the nation should nevertheless proceed with the certainty that it has survived greater turmoil, and arisen all the stronger for it, with democracy intact, values purified, and the co-equal branches of government

functioning as intended in 1787. In the immortal words of President Lincoln:

With malice toward none; with charity for all; with firmness in the right, as God gives us to see the right, let us strive on to finish the work we are in; to bind up the nation’s wounds; to care for him who shall have borne the battle, and for his widow, and his orphan—to do all which may achieve and cherish a just, and a lasting peace, among ourselves, and with all nations.¹⁴

This is a diverse country. That is the historical perspective. Respect, understanding, compromise, and concern for the interests of our entire country, majority and minority, are necessary. This includes respect for the legal profession, for attorneys and judges who endeavor daily to ensure justice and equality, for the rich and the poor, for the majority as well as minority viewpoints.¹⁵ The Pledge of Allegiance is often recited at public gatherings, and political events. In its present form the Pledge concludes: “to the Republic, . . . one Nation, under God, indivisible, *with liberty and justice for all.*”¹⁶ Truly, “[i]njustice anywhere is a threat to justice everywhere.”¹⁷ That is where attorneys and judges find their calling—as society’s bulwark against injustice.¹⁸

Endnotes

1. Alexander Hamilton, although born in the British West Indies, moved to New York early in his life. *Alexander Hamilton Biography*, THE BIOGRAPHY.COM WEBSITE (April 27, 2017), <https://www.biography.com/people/alexander-hamilton-9326481>. He was educated at Kings College (now Columbia University) in New York City, and was the only representative from New York to sign the United States Constitution. *Id.* Furthermore, before and after serving as our Nation’s first Secretary of the Treasury, he was an attorney practicing in New York City. *See also, The Constitution of the United States: A Transcription*, NATIONAL ARCHIVES: AMERICA’S FOUNDING DOCUMENTS (Oct. 23, 2017), <https://www.archives.gov/founding-docs/constitution-transcript>.
2. THE FEDERALIST NO. 78 (Alexander Hamilton). *See, U.S. v. Lopez*, 514 U.S. 549, 601 n.9 (1995) (Thomas, J., concurring) (citing to *The Federalist*).
3. *Id.*
4. *Id.* (emphasis added).
5. Mark D. Fox & Michael L. Fox, *It’s No Joking Matter Our Profession Requires Greater Civility and Respect*, 81 N.Y. Sr. B.J. 10 (Feb. 2009).
6. This plan for congressional representation is often referred to as “The Great Compromise” or “The Connecticut Compromise.” *The Senate and the United States Constitution*, UNITED STATES SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Constitution_Senate.htm (last visited Mar. 22, 2017).
7. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2. Among some modern versions are: “What is the ideal weight for a lawyer? Ten pounds—but that includes the urn.” LAW LAUGHS, <http://www.lawlaughs.com/short/observations.html> (last visited Mar. 21, 2017). “Where can you find a good lawyer? In the cemetery.” LAW LAUGHS, <http://www.lawlaughs.com/short/simple.html> (last visited Mar. 21, 2017).

8. There is a competing line of thinking—that the Butcher and Cade were discussing how lawyers protected the landed and wealthy class, and how the new kingdom would feature an equality of all classes only achievable by ridding England of the lawyers who created contracts of serfdom. (Many across the Internet and other forums advance this argument.) As charitably as can be stated, that argument is unsupported. Taking *Henry VI* in full context, it is clear that while some lawyers in society may be less than altruistic, by and large attorneys are the ones who perpetuate an ordered civilization of laws, and who must be eliminated in order for traitorous mutineers or other dark souls to find success. Indeed, in other Shakespearean works, attorneys (doctors of law) are accorded great respect. See e.g., WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1.
9. *Pakistani Lawyers Go On Strike Over Deadly Bomb Attack*, HUFFPOST (Aug. 9, 2016, 5:19AM), http://www.huffingtonpost.com/entry/pakistan-deadly-bombing-lawyers-strike_us_57a99c27e4b0b770b1a432e1.
10. See Jenna Buzzacco-Foerster, *Legislation would allow lawmakers to override judges' rulings*, FLORIDA POLITICS (Dec. 27, 2016, 1:28pm), <http://floridapolitics.com/archives/229469-lawmakers-override-judges-rulings>; Amber Phillips, *It's not just Donald Trump feuding with the courts. States are doing it, too*, THE WASHINGTON POST (Feb. 12, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/12/its-not-just-donald-trump-feuding-with-the-courts-states-are-doing-it-too/?utm_term=.45b01744e443.
11. Tristan Lejeune, *Trump attacks 'so-called judge' over travel ban ruling*, THE HILL (Feb. 4, 2017, 8:33AM), <http://thehill.com/homenews/administration/317899-trump-attacks-so-called-judge-over-travel-ban-ruling>.
12. See Milard King Roper, Jr., *Lawyers & the Title "Doctor,"* 6 AKRON L. REV. 83 (1973).
13. Franklin D. Roosevelt, Second Inaugural Address (Jan. 20, 1937) (transcript available at <http://historymatters.gmu.edu/d/5105/> (last visited Feb. 3, 2018)).
14. Hon. Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865) (transcript available at <https://www.ourdocuments.gov/doc.php?flash=false&doc=38> (last visited Mar. 22, 2017)). President Lincoln was, himself, an attorney and orator.
15. See *Mapp v. Ohio*, 367 U.S. 643, 663 & n.8 (1961) (Black, J., concurring) (citing *Boyd v. U.S.*, 116 U.S. 616, 635 (1886)). Justice Black agreed with the opinion of Justice Bradley in the *Boyd* case, wherein it was stated: “[C]onstitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of [the] courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.” *Boyd*, 116 U.S. at 635.
16. *The Pledge of Allegiance*, available at <https://www.va.gov/opa/publications/celebrate/pledge.pdf> (last visited Mar. 22, 2017) (emphasis added).
17. Aaron Couch, *Martin Luther King Day: 10 memorable MLK quotes*, THE CHRISTIAN SCIENCE MONITOR (Jan. 17, 2011), <https://www.csmonitor.com/USA/2011/0117/Martin-Luther-King-Day-10-memorable-MLK-quotes/The-ultimate-measure-of-a-man>.
18. See *Blyn v. Bartlett*, 379 N.Y.S.2d 580, 597 (Sup. Ct. 1975) (“throughout past crises, the work of the courts has gone on, as it must now go on, unimpaired and unhindered, in the interests of justice, and for the benefit of all. It is fundamental that our courts, the bulwark of our democratic form of society, are an intrinsic and independent branch of government, deriving their powers directly from the Constitution.... Therefore, the courts may not properly be directed, controlled or impeded in their functions by any other branch of government.... The court is the keeper of the conscience and the conscience is the Constitution. It must remain strong and independent—above the momentary storm—lest it be forever compromised.”), *rev'd other grounds*, 379 N.Y.S.2d 616 (App. Div. 1976); see also *In re Markewich*, 182 N.Y.S. 653 (App. Div. 1920). The *Markewich* state court case concerned an attorney disciplinary matter. Following his utterance of inflammatory statements about members of the judiciary, respondent thereafter recanted and stated upon arraignment before the U.S. District Court in a separate proceeding: “when disorder shows its threatening hand, that the courts stand out as the bulwark of orderly and organized society, and unfair and unjust criticism of the courts and judges at this time above all times cannot be productive of any good.” *Id.* at 657.

