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Alexis Anderson

*Boston College Law School*, [alexis.anderson@bc.edu](mailto:alexis.anderson@bc.edu)

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# Classroom Taping Under Legal Scrutiny—A Road Map for a Law School Policy

Alexis Anderson

“Could you tape this class for me tomorrow? I’ve got an interview downtown . . . .”

“Sure; happy to help a friend . . . .”

The basic circumstances are well-known: A student who is absent from class for various reasons, including illness, weather, or religious observance, or a student entitled to disability accommodations, seeks access to the content of the class presentation. Until relatively recently, obtaining another student’s class notes was the common solution. Now technological advances enable recording of the class as a more robust method of capturing the actual material for future review. Attendant to these new developments are legal issues ranging from federal and state wiretapping statutes, to federal disability law, privacy protections, and intellectual property law, all of which need to be analyzed before a school adopts a policy on classroom taping.<sup>1</sup> In addition, creating any university standard also entails considering the needs of the various stakeholders, including the professors, students, and administrations whose interests may at various points coincide, but, at other junctures, conflict.

**Alexis Anderson** is Associate Clinical Professor, Boston College Law School. I owe an inestimable debt to my colleagues at Boston College Law School who comprised the faculty working group exploring classroom taping issues. They are: Associate Dean Maris Abbene (chair), Professors Mark Brodin, Kent Greenfield, David Olson, and Judith Tracy, and Associate Director of Administrative & Technology Services Michael Mitsukawa. Further, this article has been greatly improved through the thoughtful feedback received from colleagues on earlier drafts, including Professors R. Michael Cassidy, Paul Tremblay, and Associate Dean of Students Maris Abbene, and (former) Associate Dean of Students Norah Wylie. I wish to thank Robert Park and Ivana Aksentijevich for their invaluable research assistance. In addition, the author is very appreciative of the support for this project provided by the Boston College Law School Fund.

1. Throughout the article I use the word “taping” to include all forms of electronic recording of classroom audio, including both purely audio capture, as well as combined audio and video recording.

To date, the relevant literature lacks any extended analysis of the legal issues inherent in developing a law school policy on classroom taping.<sup>2</sup> While all academic institutions will face questions related to taping protocols, the issues are particularly acute in the law school setting, given the particular pedagogical demands of teaching professional advocates. This article seeks to fill the gap by outlining the key legal issues inherent in crafting a comprehensive academic policy on classroom taping and by identifying the foreseeable consequences to the institutional stakeholders using real-world scenarios. Section I introduces the various pressures driving law school administrations to approve classroom taping. Next, in Section II, the article offers a detailed analysis of the relevant wiretapping statutes, defining the minimum legal requirements for permissible taping. Other regulatory provisions implicated by classroom taping, from disability accommodation, to common-law privacy standards, to copyright protections, are addressed in Section III. Many law schools' taping policies have developed organically in response to particular exigencies. In contrast to that ad hoc approach, this article concludes with materials designed to assist institutions in the throes of creating coherent and comprehensive classroom taping protocols that will be responsive to the needs of all stakeholders.

### I. The Allure of Classroom Taping

Law schools are under significant pressure to permit classroom taping. Students eligible for educational accommodations claim rights to taped classes as the most effective and appropriate means to ensure their full participation in the educational program.<sup>3</sup> Other students seek "on demand" access to classroom dialogue for exam preparation or as a study aid, finding recordings to be the modality best designed to assist their particular learning style. Students petition administrations and faculty for class recordings after absences caused by unavoidable illness, pregnancy, bereavement, military reserve duty, religious observance,<sup>4</sup> and jury duty. Perhaps more sheepishly,

2. See generally *Recording Lectures and Participants' Legal Rights—What You Should Know*, UNIV. OF MANCHESTER, <http://www.elearning.eps.manchester.ac.uk/recording-lectures-and-participants-legal-rights-what-you-should-know/> (last visited Nov. 7, 2016) (analysis by the University of Manchester, England, of rights affected by classroom taping and explanation of its policies).
3. See *Auxiliary Aids and Services for Postsecondary Students with Disabilities*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/docs/auxaids.html> (last updated Nov. 16, 2011) (hereinafter *Auxiliary Aids*) (outlining post-secondary schools' duties under the Rehabilitation Act of 1973 § 504, 29 U.S.C. 794 § (2012) and the Americans with Disabilities Act of 1990 (2012), 42 U.S.C. § 1210 et seq.).
4. Congress has attempted to protect individuals' free exercise rights through the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-4 (2006) ("RFRA"). Following the Supreme Court's decision in *Boerne v. Flores*, 521 U.S. 507, 536 (1997), which ruled RFRA inapplicable to state governments, numerous states enacted analogous provisions. See generally, Whitney Travis, Note, *The Religious Freedom Restoration Act and Smith: Dueling Levels of Constitutional Scrutiny*, 64 WASH. & LEE L. REV. 1701 (2007). Research to date has not revealed any reported cases in which a student has claimed a protected right to have his classes recorded so he might partake in a religious observance. However, as schools increasingly

students may also ask for recordings after missing class for job interviews, family and friend celebrations, and oversleeping. Having readily available, routinely provided recordings becomes a convenient method for communicating the missed course content.

Similarly, faculty members frequently perceive advantages to recording their classes related to both pedagogy and expediency, including readily available content review, access to makeup sessions, and facilitation of faculty peer review. Administrative staff benefit from having accessible tapes of classroom sessions to afford them more options in dealing with unexpected developments from weather to public transportation outages and student crises.<sup>5</sup>

The technical equipment needed for classroom taping became generally available at the end of the twentieth century.<sup>6</sup> Hand-held tape recorders supplanted the need for borrowing another student's notes. Soon thereafter video capture equipment became more commonly available, enabling students to access both visual and audio features. Digital capability has enhanced the viewer's experience from the earlier analog formats. Many law school classrooms are now outfitted with the technology to enable the law school administration to record courses remotely or by the faculty locally.<sup>7</sup> Indeed, professors have increasingly embraced technology as vital to their ability to effectively teach students with a range of different learning styles.<sup>8</sup>

Currently, any law school seeking to institute a classroom taping system would have its choice of software designed to facilitate lecture capture.<sup>9</sup>

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permit taping for a wide variety of circumstances, a student denied taping as a religious accommodation might attempt to challenge that decision.

5. Discussion of educational recording inherent in online and distance-learning courses is beyond the scope of this article. A number of universities offer online instruction with unique protocols for appropriate protection of electronic content. One such consortium is Coursera. See COURSERA, <https://www.coursera.org/> (last visited Nov. 7, 2016).
6. In 1886, Alexander Graham Bell's laboratory obtained a patent for a nonmagnetic, nonelectronic audio recorder. See *Tape Recorder*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Tape\\_recorder](https://en.wikipedia.org/wiki/Tape_recorder) (last visited Nov. 10, 2016). However, it was not until the latter part of the twentieth century that the price and availability of recording devices made regular classroom lecture capture practical. Since then, digital sound recordings have quickly supplanted most analog systems. *Id.*
7. See generally *AALS Handbook: Executive Committee Regulations*, ASSOC. AMER. L. SCH. § 6-9.1 (last updated May 2005), <https://www.aals.org/about/handbook/executive-committee-regulations/> (requiring each member law school to establish a technology plan to enhance the teaching environment). See also WOLTERS KLUWER, LEGAL EDUCATION LEADING EDGE REPORT I (2015), <http://www.wklegaledu.com/pages/leadingedge> [hereinafter LEADING EDGE REPORT] (noting "heavy increase" in use of classroom technology).
8. See M.H. Sam Jacobson, *A Primer on Learning Styles: Reaching Every Student*, 25 SEATTLE L. REV. 139 (2001); Alex Berrio Matamoros, *Answering the Call: Flipping the Classroom to Prepare Practice-Ready Attorneys*, 43 CAP. U.L. REV. 113 (2015).
9. For background on the history and goals of lecture capture, including different technology systems, see Margaret Martyn, *Engaging Lecture Capture: Lights, Camera . . . Interaction!*, EDUCAUSE REV. (Dec. 22, 2009), <http://er.educause.edu/articles/2009/12/engaging-lecture-capture->

Given available technology and the convenience and educational value of a regular taping procedure, institutions may reflexively rush to adopt the new technology.<sup>10</sup> However, experience with class recording suggests that there are both benefits and inherent challenges, ranging from legal constraints to pedagogical concerns, that should be addressed before an institutional taping policy is adopted.

Whether or not a law school undertakes a centralized classroom taping system, students, with or without other participants' knowledge, have the means to undertake taping themselves given technological advancements (e.g., smartphones, laptops, smartpens, hand-held audio recorders). Students may elect to record a class session for their own later review or for an absent colleague. The current generation of law students has reached maturity in an era in which social media is omnipresent; they are accustomed to documenting events. Given the likelihood that student-initiated recordings will occur where no institutionally controlled system exists, law schools are under pressure to develop rules so that all interested parties have explicit guidance on what, if any, taping is permissible.

While all academic institutions face the issue of developing appropriate lecture-capture policies, the very nature of law school instruction heightens the concern for law faculty and administrators. As part of their professional training, law students are exposed daily to Socratic dialogue and engage in academic debate in their classes. Pure lecture is not the norm.<sup>11</sup> Therefore, the quality and quantity of the student-faculty interaction during law school class is materially different from the lecture format of many college classes. Therefore, as developed more fully below, taping policies tailored to the particular pedagogical needs of law school stakeholders is critically important.

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lights-camera---interaction. Respondents to a posting on the associate deans' listserv noted use of a variety of systems, including Panopto, Vimeo, Echo360, CourseCasting, Comtasia, and Mediasite. See Posting of Susan Mandiberg, *sfm@lclark.edu*, to LEAP-ASSOCIATE-DEANS@mail.americanbar.org (Jul. 22, 2015) (on file with author) [hereinafter Posting of Susan Mandiberg].

10. A review of the public websites of the top thirty schools based on the 2016 U.S. News & World Report rankings shows that some two-thirds of those schools have publicized classroom taping policies. Eleven schools do not have publicly available protocols (but could have policies available only internally). See Appendix 1 for the compilation of those data. See also Posting of Susan Mandiberg, *supra* note 9 (noting that sixteen of twenty-six responding schools recorded all or most law school classes, while ten other schools did not routinely do so, absent special circumstances such as disability accommodations).
11. Indeed for material best delivered in that format, law faculty are increasingly using flipped classroom approaches to allow students to cover the basic material before and outside of class so that the in-class period can be reserved for group work, questions, feedback and other forms of interactive instruction. See Laurel Davis, Mary Ann Neary & Susan E. Vaughn, *Teaching Advanced Legal Research in a Flipped Classroom*, 22 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 13, 13-19 (2013); Matamoros, *supra* note 8.

## II. Avoiding Statutory Liability for Illegal Wiretapping

Wiretapping? How could taping of academic classes for educational purposes possibly run afoul of criminal statutes restricting wiretapping?<sup>12</sup> After all, classroom taping is far different from law enforcement surreptitious wiretapping or clandestine eavesdropping. A critical first step in developing an effective institutional policy on classroom taping is to recognize the state and federal restrictions on interception of communications and then to construct a policy consistent with those statutory safeguards.

