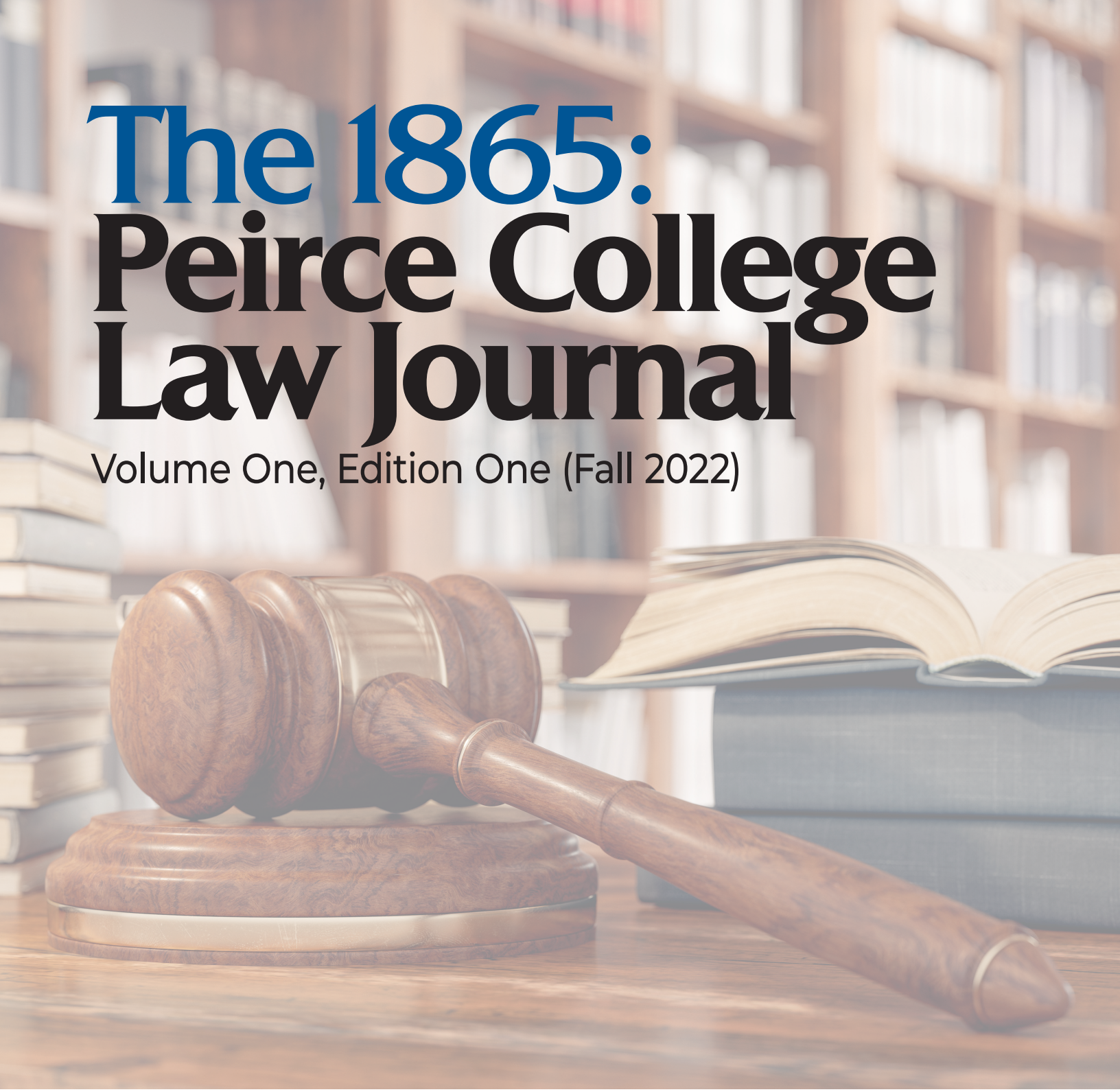

The 1865: Peirce College Law Journal

Volume One, Edition One (Fall 2022)

1608 Walnut Street
19th Floor
Philadelphia, PA 19103

PEIRCE COLLEGE
SINCE 1865

The 1865

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1608 Walnut Street
19th Floor
Philadelphia, PA 19103

THE 1865
PEIRCE COLLEGE LAW JOURNAL *

* *The 1865: Peirce College Law Journal* uses outside editors (practicing attorneys) for the Journal's double-blind, peer-review process.

LEGAL STUDIES FACULTY

Michael Agnello, J.D.
Faculty Chair

Ivy Kempf, J.D.
Professor

Frank Plunkett, MAT, MCJ
Associate Professor

R. Christopher Campbell, J.D.
Associate Professor

PEIRCE COLLEGE
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— HISTORY OF THE LEGAL STUDIES PROGRAM —

Peirce College was established in 1865 as Union Business College to provide career-focused education for soldiers returning from the Civil War and was one of the country's first schools to embrace women as students.[1]

As the College grew, it was renamed the Peirce College of Business and moved to larger facilities. Growth led to distinction with honors in the form of awards and well-known commencement speakers visiting Peirce College for graduation ceremonies, like John Wanamaker, Andrew Carnegie, and several ex-presidents, including Benjamin Harrison, Grover Cleveland, Theodore Roosevelt, and William Howard Taft.[2]

Through the 1970s and '80s, Peirce's success was fueled by interest in its practical business and technology programs. While Peirce continued to be a leader in business education, in 1985, Peirce established a paralegal studies program—one of the first paralegal programs in the region. After the Peirce College Paralegal Program gained approval from the American Bar Association (ABA), the Program quickly became one of Peirce's more popular offerings.

The ABA-approved Paralegal Program at Peirce—now part of Peirce's larger Legal Studies Program, which includes Criminal Justice—prepares students with critical, intellectual tools and practical application skills required to explore the intersections of law, business, and society.[3] The Paralegal Program currently offers associate's and bachelor's degrees as well as a post-bachelorette certificate. Peirce's Paralegal Program (and its Criminal Justice Program) can be completed entirely online. However, some of the foundational courses in the Paralegal Program must be completed with live, synchronous courses.

In keeping with Peirce's reputation as a leading legal studies educator in the region, Peirce College is proud to introduce its next venture. The United States has roughly 800 paralegal programs. Of those paralegal programs not associated with a law school, only a handful have a law journal. *The 1865: Peirce College Law Journal* will fill that void by providing a forum for compelling issues, trends, and topics in the legal field as well as specific topics in the paralegal profession. *The 1865* will further provide our student editors with invaluable education in legal research, legal writing, and legal citations.

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[1] Peirce is designated as a Minority Serving Institution (MSI) by the U.S. Department of Education and is the only college or university in Pennsylvania dedicated exclusively to serving adults.

[2] Taft was also Chief Justice of the United State Supreme Court.

[3] The ABA (the American Bar Association) is the preeminent organization for legal academic programs. *See* https://www.americanbar.org/.

Coming in 2023, *The 1865* will also have an online component. The online component will serve as a forum for the articles in the Journal and a host for short-form writings and discussions on issues, trends, and developments in the legal field. With these new ventures, Peirce College will continue to be a leader in legal studies education in this region and beyond.

— PEIRCE COLLEGE POCKET PART —

Peirce College and Rutgers Law School Partner For an Accelerated Bachelor-to-Juris Doctor Program

In each edition of *The 1865*, the "Peirce College Pocket Part" will provide the latest news, advancements, and initiatives from Peirce College's Legal Studies Program. In this edition of *The 1865*, Peirce College proudly announces its partnership with Rutgers Law School.

Peirce College and Rutgers Law School recently partnered for an accelerated Bachelor-to-Juris Doctor program, better known as the "Three-Plus-Three." This program enables students to earn a bachelor's degree from Peirce College and a law degree from Rutgers Law School in six years rather than seven.

Eligible Peirce College students who have completed 94 credits toward their bachelor's degree may apply to Rutgers Law School. Courses completed at Rutgers during the first year of law school will satisfy the remaining requirements of the bachelor's degree at Peirce; Rutgers Law School will award the juris doctor degree upon completion of 84 credits and other juris doctor requirements. The 84 credits and other requirements are typically completed in three years as a full-time student at Rutgers Law School.

This partnership exemplifies Peirce's commitment to preparing students for professional advancement and graduate study in law and business, and Peirce is fortunate to have a partner in Rutgers Law that shares in its commitment to student success.

For eligibility, requirements, or more information about the Peirce College and Rutgers Law School "Three-Plus-Three" program, please visit https://www.peirce.edu/about-peirce/peirce-partners/academic-partners/rutgers-law

— ABOUT THE LAW JOURNAL —

The 1865: Peirce College Law Journal is a student-run, double-blind peer-reviewed law journal that provides a forum for original articles written by attorneys, paralegals, legal professionals, legal scholars, alumni, professors, and law enforcement. The Journal publishes once a year in June. *The 1865* addresses compelling issues, trends, and topics in the legal field as well as specific topics in the paralegal profession.

The Journal staff consists of a faculty advisor, a technical advisor, and a handful of current Peirce College students. Each year, Peirce College's Legal Studies Department selects four to five students to run the Journal as staff editors. The students are selected based on their outstanding academic achievements and writing abilities. The staff editors elect an editor-in-chief. Students may also be admitted to the Journal by authoring an article suitable for publication (i.e., "writing on"). For the Journal's double-blind, peer-review process, the Journal uses "outside editors" (practicing attorneys).

SUBMITTING ARTICLES

Articles may be submitted each school year from September 1 through February 25. To submit an article, please forward the article as an email attachment to LawJournal@peirce.edu.[4] For the double-blind peer-review process, the author's name, email, credentials, and biographical information should be on a separate page from the article. After an article is submitted, all correspondence with the author will be via email.

JOURNAL GUIDELINES

All submitted articles will be carefully considered. However, articles must comply with Peirce College standards and the Journal guidelines. Articles that meet the standards and guidelines will be considered for publication through a double-blind peer-review process to ensure impartiality. All articles must be focused on or linked to a law-related topic. Submitted articles should be double-spaced, with one-inch margins in a word document. Articles should also be no fewer than 1,000 words and no more than 6,000 words. (Articles fewer than 1,000 words or larger than 6,000 words may be considered on a case-by-case basis.) Quotation marks and citations should be used for another author's language, and citations and references should also be used to support the article. For sources and references, please use footnotes rather than endnotes. For editing and citation checking, the Journal uses the *ALWD* citation manual (Associate of Legal Writing Directors). Articles formatted

[4] Note that articles sent by regular mail will not be accepted.

via *The Bluebook* are acceptable. Articles submitted in APA format may be considered if our staff editors can easily convert the citations and references to an *ALWD* format.

For more information about the Law Journal, please visit the Journal's home page[5], email the Journal at LawJournal@peirce.edu, or follow the Journal on Twitter: @1865Law.

REFERENCES

The recommended citation for articles, comments, or essays in *The 1865: Peirce College Law Journal* is: [Vol.] Peirce College L. J. [page] ([semester] [year]).

CONTENT OF ARTICLES, COMMENTS, & ESSAYS

The opinions expressed in the articles, comments, and essays in *The 1865: Peirce College Law Journal* are solely the opinions of the authors. The opinions do not reflect Peirce College, *The 1865*, or the staff and outside editors. Although *The 1865* was created as a forum for compelling issues, trends, topics in the legal field, and specific topics in the paralegal profession, *The 1865* was not created to offer legal advice. If seeking legal advice, please contact a legal professional.

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OUTSIDE EDITORS

If interested in reviewing articles as an outside editor for the Journal's double-blind, peer review process, please email LawJournal@peirce.edu. In the email, include a resume and the reasons for your interest.