Michael L. Fox is an Assistant Professor of Business Law, and Pre-Law Advisor, at Mount Saint Mary College in Newburgh, New York. He received his Bachelor of Arts (B.A.) in Economics from Bucknell University, *summa cum laude* and Phi Beta Kappa, and his Doctor of Law (J.D.) from Columbia University School of Law, where he was a Harlan Fiske Stone Scholar. Professor Fox was rated AV as a litigator by Martindale-Hubbell when he was in practice. He previously served as a law clerk in federal court, practiced law in Manhattan and Orange County, New York, and served as deputy corporation counsel for a city in Orange County while practicing law. He is a Past Chair of the Young Lawyers Section and currently serves as Vice President for the Ninth Judicial District of the New York State Bar Association, and as a Member of the NYSBA Executive Committee and House of Delegates. He can be reached at Michael.Fox@msmc.edu. The opinions and thoughts expressed herein are those of the author alone.

A version of this article was previously posted on the Young Lawyers Section Website at www.futurelawyers.org.

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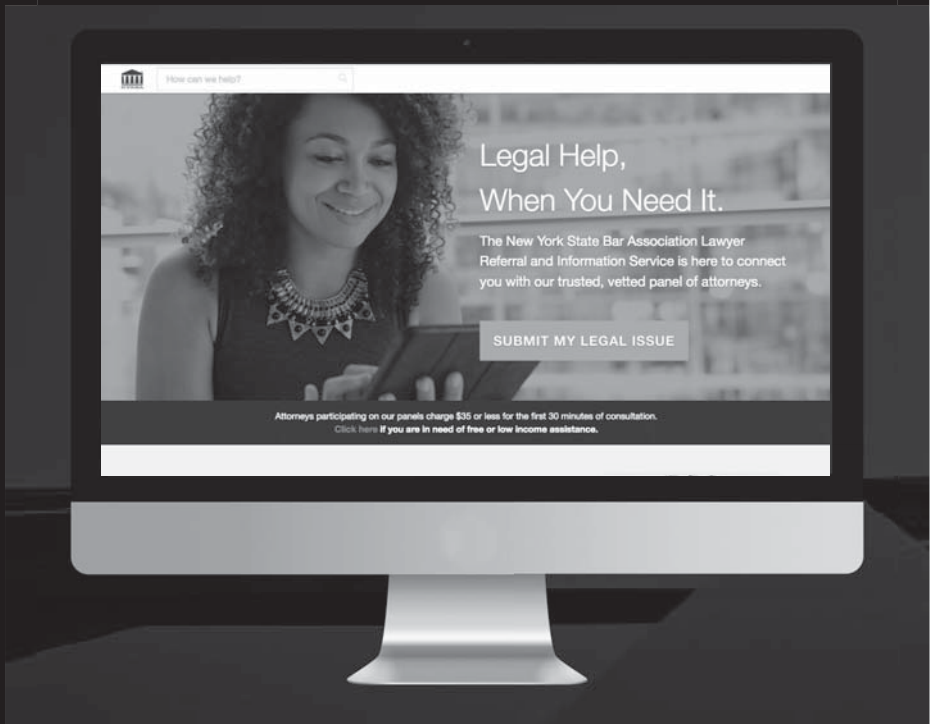
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Taxation of Fiber Optic Cables in New York State

By Dylan C. Harris

While all real property in New York State is taxable unless an exemption to taxation exists, the taxation of fiber optics remains an aberration to this rule. Although fiber optics have been in use for well over two decades, the appellate level courts of New York only recently began to rule on their taxability. The Appellate Departments, however, are split on how to define fiber optics as well as their taxability.

Fiber optics are enclosed, “thin transparent fibers of glass or plastic...that transmit light throughout their length by internal reflections.”¹ They are used to transmit light and data over short or long distances, including transmission for telecommunications, internet, and cable television. These cables can be placed above ground, underground, and underwater.