To date, research has not identified any reported cases construing the federal and state wiretapping statutes in the classroom taping context.<sup>13</sup> However, those laws attempt to define the ambit of protection to be afforded oral and electronic communications in the context of ever-developing technological advances.<sup>14</sup> Congress and state legislatures have sought to restrict interception of communications resulting in broad laws that apply to classroom taping.<sup>15</sup> How any member of the law school community can undertake taping consistent with those laws will be explored below.

Before providing an overview of the wiretapping laws, it will be helpful to analyze these classroom taping issues in factual context.<sup>16</sup>

Allen and Sonia enrolled in their law school's required criminal law class. Their school has the technological resources to capture classroom instruction, including for their class.<sup>17</sup> Its administration has tasked the technology

12. While the federal wiretapping laws and their state counterparts are criminal statutes, most also provide for civil liability. *See, e.g.*, 18 U.S.C. § 2520 (2002).
13. There are a few wiretapping cases arising in a school setting; however the wiretapping at issue did not involve classroom recordings. For example, while the parties in *Kinsey v. Case*, 162 F.3d 1173 (10th Cir. 1998), were teachers, the dispute arose over interception of internal school phone calls. *Wesley College v. Pitts*, 974 F. Supp. 375 (D. Del. 1997), *aff'd without published op.*, 172 F.3d 861 (3d Cir. 1998), involved alleged hacking of the university's email system.
14. *See generally* S. REP. NO. 90-1097 (1968), as reprinted in 1968 U.S.C.C.A.N. 2112 (Congress's statement about the scope of Title III of the Omnibus Crime Control and Safe Streets Act of 1968). As the Committee's report states: "The tremendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of electronic surveillance techniques. As a result of these developments privacy of communication is seriously jeopardized by these techniques of surveillance." S. REP. NO. 90-1097, 1968 U.S.C.C.A.N. at 2154.
15. According to the congressional report, "Title III has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." S. REP. NO. 90-1097, 1968 U.S.C.C.A.N. at 2153.
16. The fact scenarios appearing in this article are loosely based on situations reported to the author by deans of students and disability services officers. Names are fictitious.
17. As discussed in more detail in Section II.A. *infra*, wiretapping statutes govern audio recordings; pure video images are not subject to those laws (though a videotape that includes

department with notifying students and faculty that their classes will be recorded regularly and with taping the classes through a centralized recording system. Links to the class recordings are then posted to the appropriate course website for access by designated students and faculty, who must acknowledge and agree to certain specific terms of use.

Allen accessed one of last week's class recordings on the course website to review the material on sexual assault and rape statutes. At the end of the tape, he was concerned that the recording had captured a private conversation between one of his classmates, Sonia, and their professor, Mark Schwartz, and alerted the professor, who investigated.

Professor Schwartz found that Allen's concern was unfortunately justified. When last week's session ended a few minutes early, Sonia had approached the professor while he was still gathering his materials at the lectern and talked privately with Schwartz about issues raised during class and in the readings. Sonia acknowledged that she had not been prepared to discuss the material and sought to explain why. She confided that she had been a rape victim; she was still processing those events and had not disclosed the circumstances to other students or faculty. However, she knew that her experiences adversely affected her ability to undertake the analysis asked for in class. While Schwartz tried to be supportive and offered to meet with Sonia later to discuss the issues more fully, he now realized that the standardized taping program had captured that confidential exchange, since the system had been programmed to tape for the entire time block allocated for the class.

As we will see, many pivotal, preliminary questions affect how federal and state wiretapping laws will apply to the taping event. What notice and/or consent is legally required before any taping can occur? What if a faculty member does not consent to the recording? What if a student does not wish to participate in a recorded session? What safeguards should be in place to avoid subsequent misappropriation or misuse of the recordings? To examine these issues, we begin with an overview of the relevant statutory provisions and then explore how the attendant consequences can be addressed.

### *A. Federal Wiretapping Laws*

University policymakers will want to start with the federal laws regulating recording of both oral and electronic communications.<sup>18</sup> A law school's decision to capture classroom conversation requires analysis of two distinct events: 1. the initial recording of the presentation, which is analyzed as the interception of oral communication;<sup>19</sup> and 2. the subsequent distribution or

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audio would fall within the ambit of the statutes). *See generally* State v. Wallace, 986 N. E. 2d 498 (Ohio Ct. App. 2012) (interpreting both federal and state wiretapping laws).

18. *See* 18 U.S.C. § 2510 et seq. (2012).

19. Oral Communication is defined as "communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances

release of the classroom recording, regulated as dissemination of an electronic communication.<sup>20</sup>

As to the first aspect, the centralized program to record all of Sonia and Allen's criminal law classes should easily withstand scrutiny under federal law. Those statutes explicitly exempt recordings made with the consent of one party to the communication.<sup>21</sup> Further, it is well-established that consent is not limited to express agreement; rather it can be implied from the circumstances.<sup>22</sup> Here, the institution is capturing the oral communication after providing advance notice to the participants. In addition, Professor Schwartz facilitated the class discussion with full knowledge of the taping. Therefore participant consent, actual or implied from the circumstances, would satisfy federal restrictions on interception of oral communications.<sup>23</sup>

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justifying such expectation . . . ." 18 U.S.C. § 2510 (2) (2012).

20. The federal wiretapping law defines "electronic communication" as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce . . ." 18 U.S.C. § 2510 (12) (2012). In 1986, Congress amended Title III to add electronic communications to the existing restrictions on interception of wire and oral communications. See 18 U.S.C. §§ 2510-2521 (2012).
21. The relevant provision of 18 U.S.C. § 2511 (2) (d) (commonly called a "one-party consent statute") states: "it shall not be unlawful . . . where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception"). 18 U.S.C. § 2511 (2) (d) (2012). Note that "person" is defined to include legal entities as well as individuals. See 18 U.S.C. § 2510 (1) (6). The consent exception has a qualifier that would typically be irrelevant in a broad institutional class taping system. However, were the purpose of the interception to be commission of a criminal or tortious act, then one-party consent would not suffice to render the interceptions legal. 18 U.S.C. § 2511 (2) (d). See generally *Griggs-Ryan v. Smith*, 904 F. 2d 112 (1st Cir. 1990).
22. See *Griggs-Ryan*, 904 F.2d at 119 (affirming that no violation of the federal wiretapping law occurred where evidence showed that tenant acquiesced to the taping); *United States v. Amen*, 831 F. 2d 373 (2d Cir. 1987) (wiretapping statute's requirement of consent should be liberally construed).
23. This conclusion assumes faculty buy-in to the taping program. In the event that a faculty member wished to opt out of class recordings, a school would need to defend a centralized taping program against a challenge under the federal wiretapping law on the basis of implied student consent following adequate notice of the program. See text accompanying note 62 *infra*, and discussion of Judge Rojas's objection to taping of her trial practice class. A school administration might argue that its decision to tape obviates the need for faculty consent under principal-agent principles, since the faculty member is an employee of the institution. However, even with adequate advance notice to all participants, if a faculty member explicitly objected, that dissent could trigger exposure under state wiretapping statutes requiring all-party consent. See text accompanying note 32 *infra*. A school might also argue that the professor's consent should be inferred, given the possibility that classroom taping for qualified students with a disability could be mandated under other federal statutory requirements. However, the better statutory interpretation would require advance notice to the professor and students under the federal wiretapping laws. See Section III.A. *infra*, relating to disability accommodations. Last, arguably, the statutory language could be interpreted that one student's consent to the taping would suffice to render the recording permissible. However, the better analysis would require all students and faculty to have



Sonia (and indeed her professor) might argue that she had no notice that discussions held in the room—but after conclusion of the class—would also be recorded, and therefore she did not consent to that taping. Had she known, she would likely have asked to speak with Professor Schwartz in his office. In such situations, the aggrieved student could claim that her consent was not “all or nothing,” but rather was limited to the actual course-related events.<sup>24</sup> Therefore any taping notices should warn participants that “tails” of a class proceeding may also be inadvertently recorded.<sup>25</sup>

Once a recording has been made, an electronic communication exists that triggers additional usage restrictions under federal law. In our example, when the technology staff at Sonia’s law school posted the recording on the criminal law course website, that distribution of the recording is also subject to federal law as an electronic communication.<sup>26</sup> The statute limits the intentional disclosure and use of impermissibly obtained oral and electronic communications.<sup>27</sup> Therefore, if the original interception of the oral communication (i.e., the class presentation) is tainted because of no notice or consent, then the subsequent dissemination of that illegal recording is also improper.<sup>28</sup> However, the professor’s consent to the original recording and its succeeding distribution will suffice to prevent liability under federal law.<sup>29</sup>

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at least notice of the taping to satisfy the statute. For a discussion of issues raised where a student wishes to opt out of participating in classroom taping, see *infra* text accompanying note 58.

24. See *Griggs-Ryan*, 904 F.2d at 116-19, noting that consent need not mean blanket permission, but rather can be construed from particular circumstances, citing *Watkins v. L. M. Berry & Co.*, 704 F. 2d 577, 582 (11th Cir. 1983), with approval.
25. See generally HARVARD LAW SCHOOL, HANDBOOK OF ACADEMIC POLICIES 2016-2017, Section XIII. (E.) (3), <http://hls.harvard.edu/dept/academics/handbook/xiii-other-rules/f-class-recordings/> (last visited Nov. 10, 2016) (noting that unintentional taping of tails of class can occur).
26. One might question whether an interception has occurred during the second stage of our inquiry, i.e., in which the institution is merely storing and posting the classroom recording. However, 18 U.S.C. § 2510 (4) defines “intercept” broadly to include the “aural or other acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical, or other device.” (emphasis added).
27. See 18 U.S.C. § 2511 (1) (c) banning intentional disclosure and 18 U.S.C. § 2511 (1) (d) banning intentional use. Note that Congress amended Section 2511 (1) in 1986 to require proof only of intentional conduct, deleting the prior requirement of willful conduct. See also, S. REP. NO. 99-541, as reprinted in 1986 U.S.C.C.A.N. 3555-56 (defining intentional as “conscious objective”). For our purposes, it seems clear that an institutional decision to conduct classroom taping would satisfy the intent requirement.
28. 18 U.S.C. § 2511 (2) (g) exempts from coverage electronic communications which are “readily accessible to the general public.” *Id.* Applied to classroom taping programs, this exception would generally be inapplicable given that most universities post classroom recordings through internal course management systems rather than making them available on public sites.
29. 18 U.S.C. § 2511 (2) (d) expressly includes electronic communications under its one-party consent provisions. See also S. REP. NO. 90-1097, as reprinted in 1968 U.S.C.C.A.N. at 2154

Our first vignette demonstrates that even a class taping policy involving advance notice and administrative oversight can go awry. Despite appropriate safeguards, Sonia's private conversation with Professor Schwartz was unintentionally captured when the class session ended earlier than the recording was timed to end. Just because Sonia impliedly consented to participating in a class that was being taped does not prevent her from challenging the recording of her confidential after-class discussion with her professor, which neither person expected to be taped. Even if Professor Schwartz moves immediately to request that the school's technology staff delete the objectionable section of the tape, the damage has been done, as the clip has been viewed by at least one unintended viewer. The fact that Allen acted responsibly by promptly bringing the matter to the professor's attention does not minimize the distress Sonia will experience once she learns of the disclosure. Going forward, administrative notice of a school's taping policy should warn participants that accidental taping of unintended classroom matters can occur.

One can envision other scenarios in which taping could be suspect. What if a student explicitly objects to attending a class that is being taped? His interests might not easily be addressed in those schools where all classes are taped or where the specific class being taped is a required course. Opening a dialogue involving the student, the administration, and faculty to better understand his reservations will be a critical first step.