[5] https://www.peirce.edu/degrees-programs/undergraduate/legal-studies/the-1865-peirce-college-law-journal

— ARTICLES, COMMENTS, & ESSAYS —

On behalf of the Legal Studies Department, I am proud to introduce the first edition of *The 1865: Peirce College Law Journal*. Congratulations to Associate Professor R. Christopher Campbell, J.D., and the Journal Staff for this impressive accomplishment. *The 1865* was conceived as a forum for our students, alumni, and faculty to explore legal issues they are passionate about and to provide relevant information about the legal profession.

The opportunity to publish a journal article is a uniquely valuable experience as the goal of many of our students and alumni is to attend law school; this is demonstrated by the interest in our partnership with Rutgers Law. As we look to the future, we hope to expand *The 1865* to include articles by paralegals, attorneys, and educators.

To our students and faculty, thank you for your hard work creating this exciting and informative publication. With that, and without further delay, here is Volume 1, Edition 1, of *The 1865: Peirce College Law Journal*.

– Michael Agnello, J.D.
Legal Studies Faculty Chair

The Deficiency of Transferred Intent and Proximate Cause in Pennsylvania and the Fanta Bility Case

Ryan Raynor *

I. INTRODUCTION

According to *Black's Law Dictionary*, proximate cause is a cause that is "legally sufficient to result in liability; an act or omission that is considered in law to result in a consequence, so that liability can be imposed on the actor."[1] There is a significant deficiency, however, in law regarding proximate cause and transferred intent in Pennsylvania, and recent matters in Delaware County, Pennsylvania, illustrate the confusing interpretations that result.

On August 27, 2021, outside the Academy Park High School Football Field in Sharon Hill, PA, two teenagers got into an argument after leaving a football game. The argument led to gunfire approximately one block away from the stadium's exit, where three Sharon Hill Police Officers were monitoring the crowd exiting the stadium.[2] Amidst the chaos, a car approached the police officers, and police fired on the vehicle in response. The aftermath left four people wounded and one dead. Four victims were struck by stray bullets fired by police, while one victim was wounded by a stray bullet from the teenage shooters. The victim that died was an eight-year-old child named Fanta Bility, who was shot by police while running back into the stadium with her sister in fear for her life.[3]

Following the tragedy, Delaware County District Attorney announced first-degree murder charges to both teenage shooters for the killing of Fanta Bility, while a grand jury was summoned to determine if any criminal charges applied to the three Sharon Hill Police Officers.[4]

The obvious question surrounding the District Attorney's first-degree murder charge is how the Commonwealth will connect the conduct of each teenage shooter to the murder of a victim they did not kill and did not intend to kill?

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* B.S. (2023) Peirce College. Editor-in-Chief for *The 1865: Peirce College Law Journal*. Legal Assistant at Salaman Law P.C. To my amazing family, Maryum, Darby, Izzy, Fiona, and Ezra, thank you so much for your firm support and affirmation.

[1] *CAUSE*, *Black's Law Dictionary* (11th ed. 2019).

[2] Press Release of Jack Stollsteimer, Delaware County District Attorney, September 2, 2021, https://delcoda.com/press-release/statement-of-district-attorney-jack-stollsteimer-regarding-investigation-into-shooting-in-sharon-hill/

[3] Press Release of Jack Stollsteimer, Delaware County District Attorney, September 27, 2021, https://delcoda.com/press-release/district-attorney-issues-update-on-sharon-hill-investigation/

[4] Press Release of Jack Stollsteimer, Delaware County District Attorney, November 10, 2021, https://delcoda.com/press-release/district-attorney-stollsteimer-announces-arrest-in-connection-with-the-august-27-2021-death-of-fanta-bility/

In Pennsylvania, "a criminal homicide constitutes murder of the first degree when it is committed by an intentional killing."[5] "Intentional killing" is defined as "[k]illing by means of poison, or by lying in wait, or by any other kind of willful, deliberate[,] and premeditated killing."[6] Clearly, the Commonwealth of Pennsylvania expects that murder of the first degree must constitute an intentional killing. Furthermore, a willful, deliberate, and premeditated killing is considered intentional.

However, in the Bility case, neither teenage shooter intended for the victim to be killed. Thus, the foregoing application of first-degree murder charges to each teenage shooter is curious. How did the Commonwealth plan to prove an intentional killing when the circumstances of death arose from recklessness but not intentional conduct?

II. PENNSYLVANIA LAW

Chapter Three of Pennsylvania's crimes and offenses statutes focuses on culpability. In general, criminal culpability refers to a person(s) blameworthiness. In Chapter Three, the Delaware County District Attorney bridges the gap between the teenage shooters' conduct and the death of Fanta Bility. Furthermore, Chapter Three is also where the above-referenced error of law in this comment's title presents itself.

Generally, in Pennsylvania, "conduct is the cause of a result when: (1) it is an antecedent but for which the result in question would not have occurred; and (2) the relationship between the conduct and result satisfies any additional causal requirements imposed by this title or by the law defining the offense."[7]

Section one is traditionally referred to as a *but-for* test. Applied to the Bility case, the teenagers engaging in a shootout is antecedent but for which the police would not have responded with gunfire resulting in the victim's death. However, the result alone is not enough to prove criminal liability. "Standing alone, causation-in-fact, the "*but for*" element of assessing causal connection, will not necessarily determine criminal culpability; criminal conviction requires a more direct causal connection than tort concepts."[8] In addition to conduct being the *but-for* or factual cause of a result, section two requires a "causal connection between the conduct and the result of conduct."[9] Also referred to as the legal or proximate cause of the result.

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[5] 18 Pa.C.S.A. § 2502(a).
[6] 18 Pa.C.S.A § 2502(a)(d).
[7] 18 Pa.C.S.A. § 303(a).
[8] *Commonwealth v. Rementer*, 598 A.2d 1300, 1306 (Pa. Super. 1991) (emphasis added) (footnotes omitted) (*appeal denied* 617 A.2d 1273, 533 Pa. 599 (1992)).
[9] *Id.* at 1305.

Therefore, the teenagers' conduct (engaging in a shootout) must be the proximate cause of the victim's death to be held criminally responsible in Pennsylvania. Although, to what degree can they be liable? Here, the teenage shooters have been charged with murder of the first degree, requiring intent.

Pennsylvania's criminal code codifies language applying directly to this set of circumstances for when an actor's conduct is the cause of a result, but the necessary *mens rea* element(s) are missing.

When intentionally or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the intent or the contemplation of the actor unless:

> (1) the actual result differs from that designed or contemplated as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have been more serious or more extensive than that caused; or
> (2) the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a bearing on the actor's liability or on the gravity of his offense.[10]

The above Rule 303(b) is entitled *Divergence between result designed or contemplated and actual result.* In this section, the legislature addresses the specific circumstances when the intended result of an actor's conduct and the actual result of an actor's conduct differ. The phrase "result designed or contemplated" refers to the actor's state of mind, which can be *intentionally, knowingly*, *recklessly or negligently*. Therefore, when intent is an element of an offense, as is charged in the Bility case, the element is *not* established if the actual result is not within the intent of the actor *unless*, or (if we remove the double negative) the actual result *is* within the intent of the actor *if* the actual result differs from that intended, only in the respect that a different person or property is injured or affected, or that the injury or harm intended would have been more serious or more extensive than that caused. This first part of § 303(b) echoes the common law doctrine of transferred intent.

Transferred intent is defined as "[i]ntent that the law may shift from an originally intended wrongful act to a wrongful act

[10] 18 Pa.C.S.A. § 303(b).

actually committed."[11] Traditionally, transferred intent applies when a person specifically intends to harm one victim but unintentionally harms a second victim instead.[12] The specific intent a person possesses to kill victim one transfers to victim two, thus satisfying any lacking *mens rea* elements required.

For example, if person A fires a gun at person B with intent to kill but misses target B and hits unintended person C resulting in C's death; then the specific intent that person A employs to kill person B is transferred to the unintended victim, satisfying the *mens rea* requirement for first-degree murder.

However, the application of transferred intent in the Bility case follows a different pattern. The bullets the teenagers fired did not strike and kill the unintended victim. Here, teenager A shoots at teenager B and misses. B returns gunfire at A and misses; then, three police officers return fire, shooting twenty-five times at a vehicle they perceived as threatening but missing. The police officer's stray bullets killed the unintended victim, not the teenagers charged with first-degree murder.

Under these circumstances, transferred intent would not traditionally apply; the necessary causal connection appears to be missing. However, suppose the Delaware County Prosecutor intended to charge the teenage shooters with first-degree murder under the transferred intent doctrine. In that case, there is presiding law for this theory in Pennsylvania, allowing for an intervening cause to connect a person's conduct to a result and impute intent.

III. *COMMONWEALTH V. GAYNOR*

In 1988, Michael Gaynor was in a heated argument with Ike Johnson on a sidewalk in front of a West Philadelphia corner store where children inside were playing arcade games. Both Gaynor and Johnson left the store and later returned armed with guns. The argument continued inside the store, leading to Gaynor and Johnson drawing their weapons and firing at each other. Johnson was at the back of the store shooting at Gaynor, who was in the front doorway. Gaynor fired once before fleeing, pursued by Johnson. Bullets struck neither of the two shooters. However, one child was dead inside the store, and two others were wounded. "Expert testimony at trial proved Johnson's gun fired the shots which killed and wounded the children."[13]

Among other charges, Gaynor was convicted of first-degree murder even though it is not alleged that his bullet struck or killed the child or that he was an accomplice or accessory to murder.

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[11] *INTENT*, *Black's Law Dictionary* (11th ed. 2019).

[12] *Transferred Intent, Legal Information Institute Wex Law Dictionary, https://www.law.cornell.edu/wex/ transferred_intent* (last visited May 7, 2022).

[13] *Commonwealth v. Gaynor*, 648 A.2d 295, 296 (Pa. 1994).

Although it does not specify under what part (1 or 2), the Supreme Court of Pennsylvania (SCOPA) holds that "under § 303(b) that the actual result can be attributed to Gaynor's intent to kill Johnson even though the latter's bullets murdered and wounded the victims."[14]

The Court's analysis applying Gaynor's conduct applies to 303(b) as follows:

> Murder of the first degree requires an intentional killing-a willful, deliberate, premeditated killing. 18 Pa.C.S. § 2502(a), (d). For purposes of establishing sufficiency of the evidence, it is obvious that Gaynor intended to kill Ike Johnson. The actual result, of course, was that another person was killed instead of the intended victim. Section 303(b) establishes liability when intent must be proved if the Commonwealth establishes (a) that the only difference between the intended result and the actual result is that a different person was harmed; or (b) that the actual result is of the same type as was intended and is not too remote to justify liability.[15]

SCOPA does not explicitly state under what section (a or b) it finds applicable to establish criminal liability where intent must be proved. SCOPA acknowledges that this is a case of first impression and "give[s] rise to our consideration of the interplay among causation, specific intent and transferred intent in a case of murder of the first degree."[16] The Court's opinion provides that it found criminal liability was established under the transferred intent doctrine, where the *only* difference between the intended result and the actual result is that a different person was harmed. This begs the question: is it not a legally substantial difference that someone else fired the fatal bullet? Meaning there are two differences: (1) a person other than the intended was harmed; and (2) the fatal conduct was physically performed by a person other than the defendant. Thus, SCOPA's decision appears to either lack a vital explanation or is a misinterpretation of the law.

[14] *Id.* at 299.
[15] *Id.* at 298.
[16] *Id.* at 296.