Fiber optics run through both private and public rights of way and the placement of fiber optics directly impacts their taxability. New York’s Real Property Tax Law (RPTL) defines what constitutes real property in New York State.² Specifically, RPTL states that real property includes “all lines, wires, poles, supports and inclosures [sic] for electrical conductors upon, above and underground used in connection with the transmission or switching of electromagnetic voice, video and data signals between different entities separated by air, street or other public domain,” when owned by other than a telephone company.³



The split amongst the Appellate Departments of New York State concerns the taxability of fiber optics in the private right of way. The controlling case law for each Appellate Department is discussed *infra*.

Not Taxable

*RCN N.Y. Communications, LLC v. Tax Commission of New York*⁵

The Appellate Division, First Department held that RPTL § 102(12)(i) limits assessable property to wires “for electrical conductors.”⁶ Since fiber optic cables are not “for electrical conductors,” they are not assessable.⁷

The court narrowly construed RPTL § 102(12)(i) and any doubts in the construction of the statute were resolved in favor of the taxpayer.

*Level 3 Communications, LLC v. Clinton County*⁸

As above, the Appellate Division, Third Department looked at the different meanings of “transmit” and “distribute,” because courts may reasonably infer that where different terms are used in a statute, different concepts are intended.⁹ Applying RPTL § 102(12)(f), the Third Department ultimately held that fiber optics transmit light signals, but do not distribute light, keeping fiber optics outside the purview of the statute and making them not taxable real property in New York.¹⁰

*Level 3 Communications, LLC v. Chautauqua County*¹¹

Similar to the First Department in the *RCN* case, the Fourth Department looked to the plain meaning of the statutory language and narrowly construed the statute, resolving any doubts concerning the scope in favor of the taxpayer.¹² The court defined the word “distribute” as used in RPTL § 102(12)(f) and held that fiber optic cables transmit light signals, but do not distribute light; rather, they distribute data.¹³ Therefore, fiber optic installations do not fit within the plain meaning of “distribute” in RPTL § 102(12)(f) and are not taxable real property.¹⁴

Taxable

*T-Mobile Northeast, LLC v. DeBellis*¹⁵

The Appellate Division, Second Department interpreted RPTL § 102(12)(i) in an attempt to effectuate the legislative intent according to the plain meaning.¹⁶ Ultimately, “for electrical conductors,” as used in the statute,

“Applying RPTL § 102(12)(f), the Third Department ultimately held that fiber optics transmit light signals, but do not distribute light, keeping fiber optics outside the purview of the statute and making them not taxable real property in New York.”

Fiber optics in a public right of way are taxed as special franchise property by the New York State Department of Taxation and Finance, Office of Real Property Tax Services (ORPS). A special franchise is defined as the right of a utility company to place equipment in a public right of way.⁴ However, fiber optics in the private right of way are only taxable if they fall within the above statutory definition of real property.

was found to modify only the term “inclosures” [sic] and not the entire list of “lines, wires, poles, supports and inclosures [sic].”¹⁷ The court then reasoned that Petitioner’s fiber optic cables are “lines” or “wires” within the meaning of RPTL § 102(12)(i) and taxable real property.¹⁸

Conclusion

The issue of whether fiber optics in the private right of way are taxable in New York State and may be added to tax rolls likely will be decided by the Court of Appeals. While the First, Third, and Fourth Departments have held that fiber optics in the private right of way are not taxable, the Second Department has held that they are. This issue is ripe for legislation clarifying the language of the RPTL § 102(12) in the event that New York’s highest Court declines to decide the issue.

Endnotes

1. Dictionary definition of fiber optics, Merriam-Webster, <https://www.merriam-webster.com/> (enter fiber optics in search box).
2. N.Y. Real Prop. Tax § 102(12).
3. *Id.* § 102(12)(i).
4. *Id.* § 102(17).
5. 943 N.Y.S.2d 480 (App. Div. 1st Dep’t 2012).
6. *Id.* at 481.
7. *Id.*
8. 40 N.Y.S.3d 227 (App. Div. 3d Dep’t 2016).
9. *Id.* at 230.
10. *Id.* at 230-31.
11. 50 N.Y.S.3d 202 (App. Div. 4th Dep’t 2017).
12. *Id.*
13. *Id.* at 205.
14. *Id.* at 204.
15. 40 N.Y.S.3d 164 (App. Div. 2d Dep’t 2016).
16. *Id.* at 167.
17. *Id.*
18. *Id.*

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Raising the Bar: Adjusting the New York Law School Curriculum to Prepare for an Inevitable Exam

By Benjamin Pomerance

Introduction

For decades, observers have speculated about the best ways to revise and refine the American law school curriculum.¹ Relatively few commentaries, however, focus their attention on the most glaring inevitability for the majority of law students: the bar exam. While plenty of pundits offer fine arguments about the insufficiency of state bar exams as tools for assessing an aspiring attorney's fitness for legal practice, only a small number of evaluators center their gaze on the important matter of better preparing law students to take these ever-controversial tests.²

This lack of detailed attention regarding bar exam preparation is problematic. The continued existence of these exams is a reality that legal educators cannot in good faith avoid.³ Most students pay the high price of a law school education with the goal of entering the practice of law—a desire that becomes unattainable without passing the bar.⁴ To fulfill the reasonable expectations of their paying customers, law schools are obligated to prepare students as best as possible to overcome this inevitable barrier.⁵ While students bear a responsibility to devote the time and energy that is necessary to learn the material that is tested on this exam, educators possess an equally vital duty to develop the best pathway for students to reach this objective.⁶

This article briefly outlines a set of principles which, if followed, should improve the readiness of law school graduates to confront this inevitable test. It then provides a sample three-year course curriculum aimed at improving the overall preparation for the majority of students at a New York State law school. Overall, this article demonstrates that New York's law schools can follow this set of basic values to better prepare students for passing the bar without causing a decline in the overall academic experience that the students at these schools receive.