Despite some rare situations that would continue to pose challenges, a published taping policy providing appropriate advance notice to all members of the community is best-designed to pass scrutiny under federal law. As we will see, workarounds to meet state law standards are also feasible.

### *B. State Wiretapping Laws*

If federal wiretapping restrictions can be overcome, do the relevant state wiretapping laws pose any hurdle to policymakers?<sup>30</sup> As we will see, certain states' more restrictive wiretapping laws do raise additional challenges, but not insurmountable hurdles. A majority of states track federal law, holding that one-party consent suffices; however, a minority require additional protections under state law before taping will pass muster.<sup>31</sup> While the federal

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“Virtually all concede that the use of wiretapping or electronic surveillance techniques by private unauthorized hands has little justification where communications are intercepted without the consent of one of the participants.”

30. It is well-established that Congress's enactment of the federal wiretapping laws did not preempt more protective state law efforts. Rather, the federal law provides the minimum federal requirements, but left open opportunities for states to enact provisions that would require more stringent safeguards for lawful interception. For a lengthy analysis of this federalism issue in the criminal law context, see *Commonwealth v. Vitello*, 367 Mass. 224, 242-52 (1975) (holding that the Massachusetts Wiretapping Law was not preempted by federal law).

31. One recent survey concluded that twelve states were all-party consent states. REPORTERS' COMMITTEE FOR FREEDOM OF THE PRESS, REPORTER'S RECORDING GUIDE 3 (Aug. 1, 2012),

law is commonly called a one-party consent statute, twelve states have required *all* parties to an interception to consent.<sup>32</sup> Therefore, policymakers should determine if their state is a minority jurisdiction requiring extra scrutiny to ensure compliance with local electronic wiretapping/surveillance statutes.<sup>33</sup>

State laws vary as to what constitutes valid consent under their wiretapping laws; however, two key factors have shielded recordings in the minority jurisdictions from legal attack. First, even in all-party consent states, courts have not routinely required express agreement, but rather have approved taping when the evidence supports a finding of the parties' implied consent.<sup>34</sup> Second, state wiretapping statutes commonly exempt recordings made in cases in which either the victim had no reasonable expectation of privacy or where the taping is not surreptitious.<sup>35</sup> Thus, proof of the participants' knowing acquiescence to a recording openly undertaken in a public setting would constitute a defense to an allegation of improper wiretapping in those minority jurisdictions purportedly requiring all parties' consent.<sup>36</sup>

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<http://www.rcfp.org/rcfp/orders/docs/RECORDING.pdf> [hereinafter RECORDING GUIDE]. While a comprehensive search of all fifty jurisdictions is beyond the scope of this article, policymakers may find the following resources helpful: 50 STATE STATUTORY SURVEYS: ELECTRONIC SURVEILLANCE, 0170 Surveys 22, Westlaw (database updated July 2015), and 50 STATE SURVEYS, STATUTES & REGULATIONS: CIVIL RIGHTS LAW - PROTECTION OF RIGHTS: SURVEILLANCE, RECORDING & INTERCEPTION, LexisNexis (database updated June 2016).

32. These minority jurisdictions have euphemistically been referred to as *two*-party consent states. *See generally* RECORDING GUIDE, *supra* note 31, at 2; *Massachusetts Recording Law*, DIGITAL MEDIA LAW PROJECT, <http://www.dmlp.org/legal-guide/massachusetts-recording-law> (last visited Nov. 10, 2016). However, those state statutes are more correctly termed "*all*-party consent" laws. RECORDING GUIDE at 2 (emphasis added).
33. Institutions in those jurisdictions with all-party consent laws will need to review carefully the specific statutory provisions and judicial interpretations to ensure compliance with their state's wiretapping requirements.
34. *See, e.g.*, *People v. Ceja*, 789 N.E.2d 1228, 1241 (Ill. 2003) (implied consent can suffice under Illinois' all-party consent wiretapping law); *Commonwealth v. Jackson*, 370 Mass. 502, 507 (1976) (holding that conduct demonstrating knowledge of taping can evidence consent); *Fisher v. Hooper*, 732 A. 2d 396 (N.H. 1999) (under an all-party consent state's wiretapping law, consent can be inferred from conduct).
35. *Malpas v. Maryland*, 695 A.2d 588 (Md. Ct. Spec. App. 1997) (conviction under state wiretapping law affirmed where defendant's loud communications were audible in adjoining apartment where taping occurred). Note that some states limit prosecutions under their wiretapping laws to secretive interceptions. *See generally* M.G.L. c. 272 § 99 (B) (4), which provides: "The term 'interception' means to *secretly* hear, *secretly* record, or aid another to *secretly* hear or *secretly* record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication . . ." (emphasis added). Similarly, the federal wiretapping law requires evidence that the speaker has a reasonable expectation of privacy. 18 U.S.C. § 2510 (2) (2012) (defining "oral communication" as utterances "by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . .").
36. Unlike a home, which would trigger the highest privacy interests, classrooms are public spaces where the participants openly exchange ideas, undercutting any expectation

Applied to our classroom context, clear advance notice to the students and faculty through signage, notice in syllabi and on course websites, as well as prominently displayed recording equipment, would evidence that the taping was not clandestine and that the participants attended the class with knowledge that it was being recorded.<sup>37</sup> These safeguards can readily be implemented when the classroom taping is undertaken by administrators who can erect appropriate signs and post terms of use on course websites. Faculty-initiated recording would also likely ensure that adequate advance notice to students occurred, assuming professors announce their plans at the outset. However, random, unauthorized student-initiated taping poses the greatest risk that classmates or faculty could cry foul.

All school administrations in the throes of developing classroom taping policies will want to craft notice and consent protocols that conform to federal and state wiretapping laws.<sup>38</sup> In addition, inviting all stakeholders to have input on the process will allow airing of individuals' concerns. Those statutes establish the minimum requirements for capture of class presentations. Next, we will turn to other laws that also must be analyzed before a comprehensive classroom taping policy can be formulated.

### III. Compliance with Other Legal Duties Triggered by Classroom Taping

Our review of the wiretapping laws' constraints on classroom taping forms the foundation for any institutional taping policy and highlights the balance between the participants' privacy interests and some constituents' demands for class recordings. We now turn to challenges imposed by other laws designed to protect the interests of certain discrete groups of stakeholders in the school community.

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of privacy. *See generally* Commonwealth v. Blood, 400 Mass. 61, 68-69 (1987) (ordering suppression of recordings of conversations which occurred in defendant's home). However, as we have seen in the article's first vignette, Sonia entered into a confidential conversation with her professor assuming that the room *after* class had become a private space. *See* text accompanying note 16, *supra*.

37. The presence of other factors, such as the public importance of the subject of the recording, has also been held to affect whether the taping passed state law muster. *See* Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011) (vindicating free speech rights of private citizen who taped police action in a public park and was subsequently charged under Massachusetts' wiretapping laws).
38. Appropriate notice could include prominently displayed signage on the classroom doors and advisories in course syllabi, such as: "Classroom proceedings may be recorded by the school's audiovisual department for purposes including, but not limited to, student illness, religious holidays, disability accommodations, and student course review. The school's academic policies preclude student recording without the express permission of the instructor."

*A. Students Entitled to Disability Accommodations under Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act*

Qualified individuals with documented disabilities are afforded protections against discriminatory policies under various statutes.<sup>39</sup> Law schools, like other academic institutions, are bound to comply with the dictates of federal laws designed to ensure effective academic participation by students with disabilities.<sup>40</sup>

Both Section 504 of the Rehabilitation Act of 1973 (“Section 504”) and the Americans with Disabilities Act (“ADA”) specify that schools must provide students entitled to accommodations with appropriate auxiliary aids and services to enable them to participate effectively in the educational program.<sup>41</sup> Examples relevant to our inquiry include note takers and tape recorders. Postsecondary schools commonly offer both auxiliary tools to qualified students.<sup>42</sup>

39. This article will focus on two such provisions: Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2012) (“Section 504”) (prohibiting discrimination on the basis of physical or mental disability by programs and activities that receive funding from the United States Department of Education), and Titles II and III of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. (2012) (“ADA”) (barring entities from discriminating based on disability). Many states also have complementary anti-discrimination laws protecting persons with disabilities. *See, e.g.*, 50 STATE STATUTORY SURVEYS, UNLAWFUL DISCRIMINATION, 0060 Surveys 25, Westlaw (database updated October 2015) (classifying state anti-discrimination laws affecting persons with disabilities).
40. Title II of the ADA prohibits discrimination on the basis of disability in postsecondary education by state and local governments and is enforced by the Office of Civil Rights (“OCR”) of the United States Department of Education (“DOE”). 42 U.S.C. § 12132 (2012). However, Section 504’s jurisdictional scope is broader and includes postsecondary institutions receiving any federal DOE funding. *See* 29 U.S.C. § 794; *see generally* 45 C.F.R. § 1170 et seq. OCR ensures compliance with both statutes and enabling regulations and it views the provisions of the two Acts to be complementary. *See Auxiliary Aids, supra* note 3. Therefore, drafters of a taping policy will find it helpful to consult the OCR’s interpretations of the ADA even if they are members of a private institution.
41. The ADA regulation, 28 C.F.R. § 35.104, defines auxiliary aids and services as including:
  - (1) Qualified interpreters, *notetakers*, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed-caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD’s), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
  - (2) Qualified readers, taped texts, *audio recordings*, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments;
  - (3) Acquisition or modification of equipment or devices; and
  - (4) Other similar services and actions (emphasis added).

The applicable 504 regulation, 45 C.F.R. § 1170.44 (d)(2), does not expressly include note takers or audio recordings, but the OCR interpretation, note 3 *supra*, explicitly covers classroom taping.
42. *See generally* *Kaltenberger v. Ohio College of Podiatric Medicine*, 162 F.3d 432 (6th Cir. 1998) (permitting student taping); *Mershon v. St. Louis University*, 442 F.3d 1069 (8th Cir.

Consider this increasingly frequent sample scenario.

Sam Menno, an eager 1L, has arrived on campus ready to begin his law school career. In high school he was diagnosed with learning disabilities, including ADHD and slowed executive processing functions.<sup>43</sup> Sam contacted the Dean of Students during his law school orientation; during the meeting, the Dean learned for the first time of Sam's disability through his request for accommodations and from the properly documented evidence he submitted of his conditions and ongoing treatment. Sam reported that he has received various accommodations throughout high school and college that have allowed him to succeed academically. Indeed, the Dean knew that Sam's educational achievements have been noteworthy as demonstrated by his admission to the school.

During the meeting, Sam described how he has benefited from access to recordings of his classes and requested that all of his classes be taped, as was the norm at his college. The Dean offered that his office frequently arranges note takers for qualified students and suggested that approach for law school. The Dean knew that not all professors have welcomed having their classes taped.

Sam expressed significant reservations with note takers and recounted his experience with both class recordings and class notes. He indicated that note takers rob him of the opportunity to synthesize the material himself. Sam claimed he does not experience difficulty with structuring the information, which he acknowledged a good note taker does well. Rather, he needs the opportunity to revisit the teacher's presentation by stopping and starting the recording so that he can master chunks of the material at his pace. The Dean (and appropriate disability services staff at the school) now faces the critical question of whether classroom taping requested by a qualified student seeking accommodations trumps a law school's or faculty member's preference for substitute aids, such as note takers.