In this regard, there appears to be a divergence between what 303(b) says and what 303(b) means. Under the transferred intent doctrine, the intent follows the bullet. When person A fires a gun, aiming at and intending to kill B, but misses and kills C. A's intent to kill follows the bullet to C. In Pennsylvania, intent follows a fired bullet into an abyss and does not factor in the proximate cause.

The *Gaynor* decision and the charges filed in the Bility case illustrate the problem created by the deficiency mentioned above. Although it should be noted that the first-degree murder charges for both shooters were eventually dropped, and a grand jury indicted three Sharon Hill Police Officers for their part in the killing of Fanta Bility. However, this outcome does not render the issue moot, nor does it mean that the law is working as intended.

IV. *COMMONWEALTH V. REMENTER*

Three years prior to *Gaynor*, in *Commonwealth v. Rementer*, the Pennsylvania Superior Court thoroughly examined 18 Pa.C.S.A. § 303, albeit under a much different set of facts. The *Rementer* court established a two-part inquiry to determine criminal causation. The first part is the traditional *but-for* test as stated in 18 Pa.C.S. § 303(a)(1). However, part two addresses "whether the result of defendant's actions were so extraordinarily remote or attenuated that it would be unfair to hold the defendant criminally responsible."[17] The *Rementer* court notes that its conclusion is based on "careful readings of cases and analysis provided by criminal law commentators."[18]

The *Rementer* court makes sure to include in its two-part inquiry whether a result is too remote that it is unfair to hold the defendant criminally responsible. Comparatively, the *Gaynor* court hardly mentions this language outside of quoting section 303(b), and by its interpretation of the law, transferred intent does not require any inquiry regarding whether the result is too remote to justify criminal liability.

The *Gaynor* court points out that "[18 Pa.C.S.A. §] 303 was taken verbatim from the Model Penal Code, § 2.03."[19] The *Gaynor* court also finds commentary about Model Penal Code § 2.03. persuasive of its reasoning. The court cited the American Law Institute's 1985 commentary to the Model Penal Code, where "if one of the participants in a robbery shoots at a policeman with intent to kill and provokes a return of fire by that officer that kills a bystander . . . the robber who initiates the gunfire could be charged

[17] *Commonwealth v. Rementer*, 598 A.2d 1300, 1305 (Pa. Super. 1991).
[18] *Id.*
[19] *Gaynor*, 648 A.2d at 298.

with purposeful murder."[20] However, except for the murder being "purposeful," Pennsylvania already applies criminal liability to this scenario under the felony murder rule.

Note that the Model Penal Code "creates a rebuttable presumption that killings which occur during the commission of listed dangerous felonies show extreme recklessness for purposes of the code's other murder provisions" instead of a traditional felony-murder rule.[21] By adopting the Model Penal Code's design for culpability but not its model for homicide, Pennsylvania invited this misalignment in law.

V. MODEL PENAL CODE § 2.03

As the *Gaynor* court points out, 18 Pa.C.S.A. § 303 is taken directly from Model Penal Code § 2.03 without any substantive alterations. In a 2015 article titled "The Model Penal Code's Conceptual Error on the Nature of Proximate Cause, and How to Fix It," Paul H. Robinson analyzes Model Penal Code § 2.03, finding that:

> The Model Penal Code reconceptualized proximate cause to see it as part of the offense culpability requirements rather than as, in the traditional view, a minimum requirement for the strength of the connection between the actor's conduct and the prohibited result. That conceptual error, rare in the well-thought-out Model Code, invites misinterpretation and misapplication of the proximate cause provision, and can produce improper liability results.[22]

Robinson illustrates the problem using the classic falling piano scenario. Person A shoots at person B and misses. Person B runs away, and many blocks later, they are struck and killed by a falling piano being pulleyed into a building.[23] Here, Person A is guilty of attempted murder, but also that the result is too accidental and unforeseeable to hold Person A liable for murder.

Suppose, however, the scenario is altered only slightly so that the victim is a bystander to Person B, who runs away and is struck

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[20] *Id.*

[21] *Murder, Legal Information Institute Wex Law Dictionary,* https://www.law.cornell.edu/wex/murder (last visited May 7, 2022).

[22] Paul H. Robinson, *The Model Penal Code's Conceptual Error on the Nature of Proximate Cause, and How to Fix it*, 51 CRIM. L. BULL., no. 6, 2015, at 1311.

[23] *Id.* at 1312.

and killed by the falling piano. In that case, Person A might be found guilty of murder like the *Gaynor* court. The proximate cause issue is the same as in the first scenario. However, the law might be interpreted to hold person A liable because after the required intent for murder is imputed under the transferred intent section, there is no need to proceed to the section containing a proximate cause defense.

According to Robinson, just as if the intended victim, person B, had been struck by the falling piano, all agree that person A is not criminally liable for murder because the result is not foreseeable. However, Robinson claims, and the *Gaynor* decision proves that the law allows for person A to be held liable "because subsection (2)(a) imputes the missing intention needed for murder liability under the doctrine of transferred intent… Having imputed the missing intention under "transferred intent," subsection (2)(b) [too remote or accidental] becomes irrelevant."[24]

Robinson says that for this issue, there is a simple fix. Restructure the law, so that proximate cause becomes a "conduct-result relationship issue" rather than a "culpable state of mind issue."[25] In doing so, Robinson establishes that conduct *must* not only be the *but-for* cause but also be the proximate cause, meaning the result is not too remote or accidental to affect criminal liability.

VI. CONCLUSION

In Pennsylvania, the *Rementer* court established a two-part test that resembles Robinson's reconstructed version of the law. The *Rementer* court's method for determining criminal causation includes the *but-for* test in addition to proximate cause, or in the Court's words, "whether the result of defendant's actions [was] so extraordinarily remote or attenuated that it would be unfair to hold the defendant criminally responsible."[26]

However, Bility and *Gaynor* illustrate that under 303(b)(1), no statutory obligation exists to require the court to measure whether a result is too remote or accidental that it is unfair to hold a defendant liable. While only two cases in the last thirty years clearly highlight this deficiency in law, dozens of other third-degree murder cases stem from the same error in law. Only they escape scrutiny because the burden to prove intent is not necessary. For example, it is much less legal fiction if Gaynor or the teenagers in the Bility case were charged according to third-degree murder standards based on their reckless conduct. Both Gaynor and the teenagers in the Bility case are not shielded from prosecution, but to impute the intent to kill

[24] *Id.* at 1322.
[25] *Id.* at 1315.
[26] *Commonwealth v. Rementer*, 598 A.2d 1300, 1305 (Pa. Super. 1991).

and the corresponding penalties in the foregoing situations is a slippery slope.

WHAT *ROE V. WADE* MEANS FOR THE WAR ON WOMANKIND: Why the Fifty-Year-Old Precedent Should Stand

By Karissa Fritz *

I. INTRODUCTION

Throughout history, women have fought for rights of all kinds, including the right to vote, work outside of the home, and receive an education. Despite obtaining certain rights, women continue to fight for further advances, such as equal pay and the right to be free from domestic/sexual violence.[1] In addition, women are still pleading with the government for the right to their own bodies; they are petitioning for the salvation of bodily autonomy that is so often challenged by those who have no authority to govern it.

In 1973, a landmark case in women's rights was decided. *Roe v. Wade* established and protected a pregnant woman's freedom to have an abortion without government interference.[2] In *Roe*, a single woman challenged the constitutionality of criminal abortion laws in Texas. The Supreme Court, in a seven to two opinion, upheld the plaintiff's right to seek an abortion that was not medically necessary for the plaintiff's survival.[3] In *Roe*, it was held that a woman has the constitutional right to an abortion prior to fetal viability, the point at which a fetus can survive outside of the womb.[4] This holding set the floor for abortion limitations. Despite being almost fifty years after *Roe*, that decision has resurfaced with *Dobbs v. Jackson Women's Health Organization* and has become the focal point of a national women's movement[5]: to protect the rights guaranteed to women in *Roe v. Wade* and to persuade the Supreme Court not to overturn the decision that it rendered half of a century ago.

II. WHY *ROE* MATTERS

According to a study published by National Public Radio, one in four women can be expected to get an abortion in their

* B.S., Paralegal Studies, *summa cum laude*, Peirce College. Special thanks to my family, friends, and those that supported my educational journey.

[1] Amnesty International, *Women's Rights*, Amnesty International (Mar. 5, 2021), https://www.amnesty.org/en/what-we-do/discrimination/womens-rights/.

[2] 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), *modified sub nom. Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

[3] *Id.* at 166.

[4] *Id.* at 163.

[5] 945 F.3d 265 (5th Cir. 2019).

lifetime.[6] If *Roe* is overturned, these women could lose access to safe healthcare, and even be criminally liable for their choice to terminate their pregnancy. In more than one-third of the states, trigger-laws exist that would ban abortion if current case law were overturned.[7] However, judicial officials have stated that overturning *Roe* would not banish abortion nationwide but instead would vest the power in the individual states to decide to restrict or even forbid abortion. Overturning *Roe* would have serious repercussions, including mass increases in the number of patients within states that would still permit abortions, severe disparities in accessibility for minorities who obtain abortions at higher rates than others, and negative long-term effects on physical and mental health.[8]

With the appointment of three new Supreme Court Justices, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett, women's reproductive rights are at greater risk than ever before. The Justices' records reflect hostile opinions towards women's reproductive rights, and three other Justices on the Court have previously ruled to limit abortion access—these parties make up a combined two-thirds of the United States Supreme Court.[9] In Justice Gorsuch's book titled "*The Future of Assisted Suicide and Euthanasia*," he discusses his views on human life, and his assertion that life is "intrinsically valuable and that intentional killing is always wrong."[10] While Justice Gorsuch has neglected to explicitly state a clear stance on abortion, his personal beliefs in other ventures have shown his opposition to any challenge to human life.[11] Justice Kavanaugh, at his confirmation hearing, continuously reiterated that *Roe* had been "settled as precedent."[12] But Justice Kavanaugh's statement about *Roe* is difficult to reconcile with his record. For instance, in *Dobbs v. Jackson Women's Health Organization*, Justice Kavanaugh seems poised to overturn the case he called "settled precedent" at the earliest opportunity.[13] President Trump's final nominee, Justice Barrett, also

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[6] Joe Hernandez, *Here's What Could Happen Now That the Supreme Court Has Overturned Roe v. Wade*, NPR (Jun. 24, 2022). https://www.npr.org/2022/05/03/1096094942/roe-wade-overturned-what-happens-next.

[7] *Id.*

[8] *Id.*

[9] Planned Parenthood Action Fund, *Roe v. Wade at Risk: Nationwide Legal Abortion May Be a Thing of the Past*. Planned Parenthood Action Fund, https://www.plannedparenthoodaction.org/issues/abortion/roe-v-wade (last visited June 24, 2022).

[10] Arina Grossu. *Gorsuch's Pro-Life Promise*. U.S. News & World Report (March 21, 2017), https://www.usnews.com/opinion/civil-wars/articles/2017-03-21/5-rulings-that-show-neil-gorsuch-wont-defer-to-abortion-advocates.

[11] *Id.*

[12] D'Angelo Gore, Robert Farley, & Lori Robertson, *What Gorsuch, Kavanaugh and Barrett Said About Roe at Confirmation Hearings*, The Annenberg Public Policy Center (May 10, 2022), https://www.factcheck.org/2022/05/what-gorsuch-kavanaugh-and-barrett-said-about-roe-at-confirmation-hearings/.

[13] 945 F.3d 265 (5th Cir. 2019).

declined in her confirmation hearing to cite *Roe*—which had been repeatedly reaffirmed—as "super precedent."[14] When those appointed to the Court hold these predispose views, it not only creates a major impediment for the rights that women were previously guaranteed, but such predispose views also acutely affect *stare decisis* (*see stare decisis* discussion, *infra*).

