

**IN RE A LAW STUDENT 94-01**

**JUDICIAL COUNCIL OPINION**

**Trial Date: January 28, 1995**

**Sentencing Hearing: February 11, 1995**

**Opinion Issued: February 28, 1995**

**CONFIDENTIAL**

**Judicial Council Members**

**Elinor S. Nathanson, Chairperson  
Lisa Cipriano  
John Grady  
John Kelsh  
Susanne MacIntosh  
Seth Miller  
Matthew Rosenberg  
David Silverman**

Chairperson Elinor Nathanson and Judicial Council Members Lisa Cipriano, Susanne MacIntosh, Seth Miller, Matthew Rosenberg, and David Silverman deliver the majority opinion. Judicial Council members John Grady and John Kelsh dissent.

## **I. Introduction**

The Defendant was accused of violating Article I, Section 2(c) of the Honor Code of the Students of Northwestern University School of Law. Such a violation "occurs when the student knowingly uses materials not permitted by the professor in an examination or other graded assignment." Honor Code, Article I, Section 2(c). Specifically, the defendant was accused of using an outline during a closed book Torts examination on December 10, 1993.

The defendant conceded that he/she did use an outline during the Torts exam. The question presented for the Judicial Council, therefore, was whether the defendant knew that the Torts exam was closed book, and therefore knew that the use of an outline was prohibited. The Judicial Council found the defendant guilty of violating Article I, Section 2(c) of the Honor Code by a vote of 6-2.

## **II. Evidence and Testimony Presented At Trial**

The defendant is a twenty-three year old, second year student at Northwestern University School of Law. During the Fall of 1993, the defendant was a first-year law student enrolled in a

Torts class. On December 10, 1993, at approximately 1:00 p.m., the defendant took a closed book Torts examination with the aid of an outline. The evidence at trial showed that the defendant had at least seven opportunities, both before and during the examination, to learn that the exam was closed book.

First, the defendant had several opportunities to learn that the exam was closed book over the course of the fall semester. The Torts professor testified that it was his general practice to announce to his Torts class during the semester that the exam would be closed book and that the students were to rely on "nothing but [their] wits and learning." The professor, however, could not specifically recall having done so in this particular Torts class. R.30-32. The evidence was inconclusive as to whether the defendant was present for the Professor's announcements regarding the closed book nature of the exam.

On the day of the exam, however, the defendant had six other opportunities to learn that the exam was closed book. The evidence showed that the defendant arrived ten to fifteen minutes before the 1:00 p.m. exam. On the way to his/her seat in the first row, the defendant approached a fellow student and asked that student what materials could be used on the exam (hereafter Student A). Student A testified that he told the defendant that "you can have things out now but you know you have to put them away later." R.123. Next, the defendant engaged in a brief conversation about summer jobs with the student who sat to his/her immediate right in Rubloff 150 (hereafter Student B). Student B testified that during this conversation she told the defendant, in

a joking manner, that it was a closed book exam and that the defendant should put his/her outline away. R.60. In response, the defendant took his/her outline and a newspaper off the desktop and placed the materials under the desk. R. 61.

The law school Registrar, who proctored the exam, testified that throughout the entire exam the chalkboard at the front of the classroom contained exam instructions written in large, legible letters. These instructions plainly stated that the exam was closed book. R. 40-41. Furthermore, according to the Registrar, approximately two minutes before the exam began, she stated in a loud, clear voice that the exam was closed book, and that all prohibited materials had to be brought to the front of the room or placed under the desk. R.42-43. The Registrar reemphasized the import of these instructions shortly thereafter when a student expressed concern about his briefcase, and she told him it was acceptable to put the briefcase under the desk. R.43-44. The Registrar testified that she also pointed out the instructions on the chalkboard. R.42. Moreover, the cover sheet on the defendant's exam stated as follows: "It is a CLOSED BOOK EXAM, meaning that you should refer to nothing, other than your wits and learning during the course of the exam." Exhibit 2 (emphasis in original).

