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FOREWORD

The Shadowy Law of Modern Surveillance

*Gina M. Abbadessa**

The law is notoriously slow, and technological advancement fast. The Founders never imagined cell phones and text-messaging, drones and aerial surveillance, personal computers and wireless home automation systems. These technologies can contain innumerable bits of our personal lives—photos, call records, search histories, text messages, and even audio of telephone calls—that we would prefer to keep private. Yet we have but one Constitution (infrequently amended) to protect us against privacy intrusions, and court interpretations of it must keep pace with how the world changes. These interpretations—particularly those issued by the Supreme Court, which generate a fair amount of fervor—create a sort of collective understanding of what the government can and cannot do within the bounds of the Constitution. In her recent book, *The Future of Foreign Intelligence: Privacy and Surveillance in a Digital Age*, Laura K. Donohue contends that individual rights in the United States are disserved and even violated by a shadowy, undercover body of legal precedent—or "secret law."[1] Responding to Professor Donohue's book, Professors Heidi Kitrosser and Lawrence Friedman explore the implications of secret law on individual rights in the United States.

In her article "Secret Law and the Snowden Revelations: A Response to *The Future of Foreign Intelligence: Privacy and Surveillance in a Digital Age*, by Laura K. Donohue," Professor Heidi Kitrosser notes that new and developing technologies enable the government to have an unprecedented look at our "personal relationships, political commitments, and health concerns."[2] Kitrosser characterizes the law that exists to theoretically

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[1] LAURA K DONOHUE, THE FUTURE OF FOREIGN INTELLIGENCE: PRIVACY AND SURVEILLANCE IN A DIGITAL AGE 146 (2016).

[2] Heidi Kitrosser, *Secret Law and the Snowden Revelations: A Response to* The Future of

oversee such government intrusion as "secret law," or legal authority that requires compliance, but is classified or withheld from the public.[3] If secretive courts like the Foreign Intelligence Surveillance Court (FISC) are issuing unpublished—but precedential—opinions, Kitrosser argues, an entire body of covert law has developed to govern the constitutionality of surveillance procedures.[4]

Though the FISC and similar courts govern the behavior of the executive branch only, they may be radically altering individual rights by reinventing statutes behind the scenes, thus expanding their reach in practice.[5] As an illustration of this practice, Kitrosser points to Edward Snowden's leak of a government order directed to Verizon. The order was upheld (in a confidential opinion that would never have seen light but for Snowden's leak) based on a lax interpretation of what information was "relevant"—and therefore able to be collected—for the purposes of a terrorism or intelligence investigation by the government.[6] Although only "relevant" tangible things may be collected by statute, Kitrosser suggests that the FISC judge who upheld the Verizon order neutered the import of the relevance requirement by concluding that "*all* Internet metadata was 'relevant' to terrorism investigations."[7]

By this standard, there is practically no metadata information that cannot legally be collected by the government when it is engaged in a terrorism or intelligence investigation. Were it not for the secrecy of surveillance law, Kitrosser asserts, erroneous reasoning like this would be easier to spot and challenge—and individual rights would be less subject to the vagaries of a concealed body of law.[8]

Professor Lawrence Friedman confronts secret law in his article *Remnants of Privacy in the Modern Surveillance State.* Much as Kitrosser contends that secret law allows for reinvention of existing statutes, Friedman asserts that government agencies involved in surveillance are practically untethered from the reach of the Fourth Amendment. Agents at organizations such as the National Security Agency are free to collect sensitive data from us, and "[w]e just have to trust that they are acting in

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Foreign Intelligence: Privacy and Surveillance in a Digital Age, *by Laura K. Donohue,* 52 NEW ENG. L. REV. 5,6 (2017).

[3] *Id.* at 7 (quoting Dakota S. Rudesill, *Coming to Terms with Secret Law,* 7 HAR. NAT'L SEC. J. 241, 249 (2015)).

[4] *See id.* at 8.

[5] *Id.* at 9.

[6] *Id.* at 10.

[7] *Id.* (quoting DONOHUE, *supra* note 1, at 48 (emphasis in original)).

[8] Kitrosser, *supra* note 2, at 11.

good faith."[9] This is especially problematic because the material being surveilled—internet and telephony metadata, for example— provide "the context for everything we do."[10]

Friedman agrees with Donohue that today's surveillance collection methods are akin to use of the general warrant, so reviled by the Founders that granted the new Americans express protections against such indiscriminate intrusion.[11] Where Friedman disagrees with Donohue is in his estimation of what can be done to counter secret law and rampant individual rights abuses in the course of surveillance. Donohue believes that judicial consideration of the opposition to general warrants may help, but Friedman doubts the judiciary can or will accomplish any meaningful change.[12] This doubt is premised on serious concerns about the ability of the Supreme Court to rein in government surveillance given the entrenched third-party doctrine[13] and the deference the Court has traditionally shown to national security concerns.[14]

So what can be done to counter privacy intrusion by agencies governed by secret law? Kitrosser points out that the public cannot contest such transparent "secret law," and concludes that actions like Snowden's are what will ultimately focus attention on secret law and force legislative response.[15] Friedman advocates for state constitutional litigation, believing the states to be in a position to appreciate historical arguments about information privacy and to influence Supreme Court decision-making.[16] Whatever the merits of either approach, they are not the only approaches to be considered. One could imagine, for example, that voters could elect an official who promised to take action on this issue—or, conversely, to not elect officials who have been complacent about it. The Supreme Court could surprise legal scholars like Professor Friedman and make a definitive ruling that reins in the ability of government agencies to intrude in the name or surveillance. Or, as Professor Kitrosser surmises, the future or foreign intelligence may in fact be a future of leakers and whistleblowers. Whichever the case, Laura Donohue's book sounds the alarm on

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[9] Lawrence Friedman, *Remnants of Privacy in the Modern Surveillance State*, 52 NEW ENG. L. REV. 15, 17 (2017).

[10] *Id.* (quoting DONOHUE, *supra* note 1, at 39).

[11] *Id.* at 16, 18.

[12] *Id.* at 19, 20, 27.

[13] *Id.* at 20 ("This doctrine, developed by the Supreme Court in the late 1970s, holds that individuals have no reasonable expectation of privacy in information they voluntarily transmit to third parties, like financial institutions and telephone service providers.")

[14] *Id.* at 25.

[15] *See* Kitrosser, *supra* note 2, at 12–13.

[16] Friedman, *supra* note 9, at 28.

government surveillance—an alarm Americans would do well to heed.

ARTICLES

Secret Law and the Snowden Revelations: A Response to *The Future of Foreign Intelligence: Privacy and Surveillance in a Digital Age*, by Laura K. Donohue

HEIDI KITROSSER*

INTRODUCTION

On June 6, 2013, the British newspaper *The Guardian* revealed a secret order of the United States Foreign Intelligence Surveillance Court (FISC) requiring Verizon, a major telecommunications provider, to turn over all of its customer calling records to the National Security Agency (NSA) on an "ongoing, daily basis" for a three- month period.[1] This article turned out to be the first trickle in a wave of blockbuster stories published by *The Guardian* and *The Washington Post*, among other outlets, based on leaks from former NSA contractor Edward Snowden.[2]

The stories detailed a host of secret NSA surveillance operations.[3] The Verizon order, for example, was one among many similar orders issued to major telecommunications providers over a nine-year period directing the providers to turn over all of their customers' telephony metadata to the NSA.[4] Although metadata does not include a communication's contents,

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[1] Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, THE GUARDIAN (June 6, 2013), https://perma.cc/AXH5-G8NR.

[2] *See* Glenn Greenwald, Ewen MacAskill & Laura Poitras, *Edward Snowden: The Whistle-blower Behind the NSA Surveillance Revelations*, THE GUARDIAN (June 11, 2013), https://perma.cc/4JU3-P5ND. *See, e.g.*, Joshua Eaton, *Timeline of Edward Snowden's Revelations*, AL JAZEERA AM., (June 5, 2013), https://perma.cc/GUL5-3S5F.

[3] *See* Eaton, *supra* note 2.

[4] LAURA K. DONOHUE, THE FUTURE OF FOREIGN INTELLIGENCE: PRIVACY AND SURVEILLANCE IN A DIGITAL AGE 48 (2016).

the information that it does encompass—including the identity and potentially the location of communicants and the length of each exchange[5]—enables recipients to piece together substantial information about individuals, including their personal relationships, political commitments, and health concerns.[6] Other NSA programs revealed by the stories included bulk e-mail metadata collection and bulk Internet content collection, the latter including e-mail and voice communications.[7]

These revelations have serious constitutional, statutory, and policy implications. The bulk metadata programs alone have credibly been challenged as violating the Fourth Amendment to the U.S. Constitution, exceeding statutory limits, and constituting bad policy.[8] The experiences of the FISC and the House and Senate Intelligence Committees with the programs also present important questions about the efficacy of particular oversight mechanisms.[9] The existence of a longstanding, secretive program implicating the rights of Americans, possibly in violation of statutory limits, also raises the specter of secret law.[10] More so, these revelations and their implications hardly exist in a historical vacuum. Most immediately, they call to mind, and are traceable partly to, controversial surveillance programs of the George W. Bush administration.[11] They also echo aspects of the findings and conclusions of the famed congressional proceedings—particularly the Church Committee hearings—of the 1970s on surveillance by the U.S. intelligence community.[12] Reaching back further still, concerns

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[5] *See id.* at 18.

[6] *See id.* at 18, 39–41; Greenwald, *supra* note 1.

[7] *See* DONOHUE, *supra* note 4, at 54–57; Barton Gellman & Laura Poitras, *U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program*, WASH. POST (June 7, 2013), https://perma.cc/5HMQ-UW5Z.

[8] *See, e.g.*, ACLU v. Clapper, 785 F.3d 787, 810 (2d Cir. 2015); DONOHUE, *supra* note 4, at 39–53, 94–97. *See generally* Laura K. Donohue, *Bulk Metadata Collection: Statutory and Constitutional Considerations*, 37 HARV. J.L. & PUB. POL'Y 757, 836–97 (2014); Jennifer Granick, *The Surveillance State's Legalism Isn't About Morals, It's About Manipulating the Rules*, JUSTSECURITY (Nov. 13, 2014), https://perma.cc/W5Y3-P84S.

[9] *See* DONOHUE, *supra* note 4, at 45–47, 138–50.

[10] *See* DONOHUE, *supra* note 4, at 146("[A] separate body of secret law has evolved in ways not anticipated by Congress in 1978."). For discussions of the concept of secret law more broadly, *see, e.g.*, ELIZABETH GOITEIN & BRENNAN CENTER FOR JUSTICE, THE NEW ERA OF SECRET LAW (2016); Dakota S. Rudesill, *Coming to Terms with Secret Law*, 7 HARV. NAT'L SEC. J. 241 (2015).

[11] *See* DONOHUE, *supra* note 4, at 45–53.

[12] *See* DONOHUE, *supra* note 4, at 4–12; Richard A. Clarke, et al., *Liberty and Security in a Changing World: Report and Recommendations of The President's Review Group on Intelligence and Communications Technologies*, OFF. OF THE DIRECTOR OF NAT'L INTELLIGENCE 114 (Dec. 12, 2013), https://perma.cc/S542-89SJ.

about abusive surveillance practices were foremost in the minds of the nation's founders.[13]

It is no easy task to unpack and accessibly explain the Snowden revelations, the programs that they illuminate, and the relevant historical context. It is a more daunting undertaking still to identify and address the major constitutional, statutory, and policy issues that the disclosed programs raise. Laura Donohue, a professor at Georgetown University Law Center, accomplishes these feats in a remarkably concise and highly readable book entitled, *The Future of Foreign Intelligence: Privacy and Surveillance in a Digital Age*.[14]

Donohue focuses on two main categories of revealed programs: those involving meta-data collection and access and those entailing content collection and access. She takes readers on a sweeping tour of the programs' features, their evolving legal justifications within the executive branch, the roles played by Congress and the FISC in enabling and challenging them, the programs' legal shortcomings, and the broader historical context. Donohue also flags larger issues that transcend, but are very much illuminated by, the particular programs that she explores. In particular, she cites the phenomenon of secret law. She also discusses the closely related puzzle of how to design oversight mechanisms that accommodate justifiable secrecy while protecting democratic accountability and the rule of law. The constitutional and policy imperatives of privacy also are deeply woven into the book's fabric. Much of Donohue's discussion touches, at least implicitly, on the negative relationship between secret law and the ability of individuals to keep their own secrets—that is, to enjoy personal privacy.

In this short essay, I use Donohue's excellent book as a jumping-off point to reflect on the concept of secret law. I consider the light that Donohue's discussion sheds on four aspects of the concept: the definition of secret law, why secret law matters, the mechanisms that facilitate secret law, and the accountability tools that help to chip away at secret laws.

ANALYSIS

I. *The Future of Foreign Intelligence* and the Meaning and Importance of Secret Law

In recent years, academics, legislators, and other commentators have expressed growing concern about the phenomenon of secret law.[15] As Pro-

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[13] *See generally* DONOHUE, *supra* note 4, at 75–94.

[14] *See* DONOHUE, *supra* note 4.

[15] *See generally* GOITEIN, *supra* note 10; Jonathan Hafetz, *A Problem of Standards? Another*

fessor Dakota Rudesill helpfully defines the term, secret law consists of "legal authorities that require compliance that are classified or otherwise withheld from the public."[16] Some of the attention to secret law has focused on classified annexes to legislation.[17] Most of the commentary, however, has been directed toward two non-legislative sources of authority: classified legal opinions by the FISC or the Foreign Intelligence Surveillance Review Court (FISRC), and unpublished executive branch legal opinions, typically from the Justice Department's Office of Legal Counsel (OLC).[18] Commentators explain that legal opinions "such as OLC and FISC opinions" can constitute secret law when they "provide precedential value or otherwise binding constructions of law."[19]

Critics of FISC, FISRC, and OLC secrecy do not argue that legal opinions must never be secret. They take the view, however, that such secrecy is rarely, if ever, justified, and at minimum is deeply problematic when the opinions constitute law making. The arguments against secret legal opinions are premised, in short, on two interlocking claims: some such opinions amount to law and secret law is intrinsically problematic.

Defenders of secret legal opinions do not dispute that secret law is troubling. Rather, they challenge the notion that FISC, FISRC, or OLC opinions can constitute secret law.[20] Perhaps most fundamentally, they argue

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Perspective on Secret Law, 57 WM. & MARY L. REV. 2141 (2016); Rudesill, *supra* note 10; Sudha Setty, *No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn't Let the Terrorists Win*, 57 U. KAN. L. REV. 579 (2009); *Secret Law and the Threat to Democratic and Accountable Government: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 110th Cong. (2008).

[16] Rudesill, *supra* note 10, at 249.

[17] *See* GOITEIN, *supra* note 10, at 28–31; Rudesill, *supra* note 10, at 260–83.

[18] GOITEIN, *supra* note 10, at 3 ("OLC opinions and FISA Court opinions are the only two manifestations of secret law that regularly make headlines"); Rudesill, *supra* note 10, at 246, 253, 283 (describing commentators' emphasis on FISC and OLC opinions).

[19] Rudesill, *supra* note 10, at 249; *see, e.g.*, GOITEIN, *supra* note 10, at 36–37 (explaining OLC's role as "quasi-judicial interpreter of the law"); GOITEIN, *supra* note 10, at 57–58 (discussing FISC's role in effectively making law on occasion).

[20] *See Secret Law Hearing*, *supra* note 15, at 4 (opening statement of Sen. Sam Brownback) (disputing notion that OLC legal opinions constitute "secret law"); *Secret Law Hearing*, *supra* note 15, at 6 (testimony of John P. Elwood, Deputy Ass't Att'y Gen., Office of Legal Counsel) (stating that the OLC's "confidential legal advice" does not "constitute 'secret' law"); *Secret Law Hearing*, *supra* note 15, at 9 (testimony of Bradford A. Berenson, Partner, Sidley & Austin, LLP) (taking view that FISC opinions, OLC opinions, and executive orders are not secret law). *Cf.* Christopher A. Donesa, *Is "Secret Law" Really Either? Congressional Intent, Legislative Process, and Section 215 of the USA Patriot Act*, 3 NAT'L SEC. L.J. 101, 118–23 (2014) (secret legal interpretations of Section 215 of the Patriot Act by the FISC and the executive branch do not make Section 215 secret law).

that such opinions—at least when they consist of statutory interpretation—merely interpret, rather than make law,[21] and that the interpreted statutes themselves are publicly known.[22] Those in the "not secret law" camp also argue that secret OLC and FISC opinions are not law because they do not "regulate the primary conduct of private citizens," but rather govern behavior within the executive branch.[23]

Donohue's book sheds light on this debate by illuminating the far-reaching impact that secret FISC, FISRC, and OLC opinions have had on surveillance practices and individual privacy since 9/11; the opinions' often counter-intuitive relationships to the statutes that they purport to interpret; and the serious constitutional questions raised by the surveillance practices that the opinions blessed. These examples and analyses vividly demonstrate why the opinions at issue deserve the moniker "secret law," and why secret law poses such a threat to the rule of law and democratic accountability. Specifically, such opinions can covertly reinvent rather than interpret existing statutes, and can bear heavily on the rights of individual citizens.

For example, Donohue chronicles the executive's shifting, secret justifications for bulk collection of telephony and Internet metadata. The OLC's initial assessments of these programs were so closely held that even the NSA was not allowed to read them[24] and so weak that they were repudiated by the OLC after their author, John Yoo, left OLC and a new OLC head, Jack Goldsmith, was appointed.[25] The replacement memoranda themselves justified the programs through a combination of strained statutory interpretation and a very aggressive reading of presidential power under Article II of the Constitution.[26]

In 2006, the administration secretly shifted the bulk collection of te-

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[21] *See, e.g.*, Donesa, *supra* note 20, at 105–07, 118–23 (explaining that Section 215 of the Patriot Act itself is publicly known and that non-public interpretations do not alter the statute's transparency).

[22] The picture would be more complicated, of course, were the "secret law" claim based partly on the fact of statutory secrecy in the form of classified annexes or otherwise. *See* GOITEIN, *supra* note, 10 at 29–31; Rudesill, *supra* note 10, at 260 (citing sources that discuss the use of classified annexes to statutes and the statutory incorporation of non-public legislative history).

[23] *Secret Law Hearing*, *supra* note 15, at 9 (testimony of Bradford A. Berenson, Partner, Sidley Austin, LLP). In the case of OLC opinions, they make the related argument that the opinions constitute legal advice about actual or contemplated policies but do not themselves set policy; *see, e.g.*, *Secret Law Hearing*, *supra* note 15, at 4 (opening statement of Sen. Sam Brownback).

[24] *See* DONOHUE, *supra* note 4, at 19–20.

[25] *See* DONOHUE, *supra* note 4, at 20–23, 45.

[26] *See* DONOHUE, *supra* note 4, at 22–24.

lephony metadata to Section 215 of the Patriot Act, which was codified at 18 U.S.C. § 1861.[27] Section 215 authorizes the FISC to compel the production of "any tangible things" including business records, when the government provides "'a statement of facts showing that there are reasonable grounds to believe that the tangible objects sought are relevant' to an authorized investigation intended to protect 'against international terrorism or clandestine intelligence activities.'"[28] The 2006 Verizon order on which the first Snowden leak story centered was a FISC directive to turn over bulk telephony metadata under Section 215.[29]

The Verizon order and the many similar FISC orders relied on a tenuous interpretation of the word "relevant" that borrowed from the logic of an earlier secret FISC opinion authorizing bulk internet and telephony metadata collection.[30] In that earlier, classified ruling, FISC Judge Colleen Kollar-Kotelly "accepted the government's argument, made without opposing counsel, that *all* Internet metadata was 'relevant' to terrorism investigations."[31] The judge agreed that the "'collection of both a huge volume and high percentage of unrelated communications' was necessary to identify a smaller number of germane communications."[32]

This reasoning, Donohue protests, flies in the face of the Foreign Intelligence Surveillance Act's (FISA's) central purpose: to prevent "widespread collection absent particularized suspicion."[33] The Second Circuit took a similar view in May 2015, holding that Section 215 does not authorize bulk telephony metadata collection. The court "rejected the government's argument that 'relevant' should be understood as anything potentially bearing upon, connected with, or pertinent to a specified subject matter."[34]

Donohue forcefully makes the case that the bulk metadata collection programs were antithetical to the letter and spirit of the relevant public

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[27] *See* DONOHUE, *supra* note 4, at 23–25, 31.

[28] Clarke, et al., *supra* note 12, at 81–82 (citing Section 215); *see also* DONOHUE, *supra* note 4, at 25–26.

[29] Amy Davidson Sorkin, *The N.S.A.-Verizon Scandal*, THE NEW YORKER (June 6, 2013), https://perma.cc/3E6P-JYNN.

[30] *See* DONOHUE, *supra* note 4, at 47–48.

[31] *See* DONOHUE, *supra* note 4, at 48.

[32] DONOHUE, *supra* note 4, at 45.

[33] DONOHUE, *supra* note 4, at 46.

[34] DONOHUE, *supra* note 4, at 51. As for the internet metadata program, apparently it was discontinued by the government in 2011, two years prior to Snowden's disclosures. For more on the fate of that program, *see* Timothy Edgar, *Bulk NSA Internet Program Shows the Complete Incoherence of Surveillance Law*, LAWFARE (Nov. 20, 2015, 9:45 AM), https://perma.cc/6Y2L-FMCT (concluding that "the widely-held theory that the NSA had figured out another way to obtain the data – with less oversight – is correct.").

laws, that the legal opinions of the executive branch and of FISC did not resolve these difficulties but themselves were deeply erroneous, and that secrecy—including the *ex parte* nature of FISC proceedings—enabled such shoddy legal reasoning. Donohue makes similar arguments with respect to the NSA's bulk content collection programs, which also were exposed by the Snowden leaks.[35]

For all of its probing into failures of legality and transparency, *The Future of Foreign Intelligence* does not treat these ideals solely as ends in themselves. Rather, the book wears its deepest commitment—to personal privacy—on its every page, and Donohue returns frequently to the privacy deprivations enabled by a "body of secret law."[36] Indeed, Donohue thoroughly and persuasively makes the case that the bulk collection programs—of both the metadata and content variety—endanger the privacy of every U.S. citizen, however unconnected one may be to terrorist activity.[37] She also convincingly argues that bulk collection orders amount to general warrants, and that the latter strike at the very heart of the Fourth Amendment from any reasonable interpretive perspective.[38]

Although *The Future of Foreign Intelligence* uses the phrase "secret law" just a single time,[39] its examples and analyses make plain that secret OLC and FISC opinions indeed can constitute secret law. The OLC and FISC opinions of which Donohue writes blessed programs that deeply impacted the privacy rights of millions of Americans. They did so partly through statutory interpretations that at best were highly contestable, while the opinions' secrecy made meaningful contestation impossible.

II. The Infrastructure of Secret Law and Tools to Dismantle It

Beyond its contributions to debates over secret law's meaning and significance, *The Future of Foreign Intelligence* helps to illuminate—and provides a jumping-off point to think further about—the factors that create and sustain secret law. Perhaps the most obvious factor in the case of FISC is the very scope of the court's opacity—with its proceedings off limits not only to the public, but to any parties beyond the government, and with no mechanism to appeal its pro-government rulings. Under such conditions, as Donohue notes, it is not surprising that the court would fall prey to mission creep, moving beyond its historically limited role as adjudicator of

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[35] *See generally* DONOHUE, *supra* note 4, at 54–74 (discussing content collection).

[36] *See* DONOHUE, *supra* note 4, at 146.

[37] *See* DONOHUE, *supra* note 4, at 39–45, 55–56, 72–74, 98–116.

[38] *See* DONOHUE, *supra* note 4, at 75–97.

[39] *See* DONOHUE, *supra* note 4, at 146.

case-by-case warrant requests to issue sweeping legal rulings.[40]

Another factor is the failure of congressional oversight. For example, Donohue observes that the congressional intelligence and judiciary committees, though informed of the government's bulk content collection program under a questionable interpretation of Section 702 of the Patriot Act, offered little pushback before the Snowden revelations brought the program to public attention.[41] More so, many members of Congress failed to take—and in some cases were actively prevented by Congressional leadership from taking—advantage of an opportunity to read a classified report about the program "more than a year before the Snowden revelations."[42] Donohue attributes Congress's failings mainly to a lack of political will, although she acknowledges that there are logistical barriers to congresspersons accessing and responding to classified information.[43]

Countless other factors play a role in creating and maintaining secret law. For example, I have written elsewhere of the support that secret law receives from actors in all three branches of government, and in public and academic discourse, who aggressively interpret the President's powers under Article II of the Constitution.[44]

Nonetheless, opponents of secret law are not without grounds for some optimism. Snowden's revelations and subsequent developments themselves amount to a case study in what Seth Kreimer has called "the ecology of transparency," whereby a loose chain of transparency agents—including leakers, freedom of information laws, "federal civil servants with integrity, internal watchdogs, reasonably open opportunities to publish and share information, and a set of civil society actors capable of pursuing prolonged campaigns for disclosure"—buttress one another and protect against the failure of any one point in the chain.[45] Together, such mechanisms pose a powerful challenge to regimes of secret law. Indeed, Snowden's leaks and the resulting publications sparked a variety of subsequent information releases, ranging from voluntary submissions to FOIA request responses to litigation-driven disclosures.[46]

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[40] DONOHUE, *supra* note 4, at 144–46; *see, e.g.*, Orin S. Kerr, *A Rule of Lenity for National Security Surveillance Law*, 100 VA. L. REV. 1513, 1513–14 (2014) (citing FISC's transformation into a "lawmaking court").

[41] DONOHUE, *supra* note 4, at 66–68.

[42] DONOHUE, *supra* note 4, at 66.

[43] DONOHUE, *supra* note 4, at 66–68.

[44] HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY 100–06 (2015).

[45] Seth Kreimer, *The Ecology of Transparency*, 10 U. PENN. J. CONST. L. 1011, 1017, 1075 (2008).

[46] *See*, GOITEIN, *supra* note 10, at 59; Yochai Benkler, *A Public Accountability Defense for National Security Leakers and Whistleblowers*, 8 HARV. L. & POL'Y REV. 281, 281 (2014); Rainey Reit-

Snowden's revelations and related disclosures also have generated calls for reform, both of surveillance practices themselves and of the factors that enable secret law. Such calls have come from a variety of sources including federal courts, a presidential review group, the Privacy and Civil Liberties Oversight Board, and the U.S. Congress.[47] Such calls also have come from engaged public intellectuals through vehicles like *The Future of Foreign Intelligence*.[48]

One prominent set of steps toward reform is contained in the USA Freedom Act, which became law in June 2015.[49] The Act "requires the release of a redacted or summarized version of all significant FISA Court opinions."[50] It also "require[s] the establishment of a panel of independent attorneys (. . . *amici* . . .) on whom the [FISC] can call to provide perspectives other than the government's."[51] Among the first amici appointed by FISC is the author of *The Future of Foreign Intelligence*, Laura Donohue.[52]

CONCLUSION

Donohue and others are quick to acknowledge that the reforms initiated by the USA Freedom Act are far from complete. For instance, the Act leaves it to executive branch officers to determine whether a FISC opinion is "significant" and thus must be made public in some form. Elizabeth Goitein of the Brennan Center for Justice observes that, "[t]here is no external check to prevent the executive branch from interpreting the term 'sig-

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man, *3 Years Later, the Snowden Leaks Have Changed How the World Sees NSA Surveillance*, ELECTRONIC FRONTIER FOUND. (June 5, 2016), https://perma.cc/B89V-2VDD.

[47] *See supra* note 46 and accompanying text; *see, e.g.*, President's Review Group Report, *supra* note 12; Privacy & Civil Liberties Oversight Board, *Report on the Telephone Records Program Conducted Under Section 215 of the USA Patriot Act and on the Operations of the Foreign Intelligence Surveillance Court* (Jan. 23, 2014), https://perma.cc/8SNR-HDHQ. *See generally*, ACLU v. Clapper, 785 F.3d 787, 826 (2d Cir. 2015) (discussing the Supreme Court's holding that the telephone metadata program exceeds the scope of what Congress intended under Section 215).

[48] Indeed, the final chapter of *The Future of Foreign Intelligence* is called "Reform." It contains a number of thoughtful suggestions, including revisions to the FISC and congressional intelligence committee appointment processes, and to other aspects of those bodies to enhance their independence from their intelligence community. DONOHUE, *supra* note 4, at 138–50.

[49] Uniting & Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015, Pub. L. No. 114–23, 129 Stat. 268.

[50] GOITEIN, *supra* note 10, at 25.

[51] GOITEIN, *supra* note 10, at 22.

[52] Cyrus Farivar, *America's Super-Secret Court Names Five Lawyers as Public Advocates*, ARS TECHNICA (Nov. 28, 2015), https://perma.cc/DW3U-R59R. An editor's note at the beginning of *The Future of Foreign Intelligence* notes that Donohue wrote the book "before the United States government granted her access to any classified information." DONOHUE, *supra* note 4, at xiii.

nificant' as creatively as it interpreted the term 'relevant.'"[53] The Act's amicus appointment provision, too, is quite modest. Donohue points out that, "[i]t has yet to be determined . . . how frequently amici will participate in questions before the court."[54]

The Act, like other actions and investigations undertaken in response to the Snowden revelations, is necessarily partial and imperfect. Such is the nature of all reform and all policy-making. Feedback and re-evaluation thus are crucial protectors of good policy-making, democratic accountability, and individual rights. Yet these protective mechanisms cannot be triggered when the laws themselves are secret. *The Future of Foreign Intelligence* does very important work by accessibly conveying a complex, once-secret body of surveillance law, explaining the costs of that body of law to personal privacy, and proposing thoughtful means to better reconcile intelligence needs with privacy and legal transparency going forward.