Overturning *Roe*, however, does not eliminate abortions; it only eliminates access to safe abortions. In 1965, illegal abortions made up one-sixth of all pregnancy-related deaths within the United States, but medical professionals are confident that the actual figures were much higher since not all instances were reported.[15] Additionally, low-income women would be directly affected by the change. In a New York City study conducted in the 1960's, prior to *Roe*, eight in ten pregnant women attempted a dangerous self-induced procedure to terminate their pregnancy if unwanted.[16] If *Roe* is overturned, these issues will return to the forefront. Becoming a mother and carrying a pregnancy full-term is an immense responsibility for a woman to bear; and if a woman chooses not to take on said way of life, she may engage in risky behavior to end the pregnancy unsafely. This can result in serious harm to both mother and baby. According to Planned Parenthood, legal abortions are one of the safest possible medical procedures, with a safety record of over ninety-nine percent.[17]

The vast majority of Americans support *Roe v. Wade*, with seven in ten Americans stating that they do not wish to see the case overturned completely.[18] Most Americans, fifty-nine percent, additionally agree that states are making it too difficult for women to get an abortion.[19] Indeed, being pro-choice does not mean that one is forced to have an abortion, but rather that one believes that each woman should have the opportunity to choose for herself, free of governmental involvement. A pro-choice individual believes in the choice, regardless of reason. Many countries across the globe permit abortion exemptions for rape and incest victims, which can be explicitly stated in the law.[20] While instances of rape and incest

[14] Gore, *supra.*
[15] Planned Parenthood Action Fund, *supra.*
[16] *Id.*
[17] *Id.*
[18] Pew Research Center, *U.S. Public Continues to Favor Legal Abortion, Oppose Overturning Roe v. Wade,* Pew Research Center (Aug. 29, 2019), https:/ www.pewresearch.org/politics/2019/08/29/u-s-public-continues-to-favor-legal-abortion-oppose-overturning-roe-v-wade/.
[19] *Id.*
[20] Center for Reproductive Rights, *Law and Policy Guide: Rape and Incest Exceptions*. Center for Reproductive Rights (Jan. 18, 2022), https: //reproductiverights.org/maps/worlds-abortion-laws/law-and-policy-guide-rape-and-incest-exceptions/.

are entirely valid reasons for one to desire an abortion, they are not the only instances in which abortion should be permitted. Research has shown that a plethora of different basis exists for abortion, including not being financially prepared, bad timing/unplanned pregnancies, partner-related issues, interference with educational or career-driven goals, and medical reasons, among other factors.[21] Abortions are the most stigmatized medical procedures that women can endure, with many people believing that abortions are a form of birth control and serve as the "easy way out" for a woman to simply disregard her unborn child.[22] Certainly, this is not the case. Deciding to get an abortion is an incredibly difficult decision that requires extensive thought and consideration. No matter the reason for electing an abortion, it can be a painstaking and strenuous commitment that lives with the mother for the remainder of her life.[23]

Not only do American citizens agree with the protections in *Roe*, but the United States Constitution does as well. Under the Fourteenth Amendment,[24] all citizens must be both equally protected and equally treated under the law, better known as the Equal Protection Clause.[25] Additionally, the Fourteenth Amendment requires a right to due process, which has previously been utilized by courts to strike down matters that restrict personal liberties, including the right to privacy.[26] *Roe* was founded upon these key principles which safeguard privacy rights for women. Because of *Roe*, women can make conclusions about their bodies in a private capacity. When women are forced to bring their unwanted pregnancies to the court as subjects of litigation, women are obligated to disclose their desire to seek an abortion, violating the constitutional privacy rights that are assured under the Fourteenth Amendment. Such a violation constitutes blatant discrimination toward women.[27]

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[21] Dawn Stacey, P. D., *Why do people have abortions?* Verywell Health (2021, December 20), https://www.verywellhealth.com/reasons-for-abortion-906589

[22] *Id.*

[23] *Id.*

[24] U.S. Const. amend. XIV.

[25] *Id.*

[26] Orlando Mayorquin, *What is The 14th Amendment and What Does It Have to Do with Roe v. Wade?*, USA Today (May 3, 2022), https://www.usatoday.com/story/news/politics/2022/05/03/what-14th-amendment-scotus-used-roe-v-wade/9629256002/.

[27] United Nations Human Rights Office of the High Comm'r, *Abortion*, United Nations Human Rights Office of the High Comm'r, https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf (last visited June 24, 2022).

III. *STARE DECISIS*

On May 2, 2022, a draft majority opinion by the United States Supreme Court, authored by Justice Samuel Alito, in the case of *Dobbs v. Jackson Women's Health Organization*[28] was leaked.[29] While not an official opinion, this draft showed the nation what can be expected if *Roe* is to be overturned. In the opinion, Justice Alito detailed several main issues, most importantly: that the logic of *Roe* and a similar case, *Planned Parenthood v. Casey*,[30] were not rooted in constitutional history and that the two cases[31] have failed to settle the debate on abortion, which continues to create, in his view, "legal chaos."[32] Justice Alito further avered that abortion was deemed to be a "fundamental right" in error and that the only issues deserving to be called a "fundamental right" are those that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[33] Justice Alito also referred to *Roe* as being a stretch of the Constitution because the Constitution does not directly address abortion or privacy rights.[34] Finally, Justice Alito discussed the past criminality of abortion as well as the "ordered liberty" associated with abortion, referring to the idea that abortion rights must be limited to maintain regulation within society.[35]

Despite his rationale for overturning *Roe*, Justice Alito's draft opinion radically undermined the doctrine of *stare decisis* and its importance to the law. *Stare decisis* is a Latin term, defined as "to stand by decided cases; to uphold precedents; to maintain former adjudications."[36] Under *stare decisis*, cases should rarely be overturned. To support the Court overturning *Roe*, Justice Alito cited various cases where unfavorable precedent was overturned by the Court, such as the imposition of *Brown v. Board of Education*[37] which overruled *Plessy v. Ferguson*.[38] However, Justice Alito's

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[28] 945 F.3d 265 (5th Cir. 2019).

[29] Elura Nanos, *History, Stare Decisis, and Fallout: What You Need to Know About the Legal Reasoning in Bombshell Draft Opinion That Would Overturn Roe v. Wade*, Law & Crime (May 3, 2022), https://lawandcrime.com/legal-analysis/history-stare-decicis-and-fallout-what-you-need-to-know-about-the-legal-reasoning-in-bombshell-draft-opinion-that-would-overturn-roe-v-wade/.

[30] 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

[31] *Planned Parenthood v. Casey* was a five to four decision which reaffirmed *Roe*.

[32] Nanos, *supra*.

[33] *Id*.

[34] *Id*.

[35] *Id*.

[36] The Law Dictionary, *Stare Decisis Definition & Legal Meaning,* The Law Dictionary. (March 2, 2014), https://thelawdictionary.org/stare-decisis/.

[37] *Brown v. Bd. of Educ. of Topeka, Kan*., 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955).

[38] 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), *overruled by Brown v. Bd. of Educ. of Topeka, Shawnee Cty., Kan*., 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).

reference to *Brown* overturning *Plessy* is misplaced. In *Plessy*, the "separate but equal" doctrine was established, which provided that racial segregation laws did not violate the U.S. Constitution if the separate facilities were equal in quality.[39] *Brown* overturned *Plessy* on the basis that racial segregation within schools violated the Equal Protection Clause.[40] *Brown* consistently reaffirmed the idea that separate is inherently unequal.[41]

By overturning *Plessy*, *Brown* reversed a long-standing injustice. In doing so, *Brown* afforded a new constitutional right. But with *Dobbs*, overturning *Roe* would do the opposite: *Dobbs* would instead revoke a long-standing constitutional right, a right that was reaffirmed by the Court in *Casey*.[42] Further, *Dobbs* would revoke that long-standing constitutional right not because the arguments for or against abortion have changed since *Roe*, but merely because the makeup of the Court has since changed. This is precisely what *stare decisis* is supposed to prevent. *Stare decisis* serves to create stability within the justice system which is based upon equal protection; overturning such a doctrine would undermine laws that the public has relied upon for almost fifty years.[43]

When debating whether to overturn precedent, courts consider several factors, including workability, reliance, abandonment, and legitimacy.[44] When a court routinely overturns precedent, the public loses confidence that the court can act in good faith or render reliable decisions.[45] If the court were to overturn *Roe*, it would create an inequity that could later be utilized for other groundbreaking cases, such as case law that permits same-sex or interracial marriage. *Stare decisis* is a critical component of the judicial system; however, if courts consistently rule contradictory to the precedent, such rulings question the integrity of the court and allow individuals to distrust the American legal system. Because of the hesitancy to create wariness between the public and those who vow to protect the public, *stare decisis,* again, should rarely be overturned, especially without substantial criteria or novel circumstances for the reversal. While a Justice may be able to attempt to substantiate his

[39] Nat'l Archives and Records Admin., *Timeline of Events Leading to the Brown v. Board of Education Decision of 1954*. Nat'l Archives and Records Admin., https://www.archives.gov/education/lessons/brown-board/timeline.html (last visited June 24, 2022).
[40] *Id.*
[41] 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955).
[42] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
[43] Stanford Law School,*The Role of Precedent in the United States: How Do Precedents Lose Their Binding Effect?*, Stanford Law School (Oct. 19. 2018), https://cgc.law.stanford.edu/commentaries/15-john-walker/.
[44] *Id.*
[45] *Id.*

or her claims for why a specific case should be overturned, evidence of such must be undeniable.

III. FINAL THOUGHTS

In regard to *Roe v. Wade*, research has consistently validated that abortion is an extension of healthcare.[46] Abortion rights should be upheld for the most basic of reasons: women's reproductive rights are human rights.[47] While the government has engaged in the shutdown of abortion clinics,[48] dictating which Americans are eligible for reproductive healthcare, and trying to overturn the constitutional provisions that guarantee women a voice regarding their own body, women have stopped at nothing to defend their right to make one of the most personal decisions that a woman can make. Women will never be equal to their male counterparts if women are not permitted to decide best for themselves and the family that they wish to have.[49] Women in the United States desire to live in a country where reproductive rights are honored and respected.[50] If *Roe* no longer serves as precedent, this country will become a dangerous place for women. Women's reproductive rights are among the most fundamental liberties. Accordingly, it is essential that *Roe v. Wade* remains the law and be codified to guarantee that a woman's body is no one's more than her own.

IV. ADDENDUM

On June 24, 2022, prior to the publication of this article, the United States Supreme Court in *Dobbs v. Jackson Women's Health Organization*[51] overturned *Roe v. Wade*, which had been recognized as a longstanding constitutional right for the past fifty years.[52] This decision will not only set back women's reproductive rights but will discredit the uprightness of the nation's highest Court. In Chief Justice Roberts' concurring opinion, he disagreed with the viability standard under *Roe*, but he did not wish to see the entire case overturned, especially since *Roe* was not the immediate target in

[46] The American College of Obstetricians and Gynecologists, *Fact Are Important: Abortion is Healthcare*, The American College of Obstetricians and Gynecologists, https://www.acog.org/advocacy/facts-are-important/abortion-is-healthcare (last visited June 24, 2022).

[47] NARAL Pro-Choice America. *Abortion Access*. NARAL Pro-Choice America (July 30, 2019), https://www.prochoiceamerica.org/issue/abortion-access/.