Student B testified that, approximately fifteen minutes after the exam began, she observed the defendant using the outline that he/she had previously put away. Student B touched the defendant on his/her elbow and whispered in a firm tone, "I think I should tell you, I will report you." Student B then resumed

working on her exam. R.64. According to Student B, although she could not specifically recall whether the defendant turned to her, she believed that she had gotten the defendant's attention. R.68. Her whisper was loud enough to attract the attention of two students, Student A and Student C, sitting in the row behind the defendant. Both Student A and Student C testified that they saw the defendant turn immediately to the student on the defendant's right, shrug, and turn back to his/her exam. The defendant continued to write his/her exam with the aid of the outline until the conclusion of the three hours. R.98-99, 144. On cross-examination, the defendant acknowledged that he/she wrote two essays of approximately equal length in response to the two exam questions. The exam cover sheet stated that the questions were equally weighted. Exhibit 2.

The defendant contended that he/she had no knowledge that the Torts exam was closed book. Specifically, the defendant testified that:

- 1) his/her class attendance was sporadic during the semester, and he/she had no recollection of the professor's in-class remarks regarding the exam. R.166-67.
- 2) after the conversation with Student A, regarding whether the exam was closed book, the defendant had the "clear impression" that the exam was open book. R.173. The defendant, however, could not recall exactly what Student A said to him/her.
- 3) he/she did not recall seeing the instructions on the chalkboard or even seeing the chalkboard. F.175.

4) he/she did not, at any time, engage in any conversation with Student B. His/her only recollection of Student B from before the exam was a hazy mental image of her laughing and talking to others. R.175.

5) he/she did not, at any time, remove the outline from his/her desktop and place it under the desk. R.180.

6) he/she had no recollection of seeing or hearing the Registrar at any time. The defendant testified that after he/she sat down, the defendant took the outline and a newspaper out of his/her bookbag; the next thing the defendant remembered was beginning the exam. R.174-75.

7) he/she did not read the exam cover sheet and had no recollection of its existence. However, the defendant further testified that after receiving the exam, he/she opened the exam to the questions and placed the exam face down on the desk. R.199.

8) he/she recalled being brushed on the arm during the exam, but he/she was unable to determine the origins or significance of the touch. The defendant denied that the touch was accompanied by a whisper. The defendant stated that when he/she turned to his/her right in response to the touch, the defendant saw only Student B working on her exam. The defendant then simply returned to his/her test. R. 177-81. The defendant described the tap as "the one thing from the exam that was kind of bizarre." R.180.

9) he/she completed the exam by the end of the three hours, although he/she did not know that the exam was three hours in length. R.190.

Furthermore, the defense presented witnesses (Students D, E, and F) who testified that several days after the exam, they engaged in a conversation with the defendant in Jimmy G's. These students were not enrolled in the same Torts section as the defendant and did not take the same Torts exam. During this conversation, the defendant told them that he/she believed that his/her Torts exam was open book. Students D, E, and F testified that such a misunderstanding regarding the exam instructions was in line with the defendant's general absent-mindedness. Students D and E gave several examples of the defendant's absent-minded nature.

### **III. Findings of Fact**

The Judicial Council found the defendant's testimony lacked credibility. In sharp contrast, the Judicial Council found that the testimony of prosecution witnesses was far more credible than the testimony of the defendant. In particular, Student B's testimony was extremely credible. Therefore, the Judicial Council adopts as its findings of fact the evidence and testimony presented by the prosecution's witnesses. Specifically, the Judicial Council found that, prior to the exam, Student B jokingly told the defendant that the exam was closed book and that he/she should put his/her outline under away; the defendant responded to this conversation by putting his/her outline under his/her desk.

The defendant's lack of credibility manifested itself throughout the trial. During the direct examination, cross examination, and in response to questions from the Judicial

Council, the defendant offered a patchwork of partial answers and all-too-convenient memory loss. When it was to his/her advantage, the defendant was able to recall with clarity the events prior to his/her Torts exam. When such recollections would have put him/her at a disadvantage, however, he/she was consistently unable to recall those events. For example, although the defendant was unable to recall seeing the chalkboard, the Registrar, or the exam cover sheet, he/she was able to recall with certainty that he/she did not engage in any conversations with Student B at any time prior to the exam.<sup>1</sup> Furthermore, the defendant would have the Council members believe that he/she had no knowledge of any of the exam instructions. Yet, he/she managed to begin the exam on time without hearing the Registrar. He/she wrote two questions of equal length, curiously in line with the instruction that the questions were equally weighted. Finally, he/she finished the exam within the three hour time limit, although he/she claimed to be ignorant of the exam's duration.<sup>2</sup> Such contentions became so