The enforcement arm of the United States Department of Education Office of Civil Rights ("OCR") has addressed this issue, setting forth the effectiveness of the auxiliary aid as the critical test:

Colleges are not required to provide the most sophisticated auxiliary aids available; however, the aids provided must effectively meet the needs of a student with a disability. An institution has flexibility in choosing the specific

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2006) (permitting student taping and access to note taker); *Rhodes v. Southern Nazarene University*, 554 Fed.Appx. 685 (10th Cir. 2014) (permitting student taping but approving denial of note taker upon insufficient documentation of medical need).

43. For background on Attention Deficit Hyperactivity Disorder ("ADHD"), see generally DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 59 (Am. Psychiatric Ass'n, 5th ed. 2013); see also Dyan O'Leary, *Flipped Out, Plugged In, and Wired Up: Fostering Success for Students with ADHD in the New Digital Law School* (Suffolk Law Sch. Research Paper No. 16-9, 2016), <http://ssrn.com/abstract=2820738> (describing how classroom technology can benefit and challenge law students with ADHD).

aid or service it provides to the student, as long as the aid or service selected is effective. These aids should be selected after consultation with the student who will use them.<sup>44</sup>

If the student with documented disabilities prefers taping after a school has offered to provide a note taker, an institution will need to engage in dialogue with the student to determine whether the student has sufficient evidence to establish that class recordings are the necessary tool to ensure his effective participation.

OCR has anticipated this specific scenario in its materials on postsecondary auxiliary aids. In its advisory, OCR posts the question: “What if an instructor objects to the use of an auxiliary or personal aid?”<sup>45</sup> Its answer addresses a student’s request to tape-record a class and concludes that “the instructor may not forbid a student’s use of an aid if that prohibition limits the student’s participation in the school program.”<sup>46</sup> Indeed, the agency concludes that a student’s documented need for taping trumps a faculty member’s assertion of rights to academic freedom or to copyright challenges.<sup>47</sup>

OCR does acknowledge limited exceptions to its mandate that qualified students be provided class recordings. In cases in which undue administrative burden or fundamental alteration of the program would result, a law school

44. *Auxiliary Aids*, *supra* note 3. See also 28 C.F.R. § 35.160 (b)(2): “In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.” Further, in its commentary on the regulations, OCR provides that: “The public entity must provide an opportunity for individuals with disabilities to request the auxiliary aids and services of their choice. This expressed choice shall be given primary consideration by the public entity (Sec. 35.160(b)(2)). The public entity shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under Sec. 35.164 [which provides exceptions upon institution’s evidence that the requested accommodation would result in a fundamental alteration of the program or result in undue financial or administrative burdens].” Section by Section Analysis, 28 C.F.R. § 35.160 (2011).
45. See *Auxiliary Aids*, *supra* note 3.
46. *Id.* The OCR advisory relies upon a Section 504 regulation: “A recipient may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient’s education program or activity.” 24 C.F.R. § 104.44 (b).
47. See Section III. B.1. *infra* for a discussion of faculty’s interests in preserving their academic freedom; see Section III, B.2. *infra* for an analysis of a faculty member’s assertion of copyright. Note that OCR believes those faculty rights can be dealt with through appropriate agreements that an institution could require the student accessing the recordings to sign. See *Auxiliary Aids*, *supra* note 3, Answer to Question: “What if an instructor objects to the use of an auxiliary or personal aid?” For an example of terms of use, see Section IV *infra* at note 99. See also Woodland Community College, OCR Case Number 09-14-2404 (2016) (upholding qualified student’s right to record without seeking faculty permission, subject to requirement that she agree to certain terms of use as sufficient protection of faculty interests, including copyright), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09142404-b.pdf>.

could provide an alternative accommodation.<sup>48</sup> A school would be hard-pressed to argue that taping is more expensive than note takers or to claim that there is a formidable administrative burden to taping given present technology. Therefore, an institutional request for an exception would be based on an assertion that taping would undermine the pedagogical objectives of the course.

For example, assume a professor teaching Sam's required constitutional law course worries that taping would chill robust class discussion if faculty or students worried that every provocative question or response might be recorded.<sup>49</sup> Legal education thrives on the vigorous, free exchange of ideas; pure lecture format is the rare exception. Given that pedagogical imperative, law faculty who could document that taping adversely affected the classroom climate would raise legitimate concerns.

Sam might respond that taping is designed to capture public discussion, not private conversation; therefore, the taping that he needs to succeed academically does not expose participants to public scrutiny beyond what already occurs in a classroom. However, faculty might disagree on at least two bases: (a) there is permanence to a recording that preserves provocative remarks; and (b) there is a heightened worry of misappropriation.<sup>50</sup> Particularly in classes where potentially incendiary issues are discussed, faculty members may argue that certain classes should be exempt from taping lest taping fundamentally alter the program, assuming other alternative accommodations are provided.

Ultimately, institutions will want to avoid a standoff between objecting faculty and qualified students entitled to taping accommodations lest it result in a lawsuit over whether a professor can demonstrate that taping would materially undermine the course's pedagogical goals. Instead administrations may alleviate some faculty concerns by adding supplemental protocols designed to best ensure that improper usage does not occur.

Here, the analogous experiences of law school clinics are relevant. Clinicians and their students frequently record their work, assuming their clients' informed consent, for subsequent review and feedback by the faculty supervisors. However, these tapes contain confidential client communications that the faculty and student lawyers are ethically bound to protect. Thus clinics suggest a possible safeguard to overcome taping challenges: linking

48. See note 52 *infra*.

49. Nor is this issue confined to large, doctrinal class settings; discussions in more intimate seminar settings where class interaction is critical also risk being compromised when participants know they are being taped.

50. See Andrew McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N. C. L. REV. 989 (1995) and text accompanying note 72 *infra* regarding common-law claims for invasion of privacy. While technological tools can minimize the ease by which unauthorized distribution can occur, there may not (yet) be any foolproof prevention mechanism. See note 71 *infra* discussing tools such as "view only" access to recordings posted on course websites.



proper treatment of class recordings to students' ethical duties. While there is no attorney-client relationship among classroom participants, schools' academic codes could serve as the institutional corollary; appropriate usage of tapes could be enforced through existing academic standards.<sup>51</sup> Such an approach seems particularly relevant for law schools, given their professional training mission.

Thus, accommodating the needs of students with disabilities is one critical factor that law schools will need to consider as they weigh various approaches to classroom taping. On the one hand, students with disabilities, like Sam, who can document their need for class recordings over other educational aids will press either to be given the right to record themselves subject to certain safeguards or to be provided tapes of their classes intercepted administratively.<sup>52</sup> On the other hand, law school professors who have elected to opt out of a classroom taping program will need to assess whether there is convincing evidence of fundamental alteration if they continue to object to providing a tape to a qualified student who requires recording.

One recent, lengthy court battle in the analogous medical school setting is instructive.<sup>53</sup> In 2009, Creighton University Medical School admitted Michael Argenyi, who suffers from significant hearing loss, to its medical program. His need for accommodations was uncontested; however, the protracted litigation tested exactly which communication aids were legally required. Creighton provided only some auxiliary services and balked at providing sign-supported oral interpreters for his clinical work, claiming the extra personnel would adversely affect the doctor-patient relationship. Mr. Argenyi sued under both the ADA and Section 504. Four years later, after Mr. Argenyi had had to take a leave of absence resulting from the lack of sufficient accommodations, a jury

51. See generally HARVARD LAW SCHOOL, HANDBOOK OF ACADEMIC POLICIES 2016-2017, Section XIII. (E.) (3), *supra* note 25.

52. The ADA process envisions a robust dialogue involving the student and the disability officer, rather than the faculty member, should the student wish to preserve his anonymity. Recent litigation in an analogous situation tested the limits of a defense of fundamental alteration. A medical student with a significant hearing loss petitioned Creighton Medical School for accommodations in the clinical setting and prevailed following protracted litigation and a jury trial. Specifically, he sought interpreters and closed captioning for lectures and in his clinics. Creighton had initially barred him from having interpreters assist him in his clinics, even at his own expense. *Argenyi v. Creighton Univ.*, 703 F.3d 441, 446-47 (8th Cir. 2013) (reversing the district court's initial summary disposition and holding that, under both § 504 and Title III, Creighton was to provide "reasonable auxiliary aids and services to afford Argenyi 'meaningful access' or an equal opportunity to gain the same benefit as his nondisabled peers."); see also Statement of Interest of the United States of America, *Argenyi v. Creighton Univ.*, 703 F.3d 441 (2013) (No. 8:09CV341), <https://www.ada.gov/briefs/creighton-soi.pdf>.

53. The fact that the federal government filed a Statement of Interest in this proceeding in support of Argenyi confirms that the matter is instructive. Statement of Interest of the United States of America, *supra* note 52.

agreed that Creighton needed to provide clinic interpreters at its expense.<sup>54</sup> The federal district court ultimately rejected Creighton's claims that the requested communication aids would fundamentally alter the medical program when he had produced extensive evidence documenting his need for the additional aids.<sup>55</sup> He re-enrolled and is currently a practicing physician.<sup>56</sup>

Dr. Argenyi's saga teaches us that a professional school's unsupported allegations that accommodations for an admitted, qualified student would fundamentally alter the curricular program are unlikely to survive challenge.<sup>57</sup> Any stakeholder seeking to sustain its burden of proof faces a formidable challenge. What type of evidence could possibly prevail? Argenyi suggests that a professor's bald assertion that the quality of class discussion will be impaired will not be persuasive. A nondisabled student who asserts that he will not attend a required class if it is recorded might pose a compelling challenge. The professor and appropriate Deans would want to meet with that student to understand his particular concerns and determine how they could be addressed.<sup>58</sup> Transfer of that student to another section of the course where no taping is required for ADA accommodations might be feasible.

Policymakers should proceed to craft a taping policy assuming that qualified students will have a legal right to recordings. With that presumption as the norm, those rare situations that challenge that principle can be assessed on their unique factual circumstances to determine how best to attend to all parties' concerns.

54. The court also ordered Creighton to provide Communication Access Real-Time Transcription (CART) services in his doctrinal classes. Memorandum and Order, *Argenyi v. Creighton Univ.*, No. 8:09-CV-341 (D. Neb. Dec. 19, 2013), [https://www.gpo.gov/fdsys/pkg/USCOURTS-ned-8\\_09-cv-00341/pdf/USCOURTS-ned-8\\_09-cv-00341-5.pdf](https://www.gpo.gov/fdsys/pkg/USCOURTS-ned-8_09-cv-00341/pdf/USCOURTS-ned-8_09-cv-00341-5.pdf).
55. *Id.*
56. See Argenyi's professional profile at *About Us*, AMPHL, <https://amphl.org/about-us/> (last visited Nov. 11, 2016).
57. Arguably the calculus may differ in cases in which the student is an applicant instead of an admitted student. See *Mershon v. St. Louis University*, 442 F.3d at 1069, affirming that additional accommodations beyond note takers and taping were not required upon evidence of material alternation of the graduate school program for a student with cerebral palsy. Since our inquiry focuses on admitted students' experience, the Argenyi case is most relevant.
58. This analysis assumes that the student objecting to the taping has an articulable reason for opposing taping. Mere preference (versus explicit, well-founded opposition) would likely be unpersuasive. See generally the procedure included in Section 1.24 of the University of Chicago's Student Handbook, which provides an appeal procedure for a student who objects to taping for other students' religious observances, STUDENT HANDBOOK, UNIVERSITY OF CHICAGO LAW SCHOOL, <http://www.law.uchicago.edu/students/handbook/academicmatters/classrecording> (last visited Nov. 14, 2016).