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[53] GOITEIN, *supra* note 10, at 59.

[54] DONOHUE, *supra* note 4, at 147; *see also* GOITEIN, *supra* note 10, at 22.

Remnants of Information Privacy in the Modern Surveillance State

LAWRENCE FRIEDMAN*

"Information is all, is it not?"[1]

Take as a given that we must, in the interest of national security, gather intelligence about potential foreign threats. As Laura Donohue observes on the first page of *The Future of Foreign Intelligence: Privacy and Surveillance in a Digital Age*, presidents have authorized foreign intelligence collection since the earliest days of the republic.[2] The question today is not whether to acquire foreign intelligence, but how to go about it. Part of the answer depends upon what is technologically and practically feasible, and part upon what is legally permissible. And the legal limits confound us: as Donohue explains, what national security demands—or, at least, what our elected leaders and the national security establishment often believe it demands—seems frequently to run counter to the Fourth Amendment's commitment to the protection of information privacy from random government snooping.

Indeed, the reality of foreign intelligence collection in the digital age is that the Fourth Amendment doctrine, as interpreted and applied by the courts, trails both operational needs and executive assurances about the breadth of the surveillance undertaken and its potential impact on privacy. To be sure, many Americans, even if confronted with the actual scope of the government's surveillance efforts—which may, as Donohue notes, capture personal information about many thousands of United States persons—likely would express a preference for security over privacy, as if the two values necessarily stood in opposition to one another. And many

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[1] Said to James Bond by the villainous character Ernst Stavro Blofeld in the film *Spectre*. SPECTRE (Eon Prods. 2015).

[2] LAURA DONOHUE, THE FUTURE OF FOREIGN INTELLIGENCE: PRIVACY AND SURVEILLANCE IN A DIGITAL AGE 1 (Oxford 2016).

likely would acknowledge that they trust executive department actors to conduct such surveillance responsibly. And even those who might question the basis for such trust likely would hold close the belief—notwithstanding the real possibility that they too blithely share all manner of information about themselves through electronic means—that inevitably it will be the details of someone else's life the government captures and exploits.

Of course, the framers of the Fourth Amendment—and the framers of the similar state constitutional provisions that preceded it—chose not to rely upon trust. Recall that agents of the Crown in pre-Revolutionary days employed general warrants to conduct searches of almost anyone or anything, and for almost any reason.[3] Having been the targets of these searches, the framers had few illusions about whose privacy the government was likely to invade, and why.[4] In this light, the information privacy protected by the Fourth Amendment can be understood to have a political dimension—as necessary to secure a space in which individuals may criticize their government's leaders and policies without fear of arbitrary invasion by that same government.[5] In that space, the people may compose and save their critical or dissenting thoughts in their "papers" and "effects"—today, their smartphones, personal digital assistants, and electronic notebooks. As Justice Lewis Powell observed long before the dawn of the internet, "private dissent, no less than open public discourse, is essential to our free society."[6]

In addition to its political dimension, the protection of privacy from arbitrary governmental invasion allows us, as Donohue puts it, "to pursue our own values, without others limiting our thoughts, actions, and perceptions, [which] is central to our ability to define ourselves. It matters for our personal and moral development."[7] The ability to define ourselves would be circumscribed if we lacked control over the information that formed the definition.[8] Surveillance marks a loss of control—that is its

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[3] *Id.* at 75.

[4] *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 266 (1990) (discussing hostility of former colonists to "general search warrants permitting the search of private houses, often to uncover papers that might be used to convict persons of libel"); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 287 (1984) (discussing the role of Fourth Amendment as "intended to protect the right of people to be secure by ensuring that governmental power would remain subject to judicial control").

[5] *See* DONOHUE, *supra* note 2, at 101 (arguing that privacy "is critical for our political engagement"); *see also* Thomas P. Crocker, *The Political Fourth Amendment*, 88 WASH. U. L. REV. 303, 311 (2010) (discussing the role of the Fourth Amendment in protecting political liberty).

[6] United States v. U.S. Dist. Court, 407 U.S. 297, 314 (1972).

[7] DONOHUE, *supra* note 2, at 101.

[8] *See* DONOHUE, *supra* note 2, at 102.

point—and the prospect of surveillance, Donohue argues, may cause individuals to "change their behavior in ways that hurt social interaction and the ability . . . to build strong relationships."[9]

In view of information privacy's importance, it would be passing strange simply to entrust its protection to the discretion of the executive branch. And yet, as Donohue contends in *The Future of Foreign Intelligence*, the Foreign Intelligence Surveillance Act (FISA)[10] effectively allows the government to capture and store the communications of U.S. persons while it is engaged in foreign intelligence surveillance.[11] Indeed, under rules put in place in the last days of the Obama administration, more than a dozen intelligence agencies may now have access to, and search directly, much of the raw data collected by the National Security Agency (NSA) under various surveillance programs.[12] The analysts at these agencies do not have to justify requests to access and search the raw data under any legal standard that reflects the requirements of the Fourth Amendment—no showing of individualized suspicion, no determination of need by a neutral and detached magistrate. None of these analysts are directly accountable to the people for their actions. We just have to trust that they are acting in good faith.

Congress, when it enacted FISA, simply did not contemplate the ubiquity of electronic communication, or that a great deal of information about U.S. persons would be scooped up through foreign intelligence surveillance.[13] Section 215 of FISA allows the government to collect "tangible things," which successive administrations have defined to include information about Americans in the control of such entities as telecommunications service providers (among others).[14] The information captured includes internet and telephony metadata—the information, Donohue correctly notes, that "provides the context for everything we do"[15]—and, sometimes, the contents of communications. Once acquired in the name of foreign intelligence gathering, much of the information may then be made available for use by U.S. law enforcement agencies—without those agencies having to comply with the Fourth Amendment, as they

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[9] DONOHUE, *supra* note 2, at 103.

[10] 50 U.S.C. § 1801 (2015).

[11] *See* DONOHUE, *supra* note 2, at 151–52.

[12] Charlie Savage, *N.S.A. Gets More Latitude to Share Intercepted Communications*, N.Y. TIMES (Jan. 12, 2017), https://perma.cc/94GB-3KY6.

[13] *See* BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR 222 (2008) (observing that "the communications and data infrastructure FISA sought to regulate no longer exists and the one that exists today was beyond the fathoming of legislators thirty years ago").

[14] *See* 50 U.S.C. § 1861 (2017).

[15] DONOHUE, *supra* note 2, at 39.

would if they sought this information on their own.[16]

The practice of foreign intelligence surveillance, in short, has evolved to escape ordinary Fourth Amendment analysis. Donohue contextualizes the problem by reference to the orders issued by the Foreign Intelligence Surveillance Court (FISC) that allow the bulk collection of metadata. These orders, she argues, are

> strikingly similar to the general warrants that caused the Founders concern. It would be difficult to imagine a *better* example of a general warrant, than the *one* order, issued by FISC, authorizing the collection of international Internet and telephone content. It names approximately 90,000 targets, in the process monitoring millions of Americans' communications. The order is not premised upon prior suspicion of wrongdoing. It does not identify a particular place to be searched. The program is so massive that the government admits it is impossible to state the number of citizens whose e-mails, telephone conversations, visual communications, and private documents are being monitored.[17]

What is to be done? Donohue urges changes to the way in which the FISC operates—for example, by giving that court an expert advisory panel, to "decrease [its] reliance on the intelligence agencies,"[18] and by rule changes that would allow for the possibility of adversarial argument and appeal from FISC orders, ultimately to the U.S. Supreme Court.[19] She suggests we need to restore the line separating national security information from information relating to criminal activity—a line undermined by the 2002 ruling by the Foreign Intelligence Surveillance Court of Review in *In re Sealed Case*.[20] Perhaps most importantly, she advocates for "a new constitutional rule of construction that acknowledges the deeper privacy interests involved."[21] At a minimum, she believes we need "a new Fourth Amendment test" that, among other things, "recognize[s] the rejection of general warrants that marked the Founding."[22]

Legislative reform would be welcome, and recent history shows it may be possible.[23] But there is a reason the framers sought to constitutionalize

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[16] *See* DONOHUE, *supra* note 2, at 74.

[17] DONOHUE, *supra* note 2, at 95.

[18] DONOHUE, *supra* note 2, at 144.

[19] *See* DONOHUE, *supra* note 2, at 145–46.

[20] *See generally* In re Sealed Case, 310 F.3d 717 (FISA Ct. Rev. 2002).

[21] DONOHUE, *supra* note 2, at 157–58.

[22] DONOHUE, *supra* note 2, at 157.

[23] *See* LAWRENCE FRIEDMAN, *National Security in the United States Through a Litigation Lens*, *in* ROUTLEDGE HANDBOOK OF DEMOCRACY AND SECURITY (forthcoming 2019) (discussing

the protection of information privacy. The strength of legislative oversight necessarily depends upon the seriousness with which those members of Congress assigned the responsibility go about their task. Though meaningful oversight may become a routine practice and expectation, motivated members of Congress can undermine even long-settled accommodations.[24] Foreign intelligence collection, moreover, is complicated and, of necessity, secret, which advantages the executive in its reports to members of Congress; one result is that policies designed and executed by the intelligence agencies gradually become effectively immune to the changes of direction often associated with the election of a new administration.[25]

The uncertainty of legislative oversight points to the importance of judicial enforcement of the privacy norms embedded in the Fourth Amendment, and it is difficult to disagree with Donohue's central conclusion that, to recalibrate the balance between security and privacy, we need a new and enforceable understanding of the Fourth Amendment's reach in the area of foreign intelligence collection. But such an understanding can only come from the U.S. Supreme Court—and it's likely not coming soon. There are at least two reasons why: first, the value of information privacy has been diminished over the past several decades, as the Supreme Court has favored governmental over individual interests when interpreting and applying the Fourth Amendment. Second, the Court's institutional deference to the political branches in matters touching on national security suggests the justices would be reluctant to risk the Court's institutional standing on privacy protection. I address each of these reasons in turn.

THE PROBLEM OF PRECEDENT

The Supreme Court's failure to understand or contextualize rapid developments in communications technology has effectively diminished

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congressional control over collection of telephony metadata).

[24] *Cf.* Lawrence Friedman, *The Ninth Justice*, NEW ENG. L. REV. FACULTY BLOG (Apr. 8, 2016), https://perma.cc/9BG8-97B8 (discussing the decision of Senate Republicans to ignore constitutional text and tradition by refusing to hold hearings on President's nominee for open U.S. Supreme Court seat).

[25] *See* Michael V. Hayden, *Donald Trump Is Undermining Intelligence Gathering*, N.Y. TIMES (Mar. 9, 2017), https://perma.cc/Q5VY-KHTQ (discussing apolitical professionalism of intelligence agency personnel); *see also* MICHAEL J. GLENNON, NATIONAL SECURITY AND DOUBLE GOVERNMENT 6 (2015) (explaining that control over national security policy in the United States lies with the network of "several hundred executive officials who sit atop the military, intelligence, diplomatic, and law enforcement departments and agencies that have as their mission the protection of America's . . . security").

the constitutional scope of information privacy. The weight of the resulting precedent has, as one commentator observed, put privacy "on life support,"[26] a condition that is merely the logical extension of cases decided long before the digital connectivity we enjoy today became commonplace. For example, the reasonable expectation of privacy test—used by courts to determine whether an individual has any protectable privacy interest under the Fourth Amendment—and the reasonableness test—used by courts to determine the validity of a search (assuming the existence of a protectable privacy interest)—have created doctrinal obstacles to the realization of the reforms for which Donohue advocates in *The Future of Foreign Intelligence.*

Consider, first, the effect of the third-party doctrine on the reasonable expectation of privacy test. This doctrine, developed by the Supreme Court in the late 1970s, holds that individuals have no reasonable expectation of privacy in information they voluntarily transmit to third parties, like financial institutions and telephone service providers.[27] If you have no continuing expectation of privacy in information you disclosed to someone else, that information will no longer be considered protected from acquisition by the government under the Fourth Amendment.

As Donohue notes, in the digital age the third-party doctrine effectively renders unprotected, for Fourth Amendment purposes, much of the information about our lives that we routinely create and share through various digital platforms.[28] In *American Civil Liberties Union v. Clapper*—a challenge to the NSA's collection of telephony metadata in the service of foreign intelligence acquisition—the District Court recognized that this information, "[i]f plumbed, . . . can reveal a rich profile of every individual as well as a comprehensive record of people's associations with one another."[29] The Court nonetheless concluded that, under the third-party doctrine, the voluntary disclosure of the information that constitutes metadata eliminates any reasonable expectation of privacy in it.[30] The third-party calculus does not change even when the search concerns thousands of individuals; as the FISC has reasoned, when "one individual

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[26] Mark R. Brown, *Foreword to the Sullivan Lecture Essay: Is Privacy on Life Support?*, 44 CAP. U. L. REV. 671, 675 (2016).

[27] *See* United States v. Miller, 425 U.S. 435, 442–43 (1976) (bank records); Smith v. Maryland, 442 U.S. 735, 744–46 (1979) (information provided to telephone service providers).

[28] DONOHUE, *supra* note 2, at 120–21; *see also* Alex Kozinksi & Eric S. Nguyen, *Has Technology Killed the Fourth Amendment?*, 2011–2012 CATO SUP. CT. REV. 15, 29 (observing that, "[i]f speaking to friends, putting money in a bank account and making telephone calls routed through a phone company waive the privacy of information so disclosed, then very little indeed can remain private").

[29] ACLU v. Clapper, 959 F. Supp. 2d 724, 730 (S.D.N.Y. 2013).

[30] *Id.* at 752.

does not have a Fourth Amendment interest, grouping together a large number of similarly-situated individuals cannot result in a Fourth Amendment interest springing into existence *ex nihilo*."[31]

"These analyses," Donohue contends, "turn a blind eye to the ways in which the privacy interests" affected by the use of the technology available when the courts adopted the third-party doctrine "have changed as technology has advanced and new analytical tools have come into being. The interests that the Court confronted in the 1970s are different than those that characterize third-party information today." Moreover, today—unlike in the pre-digital days, when law enforcement sought information disclosed to a third party by a particular person of interest—the bulk information collection programs are not predicated on the suspicion that even one of the many thousands of individuals whose information is captured—possibly you, me, or someone we know—was "engaged in [any] wrongdoing."[32]

As Donohue urges, now is the time to reconsider the third-party doctrine.[33] At least one member of the Supreme Court agrees: in her concurring opinion in *United States v. Jones*, the case involving the constitutionality of law enforcement attaching a GPS tracking device to an automobile, Justice Sonya Sotomayor ventured that "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties[.]" Further, she declined, in the circumstances of the case, to assume "that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection."[34]

Of course, just because commentators have concluded the premises underlying the third-party doctrine should be revisited, and just because one Justice of the Supreme Court appears to agree, does not mean change in respect to foreign intelligence surveillance is imminent. *Clapper* provided an opportunity to reconsider the doctrine in the foreign intelligence context, but in overturning the district court's determination that the government's bulk metadata collection program was legal, the Second Circuit Court of Appeals ruled on statutory, not constitutional grounds.[35] More recently, in *Carpenter v. United States*, the Supreme Court held that the third-party doctrine does not apply to cell site location data, because

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[31] In re FBI, No. BR 13-109, 2013 WL 5741573, at *2 (FISC Aug. 29, 2013).

[32] DONOHUE, *supra* note 2, at 122.

[33] *See* DONOHUE, *supra* note 2, at 123–24; *see also* Lawrence Friedman, Commonwealth v. Augustine *and the Future of the Third-Party Doctrine*, 41 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 271, 283–84 (2015).

[34] United States v. Jones, 565 U.S. 400, 417–18 (2012) (Sotomayor, J., concurring).

[35] *See* ACLU v. Clapper, 785 F.3d 787, 813 (2d Cir. 2015).

individuals have a reasonable expectation of privacy in this information.[36] The Court notably confined the reach of this holding, however, to the "rare case" in which the quantity and quality of the information conveyed to a third party places it beyond the rationale in *Smith*.[37]

Unless and until the Court specifically relies upon the reasoning of *Carpenter* in the national security context, the government likely will continue to argue that individuals have no reasonable expectation of privacy in information incidentally and routinely captured through foreign intelligence surveillance—notwithstanding that, with this information, the most intimate details of many individuals' lives could be mapped.

Even assuming the Court extended *Carpenter* to protect information shared through modern telecommunicative means, still the collection of information pursuant to § 215 of FISA could be justified and constitutional under the so-called "special needs" exception to the Fourth Amendment's requirements of probable cause and a warrant. This exception allows certain governmental searches absent any quantum of individualized suspicion. The Supreme Court adopted the special needs exception in response to perceived governmental interests in ensuring human health and safety in certain contexts—public policy goals that the Court distinguished from ordinary law enforcement interests.[38] The classic example of a special need is the sobriety checkpoint. The checkpoint illustrates the signature feature of the exception: it applies in situations in which the government seeks to learn just one piece of information about many individuals engaged in a particular activity—say, whether any of them, while behind the wheel of an automobile, has been drinking alcohol in a way that might compromise their safety, or the public's—and the immediacy of the governmental interest would be thwarted by adherence to the warrant requirement.[39]

A 2002 decision of the Foreign Intelligence Surveillance Court of

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[36] 138 S.Ct. 2206 (2018).

[37] *Id.*

[38] *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 620 (1989) (holding that the government interest "in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison" presents "'special needs' beyond normal law enforcement" (quotation omitted)).

[39] *See* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (holding the checkpoint program consistent with Fourth Amendment given "the State's interest in preventing drunken driving, the extent to which [the] system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped"); *see also* City of Indianapolis v. Edmond, 531 U.S. 32, 41–42 (2000) (holding unconstitutional a checkpoint program designed to interdict illegal narcotics, a goal indistinguishable from efforts "to uncover evidence of ordinary criminal wrongdoing").

Review (the FISCR)—that Court's first published decision—suggested that the Fourth Amendment exempts from the warrant requirement foreign intelligence surveillance.[40] Then, in a 2008 decision, the FISCR concluded the special needs exception justified a program requiring communications service providers to assist the government in foreign intelligence acquisition related to individuals outside the United States, including U.S. persons.[41]

Donohue notes that the special needs exception functions in practice to authorize limited general warrants—limited, that is, by the circumstances justifying the particular search, which must be distinct from ordinary law enforcement; and by the scope of the invasion of privacy, which must be minimal.[42] Given these parameters—and accepting for the moment the constitutionality of the special needs exception—it is not immediately obvious that the exception applies to any kind of bulk data collection program given the quantity and detail of the information these programs collect.[43] Indeed, the FISCR concluded the exception applies despite the fact that the pieces of information acquired by the government, when assembled, could very nearly describe a person's entire life—with whom she most often spoke, where she lived, when and where she traveled, and what she purchased. A record of our days can be constructed from metadata.[44] In another context, the government will use metadata as the basis for targeting drone strikes.[45]

At bottom, doctrinal developments like the third-party doctrine and the special needs exception not only fail to reflect accurately the Fourth Amendment's animating spirit, they cannot be confined to the criminal context: Fourth Amendment law is transsubstantive, "equally [applicable] to suspected drug dealers and suspected terrorists."[46] Thus, the diminishment of reasonable expectations of privacy and development of exceptions to the warrant requirement in criminal cases may be deployed by the government as it defends the current foreign intelligence surveillance regime and its substantial domestic component.

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[40] *In re* Sealed Case, 310 F.3d 717, 719–20 (FISA Ct. Rev. 2002).

[41] *In re* Directives [Redacted] Pursuant to Section 105b of the Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1006, 1011 (FISA Ct. Rev. 2008).

[42] *See* DONOHUE, *supra* note 2, at 145–46.

[43] *See* OWEN FISS, *Warrantless Wiretapping, in* A WAR LIKE NO OTHER 251 (Trevor Sutton ed., 2015) (arguing that special FISA wiretaps do not satisfy the conditions necessary for a legitimate special need).

[44] *See id.* at 39–40.

[45] David Cole, *'We Kill People Based on Metadata'*, NYR DAILY (May 10, 2014), https://perma.cc/KR32-GYFJ (quoting General Michael Hayden, former director of the CIA and NSA).

[46] William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2140 (2002).

And yet: rules like the third-party doctrine and special needs exception streamline the application of the Fourth Amendment in the lower courts, by deterring both a contextual approach to expectations of privacy in the digital age and more probing explorations of the reasonableness of high-yield searches of electronic communications conducted without individualized suspicion. Absent these doctrines, many lower courts likely would deploy a case-by-case approach, which could lead, potentially, to contradictory judicial orders, or orders that undermine legitimate law enforcement—and foreign intelligence surveillance—efforts. It is not too much to say that the influence of the precedent cases under the third-party doctrine and special needs exception is most keenly felt in the lower courts, where the challenges to various aspects of FISA orders inevitably have and for the most part will continue to reside.

To be sure, as against the influence of precedent, there is the argument that privacy protections the Supreme Court understands the Fourth Amendment to encompass may wax and wane as the times dictate.[47] Just as lower crime rates may lead courts to reject the government's privacy-diminishing arguments in criminal cases, a decrease in the threat of foreign-based terrorism may do the same in cases involving foreign intelligence surveillance. But this is not really how doctrinal development works in practice. Prosecutors in state and federal courts regularly press judges to accept arguments that will effectively shrink reasonable expectations of privacy or expand the special needs exception. Should a court disagree with the government, the status quo will prevail—in other words, there will not be a net increase in the amount of information privacy each of us enjoys, just no further decrease. And the government will be back another day to try again, armed with new arguments—and, in the context of foreign intelligence surveillance, with the traditional deference the courts have shown the policymaking of the political departments.

THE PROBLEM OF DEFERENCE

The second reason why we should not expect the Supreme Court to embrace an understanding of the Fourth Amendment that prizes the individual's interest in information privacy, at least when it comes to foreign intelligence surveillance, relates to the deference the Court traditionally has shown the political branches when it comes to national security. The FISCR may have been wrong, as Donohue maintains, to recognize a foreign intelligence exception to the Fourth Amendment's

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[47] *See id.* at 2154–55.

warrant requirement,[48] but that doesn't mean the Supreme Court would not agree with its decision, or with the FISCR's general understanding of the Fourth Amendment. Indeed, history demonstrates that the judiciary may lack the institutional capacity to enforce constitutional information privacy norms in the national security context—a context in which judicial decision-making often seems to be driven by a kind of institutional anxiety.

Supreme Court deference to the political branches in the national security context has been well documented. As the legal scholar David Rudenstine has concluded, "the Court has been excessively deferential to the executive branch of government in legal disputes that the executive claims implicate national security[.]"[49] He emphasizes the excessive nature of this deference, going on to catalogue the array of cases in which such deference has prevailed,

> including such matters as challenges to surveillance activities, restrictions on expression, infringements on political associations, kidnapping and torture policies, preventative detention practices, policies that discriminate on the basis of religion or ethnicity that result in detention and harsh treatment, or secret Army experiments that cause irreparable harm to members of the armed services.[50]

Consider a couple of federal rulings in post-September 11 cases in which the government asserted a national security rationale to justify rules that impinged upon legitimate First Amendment interests. In *North Jersey Media Group v. Ashcroft*,[51] the plaintiffs objected on First Amendment grounds to the closing of certain immigration hearings deemed to be of special interest by the Department of Justice. The U.S. Court of Appeals for the Third Circuit accepted the government's argument that immigration hearings were not traditionally open proceedings and that the potentially negative consequences of open hearings trumped the right of access by the press.[52] The court claimed to recognize "the dangers presented by deference to the executive branch when constitutional liberties are at stake, especially in times of national crisis, when those liberties are likely in greatest jeopardy," but, on balance, it could not agree that openness played "a positive role in special interest deportation hearings at a time when our nation [was] faced with threats of such profound and unknown

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[48] *See* DONOHUE, *supra* note 2, at 145 (observing that "[t]he U.S. Supreme Court has *never* recognized such an exception" (emphasis added)).

[49] DAVID RUDENSTINE, THE AGE OF DEFERENCE: THE SUPREME COURT, NATIONAL SECURITY, AND THE CONSTITUTIONAL ORDER 3 (2016).

[50] *Id.*

[51] 308 F.3d 198 (3d Cir. 2002).

[52] *See id.* at 225.

dimension."[53]

More recently, in *Holder v. Humanitarian Law Project*,[54] the Supreme Court ruled against the Humanitarian Law Project, which sought to assist certain groups to resolve their conflicts peacefully—including groups that the United States regarded as terrorist organizations. The Court agreed such assistance qualified as speech for First Amendment purposes, but nonetheless concluded that it ran afoul of the compelling governmental interest in preventing material aid to terrorist organizations, because such assistance could work to "legitimate" terrorist organizations, thereby freeing up resources for terrorist activities.[55] Writing for the majority, Chief Justice Roberts noted that, in respect to the Humanitarian Law Project's work, "Congress and the Executive [were] uniquely positioned to make principled distinctions between activities that will further terrorist conduct and undermine United States foreign policy, and those that will not."[56]

The Roberts Court has a well-earned reputation for its expansive view of freedom of speech.[57] If deference prevails in cases in which free speech interests run up against national security concerns, it seems unlikely that privacy interests will fare better in similar circumstances. Notwithstanding Justice Sandra Day O'Connor's admonition in *Hamdi v. Rumsfeld* that a state of war is not a blank check,[58] it's worth remembering that the more representative judicial treatment of national security policy is *Korematsu v. United States*,[59] a case in which a majority of all-too-human judges could not muster the will to challenge the constitutionally suspect national security claims of the political departments.[60]

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[53] *Id.* at 220. The U.S. Court of Appeals for the Sixth Circuit reached the opposite conclusion on similar facts in Detroit Free Press v. Ashcroft, 303 F.3d 681, 684 (6th Cir. 2002).

[54] Holder v. Humanitarian Law Project, 561 U.S. 1, 2 (2010).

[55] *Id.* at 36–37.

[56] *Id.* at 35.

[57] *See* MARCIA COYLE, THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION 324 (2013) (noting the First Amendment is "an area of law fast becoming identified with the Roberts Court").

[58] 542 U.S. 507, 536 (2004) (plurality).

[59] 323 U.S. 214 (1944).

[60] Writing for the majority in *Korematsu*, Justice Hugo Black held the exclusion order aimed at Japanese-American citizens constitutional because the nation was at war with Japan,

> because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of

For the better part of a century, justices of the Supreme Court have believed—and acted on the belief—that deference is necessary in matters touching national security. Rudenstine suggests a host of reasons that might explain such deference. It may flow, for example, from the view that the Court lacks the institutional competence "to assess matters implicating national security,"[61] or the view that "the judicial process is totally inappropriate for making decisions that affect national security operations,"[62] or the view that our "governing scheme" has not vested the Court "with responsibility over such matters, or because [the justices] . . . resist having any responsibility for a decision affecting the nation's security."[63] All of these reasons also may apply, and with greater force, to the lower court judges who hear cases in which national security policy is in tension with individual rights.

Regardless of the reasons underlying the deference, the result is the same: "the legal doctrines that insulate the executive in cases implicating national security[,]" Rudenstine explains, "have expanded incrementally over many decades, gathering precedent after precedent in support of the mindset that in turn further insulates the mindset from a reexamination of its premises."[64] That mindset stands as a substantial obstacle, in the foreign intelligence surveillance context, to federal judicial reorientation of the Fourth Amendment around the privacy values the Framers sought to protect.

PROTECTING THE REMNANTS OF PRIVACY

So here we are: Fourth Amendment rules developed in the criminal context, like the third-party doctrine and the special needs exception, together with the Court's traditional deference to the political branches in national security matters, have led to limits on foreign intelligence surveillance that, in Donohue's view, are looser than the Fourth Amendment demands. Her suggested remedy is judicial adoption of Fourth Amendment doctrinal analyses informed by the history of opposition to general warrants that she recounts in *The Future of Foreign Intelligence*. For the reasons I have explained here, it seems unlikely that the federal courts will be the wellspring of such an effort.

> disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short.

Id. at 223–24.

[61] RUDENSTINE, *supra* note 49, at 294.

[62] RUDENSTINE, *supra* note 49, at 298.

[63] RUDENSTINE, *supra* note 49, at 298.

[64] RUDENSTINE, *supra* note 49, at 307.

It is possible, though, that advocates might gain some traction in state courts. Freed of the obligation to follow federal precedent when interpreting their own constitutions, state courts in criminal cases can consider in a different light the balance between privacy and security with which the federal courts have struggled. Indeed, many state courts have sought to address the meaning of the protection against unreasonable searches and seizures in cases involving telecommunications technologies new and old.[65] Such efforts acknowledge the need to protect from arbitrary government intrusion the interest in information privacy that the framers understood to be crucial to the exercise of liberty.