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<sup>1</sup> In suggesting that sufficient evidence existed to create a reasonable doubt, both dissenting opinions make the factual finding that the defendant engaged in at least one conversation with the student to his/her immediate right. Such a finding flies in the face of the defendant's own testimony that no such conversation ever occurred. As a result, the dissents' factual findings have two noteworthy implications. First, in determining that a conversation did take place, the dissents clearly found the testimony of the student to the defendant's immediate right more credible than the defendant's own assertions. Second, and more importantly, in drawing upon this finding, the dissents have ironically sought to prove the defendant not guilty by using evidence the defendant, him/herself, denies. The dissents' failure to address these discrepancies head-on makes their argument unpersuasive.

<sup>2</sup> The following exchange between the prosecutor and the defendant provides an example:

unbelievable that they discredited the defendant's entire testimony.

Although the defense presented several witnesses who testified regarding the careless and forgetful nature of the defendant, the Council did not find that the testimony of these witnesses was strong enough to present a reasonable doubt as to whether the defendant knew, by the time the Torts exam began, that the exam was closed book. These witnesses testified that the defendant was careless when crossing the street, and on occasion, did not respond when his/her name was called. While these examples are indicative of the defendant's absent-mindedness, they do not indicate a level of academic irresponsibility necessary to justify the defense's contentions.

#### **IV. Conclusions of Law**

The Judicial Council found that the Prosecution proved that the defendant was guilty beyond a reasonable doubt<sup>3</sup> of violating Article 1, Section 2(c) of the Honor Code by a vote of 6-2. The evidence presented by the prosecution's witnesses was far more credible than the evidence put forth by the defendant and his/her witnesses. Further, in contrast to the defendant, the Judicial

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Q. The torts exam. How did you know it was three hours?

A. I didn't know it was three hours. I just --

Q. Why didn't you write for ten hours?

A. Well, you know, I don't know. I think I was probably done at some point. R. 190.

<sup>3</sup> Article V, Section 2(j) of the Honor Code states that "The Judicial Council shall convict the Accused if two-thirds of the members present find the Accused guilty beyond a reasonable doubt."

Council found that the prosecution's witnesses had no motivation to lie.

Although the Council did not make a finding as to whether the defendant knew that the Torts exam was closed book before he/she entered Rubloff 150 on the day of the exam, the Council found that the evidence of the other opportunities given to the defendant in Rubloff 150 was so strong that it vitiated any claims to his ignorance.<sup>4</sup> In particular, the fact that the defendant put the outline under his desk before the exam began is incontrovertible evidence that at that point he/she knew the exam was closed book. By bringing the outline back out and using it for the duration of the exam, he/she undeniably violated the Honor Code.

#### **V. The Recommended Penalty**

The Judicial Council recommends the following penalty:

1. A suspension of one year<sup>5</sup> (two consecutive semesters) beginning in the fall of 1995. The defendant's readmission is to be

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<sup>4</sup> In finding that a reasonable doubt existed, the dissenting opinions made much of the fact that the defendant sat in the first row and kept an outline with three metal rings on his/her desk-top for the majority of the exam. While such behavior seems unusual, the Judicial Council found that this behavior did not create a reasonable doubt as to the defendant's guilt in the face of the overwhelming contrary evidence discussed above. Indeed, there are a myriad of alternative explanations for the defendant's behavior. They range from the brazenness offhandedly dismissed by the dissenters, to a more subtle rationalization by the defendant that his/her actions of using an outline on a closed book exam were somehow justified or excusable.

<sup>5</sup> The Judicial Council originally decided upon a suspension of three semesters. However, upon further reflection, the Council voted to re-open the sentencing discussion and ultimately found a one year suspension to be a more just penalty.

achieved only through the regular readmission processes of the school. A memorandum noting this offense and penalty shall be sent to the Associate Dean in charge of Admissions.