The Five Pillars

a. Complementary Pairings

Legal education is in many respects an ongoing cumulative process.⁷ Law is best taught in an environment of constant critical thinking in which students are forced to view various practice areas as interlocking and interrelated components of a much larger whole.⁸ To maximize this form of learning, law schools should look to match complementary courses together in a single semester. Certain legal subjects pair particularly well with other topics, allowing professors to highlight both the similarities and the differences of each.

By closely evaluating which topics intersect best together, and then assigning these courses side-by-side in the same semester, schools will give students a better understanding of these subjects at both the micro level and the macro level. As a result, graduates will leave these classrooms with a far better grasp of the material taught in these courses, a depth of understanding that should pay dividends when evaluating fact patterns on the bar exam.



b. Familiar Before Foreign

For most students, all law school classes introduce a substantial amount of previously unknown subject matter.⁹ However, certain law school courses are typically more foreign than others. Criminal law, for instance, contains situations, principles, and concepts that are at least peripherally recognizable to most people who watch crime shows on television. On the other hand, a course in property law forces the majority of students to learn an array of unfamiliar terms and procedures, leading to a typically steeper learning curve for pupils in these classes.

A student's ability to learn, retain, and properly apply information increases when that student gains confidence and acts with assurance within a subject area.¹⁰ With this in mind, it logically follows that law students will improve their retention of knowledge and their ability to apply concepts to fact patterns—essential skills for bar exam success—if they encounter at least partially familiar subjects at the outset of their law school careers.¹¹

c. More Mandatory, More Meaningful

This is perhaps the most controversial proposal on the list. Trends in modern legal education emphasize the need for law students to pick from a broad menu of course offerings.¹² Commentators supporting these theories call for ample room in a law student's schedule for multiple elective courses, allowing the pupil to select from an array of lecture classes, seminars, clinics, internships, externships, study abroad opportunities, independent study options, and more.¹³ Without a doubt, students benefit in many ways from a diverse legal education, allowing them to gain experiences that they can carry with them into the practice of law.

However, the gates to the practice of law will almost certainly remain closed to students who do not pass the bar exam. Accordingly, law schools need to strike a better balance between the all-you-can-eat buffet of elective class offerings and the castor oil of mandatory courses. While most law schools tend to demand that all of their students pass courses in criminal law, constitutional law, contracts, property law, torts, federal civil procedure, and evidence, classes in plenty of frequently tested bar exam topics are not required learning at many New York State law schools.¹⁴ At minimum, a law school in New York should also mandate classes in trusts and estates, matrimonial and family law, criminal procedure, conflicts of laws, and business organizations to best prepare all students for bar exam success.¹⁵

“The only mandatory course in this final semester is a graded four-credit bar review class.”

Experts agree that the current New York State bar exam demands greater precision than ever in understanding the black-letter law in these areas and successfully applying these laws to sets of facts.¹⁶ Preparations to succeed in this format should not begin on the first day of some costly high-pressure bar review course. Instead, law schools need to establish the groundwork of knowledge in all of these areas by requiring at least one semester of focused study in each of these fields. As the sample schedule illustrates below, such a structure is eminently possible.

d. Reinforce Through Review

Typically, law schools assign courses in the subjects that appear most frequently on the bar exam—torts, contracts, criminal law, property law, and the like—during students’ first two semesters of study.¹⁷ As a result, students subsequently have two years to forget most of the in-depth knowledge acquired during those two semesters.¹⁸ Consequently, most pupils begin their bar review sessions by trying to dust the cobwebs off of material that they likely have not touched in two years, an experience that is both counterproductive and exasperating.¹⁹

Reinforcement and review is an age-old pedagogical tool which often proves successful, particularly when preparing for an exam that requires test-takers to think of key concepts accurately and quickly to avoid wasting time.²⁰ Therefore, to avoid this damaging knowledge regression, law schools should mandate review courses for all students during their second- and third-year schedules. Students need to take these courses for academic credit, and professors administering these courses need to offer periodic graded examinations—preferably using questions from prior bar examinations—to assess student performance in these classes.

While such a system may seem unduly paternalistic to some observers, it is the only practical way to ensure that law students continually review and reinforce the material learned in their prior year’s courses. Voluntary ungraded review sessions will never rise to the top of a law student’s hierarchy of needs. Only mandatory courses with grades that count toward the student’s class rank will stimulate the majority of students to take these review classes seriously.²¹ Through these periodic well-structured review opportunities, schools will help students guard against the demoralizing phenomenon of beginning to study for the bar exam and abruptly realizing just how much material they forgot since their first semester of law school.

e. Pace and Space

As discussed above, most law school curriculums ironically place virtually all of their mandatory bar exam-related courses into the first two semesters, with perhaps one or two required courses remaining for the third semester.²² By the time a student enters his or her fourth semester of law school, the classes encompassing the subjects that are most heavily tested on New York State’s bar exam are already squarely in the rearview mirror.

There is no reason why these courses cannot be spaced out in a more balanced manner during the first two years of law school rather than shoved into the first couple of semesters. In particular, law schools should extend many of the most heavily tested core subjects into a full-year course. This will provide students with ample opportunity to ask questions, address concerns, and fill in any gaps in their necessary knowledge of these topics. Additionally, stretching these courses from one semester into a full year will afford professors enough time to cover each key element upon which the bar exam tests, rather than rushing through certain sections or skipping particular segments entirely due to tight time constraints.