State constitutional litigation has provided an alternative path to securing individual rights for decades.[66] But with the goal in mind of influencing the U.S. Supreme Court's understanding of the scope of the protection against unreasonable searches and seizures, state constitutional decisions valuing information privacy as against government action cannot be seen merely as ends unto themselves. Rather, state decisions exploring new doctrinal approaches should be seen as supporting historical, philosophical and practical arguments about the importance of information privacy—arguments with which the Supreme Court ultimately must reckon. Consider, in this light, same-sex marriage litigation in state courts: after less than a decade, there existed a sufficient mass of state precedent exploring the ways in which same-sex marriage prohibitions violated constitutional equality norms that a U.S. Supreme Court consideration of the issue under the Fourteenth Amendment had become inevitable.[67]

At best, in other words, state constitutional litigation will provide advocates a foothold, a body of decisions on the value of information privacy of sufficient weight that it cannot be ignored by the Supreme Court—whether in a criminal case testing the limits of the government's ability to investigate or, should a plaintiff be found to have standing, a case challenging the scope of the government's foreign intelligence surveillance regime.[68] And in the cases in which it must confront state court interpretations of parallel constitutional provisions, the Supreme Court

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[65] *See, e.g.*, Commonwealth v. Augustine, 4 N.E.3d 846, 850 (Mass. 2014) (noting that the state's constitution protects an individual's reasonable expectation of privacy in cellular telephone cell location data); State v. Hunt, 450 A.2d 952, 957 (N.J. 1982) (noting that the state's constitution protects an individual's reasonable expectation of privacy in telephone numbers dialed).

[66] *See* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 114–15 (2009) (discussing the "new judicial federalism").

[67] *See id.* at 283 (discussing state constitutional precursors to federal litigation over the constitutionality of same-sex marriage).

[68] *See* Clapper v. Amnesty International, 568 U.S. 398, 420 (2013) (holding plaintiff lacked standing to challenge certain provisions of FISA).

will at least be pressed to explain why the Fourth Amendment should be understood to provide citizens less protection than many of its state counterparts.

Donohue is right—we need a new approach to implementing the Fourth Amendment, one that better reflects its animating purposes.[69] Many state high courts have already begun to develop alternative ways of understanding the constitutional protection against unreasonable searches and seizures. These decisions may help to persuade the U.S. Supreme Court that judicially-enforceable limits on the federal government's ability to abridge individual privacy interests are as necessary today as they were when the framers sought to put an end to general warrants.

[69] DONOHUE, *supra* note 2, at 157.

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COMMENT

Augustine and *Estabrook*: Defying the Third-Party Doctrine

*Michael Locke**

INTRODUCTION

In recent years, the world has seen the emergence of many new devices that allow government agencies to monitor a person's thoughts, actions, and movements.[1] The Federal Government flies surveillance drones across the United States[2] while also lending these drones to state law enforcement.[3] GPS tracking devices can generate a precise and detailed picture of an individual's public movements.[4] E-mail providers scan accounts for government agencies.[5]

However, perhaps the piece of technology that has become the greatest source for information about an individual is the cellular phone.[6] Even the

* Juris Doctor, *Magna cum* laude, New England Law | Boston (2018). B.A., *Magna cum laude*, Legal Studies and Political Science, University of Massachusetts Amherst (2015). I would like to thank my parents, Michael and Therese, for without their support this article would not have been possible. I would also like to thank Alexa, for without her the journey of law school would have felt quite a bit longer. I also would like to thank all my other family members and friends who I have relied upon throughout this process, whether they know it or not. Finally, I would like to thank the students of New England Law Review for their hard work in helping me make this article what it is today.

[1] United States v. Jones, 565 U.S. 400, 428 (2012) (Alito, J., concurring).

[2] Conor Friedersdorf, *The Rapid Rise of Federal Surveillance Drones Over America*, THE ATLANTIC (Mar. 10, 2016), https://perma.cc/HL39-E92P.

[3] Jason Koebler, *North Dakota Man Sentenced to Jail in Controversial Drone-Arrest Case*, U.S. NEWS (Jan. 15, 2014, 11:55 AM), https://perma.cc/6GMG-8PPV.

[4] *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring).

[5] Elizabeth Weise & Mike Snider, *Yahoo's Massive, Hidden Email Search Would be First of its Kind, If True*, USA TODAY (Oct. 4, 2016, 10:03 PM), https://perma.cc/RRD6-39U5.

[6] *See* Riley v. California, 134 S. Ct. 2473, 2491 (2014) ("[A] cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not

most basic of cell phones can hold photographs, text messages, internet browsing history, a phone book, and more.[7] Not only do cell phones hold such personal information, they also send out signals which allow law enforcement agencies to track their location.[8] Cell phones transmit three main types of data which can be tracked: GPS data,[9] registration cell site location information ("CSLI")[10] and telephone CSLI.[11]

GPS phone data is no different than the GPS data given out by a car's built in GPS; the phone transmits a signal to and from a series of satellites to pinpoint the location of the device.[12] CSLI data, rather than being transmitted to and from satellites, is transferred between a cell phone and a cell phone tower.[13] Cell phones communicate with the nearest cell phone tower, and once that communication is made, it is possible to get a rough estimate of the cell phone's location in relation to a cell tower.[14] Registration CSLI data and telephone CSLI differ in the manner in which the data is sent to the cell phone tower.[15] Registration CSLI is sent to a cell phone tower every seven seconds while the phone is powered on.[16] This happens regardless of whether the phone is being used or changes location.[17] Telephone CSLI is sent to a cell phone tower only when a telephone call is made or received by the telephone.[18] Telephone CSLI is the form of data that was obtained by Massachusetts law enforcement agents in both *Commonwealth v. Augustine* and *Commonwealth v. Estabrook* without a search warrant.[19]

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only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in any form—unless the phone is." (emphasis in original)).

[7] *Id.* at 2489.

[8] *See* Courtney E. Walsh, *Surveillance Technology and the Loss of Something A Lot Like Privacy: An Examination of the "Mosaic Theory" and the Limits of the Fourth Amendment*, 24 ST. THOMAS L. REV. 169, 239 (2012).

[9] *Id.* at 239–40.

[10] Commonwealth v. Augustine, 4 N.E.3d 846, 868 (2014) (Gants, J., with Cordy, J., dissenting).

[11] *Id.*

[12] John Patrick Pullen, *Here's How GPS Actually Works*, TIME (Aug. 8, 2015, 10:14 AM EST), https://perma.cc/57SC-3LSN.

[13] Walsh, *supra* note 8, at 239.

[14] *Id.*

[15] *Augustine*, 4 N.E.3d at 86 (Gants, J., with Cordy, J., dissenting).

[16] *Id.*

[17] Walsh, *supra* note 8, at 239.

[18] *Augustine*, 4 N.E.3d at 868 (Gants, J., with Cordy, J., dissenting).

[19] Commonwealth v. Estabrook, 38 N.E.3d 231, 234 n.2 (2015); *Augustine*, 4 N.E.3d at 870 (Gants, J., with Cordy, J., dissenting).

This Comment addresses the challenge that is faced by courts in establishing a reasonable expectation of privacy in telephone CSLI data and argues that the Massachusetts Supreme Judicial Court's ("SJC") creation in *Commonwealth v. Estabrook* of a six hour window in which an individual has a reasonable expectation of privacy in telephone CSLI data is arbitrary. Further, the SJC improperly decided in *Augustine* that telephone CSLI data is offered extra protection under Article Fourteen of the Massachusetts Declaration of Rights because telephone CSLI data falls under the Third-Party Doctrine, and there is no precedent in which extended Article Fourteen protection has applied to information voluntarily divulged to a third-party. This Comment also argues the SJC improperly compared telephone CSLI data to GPS surveillance and failed to adequately distinguish telephone CSLI data from registration CSLI data.

Part I of this Comment details the development of the Third-Party Doctrine in both federal and Massachusetts Courts, how Congress has already created a requirement for law enforcement before CSLI data must be divulged, and how federal courts have dealt with the issue. Part II discusses *Estabrook*, focusing on the six hour window created by the Court after which law enforcement is required to obtain a warrant when seeking CSLI data from a telecommunications provider. Part III critiques the SJC's determination that Article Fourteen affords extra protection to telephone CSLI data collected for more than six hours. Part IV of this Comment argues that under both Article Fourteen of the Massachusetts Declaration of Rights and the Fourth Amendment an individual does not have a reasonable expectation of privacy in telephone CSLI data, as the Third-Party Doctrine controls. Part V argues that even if the Third-Party Doctrine does not apply to CSLI data, an individual still does not have a reasonable expectation in telephone CSLI data. Finally, Part VI argues that the Massachusetts Legislature is better equipped to handle technological privacy concerns due to the quickly evolving nature of surveillance technologies.

I. Background

A. *Federal Doctrines, Decisions, and Statutes*

1. The Fourth Amendment

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons

or things to be seized.[20]

Searches which are conducted without a warrant are *per se* unreasonable, subject to certain exceptions.[21] In regard to what constitutes an "unreasonable" search or seizure, the Supreme Court has adopted a two-pronged test from Justice Harlan's concurrence in *Katz v. United States*.[22] The individual claiming that a search or seizure violated the Fourth Amendment must have exhibited an actual, subjective expectation of privacy, and society as a whole must be prepared to recognize that expectation of privacy as reasonable.[23] The Court has applied this test to a variety of government searches involving technology, including searches using planes,[24] helicopters,[25] beepers,[26] and thermal imaging devices.[27]

2. The Third-Party Doctrine

The Third-Party Doctrine holds that individuals have no reasonable expectation of privacy under the Fourth Amendment when it comes to information they voluntarily convey to third-parties.[28] The doctrine has its roots in two cases, *United States v. Miller*[29] and *United States v. Smith*.[30] In *Miller*, the defendant was charged with possessing an unregistered still after police discovered a distillery at a warehouse rented to the defendant.[31] To support the case against the defendant, agents from the Alcohol, Tobacco, and Firearms Bureau issued subpoenas to two different banks, *sans* warrant, seeking the bank records of the defendant.[32] After the records were produced, the defendant filed a motion to suppress, arguing that the subpoena violated his Fourth Amendment right against unreasonable searches and seizures.[33] The district court denied the motion,

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[20] U.S. CONST. amend. IV.

[21] Katz v. United States, 389 U.S. 347, 357 (1967).

[22] *Id.* at 361 (Harlan, J., concurring).

[23] *Id.*

[24] California v. Ciraolo, 476 U.S. 207, 211 (1986).

[25] *See* Florida v. Riley, 488 U.S. 445, 449 (1989).

[26] United States v. Knotts, 460 U.S. 276, 281 (1983).

[27] Kyllo v. United States, 533 U.S. 27, 34 (2001).

[28] Lawrence Friedman, *Commonwealth v. Augustine and the Future of the Third-Party Doctrine*, 41 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 271, 272 (2015).

[29] *See generally* United States v. Miller, 425 U.S. 435 (1976).

[30] *See generally* Smith v. Maryland, 442 U.S. 735 (1979).

[31] *Miller*, 425 U.S. at 436–37.

[32] *Id.* at 437.

[33] *Id.* at 439; *see* Boyd v. United States, 116 U.S. 616, 622 (1886) (describing the prohibition against "compulsory production of a man's private papers to establish a criminal charge against him").

but the court of appeals reversed.[34] The Supreme Court stated that the court of appeals incorrectly assumed that the defendant had a Fourth Amendment interest in the bank records, that bank records are not "private papers," and that the Fourth Amendment does not prevent the government from obtaining information about an individual which has been revealed to a third-party.[35]

In *Smith*, a telephone company, at the request of police, installed a pen register at its central offices to record the numbers dialed from the defendant's phone, who was a suspect in a robbery.[36] The next day, the register revealed that the defendant placed a call to the victim's home, and using this information (along with other evidence) police obtained a warrant to search the defendant's home, where evidence was found which led to his arrest.[37] At trial the defendant moved to suppress all evidence which was found as a result of the information gleaned from the pen register, arguing that the warrantless installation of the register violated the Fourth Amendment.[38] The motion was denied by the district court and the decision was affirmed by the court of appeals.[39]

The Supreme Court upheld the decision, stating that it was doubtful that people in general have any actual expectation of privacy in the numbers they dial into a telephone.[40] The Supreme Court reasoned that all telephone users must realize that they give the numbers they dial to the telephone company because it is the telephone company that connects them to the phone that they are attempting to get in contact with.[41] Although the Supreme Court noted that most people may be oblivious to every function of a pen register, it was presumed that the average person has awareness of its use to aid in the identification of persons making a call.[42] Additionally, society was not prepared to recognize such an expectation of privacy as reasonable because a person has no legitimate expectation of privacy in information they voluntarily turn over to third-

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[34] *Miller*, 425 U.S. at 439.

[35] *Id.* at 440–44 ("The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government.").

[36] Smith v. Maryland, 442 U.S. 735, 737 (1979).

[37] *Id.* After the robbery, the defendant had harassed the victim with telephone calls, even telling the victim to look outside her house as he drove by. Based upon her description of the car and the driver, police had identified the defendant as a suspect before the pen register was installed.

[38] *Id.*

[39] *Id.* at 737–38.

[40] *Id.* at 742.

[41] *Smith*, 442 U.S. at 742.

[42] *Id.*

parties.[43]

The Third-Party Doctrine has often come under attack from privacy advocates, who argue that modern day technologies have rendered the doctrine obsolete.[44] However, some defenders of the doctrine do exist.[45]

3. § 2703 of the Stored Communications Act of 1986

Section 2703 of the Stored Communications Act gives governmental entities the ability to require a provider of electronic communication services, or remote computing services to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the content of communications), if the government entity obtains a court order for such disclosure.[46] The statute further defines the requirements under which a court may issue such an order—namely, when the court is presented with "specific and articulable facts showing that there are reasonable grounds to believe that the contents of [the communication] are relevant and material to the ongoing investigation."[47] This order is "something like a mix between a subpoena and a search warrant," requiring more evidence than the former but less evidence than the latter.[48]

4. CSLI Cases in Federal Appellate Courts

Several federal appellate courts have decided cases which involved a Fourth Amendment claim over CSLI data, and all have decided that telephone CSLI data is not protected by the Fourth Amendment.[49] Each circuit determined that an individual has no expectation of privacy over

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[43] *Id.* at 743–44.

[44] *See e.g.*, Lucas Issacharoff & Kyle Wirshba, *Restoring Reason to the Third Party Doctrine*, 100 MINN. L. REV. 985, 993 (2016) (discussing ways to adapt the Third-Party Doctrine to the modern age); David A. Harris, *Riley v. California and the Beginning of the End for the Third-Party Search Doctrine*, 18 U. PA. J. CONST. L. 895, 898, 915–21 (2016) (speculating that the Third-Party Doctrine may soon be abandoned); Saby Ghoshray, *Privacy Distortion Rationale for Reinterpreting the Third-Party Doctrine of the Fourth Amendment*, 13 FLA. COASTAL L. REV. 33, 67–69 (2011) (arguing that the Third-Party Doctrine needs to be reinterpreted in the modern age).

[45] *See* Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 564 (2009) (arguing that the Doctrine can adapt to the digital age).

[46] 18 U.S.C. § 2703(c) (2009).

[47] 18 U.S.C. § 2703(d) (2009).

[48] Orin S. Kerr, *A User's Guide to the Stored Communications Act, and A Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1219 (2004).

[49] United States v. Carpenter, 819 F.3d 880, 890 (6th Cir. 2016); United States v. Graham, 824 F.3d 421, 430 (4th Cir. 2016); United States v. Davis, 785 F.3d 498, 511 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 479 (2015); In re United States for Historical Cell Site Data, 724 F.3d 600, 613 (5th Cir. 2013).

telephone CSLI data because the CSLI data in question was voluntarily given up to the telecommunications company, and therefore the Third-Party Doctrine controlled.[50]

B. *Massachusetts Doctrines and Decisions*

1. Article Fourteen of the Massachusetts Constitution

Article Fourteen is the state analog to the Fourth Amendment, giving each subject the right to be secure from unreasonable searches and seizures of one's person, house, papers, and possessions.[51] The requirements of establishing an expectation of privacy under Article Fourteen are the same as under the Fourth Amendment—a subjective expectation that society would recognize as reasonable.[52]

2. Massachusetts Cases Involving the Third-Party Doctrine

The Massachusetts Supreme Judicial Court has essentially tracked Fourth Amendment jurisprudence when applying the Third-Party Doctrine.[53] The SJC "tacitly embraced" the doctrine in *District Attorney for Plymouth Dist. v. New England Tel. & Tel. Co.*[54] In that case, the SJC stated that although Article Fourteen may give more privacy protections to individuals than the Fourth Amendment, the facts of this case were not sufficient for the Court to come to a conclusion on the Third-Party doctrine issue.[55]

Soon after, the SJC tackled Fourth Amendment and Article Fourteen concerns with the application of cross frame trap units on telephones by a telephone company in *Dist. Attorney for Plymouth Dist. v. Coffey*.[56] The Court stated that there is no "search" in the constitutional sense when the State is not involved in a private search by a third-party, even when the evidence

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[50] *Davis*, 785 F.3d at 511; *In re United States for Historical Cell Site Data*, 724 F.3d at 613; *see Carpenter*, 819 F.3d at 889–90; *Graham*, 824 F.3d at 430.

[51] Mass. Const. art. XIV.

[52] Commonwealth v. Blood, 507 N.E.2d 1029, 1033 (Mass. 1987).

[53] Commonwealth v. Augustine, 4 N.E.3d 846, 858 (Mass. 2014).

[54] Friedman, *supra* note 28, at 274; *see* Dist. Attorney for Plymouth Dist. v. New England Tel. & Tel. Co., 399 N.E.2d 866, 868 (Mass. 1980).

[55] *New England Tel. & Tel. Co.*, 399 N.E.2d at 868.

[56] Dist. Attorney for Plymouth Dist. v. Coffey, 434 N.E.2d 1276, 1278 (Mass. 1982). A cross frame trap traces the telephone numbers of calls coming into the monitored telephone line, but not the content of the conversation. *Id.* at 1278 n.1. The SJC, along with other courts, has analyzed the use of a cross frame trap in the same manner as the pen register used in *Smith*. *Id. Compare id.* (describing the mechanics of a cross frame trap), *with Augustine*, 4 N.E.3d 854–55 (describing the process of how telephone CSLI data is collected).

was subsequently given to police.[57] The Court held that the actions of the telephone company to place the cross frame trap could not be viewed as state action, and therefore could not be suppressed on the basis of a violation of either the Federal or State Constitution.[58]

The SJC touched upon the Third-Party Doctrine once again in *Commonwealth v. Cote*.[59] In this case, a company that recorded telephone messages was subpoenaed for records concerning the defendant, which the company subsequently produced.[60] The Court stated that although Article Fourteen may provide more protection of individual's privacy than the Fourth Amendment, in this case, the defendant knew that the information would be exposed to at least one third-party and therefore no reasonable expectation of privacy existed in the contents of the telephone messages.[61]

In a more recent case where the SJC considered the Third-Party Doctrine, the defendant did not raise an Article Fourteen defense, and therefore the Court declined to establish any difference between an analysis under the Fourth Amendment and Article Fourteen.[62]

3. Commonwealth v. Augustine

Augustine was an appeal by the state after a trial court judge granted the defendant's motion to suppress telephone CSLI data recorded at the time of the alleged crime.[63] However, unlike several federal circuit courts of appeals, the Massachusetts SJC held that individuals do have a reasonable expectation of privacy in telephone CSLI phone data.[64] After a detailed discussion of the Third-Party Doctrine, the Court reiterated that Article Fourteen can provide more protection to defendants than the Fourth Amendment, and therefore the Court would not "wade into the[] Fourth Amendment waters."[65] Instead, the Court applied the *Katz* reasonable expectation of privacy test, but under Article Fourteen, rather than under the Fourth Amendment.[66]

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[57] *Coffey*, 434 N.E.2d at 1279–80.

[58] *Id.* at 1280.

[59] Commonwealth v. Cote, 556 N.E.2d 45, 49 (Mass. 1990).

[60] *Id.* at 47.

[61] *Id.* at 50.

[62] Commonwealth v. Buccella, 751 N.E.2d 373, 383 n.9 (Mass. 2001).

[63] Commonwealth v. Augustine, 4 N.E.3d 846, 851–52 (Mass. 2014).

[64] *Id.* at 865–66.

[65] *Id.* at 857–58.

[66] Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (establishing that in order to for an individual to have a reasonable expectation of privacy, they must have a subjective expectation of privacy and society must objectively view that belief as reasonable); *Augustine*, 4 N.E.3d at 858–59.

The Court stated that the digital age has "dramatically" altered the landscape of societal expectations in a way that the bank records in *Miller* and the standard telephone in *Smith* did not.[67] The Court compared CSLI data to a GPS tracking device, citing concurring opinions in the Supreme Court case *United States v. Jones* and the decision of a similar Massachusetts case.[68] Despite claiming no intention to wade into Fourth Amendment issues, the Court returned to the third-party cases of *Miller* and *Smith*, distinguishing the CSLI data at issue in those two cases by stating that cell phone users do not identify a "discrete item of information" such as a telephone number or bank deposit slip and transmit it to a service provider.[69] The Court did not go so far as to completely remove the Third-Party Doctrine under Article Fourteen, but held that CSLI data has distinctive qualities that places it outside of the doctrine.[70] Chief Justice Gants was joined in his dissent by Justice Cordy, where he argued that the majority opinion erred in not applying the Third-Party Doctrine to this specific form of CSLI data, as this data is only recorded when an individual makes a call from his or her cell phone and therefore is not the constant tracking tool that a GPS monitor would be.[71]

II. The Court's Opinion

A. *Facts- Commonwealth v. Estabrook*

At approximately 3:50 A.M. on July 7, 2012, the victim, Quintin Koehler, and his brother, Ryan, were in their home in Billerica when they were confronted by masked men in their kitchen.[72] There was a struggle, and the victim was shot and killed by one of the intruders.[73] On July 10, 2012, Nicholas Cappello told police that he lived with the victim, that the victim regularly purchased and distributed marijuana, and that he had purchased drugs from a supplier named Ashley in the past.[74] The police learned that the supplier was Ashley Marshall, and that the defendant

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[67] *Augustine*, 4 N.E.3d at 859.

[68] *Id.* at 860–65; *see* United States v. Jones, 565 U.S. 400, 413 (2012) (Sotomayor, J., concurring); *Jones*, 565 U.S. at 418 (Alito, J., concurring); Commonwealth v. Rousseau, 990 N.E.2d 543, 552–53 (Mass. 2013).

[69] *Augustine*, 4 N.E.3d at 862.

[70] *Id.* at 863.

[71] *Id.* at 868, 871 (Gants J., with Cordy, J., dissenting) ("The telephone CSLI obtained in this case is much closer to the 'traditional telephone records' that, the court agrees, are still governed by the third-party doctrine.").

[72] Commonwealth v. Estabrook, 38 N.E.3d 231, 235 (Mass. 2015).

[73] *Id.*

[74] *Id.*

Bradley was an associate of hers.[75]

Prior to July 25, 2012, an assistant district attorney obtained call logs of the defendants, which did not contain CSLI data.[76] On July 25, 2012, based upon the information in the call logs and the ongoing police investigation, the Commonwealth filed an application seeking telephone CSLI data from the defendant Bradley's phone under § 2703(d).[77] The application was approved, and the CSLI data indicated that Bradley's cellular telephone was near the scene of the murder, communicating with a cell tower located three miles from the victim's home.[78] The police then interviewed Bradley, who denied involvement in the murder but pointed investigators to his cousin, defendant Estabrook.[79] Estabrook was interviewed and subsequently arrested for the murder of the victim.[80]

After indictment, both defendant Bradley and defendant Estabrook each filed motions to suppress evidence of Bradley's CSLI data, arguing that the data was obtained in violation of Article Fourteen.[81] Both motions also sought to suppress statements that were allegedly derived from the CSLI data.[82] The trial court judge denied both motions, stating that § 2703(d) did not require probable cause and that the defendants had no reasonable expectation of privacy in six hours' worth of telephone CSLI data.[83] A single justice of the SJC allowed the defendants' applications for interlocutory review.[84]

B. *The SJC Held that Individuals Do Not Have A Reasonable Expectation of Privacy in CSLI Data Collected for Six Hours or Less*

The Court began its analysis of the CSLI issue by citing the decision in *Augustine*, which held that telephone CSLI data collected over a two-week span was subject to the warrant requirement under Article Fourteen.[85] The Court stated that *Augustine* had left the door open to establish a specific length of time where a warrant would be necessary for law enforcement to retrieve CSLI data under § 2703(d) in a future case.[86] The Court ruled that it

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[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Estabrook*, 38 N.E.3d at 235.

[79] *Id.* at 236.

[80] *Id.*

[81] *Id.*; *see* Commonwealth v. Augustine, 4 N.E.3d 846, 863 (Mass. 2014).

[82] *Estabrook*, 38 N.E.3d at 236.

[83] *Id.*

[84] *Id.* at 237.

[85] *Id.*; *see Augustine*, 4 N.E.3d at 850.

[86] *Estabrook*, 38 N.E.3d at 237; *see Augustine*, 4 N.E.3d at 865 ("[I]t is likely that the duration

would now establish that law enforcement may request telephone CSLI data without a warrant under § 2703(d) if the request is for a six-hour time period or less.[87] This rule would apply to the time period requested by law enforcement, not the amount of time that is to ultimately be offered at trial.[88] Despite this new rule, the defendants in this case would not reap the benefits, as the Court ultimately held that the CSLI data in this case would not be suppressed because the Commonwealth later obtained a search warrant which would have allowed them to collect the CSLI data in dispute.[89]

ANALYSIS

I. The SJC Improperly Gave Extra Article Fourteen Protection Under the Third-Party Doctrine as Six Hours of Telephone CSLI Data Bears No Special Attribute to Afford it Extra Protection

Several of the previous Massachusetts court cases concerning the Third-Party Doctrine stress that Article Fourteen *may* provide more privacy protection than the Fourth Amendment when it comes to divulging information to third-parties.[90] Yet in each of these cases, the Court gives no indication as to when Article Fourteen would give such extra protection.[91] The Court followed this pattern in *Estabrook*, failing to give a reason as to why six hours of telephone CSLI data triggered Article Fourteen protection compared to telephone CSLI data collected for a shorter period of time.[92] The only indication that there may be any difference in the application of the Third-Party Doctrine came in *Cote*, when the Court stated that "we consider the issue of the defendant's reasonable expectation of privacy to

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of the period for which historic CSLI data is sought will be a relevant consideration in the reasonable expectation of privacy analysis-that there is some period of time for which the Commonwealth may obtain a person's historical CSLI by meeting the standard for a § 2703(d) order alone, because the duration is too brief to implicate a person's reasonable privacy interest.").

[87] *Estabrook*, 38 N.E.3d at 237.

[88] *Id.* at 238.

[89] *Id.* at 246–47; *see* Commonwealth v. DeJesus, 790 N.E.2d 231, 238 (Mass. 2003) ("Evidence initially discovered as a consequence of an unlawful search may be admissible if later acquired independently by lawful means untainted by the initial illegality.").

[90] Commonwealth v. Buccella, 751 N.E.2d 373, 383 n.9 (Mass. 2001); Commonwealth v. Cote, 556 N.E.2d 45, 50 (Mass. 1990); Dist. Attorney for Plymouth Dist. v. Coffey, 434 N.E.2d 1276, 1282 (Mass. 1982) (Liacos, J., concurring); Dist. Attorney for Plymouth Dist. v. New England Tel. & Tel. Co., 399 N.E.2d 866, 868 (Mass. 1980).

[91] *See Buccella*, 751 N.E.2d at 383 n.9; *Cote*, 556 N.E.2d at 50; *Coffey*, 434 N.E.2d 1276 at 1282 (Liacos, J., concurring); *New England Tel. & Tel. Co.*, 399 N.E.2d at 868.

[92] *See Estabrook*, 38 N.E.3d at 237.

be a closer question under art. 14 than the Fourth Amendment."[93] But the Court fails to explain why this is or how it came to that conclusion. Regardless it held that the defendant did not have a reasonable expectation of privacy under either the Fourth Amendment or Article Fourteen.[94]

The clearest indication given as to how the Third-Party Doctrine should be applied came in *Coffey* when the Court stated:

> It is well settled that the Fourth Amendment to the United States Constitution applies only to searches and seizures conducted by or at the direction of the State . . . The same considerations apply to art. 14. Neither the Fourth Amendment nor art. 14 is implicated when the state is not involved in the private "search," even when evidence is subsequently given to the police. . . The constitutional analysis is triggered only when either the Federal or State government is significantly involved in the search, either participating in it or directing it in some way.[95]

The Court stated that there was no evidence that the State significantly involved itself in *placing* the recording device on the defendant's phone, and therefore there was no state action.[96] Further, *directing* a telephone company to install a recording device constitutes state action, but merely deriving evidence from an already placed recording device does not violate either the Fourth Amendment or Article Fourteen.[97]

This language in *Coffey* is evidence that although Article Fourteen can provide more privacy protection than the Fourth Amendment, the SJC concluded that there is no extra privacy protection when information is given to a third-party and is originally collected for a non-law enforcement purpose.[98] Therefore, when a law enforcement agency seeks to obtain that information after the fact, neither Article Fourteen nor the Fourth Amendment is implicated.[99]

When applying the holding of *Coffey* to telephone CSLI data, the amount of time in which the CSLI data is collected should have no effect on whether Article Fourteen is implicated.[100] Regardless of whether the telephone CSLI data that is collected by law enforcement is for more or less than six hours, the State has neither significantly participated in nor

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[93] *Cote*, 556 N.E.2d at 50.

[94] *Id.*

[95] *Coffey*, 434 N.E.2d at 1279.

[96] *Id.* at 1280.