*B. Countervailing Faculty Interests in Academic Freedom, Privacy, and Copyright*

Given the educational mission of law schools, professors are devoted to enhancing students' ability to learn.<sup>59</sup> Faculty members have increasingly embraced technological developments to help students achieve their educational goals, from PowerPoint slides to flipped classrooms.<sup>60</sup> Capture of faculty presentations, both course materials and the oral dialogue, for subsequent use by all students (whether or not entitled to accommodations) coincides with those goals.

But professors also have personal and professional interests in protecting their image and their work product.<sup>61</sup> For example, they may wish to control distribution of problem sets, PowerPoints, and other course materials they have prepared. Similarly, they may want to regulate access to their lectures and other oral presentations. They may wish to limit peer review of their lectures to times and dates when they are especially well-prepared for visitors. Perhaps most important, faculty members question the impact of recording on the quality of the classroom experience and participation of both professors and students. These concerns raise various issues, including academic freedom and copyright, as seen in the following vignette.

Judge Lizette Rojas has enjoyed a long and distinguished career as a jurist on her state's Court of Appeals. Approaching mandatory retirement next year, she has begun exploring other outlets for her legal talents. She has accepted

59. The American Association of University Professors ("AAUP") put it best in its seminal report on academic freedom issued in 1915:
- The importance of academic freedom is most clearly perceived in the light of the purposes for which universities exist. These are three in number: a. to promote inquiry and advance the sum of human knowledge; b. to provide general instruction to the students; and c. to develop experts for various branches of the public service.
- General Report of the Committee on Academic Freedom and Academic Tenure*, 1 AAUP BULL. 17 (1915) [hereinafter 1915 Declaration].
60. Several national organizations are at the forefront of enhancing classroom use of technology. Educause and Campus Technology are two such groups that have applicable research resources. See EDUCAUSE, <http://educause.edu> (last visited Nov. 14, 2016) and CAMPUS TECHNOLOGY, <http://campustechnology.com> (last visited Nov. 14, 2016). See also LEADING EDGE REPORT, *supra* note 7; the American Bar Association's technology survey, which polled practicing attorneys on their technology usage: AM. BAR ASS'N, 2015 LEGAL TECHNOLOGY SURVEY REPORT, [http://www.americanbar.org/groups/departments\\_offices/legal\\_technology\\_resources/publications.html](http://www.americanbar.org/groups/departments_offices/legal_technology_resources/publications.html) (last visited Nov. 14, 2016).
61. See discussion in Section III, B. 2., *infra*; see generally RESTATEMENT (SECOND) OF TORTS 652A-D (AM. LAW INST. 1977), referencing misappropriation of one's likeness/image as a violation of one's privacy rights. *Id.*, § 652 C. As two leading legal commentators mused long ago, "numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'" Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (decrying publication of information about conversations at a private dinner party). See also Jon M. Garon, *The Electronic Jungle: The Application of Intellectual Property Law to Distance Education*, 4 VAND. J. ENT. L. & PRAC. 146, 161 (2002) (noting that Internet publication of faculty images can pose challenges not raised when restricted to intraschool dissemination on course websites).

an adjunct position teaching trial practice at her alma mater. In addition, she has begun developing continuing legal education materials on trial practice and evidence, drawing on pleadings and opinions from some of the key cases on which she deliberated. Marketing of those materials is still on hold pending her official retirement; however, Judge Rojas has posted relevant chapters on the trial practice course website for her students' use.

On the first day of class, she intentionally introduces the course provocatively by staging an oral argument on a Motion in Limine with the help of her teaching assistant, Jennifer Cho, an Asian student. Judge Rojas challenges Jennifer's argument, peppering her not only with questions on the merits of the case, but also with ad hominem attacks on Jennifer's allegedly inferior advocacy. Indeed, Judge Rojas berates Jennifer with racial slurs. The trial practice class is aghast, until Judge Rojas terminates the role-play and explains that her intent was to challenge the class to devise tools for dealing with an unsupportive, intemperate judge.

There is an immediate collective sigh of relief that their new professor may not actually be as confrontational and biased as the role-play suggested. One student exclaims, "I can't wait to watch that scene again tonight once the tape is uploaded! Now I can really enjoy it!" Judge Rojas looks shocked. "What do you mean 'the tape'?" As soon as class concludes, she seeks out the Dean to protect her reputational and property interests.

This scenario builds on prior vignettes to provide context for this section's exploration of professorial rights, including those relating to academic freedom, protection against invasions of privacy, and copyright interests.

### 1. Academic freedom meets institutional taping policies

Since its founding in 1915, the American Association of University Professors ("AAUP") has led the effort to identify and protect the academic freedom of faculty.<sup>62</sup> Within the immediate law school realm, the American Bar Association's Standards and Rules of Procedure for Approval of Law Schools include a provision on academic freedom, mandating that every law school as a requirement of accreditation have an academic freedom policy consistent with the AAUP standards.<sup>63</sup>

62. A full review of the work of the AAUP is beyond the scope of this article. However, its initial Declaration of Principles of Academic Freedom and Academic Tenure outlined the essential concept. See 1915 Declaration, *supra* note 59. Subsequently, in 1940 the AAUP issued a Statement on Academic Freedom and Tenure, which further described the societal values of unfettered pursuit of truth. See also AAUP, 1940 STATEMENT OF PRINCIPLES OF ACADEMIC FREEDOM AND TENURE 3 (1984). The AAUP updated its 1940 Statement by interpretive comments in 1970.

63. See Standard 405 (b), referencing Appendix 1, which is the 1940 AAUP Statement of Principles. AM. BAR ASS'N, *Standard 405: Professional Environment*, in STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2015-2016, at 29 (2015) [hereinafter ABA STANDARDS]. The 1940 AAUP Statement provides: "Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student

When confronted with a request to record a class, a faculty member may express concerns that taping conflicts with her academic freedom. Had Judge Rojas known that her role-play would be recorded for posterity, she might have scrapped her lesson plan. Going forward, she and other professors may be less likely to express controversial viewpoints lest they be attributed to them personally or be taken out of the academic context.<sup>64</sup> Furthermore, faculty may also be wary that even recordings originally made for legitimate pedagogical purposes can subsequently be misused or posted online.<sup>65</sup>

Professors may also worry that taping materially changes the dynamics of their classroom. At the most basic level, a faculty member could feel constrained by the technology (i.e., activating the equipment properly, remaining within camera range, wearing a microphone).<sup>66</sup> In addition, readily available recordings may lead some students to opt to skip class.<sup>67</sup>

Faculty may also fear that taping will affect the quality and quantity of class participation. Many faculty members spend significant energy building a classroom climate that facilitates robust discussion and airing of controversial

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to freedom in learning.” *Id.*, Appendix 1, at 189.

64. See generally Jack Stripling, *Video Killed the Faculty Star*, INSIDE HIGHER EDUC. (Nov. 18, 2010), <https://www.insidehighered.com/news/2010/11/18/videos> (discussing three cases in which video clips of faculty members’ presentations went viral, and the concomitant effect on faculty academic freedom). It may be true that procedures exist by which the individuals responsible for posting misappropriated video recordings can be identified. The name of the person posting videos is typically shown on most social media sites; should the person post using an alias, most sites have provisions for disclosing the person’s true identity to appropriate authorities. See generally Google’s Privacy Policy, which reserves to the entity the right to share personal information about its users to the extent legally required. *Privacy Policy*, GOOGLE (last updated Aug. 29, 2016), <https://www.google.com/policies/privacy/>.
65. These concerns raise questions of academic integrity, which universities have traditionally sought to protect. See *Standard 308(a): Academic Standards*, in ABA STANDARDS, *supra* note 63, at 20: A law school shall adopt, publish, and adhere to sound academic standards, including those for regular class attendance, good standing, academic integrity, graduation, and dismissal. See also discussion at note 101 *infra* regarding sanctions for misuse of class recordings.
66. Some of these faculty concerns may be addressed depending on the type of lecture capture/recording system that is adopted. For example, if law school administrative staff is responsible for the recording, then faculty can be freed from running the taping equipment.
67. Should class attendance be the concern, law schools could review their policies relating to required student presence and revise them accordingly. See *Standard 308(a): Academic Standards*, in ABA STANDARDS, *supra* note 63, at 20 (requiring law schools to develop policies mandating regular class attendance); see also *Standard 304(b): Simulation Courses and Law Clinics*, in ABA STANDARDS, *supra* note 63, at 17 (requiring 45,000 minutes of attendance in regularly scheduled class sessions at the law school). Enactment of schoolwide or course-specific attendance and class participation requirements would address that concern. At least one law school has addressed this concern by explicitly advising students that class attendance is expected and that having access to class recordings is the exception. See, e.g., *Policy for Audio- or Video-Recording of Classes of Georgetown University Law School*, GEORGETOWN LAW STUDENT HANDBOOK, <https://www.law.georgetown.edu/campus-services/registrar/handbook/recording.cfm> [hereinafter *Georgetown Course Recording Policy*] (last visited Nov. 14, 2016).

views. Students may be less likely to contribute in class lest their views be deemed unfounded or controversial.<sup>68</sup> Faculty may even question whether a centralized taping program is appropriate for some classroom settings, including seminars in which there is even less focus on doctrinal presentation and clinics in which third parties (i.e., clients) have privacy interests at stake that must be protected.<sup>69</sup>

Therefore, obtaining the faculty's buy-in for any class taping policy will go far toward preserving academic freedom. In subsequent sections, we will outline a proposed process for development of a policy and safeguards to help prevent misappropriation of the recordings.<sup>70</sup>

## 2. Safeguards against invasion of privacy

Faculty and students share a mutual interest in protecting their privacy. In our first vignette involving Sonia's confidential disclosures to her criminal law professor, we saw how taping can inadvertently capture participants' confidential communications. Then, in the most recent trial practice scenario, Judge Rojas opposed the school's taping policy, given no Dean can guarantee that her role-play remarks would never be misappropriated or improperly distributed.<sup>71</sup> These situations suggest that a school would be well-advised to consider all stakeholders' privacy interests in fashioning its taping policies.

68. One leading educational technology association notes: "While lecture recordings are beneficial for the majority of courses, class discussions in courses that address personal topics or controversial subject matter might be adversely affected if recorded." Martyn, *supra* note 9. Should recordings become accessible to persons outside the designated course participants, that danger could inhibit class participation. *See generally* the United States Supreme Court's majority opinion in *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (holding that dissemination of information on public affairs was permissible where the publisher was not responsible for the illegal interception, citing favorably the President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society" 202 (1967)):

In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas.

*Id.* at 533.

69. *See generally Georgetown Course Recording Policy*, Section B.3.(1.), *supra* note 67, noting that "[d]ue to concerns about client confidentiality and attorney-client privilege, the recording of clinical classes will be handled slightly differently. Clinic classes will be recorded through the use of either video tape or MP3 technology in the classroom, rather than through a centralized computer recording system. Clinical faculty will handle the distribution of any recordings to students and will supervise the storage and 'shredding' of any recordings containing privileged information."

70. *See* Section IV *infra*.