[48] Erin Schumaker, *Clinics Where Majority of US Patients Get Abortions Are Rapidly Closing: Report*, ABC News (Dec. 11, 2019), https://abcnews.go.com/Health/clinics-majority-women-abortions-rapidly-closing-report/story?id=67624226.

[49] NARAL Pro-Choice America, *supra.*

[50] Ipas, *Working for a World Where All Human Rights Are Respected*, Ipas (April 25, 2022), https://www.ipas.org/our-work/human-rights-and-abortion/.

[51] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___ (2022).

[52] *See Roe, supra.*

Dobbs.[53] Chief Justice Roberts stated that a judgment in favor of Mississippi would not require the Court to overrule *Roe v. Wade*.[54] The *Dobbs* case asked the Supreme Court to call into question the constitutionality of a Mississippi law. The *Dobbs* case did not initially ask the Supreme Court to determine the constitutionality of *Roe*.[55] By ruling on an aspect outside of the scope of the issue at hand, the Court overstepped its bounds.[56] While the point at which abortions must be limited can be debated, the fundamental right for one to elect an abortion should not be.[57]

The *Dobbs* decision further shows that overturning *Roe* was on the agenda of recently appointed Justices since taking the bench. Not only did the Court overturn *Roe* without a justifiable reason, but it did so when the issue was not properly before the Court. This decision will remain an infamous point in the discussion of *stare decisis*.

Supporters of *Roe* can only hope that a new case will come before the Court, overturning the holding in *Dobbs*. Until then, American citizens will likely remain fearful that other fundamental rights may be at risk. One can only hope that other guaranteed liberties will not be challenged virtually overnight, similar to how overturning the protections once warranted under *Roe* impacted thousands of Americans in a matter of minutes.

[53] *See Dobbs*, 597 U.S. ___.
[54] *Id.*
[55] *Id.*
[56] *Id.* (Roberts asserted that the majority's ruling in *Dobbs* was "dramatic and consequential" and "unnecessary to decide the case before us.").
[57] *Id.*

CAN ANYONE BE A PARALEGAL?

By Sirberina V. Davis *

I. INTRODUCTION

Although employers may prefer it in Pennsylvania, there is no legal requirement for people to receive training, education, certification, or licensure to be a paralegal. Since their inception in the 1960s, paralegals have grown impressively, with almost 300,000 paralegals currently working in the United States.[1] With so many paralegals in the legal profession, it is surprising that there are so few requirements for them.

The American Bar Association (ABA) defines a paralegal as "a person qualified by education, training[,] or work experience . . . who performs specifically delegated substantive legal work for which a lawyer is responsible."[2] But, generally, anyone working in a law firm could use the title "paralegal." (Paralegals should, however, be abreast of the Professional Rules of Conduct and ethics while working under the supervision of an attorney.)

Although there are few requirements to be a paralegal, there are multiple ways to advance in the profession, including college degrees from ABA-approved programs, certifications from national and local associations, and, in some states, licensure.[3] This article will discuss each of those ways. First, this article will briefly discuss the benefits of a paralegal degree. This article will also review the history of paralegal associations and certifications. Next, this article will review the permissible and impermissible paralegal tasks. Finally, this article will examine state licensure and its benefits for paralegals and the public.

II. PARALEGAL DEGREES

While a college degree in legal studies is not required to work as a paralegal, there are substantial benefits to having a degree. Like most professions, better credentials can increase earning potential, expand career opportunities, and provide a rewarding professional experience. For paralegals, a degree allows a paralegal to stay current with the rules and regulations that govern and affect not only themselves but also their supervising attorney. A paralegal degree

* B.S. (2023), Legal Studies, Peirce College. Paralegal at Saraceni Law, PLLC. I would like to thank Associate Professor R. Christopher Campbell, J.D., for allowing me to be a part of this experience.

[1] Center for Advanced Legal Studies, The Paralegal Profession, Paralegal.edu, https://www.paralegal.edu/paralegal-profession (last visited June 30, 2022).

[2] American Bar Ass'n, Current ABA Definition of Paralegal, American Bar Ass'n, https://www.americanbar.org/groups/paralegals/professioninformation/current_aba_definition_of_legal_assistant_paralegal/ (last visited June 30, 2022).

[3] Generally, a person needs a college degree before obtaining a paralegal certificate.

allows a paralegal to advance in his/her career while navigating several complicated areas of the law, including business, banking, insurance, corporate, and government. Lastly, a paralegal degree is beneficial by providing the competent, technical, and intellectual aspects of being a paralegal, including legal writing and research, as well as analytical, investigative, and communicative skills.

III. PARALEGAL ASSOCIATIONS AND CERTIFICATION

Even without a college degree, certifications from paralegal associations can provide some of the same benefits described above. During the 1970s, the first national paralegal associations were formed. While the paralegal profession and these associations grew, the Federal Government classified paralegal work as an occupation in 1975; soon thereafter, states and cities followed suit.[4] Around this time, the National Federation of Paralegal Associations (NFPA)[5], the National Association of Legal Assistants (NALA),[6] and the American Association for Paralegal Education (AA/PE) were established.[7] As the most prominent paralegal associations in the United States, these associations began offering continuing education, professional development, and networking opportunities.[8]

Several of these national associations continue to work to establish voluntary certification programs.[9] NALA, for instance, established a voluntary certification program in 1976, known as Certified Paralegal (CP).[10] To meet certification, applicants must meet the eligibility requirements and pass an exam that encompasses general knowledge and competency concerning communication, ethics, legal research, law, judgment, and analytical skills in various areas.[11]

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[4] Career Igniter, *What is the History of Paralegals?,* Career Igniter, https://www.careerigniter.com/questions/what-is-the-history-of-paralegals/2022 (last visited June 30, 2022).

[5] Nat'l Fed'n of Paralegal Ass'ns, *About NFPA*, Nat'l Fed'n of Paralegal Ass'ns, https://www.paralegals.org/i4a/pages/index.cfm?pageid=3268 (last visited June 30, 2022).

[6] Nat'l Ass'n of Legal Assistants, *About NALA*, NALA, https://nala.org/about-nala/ (last visited June 30, 2022).

[7] Am. Ass'n for Paralegal Educ., *Welcome to AAfPE!,* AAfPE, https://www.aafpe.org/about-us. (last visited June 30, 2022).

[8] Nat'l Ass'n of Legal Assistants, *About NALA*, NALA, https://nala.org/about-nala/ (last visited June 30, 2022).

[9] Note that certification is not the same as a certificate. A paralegal certificate is earned from a training program, usually after one has obtained an associate's or a bachelor's degree.

[10] NALA - Certified Legal Assistant (CLA) (this certification was formally known as Certified Legal Assistant (CLA)).

[11] *Id.* The eligibility requirements for the CP exam vary and include different levels of education.

NFPA offers certification for Registered Paralegals (RP) through its PACE exam. The PACE exam covers several areas, including administration, client matters, legal research, and legal writing. RP's are also required to complete continuing education courses, including ethics, every two years.[12]

Local organizations in Pennsylvania have similar certifications. For example, the Keystone Alliance of Paralegal Associations offers a voluntary program which began in 2008 for individuals who prefer to be certified paralegals in Pennsylvania under the designation of the Pennsylvania Rules of Civil Procedure (Pa.C.P. credential). Unlike the national paralegal organizations, the Pa.C.P. credential does not require an exam.[13] Instead, the requirements balance education and experience.

However, none of the certifications offered by local or national paralegal associates permit paralegals to work independently of an attorney. Instead, these certifications are primarily used to enhance one's value in the legal field. With or without these certifications, paralegals are still vastly limited in what they can and cannot do.

IV. WHAT PARALEGALS CAN AND CANNOT DO

States such as South Dakota, Maine, California, and Arizona[14] have adopted rules for paralegals, including regulations and definitions.[15] Some states also require continuing learning education requirements. California, for example, requires all paralegals to attend at least eight hours of CLEs every two years.[16] Four of those eight hours must relate to ethics.[17]

Although some states and organizations have taken different approaches to address the lack of recognition for paralegals, the

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[12] Robyn A. Sweet & Lynn C. Wdowiak, Certified v. Certification Paralegals: What's the Difference and Why You Should Care, 44 Vt. B.J. 35 (2018); *see also* Nat'l Fed'n of Paralegal Ass'ns, PACE and PCCE Information, Nat'l Fed'n of Paralegal Ass'ns, https://www.paralegals.org/i4a/pages/index.cfm?pageid=3845#PACE%20Eligibility

[13] Keystone All. of Paralegal Ass'ns, *What Is the Pa.C.P. Credential?*, Keystone Alliance of Paralegal Associations, https://keystoneparalegals.org/the-pa-c-p-credential/ (last visited June 30, 2022).

[14] *See* M.R.S.A §921. Maine was the first state in the country to enact the use of the title's paralegal and legal assistant. Maine adopted a state law that defines paralegal or legal assistant in 1999.

[15] *See, e.g.,* Cal. Bus. & Prof. Code § 6450 (West 2007) ("Paralegal" defined; prohibited activities; qualifications; continuing legal education).

[16] Paralegal-Edu.Org, How to Become a Paralegal in California, Paralegal-Edu.Org, https://www.paralegal-edu.org/california-certification/ (last visited June 30, 2022).

[17] *Id.*

correlating goal is for those looking to use the title "paralegal" to meet the requirements outlined in these state rules and regulations. While it may vary by state, the following rules generally govern paralegals:

1. *Signing and filing Pleadings with the Court*

An attorney must sign every pleading filed with the Court; if no attorney is representing the party, it shall be signed by the *pro se* party.[18] Paralegals cannot sign court filings. It is also forbidden for a paralegal to perform any action that requires a lawyer's expertise.[19] Moreover, a paralegal cannot commit any act that would portray that he or she is licensed to practice law.[20]

2. *Assisting Clients and Performing Tasks*

A paralegal may perform tasks that an attorney orders, so long as the attorney monitors and takes accountability for the work performed and retains a direct relationship with the client.[21] While paralegals can assist a client with general expertise and skill and draft documents, they cannot render legal advice in the process.[22] A paralegal should act cautiously to decide how far he or she can assist a client without the presence of an attorney.[23]

3. *Duties of Supervising Attorneys and Their Non-Lawyer Employees*

An attorney who has supervising authority over paralegals must ensure that their actions are not in violation of the Professional Rules of Conduct.[24] Attorneys are responsible for any misconduct committed by their employees.[25] Further, if an attorney fails to take immediate action in rectifying, preventing, or alleviating the issue or misconduct, the attorney may be accountable.[26]

4. *Unauthorized Practice of Law*

Unauthorized practice of law is the cardinal rule for paralegals. A paralegal engages in unauthorized practice of law by perpetrating, promoting, or participating in any activity that violates the Rules of Professional Conduct.[27] For instance, a paralegal engages in unauthorized practice of law if he/she fails to have the supervising attorney review, sign, and finalize documents for filing

[18] *See, e.g.,* 231 Pa. Code §1023.1(b) (2002).
[19] NALA Code of Ethics and Professional Responsibility, Canon 1
[20] *See, e.g.,* 42 Pa.C.S.A. § 2524.
[21] NALA Code of Ethics and Professional Responsibility, Canon 2
[22] NALA Code of Ethics and Professional Responsibility, Canon 4
[23] NALA Code of Ethics and Professional Responsibility, Canon 5
[24] Pa. R. Prof. Conduct 5.3(b).
[25] Pa.R.P.C. 5.3(c).
[26] Pa.R.P.C. 5.3(c)(2).
[27] NALA Code of Ethics and Professional Responsibility, Canon 3

with the Court. Also, a paralegal engages in unauthorized practice if he/she does not inform a client of his/her paralegal status or gives legal advice. Further, if the supervising attorney fails to correct or reprimand the paralegal's conduct after learning of the unauthorized practice of law, the attorney may also be in violation.