2. A temporary notation, to be placed on the defendant's transcript immediately, consisting of a brief but specific description of the penalized conduct. This notation shall only be removed upon petition to the Dean of the Law School. Such a petition shall not be considered until ten years after the defendant's graduation from law school, or, if the defendant chooses not to return to school, until eleven years from the end of the suspension (fall 2007). The petition shall consist of three letters of recommendation from non-family members, attesting to his/her character and giving justification for removal of the notation from defendant's transcript.

## **VI. Reasoning and Evidence Supporting the Recommended Penalty**

### **A. Suspension**

In deciding upon a one year suspension, the Judicial Council intended to serve goals of punishment, rehabilitation, and deterrence. It is an honor to be a part of the academic community at the Northwestern University School of Law. Along with the privileges and educational opportunities that accompany this honor, however, is a duty to act ethically in all phases of law school academic life. The defendant committed a serious violation of this ethical duty by using prohibited materials on a final examination, and this ethical breach jeopardized his/her right to be a part of this community.

Final exams are a critical measure of a student's academic standing. Exams are determinative in terms of grades, honors, and journal participation. This is particularly true of first-year examinations.<sup>6</sup> The use of prohibited materials, specifically an outline on a closed-book exam, is a benefit per se; while other students are struggling to pull the elements of negligence from their memories, a student with an outline has those elements in front of him/her. Surely the defendant would not have used an outline if he/she did not think that it would be of advantage to him/her. The defendant knowingly took an unfair advantage over his/her classmates.

Although according to the Prosecution's theory, the defendant panicked under the pressure of his/her second law school final, this should not minimize this serious violation. The three years of law school are filled with constant pressures that all students face. Our future legal careers are also certain to be filled with many pressures. Even when under pressure, however, law students and future lawyers have a duty to act ethically. The defendant's Honor Code violation displayed his/her inability to act in accordance with his/her ethical duty. Therefore, for a period of one year, he/she should not be able to take part in the privileges and opportunities of this academic community and should be readmitted only through the school's regular readmission processes.

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<sup>6</sup> The Judicial Council in no way means to imply that such an Honor Code violation would be less serious if committed on a final exam during the second or third year of law school.

The Judicial Council believes that such a penalty will deter other law students, who are undergoing the same academic pressures, from engaging in similar conduct. Such behavior is not acceptable. Because of the inconsistencies and overall lack of credibility of the defendant's testimony, we also believe that the length of the suspension will give the defendant a sufficient amount of time to reflect on and come to terms with this violation. Such a rehabilitative purpose in a recommended penalty is supported by prior Honor Code precedent. See Judicial Council Opinion 84-2, p.8. Lastly, a one year suspension will give the defendant a chance to return to school with a clean slate. The current first-year students, with whom the defendant will now graduate, should have no knowledge of these events.

This suspension is clearly within the range of penalties recommended by prior Judicial Council opinions. While there is no prior opinion that is directly on point, the two opinions recommending penalties in cases where the defendants were found guilty of plagiarism closely approximate the nature and seriousness of the present violation. Both plagiarism and the use of prohibited materials on an exam are serious violations in which the wrongdoer takes an unfair advantage over his/her classmates. While the Faculty Review Council recommended a two year suspension in case 84-2 and the Judicial Council recommended only a six month suspension in case 82-1, both of these cases are distinguishable on their facts.

In 84-2, the Judicial Council found that the defendant had plagiarized 60-70% of his/her seminar paper and had planned to

engage in this violation two weeks before the paper was due. The violation in 84-2 is more severe than the present case based on the extent of plagiarism and the length of premeditation. In the present case, the defendant was found to have learned that the torts exam was closed book by the time the exam started, but there was no evidence of the extensive premeditation that existed in 84-2. Nevertheless, the defendant did use an outline for the exam's entirety with the full knowledge that it was prohibited. The current violation is also distinguishable from the violation in 82-1.

In 82-1 the defendant plagiarized approximately 25% of the text and 48% of the footnotes of a casenote submitted to the joint writing competition. Unlike the present case, 82-1 involved an extra-curricular activity, rather than a graded class requirement. Further, due to the nature of the violation, the Judicial Council had another penalty option open to it--the Council recommended that the student be barred from participation on the journals. Because the Judicial Council does not have such a penalty option open to it in the present case, a longer suspension is warranted.