[97] *Id.*

[98] *See id.*

[99] *Id.*

[100] *See* Commonwealth v. Estabrook, 38 N.E.3d 231, 237 (Mass. 2015).

directed the search of the data when it was collected.[101] As in *Coffey*, the type of CSLI data collected in *Estabrook* was routinely recorded by telecommunications without prompting from law enforcement when a telephone user made a call.[102] In *Estabrook* the Court could possibly have made the argument that when law enforcement seeks more than six hours of telephone CSLI data the state becomes a significant part of the search, but the Court fails to explain what makes six hours the proper temporal demarcation.[103] Without any further explanation as to why more than six hours of telephone CSLI data falls outside of the reasoning in *Coffey* while less than six hours of data does not, the demarcation can be seen as nothing more than arbitrary, and the Third-Party Doctrine should have been applied.[104]

II. There is No Reasonable Expectation of Privacy in Telephone CSLI Data Under the Third-Party Doctrine of the Fourth Amendment to the United States Constitution or Article Fourteen of the Massachusetts Declaration of Rights

A. *Telephone CSLI Data Collected Does Not Include the Content of Telephone Communications, Regardless of the Length of Time the Data is Sought*

As stated in *Miller* and *Smith*, an individual has no reasonable expectation of privacy in information that is given voluntarily to a third-party, as the Fourth Amendment is not implicated in such a circumstance.[105] Further, the Supreme Court stated in *Smith* that it is the *content* of communications that deserve extra protection, not the information which is used to establish communication.[106] Discussing the capabilities of the pen register used to record phone numbers, the Court stated that because the devices do not record sound, but merely disclose a means of establishing communication, there is no search in the Constitutional sense.[107]

Both telephone and registration CSLI data are similar to pen registers in the sense that they only contain information about the establishment of a

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[101] *See id.*; *Coffey*, 434 N.E.2d at 1279.

[102] *See Estabrook*, 38 N.E.3d at 236.

[103] *See id.* at 237.

[104] *See id.*

[105] United States v. Miller, 425 U.S. 435, 439 (1976); Smith v. Maryland, 442 U.S. 735, 743–44 (1979).

[106] *Smith*, 442 U.S. at 743; United States v. Carpenter, 819 F.3d 880, 887 (6th Cir. 2016).

[107] United States v. New York Tel. Co., 434 U.S. 159, 167 (1977).

communication, not the content of a communication.[108] The signals which are sent through CSLI data are transmitted on a separate frequency from those that transmit voice and other data to the phone.[109] Both types of CSLI data can include the date, time, and duration of calls along with the cell tower or towers which process the call.[110] None of this information includes the actual content of the communication, which was a vital distinction in *Smith*.[111] Whether the telephone CSLI data is requested for more or less than six hours, this fact remains the same.[112]

B. *Individuals Voluntarily Divulge Telephone CSLI Data When Making A Phone Call, Regardless of the Length of Time the Data is Sought*

The Third-Party Doctrine only applies to information that has been *voluntarily* turned over to a third-party.[113] In *Smith*, the Supreme Court stated that when an individual "used" his phone, he voluntarily conveyed information to the telephone company and exposed information to the telephone company's equipment in the ordinary course of business.[114] The telephone company had the technical and legal ability to record the information given to them by the defendant; therefore the defendant relinquished any reasonable expectation of privacy when he or she chose to use their phone.[115] The Third-Party Doctrine does not require recognition of every detail that has been conveyed to a third-party, but only does not apply if the individual involuntarily conveys information.[116]

The distinction between telephone CSLI and registration CSLI is vital when determining whether CSLI data is voluntarily turned over to a third-party.[117] Registration CSLI data is essentially continuous, a cell phone owner has no control over the transmission of registration CSLI data

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[108] *See* Commonwealth v. Augustine, 4 N.E.3d 846, 868 (Mass. 2014) (Gants, J., with Cordy, J., dissenting).

[109] Scott A. Fraser, Comment, *Making Sense of New Technologies and Old Law: A New Proposal for Historical Cell-Site Location Jurisprudence*, 52 SANTA CLARA L. REV. 571, 578–79 (2012).

[110] *Id.* at 580.

[111] *Smith*, 442 U.S. at 741 ("Yet a pen register differs significantly from the listening device employed in *Katz*, for pen registers do not acquire the *contents* of communications." (emphasis in original)).

[112] *See* Commonwealth v. Estabrook, 38 N.E.3d 231, 237 (Mass. 2015).

[113] *Smith*, 442 U.S. at 743–44.

[114] *Id.* at 744.

[115] *Id.* at 745.

[116] United States v. Graham, 824 F.3d 421, 431 (4th Cir. 2016).

[117] *See* Commonwealth v. Augustine, 4 N.E.3d 846, 868 (Mass. 2014) (Gants, J., with Cordy, J., dissenting).

beyond shutting the phone off entirely.[118] *Registration* CSLI potentially raises greater privacy concerns than even GPS data, as cell phones are often carried in a person's pocket throughout the day, while GPS tracking devices are often attached to a vehicle.[119] However, *telephone* CSLI is only transmitted when an individual actively makes a telephone call.[120] When making a phone call, an individual has some idea that location is an important part of completing a phone call.[121] As of 2012, there were approximately 300,000 cell towers throughout the United States.[122] If an individual is too far from a cell tower, they are unable to make or receive phone calls.[123] Individuals can be expected to know that location information must be provided to a telephone company when a call is made or received from a phone.[124] Therefore, in terms of Third-Party Doctrine jurisprudence, "cell phone users voluntarily convey cell tower location information to telephone companies in the course of making and receiving calls on their cell phones."[125]

This analysis does not change depending on the amount of time over which telephone CSLI data is sought.[126] Whether law enforcement receives telephone CSLI data for more or less than six hours, the phone calls made by those individuals over any length of time were still originally voluntary information exchanges with a telecommunications company.[127] Therefore, the Third-Party Doctrine should have been applied to all telephone CSLI data, not just data collected for less than six hours.[128]

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[118] *Id.*

[119] *Id.* at 860–61.

[120] *Id.* at 868.

[121] *Id.* at 871.

[122] Ryan Merkel, Comment, *Playing Hide and Seek with Big Brother: Law Enforcement's Use of Historical and Real Time Mobile Device Data*, 35 N. ILL. U. L. REV. 429, 431 (2015).

[123] *See Augustine*, 4 N.E.3d at 870 (Gants, J., with Cordy, J., dissenting).

[124] *Id.* at 871.

[125] United States v. Davis, 785 F.3d 498, 512 n.12 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 479 (2015).

[126] *See* Commonwealth v. Estabrook, 38 N.E.3d 231, 237 (Mass. 2015).

[127] *Compare id.* (holding that individuals have a reasonable expectation of privacy in telephone CSLI collected for more than six hours), *and Augustine*, 4 N.E.3d at 862 (stating that cell phone users do not voluntarily convey their location to telecommunications companies when a phone call is made), *with Davis*, 785 F.3d at 512 n.12 (stating that cell phone users do voluntarily convey their location when making a phone call because there is no other way that the phone would operate, and therefore they retain no reasonable expectation of privacy).

[128] *See Estabrook*, 38 N.E.3d at 237.

III. Even Assuming the Third-Party Doctrine Does Not Apply, There Remains No Reasonable Expectation of Privacy in Six Hours of Telephone CSLI Data

If the Third-Party Doctrine were not to apply under Article Fourteen, the proper test to apply would be from *Katz*: whether the individual represented a subjective reasonable expectation of privacy and whether society would accept that expectation as reasonable.[129] In *Augustine*, the Court accepted that the defendant had a subjective expectation of privacy in all forms of CSLI data.[130] After discarding the Third-Party Doctrine, the Court opined that CSLI telephone data would create too many tracking points for law enforcement officers; therefore society would view the defendant's expectation of privacy as reasonable.[131] In making this determination the Court made a fundamental mistake in arguing that telephone CSLI data would give law enforcement a similar picture of an individual's life that would be exposed through GPS surveillance or registration CSLI.[132] For example, the Court quoted a New Jersey Supreme Court case which likened CSLI data to "24/7 surveillance."[133] In reality, the only way in which telephone CSLI data could provide that type of surveillance would be if the individual was making a continuous phone call throughout his or her entire life.[134]

The Court also frequently compares telephone CSLI to GPS monitoring, citing to the concurrences of Justice Alito and Justice Sotomayor in *Jones*.[135] In its explanation of why tracking a person's movements with CSLI data implicates privacy concerns, the SJC also cites to a previous Massachusetts GPS case, *Commonwealth v. Rousseau*.[136] However, in both *Jones* and *Rousseau* law enforcement agents actively attached GPS tracking devices to automobiles and then tracked the

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[129] *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); Commonwealth v. Montanez, 571 N.E.2d 1372, 1380 (Mass. 1991) (articulating same standard under Article Fourteen of the Massachusetts Declaration of Rights).

[130] *Augustine*, 4 N.E.3d at 865–66, 865 n.38.

[131] *Id.* at 865.

[132] *Id.* at 868 (Gants, J., with Cordy, J., dissenting).

[133] *Id.* at 861 (majority opinion) (quoting State v. Earls, 70 A.3d 630, 642 (N.J. 2013)).

[134] *Augustine*, 4 N.E.3d at 868 (Gants, J., with Cordy, J., dissenting) ("Telephone call CSLI . . . provides the approximate physical location (location points) of a cellular telephone *only* when a telephone call is made or received by that telephone.").

[135] *Id.* at 860 (majority opinion); *see* United States v. Jones, 565 U.S. 400, 413 (Sotomayor, J. concurring) (2012); *Jones*, 565 U.S. at 418 (Alito, J., with Ginsburg, Breyer, & Kagan, JJ., concurring).

[136] *Augustine*, 4 N.E.3d at 861; *see* Commonwealth v. Rousseau, 990 N.E.2d 543, 553 (Mass. 2013).

movements of the defendants in real time.[137] This distinguishes the type of GPS data mining feared in those two cases from telephone CSLI data, which is not actively collected by law enforcement and which was not used for real time tracking.[138]

The Court also raises concerns over law enforcement obtaining telephone CSLI data because the data may have been created while the individual is in the home, and the "sanctity of the home" warrants protection under Article Fourteen because "all details [in the home] are intimate details, because the entire area is held safe from prying government eyes."[139] Yet as concerned as the Court seems to be with the sanctity of the home, the creation of the six-hour exception to the warrant requirement in *Estabrook*[140] allows telephone CSLI data generated in the home to be obtained by law enforcement without a warrant, as long as the data is for less than six hours.[141] This fact is evidence that the Court was not truly concerned with protecting the privacy of the home when making its decision.[142]

Nevertheless, the Court need not worry about protecting the sanctity of the home, as telephone CSLI data is nowhere near accurate enough to allow law enforcement to observe any "intimate details" of the home.[143] This is yet another example of how telephone CSLI data is distinguishable from the GPS data, as CSLI data is unable to generate "a precise, comprehensive record of a person's public movements that reflects a wealth of detail about [one's] familial, political, professional, religious, and sexual associations."[144]

Finally, by holding that individuals have a reasonable expectation of privacy over telephone CSLI data spanning more than six hours, the Court also held that society deems any expectation of privacy in telephone CSLI data for less than six hours unreasonable.[145] Yet when applying the *Katz*

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[137] *Jones*, 565 U.S. at 402; *Rousseau*, 990 N.E.2d at 548.

[138] *See* United States v. Graham, 824 F.3d 421, 435 (4th Cir. 2016); *Augustine*, 4 N.E.3d at 855 n.24 ("[T]he CSLI sought by the Commonwealth and at issue here is 'historical' CSLI, meaning the calls already have occurred when the data are requested.").

[139] *Augustine*, 4 N.E.3d at 864 (quoting Commonwealth v. Porter P., 923 N.E.2d 36, 44 (Mass. 2010)).

[140] Commonwealth v. Estabrook, 38 N.E.3d 231, 234 (Mass. 2015).

[141] *Graham*, 824 F.3d at 435.

[142] *See Estabrook*, 38 N.E.3d at 237.

[143] *See* United States v. Carpenter, 819 F.3d 880, 889 (6th Cir. 2016) ("The data could do no better than locate the defendants' cellphones within a 120- (or sometimes 60-) degree radial wedge extending between one-half mile and two miles in length.").

[144] United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring); *see Carpenter*, 819 F.3d at 889 (6th Cir. 2016).

[145] *See Estabrook*, 38 N.E.3d at 237.

test in *Augustine,* the Court failed to produce any evidence that a reasonable expectation of privacy existed over only six hours or more of telephone CSLI data.[146] The Court recognized that a time demarcation may exist, and only suggested that six hours would be a reasonable choice in a footnote.[147] In *Estabrook* the Court held "the Commonwealth may obtain historical CSLI for a period of six hours or less relating to an identified person's cellular telephone from the cellular service provider without obtaining a search warrant, because such a request does not violate the person's constitutionally protected expectation of privacy."[148] The Court failed to apply the *Katz* test and again gave no other indication as to why an expectation of privacy over six hours of telephone CSLI data is any more reasonable than such an expectation over five hours of the same data.[149]

IV. The Arbitrary Time Distinction Created in *Estabrook* is Evidence That a Warrant Requirement for Cell Phone CSLI Would Be Better Handled by the Massachusetts Legislature Than the Massachusetts Judiciary

Fourth Amendment rules created by judiciaries tend to lag behind both new surveillance technologies and statutory rules by at least a decade.[150] Judicial decisions are based upon a specific set of facts and are meant to resolve an adversarial dispute between two parties.[151] This context contributes to the arbitrariness of the decision in *Estabrook.*[152] In *Estabrook,* law enforcement had obtained two weeks' worth of telephone CSLI data, making it less controversial to institute a six hour time demarcation.[153] If the facts of the case had been different and law enforcement had obtained seven hours of telephone CSLI data, creating a six hour demarcation would have been more controversial and may have had a much greater effect in the decision-making process.[154] In creating a policy concerning CSLI data, the Massachusetts Legislature would not be constrained to the facts of a particular case, which would give them more freedom to establish a

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[146] *See* Commonwealth v. Augustine, 4 N.E.3d 846, 865 (Mass. 2014).

[147] *Id.* at 865 n.37.

[148] *Estabrook,* 38 N.E.3d at 237.

[149] *See id.*

[150] Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution,* 102 MICH. L. REV. 801, 868 (2004).

[151] United States v. Davis, 785 F.3d 498, 520 (11th Cir. 2015), *cert. denied,* 136 S. Ct. 479 (2015).

[152] *See Estabrook,* 38 N.E.3d at 237.

[153] *See id.*

[154] *See id.*

comprehensive framework to deal with the issue.[155]

Furthermore, technology changes so rapidly that it is difficult for courts across the country to keep up, as the exact form of the technology that the court applies its ruling to may morph even before the case is decided.[156] Therefore, due to the emergence of a dramatic change in surveillance technology, the best solutions will be found through legislation.[157] When the impact of new technologies creates this uncertainty, statutes tend to be more forward-thinking and flexible than judicial rules.[158] Legislatures are able to consider a wider range of factors, and therefore are better able to weigh the costs and benefits of creating a warrant requirement for emerging surveillance technologies.[159]

Congress' passage of § 2703 is a perfect example of a legislative response to the CSLI issue.[160] Congress recognized that there would be a question of whether or not CSLI data would fall under the warrant requirement, and reacted by creating a standard that requires specific and articulable facts, but does not rise to the level of a warrant requirement.[161] Like Congress, the Massachusetts Legislature should take the lead in crafting solutions to controversial electronic surveillance policies.[162] This will allow Massachusetts to reflect on the issue of cell phone privacy and devise a solution which is not based upon an arbitrary notion of an individual's expectation of privacy.[163]

CONCLUSION

"[C]ell-phone use has become an indispensable part of modern life."[164] Cell phones differ in both a qualitative and quantitative sense from other possessions, and currently they are more similar to computers than telephones.[165] The amount of personal data on cell phones has made them a target for law enforcement surveillance. However, that does not mean that every piece of information gained from a cell phone is subject to a warrant

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155 *See Davis*, 785 F.3d at 520.

156 U.S. v. Carpenter, 819 F.3d 880, 890 (6th Cir. 2016).

157 United States v. Jones, 565 U.S. 400, 429 (2012) (Alito, J., concurring).

158 Kerr, *supra* note 150, at 859–60.

159 *Davis*, 785 F.3d at 520.

160 *In re United States for Historical Cell Site Data*, 724 F.3d 600, 614–15 (5th Cir. 2013); *see* 18 U.S.C. § 2703(d) (2009).

161 *In re United States for Historical Cell Site Data*, 724 F.3d at 614–15; *see* 18 U.S.C. § 2703(d).

162 *See* Kerr, *supra* note 150, at 888.

163 *See* Commonwealth v. Estabrook, 38 N.E.3d 231, 237 (Mass. 2015).

164 State v. Earls, 70 A.3d 630, 643 (N.J. 2013).

165 Riley v. California, 134 S. Ct. 2473, 2489 (2014).

requirement. The Massachusetts Supreme Judicial Court concluded that telephone CSLI data revealed so much personal information that for the first time they extended Article Fourteen protection to shield it from the Third-Party Doctrine. But the Court did so based upon a faulty comparison of telephone CSLI data to GPS data and concurrences from *Jones* which, though persuasive, have no binding authority and are easily distinguishable based upon the geographic accuracy and timing of the information gained.

Under the Fourth Amendment and Article Fourteen, telephone CSLI data falls under the Third-Party Doctrine because the data is voluntarily divulged to a third-party, and the user therefore no longer has a reasonable expectation of privacy in the data. The Court erred in extending protection to telephone CSLI data and then subsequently creating a six hour exception to the rule, as the Massachusetts Legislature has a better opportunity to create a rule better suited to changing technology.

NOTES

Revealing a Necessary Evil: The United States Must Continue to Use Some Form of Domesticated Counter-Terrorism Program

*Daniel R. Godefroi**

INTRODUCTION

Tragedy often strikes the news when members of military service are killed overseas.[1] These heroes willingly fight for the general welfare and safety of United States citizens.[2] They know of the dangers and risks that they have courageously opened themselves up to when preparing for battle. Unfortunately, on December 2, 2015, tragedy struck innocent civilians on United States soil.[3] Two individuals, armed with automatic weapons and pipe bombs, walked into a holiday party in San Bernardino, California and took the lives of fourteen unsuspecting individuals, and injured an additional twenty-two.[4] The victims of this attack did not sign up to be put in harm's way.[5] An act of terrorism found them in a place they considered safe — inside the boundaries of the United

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[1] *See, e.g.*, Megan Crigger & Laura Santhanam, *How Many Americans Have Died in U.S. Wars?*, PBS NEWSHOUR (May 24, 2015, 4:19PM), https://perma.cc/55FN-W4DR.

[2] *See id.*

[3] *See Everything We Know About the San Bernardino Terror Attack Investigation So Far*, L.A. TIMES (Dec. 14, 2015, 4:03 PM), https://perma.cc/ULU6-DRDE.

[4] *Id.*

[5] *See id.*

States.[6]

Of late, extremist terrorist organizations focused their hatred towards the United States.[7] It would be foolish to think that the possibility of a large-scale terrorist attack is not possible on domestic soil.[8] America will not soon forget the horror of the events that took place on September 11, 2001.[9] These attacks, carried out by Al Qaeda and its leader Osama bin Laden, tragically affected tens of thousands of American families.[10] Since its inception in 1999, ISIS has been inflicting gruesome acts of terror worldwide,[11] including the attack in San Bernardino.[12] The safety of American lives against radical terrorist groups has never been in more jeopardy than the present.[13]

With safety remaining an issue,[14] in June 2013, information unfolded that the NSA had been collecting phone records of millions of Americans on domestic soil.[15] Edward Snowden, a contracted employee of the NSA, gained access to sensitive information after realizing the extent to which the agency had stretched its authority.[16] The importance of this information was immediately downplayed by American leadership.[17] However, now

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[6] *See id.*

[7] *See* Ryan Browne, *Top Intelligence Official: ISIS to Attempt U.S. Attacks This Year*, CNN (Feb. 9, 2016, 2:39 PM), https://perma.cc/W5EZ-6R5U.

[8] *See id*; Thomas Peele, *Terrorism Poll: After San Bernardino Attack, 71 Percent of California Voters Believe Another Attack is Likely*, MERCURY NEWS (Aug. 11, 2016, 11:10 PM), https://perma.cc/3LQ5-QZXN.

[9] *See 9/11 Attacks*, HISTORY.COM, https://perma.cc/3J8H-WRW4 (last visited July 11, 2017).

[10] *Id.*

[11] *See* Tim Lister et al., *ISIS Goes Global: 143 Attacks in 29 Countries Have Killed 2,043*, CNN (Jan. 16, 2017, 3:02 PM), https://perma.cc/J3BK-SHM3; Karen Yourish, et al., *Where ISIS Has Directed and Inspired Attacks Around the World*, N.Y. TIMES (Mar. 22, 2016), https://perma.cc/4BSX-BQCE; *Paris Attacks: What Happened on the Night*, BBC NEWS (Dec. 9, 2015), https://perma.cc/E4B5-JJ7X.

[12] Michael S. Schmidt & Richard Pérez–Peña, *F.B.I. Treating San Bernardino Attack as Terrorism Case*, N.Y. TIMES (Dec. 4, 2015), https://perma.cc/QP2V-6RE6.

[13] *See* Browne, *supra* note 7.

[14] *See* Browne, *supra* note 7.

[15] Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN (June 6, 2013, 6:05 AM), https://perma.cc/7WFA-99PT] [hereinafter *NSA Collecting Phone Records*]; Glenn Greenwald, et al., *Edward Snowden: The Whistleblower Behind the NSA Surveillance Revelations*, GUARDIAN (June 11, 2013, 9:00 AM), https://perma.cc/6P28-ZDNX [hereinafter *The Whistleblower*]; CITIZENFOUR (HBO Documentary Films 2014).

[16] *The Whistleblower*, *supra* note 15; CITIZENFOUR, *supra*, note 15.

[17] Elizabeth Atkins, *Spying On Americans: At What Point Does the NSA's Collection and Searching of Metadata Violate the Fourth Amendment?*, 10 WASH. J.L. TECH & ARTS 51, 54 (2014) (citing President Obama, Remarks by the President on Review of Signals Intelligence (Jan. 17, 2014)).

that terrorist cells are an internal threat to America's safety,[18] it is important for counter-terrorism programs to be in place.[19] Many Americans fear the possibility of facing another attack of the same gravity as September 11.[20] Every precaution should be taken to prevent such an attack.[21] Snowden's revelations regarding secret surveillance programs taking place without prior consent or knowledge were extremely important for the American public. However, it is necessary for such counter-terrorism programs to exist in order to protect their general welfare and safety.

This Note will examine the origins of the programs exposed by Edward Snowden and elaborate on the need to sustain similar programs. Part I will examine the backgrounds of the Foreign Intelligence Surveillance Act and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (Patriot Act), as these acts laid the groundwork for counter-terrorism programs. Part II will focus on the revelations that Edward Snowden provided to the world about the NSA's programs. Part III will acknowledge potential problems with having programs such as these, but will ultimately argue that the importance of having such programs outweighs any issues they may pose. Finally, Part IV will conclude this Note.

I. History of the Foreign Intelligence Surveillance Act and the Patriot Act

The NSA was originally created for the United States to reveal enemy

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[18] *See* Malia Zimmerman, *Feds Release New Evidence, Seek Link Between San Bernardino Attack, Prior Terrorist Plot*, FOX NEWS (Jan. 29, 2016), https://perma.cc/PM3B-YS42.

[19] *See* Geoffrey R. Stone, *The View From Inside the NSA Review Group*, 63 DRAKE L. REV. 1033, 1035–36 (2015) ("[I]nternational terrorists today can inflict massive damage, using not only conventional but possible also chemical, biological, and even nuclear weapons. Such attacks can not only cost billions of dollars of damage and cause thousands of deaths, but they can also change our culture in fundamental ways by leading us to sacrifice ever more of our civil liberties and privacy in the quest for national security. The costs of failing to prevent such attacks, I thought, would be staggering" (internal citations omitted)).

[20] *See* Peter M. Shane, *Foreword: The NSA and the Legal Regime for Foreign Intelligence Surveillance*, 10 I/S: J.L. & POL'Y FOR INFO. SOC'Y 259, 292 (2015) ("[O]ur history after 9/11 reinforces the fundamental point that the public is more vigilant about its civil liberties when it feels safe. The argument, in short, is that without security, there is no liberty."); Browne, *supra* note 7; Peele, *supra* note 8.

[21] *See* Nathan A. Sales, *Domesticating Programmatic Surveillance: Some Thoughts on the NSA Controversy*, 10 I/S: J.L. & POL'Y FOR INFO. SOC'Y 523, 524 (2015) ("The recently disclosed NSA surveillance programs . . . aim at . . . harnessing the power of big data to detect nascent threats before they can do harm—and raise the same vital questions about how to balance the competing demands of national security on the one hand and privacy and civil liberties on the other.").

codes during World War II.[22] Jurisdictionally, the NSA operates under the authority of the military, and reports to the director of national intelligence.[23] Unfortunately, the events that took place on September 11 proved that the information the agency had been receiving was not sufficient to protect the safety of thousands of innocent victims.[24] Within weeks, Congress implemented the Patriot Act.[25] However, counterintelligence was a focus stemming from before the Patriot Act's existence.[26] The Foreign Intelligence Surveillance Act (FISA) was enacted decades prior.[27]

A. *History of the Foreign Intelligence Surveillance Act*

In the early stages of counterintelligence, agencies were not subject to a high level of supervision.[28] Therefore, in 1978, FISA was implemented in order to establish guidelines for intelligence gathering via electronic surveillance.[29] Searches and electronic surveillance are governed by the Federal Rules of Criminal Procedure, however, "the secretive and less protective rules and procedures of FISA may be employed when matters of national security are involved and the aim is to collect foreign intelligence."[30] The use of more lenient rules for FISA centers around the seriousness of terrorist threats, and that sometimes privacy intrusions are necessary in order to collect certain information.[31] Yet, it is important to note that the surveillance power in FISA was only to be used for national security reasons, and not by domestic law enforcement agencies searching

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[22] Anna S. Persky, *Cover Blown: NSA Surveillance and Secrets*, 28 WASH. LAW. 23, 25 (2014) (explaining the rationale for President Truman's creation of the NSA in 1952).

[23] *Id.*

[24] *See* Michael T. McCarthy, *Recent Developments: USA Patriot Act*, 39 HARV. J. ON LEGIS. 435, 436 (2002).

[25] *Id.* at 435 (citing Pub. L. No. 107–56, 115 Stat. 272 (2001)).

[26] *See* Persky, *supra* note 22; *see also* Casey J. McGowan, *The Relevance of Relevance: Section 215 of the USA PATRIOT Act and the NSA Metadata Collection Program*, 82 FORDHAM L. REV. 2399, 2410 (2014); Michael J. Woods, *Counterintelligence and Access to Transactional Records: A Practical History of USA PATRIOT Act Section 215*, 1 J. NAT'L SEC. L. & POL'Y 37, 40 (2005).

[27] McGowan, *supra* note 26.

[28] Woods, *supra* note 26 (explaining that in the 1960s–1970s, there were very few standards that agencies had to abide by).

[29] *See* McGowan, *supra* note 26 (quoting William C. Banks, *And the Wall Came Tumbling Down: Secret Surveillance After the Terror*, 57 U. MIAMI L. REV. 1147, 1148 (2003)); Woods, *supra* note 26 (alluding to the fact that the executive branch was taking more control over counter-terrorism activities).

[30] McGowan, *supra* note 26 (justifying the potential breach to privacy by stressing the seriousness of terrorism threats).

[31] *See* McGowan, *supra* note 26.

for criminal activity.[32] FISA was intended to provide a clear dividing line between foreign intelligence and law enforcement, as "privacy intrusions are limited to the collection of information for foreign intelligence purposes."[33]

Governing the activities under FISA is the Foreign Intelligence Surveillance Court (FISC).[34] By design, the judges appointed to the FISC must reside within twenty miles of the District of Columbia.[35] This court has the power to "hear applications for and grant orders approving electronic surveillance anywhere within the United States but may not hear an application that was previously denied by another FISC judge."[36] When necessary, one can appeal decisions made by the FISC to the Foreign Intelligence Surveillance Court of Review.[37] This panel of three judges has the jurisdiction to review any denied FISC application.[38]

FISA was not widely recognized until the horrific events of September 11.[39] It was drafted based off the technology available prior to 1978,[40] and follows "cumbersome procedures on our intelligence and law enforcement officers."[41] From 1979-2000, the FISC received about 600 warrant applications for electronic surveillance every year, and never rejected a single application.[42] However, following the September 11 attacks, the FISC

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[32] *See* McGowan, *supra* note 26, at 2411.

[33] McGowan, *supra* note 26, at 2410–11 (quoting William C. Banks, *And the Wall Came Tumbling Down: Secret Surveillance After the Terror*, 57 U. MIAMI L. REV. 1147, 1148, 1160 (2003)).

[34] *See* 50 U.S.C. § 1803(a) (2006); *see also* McGowan, *supra* note 26, at 2411 (explaining how the court includes eleven district court judges appointed by the chief justice of the United States, who must represent at least seven of the federal circuits).

[35] § 1803(a).

[36] McGowan, *supra* note 26, at 2411 (citing § 1803(a)).