The above rules aim to codify and curtail paralegals' functions and protect the public. That said, the public still needs legal assistance for low-income and *pro se* clients in certain areas of the law, including family court, landlord-tenant issues, ordinance infractions, and traffic violations. In Vermont, for example, eighty percent of the cases on the civil docket have at least one *pro se* litigate.[28] The current paralegal rules and regulations limit the impact paralegals can have on low-income and *pro se* clients. Accordingly, only state licensure can balance the state's aims and the public's needs.

V. STATE LICENSURE

To be certified is to have recognition from an agency or organization that one has met a level of competency. On the other hand, state licensing would be mandatory, granted by the government for an individual to practice in a field of expertise. Being licensed in a field is an added obligation as a licensee must adopt and abide by codes of ethics and continuing education requirements.

Currently, no state, including Pennsylvania, requires paralegals to be licensed. That said, a few states offer options for licensed paralegals to work without the supervision of an attorney. In June 2012, the Supreme Court in Washington State adopted a program offering a limited license for legal technicians, known as an LLLT.[29] With an LLLT, a person can advise and assist people with "divorce, child custody, and other family law matters." A person with an LLLT can also consult with clients, assist in completing court documents, and help clients with *pro se* hearings.[30] To obtain an LLLT, a person must meet certain thresholds in education, examination, and experience.[31] However, in 2020, the Washington State Supreme Court ordered the LLLT program to end by July 2022 because of so few applicants.[32]

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[28] Carie Tarte, Lucia White & Corinne Deering, *Paralegal Licensure Is a Solution*, 45 Vt. B.J. 49 (2019).

[29] Wash. State Bar Ass'n., Limited License Legal Technicians, Wash. State Bar Ass'n., https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-license-legal-technicians (last updated June 30, 2022).

[30] *Id.*

[31] *See* eligibility requirements. Wash. State Bar Ass'n., Become a Legal Technician, Wash. State Bar Ass'n., https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/become-a-legal-technician (last updated Oct. 8, 2021).

[32] Lyle Moran, Washington Supreme Court Sunsets Limited License Program for Nonlawyers, ABA J. (June 8, 2020), https://www.abajournal.com/news/article/washington-supreme-court-

Although the Washington State program did not catch on, other states are moving forward with similar programs. In Utah, the state permits a Licensed Paralegal Practitioner (LPP) to assist clients without attorney supervision. The program limits LPP's to practice law in specific family law matters (e.g., divorce, civil stalking, name changes, etc.), forcible entry and detainers, and minor debt collection issues.[33] In 2020, Minnesota started a legal paraprofessional pilot program. Like the Utah program, the Minnesota program will focus on a few areas of the law (e.g., family law and landlord-tenant issues) in which a paralegal can represent clients without the supervision of an attorney.[34] Similarly, the Oregon Bar Association also recently announced that it is "working toward a possible program to license paralegals to provide limited legal assistance in specific family law issues and landlord-tenant matters."[35]

While the need for licensure is centered around assisting low-income litigates, licensing paralegals may have added benefits. The arguments supporting the licensing also center on establishing paralegal work as a separate independent legal career. Some advocates believe better regulation would provide proper public recognition for paralegals as significant members of the legal field, guarantee high standards and quality work from paralegals, and increase the use of paralegals, which can expand access to legal services and lower costs while inspiring standardized professionalism in the field.

Others may argue that establishing paralegals through licensing and certification could be misleading, as it sets a tone that paralegals are equivalent to an attorney. On the contrary, states requiring licensure, including paralegals obtaining a certification or degree, set a precedent. Requiring licensure would allow those seeking to pursue and excel in the paralegal profession to be held to a standard and be confident that not just anyone performing paralegal duties can claim the title.

Licensing paralegals would also reduce the caseload and burden of attorneys. Attorneys are already overworked in a demanding profession and cannot always afford to micromanage paralegals working under them. Lastly, and most significantly,

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decides-to-sunset-pioneering-limited-license-program.

[33] Utah Courts, Licensed Paralegal Practitioner, Utah Courts, https://www.utcourts.gov/legal/lpp/index.html (last visited June 30, 2022).

[34] Lyle Moran, *Minnesota Will Launch Legal Paraprofessional Pilot Program*, ABA J. (Oct. 1, 2020), https://www.abajournal.com/news/article/minnesota-to-launch-legal-paraprofessional-pilot-program.

[35] Kamron Graham, (The President's Message), *The Bar Is Working to Better Serve You*, 82 Or. St. B. Bull. 32 (2022).

mandatory requirements and licensing will bear fruit for more competent, skilled, and knowledgeable paralegals in the legal field, providing benefits for the health and well-being of the public.

MAY THE *FORCE MAJEURE* BE WITH YOU: How this Contract Clause May Be Used in Light of Covid-19

By Charlene Glenn *

I. INTRODUCTION

Delays in the arrival of goods have become a challenge for businesses to meet customer demand due to the shortages in product inputs, factory shutdowns, and transportation delays, all due in part to the coronavirus. These events have disrupted and interrupted business operations causing unmet customer requests largely due to suppliers' inability to deliver goods. In turn, many businesses are reviewing their contractual terms with suppliers to consider what, if any, remedy they might access. Many suppliers believe that *force majeure*—often referred to as an "act of God" clause—could be their way out of meeting contractual obligations.[1]

However, suppliers often find that a *force majeure* clause is not all-encompassing. Unless specific or narrowly tailored, a *force majeure* clause may offer little protection for parties who failed to fulfill a contract due to unanticipated events. This limited protection is even more apparent with the coronavirus as many *force majeure* clauses never mention—and, therefore, may not cover—local virus outbreaks or global pandemics.

This article will explore *force majeure,* its application to contracts, and the different state law interpretations. This article will also explore why a conventional *force majeure* clause may not be enough to protect parties during a pandemic or other unanticipated event. Lastly, this article will present several strategies and provisions that suppliers and businesses may include in their agreements to address the contractual breaches resulting from unexpected occurrences and to mitigate risks of unforeseen events.

II. *FORCE MAJEURE*

All parties involved in creating a business contract should anticipate actions that would prevent the other from complying with the terms and conditions of the contract. Generally, standard contract provisions include[2] terms of payment, terms of delivery, and

* Ed. D., Saint Joseph's University, Professor of Business at Peirce College and Fulbright Scholar Recipient. Special thanks to my colleagues R. Christopher Campbell, J.D. and Jackie Penrod, J.D. for motivating and pushing me to move beyond my comfort zone.

[1] *Ner Tamid Congregation of N. Town v. Krivoruchko,* 638 F. Supp. 2d 913, 931 (N.D. ILL.), *as amended* (July 9, 2009).

[2] The University of New Mexico Judicial Education Center, Elements of a Contract, The University of New Mexico Judicial Education Center, http://jec.unm.edu/education/online-training/contract-law-

recommended measures against contract violation. Parties may also write provisions in contracts to prepare for unforeseen circumstances and potential contractual breaches. For example, a party may include an "Acceleration Clause." This clause provides that upon either party's breach of the contract, the other party may immediately demand the contract's full performance.[3] A contract may include an "Arbitration Clause." This clause relates to using an independent third party to settle disputes without litigation in court.[4] Contracts may also include, *inter alia*, clauses for "Attorney Fees,"[5] "Liquidated Damages,"[6] "Exemptions,"[7] or "Indemnification."[8] These clauses limit risk and provide due process and remedies for breaches of contracts. Many of these clauses, however, may not provide a remedy for unforeseen events, including pandemics. Generally, only a *force majeure* clause can offer such protection.

Black's Law Dictionary defines *force majeure* as an "event or effect that can be neither anticipated nor controlled."[9] The term may include "acts of nature" or "acts of a god" (e.g., floods and hurricanes),"[10]—and "acts of people" (e.g., riots and wars).[11] In contract law, *Force majeure* is also used to refer to events beyond the parties' control that frustrate the purpose of a contract or make

tutorial/contract-fundamentals-part-2 (last visited Dec. 7, 2021).

[3] David Hahn, *The Roles of Acceleration*, 8 DePaul Bus. & Com. L.J. 229, 236–37 (2010) ("Acceleration clauses are the contractual bridge between actual or anticipated violations of payment obligations and the contractual remedies of full performance or damages.").

[4] Terese M. Schireson, *The Ethical Lawyer-Client Arbitration Clause*, 87 Temp. L. Rev. 547, 548–49 (2015).

[5] An "Attorney Fees" clause usually dictates that the losing party reimburse the other party for attorney fees, court fees, and costs. Larry A. Dimatteo, *A Theory of Efficient Penalty: Eliminating the Law of Liquid Damages,* 38 Am. Bus. L.J. 633 (2001).

[6] This provision permits a non-breaching party to recover damages if actual damages are difficult to calculate or ascertain and must be reasonable under the circumstances. *Id.*

[7] This clause seeks to restrict the liability of a party. It may do so either in the form of an exclusion clause that attempts to exclude liability completely for specified outcomes and/or a limitation clause that attempts to limit damages a party pays in the event of some breach of the contract. Michael Joachim Bonell, *Policing the International Commercial Contract Against Unfairness Under the Unidroit Principles*, 3 Tul. J. Int'l & Comp. L. 73 (1995).

[8] "Indemnification" clauses release from liability or indemnify a party in the event of a loss. Mark Cohen, *Indemnification Provisions in Commercial Contracts, A Drafting Primer*, 49 Colo. Law. 28 (2020).

[9] *Force majeure*, *Black's Law Dictionary* (11th ed. 2019).

[10] Myanna Dellinger, *An "Act of God"? Rethinking Contractual Impracticability in an Era of Anthropogenic Climate Change*, 67 Hastings L.J. 1551, 1565 (2016) ("[T]he notion that 'acts of God' could provide a defense to liability first appeared in 1581 in the famous English "Shelley's Case.'").

[11] *Id.*

performance impracticable for one or more parties.[12] *Force majeure* events can be listed in contracts to further include "acts of God, accident, riots, war, terrorist act, epidemic, pandemic, quarantine, civil commotion, breakdown of communication facilities, breakdown of web host, breakdown of internet service provider, natural catastrophes, governmental acts or omissions, changes in laws or regulations, national strikes, fire, explosion, generalized lack of availability of raw materials or energy."[13]

Notwithstanding the above, there is no definitive nor acceptable definition of what event or effect the term *force majeure* includes.[14] Moreover, states vary on when or how a contracting party can successfully invoke a *force majeure* clause. Under New York law, for example, "a key issue in determining whether a party can successfully invoke a *force majeure* is whether the clause lists the specific event claimed to be preventing the performance."[15] "*Force majeure* clauses mention epidemics or pandemics as *force majeure* events; therefore, if a contract at issue lists epidemics or pandemics, the claiming party could argue that the coronavirus qualifies because it was officially declared a pandemic by the World Health Organization."[16]

In California, *force majeure* "is not necessarily limited to the equivalent of an act of God, but the test is whether under the particular circumstances there was such an insuperable interference occurring without the party's intervention as could not have been prevented by the exercise or prudence, diligence, and care."[17]

Under Texas law, "parties seeking to invoke a *force majeure* clause to excuse non-performance are not required to exercise reasonable diligence to overcome the force majeure event. Parties are expected to exercise reasonable diligence and this process is fact-intensive and must be assessed on a case-by-case basis."[18] "Reasonable diligence" is defined under Texas law as "such

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[12] J. H. Robinson, J.C., Selman, J.C., Steineker, W., & Thrasher, A.G., *Use the force? Understanding Force Majeure Clauses*, 44 Am. J. Trial Advoc. 1 (2020) (*citing* 2 Philip L. Bruner & Patrick J. O'Connor, Jr., Bruner & O'Connor on Construction Law § 7:229 (2020) ("Project risks-Force Majeure risks.")).