In deciding upon a one year suspension, the Judicial Council unanimously rejected the Prosecution's recommended penalty of expulsion. According to the precedent set by previous Honor Code proceedings, even extremely serious violations (as in 84-2) have not resulted in expulsion. The prosecutor's suggestion that the present violation was even more egregious than even 84-2 was unconvincing. The Honor Code Prosecutor has a duty to administer justice, which we interpret to include following Honor Code

precedent. The Judicial Council believes that the prosecutor failed to sustain his burden of demonstrating that expulsion is an appropriate penalty because he did not provide satisfactory factual or precedential support for his recommendation.

However, at the same time, we also rejected Defense Counsel's suggestion that the present violation is among the least serious violations, and therefore, should not result in any term of suspension. The knowing use of prohibited materials on a final exam constitutes an extremely severe violation of the Honor Code.

#### **B. Notation**

In addition to the one year suspension, the Judicial Council also recommends that a notation describing this violation be immediately placed upon the defendant's transcript. Further, the notation may be removed from his/her transcript only in accordance with the above-described procedures. See supra Part V. Even after serving his/her suspension, the defendant should not be able to easily eschew this violation. Such conduct is serious and is as much a part of his/her law school record as his classes and grades.

The Judicial Council believes that more than the passage of time is required in order for the defendant to truly move past this violation. Hopefully, this notation will propel him/her to behave more ethically in the future, thereby rising above this offense through his/her own exemplary conduct. We realize that this notation may make it more difficult for the defendant to

secure a job, but we believe that this is a necessary consequence of his/her action.

Further, this notation is necessary to protect the integrity of our law school. Future employers and clients have a right to this information, as it bears heavily on the type of lawyer that the defendant may be. In recommending notation penalties, prior See Honor Code Review Council, Case No. 84-1.

The Judicial Council believes that the recommended notation will also serve rehabilitative goals. Because the notation may only be removed upon a petition supported with three letters of reference attesting to the defendant's character and giving justification for removal, the right to removal must be earned by the defendant and will be a key indication of his/her rehabilitation. If he/she cannot meet the petition requirements, he/she will be unable to have the notation removed from his/her transcript. Although we acknowledge that in the past the Honor Code Review Council has required a permanent notation for serious Honor Code violations, See Judicial Council Opinions 84-2 and 82-1, we decided against a permanent notation because we believe that such a penalty would decrease the rehabilitative goals of the punishment. The knowledge that the notation is permanent may decrease the defendant's incentive to change his/her behavior and to participate meaningfully in the community in order to gain sufficient references. Further, we believe that our more innovative notation penalty strikes the appropriate balance between the concern of maintaining the integrity of our school and

the need to allow the defendant to put this episode behind him/her.

## VII. Conclusion

For the foregoing reasons, we find the defendant guilty of violating Article I, Section 2(c) of the Honor Code of the Students of Northwestern University School of Law. Such a violation "occurs when the student knowingly uses materials not permitted by the professor in an examination or other graded assignment." Honor Code, Article I, Section 2(c). Accordingly, we recommend for faculty review the following penalty:

1. A suspension of one year (two consecutive semesters) beginning in the fall of 1995. The defendant's readmission is to be achieved only through the regular readmission processes of the school. A memorandum noting this offense and penalty shall be sent to the Associate Dean in charge of Admissions.

2. A temporary notation, to be placed on the defendant's transcript immediately, consisting of a brief but specific description of the penalized conduct. This notation shall only be removed upon petition to the Dean of the Law School. Such a petition shall not be considered until ten years after the defendant's graduation from law school, or, if the defendant chooses not to return to school, until eleven years from the end of the suspension (fall 2007). The petition shall consist of three letters of recommendation from non-family members, attesting to his/her character and giving justification for removal of the notation from defendant's transcript.

Seth Miller and Susanne MacIntosh, dissenting from part VI(b) of the majority opinion.

We join in parts I-V, and VI(a) of the majority opinion. However, we respectfully dissent from the majority holding in part VI(b), which subjects the defendant to a notation on his/her transcript for ten years from his/her graduation.