[37] McGowan, *supra* note 26, at 2411 (citing William C. Banks, *And the Wall Came Tumbling Down: Secret Surveillance After the Terror*, 57 U. MIAMI L. REV. 1147, 1171 (2003) (describing the Foreign Intelligence Surveillance Court of Review as the nation's most secret appellate court, which only meets on rare occasions)).

[38] § 1803(b); McGowan, *supra* note 26, at 2411.

[39] McGowan, *supra* note 26, at 2412 (citing Stephen J. Schulhofer, *The New World of Foreign Intelligence Surveillance*, 17 STAN. L. POL'Y REV. 531, 534–35 (2006)).

[40] John Yoo, *The Legality of the National Security Agency's Bulk Data Surveillance Programs*, 10 I/S: J.L. & POL'Y FOR INFO. SOC'Y 301, 309 n.36 (2014) (citing Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. PA. L. REV. 793, 825 (1989) (expressing how FISA was drafted on technology available in the years 1968 to 1978, but even by 1989 technology was already vastly improved from the technology a decade earlier)).

[41] Yoo, *supra* note 40 at 309.

[42] McGowan, *supra* note 26, at 2412 (citing *Foreign Intelligence Surveillance Act Court Orders 1979–2014*, EPIC.ORG, https://perma.cc/JKG9-6XKY (last visited Mar. 21, 2017) [hereinafter *Foreign Intelligence*]).

showed an extreme increase in applications.[43] This was in large part due to the implementation of the Patriot Act.[44]

B. *History of the USA PATRIOT Act*

The September 11 attacks showed that the government was taking a flawed approach at preventing terrorism on home soil.[45] It was determined that lapses existed in the collective effort to obtain information in the intelligence community.[46] Less than six weeks after the September 11 attacks, the Patriot Act was signed into law.[47] Reacting to the horrific attacks:

> The legislation grant[ed] additional wiretapping and surveillance authority to federal law enforcement, remove[d] barriers between law enforcement and intelligence agencies, add[ed] financial disclosure and reporting requirements to combat terrorist funding, and [gave] greater authority to the Attorney General to detain and deport aliens suspected of having terrorist ties.[48]

The goals of the Patriot Act were to provide law enforcement with more thorough investigatory tools and to deter terrorist attacks from taking place.[49] The Act encouraged the expansion of what the government could investigate by defining what constituted domestic terrorism.[50] Per the Act, domestic terrorism "includes any dangerous acts that 'appear to be

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[43] McGowan, *supra* note 26, at 2412.

[44] McGowan, *supra* note 26, at 2412 (citing Stephen J. Schulhofer, *The New World of Foreign Intelligence Surveillance*, 17 STAN. L. POL'Y REV. 531, 549 (2006)).

[45] McCarthy, *supra* note 24, at 437–38 (explaining that there was intelligence prior to the attacks which would have been useful in preventing the attacks, if better communication between agencies was available).

[46] Persky, *supra* note 22 ("One major problem was a gap in the ability to quickly make connections between phone numbers used by individuals inside the U.S. to phone numbers of people outside the U.S. who are associated with terrorism.") (quoting Carrie F. Cordero, adjunct professor and director of National Security Studies at Georgetown University Law Center).

[47] McCarthy, *supra* note 24, at 435 (citing Pub. L. No. 107–56, 115 Stat. 272 (2001)).

[48] McCarthy, *supra* note 24, at 435.

[49] *See* BERNARD D. REAMS, JR. & MICHAEL P. FORREST, USA PATRIOT ACT: A LEGISLATIVE HISTORY OF THE UNITING AND STRENGTHENING OF AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM ACT, PUBLIC LAW NO. 107–56 (2001); Joshua M. Mastracci, Klayman v. Obama*: The D.C. District Court Misinterprets the NSA Metadata Collection Program as a Violation of Individual Fourth Amendment Rights*, 17 TUL. J. TECH. & INTELL. PROP. 365, 367 (2014) (quoting USA PATRIOT Act, Pub. L. No. 107–56, § 501(a)(1), 115 Stat. 287 (2001)).

[50] REAMS & FORREST, *supra* note 49 (citing Lisa Finnegan Abdolian & Harold Takooshian, *The USA Patriot Act: Civil Liberties, the Media, and Public Opinion*, 30 FORDHAM URB. L.J. 1429, 1430 (2003) (citing USA PATRIOT Act, Pub. L. No. 107–56, § 802, 115 Stat. 376 (2001)).

intended . . . to influence the policy of a government by intimidation or coercion.'"[51] In essence, the Act provided a statutory guide allowing for investigative tactics that would normally constitute a violation of civil liberties.[52] The use of such information is necessary for authorities to combat the threat of terror.[53]

At inception, the executive branch was to maintain a higher degree of power over these counter-terrorism tactics.[54] For example, the statute authorized the head of the FBI to apply for an order for the production of materials regarding foreign intelligence.[55] When seeking information, the application must show evidence that it is not unreasonable to consider the intelligence pertinent to the investigation.[56] Ultimately, "there are three essential legal elements concerning the metadata collection program: (1) the collection is part of an authorized investigation, (2) the records obtained are 'tangible things,' and (3) the data collected is relevant to that investigation."[57]

Metadata is the term for content data contained in a phone call.[58] Specifically, "metadata . . . includes such things as the telephone number from which the call originated, the number to which it was placed, the length of the call, the time of day it was made and other like material."[59] However, throughout the years 2001–2013, the NSA utilized the Patriot Act in order to maintain surveillance over not only foreign communications, but on its citizens as well.[60] Until Edward Snowden came forward with information regarding secretive surveillance programs, American citizens were oblivious that their metadata was being collected.[61]

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[51] Abdolian & Takooshian, *supra* note 50 (quoting USA PATRIOT Act of 2001, Pub. L. No. 107–56, § 802, 115 Stat. 272, 376 (2001)).

[52] *See* REAMS & FORREST, *supra* note 49.

[53] *See* REAMS & FORREST, *supra* note 49 (quoting George W. Bush).

[54] McGowan, *supra* note 26, at 2413 (citing William C. Banks, *And the Wall Came Tumbling Down: Secret Surveillance After the Terror*, 57 U. MIAMI L. REV. 1147, 1166 (2003)).

[55] 50 U.S.C. § 1861(a)(2)(B) (2012); McGowan, *supra* note 26, at 2413 (elaborating that if the subject of the investigation is a U.S. citizen, then there must be more information than activities protected by the First Amendment).

[56] 50 U.S.C. § 1861(b)(2)(A); McGowan, *supra* note 26, at 2413.

[57] McGowan, *supra* note 26, at 2414.

[58] McGowan, *supra* note 26, at 2415; *see* James F. McHugh, Book Review, 97 MASS. L. REV. 19, 19 (2015) (reviewing GLENN GREENWALD, NO PLACE TO HIDE: EDWARD SNOWDEN, THE NSA AND THE U.S. SURVEILLANCE STATE (2014)).

[59] McHugh, *supra* note 58.

[60] Devon Ombres, *NSA Domestic Surveillance from the PATRIOT ACT to the Freedom Act: The Underlying History, Constitutional Basis, and the Efforts at Reform*, 39 SETON HALL LEGIS. J. 27, 28 (2015), https://perma.cc/P8G6-KPHJ.

[61] *See* McHugh, *supra* note 58, at 20; CITIZENFOUR, *supra* note 15.

II. Edward Snowden Reveals NSA Programs to the Public

Edward Snowden went to extraordinary lengths to inform the world of the secret activities carried out by the American government.[62] He never wanted to hide his identity, boasting he had done nothing wrong.[63] Snowden revealed new details about metadata collection, of which the public had no knowledge.[64] Major disclosures included the existence of a secret collection program authorized by Section 215 of the Patriot Act,[65] and the PRISM program, which allows domestic Internet providers to share information with the NSA surrounding suspicious email addresses.[66] Snowden did not go unpunished for leaking this information to the public, as he is yet to return to the United States.[67] However, the government should not have shielded these programs from the public's knowledge.[68] Regardless of Snowden's leak and the public's reaction, programs like these are important in order to keep Americans safe from terrorism.[69]

A. *Section 215 of the Patriot Act*

The first major revelation by Snowden was a FISC order served upon Verizon,[70] one of America's largest communications companies.[71] The

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[62] *See The Whistleblower*, *supra* note 15; CITIZENFOUR, *supra* note 15 (depicting the steps Snowden took in order to ensure his safety prior to revealing the information, including use of encrypted email systems, lying to his girlfriend about his activities, and traveling to Hong Kong where the secret meetings took place between Snowden and journalists from The Guardian and The Washington Post).

[63] *The Whistleblower*, *supra* note 15; CITIZENFOUR, *supra* note 15 (displaying, ironically, extreme paranoia shown by Snowden).

[64] *See supra* note 61 and accompanying text.

[65] *See supra* note 61 and accompanying text; *see* 50 U.S.C. §1851 (2014).

[66] *See* McHugh, *supra* note 58, at 20.

[67] *See, e.g.*, McHugh, *supra* note 58, at 20 ("That revelation [of Snowden being the leaker] produced a furious media search to locate Snowden and, ultimately, to his departure from Hong Kong. His immediate destination turned out to be Moscow, where, in August, 2014, he was granted a three-year visa that keeps him in a limbo status until his ultimate destination is determined."); Shane, *supra* note 20, at 284–85 (aggregating some of the more significant documents leaked by Snowden in addition to the general information regarding the programs); CITIZENFOUR, *supra* note 15 (showing Snowden unable to pass through customs in Moscow for several weeks after the United States government revoked his passport).

[68] *See* Stone, *supra* note 19, at 1042 (discussing that the use of these counter-surveillance programs must be governed by a set of rules); Sales, *supra* note 21, at 535 (stressing the importance of allowing the public to participate in debates for the use of these programs).

[69] *See generally* Sales, *supra* note 21 (emphasizing the importance of governmental use of counter-terrorism tools in the modern age).

[70] Susan Freiwald, *Nothing to Fear or Nowhere to Hide: Competing Visions of the NSA's 215 Program*, 12 COLO. TECH. L.J. 309, 313 (2014); Greenwald, *NSA Collecting Phone Records supra*

sought-after information included:

> [C]omprehensive communications routing information, including but not limited to session identifying information (e.g., originating and terminating telephone number, International Mobile Station Equipment Identity (IMEI) number, International Mobile Subscriber Identity (IMSI) number, etc.), trunk identifier, telephone calling card numbers, and time and duration of call. Telephony metadata does not include the substantive content of any communication . . . or the name, address, or financial information of a subscriber or customer.[72]

The NSA requires telecommunication companies to deliver requested information on a daily basis.[73] NSA agents are then able to convert the data into readable information.[74]

The primary techniques utilized by the NSA when dissecting data were "contact chaining," and "three-hop network analysis."[75] Contact chaining is used to analyze the calling tendencies and patterns of a particular suspect.[76] Once a pattern is recognized, agents identify each phone call as a "hop."[77] From here on, each successive call by the recipients also constitutes a "hop."[78] As the NSA uses a "three-hop network analysis," they analyze patterns within three degrees of separation from the original suspect.[79] To clarify the extent of how the three-hop analysis works—an individual with forty contacts can reveal data on as many as 2.5 million people.[80]

Ultimately, Section 215 of the Patriot Act was replaced upon the

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note 15; CITIZENFOUR, *supra* note 15. *See generally* 50 U.S.C. §1861 (2014) (allowing the government to have access to certain business records for purposes of intelligence investigations).

[71] *See* Freiwald, *supra* note 70.

[72] *E.g.*, Joseph D. Mornin, *NSA Metadata Collection and the Fourth Amendment*, 29 BERKELEY TECH. L.J. 985, 993–94 (2014) (quoting Amended Memorandum Opinion at 2 n.2, In re Application of the Fed. Bureau of Investigation for an Order Requiring the Production of Tangible Things from [Redacted], No. BR 13–109 (FISA Ct. Aug. 29, 2013)); Freiwald, *supra* note 70 (quoting Secondary Order, In re Application of the Fed. Bureau of Investigation for an Order Requiring the Production of Tangible Things, No. 13–80, slip. op. at 2 (FISA Ct. Apr. 25, 2013)).

[73] Freiwald, *supra* note 70, at 314.

[74] Freiwald, *supra* note 70, at 314.

[75] Mornin, *supra* note 72, at 995.

[76] Mornin, *supra* note 72, at 995; Freiwald, *supra* note 70, at 314–15.

[77] Mornin, *supra* note 72, at 995.

[78] Mornin, *supra* note 72, at 995.

[79] Mornin, *supra* note 72, at 995.

[80] Mornin, *supra* note 72, at 995.

enactment of the USA Freedom Act of 2015.[81] Many view the new legislation—which was intended to be more protective of individual rights[82]—to be a positive scheme change.[83] However, a cumulative decrease in collected data from the loss of such an important counter-terrorism tool will surely lead to a higher risk of terror acts taking place on American soil.[84]

B. *The PRISM Program*

Snowden also unveiled that the NSA was utilizing a program called PRISM to obtain information from citizens.[85] PRISM was given authority under section 702 of the FISA in 2008.[86] The program allows for governmental access to domestic Google and Yahoo accounts,[87] in a similar manner to data-mining programs.[88] Specifically, under this program:

> [T]he NSA targets specific non-Americans who are reasonably believed to be located outside the country, and also engages in bulk collection of some foreign-to-foreign communications that happen to be passing through telecommunications infrastructure in the United States.[89]

PRISM was not unscathed from problems.[90] Specifically, the FISC stopped the program in 2011 after it was revealed that the government had

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[81] McHugh, *supra* note 58, at 21; Erin Kelly, *Senate Approves USA Freedom Act*, USA TODAY (June 2, 2015, 9:45 PM), https://perma.cc/47BZ-YW4A.

[82] McHugh, *supra* note 58, at 21.

[83] Kelly, *supra* note.81 (revealing that the Senate voted to alter the Act in a 67–32 vote).

[84] *See* Kelly, *supra* note 81 ("I cannot support passage of the so–called USA Freedom Act . . . . It does not enhance the privacy protections of American citizens. And it surely undermines American security by taking one more tool from our warfighters at exactly the wrong time.") (quoting Mitch McConnell).

[85] *See* Sharon D. Nelson & John W. Simek, *Edward Snowden's Impact: How Will NSA Revelations Affect the Legal Profession?*, 74 OR. ST. B. BULL. 19, 20 (2014); Ombres, *supra* note 60, at 32; Persky, *supra* note 22, at 26; Sales, *supra* note 21, at 526; *see also* McHugh, *supra* note 58, at 20; CITIZENFOUR, *supra* note 15.

[86] McHugh, *supra* note 58, at 20. *See generally* CITIZENFOUR, *supra* note 15 (chronicling Edward Snowden's revalation of the NSA surveillance program known as PRISM, among others).

[87] *See* Nelson & Simek, *supra* note 85; Ombres, *supra* note 60, at 32; Persky, *supra* note 22, at 26; Sales, *supra* note 21, at 526; Shane, *supra* note 20, at 284 (elaborating that the Government also analyzes information from Microsoft, Facebook, PalTalk, YouTube, Skype, AOL, and Apple); *see also* McHugh, *supra* note 58, at 20; CITIZENFOUR, *supra* note 15.

[88] *See* Sales, *supra* note 21, at 526 (citing Barton Gellman & Laura Poitras, *U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program*, WASH. POST (June 7, 2013), https://perma.cc/2A2D-Z7Z6).

[89] Sales, *supra* note 21, at 526.

[90] *See* Sales, *supra* note 21, at 526–27.

been obtaining information on American citizens.[91] The program was later rejuvenated when the NSA provided a technical solution to the inadvertent interception of American communications, and the PRISM program was again deemed a necessary tool.[92]

The NSA collects around 250 million Internet communications annually under the PRISM program.[93] Unlike metadata collection, "PRISM allows the NSA to collect the content of the communication."[94] It is of the utmost importance for programs like this to be maintained and implemented.[95] As long as these programs are no longer carried out in secrecy,[96] they are necessary tools in keeping our country safe.[97]

III. The Exposed Programs by Snowden are a Constitutional and Necessary Form of Counter-terrorism

President Obama has publicly showed strong support for the exposure of the Section 215 and PRISM programs.[98] In support of the revelations, he articulated, "I welcome this debate. And I think it's healthy for our democracy. I think it's a sign of maturity because probably five . . . six years ago, we might not have been having this debate."[99] On the contrary, others have been outspoken about the harm Snowden's leaks have done to the security of the United States.[100] Individuals in high-ranking counter-terrorism units have publicly expressed the harm to national security that Snowden's actions have caused.[101] Ultimately, justification for counter-

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[91] Sales, *supra* note 21, at 526–27.

[92] Sales, *supra* note 21, at 526–27.

[93] Persky, *supra* note 22, at 26 (explaining that the source of her material came from the declassification of court documents).

[94] Persky, *supra* note 22, at 26.

[95] *See* Sales, *supra* note 21, at 536 (emphasizing the upside of using these tactics in order to prevent terrorism).

[96] Stone, *supra* note 19, at 1042, 1054 (implying that a lack in transparency leads to a higher chance of abuse of power over these programs).

[97] *See generally* Sales, *supra* note 21 (discussing the importance of using information to combat terrorism).

[98] John Mueller & Mark G. Stewart, *Secret Without Reason and Costly Without Accomplishment: Questioning the National Security Agency's Metadata Program*, 10 I/S: J. L. & POL'Y FOR INFO. SOC'Y 407, 407 (2015).

[99] *Id.* (quoting President Barack Obama, Statement by the President at the Fairmont Hotel, San Jose, California (June 7, 2013), https://perma.cc/TM2U-4YUW).

[100] *See id.* at 411–12.

[101] *Id.* ("[F]rom outgoing FBI Director Robert Mueller in August 2013 . . . '[L]eaks by former NSA contractor Edward Snowden have impacted, and are in the process of impacting, capabilities around the world' . . . . Even less helpful has been the expression of belief promulgated by NSA chief Keith B. Alexander: 'Based on what we know to date, we believe

terrorism programs comes from a balance between overall safety and welfare of the public and the sacrifice of individual privacy.[102] Many have questioned the constitutionality of these government surveillance programs.[103] These individuals feel that the extreme breach of privacy constitutes an unconstitutional collection of private information by the government.[104] Counter-terrorism programs such as PRISM and metadata aggregation are constitutionally valid.[105] While the government should not keep American citizens in the dark about these programs,[106] they are

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these disclosures have caused significant and irreversible harm to the security of the nation.'") (citing Billy Kenber, *Outgoing Director Robert S. Mueller, III Tells How 9/11 Reshaped FBI Mission*, WASH. POST. (Aug. 22, 2013), https://perma.cc/UHH2-SH7W).

[102] *See id.* at 410–11 (2015) (quoting Jim Harper, John Mueller, & Mark Stewart, *Comments on Notice of Proposed Rulemaking: Passenger Screening Using Advanced Imaging Technology, TSA–2013–0004 (RIN 1653–AA67)*, CATO INST. (June 21, 2013), https://perma.cc/Q6H2-JXTW).

[103] *See* Sales, *supra* note 21, at 532 ("The critical question is how to take advantage of its potentially significant national security benefits without running afoul of fundamental civil liberties and privacy values."). *See generally* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013) (holding that FISA did not purport an injury on the plaintiff when collecting data); Klayman v. Obama, 957 F. Supp. 2d 1 (2013), *rev'd*, 800 F.3d 559 (2015) (examining how the district court determined the collection of metadata to be an "arbitrary invasion" of privacy); Elizabeth Atkins, *Spying on Americans: At What Point Does the NSA's Collection and Searching of Metadata Violate the Fourth Amendment?*, 10 WASH. J.L. TECH. & ARTS 51 (2014); Randy Barnett, *Why the NSA Data Seizures are Unconstitutional*, 38 HARV. J.L. & PUB. POL'Y 3 (2015); Ted Claypoole, *Constitutionality of NSA Cybersurveillance: Early Cases Split Between Privacy and Counterespionage*, 10 SCITECH LAW. 10 (2014); Mastracci, *supra* note 49; Mueller & Stewart, *supra* note 98.

[104] *See* Barnett, *supra* note 103 (stating that—statutory authority aside—the surveillance programs breach the protected expectation of privacy); *see also* Atkins, *supra* note 103, at 70–74 (discussing recent challenges to the use of these programs); Greenwald, *NSA Collecting Phone Records*, *supra* note 15.

[105] Stone, *supra* note 19, at 1041 ("The Review Group found no evidence that the NSA had knowingly or intentionally engaged in unlawful or unauthorized activity. To the contrary, it has put in place carefully-crafted internal procedures to ensure that it operates within the bounds of its lawful authority."); *see* Mastracci, *supra* note 49; Yoo, *supra* note 40 (speaking to the legality of the metadata collection under Section 215 of the Patriot Act). *See generally Klayman*, 957 F. Supp. 2d at 1 (holding that their collection of metadata is not an arbitrary invasion of privacy); Stephen I. Vladeck, *Standing and Secret Surveillance*, 10 I/S: J. L. & POL'Y FOR INFO. SOC'Y 551 (2015) (discussing the United States Supreme Court decision in *Clapper v. Amnesty International*, 133 S. Ct. 1138 (2013) which concluded that secret surveillance programs are valid under Section 702 of FISA).

[106] Sales, *supra* note 21, at 535 ("Whenever possible, programmatic surveillance systems should be adopted through open and transparent debates that allow an informed public to meaningfully participate. The systems also should be operated in as transparent a manner as possible."); Stone, *supra* note 19, at 1042 ("The future of our nation depends not only on the NSA doing its job, but also on the existence of clear, definitive, and carefully enforced rules and restrictions governing its activities."); *see* Mueller & Stewart, *supra* note 98 (clarifying that

absolutely necessary for the general welfare and safety of the United States to prevent terrorism.[107]

A. *There are Legitimate Concerns Regarding the Safety of the Information Collected Through Surveillance Programs*

When individuals became aware of the existence of section 215 and PRISM programs, they wanted to know as much as possible.[108] In the wake of public outrage, news outlets looked at the legality of these programs, and how the information was being used.[109] While the legality of the programs are no longer at issue,[110] there are genuine concerns regarding the safety and use of the data collected.[111] The sensitive nature and quantity of the data should add extra emphasis on protecting this information,[112] as the effect of disclosing sensitive information impacts more than just our country.[113] Techniques such as minimization rules and technological safeguards should be implemented in order to protect this data.[114]

A primary concern in collecting bulk data is the manner in which the information will be used.[115] The collection of data should only be used when a threat to national security is involved.[116] Abusing these programs

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while the point of their Note was not to get caught up in the secrecy of the program—there is a debate in the overall secrecy of the programs run by the NSA).

[107] *See generally* Sales, *supra* note 21 (emphasizing that these surveillance techniques can be an important tool in the fight against terrorism).

[108] Melanie Reid, *Government Secrets: The Public's Misconceptions of the Snowden Disclosures*, 3 LINCOLN MEMORIAL U. L. REV. 36, 38 (2015).

[109] *Id.*

[110] *See generally Klayman*, 957 F. Supp. 2d at 1 (overturning the district court decision that metadata collection is an "arbitrary invasion" of privacy); Yoo, *supra* note 40; Mastracci, *supra* note 49 (elaborating on how the *Klayman* court erred).

[111] Mornin, *supra* note 72, at 1006 ("Certainly, government agents can use sophisticated data mining techniques to capture insights that may assist the legitimate needs of law enforcement. But queries may also expose a great deal of private information about innocent people."); Sales, *supra* note 21, at 531–41 (discussing many structural considerations that should be emphasized to ensure the safety of the collected data).

[112] *See* CITIZENFOUR, *supra* note 15 ("The NSA has built the world's largest repository for intercepted communication in Bluffdale, Utah."); *see also* Sales, *supra* note 21, at 531–41.

[113] Mark D. Young, *National Insecurity: The Impacts of Illegal Disclosures of Classified Information*, 10 I/S: J. L. & POL'Y FOR INFO. SOC'Y 367, 368 (2015).

[114] *See* Sales, *supra* note 21, at 540–41.

[115] *See* Mornin, *supra* note 72, at 1000 ("Metadata can expose private information on three distinct levels: first, records of individual calls; second, a caller's records collected over time; and third, an aggregation of many callers records.") (internal citation omitted); Sales, *supra* note 21, at 536 (explaining the concept of an "anti–mission–creep" principle and how it should be enforced in counterterrorist programs).

[116] Sales, *supra* note 21, at 536 ("Bulk data collection should only be used to investigate and

could lead to an even stronger public outcry.[117] Because of this potential for abuse, there should be no exceptions to using the information solely for national security interests.[118] However, when weighing the interests between overall public safety and individual privacy—the need for these programs justifies the collection of potentially sensitive information to prevent deadly attacks from organizations that wish harm upon Americans.[119]

Operational concerns with the collection of data are also warranted—including both external and internal oversight.[120] Perhaps more important still are the ideas of minimization requirements and technological safeguards.[121] Minimization requirements set limits on an acceptable use of the data, including the approved length of time to retain such information and permissible scope of use.[122] Technological safeguards additionally offer protection by restricting access to information as well as tracking where it goes.[123] The government should be taking every precaution in keeping this information safe—however, that does not seem to be the case.[124] A failure to keep information safe will create more public concerns about privacy interests.[125] Yet, as long as the NSA can protect their collected data, they can justify its bulk collection.[126] Ultimately, it is necessary for the

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prevent terrorism, espionage, and other serious threats to the national security. It should be off limits in regular criminal investigations.").

[117] Sales, *supra* note 21, at 532 ("The possibility of abuse makes it critical to establish a set of first principles to govern when and how programmatic monitoring is to be conducted . . . . The critical question is how to take advantage of its potentially significant national security benefits without running afoul of fundamental civil liberties and privacy values.").

[118] *Contra* Sales, *supra* note 21, at 536 (arguing that there should be an exception for when heinous grave crimes are at issue).

[119] *See* Sales, *supra* note 21, at 536 ("The upside of preventing deadly terrorist attacks and other national security perils can be so significant that we as a nation may be willing to sanction extraordinary investigative techniques like bulk data collection.").

[120] Sales, *supra* note 21, at 536–40.

[121] Sales, *supra* note 21, at 540–41.

[122] Sales, *supra* note 21, at 540 ("Minimization rules limit what the government may do with data that does not appear pertinent to a national security investigation—e.g., how long it may be retained, the conditions under which it will be stored, the rules for accessing it, the purposes for which it may be used, the entities with which it may be shared and so on.").

[123] Sales, *supra* note 21, at 540–41.

[124] Max Cherney, *The FBI Says It Can't Find Hackers to Hire Because They All Smoke Pot*, VICE: MOTHERBOARD (May 21, 2014, 11:05 AM), http://motherboard.vice.com/read/the-fbi-cant-find-hackers-that-dont-smoke-pot [https://perma.cc/XMF6-2MNH] (explaining that qualified computer experts seek employment elsewhere where they can get higher pay and less restrictions).

[125] *See* Claypoole, *supra* note 103, at 25.

[126] *See* Yoo, *supra* note 40, at 325. *See generally* Sales, *supra* note 21 (discussing the dynamics

authorities to have this information in order to keep American citizens safe.[127]

B. *Counter-Terrorism Programs are Necessary in Preventing Attacks Against United States Citizens*

As long as the United States remains a primary target for extremist organizations, there is an overwhelming necessity to protect the citizens, especially within our borders.[128] President Obama has even acknowledged that attacks will always be imminent, but that major attacks need to be eliminated.[129] Still, it is important to create an adequate balance between national security and the preservation of individual rights.[130] In 2013, President Obama put together a review group to weigh in on the controversial surveillance programs.[131] In relation to stopping terrorist attacks, the following analogy was suggested:

> A goalie in a soccer game . . . "must stop every shot, for the enemy wins if it scores a single goal." The problem . . . "is that the goalie cannot see the ball—it is invisible. So are the players—he doesn't know how many there are, or where they are, or what they look like. He also doesn't know where the sidelines are—they are blurry and constantly shifting, as are the rules of the game itself." The invisible players might shoot the invisible weapon "from the front of the goal, or from the back, or from some other direction—the goalie just doesn't know." In short, the only way the goalie can stop a goal is by watching the movements of the blades of grass.[132]

Since it is extremely difficult for authorities to prevent harmful attacks,[133] the identification of terrorist groups and locations has

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between privacy protection and terrorist prevention).

[127] *See generally* Sales, *supra* note 21 (highlighting the importance of utilizing surveillance techniques in the fight against terrorism).

[128] Browne, *supra* note 7; Peele, *supra* note 8; Stone, *supra* note 19, at 1035–36.

[129] David Jackson, *Obama: We can stop 'large scale' terror attacks*, USA TODAY (Dec. 2, 2015, 6:45 AM), https://perma.cc/N65M-CE2K ("The truth is that in a free and open society, we will never completely eliminate the possibility of a single terrorist act happening in any given time . . . . [But] what we can do is that we prevent the kinds of large scale attacks that result in so much [sic] deaths.").

[130] Stone, *supra* note 19, at 1037–38 (explaining how when Americans face a national crisis, they have a tendency to overreact under the concept of "better safe than sorry").

[131] Stone, *supra* note 19, at 1033–34.

[132] Stone, *supra* note 19, at 1036 (quoting JACK GOLFSMITH, THE TERROR PRESIDENCY 73 (2007)).