[13] Piper Hampton, *Finding Our New Normal: Reevaluating Force Majeure Within Oil and Gas Contracts in the Wake of Covid-19*, 7 Oil & Gas, Nat. Resources & Energy J. 149 (2021).

[14] *See* Cosmos Nike Nwedu, *The Rise of Force Majeure Amid the Coronavirus Pandemic: Legitimacy and Implications For Energy Laws and Contracts*, 61 Nat. Resources J. 1, 4 (2021) ("There is no definite or globally acceptable definition of *force majeure*, in which case varying definitions have enmeshed.").

[15] *Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl*, 720 F. Supp. 312, 318 (S.D.N.Y. 1989).

[16] *Id.*

[17] *Mathes v. City of Long Beach*, 121 Cal. App. 2d 473, 477, 263 P.2d 472, 474 (1953).

[18] *El Paso Field Servs., L.P. v. Mastec N. Am., Inc.*, 389 S.W. 3d 802, 808 (Tex. 2012).

diligence that an ordinarily prudent and diligent person would exercise under similar circumstances."[19]

Under Illinois law, "there is an implied duty on the claiming party to make an effort to attempt to resolve the event causing delay or inability to perform under the contract before invoking a *force majeure* clause." This duty is "related to the duty of good faith [and] is read into all express contracts unless waived."[20]

Force majeure clauses generally are strictly and narrowly construed and include elements from the "Impossibility Doctrine."[21] This doctrine stipulates that if contractual performance becomes impossible due to an extraordinary and exogenous event, a party may be excused from performing a contract, and the non-performance will not be considered a breach of contract.[22]

The Impossibility Doctrine also considers the question of foreseeability as it relates to the occurrence of events.[23] Acts of God are foreseeable and speak to natural disasters, like hurricanes, earthquakes, or avalanches; however, the Covid 19 pandemic is a new occurrence and has not been typically included in *force majeure* clauses in contracts.

Consequently, business contracts may include *force majeure* clauses that mention an epidemic or pandemic to protect themselves from non-performance. The inclusion of epidemic or pandemic in contracts could lengthen contract negotiations and be risky for both parties, but it will more than likely be included in most contracts going forward.[24]

III. REMEDIES SUPPLIERS CAN ADOPT FOR MITIGATION OF THE RISKS

The coronavirus impacted businesses worldwide, interrupting many supply-chain processes. As was outlined previously, businesses and suppliers should carefully assess their legal

[19] *Id*. at 808–09.

[20] *Commonwealth Edison Co. v. Allied-Gen. Nuclear Servs.*, 731 F. Supp. 850, 859 (N.D. Ill. 1990).

[21] Andrew A. Schwartz, *Contracts and Covid-19*, 73 Stan. L. Rev. Online 48, 55 (2020) ("*Force Majeure* clauses are strictly and narrowly construed for the same reason that courts demand a strong showing under the Impossibility doctrine.").

[22] Uri Benoliel, *The Impossibility Doctrine In Commercial Contracts: An Empirical Analysis* 85 Brook. L. Rev. 393, 393–94 (2021); *see also* Andrew A. Schwartz, *Contracts and Covid-19*, 73 Stan. L. Rev. Online 48, 49 (2020) ("it costs time, money, and goodwill to negotiate a *Force Majeure* clause.").

[23] Andrew A. Schwartz, *Contracts and Covid-19*, 73 Stan. L. Rev. Online 48, 55 (2020) ("'unforeseeable' events can be the grounds for excuse under the Impossibility doctrine."); *see also* Russ VerSteeg, *Perspectives on Foreseeability in the Law of Contracts and Torts: The Relationships Between "Intervening Causes" and "Impossibility*," 2011 Mich. St. L. Rev. 1497, 1510–14 (2021).

[24] Andrew A. Schwartz, *Contracts and Covid-19*, 73 Stan. L. Rev. Online 48, 56 (2020).

contract clauses, determine which sections apply to the coronavirus, and specify if contract conditions can provide solutions for the impact of coronavirus on their business operations. Additionally, suppliers should determine if the *force majeure* principle can apply to the coronavirus event and examine if the contract's law justifies the reasoning of *force majeure* for not meeting the contract obligations.[25]

Some remedies suppliers may consider in mitigating risks in this supply-chain debacle would begin with negotiating with businesses directly. Suppliers could adopt relief strategies, such as prolonging the lead delivery time to customers; prioritizing orders according to delivery time requirements per contract; postponing new incoming orders or extending the proposed delivery time; and allowing cancellations for a short period of time.[26]

Suppliers could also develop a crisis management plan that involves a problem analysis examining all reasons affecting the supply chain's performance (e.g., lockdowns, quarantine, and government restrictions). The plan may include a legal analysis of the risks involved concerning the contract clauses and contract law and the creation of outsourcing agreements with affiliate suppliers located in areas not heavily impacted by the coronavirus.[27]

Lastly, suppliers with exclusivity contracts with businesses should review their contracts with legal associates to ensure that distinct language is included that addresses the cause of delays, delivery failure, *force majeure* clauses, and reasons for contract renunciations.[28] Furthermore, suppliers should carefully review the dispute resolution section of their contract with businesses, so that the suppliers are aware of their legal rights and in a position to negotiate if necessary.[29]

In the analysis of who is legally responsible for supply-chain breach of contracts related to the coronavirus, the discussion reveals that both parties are held accountable. Both parties must spend considerable time at the onset of contract negotiations to protect their business interests and prepare for unforeseen circumstances. Parties are encouraged to include information about delays, delivery

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[25] Chambersfield Economides Kranos, *Covid-19 and Supply Chain Breach of Contracts: Who is Accountable?*, The Legal 500 (Dec. 10, 2020), https://www.legal500.com/developments/though-leadership/covid-19-and-supply-chain-breach-of-contracts-who-is-accountable/.

[26] *Id.*

[27] *Id.*

[28] *Id.*; *see also* George H. Singer, *Force Majeure Hitz Home, Excuses Rent Obligation*, 77 Bench & B. Minn. 12 (2020) (*Force majeure* clauses "are strictly and narrowly construed. Language matters, and drafting provisions that have historically been viewed as "boilerplate" now require increased attention."); *see also* Andrew A. Schwartz, *Contracts and Covid-19*, 73 Stan. L. Rev. Online 48, 55 (2020) ("only a cause that is specifically listed in the *Force Majeure* clause will excuse a party from his contract.").

[29] *Id.*

failure, *force majeure* clauses, and contract renunciations in their contracts.

Even though parties may plan for unforeseen circumstances, they should still understand the *force majeure* laws in the states they are conducting business in before invoking a *force majeure* clause. Most courts require thoroughly vetting the contract and its conditions before terminating or suspending a contract.

But there is not a large body of law surrounding how contracts have been suspended or terminated successfully with *force majeure* clauses due to the coronavirus. In a case that came before the bankruptcy court in Illinois, for example, *In Re Hitz Restaurant Group*, the petitioner had some success with a *force majeure* argument.[30] Hitz Restaurant Group filed a motion in bankruptcy court in Illinois claiming that the stay-at-home order issued during the coronavirus pandemic prevented on-premises dining and limited the operations to take-out and curbside service. Thereby, Hitz Restaurant Group requested the landlord to agree to a reduction in rent under the *force majeure* clause in the lease and argued it should be excused from the obligation to pay rent for some months due to the landlord's failure to make necessary repairs.[31]

The court granted a partial excusal of contractual performance under *force majeure*. It determined that the restaurant owner was not liable for rent payments reflecting the square footage of the entire restaurant impacted by the shut-down order.[32] Hitz Restaurant Group was liable for twenty-five percent of their rent because that signified the useable space within the restaurant for take-out and curbside service. The remaining percentage reflected dine-in space, subject to the shut-down limitations.[33]

In its ruling, the court relied on the language in the contract. The contract's *force majeure* clause stated that the landlord and tenant should each be excused from performing their obligations if the "obligations are prevented or delayed, retarded or hindered by . . . laws, governmental action or inaction, [or] orders of government."[34] Without this language, it is unlikely the court would have reached its conclusion.

Although Covid's impact on the law is still emerging, *Hitz* indicates that "governmental action," including lockdowns and mitigation measures, can excuse or reduce obligations and performance under *force majeure*.[35] *Hitz* also indicates that the

[30] *In re Hitz Restaurant Group*, 616 B.R. 374 (Bankr. N.D. Ill. 2020).
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.* at 376–77.
[35] George H. Singer, *Force Majeure Hitz Home, Excuses Rent Obligation*, 77 Bench & B. Minn. 12 (2020) ("The *Hitz* decision is significant. It is not only a case of first impression in a developing area of law, but also stands for the proposition that

language in the clause must be specific—a boilerplate clause may not suffice.

Due to the impact of the coronavirus pandemic on everyday life, many companies will tend to be more explicit and detailed in including contract clauses and provisions to cover ordinary and unordinary occurrences. The pandemic has taught businesses and suppliers to partner and work together to identify remedies that would benefit both parties.

IV. FINAL THOUGHTS

Before entering contracts, parties should prepare for unforeseen events and potential contract breaches. This preparation may require including all types of clauses in contracts (e.g., Acceleration, Arbitration, and *Force Majeure*). Acceleration and arbitration clauses are generally straightforward in their execution in the event of contract non-performance; while *force majeure* clauses are more complex and should consider several factors before a party can invoke this clause. Additionally, there are different state law interpretations of *force majeure.*

Many businesses believe that *force majeure* (or acts of God) clauses can offer protection for natural disasters like hurricanes, earthquakes, and avalanches. However, the coronavirus pandemic has presented a new dimension in creating contracts and has not been historically mentioned in *force majeure* clauses.

It should be noted that businesses will start to include more detailed and specific language within their *force majeure* clause related to pandemics, but the inclusion in contracts may not fully protect both parties. It would be in the best interest of businesses and suppliers to examine and consider remedies for mitigating the risks of contract non-performance. Developing remedies for mitigating risks would present a more proactive response to unforeseen events like the coronavirus pandemic.

covid-19 closure orders are the type of 'governmental action' that excuses performance under a *force majeure* provision.").

SEVEN RULES: Blockquotes in Legal Writing

R. Christopher Campbell *

I. INTRODUCTION

Blockquotes are ubiquitous in legal writing. With their profuse usage, one would expect consistency in their formatting. Yet blockquote formatting varies from attorney to attorney, sometimes even from page to page. Law schools are partially to blame as most never teach blockquotes. Thus, many in the legal field improvise blockquotes or use the APA template,[1] unaware that the APA significantly differs from *ALWD*,[2] *The Bluebook*,[3] and *The Redbook*.[4]

Because many in the legal field use an improper template, blockquote inconsistency has become almost comical. As an appellate attorney, I have witnessed every blockquote variation imageable: italicized blockquotes, bolded blockquotes, or blockquotes in a different font. Some attorneys double spaced blockquotes, whereas others largely avoid blockquotes, irrespective of a quote's size.

These issues, alas, are not limited to attorneys. I regularly saw improperly formatted blockquotes from trial and appellate courts when I was a law clerk. Some courts left the paginations in blockquotes, while numerous courts failed to indent and justify both sides. My students also struggle with blockquotes. Because students utilize the APA in their general education courses, some use a hybrid template, applying the APA and *ALWD* in their legal studies courses.[5] Suffice it to say, blockquote issues are nearly as ubiquitous as blockquotes.