71. Undoubtedly some safeguards can be adopted by law schools to minimize the risk that a class recording will go astray. For example, students can be asked to accept terms of use barring misappropriation and distribution of recordings before they can access them on the course website. Further, software can be programmed to provide students with "view only" access, precluding downloading of the material. In addition, schools can sanction

Tort actions for the wrongful invasion of a person's privacy interests have been recognized in some form in virtually every state.<sup>72</sup> Applied to Judge Rojas's class role-play, the particular nature of videotape recordings heightens her potential privacy interests, since recordings capture the individual's personality and bearing in a way that a still photograph does not.<sup>73</sup> Similarly, both the Judge and Sonia have legitimate worries that the recordings could be widely disseminated.

Any privacy actions would face legal hurdles. Should Judge Rojas consider lodging a suit, sustaining a claim where participants had no reasonable expectation of privacy during the class period could prove difficult, given that law school facilities are typically public places.<sup>74</sup> In contrast, our first scenario involving the private exchange between Sonia and her criminal law professor presents the privacy question more pointedly, since they could claim that they did not intend for their remarks to become public. Indeed, it is the type of conversation that would typically have occurred behind a closed office door. Some commentators have argued for limited protections against privacy intrusions even in areas normally denominated as public where the victim had a reasonable expectation of privacy.<sup>75</sup>

At least at this time, no magic technology bullet appears to exist that would guarantee no intrusions on students' and faculty members' privacy. Prophylactic measures to minimize the likelihood of misuse of recordings, coupled with accurate notice that capture of unintended "tails" of classroom

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inappropriate actions related to taping in their academic conduct codes. *See* Section IV *infra*. That said, it is naïve to think that these tools are foolproof. Inadvertent issues can arise, as seen in the first scenario, *see* text accompanying note 16 *supra*. In addition, someone with malevolent intent could use a second recording device, such as an iPhone, to tape the streaming of the class recording from the course webpage and post it to a public website. Once the errant recording was discovered, the school would need to work with the staff at the public website to request that it be deleted; however, the initial damage would have occurred.

72. McClurg, *supra* note 50 (listing Rhode Island as the only outlier that has apparently not adopted some variation of tort protections for invasions of privacy). *See also* Fisher v. Hooper, 732 A. 2d 396 (N.H. 1999) (affirming jury verdict that nonconsensual recording of ex-wife's communications with parties' child supported tort of invasion of privacy); LeCrone v. Ohio Bell Telephone Co., 201 N.E. 2d 533 (Ohio Ct. App. 1963) (noting that nonconsensual wiretapping of telephone conversations can constitute a tortious invasion of privacy).
73. McClurg, *supra* note 50 at 1044.
74. *Id.*, at 1025. However, in an all-party consent state in which Judge Rojas could show that faculty had no notice of the classroom taping system, she might be able to state a claim under the civil protections of the relevant wiretapping laws. *See* LeCrone, 201 N.E. 2d at 533.
75. McClurg, *supra* note 50, at 1025, describing a scenario analogous to the Sonia vignette; *but see* Jarrett v. Butts, 379 S. E. 2d 583, 583 (Ga. Ct. App. 1989) (rejecting claim for invasion of privacy where teacher's allegedly unauthorized photograph apparently captured only those aspects of the student victim that were normally visible during the school day).

sessions can occur, are best-suited to prevent breaches of legitimate privacy interests.<sup>76</sup>

### 3. Copyright protections for faculty presentations

Related to, but distinct from, these academic freedom and privacy interests are the faculty members' rights in their intellectual property, including that aired in the classroom. While ideas alone are not the subject of copyright, the fixed expression of a professor's concepts, including teaching materials and lecture notes, could be protected.<sup>77</sup> Hence, in our example, Judge Rojas undoubtedly wishes to protect her property interests in the written course materials, which she intends to publish. Classroom recordings of faculty presentations come within the ambit of federal copyright laws, since the capture of the class discussions renders them a fixed expression;<sup>78</sup> similarly, a professor's handouts, PowerPoints, and other expressions of their ideas could also be copyrightable.<sup>79</sup>

Law schools and universities have a vested interest in clarifying ownership of intellectual property created by their faculties. Generally, professors and their schools enter into employment contracts or other licensing arrangements

76. See generally HARVARD LAW SCHOOL, HANDBOOK OF ACADEMIC POLICIES 2016-2017, Section XIII. (E.)(3), *supra* note 25 (noting that unintentional taping of tails of class can occur).

77. The federal Copyright Act of 1976, 17 U.S.C. § 120 (b) (2012), codified the longstanding dichotomy between ideas (which remain in the public domain) and the expression of those ideas (which are subject to copyright): "In no case does copyright protection for an original work of authorship extend to any idea . . ." See also *International News Service v. Associated Press*, 248 U.S. 215, 250 (Brandeis, J., dissenting, noting that ideas are "free as the air").

78. See *Conrad v. AM Community Credit Union*, 750 F.3d 634 (7th Cir. 2014) (noting that the subject work could have been copyrightable if captured on videotape); see generally Elizabeth Townsend, *Legal and Policy Responses to the Disappearing "Teacher Exception," or Copyright Ownership in the 21st Century*, 4 U. MINN. INTELL. PROP. REV. 209, 222 (2003); Glenda Gertz, Comment, *Copyrights in Faculty-Created Works: How Licensing Can Solve the Academic Work-For-Hire Dilemma*, 88 WASH. L. REV. 1465, 1465 (2013); Garon, *supra* note 61 at 146.

79. See *Hays v. Sony Corp. of America*, 847 F. 2d 412 (7th Cir. 1988) (federal statutory copyright claim brought to protect public high school teachers' draft of computer manual deemed not frivolous). The federal government attempted to preempt most state common-law copyright protections. 17 U.S.C. § 301. However, some professors have continued to press for common-law copyright in their unpublished work product under state common-law copyright. See generally *Manasa v. University of Miami*, 320 So. 2d 467 (Fl. App. 1975) (rejecting plaintiff university employee's state law copyright claim in foundation proposal); B.J. Williams v. J. Edwin Weisser, dba Class Notes, 273 Cal. App. 2d 726 (1969) (affirming judgment for teacher for copyright infringement in lectures under California common law). Whether professors or their institutions own the copyright claim is the subject of debate. For many years, some faculty asserted a "teacher's exception" to employer ownership of the professors' creation. See generally *Hays v. Sony Corp. of America*, 847 F. 2d at 416; *Weinstein v. University of Illinois*, 811 F. 2d 1091 (7th Cir. 1987); but see *Molinelli-Freytes v. Univ. of Puerto Rico*, 792 F. Supp. 2d 164 (D. P.R. 2012) (noting that whether professors' proposal for new graduate program was their protected property or the university's should be analyzed under contract principles and federal work-for-hire doctrines). For a cogent discussion of the history of the teacher's exception, see Townsend, *supra* note 78.



that define both ownership and appropriate usage of the subject innovations.<sup>80</sup> Therefore, drafters of a schoolwide taping policy should review the institution's intellectual property agreements before formulating terms of use for subsequent distribution of class recordings and materials.<sup>81</sup>

Standard university agreements would likely limit a professor who attempted to market for personal compensation online course materials and lectures that disseminated her in-class presentations if significant university resources were used in the production.<sup>82</sup> Appropriate handling of professors' intellectual property rights likely involves contractual discussions between faculty and their institutions designed to clarify which faculty work product captured on tape remains the professors' property and which, if any, becomes university-owned. The parties might then be able to negotiate appropriate licensing agreements.<sup>83</sup>

While institutional contracts with faculty may help determine rights between professors and their schools, those agreements do not answer the question posed when students unilaterally tape their classes, including those students with disabilities who have a legal right to class recordings. Absent standards that define professors' intellectual property interests in their presentations and clear protocols on students' terms of use, faculty members risk having their work appropriated by students.<sup>84</sup> If any student redistributes

80. See generally *Molinelli-Freytes*, 792 F. Supp. 2d at 164.

81. For one school's statement of its warnings against student copyright infringement, see *Policy Regarding Audio-Video Taping of Classroom Lectures*, UNIVERSITY OF MASSACHUSETTS-LOWELL, [https://www.uml.edu/docs/2016%20-%20Permission%20to%20Record%20Policy%20WC\\_tcm18-242395.pdf](https://www.uml.edu/docs/2016%20-%20Permission%20to%20Record%20Policy%20WC_tcm18-242395.pdf) (last visited Nov. 14, 2016).

82. See STATEMENT ON COPYRIGHT, AMER. ASSOC. UNIV. PROFESSORS (Mar. 1999), <https://www.aaup.org/report/statement-copyright> (outlining different types of university-faculty ownership models, including joint ownership, faculty retention of copyright, and faculty assignment to university). The Statement anticipates the impact of new technology on the traditional rule that faculty maintained copyright interests in their scholarly work:

[I]t has been the prevailing academic practice to treat the faculty member as the copyright owner of works that are created independently and at the faculty member's own initiative for traditional academic purposes. Examples include class notes and syllabi; books and articles; works of fiction and nonfiction; poems and dramatic works; musical and choreographic works; pictorial, graphic, and sculptural works; and educational software, commonly known as "courseware." This practice has been followed for the most part, regardless of the physical medium in which these "traditional academic works" appear; that is, whether on paper or in *audiovisual or electronic form*. (emphasis added)

When the institution's contribution is limited to providing videotaping services, the Statement concludes that faculty would likely continue to hold the copyright. *Id.* See also Townsend, *supra* note 78 at 258-65. Townsend notes that some schools, such as Columbia University, have explicitly sought to define ownership of videotapes of lectures. *Id.*, at 270.

83. See Gertz, *supra* note 78.

84. Faculty-authorized student recording would not transfer copyright ownership to the student. See Townsend, *supra* note 78, at 222-23. Therefore, the main concern remains the problem of misuse/inappropriate dissemination.

or misappropriates—for free or for compensation—this intellectual property, the professor’s rights are being abused.

Prophylactic measures aimed at protecting intellectual property should be part of any institution’s classroom taping policy.<sup>85</sup> Schools could bar students from reproducing or disseminating recordings without explicit prior authorization by including that restriction in the terms of use for access to the recordings. Any school could make misuse of recordings an academic standards matter to instill on students the importance of protecting intellectual property rights.

#### **IV. Development of a Comprehensive Law School Classroom Taping Policy Consistent with Legal Constraints**

As we have seen, the various legal restrictions on classroom taping pose challenges rather than insurmountable obstacles. Through provisions for adequate notice, advance consent, licensing agreements, and terms of use, an institution can develop protocols that will pass legal muster. In this final section, we turn to development of classroom taping policies that comply with the basic legal norms, leaving to a community to elect which, if any, additional policy features will be included.

To respect the individual culture, resources, and needs of each law school community, this article does not offer one generic policy template. Rather, it offers a menu of approaches and identifies examples of policies implementing those practices. What follows is a three-point plan designed to assist policymakers in fashioning their community’s guidelines. First, we review the technology questions that must be investigated, then we offer prompts to guide the formulation of a school’s policy, and finally we conclude with an outline of the minimally necessary subjects to be covered. Appendix 1 catalogs the different approaches chosen by specific law schools for policymakers’ reference.

##### *A. Technology Audit*

At the outset, it will be useful to begin with a targeted technology audit to assess, *inter alia*:

- which resources already exist for classroom recording;

85. Internet sites where recordings could be improperly distributed typically try to prevent infringement of copyright interests. *See generally* the terms of use of YouTube:

YouTube does not permit copyright infringing activities and infringement of intellectual property rights on the Service, and YouTube will remove all Content if properly notified that such Content infringes on another’s intellectual property rights. YouTube reserves the right to remove Content without prior notice.