Extending the length of certain heavily tested courses from one semester to one year, and moving some of these courses from the first year into the second year, will not impose dramatic hardships upon the ability of students to pursue additional opportunities during their second and third years of law school. The sample schedule outlined below demonstrates that students still have room in their schedules during their second and third years to take a healthy number of elective courses, clinics, internships, and so on. This is therefore another change in the New York State law school curriculum that simply makes sense to enact.

One Sample Schedule

Various possibilities exist for developing an academic schedule adhering to the five principles discussed in the preceding section. The schedule outlined below offers just one possible plan of courses that a law school could require to better meet the needs of its students in terms

of bar exam preparation without sacrificing the quality of their legal education.

a. First Semester

Course	Credit Hours
Lawyering Skills 1	Three
Federal Civil Procedure	Three
Torts 1	Three
Criminal Law	Three
Criminal Procedure	Three
Total Mandatory Credits	Fifteen

b. Second Semester

Course	Credit Hours
Lawyering Skills 2	Three
Constitutional Law	Four
Evidence	Four
Torts 2	Two
Professional Responsibility	Three
Total Mandatory Credits	Sixteen

c. Third Semester

Course	Credit Hours
Property Law 1	Three
Contracts 1	Three
Trusts & Estates	Three
First-Year Review	Two
Total Mandatory Credits	Eleven

d. Fourth Semester

Course	Credit Hours
Property Law 2	Three
Contracts 2	Three
Matrimonial & Family Law	Four
First-Year Review	Two
Total Mandatory Credits	Twelve

e. Fifth Semester

Course	Credit Hours
Business Organizations	Four

Conflict of Laws	Two
Second-Year Review	Four
Total Mandatory Credits	Ten

f. Sixth Semester

Like a competitive swimmer, runner, or cyclist training for a big race, law students under this plan will undergo a “tapering phase” in their last semester. By this point, all of the required courses that introduce new legal practice areas will have been completed, allowing students ample room to take electives or pursue other opportunities prior to graduation day. This ensures that students will not reserve all of the courses that are most relevant to the bar for a final semester of panic.

The only mandatory course in this final semester is a graded four-credit bar review class. By adhering to the five pillars throughout the previous five semesters, this class plan should ensure that this course will not bring an unpleasant discovery of how much the student has left to learn. Rather, this course should focus on filling any final gaps in a student’s understanding of bar-tested subject matter, providing plenty of opportunities for students to practice bar-style questions under time-pressured conditions, and bolstering the confidence of students leading up to the post-graduation final leg of their journey toward the bar exam.

Conclusion

Regardless of how valid any criticisms of the bar exam might be, this test remains an inevitable reality for any person seeking a career as a practicing attorney—and, by extension, an inevitable reality that law schools must confront on their students’ behalf. This article provides five pillars upon which any bar-focused curriculum revision should stand. Placing the most traditionally familiar fields of study first in a law student’s course plan will help build confidence among these pupils from the outset. Pairing complementary courses together will immerse students in an environment of constant reinforcement and review, allowing them to better understand how key legal principles compare and contrast among interrelated fields of study.

Increasing the number of mandatory courses guarantees that pupils receive appropriate exposure to the primary areas of focus on the bar exam prior to graduation, an approach far better than leaving students to teach themselves complex fields of law in a few weeks before the exam. Spreading the required courses over a longer time period will grant professors sufficient duration to cover the various sub-topics about which the bar examiners may pose questions. Lastly, mandatory graded review classes will guard against students forgetting information

learned in prior years and will provide experience with bar-style questions long before the actual test.

The course plan described in this article represents the author's belief of how to best implement these five principles. Alternative curricula may also be possible while still following these five overarching pedagogical values. The more important takeaway from this discussion is the need for law school administrators to engage in these conversations about better preparing their students for the bar exam and revising their sets of courses accordingly. Such changes are not infantilizing, excessively paternalistic, or improperly restrictive. Rather, they represent a necessary improvement in the services that schools deliver to their students, raising the bar in legal education to help their paying customers reach their ultimate goal.