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* J.D., Delaware Law School (formally Widener University School of Law). Associate Professor of Legal Studies at Peirce College, faculty advisor for *The 1865: Peirce College Law Journal*, and a criminal appellate and PCRA attorney. Special thanks to Melissa Kowalski, Ph.D., for feedback on the APA rules. Last but never least, thanks to Katie and Lula for their amazing encouragement and support.

[1] The American Psychology Association publication manual "is used by writers in many disciplines around the world for concise, powerful, and persuasive scholarly communications." https://apastyle.apa.org, *see also* American Psychology Association (2019) 7th ed. Publication Manual of the American Psychology Association. (hereinafter "APA").

[2] *ALWD Guide to Legal Citation* is from the Association of Legal Writing Directors, a "learned society for professors who coordinate legal writing instruction in legal education." *See ALWD*, "About the Authors," (6th ed. 2017), p. xxi (hereinafter "*ALWD*").

[3] *The Bluebook: A Uniform System of Citation* is the "definitive style guide for legal citations in the United States." *See The Bluebook*, "Preface to the Eighteenth Edition" (18th ed. 2008), p. 1, (hereinafter "*The Bluebook*").

[4] *The Redbook: A Manual on Legal style* (written by Bryan Garner, editor-in-chief of *Black's Law Dictionary*) is a comprehensive guide on legal style and writing. *See The Redbook: A Manual of Legal Style* (3d ed. 2013) (hereinafter "*The Redbook*").

[5] To remedy this issue, I post the seven rules for blockquotes in each of my legal studies courses.

But it is just a blockquote, right? Why waste time discussing blockquotes? For one thing, blockquotes are part of a paper's overall formatting. Incorrect or inconsistent formatting creates a muddled presentation, distracting the reader. A legal writer should never want anything to distract from his argument, including poor grammar, punctuation, spelling, or formatting.[6]

Second, because blockquotes can be drawn-out and drab, readers often feel dread when encountering them. ("Do I have to read this long passage?"). Simply, most readers skip blockquotes, treating them as optional, like footnotes. But blockquotes are anything but optional. If a writer includes a lengthy passage, surely that passage supports his argument or analysis; surely that passage is vital to the writer's presentation.

Employing the seven rules for blockquotes can alleviate these issues. Rules one through six afford a sleek and focused presentation, allowing the reader to absorb the blockquote's information better.[7] The seventh rule (lead-in sentences) imparts context, enticing a reader to read the blockquote.[8] Some of these rules may be familiar; others may not. Regardless, using these rules will enhance the presentation of your work and make you a more effective legal writer.

II. BLOCKQUOTE RULES

1. *Fifty words or more.*

The first blockquote rule governs which quote is large enough to be presented in a block. Both *ALWD* and *The Bluebook* require quotes of fifty words or more to be blockquoted.[9] This rule is non-negotiable. If a quote is fifty words or more, it must be presented in a block, regardless of how many lines it takes up.[10] Note that this rule conflicts with the APA, which requires forty words or more for a blockquote.[11]

2. *Single-space.*

Blockquotes are *always* single-spaced in legal writing. Because most legal writings are double-spaced, single-spaced blockquotes stand out, letting the reader digest the blockquote's

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[6] To use a sports analogy, proper formatting is like a layup in basketball—easy to execute, but when missed, it is ugly and distracting.

[7] For example, the white space around a blockquote "help[s] the reader absorb the information better." *See The Redbook*, Rule 4.6(d), p. 91.

[8] Bryan A. Garner, *The Winning Brief*, 3d ed. (2014), p. 501–07.

[9] *See ALWD* Rule 38.5(a) Block Quote Format; *see also The Bluebook* Rule B12 "Block Quotation."

[10] Generally, highlighting a text with the mouse cursor will reveal the word count.

[11] American Psychology Association (2019) 7th ed. Publication Manual of the American Psychology Association. ("Blockquotes").

information.[12] This rule, again, conflicts with the APA, which requires blockquotes to be double-spaced.[13]

3. *No quotation marks at the beginning or end.*

Avoid quotation marks at the beginning or end of a blockquote. A block of text, correctly formatted, denotes a quote.[14] Quotation marks at the beginning or end of a blockquote are therefore redundant. In addition, avoid using an ellipsis (. . .) to begin a quote. This rule also applies to quotes from the end of a sentence.[15]

4. *Indent both sides.*

In legal writing, blockquotes are always indented on both sides.[16] The white space around the blockquote aids the reader in absorbing the information.[17] That said, debate on the indentation size subsists. *ALWD* advises "one tab" on both sides (i.e., roughly a half-inch).[18] *The Bluebook*, however, does not specify an indentation size. *The Bluebook* merely asserts that a blockquote should be "indented on the left and right" margins.[19] *The Redbook* also does not state an indentation size. *The Redbook* only requires that both sides be equally indented.[20] With no standard size, some writers indent one inch, letting the blockquote stand out further.[21] This is the only blockquote rule with an option. Still, regardless of the indentation size—a half-inch or an inch—all indentation sizes must be consistent throughout the writing.

5. *Justify both sides.*

In most word processor programs, paragraphs are aligned in four ways: right, center, left, or justified. Normal paragraphs are aligned "left"; blockquotes are always "justified."[22] Justifying a blockquote straightens the left and right margins, making the blockquote easier on the eyes (*See* an example, *infra*). Unlike *The*

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[12] *See ALWD* Rule 38.5(a) Block Quote Format; *see also The Bluebook* Rule B12 "Block Quotation"; *see also The Redbook*, Rule 130(d), p. 23.
[13] American Psychology Association (2019) 7th ed. Publication Manual of the American Psychology Association. ("Blockquotes").
[14] *See ALWD* Rule 38.5(a) "Block Quote Format," *The Bluebook* Rule B12 "Block Quotation," and *The Redbook* Rule 120(d).
[15] *See Aspen Handbook* at 55; *see also* Rule 5.1(a)(iii) on ellipsis. *The Bluebook* Rule 5.1(a)(iii) requires using an ellipsis to indicate that a paragraph was omitted.
[16] Note that the APA only requires an indentation on the left margin. American Psychology Association (2019) 7th ed. Publication Manual of the American Psychology Association. ("Blockquotes").
[17] *See The Redbook*, Rule 4.6(d), p. 91.
[18] *See ALWD* Rule 38.5(a) "Block Quote Format."
[19] *See The Bluebook* Rule B12 "Block Quotation," p. 23.
[20] *See The Redbook* Rule 4.8(c), p. 92.
[21] *See The Redbook*, Rule 4.6(d), p. 91.
[22] *See The Bluebook* Rule B12 "Block Quotation"; *see Aspen Handbook* for Legal Writers at 55.

Bluebook, *ALWD* does not have a specific rule to justify blockquotes. Nonetheless, all blockquote examples in the *ALWD* manual are justified.[23] *ALWD* also maintains that a blockquote should have "a surrounding *frame* of white space."[24]

6. *Place the citation after a space on the next line.*

Both *The Bluebook* and *ALWD* require blockquote citations to be placed—without indentation—on the next line after the blockquote. (*see* an example, *infra*).[25] A blockquote citation is never placed within or directly after the blockquote. This rule is consistent with the other blockquote rules as the reader has less information to absorb with the citation on the next line. The APA, once more, deviates: the APA instructs the writer to "cite the source in parentheses after the quotation's final punctuation."[26]

7. *Lead-in sentences.*

Because many readers skip blockquotes, a blockquote should be summarized with a lead-in sentence before presenting it.[27] A lead-in sentence imparts context, enticing a reader to read the blockquote.[28] To seduce the reader, a concise, instructive, and attention-grabbing lead-in works best.[29] Never write "the court said," place a colon (:), and toss in a blockquote. This lazy lead-in alerts the reader that the blockquote lacks value.

Instead, craft a lead-in sentence that crystallizes the blockquote's point of law. This will reduce the blockquote's burden—rather than the blockquote making an assertion, the blockquote will support the writer's assertion.[30] Lead-in sentences also confer credibility. Bryan Garner (editor of *Black's Law Dictionary*) comments, "once the judge confirms that the quotation does for you what you said it does, you'll have enhanced your credibility with the

[23] *See*, *e.g.*, *ALWD*, *supra.*, p. 325–28; *see*, *e.g.*, *The Bluebook*, *supra.*, p. 23, 68.
[24] *See ALWD* Rule 38.5(a) (emphases added).
[25] *See The Bluebook* Rule B12 "Block Quotation," p. 23, and Rule 5.1; *see also ALWD* Rule 38.5(e).
[26] For blockquotes, the APA states that a writer can also "cite the author and year in the narrative before the quotation and place only the page number in parentheses after the quotation's final punctuation." American Psychology Association (2019) 7th ed. Publication Manual of the American Psychology Association. ("Blockquotes").
[27] *See* Bryan A. Garner, *The Winning Brief*, 3d ed. (2014), p. 501–07. ("For every block quotation, supply an informative, eye-catching lead-in.")
[28] *Id.*; *see also The Redbook*, Rule 130(d), p. 23 ("introduce [a blockquote] with the proper lead-in.").
[29] *See* footnote 28, *supra.*
[30] *See The Winning Brief*, *supra.*, p. 501 (*quoting Garner's Dictionary of Legal Usage*, 746 (3d ed. 2011), with a lead-in sentence, "the lead-in becomes an assertion, and the [block]quotation becomes the support.").

court."[31] With these benefits in mind, consider this lead-in sentence, followed by a properly formatted blockquote:

In *Meinhard v. Salmon*, Judge Cardozo famously held that the fiduciary duties in business partnerships are bound to a higher moral standard than those of the everyday marketplace:

> Joint adventurers, like co-partners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.

249 N.Y. 458, 464–65, 164 N.E. 545 (1928).[32]

This lead-in sentence not only crystallizes Judge Cardozo's famous ruling, but the lead-in also entices the reader to read the blockquote. The lead-in mimics a news anchor handing off a story to an on-sight reporter for further details. Moreover, without the lead-in, a reader may overlook the blockquote's significance.[33] Finally, the lead-in sentence serves as a safety net: if the reader skips the blockquote, the reader will still grasp the writer's point.[34]

III. FINAL THOUGHTS

Because blockquotes are long and usually include more content than needed, use them sparingly.[35] Courts, attorneys, and paralegals often use blockquotes as shortcuts, letting someone else make their point. But blockquotes can overwhelm a reader.[36] One "should be writing, not compiling."[37] Let your writing, in your voice,

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[31] *Id.* at 502.

[32] This blockquote is indented one inch on both sides. The larger indent lets the blockquote stand out against the article's single-spaced format.

[33] Lead-in sentences are prudent for smaller quotes as well.

[34] *See The Winning Brief*, *supra*., p. 502 (with a lead-in sentence, "even if the reader were to skip your quotation, your train of thought will still be easily discernible.").

[35] Richard Nordquist, *How to Use Block Quotations in Writing*, (updated June 27, 2019) ("Blockquotes can be effective tools for persuading readers or proving a point, but they should be used sparingly and edited appropriately.") https://www.thoughtco.com/what-is-block-quotation-1689173.

[36] *The Redbook* Rule 28.3, p. 565.

[37] *Id.* (when blockquotes "appear repeatedly, they overwhelm your prose and obscure your expressions. You should be writing, not compiling.")

express your ideas.[38] Remember, in legal writing, you are the news anchor. Like most news anchors, you control who has a voice in your show.

[38] Bryan A. Garner, *The Elements of Legal Style*, (2d ed. 2002), p. 85 ("Use block quotations only as a last resort.").

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