Terms of Service, *Your Content and Conduct*, YOUTUBE (June 9, 2010), <https://www.youtube.com/static?template=terms>. *See also* Google’s Privacy Policy, which reserves to the entity the right to share personal information about its users to the extent legally required, *supra* note 64.

- which structural barriers to recording exist within the physical classrooms, if any;
- which staff and faculty trainings should be provided;
- which personnel will be tasked with implementing and overseeing the program.

Once those data are collected, policymakers can proceed to develop a complex program.

### *B. Policy Goals*

Next, stakeholders also need to articulate the goals of the project. A minimalist approach might limit the coverage to only those protocols necessary to accommodate the needs of qualified students with disabilities. A more robust endeavor would attempt to regulate classroom recordings for the whole host of circumstances for which taping could be beneficial.

To facilitate a community dialogue among stakeholders, this article appends a list of questions designed to structure a policymaking discussion, “Framework for Development of Institutional Policies on Law School Classroom Taping.” Appendix 2 explicitly recognizes that institutions should be free to develop their own policies consistent with legal constraints. Rather than propose one size fits all, the framework offers questions for policymakers’ consideration in formulating their unique approaches to the class recording issue.

### *C. Required Terms*

The following factors will be integral to any deliberate policy: (a) who will be authorized to record; (b) which safeguards should be in place; and (c) how the policy will be enforced. Those concerns will be explored below.

#### *i. Authorization to record*

A threshold question in development of an institutional policy is who will have authorization to record. There appear to be four basic choices, each with its attendant consequences: students, faculty, the administration, or some combination of those stakeholders.

##### *a. Student-initiated recording with faculty consent*

Permitting students to tape respects their autonomy in the educational enterprise. Students know best what they need to maximize their learning potential, and they have the resources to undertake the recording. Without having to disclose their disability to their professors, students entitled to accommodations could proceed to tape.<sup>86</sup> In addition, student-initiated recording requires no administrative overhead or resources.

86. This statement assumes that the qualified student with disability accommodation has already disclosed to the appropriate disability officer. That person can then notify the professor

However, a student's unilateral decision to record class secretly, without notice to other participants, runs afoul of those state wiretapping laws that require all parties to consent. Not only would the faculty member not have consented, but other students would not have been afforded an opportunity to choose whether to consent or dissent.<sup>87</sup> Furthermore, obtaining compliance with rules related to student-initiated taping may pose policing issues for the school, as it is very hard to monitor students' interception of classes and their subsequent distribution and use of the tapes.<sup>88</sup>

Therefore, if a law school elects to permit student-initiated taping, the administration should still announce clear community guidelines. Students who wish to tape the class must be required to notify the relevant faculty member (or disability officer who can then notify the professor), lest the recording be made surreptitiously in violation of certain states' wire-tapping laws.<sup>89</sup> Even in one-party-consent jurisdictions, requiring advance notice provides a timely alert to professors, who can then proceed to protect their faculty work product and the educational climate of their classroom.<sup>90</sup> In addition, students should be bound to comply with certain terms of use to minimize the likelihood of misappropriation or misuse.<sup>91</sup>

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that a student in the class is entitled to tape, without identifying the particular student. To preserve the rights of everyone in all-party consent states, general administrative notice in the classrooms should put all participants on notice that taping may occur.

87. A student who is enrolled in a course but who requests not to be taped can pose a logistical challenge for institutions. If the student's objection is related to having his image recorded, that is not a wiretapping issue. See Section II *supra* note 17. A school could attempt to accommodate such a student by having a designated area of the classroom that is not within camera range. If the student does not want his remarks captured, that position raises both legal issues in all-party-consent states and pedagogical issues for all institutions, since the student would be silenced if required to attend over his expressed objection.
88. See Posting of Susan Mandiberg, *supra* note 9, noting that, at two schools that allowed students to tape with faculty permission, monitoring student compliance was challenging.
89. For sample policies requiring faculty permission before student taping can occur, see the HARVARD LAW SCHOOL, HANDBOOK OF ACADEMIC POLICIES, *supra* note 25; *Georgetown Course Recording Policy*, *supra* note 67.
90. This recommendation presumes that permission is granted; if not, taping should not occur unless the student has a legal right to a recording, such as for a disability accommodation. The school's guidelines should include that a professor's decision is final, absent a legal right to accommodation.
91. See Section IV. C. 2 on Safeguards, *infra*. Some schools currently ask students with disabilities who are entitled to taping as an accommodation to agree to certain terms as a predicate to receiving the recordings. See *Audiotaping of Class Lectures*, BOSTON UNIVERSITY, <http://www.bu.edu/disability/policies-procedures/specific/audiotaping-of-classes/> (last visited Nov. 14, 2016). Some law schools incorporate appropriate terms of use in their academic standards to ensure compliance. See generally *Georgetown Course Recording Policy*, *supra* note 67, indicating that a violation of the rule regarding recording by students risks their violating the Student

### b. Faculty-controlled taping

Alternatively, professors could be vested with taping authority, especially since the recordings principally capture their image, materials, and ideas. Many schools provide faculty opt-in programs, whereby either the faculty members manage the taping or the professors arrange with technology services to have their classes recorded and posted on the appropriate course website.<sup>92</sup> In contrast, some law schools presume faculty permission, but allow professors to opt out to honor those members who do not wish to participate.<sup>93</sup>

That flexibility, however, raises the question of how qualified students entitled to disability accommodations can obtain recordings if the instructor does not permit recording. Particularly students with non-visible impairments may not wish to disclose their disability and related accommodations to their professor, resulting in a situation in which the administration would have to intervene to ensure that taping occurs.<sup>94</sup> Then the school's disability officer would need to notify the faculty member that her choice not to tape had been trumped to satisfy other legal requirements.<sup>95</sup>

As with student-initiated taping, community guidelines are a necessary prophylactic measure. Advance notice to all stakeholders would undercut students' argument that they were unaware of the taping. In addition, participants should be required to agree to certain terms of use to protect against improper dissemination or misappropriation.

### c. Centralized administrative taping

Several schools have adopted policies that provide for automatic recording of classes undertaken by administrative technology staff.<sup>96</sup> Typically the personnel then manage, distribute, and oversee the recordings, posting them

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#### Disciplinary Code.

92. See survey on Posting of Susan Mandiberg, *supra* note 9, finding that sixteen respondent schools either had a faculty opt-in system or a faculty opt-out program.
93. For sample policy statements providing for faculty taping, see *Class Recording Policy*, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, <https://www.law.gwu.edu/class-recording-policy> (last visited Nov. 14, 2016) (providing for annual input from instructors as to their taping preferences); *Georgetown Course Recording Policy*, *supra* note 67 (providing that the default rule is faculty opt-out).
94. In the ADA/504 context, the term "administration" includes the personnel tasked with handling requests for accommodation.
95. See generally *Georgetown Course Recording Policy*, Section B. 3.(3), *supra* note 67, noting that the Law Center retains the right to record without faculty permission with prior notice to the professor. As discussed in more detail in Section II, *supra*, if the school is located in an all-party-consent state, advance notice to all participants in the class would also need to occur lest the interception be deemed surreptitious and thus improper. While some all-party-consent states provide exceptions where there is no reasonable expectation of privacy (such as in a classroom), notice optimizes the likelihood that all participants' legal rights can be protected.
96. See Posting of Susan Mandiberg, *supra* note 9, indicating that some sixteen out of twenty-six responding schools have comprehensive taping programs.

to course websites for access by students enrolled in the course.<sup>97</sup> Institutional control allows the school to monitor compliance with its procedures and with applicable law. Notice alerting class participants to ongoing taping and protocols regarding use/preservation/destruction of the recordings could be standardized across the school.

A centralized administrative program also provides law school administrators with the most flexibility when faced with unanticipated school closures related to weather cancellations, absences due to religious observance or medical events, and public transportation outages. Since taping is the norm, rather than the specially arranged exception, administrators can move nimbly to respond to emergent circumstances. Absent students can then access the recording of the class or makeup session much as they would an online course.

This approach is the most resource-intensive, given that it would require dedicated technology assistants to manage the taping and distribution, as well as sufficient classroom recording equipment. Therefore, it may not be a feasible option for all schools. In addition, it would require all stakeholders to embrace a comprehensive taping program, which may not be realistic. A recent survey suggests that some faculties have preferred an approach that allows them to opt into taping rather than its being the norm.<sup>98</sup>

As with student and faculty taping options, it will be critical for the law school to adopt and publish user guidelines for all community members' reference. The next section addresses the safeguards that would be at the heart of such protocols.

## 2. Safeguards

Advance notice is a vital element to any classroom taping policy. Prominently displayed signage, notice on course and school websites, and advisories in student handbooks are all methods designed to apprise the community of the law school's approach to the taping issue. Notice is critically important in all-party-consent states to prevent improper, surreptitious student recording. However, we have seen how institutional transparency about taping is advisable even in majority, one-party-consent states. Alerting all participants that taping may occur—whether by students, faculty or administration—helps prevent inadvertent missteps (e.g., secretive, ad hoc taping, inappropriate denial of taping accommodation) and instills in all stakeholders the need for compliance.

Next, establishing the conditions of access and use of any recordings is also critically necessary. Students authorized to tape should be required to

97. For sample policies where taping is handled administratively, see *Georgetown Course Recording Policy*, *supra* note 67, alerting the community that there is no expectation of privacy in classrooms; HARVARD LAW SCHOOL, HANDBOOK OF ACADEMIC POLICIES 2016-2017, Section XIII. (E.)(3), *supra* note 25 (noting that recording is now “generally done in automated fashion”).

98. See Posting of Susan Mandiberg, *supra* note 9.

acknowledge restrictions on dissemination and use. Should faculty manage the recording and distribution to their students, they would need to monitor student compliance. If recordings are centrally posted, the school's technology assistants could construct terms of use on the course websites. Students wishing to view the recording could be asked to read and acknowledge the school's taping restrictions before access would be granted to posted recordings.<sup>99</sup> Click-through pop-up windows detailing the relevant restrictions could be included to enhance student compliance. Some schools task technology staff members who handle the recordings with obtaining and maintaining appropriate documentation of participants' notice and consent.<sup>100</sup>

Absent a well-developed taping policy, a significant likelihood exists that inadvertent legal lapses and pedagogical challenges will occur. It is to that issue—sanctions for misuse—to which we now turn.

### 3. Sanctions for policy violations

No one wants to assume that there will be breaches of a school policy, but technological advances make it all too easy for a recording to go viral.<sup>101</sup> A class recording is only a few keystrokes away from being posted on YouTube. In addition, faculty members' significant research and analysis can best be protected from misappropriation when the professors know the scope of their property rights. Furthermore, all class participants are likely to engage more freely in the educational endeavor when the rules of engagement are clearly established in advance, rather than learning belatedly that recording has occurred. Whether the misuse is intentional or accidental, compliance with an institutional or faculty policy is more easily maintained if all stakeholders appreciate the significance of the protocols. Hence policymakers will want to identify and publicize the consequences attached to a breach.