Endnotes

1. See, e.g., R. Michael Cassidy, *Reforming the Law School Curriculum from the Top Down*, 64 J. LEGAL EDUC. 428 (2015); J. Henry Landman, *The Curriculum of the Law School*, 47 AM. BAR ASS'N J. 156-59 (Feb. 1961); Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L. J. 1303, 1315 (1947).
2. See Linda Jellum & Emmeline Paulette Reeves, *Cool Data on a Hot Issue: Empirical Data That a Law School Bar Support Program Enhances Bar Performance*, 5 NEV. L. J. 646, 648-49 (2005); Christian C. Day, *Essay: Law Schools Can Solve the 'Bar Pass Problem'—'Do The Work!'*, 40 CAL. W. L. REV. 321, 341-50 (2003); Richard Cabrera, *Essay: Working to Improve: A Plan of Action for Improving the Bar Exam Pass Rate*, 27 WM. MITCHELL L. REV. 1169, 1182-88 (2000). One might reasonably argue that the overall lack of faculty members at law schools possessing any background in educational theory represents one reason for the lack of scholarly commentaries about improving law schools' abilities to bolster bar exam performance among their graduates. See Nancy B. Rapoport, *Essay: Rethinking U.S. Legal Education: No More 'Same Old, Same Old.'*, 45 CONN. L. REV. 1409, 1415 (2013).
3. Jellum & Reeves, *supra* note 2, at 647.
4. Cabrera, *supra* note 2; Cassidy, *supra* note 1.
5. Linda Sheryl Greene, *Law Schools Need to Better Prepare Their Students*, N.Y. TIMES, Sept. 24, 2015, <https://www.nytimes.com/roomfordebate/2015/09/24/is-the-bar-too-low-to-get-into-law-school/law-schools-need-to-better-prepare-their-students>; Jellum & Reeves, *supra* note 2, at 647 n. 10.
6. See, e.g., Lauren Carasik, *Renaissance or Retrenchment: Legal Education at a Crossroads*, 44 IND. L. REV. 735, 783 (2011) ("Law schools do have an affirmative duty to prepare students to pass the bar examination"); Christian C. Day, *Essay: Law Schools Can Solve the 'Bar Pass Problem'—'Do The Work!'*, 40 CAL. W. L. REV. 321, 322 (2003) ("Law schools have a moral and professional obligation, not only to graduate their increasingly heterogeneous student body, but also to enable graduates to practice by preparing them to pass the bar.");
7. Judith Welch Wegner, *A Legal Education Prospectus: Law Schools and Emerging Frontiers: Reforming Legal Education's 'Wicked Problems.'*, 61 RUTGERS L. REV. 867, 930-40 (2009).
8. See Cassidy, *supra* note 1, at 432-35.
9. Rapoport, *supra* note 2, at 1417-18.
10. See Jamie Doward, *Confidence, Not Peer Pressure, Is Key to Success at School, Say Researchers*, THE GUARDIAN, Sept. 21, 2013, <https://www.theguardian.com/education/2013/sep/21/confidence-peer-pressure-school>.
11. Day, *supra* note 6, at 336-38.
12. See Mark Neal Aaronson, *Thinking Like a Fox: Four Overlapping Domains of Good Lawyering*, 9 CLINICAL L. REV. 1, 17-19 (2002).
13. See Wegner, *supra* note 7, at 916, 941-42.
14. See, e.g., Academic Life As a First Year, Columbia Law School, <http://www.law.columbia.edu/admissions/jd/learn/curriculum/11>; Your First Year, Cornell Law School, http://www.lawschool.cornell.edu/admissions/admitted/first_year.cfm; Required First Year Courses, NYU Law School, <http://www.law.nyu.edu/academics/courses/requiredfirstyearcourses>; First-Year Schedule, Albany Law School, <http://www.albanylaw.edu/admissions/accepted-students/first-year-schedule>; Required First-Year Courses, Hofstra Law School, <http://law.hofstra.edu/jdprogram/academics/courses/index.html>; Course Descriptions, Syracuse University College of Law, <http://law.syr.edu/academics/course-descriptions/>; Required and Elective Courses, Pace Law School, <http://www.law.pace.edu/sites/default/files/registrar/coursedescriptions.pdf>; Sample Student Programs, St. John's University School of Law, <http://www.stjohns.edu/law/admissions/faqs/sample-student-programs>; First-Year Curriculum, Benjamin N. Cardozo School of Law, <https://cardozo.yu.edu/academics/jd-degree/curriculum>; Your First Year at Brooklyn Law School, Brooklyn Law School, <http://www.brooklaw.edu/academics/curriculum/firstyearprogram>.
15. See *The Difference Between the NY Bar Exam and the UBE*, PIEPER BAR REVIEW NEWS, Jan. 22, 2016, <http://news.pieperbar.com/the-difference-between-the-ny-bar-exam-and-the-ube>; Mary Campbell Gallagher & Suzanne Darrow-Kleinhaus, *A Comparison of the New York Bar Examination and the Proposed Uniform Bar Examination*, N.Y.S. BAR ASS'N J., Feb. 2015, at 35.
16. Jackson Mumeey, *A Chart Summarizing the New York Bar Exam Changes*, THE LAW INSIDER, May 17, 2015, <http://www.thelawinsider.com/lawschool/new-york-bar-exam-changes/>; see also Cabrera, *supra* note 2, at 1186 ("Experience tells us that the reason most people fail [the bar exam] is not lack of substantive knowledge, but the failure to correctly apply substance to the exam's hypotheticals. This is confirmed by the bar examiners...").
17. Rapoport, *supra* note 2, at 1420.
18. See Jeff Smink, *This Is Your Brain On Summer*, N.Y. TIMES, July 27, 2011, <http://www.nytimes.com/2011/07/28/opinion/28smink.html> (discussing the regression of knowledge that occurs for a student when he or she ignores material learned during the previous academic year).
19. Cabrera, *supra* note 2, at 1170-71.
20. Mumeey, *supra* note 16.
21. Some law schools already provide a mandatory bar review course that lasts for the semester prior to a student's graduation, but do not provide academic credit for this class. See Cabrera, *supra* note 2, at 1183. However, such a course is too easy for students to subordinate to other classes that actually count toward their final grade point average and class rank. See Susan Sturm & Lani Guinier, *Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 528 (2007).
22. Rapoport, *supra* note 2, at 1420.

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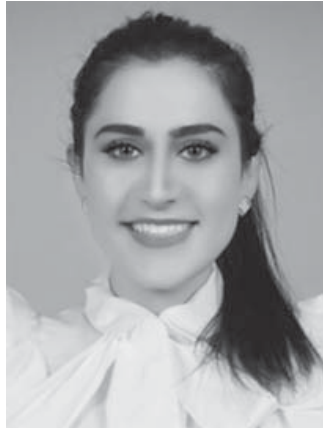


Digital Footprints and the Fourth Amendment: The Right of the People to Be Secure in Their Persons

By Roya Imani

To prevent the government from committing incursions into their lives, the American people ratified the Fourth Amendment as part of the Bill of Rights in 1791. It provides, in relevant part, that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”¹ Technological advances have made it difficult to abide by the Fourth Amendment. As technology advances, our digital footprints become easier to track by the government and private companies in ways that were once unthinkable. Thomas Jefferson’s relationship with Sally Hemmings (one of his slaves) has included tracing where he was during every day of his life in the 18th and 19th centuries—long before cell phones. As my Constitutional Law professor suggested, if Jefferson and Hemmings carried cell phones, we could have determined their relationship a lot more easily using modern tracking methods. The new normal is to have users’ knowledge shared with tech companies like Google, Facebook, and Apple as information that might end up in the hands of the government. Many cellular providers inform customers in their privacy policy that they collect location data, which means the public expects that cellular providers are regularly collecting and tracking cell phone usage.