We agree with our fellow members of the judicial council that the notation serves valid rehabilitative purposes, and protects the integrity of the law school. However, the notation also carries a great punitive weight which has a much more acute impact on the defendant than does the one year suspension. We feel that the notation as it stands is too severe. A 5 year notation has a punitive value commensurate with the nature of the violation, while successfully furthering the goals of rehabilitation and protecting the integrity of the law school.

Because the notation explicitly states that the defendant was convicted of using unauthorized materials on a closed book exam, it will have a drastic impact on the defendant's prospects for employment, and membership in legal and other professional organizations, for as long as the notation remains on his/her transcript. With this in mind, and for reasons stated below, ten years is too long a period to impose such a severe penalty in this case.

The most severe Honor Code violations which have been prosecuted in recent years involved plagiarism on papers. Though the offense committed by this defendant is extremely serious, it is not as reprehensible as plagiarism for two reasons. First, the defendant's decision to violate the Honor Code was made rashly, under immediate and daunting pressure. Honor Code violations of plagiarism prosecuted in 84-2 and 82-1, involved planning over weeks or days to violate the Code. The defendants in these cases chose to violate the Code day after day, when instead of doing their own research and thinking, they relied on the research and thoughts of others in their papers. The defendant in this case, however, made his/her decision to violate the Code within the context of a 3-hour exam. Second, plagiarism is the act of taking someone else's hard work and ideas and representing them as your own. In this case, the defendant was not appropriating another's ideas, but instead used an outline to organize and articulate what s/he'd been taught in class.

Additionally, as the years pass the probative value of the transcript notation will decrease, and the defendant's more recent behavior will speak for itself. However, the notation will continue to hinder his/her professional advancement by alerting all who examine his/her transcript to the fact that this violation occurred when s/he was a 22 year old first year law student.

The majority is concerned that the defendant needs to have a

period of time in which to prove him/herself rehabilitated. We think five years, and not ten, is a sufficient amount of time for the defendant to establish a reputation for ethical conduct. By including a petition for removal of the notation, the punishment itself contains a mechanism for ensuring that the defendant has established a reputation for ethical conduct. If the defendant has not established such a reputation, the notation will remain until s/he proves him/herself, continuing to alert potential employers and to protect the integrity of the law school. However, if after five years the defendant has proven him/herself, there is no longer any reason for the notation to remain. The defendant will have been rehabilitated, so there will be no further need to protect the school. The notation, at that point, would serve only to punish the defendant further by hindering his/her advancement in the profession, and forcing him/her to explain an incident that occurred many years earlier.

Grady, J., with whom Kelsh, J., joins, dissenting from the judgment:

The majority today finds that the evidence demonstrates beyond a reasonable doubt that the Defendant knowingly used an outline on a closed-book exam. Were the Prosecution required to demonstrate guilt with a simple preponderance of the evidence, I would vote to convict. Indeed, there was ample circumstantial evidence suggesting that it would have required a series of extraordinary circumstances for the Defendant not to have known that the exam was closed book. But the Prosecution failed not only to present any direct evidence whatsoever of the Defendant's *mens rea*, it also failed to sufficiently reconcile its own theory of the Defendant's state of mind with certain actions of the Defendant inside of the examination room before and during the exam. Accordingly, I dissent.

At trial, the Prosecution conceded that the Defendant could have entered the examination room (Rubloff 150) unaware that the exam was closed book. Once inside the room, the Prosecution argued--as the majority concludes--that the Defendant discovered that the exam was closed book, and panicked. The majority bases its conclusion on six opportunities the Defendant had to learn the exam was open book. (The seventh, Professor Polsby's announcements, occurred outside of the examination room.) All of these "opportunities" must be considered in the context of the

environment of the room. This exam was the second law school final exam for these students. There was testimony that the room sounded and felt like a final exam room: noisy, and filled with tension.