Some schools have approached the sanctions question as an issue of academic integrity. Therefore, they have incorporated their taping policies into their institutions' honor codes.<sup>102</sup> That approach ensures that every student

99. See, e.g., the terms of use included in the class taping policies issued by the Office of Disability Services at Boston University, *Audiotaping of Class Lectures*, *supra* note 91.

100. See generally HARVARD LAW SCHOOL, HANDBOOK OF ACADEMIC POLICIES, *supra* note 25, indicating that technology assistants are required to obtain signed waivers and/or disclaimers from participants upon receipt of a taping request.

101. See Posting of Susan Mandiberg, *supra* note 9, citing one instance of a class recording being posted on YouTube. See also HARVARD LAW SCHOOL, HANDBOOK OF ACADEMIC POLICIES, *supra* note 25, alerting participants that misappropriation is possible despite the school's efforts to keep recordings secure, Section 5 f). As Judge Hufstедler noted in *Holmes v. Burr*, 486 F.2d 55, 72 (9th Cir. 1973): "All of us discuss topics and use expressions with one person that we would not undertake with another and that we would never broadcast to a crowd. Few of us would ever speak freely if we knew that all our words were being captured by machines for later release before an unknown and potentially hostile audience. No one talks to a recorder as he talks to a person." (Hufstедler, J., dissenting).

102. See *Georgetown Course Recording Policy*, *supra* note 67, indicating that a violation of the rule regarding recording by students risks their violation of the Student Disciplinary Code;

has notice of the gravity of the taping policy; violation would then become an internal student disciplinary matter. Ultimately, a policy with no built-in enforcement mechanism risks becoming worse than no policy at all.

### CONCLUSION

A comprehensive class recording policy is a professional school's statement about intentional rule-making and lawyers' role in the legal protection of rights. Technological advancements and ad hoc decision-making could derail an institution from the deliberate design of a policy best-suited to that community's needs. Furthermore, given the number of legal issues inherent in class recording, it is incumbent on all institutions, but particularly law schools, to fashion and implement policies consistent with the law. This article offers a starting point for that journey.

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STUDENT HANDBOOK, UNIVERSITY OF CHICAGO LAW SCHOOL, Section 1.24, "Religious Observances and Class Recording," <http://www.law.uchicago.edu/students/handbook/academicmatters/classrecording> (last visited Nov. 14, 2016) (citing possibility of academic sanctions).



**Appendix 1—Publicly Available Classroom Taping Policies of Top Thirty Law Schools Based on 2016 USNWR Rankings (compiled October 2016)**

USNWR Ranking	Name of the Law School	Link	Key Terms
1	Yale	<a href="https://www.law.yale.edu/student-life/student-services/information-technology-services-its">https://www.law.yale.edu/student-life/student-services/information-technology-services-its</a>	Student-initiated requests to IT for religious or school-related absences with faculty approval
2	Harvard	<a href="http://hls.harvard.edu/dept/academics/handbook/xiii-other-rules/f-class-recordings">http://hls.harvard.edu/dept/academics/handbook/xiii-other-rules/f-class-recordings</a>	Student recording prohibited absent faculty approval and notice; preapproved reasons for centralized recording
2	Stanford	No comprehensive public policy located	N/A
4	Columbia	No comprehensive public policy located	N/A
4	U. of Chicago	<a href="http://www.law.uchicago.edu/students/handbook/academicmatters/classrecording">http://www.law.uchicago.edu/students/handbook/academicmatters/classrecording</a>	Centralized taping program for religious observances
6	NYU	<a href="http://www.law.nyu.edu/sites/default/files/upload_documents/Academic-Policies-Guide-2015-2016-Rev.%20Feb.%202016.pdf">http://www.law.nyu.edu/sites/default/files/upload_documents/Academic-Policies-Guide-2015-2016-Rev.%20Feb.%202016.pdf</a>	Student-initiated taping permitted for religious observance
7	U. of Penn.	<a href="https://www.law.upenn.edu/students/policies/course-registration-taping-of-classes.php">https://www.law.upenn.edu/students/policies/course-registration-taping-of-classes.php</a>	Taping at faculty request or at student request with faculty approval and notice
8	U. C. Berkeley	No comprehensive public policy located	N/A

<b>USNWR Ranking</b>	<b>Name of the Law School</b>	<b>Link</b>	<b>Key Terms</b>
8	U. of Michigan	<a href="https://www.law.umich.edu/currentstudents/student-services/handbook/Pages/ClassRecordingPolicyRequest.aspx">https://www.law.umich.edu/currentstudents/student-services/handbook/Pages/ClassRecordingPolicyRequest.aspx</a>	Student-initiated recording subject to faculty permission
8	U. of Virginia	<a href="http://uvapolicy.virginia.edu/policy/prov-008#Recording_of_Classroom_Lectures_and_Distribution_of_Course_Materials_by_Students">http://uvapolicy.virginia.edu/policy/prov-008#Recording_of_Classroom_Lectures_and_Distribution_of_Course_Materials_by_Students</a>	Student-initiated recording subject to faculty permission and notice
11	Duke	<a href="https://law.duke.edu/actech/policies/">https://law.duke.edu/actech/policies/</a>	Faculty opt-in to centralized recording
12	Northwestern	<a href="http://www.law.northwestern.edu/law-school-life/student-services/policies/">http://www.law.northwestern.edu/law-school-life/student-services/policies/</a>	Student-initiated recording with faculty approval
13	Cornell	<a href="http://www.lawschool.cornell.edu/information-technology/Class-Recordings-and-Emergency-Absences.cfm">http://www.lawschool.cornell.edu/information-technology/Class-Recordings-and-Emergency-Absences.cfm</a>	Student audio recordings permitted for short absences
14	Georgetown	<a href="https://www.law.georgetown.edu/campus-services/registrar/handbook/recording.cfm">https://www.law.georgetown.edu/campus-services/registrar/handbook/recording.cfm</a>	Faculty opt-out policy; compliance enforced by academic sanctions; centralized administration
15	U. of Texas	<a href="https://law.utexas.edu/student-affairs/academic-services/recording-of-classes/">https://law.utexas.edu/student-affairs/academic-services/recording-of-classes/</a>	Student initiated recording with faculty approval and notice
16	Vanderbilt	No comprehensive public policy located	N/A

<b>USNWR Ranking</b>	<b>Name of the Law School</b>	<b>Link</b>	<b>Key Terms</b>
17	UCLA	<a href="http://www.deanofstudents.ucla.edu/Portals/16/Documents/UCLACodeOfConduct_Revo30416.pdf">http://www.deanofstudents.ucla.edu/Portals/16/Documents/UCLACodeOfConduct_Revo30416.pdf</a> (Section 102.23 and 102.28 of universitywide conduct code)	No distribution of recordings without faculty and university-wide approval; terms of use for recordings
18	Wash. U. of St. Louis	No comprehensive public policy located	N/A
19	USC	No comprehensive public policy located	N/A
20	Boston U.	<a href="http://www.bu.edu/law/faculty-and-staff/technology-services/">http://www.bu.edu/law/faculty-and-staff/technology-services/</a> ; <a href="http://www.bu.edu/disability/policies-procedures/specific/audiotaping-of-classes/">http://www.bu.edu/disability/policies-procedures/specific/audiotaping-of-classes/</a>	Faculty permission required using centralized system; terms of use for qualified students' accommodation
20	U. of Iowa	<a href="http://law.uiowa.edu/video-operations">http://law.uiowa.edu/video-operations</a>	Professor opt-out to centralized taping; recordings also for student emergencies with faculty permission
22	Emory	No comprehensive public policy located	N/A
22	U. of Minn.	No comprehensive public policy located	N/A
22	Notre Dame	<a href="http://law.nd.edu/library/technology-services/audio-visual-services/advanced-notification-policy/">http://law.nd.edu/library/technology-services/audio-visual-services/advanced-notification-policy/</a>	Permission of Student Services required for student-requested taping

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25	Arizona State U.	<a href="https://www.asu.edu/aad/manuals/acd/acd304-06.html">https://www.asu.edu/aad/manuals/acd/acd304-06.html</a> ; <a href="https://eoss.asu.edu/drc/faculty-staff">https://eoss.asu.edu/drc/faculty-staff</a>	Provisions for protection of professors' copyrights and for taping by students qualified for accommodations
25	George Washington	<a href="https://www.law.gwu.edu/class-recording-policy">https://www.law.gwu.edu/class-recording-policy</a>	Centralized administration of taping; list of preapproved reasons; faculty right to opt out; annual faculty election
25	Ind. U. at Bloomington	<a href="http://mckinneylaw.iu.edu/students/_docs/handbook/partI.pdf">http://mckinneylaw.iu.edu/students/_docs/handbook/partI.pdf</a>	Student-initiated taping only with advance faculty permission and participant notice
28	U. of Alabama	No comprehensive public policy located; addressed in individual faculty members' syllabi	N/A
28	U.C. Irvine	<a href="http://www.law.uci.edu/its/av-recording-retention.html">http://www.law.uci.edu/its/av-recording-retention.html</a>	Student-initiated recording only with permission of Student Services or faculty
30	Boston College	<a href="http://www.bc.edu/content/dam/files/schools/law/pdf/academics/academic_policies_and_procedures%202015-16_july_2015.pdf">http://www.bc.edu/content/dam/files/schools/law/pdf/academics/academic_policies_and_procedures%202015-16_july_2015.pdf</a>	Student-initiated recording prohibited
30	Ohio State U.	No comprehensive public policy located	N/A
30	U. C. Davis	No comprehensive public policy located	N/A

## **Appendix 2: Framework for Development of Institutional Policies on Law School Classroom Taping**

### **1. Who:**

- a. Who should have input in the development of the policy (e.g., students, faculty, IT, administration, university legal counsel)?
- b. Who should be allowed to record consistent with applicable wiretapping laws (e.g., students, faculty, administration)?
- c. Who, if anyone, has the right to limit or preclude taping (e.g., faculty, students, administration) in cases in which no right to a disability accommodation exists?
- d. If alternative accommodations are available (e.g., note taking vs. taping), who will determine which accommodation will be provided?
- e. Who will be provided access to the recordings (e.g., only students entitled to disability accommodations, all students, all faculty, faculty promotions committee, public)?
- f. Who will determine the scope of distribution and retention of any recordings (e.g., administration, IT, faculty, students)?
- g. Who will monitor compliance with the policy?

### **2. What:**

- a. What type of recording will be allowed (e.g., audio only, video)?
- b. What notice, if any, will be provided to attendees of the class (including signs, equipment indicators, etc.)?
- c. What consent, if any, will be obtained before taping (including licensing of copyright materials)?
- d. What restrictions, if any, will be applicable to use of the recordings by any stakeholder (e.g., students, faculty, administration)?
- e. What sanctions will apply for misuse/misappropriation of the recordings, and how will those sanctions be enforced?

**3. When:**

- a. For what period of time will the recordings be accessible?
- b. When will any (pilot) policy be reviewed and modified as needed?

**4. Where:**

- a. Where will the recordings be stored (e.g., course website, faculty website, university server)?
- b. Does any type of course provide an exception to the general policy (e.g., seminar or clinical course vs. doctrinal course)?
- c. What exceptions to the general policy will be made when a particular classroom does not have the technological equipment to allow institutional taping?
- d. Where should notice of classroom taping be posted (e.g., doors to classroom, student handbook, course website, etc.)?

**5. Why:**

- a. What are the law school's objectives in developing a classroom taping policy (e.g., accommodations only, flexibility/convenience, faculty peer review, distance education, etc.)?