[133] Stone, *supra* note 19, at 1036.

quintessential importance.[134]

Not only have attacks become increasingly more difficult to identify,[135] the potential damage that can be inflicted upon unsuspecting victims can be catastrophic.[136] Modern day technology allows for terrorists to inflict damage on a terrifying level.[137] Developments in chemical, biological, and nuclear weaponry can lead to thousands of deaths and can cause billions of dollars in damage.[138] Failing to prevent an attack on this scale would have a catastrophic effect on American society.[139] Failure to prevent such an attack is not an option.[140]

Additionally, terrorists using modern technology are able to communicate with one another from all over the world.[141] It is essential to maintain a process of defending our nation against terrorist threats.[142] Stressing the necessity of protection:

> An effort to prevent attacks on the scale of 9/11 . . . might yield meaningful information only once in a decade. Failing to prevent such an attack, though, would be catastrophic. Thus, the [counter-terrorisms programs were] analogous to a fire alarm in one's home. It might save your life only once a decade, but that doesn't mean you toss it out.[143]

Since general public safety and welfare outweighs individual privacy concerns, there is a clear necessity for maintaining these surveillance programs.[144]

It is important for the government to be able to utilize data in order to

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[134] Sales, *supra* note 21, at 550.

[135] Stone, *supra* note 19, at 1036 (quoting JACK GOLFSMITH, THE TERROR PRESIDENCY 73 (2007)).

[136] Stone, *supra* note 19, at 1035–36.

[137] Stone, *supra* note 19, at 1035–36. ("[I]nternational terrorists . . . can inflict massive damage, using not only conventional but possibly also chemical, biological, and even nuclear weapons. Such attacks can not only cost billions of dollars of damage and cause thousands of deaths, but they can also change our culture in fundamental ways by leading us to sacrifice ever more of our civil liberties and privacy in the quest for national security. The costs of failing to prevent such attacks . . . would be staggering.").

[138] Stone, *supra* note 19, at 1035–36.

[139] Stone, *supra* note 19, at 1035–36.

[140] *See* Stone, *supra* note 19, at 1035–36.

[141] Stone, *supra* note 19, at 1046.

[142] *See id.* at 1050 (emphasizing the harm of an attack using modern technology).

[143] *Id.*

[144] *See generally* Sales, *supra* note 21 (clarifying the necessity to use counter-terrorism programs). *See also* Stone, *supra* note 19, at 1050 (determining that the potential value to a properly run counter-terrorism program is immense).

be informed of any potential threats against our country.[145] By harnessing information, the chances of terrorist attacks on a large scale are minimized.[146] For Americans to remain safe, it is essential that the government have access to data, so they can try to stay one step ahead of any potential threat.[147]

CONCLUSION

The section 215 and PRISM programs should have never been carried out in secrecy.[148] Edward Snowden was selfless in uprooting his entire life in order to inform the public about the two programs.[149] Although these programs are far from universally accepted,[150] the potential prevention of terrorist attacks in the United States makes them necessary.[151] Americans are not immune from another high-impact attack on home soil.[152] With the likely probability that an attack is imminent,[153] extreme counter-terrorism measures, such as the Section 215 and PRISM programs must be taken.[154] Programs of this nature are necessary for ensuring the safety of American lives against extremist terrorist groups.[155]

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[145] *See* Sales, *supra* note 21.

[146] *See* Sales, *supra* note 21, at 523–24 (explaining how an individual had been flagged at customs and refused entry into the United States, who later was involved in the detonation of the deadliest suicide bombing Iraq had seen to date).

[147] *See* Sales, *supra* note 21, at 524.

[148] *See* Sales, *supra* note 21, at 535–36 (stressing that transparency should be the default standard for these programs).

[149] *See The Whistleblower*, *supra* note 15.

[150] Mueller & Stewart, *supra* note 98, at 410–11.

[151] Browne, *supra* note 7; Peele, *supra* note 8; Stone, *supra* note 19, at 1035–36; Sales, *supra* note 21, at 536.

[152] *See* Browne, *supra* note 7; Peele, *supra* note 8.

[153] *See* Browne, *supra* note 7; Peele, *supra* note 8.

[154] *See generally* Sales, *supra* note 21 (concluding that there is an overall need to protect Americans by maintaining counter-surveillance programs).

[155] *See* Sales, *supra* note 21.

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NOTES

Revealing a Necessary Evil: The United States Must Continue to Use Some Form of Domesticated Counter-Terrorism Program

*Daniel R. Godefroi**

INTRODUCTION

Tragedy often strikes the news when members of military service are killed overseas.[1] These heroes willingly fight for the general welfare and safety of United States citizens.[2] They know of the dangers and risks that they have courageously opened themselves up to when preparing for battle. Unfortunately, on December 2, 2015, tragedy struck innocent civilians on United States soil.[3] Two individuals, armed with automatic weapons and pipe bombs, walked into a holiday party in San Bernardino, California and took the lives of fourteen unsuspecting individuals, and injured an additional twenty-two.[4] The victims of this attack did not sign up to be put in harm's way.[5] An act of terrorism found them in a place they considered safe — inside the boundaries of the United

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[1] *See, e.g.*, Megan Crigger & Laura Santhanam, *How Many Americans Have Died in U.S. Wars?*, PBS NEWSHOUR (May 24, 2015, 4:19PM), https://perma.cc/55FN-W4DR.

[2] *See id.*

[3] *See Everything We Know About the San Bernardino Terror Attack Investigation So Far*, L.A. TIMES (Dec. 14, 2015, 4:03 PM), https://perma.cc/ULU6-DRDE.

[4] *Id.*

[5] *See id.*

States.[6]

Of late, extremist terrorist organizations focused their hatred towards the United States.[7] It would be foolish to think that the possibility of a large-scale terrorist attack is not possible on domestic soil.[8] America will not soon forget the horror of the events that took place on September 11, 2001.[9] These attacks, carried out by Al Qaeda and its leader Osama bin Laden, tragically affected tens of thousands of American families.[10] Since its inception in 1999, ISIS has been inflicting gruesome acts of terror worldwide,[11] including the attack in San Bernardino.[12] The safety of American lives against radical terrorist groups has never been in more jeopardy than the present.[13]

With safety remaining an issue,[14] in June 2013, information unfolded that the NSA had been collecting phone records of millions of Americans on domestic soil.[15] Edward Snowden, a contracted employee of the NSA, gained access to sensitive information after realizing the extent to which the agency had stretched its authority.[16] The importance of this information was immediately downplayed by American leadership.[17] However, now

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[6] *See id.*

[7] *See* Ryan Browne, *Top Intelligence Official: ISIS to Attempt U.S. Attacks This Year*, CNN (Feb. 9, 2016, 2:39 PM), https://perma.cc/W5EZ-6R5U.

[8] *See id*; Thomas Peele, *Terrorism Poll: After San Bernardino Attack, 71 Percent of California Voters Believe Another Attack is Likely*, MERCURY NEWS (Aug. 11, 2016, 11:10 PM), https://perma.cc/3LQ5-QZXN.

[9] *See 9/11 Attacks*, HISTORY.COM, https://perma.cc/3J8H-WRW4 (last visited July 11, 2017).

[10] *Id.*

[11] *See* Tim Lister et al., *ISIS Goes Global: 143 Attacks in 29 Countries Have Killed 2,043*, CNN (Jan. 16, 2017, 3:02 PM), https://perma.cc/J3BK-SHM3; Karen Yourish, et al., *Where ISIS Has Directed and Inspired Attacks Around the World*, N.Y. TIMES (Mar. 22, 2016), https://perma.cc/4BSX-BQCE; *Paris Attacks: What Happened on the Night*, BBC NEWS (Dec. 9, 2015), https://perma.cc/E4B5-JJ7X.

[12] Michael S. Schmidt & Richard Pérez–Peña, *F.B.I. Treating San Bernardino Attack as Terrorism Case*, N.Y. TIMES (Dec. 4, 2015), https://perma.cc/QP2V-6RE6.

[13] *See* Browne, *supra* note 7.

[14] *See* Browne, *supra* note 7.

[15] Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN (June 6, 2013, 6:05 AM), https://perma.cc/7WFA-99PT] [hereinafter *NSA Collecting Phone Records*]; Glenn Greenwald, et al., *Edward Snowden: The Whistleblower Behind the NSA Surveillance Revelations*, GUARDIAN (June 11, 2013, 9:00 AM), https://perma.cc/6P28-ZDNX [hereinafter *The Whistleblower*]; CITIZENFOUR (HBO Documentary Films 2014).

[16] *The Whistleblower*, *supra* note 15; CITIZENFOUR, *supra*, note 15.

[17] Elizabeth Atkins, *Spying On Americans: At What Point Does the NSA's Collection and Searching of Metadata Violate the Fourth Amendment?*, 10 WASH. J.L. TECH & ARTS 51, 54 (2014) (citing President Obama, Remarks by the President on Review of Signals Intelligence (Jan. 17, 2014)).

that terrorist cells are an internal threat to America's safety,[18] it is important for counter-terrorism programs to be in place.[19] Many Americans fear the possibility of facing another attack of the same gravity as September 11.[20] Every precaution should be taken to prevent such an attack.[21] Snowden's revelations regarding secret surveillance programs taking place without prior consent or knowledge were extremely important for the American public. However, it is necessary for such counter-terrorism programs to exist in order to protect their general welfare and safety.

This Note will examine the origins of the programs exposed by Edward Snowden and elaborate on the need to sustain similar programs. Part I will examine the backgrounds of the Foreign Intelligence Surveillance Act and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (Patriot Act), as these acts laid the groundwork for counter-terrorism programs. Part II will focus on the revelations that Edward Snowden provided to the world about the NSA's programs. Part III will acknowledge potential problems with having programs such as these, but will ultimately argue that the importance of having such programs outweighs any issues they may pose. Finally, Part IV will conclude this Note.

I. History of the Foreign Intelligence Surveillance Act and the Patriot Act

The NSA was originally created for the United States to reveal enemy

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[18] *See* Malia Zimmerman, *Feds Release New Evidence, Seek Link Between San Bernardino Attack, Prior Terrorist Plot*, FOX NEWS (Jan. 29, 2016), https://perma.cc/PM3B-YS42.

[19] *See* Geoffrey R. Stone, *The View From Inside the NSA Review Group*, 63 DRAKE L. REV. 1033, 1035–36 (2015) ("[I]nternational terrorists today can inflict massive damage, using not only conventional but possible also chemical, biological, and even nuclear weapons. Such attacks can not only cost billions of dollars of damage and cause thousands of deaths, but they can also change our culture in fundamental ways by leading us to sacrifice ever more of our civil liberties and privacy in the quest for national security. The costs of failing to prevent such attacks, I thought, would be staggering" (internal citations omitted)).

[20] *See* Peter M. Shane, *Foreword: The NSA and the Legal Regime for Foreign Intelligence Surveillance*, 10 I/S: J.L. & POL'Y FOR INFO. SOC'Y 259, 292 (2015) ("[O]ur history after 9/11 reinforces the fundamental point that the public is more vigilant about its civil liberties when it feels safe. The argument, in short, is that without security, there is no liberty."); Browne, *supra* note 7; Peele, *supra* note 8.

[21] *See* Nathan A. Sales, *Domesticating Programmatic Surveillance: Some Thoughts on the NSA Controversy*, 10 I/S: J.L. & POL'Y FOR INFO. SOC'Y 523, 524 (2015) ("The recently disclosed NSA surveillance programs . . . aim at . . . harnessing the power of big data to detect nascent threats before they can do harm—and raise the same vital questions about how to balance the competing demands of national security on the one hand and privacy and civil liberties on the other.").

codes during World War II.[22] Jurisdictionally, the NSA operates under the authority of the military, and reports to the director of national intelligence.[23] Unfortunately, the events that took place on September 11 proved that the information the agency had been receiving was not sufficient to protect the safety of thousands of innocent victims.[24] Within weeks, Congress implemented the Patriot Act.[25] However, counterintelligence was a focus stemming from before the Patriot Act's existence.[26] The Foreign Intelligence Surveillance Act (FISA) was enacted decades prior.[27]

A. *History of the Foreign Intelligence Surveillance Act*

In the early stages of counterintelligence, agencies were not subject to a high level of supervision.[28] Therefore, in 1978, FISA was implemented in order to establish guidelines for intelligence gathering via electronic surveillance.[29] Searches and electronic surveillance are governed by the Federal Rules of Criminal Procedure, however, "the secretive and less protective rules and procedures of FISA may be employed when matters of national security are involved and the aim is to collect foreign intelligence."[30] The use of more lenient rules for FISA centers around the seriousness of terrorist threats, and that sometimes privacy intrusions are necessary in order to collect certain information.[31] Yet, it is important to note that the surveillance power in FISA was only to be used for national security reasons, and not by domestic law enforcement agencies searching

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[22] Anna S. Persky, *Cover Blown: NSA Surveillance and Secrets*, 28 WASH. LAW. 23, 25 (2014) (explaining the rationale for President Truman's creation of the NSA in 1952).

[23] *Id.*

[24] *See* Michael T. McCarthy, *Recent Developments: USA Patriot Act*, 39 HARV. J. ON LEGIS. 435, 436 (2002).

[25] *Id.* at 435 (citing Pub. L. No. 107–56, 115 Stat. 272 (2001)).

[26] *See* Persky, *supra* note 22; *see also* Casey J. McGowan, *The Relevance of Relevance: Section 215 of the USA PATRIOT Act and the NSA Metadata Collection Program*, 82 FORDHAM L. REV. 2399, 2410 (2014); Michael J. Woods, *Counterintelligence and Access to Transactional Records: A Practical History of USA PATRIOT Act Section 215*, 1 J. NAT'L SEC. L. & POL'Y 37, 40 (2005).

[27] McGowan, *supra* note 26.

[28] Woods, *supra* note 26 (explaining that in the 1960s–1970s, there were very few standards that agencies had to abide by).

[29] *See* McGowan, *supra* note 26 (quoting William C. Banks, *And the Wall Came Tumbling Down: Secret Surveillance After the Terror*, 57 U. MIAMI L. REV. 1147, 1148 (2003)); Woods, *supra* note 26 (alluding to the fact that the executive branch was taking more control over counter-terrorism activities).

[30] McGowan, *supra* note 26 (justifying the potential breach to privacy by stressing the seriousness of terrorism threats).

[31] *See* McGowan, *supra* note 26.

for criminal activity.[32] FISA was intended to provide a clear dividing line between foreign intelligence and law enforcement, as "privacy intrusions are limited to the collection of information for foreign intelligence purposes."[33]

Governing the activities under FISA is the Foreign Intelligence Surveillance Court (FISC).[34] By design, the judges appointed to the FISC must reside within twenty miles of the District of Columbia.[35] This court has the power to "hear applications for and grant orders approving electronic surveillance anywhere within the United States but may not hear an application that was previously denied by another FISC judge."[36] When necessary, one can appeal decisions made by the FISC to the Foreign Intelligence Surveillance Court of Review.[37] This panel of three judges has the jurisdiction to review any denied FISC application.[38]

FISA was not widely recognized until the horrific events of September 11.[39] It was drafted based off the technology available prior to 1978,[40] and follows "cumbersome procedures on our intelligence and law enforcement officers."[41] From 1979-2000, the FISC received about 600 warrant applications for electronic surveillance every year, and never rejected a single application.[42] However, following the September 11 attacks, the FISC

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[32] *See* McGowan, *supra* note 26, at 2411.

[33] McGowan, *supra* note 26, at 2410–11 (quoting William C. Banks, *And the Wall Came Tumbling Down: Secret Surveillance After the Terror*, 57 U. MIAMI L. REV. 1147, 1148, 1160 (2003)).

[34] *See* 50 U.S.C. § 1803(a) (2006); *see also* McGowan, *supra* note 26, at 2411 (explaining how the court includes eleven district court judges appointed by the chief justice of the United States, who must represent at least seven of the federal circuits).

[35] § 1803(a).

[36] McGowan, *supra* note 26, at 2411 (citing § 1803(a)).

[37] McGowan, *supra* note 26, at 2411 (citing William C. Banks, *And the Wall Came Tumbling Down: Secret Surveillance After the Terror*, 57 U. MIAMI L. REV. 1147, 1171 (2003) (describing the Foreign Intelligence Surveillance Court of Review as the nation's most secret appellate court, which only meets on rare occasions)).

[38] § 1803(b); McGowan, *supra* note 26, at 2411.

[39] McGowan, *supra* note 26, at 2412 (citing Stephen J. Schulhofer, *The New World of Foreign Intelligence Surveillance*, 17 STAN. L. POL'Y REV. 531, 534–35 (2006)).

[40] John Yoo, *The Legality of the National Security Agency's Bulk Data Surveillance Programs*, 10 I/S: J.L. & POL'Y FOR INFO. SOC'Y 301, 309 n.36 (2014) (citing Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. PA. L. REV. 793, 825 (1989) (expressing how FISA was drafted on technology available in the years 1968 to 1978, but even by 1989 technology was already vastly improved from the technology a decade earlier)).

[41] Yoo, *supra* note 40 at 309.

[42] McGowan, *supra* note 26, at 2412 (citing *Foreign Intelligence Surveillance Act Court Orders 1979–2014*, EPIC.ORG, https://perma.cc/JKG9-6XKY (last visited Mar. 21, 2017) [hereinafter *Foreign Intelligence*]).

showed an extreme increase in applications.[43] This was in large part due to the implementation of the Patriot Act.[44]

B. *History of the USA PATRIOT Act*

The September 11 attacks showed that the government was taking a flawed approach at preventing terrorism on home soil.[45] It was determined that lapses existed in the collective effort to obtain information in the intelligence community.[46] Less than six weeks after the September 11 attacks, the Patriot Act was signed into law.[47] Reacting to the horrific attacks:

> The legislation grant[ed] additional wiretapping and surveillance authority to federal law enforcement, remove[d] barriers between law enforcement and intelligence agencies, add[ed] financial disclosure and reporting requirements to combat terrorist funding, and [gave] greater authority to the Attorney General to detain and deport aliens suspected of having terrorist ties.[48]

The goals of the Patriot Act were to provide law enforcement with more thorough investigatory tools and to deter terrorist attacks from taking place.[49] The Act encouraged the expansion of what the government could investigate by defining what constituted domestic terrorism.[50] Per the Act, domestic terrorism "includes any dangerous acts that 'appear to be

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[43] McGowan, *supra* note 26, at 2412.

[44] McGowan, *supra* note 26, at 2412 (citing Stephen J. Schulhofer, *The New World of Foreign Intelligence Surveillance*, 17 STAN. L. POL'Y REV. 531, 549 (2006)).

[45] McCarthy, *supra* note 24, at 437–38 (explaining that there was intelligence prior to the attacks which would have been useful in preventing the attacks, if better communication between agencies was available).

[46] Persky, *supra* note 22 ("One major problem was a gap in the ability to quickly make connections between phone numbers used by individuals inside the U.S. to phone numbers of people outside the U.S. who are associated with terrorism.") (quoting Carrie F. Cordero, adjunct professor and director of National Security Studies at Georgetown University Law Center).

[47] McCarthy, *supra* note 24, at 435 (citing Pub. L. No. 107–56, 115 Stat. 272 (2001)).

[48] McCarthy, *supra* note 24, at 435.

[49] *See* BERNARD D. REAMS, JR. & MICHAEL P. FORREST, USA PATRIOT ACT: A LEGISLATIVE HISTORY OF THE UNITING AND STRENGTHENING OF AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM ACT, PUBLIC LAW NO. 107–56 (2001); Joshua M. Mastracci, Klayman v. Obama*: The D.C. District Court Misinterprets the NSA Metadata Collection Program as a Violation of Individual Fourth Amendment Rights*, 17 TUL. J. TECH. & INTELL. PROP. 365, 367 (2014) (quoting USA PATRIOT Act, Pub. L. No. 107–56, § 501(a)(1), 115 Stat. 287 (2001)).

[50] REAMS & FORREST, *supra* note 49 (citing Lisa Finnegan Abdolian & Harold Takooshian, *The USA Patriot Act: Civil Liberties, the Media, and Public Opinion*, 30 FORDHAM URB. L.J. 1429, 1430 (2003) (citing USA PATRIOT Act, Pub. L. No. 107–56, § 802, 115 Stat. 376 (2001)).

intended . . . to influence the policy of a government by intimidation or coercion.'"[51] In essence, the Act provided a statutory guide allowing for investigative tactics that would normally constitute a violation of civil liberties.[52] The use of such information is necessary for authorities to combat the threat of terror.[53]

At inception, the executive branch was to maintain a higher degree of power over these counter-terrorism tactics.[54] For example, the statute authorized the head of the FBI to apply for an order for the production of materials regarding foreign intelligence.[55] When seeking information, the application must show evidence that it is not unreasonable to consider the intelligence pertinent to the investigation.[56] Ultimately, "there are three essential legal elements concerning the metadata collection program: (1) the collection is part of an authorized investigation, (2) the records obtained are 'tangible things,' and (3) the data collected is relevant to that investigation."[57]

Metadata is the term for content data contained in a phone call.[58] Specifically, "metadata . . . includes such things as the telephone number from which the call originated, the number to which it was placed, the length of the call, the time of day it was made and other like material."[59] However, throughout the years 2001–2013, the NSA utilized the Patriot Act in order to maintain surveillance over not only foreign communications, but on its citizens as well.[60] Until Edward Snowden came forward with information regarding secretive surveillance programs, American citizens were oblivious that their metadata was being collected.[61]

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[51] Abdolian & Takooshian, *supra* note 50 (quoting USA PATRIOT Act of 2001, Pub. L. No. 107–56, § 802, 115 Stat. 272, 376 (2001)).

[52] *See* REAMS & FORREST, *supra* note 49.

[53] *See* REAMS & FORREST, *supra* note 49 (quoting George W. Bush).

[54] McGowan, *supra* note 26, at 2413 (citing William C. Banks, *And the Wall Came Tumbling Down: Secret Surveillance After the Terror*, 57 U. MIAMI L. REV. 1147, 1166 (2003)).

[55] 50 U.S.C. § 1861(a)(2)(B) (2012); McGowan, *supra* note 26, at 2413 (elaborating that if the subject of the investigation is a U.S. citizen, then there must be more information than activities protected by the First Amendment).

[56] 50 U.S.C. § 1861(b)(2)(A); McGowan, *supra* note 26, at 2413.

[57] McGowan, *supra* note 26, at 2414.

[58] McGowan, *supra* note 26, at 2415; *see* James F. McHugh, Book Review, 97 MASS. L. REV. 19, 19 (2015) (reviewing GLENN GREENWALD, NO PLACE TO HIDE: EDWARD SNOWDEN, THE NSA AND THE U.S. SURVEILLANCE STATE (2014)).

[59] McHugh, *supra* note 58.

[60] Devon Ombres, *NSA Domestic Surveillance from the PATRIOT ACT to the Freedom Act: The Underlying History, Constitutional Basis, and the Efforts at Reform*, 39 SETON HALL LEGIS. J. 27, 28 (2015), https://perma.cc/P8G6-KPHJ.

[61] *See* McHugh, *supra* note 58, at 20; CITIZENFOUR, *supra* note 15.

II. Edward Snowden Reveals NSA Programs to the Public

Edward Snowden went to extraordinary lengths to inform the world of the secret activities carried out by the American government.[62] He never wanted to hide his identity, boasting he had done nothing wrong.[63] Snowden revealed new details about metadata collection, of which the public had no knowledge.[64] Major disclosures included the existence of a secret collection program authorized by Section 215 of the Patriot Act,[65] and the PRISM program, which allows domestic Internet providers to share information with the NSA surrounding suspicious email addresses.[66] Snowden did not go unpunished for leaking this information to the public, as he is yet to return to the United States.[67] However, the government should not have shielded these programs from the public's knowledge.[68] Regardless of Snowden's leak and the public's reaction, programs like these are important in order to keep Americans safe from terrorism.[69]

A. *Section 215 of the Patriot Act*

The first major revelation by Snowden was a FISC order served upon Verizon,[70] one of America's largest communications companies.[71] The

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[62] *See The Whistleblower*, *supra* note 15; CITIZENFOUR, *supra* note 15 (depicting the steps Snowden took in order to ensure his safety prior to revealing the information, including use of encrypted email systems, lying to his girlfriend about his activities, and traveling to Hong Kong where the secret meetings took place between Snowden and journalists from The Guardian and The Washington Post).

[63] *The Whistleblower*, *supra* note 15; CITIZENFOUR, *supra* note 15 (displaying, ironically, extreme paranoia shown by Snowden).

[64] *See supra* note 61 and accompanying text.

[65] *See supra* note 61 and accompanying text; *see* 50 U.S.C. §1851 (2014).

[66] *See* McHugh, *supra* note 58, at 20.

[67] *See, e.g.*, McHugh, *supra* note 58, at 20 ("That revelation [of Snowden being the leaker] produced a furious media search to locate Snowden and, ultimately, to his departure from Hong Kong. His immediate destination turned out to be Moscow, where, in August, 2014, he was granted a three-year visa that keeps him in a limbo status until his ultimate destination is determined."); Shane, *supra* note 20, at 284–85 (aggregating some of the more significant documents leaked by Snowden in addition to the general information regarding the programs); CITIZENFOUR, *supra* note 15 (showing Snowden unable to pass through customs in Moscow for several weeks after the United States government revoked his passport).

[68] *See* Stone, *supra* note 19, at 1042 (discussing that the use of these counter-surveillance programs must be governed by a set of rules); Sales, *supra* note 21, at 535 (stressing the importance of allowing the public to participate in debates for the use of these programs).

[69] *See generally* Sales, *supra* note 21 (emphasizing the importance of governmental use of counter-terrorism tools in the modern age).

[70] Susan Freiwald, *Nothing to Fear or Nowhere to Hide: Competing Visions of the NSA's 215 Program*, 12 COLO. TECH. L.J. 309, 313 (2014); Greenwald, *NSA Collecting Phone Records supra*

sought-after information included:

> [C]omprehensive communications routing information, including but not limited to session identifying information (e.g., originating and terminating telephone number, International Mobile Station Equipment Identity (IMEI) number, International Mobile Subscriber Identity (IMSI) number, etc.), trunk identifier, telephone calling card numbers, and time and duration of call. Telephony metadata does not include the substantive content of any communication . . . or the name, address, or financial information of a subscriber or customer.[72]

The NSA requires telecommunication companies to deliver requested information on a daily basis.[73] NSA agents are then able to convert the data into readable information.[74]

The primary techniques utilized by the NSA when dissecting data were "contact chaining," and "three-hop network analysis."[75] Contact chaining is used to analyze the calling tendencies and patterns of a particular suspect.[76] Once a pattern is recognized, agents identify each phone call as a "hop."[77] From here on, each successive call by the recipients also constitutes a "hop."[78] As the NSA uses a "three-hop network analysis," they analyze patterns within three degrees of separation from the original suspect.[79] To clarify the extent of how the three-hop analysis works—an individual with forty contacts can reveal data on as many as 2.5 million people.[80]

Ultimately, Section 215 of the Patriot Act was replaced upon the

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note 15; CITIZENFOUR, *supra* note 15. *See generally* 50 U.S.C. §1861 (2014) (allowing the government to have access to certain business records for purposes of intelligence investigations).

[71] *See* Freiwald, *supra* note 70.

[72] *E.g.*, Joseph D. Mornin, *NSA Metadata Collection and the Fourth Amendment*, 29 BERKELEY TECH. L.J. 985, 993–94 (2014) (quoting Amended Memorandum Opinion at 2 n.2, In re Application of the Fed. Bureau of Investigation for an Order Requiring the Production of Tangible Things from [Redacted], No. BR 13–109 (FISA Ct. Aug. 29, 2013)); Freiwald, *supra* note 70 (quoting Secondary Order, In re Application of the Fed. Bureau of Investigation for an Order Requiring the Production of Tangible Things, No. 13–80, slip. op. at 2 (FISA Ct. Apr. 25, 2013)).

[73] Freiwald, *supra* note 70, at 314.

[74] Freiwald, *supra* note 70, at 314.

[75] Mornin, *supra* note 72, at 995.

[76] Mornin, *supra* note 72, at 995; Freiwald, *supra* note 70, at 314–15.

[77] Mornin, *supra* note 72, at 995.

[78] Mornin, *supra* note 72, at 995.

[79] Mornin, *supra* note 72, at 995.

[80] Mornin, *supra* note 72, at 995.

enactment of the USA Freedom Act of 2015.[81] Many view the new legislation—which was intended to be more protective of individual rights[82]—to be a positive scheme change.[83] However, a cumulative decrease in collected data from the loss of such an important counter-terrorism tool will surely lead to a higher risk of terror acts taking place on American soil.[84]

B. *The PRISM Program*

Snowden also unveiled that the NSA was utilizing a program called PRISM to obtain information from citizens.[85] PRISM was given authority under section 702 of the FISA in 2008.[86] The program allows for governmental access to domestic Google and Yahoo accounts,[87] in a similar manner to data-mining programs.[88] Specifically, under this program:

> [T]he NSA targets specific non-Americans who are reasonably believed to be located outside the country, and also engages in bulk collection of some foreign-to-foreign communications that happen to be passing through telecommunications infrastructure in the United States.[89]

PRISM was not unscathed from problems.[90] Specifically, the FISC stopped the program in 2011 after it was revealed that the government had

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[81] McHugh, *supra* note 58, at 21; Erin Kelly, *Senate Approves USA Freedom Act*, USA TODAY (June 2, 2015, 9:45 PM), https://perma.cc/47BZ-YW4A.

[82] McHugh, *supra* note 58, at 21.

[83] Kelly, *supra* note.81 (revealing that the Senate voted to alter the Act in a 67–32 vote).