The Prosecution failed to sufficiently explain certain of the Defendant's actions after he/she supposedly discovered the exam was closed book. First, the Defendant left the outline on his desk for approximately two hours and forty-five minutes. The outline had inch-wide shiny silver rings--three of them--which held it together through three punch holes. The Defendant clearly understood that both the outline and the rings would attract attention, but neither removed the rings nor the outline from the desk. Indeed, there was testimony from one of the students sitting behind the Defendant that the Defendant was reading a newspaper before the exam began. This is hardly the conduct of a first-year, first-semester law student who has just learned he/she cannot use the outline on which he/she planned to rely. Instead of desperately attempting to review the essential parts of his outline in the remaining minutes, the Defendant was observed casually reading for pleasure. There are two possible interpretations of the Defendant's conduct:

First, that when he/she took time to converse with friends (including a conversation about summer jobs) and read the paper he/she was planning to openly use the outline on the exam and he/she knew that the exam was closed book. He/She then would have concocted the following strategy: to

use the shiny-ringed outline so openly and in such a flagrant manner that anyone who saw him/her would conclude that he/she could not possibly have been knowingly violating the honor code, else he/she would have attempted to be less obvious. This is a highly unlikely hypothesis. It was demonstrated at trial that the proctor was outside of the room for the great majority of the exam. There were thus many less riskier options open to the Defendant. These include leaving the exam room to look at materials, removing the large rings from the outline, or, given that everyone in that room was generally preoccupied with their own exams, looking at the outline under the table. The Prosecution did not offer any convincing explanations as to why the Defendant would dismiss other options and come up with an elaborate "Too Obvious to Be Intentional" plan when he/she supposedly panicked and use the outline in a desperate attempt to save him/herself.

Second, that after the Defendant sat down--and after four of the opportunities the majority describes had occurred--he/she was still unaware that the exam was closed book. Thus, in order to support the majority's finding of mens rea, at some point between the time the Defendant read the newspaper and the end of the exam, he/she has to have discovered that the exam was closed book. This hypothetical cuts directly against the majority's analysis, which concludes essentially that there were too many opportunities for the Defendant to find out that the exam was closed book for there to be reasonable doubt of mens rea. That is, if

the Defendant was unaware that the exam was closed book up to the day of the exam, through two conversations with classmates characterized by the majority as containing information that the exam was closed book, and with the proctor's instructions written on the chalkboard, then the majority cannot argue consistent with their conclusion that--the first four opportunities having escaped him/her--the final three opportunities establish that the Defendant knew beyond a reasonable doubt.

I believe that the Prosecution failed to meet its burden at trial. The Defendant presented evidence at trial that he/she is an unusual individual. Defense witnesses testified that he/she possesses strange quality that can perhaps best be described as "removed" or "distant." There was corroborated testimony that the Defendant frequently gets lost in conversations, doesn't hear his/her uncommon name being called, and is always having to be reminded or told of things that everyone else seems to remember and know about.

In Footnote 1, the majority focuses on the Defendant's conversation about summer employment and attempts to minimize its importance by pointing to an inconsistency in this dissent. The conversation was an indication of the Defendant's relaxed posture, but--as discussed above--was not the only indication.

Additionally, the majority confines to Footnote 4 its discussion of the outline on the desk. Like the Prosecution, the majority handles the open display of the outline in

summary fashion, apparently relying on the circumstantial evidence it cites throughout the opinion to deflect this glaring inconsistency in the Defendant's behavior. I believe more than that is required to eliminate reasonable doubt.

The exam was the second of the Defendant's law school career. The first exam, Contracts, had been open book. The jury instructions given to the Judicial Counsel characterize "reasonable doubt" as "proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs." I would vote to convict were the standard of proof a mere preponderance of the evidence. But given the disturbing lack of direct evidence against the Defendant and the failure of both the Prosecution and the majority to account for the Defendant's behavior in the examination room, I believe a reasonable doubt exists.

Accordingly, I dissent.

Opinion of John Kelsh, with whom John Grady joins, dissenting from the judgment.

Under the Honor Code, a conviction is possible only if the evidence presented establishes the defendant's guilt "beyond a reasonable doubt." Under the definition stipulated to by the parties in this trial, proof beyond a reasonable doubt "must . . . be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs." In this case, there are sharp inconsistencies between the evidence presented at trial and the prosecutor's theory of the case. These inconsistencies, I believe, would cause a reasonable person to hesitate before relying on the prosecutor's proof in the most important of his/her own affairs. We should, therefore, acquit.