In 2017, the Supreme Court granted certiorari on the case of two half-brothers, Timothy Carpenter and Timothy Sanders (collectively “Carpenters”), who were accused of being the masterminds behind a series of armed robberies (ironically, stealing new smartphones) in Ohio and Michigan.² Rather than securing a warrant as required by the Fourth Amendment, pursuant to a showing of probable cause, the government acquired the records from the Carpenters’ cellular providers pursuant to the Stored Communications Act, which allows phone companies to disclose records when the government provides “specific and articulable facts showing that there are reasonable grounds to believe” that records at issue “are relevant and material to an ongoing criminal investigation.”³ The records allowed the government to determine that, over a five-month span in 2010 and 2011, the Carpenters’ cellphone connected with cell towers near the robberies.⁴ To invoke the Fourth Amendment protection, the Carpenters will have to demonstrate a reasonable expectation of privacy that has been invaded by government action. In *Katz*, the court asserted that to determine whether one has a reasonable expectation of privacy, there must be a subjective expectation of privacy that society recognizes as reasonable.⁵ Failure to demonstrate both a subjective and



objective expectation of privacy terminates the search analysis entirely, as insufficient to invoke Fourth Amendment protection.⁶

The Supreme Court should hold that Carpenters’ business records are unprotected by the Fourth Amendment because there is no subjective expectation of privacy when the Carpenters voluntarily conveyed the information to MetroPCS and T-Mobile (collectively “providers”) in the regular course of business. Under the third-party doctrine, “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”⁷ This means that once a person’s records are handed over, the “companies are deemed to ‘own’ them, as they are in possession of them and are generally the ones that created them..., the information can [then] be transferred free from the permission of the subject of the information.”⁸ The Court relied on this theory in *Miller*, where it noted that the bank records were not Miller’s “private papers” because he was not in possession of the documents.⁹ Instead, the documents were deemed “the business records of the banks.”¹⁰ Similar to *Miller*, by transmitting signals to the nearest cellular towers in order for the calls to be connected, the Carpenters did not reveal “confidential communications,” but rather information that was required to transact business.

More recently, the Court in *United States v. Graham* reasoned that because defendants knowingly and willingly surrendered historical cell site data to a third party, they assumed the risk that Sprint/Nextel, Inc. would turn over this information to government investigators, and therefore had no reasonable expectation of privacy.¹¹ The same reasoning applies in the Carpenters’ case; the government did not surreptitiously view, listen to, record, or in any other way engage in direct surveillance of petitioners to obtain the information. Instead, the providers, on their own, kept these records in the normal course of business.

Relying on *Riley v. California*, the Carpenters argue that when the government obtained months’ worth of data comprising thousands of individual locations, they needed to get a search warrant.¹² However, the Carpenters fail to recognize the important distinction between *Riley* and their case. *Riley* covered the wealth of internal data that a phone can store, including emails, notes, photos, and text messages, and not the limited kind of information such as location data.¹³ The evidence in *Riley* revealed content information which is “...vastly more... than whether the user happens to be located within

a two-mile radial wedge.”¹⁴ “Although [Carpenters’] conduct may have been calculated to keep the *contents* of [their] conversation private, [their] conduct was not and could not have been calculated to preserve the privacy of the number [they] dialed.”¹⁵ Moreover, the Carpenters chose to use the phones within two-mile radius of each of the banks during the robberies. The disclosure of this information could have been prevented by simply turning off the phones if they did not want this information to be revealed to the providers and ultimately the government. As one federal judge noted, “...the Government does not require [a member of the public] to obtain his cell phone service from a particular service provider that keeps historical cell site records for its subscribers...and it does not require him to make a call, let alone to make a call at a specific location.”¹⁶ Therefore, the Carpenters exposed that information to the company’s equipment in the ordinary course of business and thus have no subjective expectation of privacy in that information.

Even if the Carpenters had a subjective expectation of privacy in the historical cell site data that was voluntarily conveyed to the providers, that expectation is not “one that society is prepared to recognize as ‘reasonable.’”¹⁷ Individuals do not have a reasonable expectation that they may use their cell phones to make and receive calls and yet have their location remain private. In fact, the public understands that phone providers have “...facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills.”¹⁸ Like many other cellular companies, the providers in the Carpenters’ case disclosed on their websites that they collect location data, which means the public would expect that the providers regularly collect and track cell phone usage.¹⁹ Generally, phone companies do this to calculate roaming charges and detect fraud. Therefore, individuals “...take the risk, in revealing [their] affairs to another, that the information will be conveyed by that person to the government...even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.”²⁰ Likewise, the Carpenters assumed the risk that the providers would reveal to the government their historical cell site data.