[84] *See* Kelly, *supra* note 81 ("I cannot support passage of the so–called USA Freedom Act . . . . It does not enhance the privacy protections of American citizens. And it surely undermines American security by taking one more tool from our warfighters at exactly the wrong time.") (quoting Mitch McConnell).

[85] *See* Sharon D. Nelson & John W. Simek, *Edward Snowden's Impact: How Will NSA Revelations Affect the Legal Profession?*, 74 OR. ST. B. BULL. 19, 20 (2014); Ombres, *supra* note 60, at 32; Persky, *supra* note 22, at 26; Sales, *supra* note 21, at 526; *see also* McHugh, *supra* note 58, at 20; CITIZENFOUR, *supra* note 15.

[86] McHugh, *supra* note 58, at 20. *See generally* CITIZENFOUR, *supra* note 15 (chronicling Edward Snowden's revalation of the NSA surveillance program known as PRISM, among others).

[87] *See* Nelson & Simek, *supra* note 85; Ombres, *supra* note 60, at 32; Persky, *supra* note 22, at 26; Sales, *supra* note 21, at 526; Shane, *supra* note 20, at 284 (elaborating that the Government also analyzes information from Microsoft, Facebook, PalTalk, YouTube, Skype, AOL, and Apple); *see also* McHugh, *supra* note 58, at 20; CITIZENFOUR, *supra* note 15.

[88] *See* Sales, *supra* note 21, at 526 (citing Barton Gellman & Laura Poitras, *U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program*, WASH. POST (June 7, 2013), https://perma.cc/2A2D-Z7Z6).

[89] Sales, *supra* note 21, at 526.

[90] *See* Sales, *supra* note 21, at 526–27.

been obtaining information on American citizens.[91] The program was later rejuvenated when the NSA provided a technical solution to the inadvertent interception of American communications, and the PRISM program was again deemed a necessary tool.[92]

The NSA collects around 250 million Internet communications annually under the PRISM program.[93] Unlike metadata collection, "PRISM allows the NSA to collect the content of the communication."[94] It is of the utmost importance for programs like this to be maintained and implemented.[95] As long as these programs are no longer carried out in secrecy,[96] they are necessary tools in keeping our country safe.[97]

III. The Exposed Programs by Snowden are a Constitutional and Necessary Form of Counter-terrorism

President Obama has publicly showed strong support for the exposure of the Section 215 and PRISM programs.[98] In support of the revelations, he articulated, "I welcome this debate. And I think it's healthy for our democracy. I think it's a sign of maturity because probably five . . . six years ago, we might not have been having this debate."[99] On the contrary, others have been outspoken about the harm Snowden's leaks have done to the security of the United States.[100] Individuals in high-ranking counter-terrorism units have publicly expressed the harm to national security that Snowden's actions have caused.[101] Ultimately, justification for counter-

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[91] Sales, *supra* note 21, at 526–27.

[92] Sales, *supra* note 21, at 526–27.

[93] Persky, *supra* note 22, at 26 (explaining that the source of her material came from the declassification of court documents).

[94] Persky, *supra* note 22, at 26.

[95] *See* Sales, *supra* note 21, at 536 (emphasizing the upside of using these tactics in order to prevent terrorism).

[96] Stone, *supra* note 19, at 1042, 1054 (implying that a lack in transparency leads to a higher chance of abuse of power over these programs).

[97] *See generally* Sales, *supra* note 21 (discussing the importance of using information to combat terrorism).

[98] John Mueller & Mark G. Stewart, *Secret Without Reason and Costly Without Accomplishment: Questioning the National Security Agency's Metadata Program*, 10 I/S: J. L. & POL'Y FOR INFO. SOC'Y 407, 407 (2015).

[99] *Id.* (quoting President Barack Obama, Statement by the President at the Fairmont Hotel, San Jose, California (June 7, 2013), https://perma.cc/TM2U-4YUW).

[100] *See id.* at 411–12.

[101] *Id.* ("[F]rom outgoing FBI Director Robert Mueller in August 2013 . . . '[L]eaks by former NSA contractor Edward Snowden have impacted, and are in the process of impacting, capabilities around the world' . . . . Even less helpful has been the expression of belief promulgated by NSA chief Keith B. Alexander: 'Based on what we know to date, we believe

terrorism programs comes from a balance between overall safety and welfare of the public and the sacrifice of individual privacy.[102] Many have questioned the constitutionality of these government surveillance programs.[103] These individuals feel that the extreme breach of privacy constitutes an unconstitutional collection of private information by the government.[104] Counter-terrorism programs such as PRISM and metadata aggregation are constitutionally valid.[105] While the government should not keep American citizens in the dark about these programs,[106] they are

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these disclosures have caused significant and irreversible harm to the security of the nation.'") (citing Billy Kenber, *Outgoing Director Robert S. Mueller, III Tells How 9/11 Reshaped FBI Mission*, WASH. POST. (Aug. 22, 2013), https://perma.cc/UHH2-SH7W).

[102] *See id.* at 410–11 (2015) (quoting Jim Harper, John Mueller, & Mark Stewart, *Comments on Notice of Proposed Rulemaking: Passenger Screening Using Advanced Imaging Technology, TSA–2013–0004 (RIN 1653–AA67)*, CATO INST. (June 21, 2013), https://perma.cc/Q6H2-JXTW).

[103] *See* Sales, *supra* note 21, at 532 ("The critical question is how to take advantage of its potentially significant national security benefits without running afoul of fundamental civil liberties and privacy values."). *See generally* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013) (holding that FISA did not purport an injury on the plaintiff when collecting data); Klayman v. Obama, 957 F. Supp. 2d 1 (2013), *rev'd*, 800 F.3d 559 (2015) (examining how the district court determined the collection of metadata to be an "arbitrary invasion" of privacy); Elizabeth Atkins, *Spying on Americans: At What Point Does the NSA's Collection and Searching of Metadata Violate the Fourth Amendment?*, 10 WASH. J.L. TECH. & ARTS 51 (2014); Randy Barnett, *Why the NSA Data Seizures are Unconstitutional*, 38 HARV. J.L. & PUB. POL'Y 3 (2015); Ted Claypoole, *Constitutionality of NSA Cybersurveillance: Early Cases Split Between Privacy and Counterespionage*, 10 SCITECH LAW. 10 (2014); Mastracci, *supra* note 49; Mueller & Stewart, *supra* note 98.

[104] *See* Barnett, *supra* note 103 (stating that—statutory authority aside—the surveillance programs breach the protected expectation of privacy); *see also* Atkins, *supra* note 103, at 70–74 (discussing recent challenges to the use of these programs); Greenwald, *NSA Collecting Phone Records*, *supra* note 15.

[105] Stone, *supra* note 19, at 1041 ("The Review Group found no evidence that the NSA had knowingly or intentionally engaged in unlawful or unauthorized activity. To the contrary, it has put in place carefully-crafted internal procedures to ensure that it operates within the bounds of its lawful authority."); *see* Mastracci, *supra* note 49; Yoo, *supra* note 40 (speaking to the legality of the metadata collection under Section 215 of the Patriot Act). *See generally Klayman*, 957 F. Supp. 2d at 1 (holding that their collection of metadata is not an arbitrary invasion of privacy); Stephen I. Vladeck, *Standing and Secret Surveillance*, 10 I/S: J. L. & POL'Y FOR INFO. SOC'Y 551 (2015) (discussing the United States Supreme Court decision in *Clapper v. Amnesty International*, 133 S. Ct. 1138 (2013) which concluded that secret surveillance programs are valid under Section 702 of FISA).

[106] Sales, *supra* note 21, at 535 ("Whenever possible, programmatic surveillance systems should be adopted through open and transparent debates that allow an informed public to meaningfully participate. The systems also should be operated in as transparent a manner as possible."); Stone, *supra* note 19, at 1042 ("The future of our nation depends not only on the NSA doing its job, but also on the existence of clear, definitive, and carefully enforced rules and restrictions governing its activities."); *see* Mueller & Stewart, *supra* note 98 (clarifying that

absolutely necessary for the general welfare and safety of the United States to prevent terrorism.[107]

A. *There are Legitimate Concerns Regarding the Safety of the Information Collected Through Surveillance Programs*

When individuals became aware of the existence of section 215 and PRISM programs, they wanted to know as much as possible.[108] In the wake of public outrage, news outlets looked at the legality of these programs, and how the information was being used.[109] While the legality of the programs are no longer at issue,[110] there are genuine concerns regarding the safety and use of the data collected.[111] The sensitive nature and quantity of the data should add extra emphasis on protecting this information,[112] as the effect of disclosing sensitive information impacts more than just our country.[113] Techniques such as minimization rules and technological safeguards should be implemented in order to protect this data.[114]

A primary concern in collecting bulk data is the manner in which the information will be used.[115] The collection of data should only be used when a threat to national security is involved.[116] Abusing these programs

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while the point of their Note was not to get caught up in the secrecy of the program—there is a debate in the overall secrecy of the programs run by the NSA).

[107] *See generally* Sales, *supra* note 21 (emphasizing that these surveillance techniques can be an important tool in the fight against terrorism).

[108] Melanie Reid, *Government Secrets: The Public's Misconceptions of the Snowden Disclosures*, 3 LINCOLN MEMORIAL U. L. REV. 36, 38 (2015).

[109] *Id.*

[110] *See generally Klayman*, 957 F. Supp. 2d at 1 (overturning the district court decision that metadata collection is an "arbitrary invasion" of privacy); Yoo, *supra* note 40; Mastracci, *supra* note 49 (elaborating on how the *Klayman* court erred).

[111] Mornin, *supra* note 72, at 1006 ("Certainly, government agents can use sophisticated data mining techniques to capture insights that may assist the legitimate needs of law enforcement. But queries may also expose a great deal of private information about innocent people."); Sales, *supra* note 21, at 531–41 (discussing many structural considerations that should be emphasized to ensure the safety of the collected data).

[112] *See* CITIZENFOUR, *supra* note 15 ("The NSA has built the world's largest repository for intercepted communication in Bluffdale, Utah."); *see also* Sales, *supra* note 21, at 531–41.

[113] Mark D. Young, *National Insecurity: The Impacts of Illegal Disclosures of Classified Information*, 10 I/S: J. L. & POL'Y FOR INFO. SOC'Y 367, 368 (2015).

[114] *See* Sales, *supra* note 21, at 540–41.

[115] *See* Mornin, *supra* note 72, at 1000 ("Metadata can expose private information on three distinct levels: first, records of individual calls; second, a caller's records collected over time; and third, an aggregation of many callers records.") (internal citation omitted); Sales, *supra* note 21, at 536 (explaining the concept of an "anti–mission–creep" principle and how it should be enforced in counterterrorist programs).

[116] Sales, *supra* note 21, at 536 ("Bulk data collection should only be used to investigate and

could lead to an even stronger public outcry.[117] Because of this potential for abuse, there should be no exceptions to using the information solely for national security interests.[118] However, when weighing the interests between overall public safety and individual privacy—the need for these programs justifies the collection of potentially sensitive information to prevent deadly attacks from organizations that wish harm upon Americans.[119]

Operational concerns with the collection of data are also warranted—including both external and internal oversight.[120] Perhaps more important still are the ideas of minimization requirements and technological safeguards.[121] Minimization requirements set limits on an acceptable use of the data, including the approved length of time to retain such information and permissible scope of use.[122] Technological safeguards additionally offer protection by restricting access to information as well as tracking where it goes.[123] The government should be taking every precaution in keeping this information safe—however, that does not seem to be the case.[124] A failure to keep information safe will create more public concerns about privacy interests.[125] Yet, as long as the NSA can protect their collected data, they can justify its bulk collection.[126] Ultimately, it is necessary for the

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prevent terrorism, espionage, and other serious threats to the national security. It should be off limits in regular criminal investigations.").

[117] Sales, *supra* note 21, at 532 ("The possibility of abuse makes it critical to establish a set of first principles to govern when and how programmatic monitoring is to be conducted . . . . The critical question is how to take advantage of its potentially significant national security benefits without running afoul of fundamental civil liberties and privacy values.").

[118] *Contra* Sales, *supra* note 21, at 536 (arguing that there should be an exception for when heinous grave crimes are at issue).

[119] *See* Sales, *supra* note 21, at 536 ("The upside of preventing deadly terrorist attacks and other national security perils can be so significant that we as a nation may be willing to sanction extraordinary investigative techniques like bulk data collection.").

[120] Sales, *supra* note 21, at 536–40.

[121] Sales, *supra* note 21, at 540–41.

[122] Sales, *supra* note 21, at 540 ("Minimization rules limit what the government may do with data that does not appear pertinent to a national security investigation—e.g., how long it may be retained, the conditions under which it will be stored, the rules for accessing it, the purposes for which it may be used, the entities with which it may be shared and so on.").

[123] Sales, *supra* note 21, at 540–41.

[124] Max Cherney, *The FBI Says It Can't Find Hackers to Hire Because They All Smoke Pot*, VICE: MOTHERBOARD (May 21, 2014, 11:05 AM), http://motherboard.vice.com/read/the-fbi-cant-find-hackers-that-dont-smoke-pot [https://perma.cc/XMF6-2MNH] (explaining that qualified computer experts seek employment elsewhere where they can get higher pay and less restrictions).

[125] *See* Claypoole, *supra* note 103, at 25.

[126] *See* Yoo, *supra* note 40, at 325. *See generally* Sales, *supra* note 21 (discussing the dynamics

authorities to have this information in order to keep American citizens safe.[127]

B. *Counter-Terrorism Programs are Necessary in Preventing Attacks Against United States Citizens*

As long as the United States remains a primary target for extremist organizations, there is an overwhelming necessity to protect the citizens, especially within our borders.[128] President Obama has even acknowledged that attacks will always be imminent, but that major attacks need to be eliminated.[129] Still, it is important to create an adequate balance between national security and the preservation of individual rights.[130] In 2013, President Obama put together a review group to weigh in on the controversial surveillance programs.[131] In relation to stopping terrorist attacks, the following analogy was suggested:

> A goalie in a soccer game . . . "must stop every shot, for the enemy wins if it scores a single goal." The problem . . . "is that the goalie cannot see the ball—it is invisible. So are the players—he doesn't know how many there are, or where they are, or what they look like. He also doesn't know where the sidelines are—they are blurry and constantly shifting, as are the rules of the game itself." The invisible players might shoot the invisible weapon "from the front of the goal, or from the back, or from some other direction—the goalie just doesn't know." In short, the only way the goalie can stop a goal is by watching the movements of the blades of grass.[132]

Since it is extremely difficult for authorities to prevent harmful attacks,[133] the identification of terrorist groups and locations has

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between privacy protection and terrorist prevention).

[127] *See generally* Sales, *supra* note 21 (highlighting the importance of utilizing surveillance techniques in the fight against terrorism).

[128] Browne, *supra* note 7; Peele, *supra* note 8; Stone, *supra* note 19, at 1035–36.

[129] David Jackson, *Obama: We can stop 'large scale' terror attacks*, USA TODAY (Dec. 2, 2015, 6:45 AM), https://perma.cc/N65M-CE2K ("The truth is that in a free and open society, we will never completely eliminate the possibility of a single terrorist act happening in any given time . . . . [But] what we can do is that we prevent the kinds of large scale attacks that result in so much [sic] deaths.").

[130] Stone, *supra* note 19, at 1037–38 (explaining how when Americans face a national crisis, they have a tendency to overreact under the concept of "better safe than sorry").

[131] Stone, *supra* note 19, at 1033–34.

[132] Stone, *supra* note 19, at 1036 (quoting JACK GOLFSMITH, THE TERROR PRESIDENCY 73 (2007)).

[133] Stone, *supra* note 19, at 1036.

quintessential importance.[134]

Not only have attacks become increasingly more difficult to identify,[135] the potential damage that can be inflicted upon unsuspecting victims can be catastrophic.[136] Modern day technology allows for terrorists to inflict damage on a terrifying level.[137] Developments in chemical, biological, and nuclear weaponry can lead to thousands of deaths and can cause billions of dollars in damage.[138] Failing to prevent an attack on this scale would have a catastrophic effect on American society.[139] Failure to prevent such an attack is not an option.[140]

Additionally, terrorists using modern technology are able to communicate with one another from all over the world.[141] It is essential to maintain a process of defending our nation against terrorist threats.[142] Stressing the necessity of protection:

> An effort to prevent attacks on the scale of 9/11 . . . might yield meaningful information only once in a decade. Failing to prevent such an attack, though, would be catastrophic. Thus, the [counter-terrorisms programs were] analogous to a fire alarm in one's home. It might save your life only once a decade, but that doesn't mean you toss it out.[143]

Since general public safety and welfare outweighs individual privacy concerns, there is a clear necessity for maintaining these surveillance programs.[144]

It is important for the government to be able to utilize data in order to

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[134] Sales, *supra* note 21, at 550.

[135] Stone, *supra* note 19, at 1036 (quoting JACK GOLFSMITH, THE TERROR PRESIDENCY 73 (2007)).

[136] Stone, *supra* note 19, at 1035–36.

[137] Stone, *supra* note 19, at 1035–36. ("[I]nternational terrorists . . . can inflict massive damage, using not only conventional but possibly also chemical, biological, and even nuclear weapons. Such attacks can not only cost billions of dollars of damage and cause thousands of deaths, but they can also change our culture in fundamental ways by leading us to sacrifice ever more of our civil liberties and privacy in the quest for national security. The costs of failing to prevent such attacks . . . would be staggering.").

[138] Stone, *supra* note 19, at 1035–36.

[139] Stone, *supra* note 19, at 1035–36.

[140] *See* Stone, *supra* note 19, at 1035–36.

[141] Stone, *supra* note 19, at 1046.

[142] *See id.* at 1050 (emphasizing the harm of an attack using modern technology).

[143] *Id.*

[144] *See generally* Sales, *supra* note 21 (clarifying the necessity to use counter-terrorism programs). *See also* Stone, *supra* note 19, at 1050 (determining that the potential value to a properly run counter-terrorism program is immense).

be informed of any potential threats against our country.[145] By harnessing information, the chances of terrorist attacks on a large scale are minimized.[146] For Americans to remain safe, it is essential that the government have access to data, so they can try to stay one step ahead of any potential threat.[147]

CONCLUSION

The section 215 and PRISM programs should have never been carried out in secrecy.[148] Edward Snowden was selfless in uprooting his entire life in order to inform the public about the two programs.[149] Although these programs are far from universally accepted,[150] the potential prevention of terrorist attacks in the United States makes them necessary.[151] Americans are not immune from another high-impact attack on home soil.[152] With the likely probability that an attack is imminent,[153] extreme counter-terrorism measures, such as the Section 215 and PRISM programs must be taken.[154] Programs of this nature are necessary for ensuring the safety of American lives against extremist terrorist groups.[155]

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[145] *See* Sales, *supra* note 21.

[146] *See* Sales, *supra* note 21, at 523–24 (explaining how an individual had been flagged at customs and refused entry into the United States, who later was involved in the detonation of the deadliest suicide bombing Iraq had seen to date).

[147] *See* Sales, *supra* note 21, at 524.

[148] *See* Sales, *supra* note 21, at 535–36 (stressing that transparency should be the default standard for these programs).

[149] *See The Whistleblower*, *supra* note 15.

[150] Mueller & Stewart, *supra* note 98, at 410–11.

[151] Browne, *supra* note 7; Peele, *supra* note 8; Stone, *supra* note 19, at 1035–36; Sales, *supra* note 21, at 536.

[152] *See* Browne, *supra* note 7; Peele, *supra* note 8.

[153] *See* Browne, *supra* note 7; Peele, *supra* note 8.

[154] *See generally* Sales, *supra* note 21 (concluding that there is an overall need to protect Americans by maintaining counter-surveillance programs).

[155] *See* Sales, *supra* note 21.

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Death by 1000 Lawsuits: The Public Litigation in Response to the Opioid Crisis Will Mirror the Global Tobacco Settlement of the 1990s

Paul L. Keenan[*]

INTRODUCTION

In 2016, more than 42,000 Americans died from opioid-related overdoses, including overdoses from prescription painkillers, heroin, fentanyl, and other synthetic opioids.[1] Between 1999 and 2016, more than 600,000 people died from drug overdoses, a majority of which were opioid-related.[2] As it stands now, approximately 115 Americans die each day from opioid overdoses.[3] And in 2012, physicians wrote more than 259 *million* prescriptions for opioid-based pain killers—more than enough to give every American adult their own bottle of pills.[4]

The flood of prescription painkillers has affected many communities across the country.[5] Although the crisis is widespread, it has hit some communities harder than others.[6] For example, between 2006 and 2016,

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[1] Christopher Ingraham, *CDC Releases Grim New Opioid Overdose Figures: 'We're Talking About More Than an Exponential Increase'*, WASH. POST (Dec. 21, 2017), https://perma.cc/TR8A-3QWN

[2] *Understanding the Epidemic*, CENTERS FOR DISEASE CONT. & PREVENTION, https://perma.cc/VZ68-AQRP (last visited Mar. 19, 2019); Scott Higham & Lenny Bernstein, *Drugmakers and Distributors Face Barrage of Lawsuits Over Opioid Epidemic*, WASH. POST (July 4, 2017), https://perma.cc/8NQL-47YE.

[3] *Understanding the Epidemic*, *supra* note 2; Higham & Bernstein, *supra* note 2.

[4] *Opioid Addiction 2016 Facts & Figures*, AM. SOC'Y OF ADDICTION MED. https://perma.cc/G5LK-5XAM (last visited Mar. 19, 2019).

[5] *See* Elizabeth Kneebone & Scott W. Allard, *A Nation in Overdose Peril: Pinpointing the Most Impacted Communities and the Local Gaps in Care*, BROOKINGS (Sept. 25, 2017), https://perma.cc/V3LC-UUX7.

[6] *Id.*

two pharmaceutical wholesalers shipped nearly twenty-one million hydrocodone and oxycodone pills to two pharmacies less than one-quarter mile apart from one another in Williamson, West Virginia—a town of less than 3,000 people.[7]

In response to this epidemic, hundreds of cities, towns, and counties ("communities") throughout the country have filed lawsuits against prescription drug manufacturers and distributors.[8] That number continues to rise as more communities file lawsuits on almost a daily basis.[9] At least forty-one state Attorneys General have banded together to investigate pharmaceutical companies' practices for opioid production, marketing, and distribution.[10] Litigation is being pursued to recoup the costs that communities have incurred in response to the epidemic and force pharmaceutical companies to take corrective action and more accurately market their products.[11]

This response is not unlike the lawsuits that many cities and states filed against the tobacco industry in the 1980s and 1990s—and that is precisely the idea.[12] In 1998, the tobacco industry, forty-six states, and six other jurisdictions entered into the largest civil litigation settlement in United States history.[13] The settlement released tobacco companies from future liability related to their past conduct in exchange for annual payments to the states for public-health programs and anti-smoking campaigns.[14] This result was only possible as a result of the sheer pressure placed on the tobacco industry by the lawsuits.[15] A massive global settlement was the

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[7] Eric Eyre, *Drug Firms Shipped 20.8M Pain Pills to WV Town with 2,900 People*, CHARLESTON GAZETTE-MAIL (Jan. 29, 2018), https://perma.cc/MNA5-PSGN; Lindsey Bever, *A Town of 3,200 was Flooded With Nearly 21 Million Pain Pills as Addiction Crisis Worsened, Lawmakers Say*, WASH. POST (Jan. 31, 2018), https://perma.cc/TTY7-ZHU7.

[8] Mark Gillispie, *Ohio AG 'Encouraged' After Start of Opioid Lawsuit Talks*, U.S. NEWS (Jan. 31, 2018), https://perma.cc/Y5GF-NTLJ.

[9] *See, e.g.*, Samantha Fenlon, *14 RI Communities Join Suit Against Opioid Drug Manufacturers and Distributors*, ABC 6 NEWS (Jan. 29, 2018), https://perma.cc/G5X9-NWJK; Brendan Deady & Daniel Medwed, *Boston May Seek to Sue Pharmaceutical Companies for Opioid Crisis*, WGBH (Jan. 30, 2018), https://perma.cc/FNJ7-GH2A; Michael Levenson, *Quincy Plans to Sue Big Drug Makers Over Opioid Crisis*, BOS. GLOBE (Nov. 1, 2017), https://perma.cc/WM54-AF44.

[10] Yuki Noguchi, *41 States to Investigate Pharmaceutical Companies Over Opioids*, NPR (Sept. 19, 2017), https://perma.cc/2N9R-4BHX.

[11] Casey Leins, *Michigan Communities Sue Drug Industry*, U.S. NEWS (Dec. 19, 2017), https://perma.cc/JGE8-Z74D.

[12] *Id.*

[13] Alana Semuels, *Are Pharmaceutical Companies to Blame for the Opioid Epidemic?*, THE ATLANTIC (June 2, 2017), https://perma.cc/78HZ-Z5CL.

[14] *Id.*

[15] Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 762–63 (2003).

only economically feasible solution.[16] The companies could not—or would not—defend each individual lawsuit.[17]

With this in mind, communities are at it again.[18] The ultimate goal is to force the pharmaceutical companies to the bargaining table and seek restitution for the damage caused by the epidemic.[19] The end result will be the same: large corporations will re-fill local and state coffers and promote anti-addiction programs.

This Note argues that litigation is the best option for communities ravaged by the opioid crisis because it provides the best opportunity for reimbursement and gives communities a platform to effect social change. It also predicts that the current lawsuits brought by cities, towns, and counties will result in a large global settlement much like the one between the states and the tobacco industry in 1998. And it provides suggestions for how such a settlement should be structured based on the lessons learned from the tobacco Master Settlement Agreement.

Part I provides a history of the opioid crisis, an overview of the current opioid litigation, and a summary of the tobacco litigation during the 1990s. Part II discusses the unique position in which the opioid crisis has placed communities around the United States, and their unique approach to abating the crisis through lawsuits. Part III argues that litigation is the best approach for communities facing the opioid crisis because it allows communities to recoup costs and effect powerful social change. Part III also compares opioid litigation to tobacco litigation, and predicts the same result: a large global settlement. Part IV applies the lessons learned from the tobacco Master Settlement Agreement to a potential opioid litigation settlement and provides an outline for an ideal settlement agreement.

I. Background

A. *The History of the Opioid Crisis*

Opioid addiction is not a new phenomenon.[20] For more than 5,000 years, humans have used the sticky sap of the opium poppy to relieve pain and get high.[21] Throughout the nineteenth and twentieth centuries opioid

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[16] *Id.*

[17] *See id.*

[18] *See* Daniel McGraw, *New Plan to Fight the Opioid Epidemic: Sue the Hell out of Big Pharma Like Big Tobacco*, THE DAILY BEAST (Jan. 9, 2018), https://perma.cc/H6LS-LA4F.

[19] Esme E Deprez & Paul Barrett, *The Lawyer Who Beat Big Tobacco Takes On the Opioid Industry*, BLOOMBERG (Oct. 5, 2017), https://perma.cc/SH6X-BXR4.

[20] *See* Nick Miroff, *From Teddy Roosevelt to Trump: How Drug Companies Triggered an Opioid Crisis a Century Ago*, WASH. POST (Oct. 17, 2017), https://perma.cc/3B3J-8SJC.

[21] *Id.*

abuse ebbed and flowed in the United States.[22] Following the Civil War, many veterans were addicted to opioids after being treated with morphine.[23] In the early twentieth century, the federal government sought to tamp down the proliferation of opium, heroin, and other poppy-based drugs.[24] Following World War II, synthetic opioids entered the market.[25] But because of the risk of addiction and dependence, many physicians remained reluctant to prescribe them.[26]

This all changed in the 1980s, however, when "an 11-line letter printed in the New England Journal of Medicine in January 1980 pushed back on the popular thought that using opioids to treat chronic pain was risky."[27] The authors of the letter, two researchers from Boston University Medical Center, referenced their analysis of 11,882 hospitalized patients who were treated with narcotics in a clinical setting, writing that "the development of addiction is rare in medical patients with no history of addiction."[28] Drug manufacturers cited this letter and other questionable studies repeatedly, and their findings were distorted and used as evidence that addiction was rare in all patients treated with opioids.[29]

In 1996, Purdue Pharma ("Purdue") began selling OxyContin and with it, launched a marketing offensive.[30] Purdue collected and used prescription data to target primary care physicians—many of whom had no experience in treating chronic pain—and hosted dozens of conferences aimed at influencing their prescription practices.[31] Purdue targeted

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[22] *See* Sonia Moghe, *Opioid History: From Wonder Drug to Abuse Epidemic*, CNN (Oct. 14, 2016), https://perma.cc/F27D-SDK2.

[23] *Id.*

[24] Miroff, *supra* note 20.

[25] James Nevius, *The Strange History of Opiates in America: From Morphine for Kids to Heroin for Soldiers*, THE GUARDIAN (Mar. 15, 2016), https://perma.cc/39VC-RQPA.

[26] *Id.*

[27] Moghe, *supra* note 22.

[28] Sarah Zhang, *The One-Paragraph Letter from 1980 that Fueled the Opioid Crisis*, THE ATLANTIC (June 2, 2017), https://perma.cc/DVB5-ZWLM.