The prosecutor's story is simple. He contends that while the defendant may not have been aware that the exam was closed book before entering Rubloff 150, he/she became aware of this fact shortly thereafter. The prosecutor argues that when the defendant realized his/her error, he/she panicked, and in a moment of weakness decided to use the outline that he/she now knew was forbidden.

The evidence presented at trial, however, is not at all consistent with the prosecutor's picture of a student who enters a room thinking an exam is open book, panics when he/she discovers it is not, and then decides to cheat. For example, the evidence showed that the defendant chose a seat in the front row of Rubloff 150. Would a student who in a fit of panic decides to

use a forbidden outline choose a seat in full view of every other student in the room? The evidence showed that the defendant had a conversation with a classmate prior to the start of the exam during which he/she calmly discussed summer job plans. Would a student who has just realized that an exam he/she thought is open book is actually closed book be calm enough to engage in casual banter with a classmate minutes before the exam is to begin? The evidence showed that prior to the beginning of the exam the defendant was sitting at his/her seat in the front row reading a newspaper. Would a student who has just learned that an exam he/she prepared for as an open book exam is in fact a closed book exam sit and calmly read a newspaper, or would that student spend those last pre-exam minutes frantically attempting to cram information from the outline into his/her head?<sup>1</sup>

Finally, and most damagingly for the prosecutor's case, the evidence showed that the forbidden outline was sitting on the defendant's desk, in full and unobstructed view, for at least the last two hours and forty-five minutes of the exam, and perhaps for the whole three hours. No student who knows that an exam is

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<sup>1</sup> The majority places special significance on its finding that the defendant placed his/her outline under his/her desk in response to a joking comment made approximately ten minutes before the exam by the student sitting next to him/her. While I do not at all doubt the veracity of this witness' testimony, I do question the majority's assertion that this testimony provides "uncontrovertible evidence" that the defendant knew that the exam was closed book.

This evidence, like so much of the evidence at trial, is inconsistent with the prosecutor's theory of the case. A student who has arrived at an exam thinking it is open book, and then discovers it is closed book, would not take his/her outline off the desk until the last possible moment. The evidence that the defendant did so in this case suggests that the student was not caught in the panic that the prosecutor describes.

closed book would be so brazen as to leave an outline on his/her desk throughout the exam. This is particularly true in this case, because the outline in question was bound by three large metal rings that made a lot of noise when picked up and put down. At trial, the prosecutor offered no explanation for this strongly exculpatory evidence. His silence is understandable. There is no way to reconcile the undisputed evidence that the outline was on the defendant's desk throughout the exam with a verdict of guilty.

The majority today concedes that leaving an outline in full view of all of the other students in the room is "unusual" behavior for someone who knows that an exam is closed book. They contend that there are a "myriad of . . . explanations" for this behavior that are consistent with the defendant's having known that the exam was closed book. The first explanation the majority refers to is a theory of "brazenness." By this, I assume the majority is referring to a feeling on the defendant's part that there was no way anyone would catch him or turn him in. The second explanation the majority offers is that the defendant left the outline in full view of every other student in the room because he had convinced himself, by means of a "subtle rationalization . . . that his actions of using an outline on a closed book exam were somehow justifiable or excusable."

There are three significant problems with these theories. First, they are not believable. Second, they are inconsistent with the prosecutor's theory of the case. A student who is in the throes of panic is not likely to be able to engage in either

a calculated act of defiance or a "subtle rationalization." Third, and most importantly, no evidence was presented at trial that even remotely supports either of the majority's explanations for the defendant's having left his/her outline on his/her desk throughout the entire exam.

The majority has found no way to explain away this highly exculpatory evidence. They have left out of their "myriad of . . . explanations" the one explanation that makes the most sense: The defendant left the outline on his/her desk throughout the exam because he/she thought the exam was open book.

This is the most persuasive interpretation of the evidence. It need not, however, be the most persuasive interpretation in order to warrant an acquittal. It need only raise in our minds a reasonable doubt as to the defendant's guilt. It need only create enough doubt that we would hesitate to rely on the prosecutor's proof in the most important of our own affairs. In my mind, it easily does this.

I would acquit.