Relying on *United States v. Jones*, where the police attached a GPS tracking device to the underbelly of Jones’s car and tracked it 24 hours a day for 28 days without a warrant, the Carpenters argue that *Smith* does not have a place in our modern technological society.²¹ In making that argument, however, the Carpenters omit the difference between GPS tracking and cell site data. With GPS, the government is surveilling movements visible to the public and there is no third party involved, but cell site data is voluntarily disclosed to a third party who become new owners. The GPS in *Jones* revealed to the government the location and movements of the suspect in real time, showing exactly what building the target is located

within.²² Historical cell site data is, as its name implies, historical—the information revealed by such data indicating to the government only where a suspect *was* and not where he *is*.²³ This information is limited to points within a two-mile radius of a cell tower used to connect the call, which is not precise enough to be compared to GPS data.²⁴ The Supreme Court has applied the “public disclosure doctrine” to government use of GPS surveillance, beeper tracking, and the like but not to cell site data.²⁵ GPS data can reveal an individual’s political and religious beliefs, sexual habits, and so on, which is an overly broad array of information that intrudes upon the intimate lives of citizens.

Moreover, it is important to remember that the GPS surveillance in *Jones* was conducted without a valid warrant or court order.²⁶ Here, however, the government obtained the historical cell site data information from the providers pursuant to a court order issued under the Stored Communications Act, under the “specific and articulable facts” standard.²⁷

Opponents assert that third-party doctrine is outdated considering technological advancements. Justice Marshall said as much in his dissent in *Smith*, where he argued that “privacy is not a discrete commodity, possessed absolutely or not at all.”²⁸ He continued: “Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes.”²⁹ Similarly, Justice Brandeis asserted that “...every unjustifiable intrusion by the government upon the privacy of the individual, whatever means employed, must be deemed a violation of the Fourth Amendment.”³⁰ However, eliminating the third-party doctrine, would expand Fourth Amendment protection to an unreasonable extent. The third-party doctrine addresses this problem by allowing cellular providers to track cellphone usage and only reveal it to the government pursuant to a court order. Further, “[l]aw enforcement tactics must be allowed to advance along with technological changes to prevent criminals from circumventing the justice system.”³¹ The government should not be prevented from availing itself of technological advances and every request for documents should not require probable cause. As Professor Orin Kerr posits, this upsets the privacy-security balance that undergirds the Fourth Amendment because “...the police would need probable cause to observe evidence of the crime, but they would need to observe evidence of the crime first to get probable cause.”³² Accordingly, the government’s acquisition of the Carpenters’ records from the providers pursuant to court order issued under the Stored Communications Act was obtained properly.

As technology changes, so do popular expectations and attitudes towards privacy. It is Congress that is “...usually better equipped than courts are to answer the empirical questions that such technologies present.”³³ Absent Congressional action, courts should only rely on

legal precedent which currently agrees with *Smith* and *Miller* in holding that information collected and stored by cellphone companies is unprotected by the Fourth Amendment.

Endnotes

1. UNITED STATES CONST. amend. IV.
2. *United States v. Carpenter*, 819 F.3d 880 (6th Cir. 2016), cert. granted, 137 S. Ct. 2211 (2017).
3. *Id.* at 884-86 (quoting 18 U.S.C. § 2703 (d)).
4. *Id.*
5. *Katz v. United States*, 389 U.S. 347, 361 (1967).
6. *United States v. Ford*, 34 F.3d 992, 995 (11th Cir. 1994).
7. *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979).
8. Richard M. Thompson II, CONG. RESEARCH SERV., R43586, *The Fourth Amendment Third-Party Doctrine* (2014).
9. *United States v. Miller*, 425 U.S. 435, 440 (1976).
10. *Id.*
11. *United States v. Graham*, 846 F. Supp. 2d 384, 399 (D. Mar. 2012).
12. *United States v. Carpenter*, 819 F.3d 880, 889 (6th Cir. 2016).
13. *Riley v. California*, 134 S. Ct. 2473 (2014).
14. *Carpenter*, 819 F.3d at 889.
15. *Smith*, 442 U.S. at 735.
16. *In re Application of the United States of America for Historical Cell Site Data*, 724 F.3d 600, 613 (5th Cir. 2013).
17. *Smith*, 442 U.S. at 735.
18. *Id.* at 742.
19. T-Mobile Privacy Policy <https://mim.t-mobile.com/assets/html/PrivacyPolicy.jsp>, MetroPCS Privacy Policy <https://www.metropcs.com/terms-conditions/privacy.html>, Verizon Privacy Policy <http://www.verizon.com/about/privacy/full-privacy-policy>, AT&T Privacy Policy http://about.att.com/sites/privacy_policy, Sprint Privacy Policy <https://www.sprint.com/legal/privacy.html>.
20. *Miller*, 425 U.S. at 443.
21. *United States v. Jones*, 565 U.S. 400, 402-03 (2012).
22. *Graham*, 846 F. Supp. 2d at 392.
23. *Id.* at 391.
24. *Smith*, 442 U.S. at 743-44.
25. *United States v. Knotts*, 460 U.S. 276 (1983); *Jones*, 565 U.S. 400.
26. *Jones*, 565 U.S. at 413.
27. *Carpenter*, 819 F.3d at 884.
28. *Smith*, 442 U.S. at 749.
29. *Id.*
30. *Olmstead v. United States*, 277 U.S. 438, 478 (1928).
31. *United States v. Skinner*, 690 F.3d 772, 778 (6th Cir. 2012).
32. Orin S. Kerr, *The Case for the Third Party Doctrine*, 107 MICH. L. REV. 561, 575 (2009).
33. *Carpenter*, 819 F.3d at 890.

When she is not in the law library analyzing cases and blue-booking her way through law school, Roya Imani enjoys writing about current legal issues. As an immigrant to the United States, she finds the United States Constitution to be extremely valuable because its text has endured for generations. She also is fascinated by the fact that lawyers face the challenge of interpreting it and enforcing it as political and popular views change. She hopes to inspire readers about Constitutional Law in the same way that music and literature inspire.

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