[29] Pamela T.M. Leung et al., *A 1980 Letter on the Risk of Opioid Addiction*, 376 NEW ENG. J. MED 2194–95 (2017), *available at* https://perma.cc/H8WZ-QCRP ("We identified 608 citations of the index publication and noted a sizable increase after the introduction of OxyContin (a long-acting formulation of oxycodone) in 1995 []. Of the articles that included a reference to the 1980 letter, the authors of 439 (72.2%) cited it as evidence that addiction was rare in patients treated with opioids. Of the 608 articles, the authors of 491 articles (80.8%) did not note that the patients who were described in the letter were hospitalized at the time they received the prescription, whereas some authors grossly misrepresented the conclusions of the letter[]."); *see* Barry Meier, *The Delicate Balance of Pain and Addiction*, N.Y. TIMES (Nov. 25, 2003), https://perma.cc/6DZW-6BCN.

[30] Moghe, *supra* note 22.

[31] *See* Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public*

potential patients with marketing materials in waiting rooms and provided healthcare professionals with OxyContin branded gifts.[32] Purdue's aggressive marketing campaign worked—within five years of its introduction, OxyContin "was the most prescribed brand-name narcotic medication for treating moderate to severe pain . . . ."[33]

But in 2007, Purdue ran into trouble when the company and three of its executives pleaded guilty to charges of misleading "regulators, doctors, and patients about the drug's risk of addiction and its potential to be abused."[34] In a combined settlement, Purdue and the executives paid around $635 million to the federal government, state governments, and private plaintiffs.[35]

Although Purdue was responsible for a majority of the opioid painkillers that flooded the streets over the last two decades, other companies in the pharmaceutical industry were involved as well.[36] Johnson & Johnson and Teva Pharmaceuticals, two other opioid manufacturers, also engaged in questionable marketing practices and downplayed the addictive qualities of their products.[37] Drug distributors shipped millions of prescriptions to pharmacies and pain clinics throughout the country, in violation of the Controlled Substances Act, which requires that they report suspicious orders.[38]

The pharmaceutical companies' tenacity in marketing the medication and downplaying its addictive qualities was representative of an industry-wide culture.[39] For example, the Joint Commission, a non-profit which sets standards and accredits thousands of hospitals and medical centers around

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Health Tragedy, 99 AM. J. PUB. HEALTH 221, 221 (2009), *available at* https://perma.cc/RRW9-FS6D; Moghe, *supra* note 22.

[32] Van Zee, *supra* note 31, at 222.

[33] Andrew Cass, *How Aggressive Tactics by the Makers of OxyContin Helped Create a Crisis*, NEWS HERALD (Feb. 16, 2017), https://perma.cc/9PFV-KZSK.

[34] Barry Meier, *In Guilty Plea, OxyContin Maker to Pay $600 Million*, N.Y. TIMES (May 10, 2007), https://perma.cc/5ULD-5HTT.

[35] *Id; see also* Barry Meier, *Origins of an Epidemic: Purdue Pharma Knew Its Opioids Were Widely Abused*, N.Y. TIMES (May 29, 2018), https://perma.cc/S7PT-7HTG (discussing a Department of Justice Report that revealed that "federal prosecutors investigating the company found that Purdue Pharma knew about 'significant' abuse of OxyContin in the first years after the drug's introduction in 1996 and concealed that information").

[36] *See* Christopher Glazek, *The Secretive Family Making Billions From the Opioid Crisis*, ESQUIRE (Oct. 17, 2017, 10:12 AM EST), https://perma.cc/GN6Q-J5NU.

[37] *See* Matt Fair, *Philly DA Accuses Drugmakers of Deceptive Opioid Marketing*, LAW360 (Feb. 2, 2018), https://perma.cc/7M7K-N5KX.

[38] Bill Whitaker, *Ex-DEA Agent: Opioid Crisis Fueled by Drug Industry and Congress*, CBS NEWS (Oct. 15, 2017, 7:49 PM EST), https://perma.cc/6H4J-PFD7.

[39] *See* Glazek, *supra* note 36.

the country, required that medical facilities examine patients for pain and pushed for providers to recognize pain as "the fifth vital sign."[40] Although the Commission did not market opioids explicitly, it distributed marketing materials sponsored by pharmaceutical companies, which minimized any connection between opioids and addiction.[41] The Commission's standards remained in place well into 2009.[42]

As state and federal regulation began to increase, opioid manufacturers began making tamper-resistant versions of the medications—but the damage was already done.[43] Some states limited patient access to opioid medications and many stomped out "pill mill" operations, causing many opioid users to start using heroin and other street drugs.[44] Studies suggest that prescription opioid abuse rates have declined since 2010—the year Purdue reformulated OxyContin to include abuse-deterrent qualities.[45] The change coincides with a rise in the use of heroin and black-market synthetic opioids like fentanyl, a painkiller which is fifty to 100 times more powerful than morphine and typically only used in clinical settings.[46] Sophisticated cartels and traffickers use fentanyl sourced from China or Mexico to create counterfeit pain pills or mix it into heroin to increase its potency and, in turn, its deadly effects.[47]

This crisis has affected communities around the nation—big and small, rich and poor, urban and rural, white and black.[48] The root of the problem, however, is complicated, and drug manufacturers are not the only ones at fault.[49] Pharmaceutical manufacturers such as Purdue, Endo International,

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[40] Max Blau, *'This is Just the Beginning': Scope of Opioid Lawsuits Widens to Include Hospital Accreditor*, STAT (Nov. 7, 2017), https://perma.cc/QW4L-MLRH; *see also* Moghe, *supra* note 22.

[41] Moghe, *supra* note 22.

[42] Moghe, *supra* note 22.

[43] Moghe, *supra* note 22.

[44] *See* Christopher Moraff, *Feds' Pill Crackdown Drives Pain Patients to Heroin*, THE DAILY BEAST (Apr. 15, 2016, 1:00 AM EST), https://perma.cc/8939-7BEB.

[45] William N. Evans et al., *How the Reformulation of OxyContin Ignited the Heroin Epidemic* UNIV. OF NOTRE DAME 2–3 (Feb. 14, 2018), https://perma.cc/S9VW-NG4M.

[46] *Id.*; Nadia Kounang, *What You Need to Know About Fentanyl*, CNN, https://perma.cc/U542-3VRP (last updated Nov. 8, 2018).

[47] Sarah Sidner, *Fentanyl: The Powerful Opioid That Killed Prince*, CNN (Oct. 25, 2017), https://perma.cc/CJ8C-3TVQ.

[48] *See, e.g.*, Eyre, *supra* note 7 (describing how drug distributors flooded small towns in West Virginia with prescription painkillers between 2007 and 2012); Julie Bosman, *Inside a Killer Drug Epidemic: A Look at America's Opioid Crisis*, N.Y. TIMES (Jan. 6, 2017), https://perma.cc/9VPM-UNAC (describing stories of addiction from seven locations around the country).

[49] *See* Neil Howe, *America's Opioid Crisis: A Nation Hooked*, FORBES (Nov. 30, 2017), https://perma.cc/TCW8-5SFY.

Janssen Pharmaceuticals, Teva Pharmaceuticals, and Allergan have all contributed to the problem.[50] As have major distributors such as AmerisourceBergen, Cardinal Health, and McKesson.[51] To complicate matters, medical professionals throughout the country—who take an oath to do no harm—continue to overprescribe opioid painkillers and flood communities with dangerous narcotics.[52] And where limited access to pills has created a void, cartels and illegal drug traffickers have been happy to fill it with heroin and fentanyl.[53] This widespread crisis has left many community leaders at a loss as their communities are ravaged by addiction.[54]

B. *Litigation Response to the Opioid Crisis*

In response to the growing crisis, hundreds of communities have filed lawsuits against opioid manufacturers and distributors for their roles in the opioid epidemic.[55] In 2017, about 250 communities filed lawsuits against opioid manufacturers, wholesalers, distributors, and marketers.[56] In addition to the lawsuits, forty-one state attorneys general have grouped together to investigate the pharmaceutical companies' activities.[57] They have issued a number of subpoenas to well-known drug manufacturers and distributors.[58]

The communities filing the lawsuits want to recoup the costs associated with the opioid epidemic.[59] The crisis has drained county and municipal budgets because of the increased costs associated with law enforcement, first responders, and drug treatment.[60] Some communities hit hardest by the epidemic can no longer afford to do autopsies for every suspected drug overdose.[61] Communities also want to force drug

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[50] *See* Noguchi, *supra* note 10.

[51] *See* Noguchi, *supra* note 10.

[52] Marty Makary, *How Doctors Can Stop the Opioid Crisis at its Source: Quit Overprescribing*, USA TODAY (Aug. 4, 2017), https://perma.cc/ZSD7-XHSY.

[53] *See* Jennifer Miller, *Suffolk DA: Fentanyl Kingpin Tied to Sinaloa Cartel Busted in Boston*, BOS. HERALD (Feb. 8, 2018), https://perma.cc/6N6W-WJEQ.

[54] *See* German Lopez, *How to Stop the Deadliest Drug Overdose Crisis in American History*, VOX (Dec. 21, 2017, 10:00 AM EST), https://perma.cc/D7JW-5JUJ.

[55] Lyle Adriano, *Opioid Manufacturers Face Hundreds of Lawsuits for Allegedly Misleading Doctors*, INS. BUS. AM. (Feb. 6, 2018), https://perma.cc/VZ8K-FB3G.

[56] *Id.*

[57] Mattie Quinn, *The Opioid Files: Hundreds of States and Cities are Suing Drug Companies*, GOVERNING (Nov. 13, 2017), https://perma.cc/4JBY-5FTS.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

manufacturers to change their deceptive marketing tactics and mandate accurate representation of the addictive nature of the medication.[62]

There are many theories on which these lawsuits are based.[63] Many lawsuits allege that the companies violated the Controlled Substances Act when they failed to "report suspiciously large orders of prescription pain pills placed by distributors and pharmacies."[64] Other traditional government enforcement actions are being brought, too; many of which are "based on the Federal Food, Drug, and Cosmetic Act, which prohibits introducing 'misbranded' drugs into interstate commerce."[65] Other communities have focused on fraud claims, alleging that the companies "made false representations about their products' addictiveness and effectiveness, all calculated to mislead the state, prescribers, and the public."[66] The fraud claims are being brought as Medicaid fraud claims or under consumer protection laws.[67]

But some communities are taking more creative approaches, including public nuisance claims premised on the theory that "opioid companies unreasonably interfered with the public's health by oversaturating the market with drugs and failing to implement controls against misuse and diversion, thereby creating a public nuisance."[68] Another approach involves claims alleging the pharmaceutical companies violated the Racketeering Influenced and Corrupt Organizations Act ("RICO") with their distribution and marketing practices.[69] Communities are also bringing unjust enrichment claims against the pharmaceutical companies, arguing that the companies should disgorge the large profits they acquired by selling and distributing the narcotics at the expense of the communities.[70]

Regardless of theory, communities are essentially all seeking the same

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[62] *Id.*

[63] Rebecca L. Haffajee & Michelle M. Mello, *Drug Companies' Liability for the Opioid Epidemic*, 377 NEW ENG. J. MED. 2301, 2304–05 (2017), *available at* https://perma.cc/9ERB-2Q2L.

[64] Higham & Bernstein, *supra* note 2; *See* Sari Horwitz & Scott Higham, *DEA Launches New Crackdown on Pharmacies and Opioid Over-Prescribers*, WASH. POST (Jan. 30, 2017), https://perma.cc/D2TN-W33W.

[65] Haffajee & Mello, *supra* note 63, at 2304.

[66] Haffajee & Mello, *supra* note 63, at 2304.

[67] Haffajee & Mello, *supra* note 63, at 2304.

[68] Charles Toutant, *Opioid Suits by Cities Begin to Catch on in New Jersey*, N.J. LAW JOURNAL (Sept. 25, 2017), https://perma.cc/Z8DR-UGT7; Haffajee & Mello, *supra* note 63, at 2304.

[69] *See* Jo Martin, *County Lawsuits on Opioids Reminiscent of Tobacco Lawsuits*, MD. REPORTER (Feb. 5, 2018), https://perma.cc/E8C8-5KM9; *See also* Nicole Dotzenrod, *Fourteen Cities, Towns Join Lawsuit Against Drug Companies in Opioid Crisis*, VALLEY BREEZE (Jan. 23, 2018), https://perma.cc/B38V-44HD; Mary C. Serreze, *Read the Lawsuit: Greenfield Sues Big Pharma to Recoup Opioid Crisis Costs*, MASS LIVE (Dec. 20, 2017), https://perma.cc/TQW4-APNX.

[70] Haffajee & Mello, *supra* note 63, at 2305.

end—they want to force the manufacturers and distributors to the bargaining table under the sheer pressure of mass-litigation.[71] And in that sense, communities have already made some progress.[72] The Federal Court in the Northern District of Ohio has consolidated hundreds of cases through the federal multidistrict litigation process, and the judge overseeing the litigation has encouraged settlement—potentially paving the way for a big tobacco-style settlement.[73]

C. *Tobacco Litigation of the 1990s*

In 1998, cigarette manufacturers, along with forty-six states and six other jurisdictions, entered into the largest civil litigation settlement in United States history—totaling more than $200 billion.[74] The parties structured the settlement so the states would be paid in perpetuity.[75] The four remaining states, Mississippi, Minnesota, Florida, and Texas, all settled separately with the major tobacco companies.[76] Some money was earmarked for programs like smoking cessation programs or public service announcements.[77] The settlement also required cigarette manufacturers to curb their advertising directed at some segments of the population, resulting in the retirement of infamous tobacco icons like Joe Camel and the Marlboro Man.[78]

During the 1990s, the public learned that the tobacco industry deliberately concealed the risks of cigarette use and purposefully designed their products to foster addiction.[79] Litigation began in 1994, when Mike Moore, then-Attorney General of Mississippi, filed the first lawsuit against "big tobacco."[80] He argued that Mississippi—and other states like it—

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[71] Quinn, *supra* note 57.

[72] *See* Eric Heisig, *Cleveland Federal Judge Overseeing Opioid Suits Orders Parties to not Discuss Settlement Talks with Reporters*, CLEVELAND.COM (Feb. 6, 2018), https://perma.cc/99TA-F3WN.

[73] *See* Jef Feeley, *Purdue's OxyContin Targeted at Judge's Opioid Summit*, BLOOMBERG (Feb. 2, 2018), https://perma.cc/7V86-TRYZ. *See, e.g.*, In re National Prescription Opiate Litigation, Case No. 1:17 MD 2804, 2018 U.S. Dist. LEXIS 91133 (N.D. Ohio Mar. 27, 2018).

[74] *15 Years Later, Where Did All the Cigarette Money Go?*, NPR (Oct. 13, 2013, 5:52 PM EST), https://perma.cc/B8S4-Q4QK [hereinafter *15 Years Later*].

[75] *The Master Settlement Agreement: An Overview*, TOBACCO CONTROL LEGAL CONSORTIUM 2–3, https://perma.cc/3ARL-4BGE (last visited Apr. 1, 2019).

[76] *The ABCs of the Tobacco Master Settlement Agreement*, NAT'L ASS'N OF ATTORNEYS GENERAL, https://perma.cc/YUJ5-64QB (last visited Apr. 1, 2019).

[77] *15 Years Later*, *supra* note 74.

[78] *15 Years Later*, *supra* note 74.

[79] Gifford, *supra* note 15, at 757–58.

[80] Debra Cassens Weiss, *Lawyer Who Targeted Tobacco Companies Encourages State Suits Against Drug Makers for Opioid Crisis*, ABA JOURNAL (Jul. 25, 2017), https://perma.cc/A23H-4X99.

should not have to pay the costs of treating smoking-related diseases such as lung cancer, heart disease, emphysema, low-birth-weight babies, and other smoking related ailments.[81] The strategy, by using public nuisance and other equitable theories, sought "to avoid the need to prove specific causation of any individual's illness and to eliminate defenses based upon a smoker's own conduct, such as contributory negligence and assumption of the risk" which had long plagued individual plaintiffs.[82]

Within three years of Moore's first filing, about forty other states had filed lawsuits of their own.[83] Some states sought recovery under other theories including "deceptive advertising, antitrust violations, federal Racketeer Influenced Corrupt Organization (RICO) claims, unfair competition, a variety of fraud allegations, and in at least two states, Florida and Massachusetts, statutory claims based on the enactment of specific health care cost recovery legislation."[84]

Ultimately, courts never weighed in on the validity of the claims because in June 1997, the parties agreed in principle to a global settlement requiring the tobacco companies to pay more than $368 billion over a twenty five year period.[85] Congress had to approve the settlement, but they failed to do so.[86] The tobacco companies settled with four states individually (Mississippi, Minnesota, Florida, and Texas) for approximately $40 billion total, and then entered into the Master Settlement Agreement with the remaining states in the amount of $206 billion—with a total settlement amount of $246 billion spanning at least twenty-five years.[87]

The Master Settlement Agreement ("Agreement") is the long and complex agreement which governs the payments to the states.[88] The Agreement's purpose was to compensate the settling states for taxpayer money spent on healthcare costs connected to tobacco-related illness.[89] The Agreement limited future liability for legal claims brought by the settling states based on the conduct at issue in the settled lawsuits.[90] Financially, it

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[81] *15 Years Later*, *supra* note 74.

[82] Gifford, *supra* note 15, at 759.

[83] *See* Frank Sloan & Lindsey Chepke, *Litigation Settlement, and the Public Welfare: Lessons From the Master Settlement Agreement*, 17 WIDENER L. REV. 159, 164–67 (2011).

[84] Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DEPAUL L. REV. 331, 338 (2001).

[85] Sloan & Chepke, *supra* note 83, at 168–69.

[86] Sloan & Chepke, *supra* note 83, at 168–69.

[87] Gifford, *supra* note 15, at 762.

[88] Sloan & Chepke, *supra* note 83, at 168–69.

[89] *The Master Settlement Agreement: An Overview*, *supra* note 75, at 1.

[90] *The Master Settlement Agreement: An Overview*, *supra* note 75, at 1.

provided three different kinds of payments: initial payments, annual payments calculated by an independent auditor, and bonus payments for states' investments in the preceding litigation.[91] In addition to the financial terms and the release of claims, the Agreement also restricted the sale and marketing of cigarettes by the participating manufacturers, prohibited some practices that suppressed negative information about smoking, created a prevention foundation, and disbanded tobacco-industry initiatives.[92]

The prevailing theory is that the tobacco companies settled because the anticipated costs of continuing to defend the cases were cost prohibitive.[93] The tobacco industry appeared willing to buy—at a steep price—protection from the uncertainty of litigation.[94] In fact, the Agreement itself states that "the parties settled 'to avoid the further expense, delay, inconvenience, burden and uncertainty of continued litigation (including appeals from any verdicts).'"[95] While the legal theories were untested, one thing remains clear: the surround and drown style of mass-tort litigation, where states and local governments grouped together to force the industry to the bargaining table, was successful.

II. The Failure of Traditional Options Has Forced Communities to Turn to Creative Responses to the Opioid Crisis

Facing unique challenges presented by the opioid crisis, communities have responded in creative ways.[96] Traditional solutions such as law enforcement have failed to stop the ongoing epidemic.[97] State and municipal budgets are thin as it is, but they face added stress because of the cost of the crisis.[98]

The financial cost of the opioid crisis is staggering.[99] Although the true

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[91] *The Master Settlement Agreement: An Overview*, *supra* note 75, at 2.

[92] *The Master Settlement Agreement: An Overview*, *supra* note 75, at 2–4.

[93] Gifford, *supra* note 15, at 762–63.

[94] Rabin, *supra* note 84, at 338.

[95] *The Master Settlement Agreement: An Overview*, *supra* note 75, at 2.

[96] *See* Edward D. Murphy, *In Lawsuit, Portland Accuses Opioid Manufacturers of Greed*, PORTLAND PRESS HERALD (Apr. 6, 2018), https://perma.cc/9C9Q-TN2J.

[97] *See The Unprecedented Opioid Epidemic: As Overdoses Become a Leading Cause of Death, Police, Sheriffs, and Health Agencies Must Step Up Their Response*, POLICE EXEC. RESEARCH FORUM 9 (Sept. 2017), *available at* https://perma.cc/8TAF-ECQD [hereinafter *The Unprecedented Opioid Epidemic*] ("The reason PERF continues to focus on the opioids crisis is that despite the groundbreaking work that police and other agencies are doing, the epidemic is continuing to worsen." (emphasis in original)).

[98] *See* Liz Farmer, *This Week in Public Finance: The Cost of the Opioid Epidemic, Connecticut's Budget and a Disaster Relief Bond*, GOVERNING (Nov. 3, 2017), https://perma.cc/DC7P-CWKJ.

[99] German Lopez, *White House: One Year of the Opioid Epidemic Cost the U.S. Economy More*

cost is hard to calculate, a recent study estimates that the cost of the opioid epidemic in 2015 exceeded $500 *billion*.[100] The increase in costs come in different forms including "emergency call volumes, medical examiner and coroner bills, and overcrowded jails and courtrooms . . . ."[101] Criminal justice-related expenses account for a majority of those costs, including police protection, judicial and legal services, corrections (local, state, and federal), and property losses.[102]

Other costs associated with addiction treatment—including Medicaid expenditures and other treatment expenses—continue to balloon.[103] Direct healthcare costs associated with overdoses—like emergency room visits, hospital admissions, ambulance transports, and Naloxone doses—are on the rise.[104] Indirect—and often hidden—costs like those for treatment of diseases related to intravenous drug use like hepatitis and HIV continue to rise as well.[105]

The financial toll is not limited to direct government expenditures either—the crisis has affected the economy at large.[106] Studies suggest a correlation between the increase in opioid prescriptions from 1999 to 2015 and a decline in labor force participation during that same period.[107] And perhaps the greatest cost comes from lost earnings and productivity from overdose deaths—estimated at $800,000 per person.[108] Not only does this affect the families of the overdose victims, it also affects local, state, and federal tax receipts.[109]

However, the toll is not limited to purely financial costs—more important, the loss of life has been devastating.[110] Since 1990, the number of

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than $500 Billion, VOX (Nov. 20, 2017), https://perma.cc/SQU7-9AKK.

[100] *Id.*

[101] Paula Seligson & Tim Reid, *Unbudgeted: How the Opioid Crisis is Blowing a Hole in Small-Town America's Finances*, REUTERS (Sept. 27, 2017), https://perma.cc/NUT3-XWS8.

[102] *See The Opioid Crisis is Real, But Not Yet a Threat to State Credit Quality*, S&P GLOBAL MARKET INTELLIGENCE (Oct. 31, 2017), https://perma.cc/8H2A-ZWGB; Corwin N. Rhyan, *The Potential Societal Benefit of Eliminating Opioid Overdoses, Deaths, and Substance Use Disorders Exceeds $95 Billion Per Year*, ALATRUM 2 (Nov. 16, 2017), https://perma.cc/4TX6-QPDH.

[103] *See* Catherine Candisky, *The Opioid Epidemic is Costing This One State Up to $8.8 Billion a Year*, GOVERNING (Oct. 26, 2017), https://perma.cc/YWQ2-GQS3.

[104] Rhyan, *supra* note 102, at 2–3.

[105] Rhyan, *supra* note 102, at 3.

[106] *See* Fred Dews, *How the Opioid Epidemic Has Affected the U.S. Labor Force, County-by-County*, BROOKINGS (Sept. 7, 2017), https://perma.cc/L63T-TVG4.

[107] *See id.*

[108] Rhyan, *supra* note 102, at 2.

[109] Rhyan, *supra* note 102, at 2.

[110] *See Overdose Death Rates*, NAT'L INST. ON DRUG ABUSE, https://perma.cc/QE3B-KTJ9 (last updated Aug. 2018).

Americans who died each year from drug overdoses has increased by more than 650%.[111] Data compiled by the Centers for Disease Control and Prevention show that in 1999 there were fewer than 10,000 opioid-related overdose deaths compared to 42,246 in 2016, which in itself was a 28% increase over 2015.[112] But the overdose statistics do not paint the whole picture; many more Americans struggle with addiction than succumb to it.[113] In 2016, around 2.1 million people suffered from opioid use disorder, another 2.1 million people misused prescription opioids for the first time, 11.5 million total people misused prescription opioids, and 948,000 people used heroin.[114] The epidemic affects many more than the users themselves—it affects their families, friends, and communities at large.[115]

With this in mind, communities are looking for solutions.[116] Inspired by the tobacco litigation of the 1990s, many communities are shifting their strategy toward litigation.[117] The goal of these lawsuits, ultimately, is to force the pharmaceutical manufacturers and distributors to pay for the damage left in their wake.[118] Hundreds of lawsuits have been filed and more are expected.[119] But it's more than just money: "'If you see dead fish floating in the river, the best thing to do is to go upstream and find out why the fish are being killed. . . . [T]hese lawsuits might have a role in us as a society doing that.'"[120]

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[111] Josh Katz, *You Draw It: Just How Bad is the Drug Overdose Epidemic*, N.Y. TIMES, https://perma.cc/CNQ3-UNPJ (last updated Oct. 26, 2017).

[112] Ingraham, *supra* note 1.

[113] *See The Opioid Epidemic by the Numbers*, DEPT. OF HEALTH AND HUMAN SERVICES, https://perma.cc/CDE3-XGTZ (last visited Apr. 1, 2019).

[114] *Id.*

[115] *See* James Winnefeld, *No Family is Safe From This Epidemic*, THE ATLANTIC (Nov. 29, 2017), https://perma.cc/362M-7V7E.

[116] *See* J. Stephen McIver, *Seeking Solutions to the Opioid Crisis*, 42 P&T 478, 478 (2017) *available at* https://perma.cc/5954-VHFK.

[117] *See* Bill Meagher, *America's Opioid Crisis Looks a Lot Like Big Tobacco Spats of Yesteryear*, THE STREET, https://perma.cc/35RQ-ZQ8D (last Jan. 7, 2018, 7:18 AM EST).

[118] *See* McGraw, *supra* note 18.

[119] *See* McGraw, *supra* note 18.

[120] McGraw, *supra* note 18.

ANALYSIS

III. Litigation Provides Communities the Best Option for Stemming the Opioid Crisis Because It Provides a Platform Social Change and It Will Result in a Large Global Settlement

A. *Litigation as a Blunt Instrument for Change*

Because of the ends sought, litigation presents the best means for communities facing the opioid crisis.[121] Litigation has been described as a blunt instrument rather than a scalpel.[122] Yet that blunt instrument can be effective in promoting social change.[123] Litigation—especially public mass-tort litigation—can be a useful tool for:

> (1) framing issues in terms of institutional failure and the need for institutional reform; (2) generating policy-relevant information; (3) placing issues on the agendas of policy-making institutions; (4) filling gaps in statutory or administrative regulatory schemes; (5) encouraging self-regulation; and (6) allowing for diverse regulatory approaches in different jurisdictions.[124]

The current opioid litigation is an excellent vehicle for all of the above.[125]

The opioid crisis provides an illustrative example of serious institutional failures, leading to calls for institutional reform.[126] The health care system failed its patients when—encouraged by aggressive marketing from manufacturers—it introduced a steady stream of highly-addictive pain medication to the public.[127] The government then created a vacuum by limiting legal access to the drugs, driving many users to cheaper illicit alternatives such as heroin or black market fentanyl.[128] The litigation response to these failures has prompted reform efforts from policy-making institutions, including the federal government and state governments.[129]

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[121] *See* Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons From Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837, 1842 (2008); *See generally* Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645 (2017).

[122] William I. Cowin, *Reflections in Retirement*, 55 BOSTON B.J. 13, 14 (2011).

[123] *See generally* Cummings, *supra* note 121 (discussing the use of integrated legal and political strategies to effect social change).

[124] Lytton, *supra* note 121, at 1842.

[125] *See* Lytton, *supra* note 121, at 1842.

[126] *See* Jessie Hellmann, *What Caused the Opioid Crisis?*, THE HILL (Mar. 3, 2018), https://perma.cc/Z4B3-PTYK.

[127] *Id.*

[128] *Id.*

[129] *See, e.g.*, Lev Facher, *New Opioid Bill Would Impose Sweeping Limits on Some Prescriptions,*

Communities are stepping outside the traditional regulatory scheme and using litigation to end the opioid crisis and hold the pharmaceutical companies accountable.[130] By doing so, communities are using lawsuits to force the pharmaceutical industry to self-regulate and self-correct.[131]

The central tenets of traditional tort theory apply in public mass-tort litigation.[132] Generally, manufacturers of products are more likely to invest in safety and take necessary steps to avoid harming their customers if they are held liable to injured consumers.[133] This same principle applies in public mass-tort litigation as well: "[s]uccessful public tort lawsuits help to internalize product-related health costs by ensuring that they are borne by the manufacturer."[134] For example, although not a direct investment in the safety of the product, in the face of hundreds of lawsuits, Purdue has revealed that it will no longer market OxyContin or any other opioid drug to physicians.[135] The company maintains that the decision to discontinue marketing was independent of any litigation, but to many observers, the move was a clear reaction to the hundreds of lawsuits alleging that Purdue deceptively marketed OxyContin to physicians and patients alike.[136] If—or, more accurately, when—the lawsuits settle, any settlement will impose new restrictions on manufacturers and will require them to invest money directly into the development of safer products and addiction treatment programs.[137]

Boost Funding, STAT (Feb. 27, 2018), https://perma.cc/C42D-D9B3 (discussing recently-introduced bipartisan federal legislation intended to increase funding for addiction treatment and prevention and impose limitations on opioid prescriptions); William Petroski, *Bill to Combat Opioid Crisis Clears Iowa House*, DES MOINES REG. (Feb. 26, 2018), https://perma.cc/KB5X-HG2L (discussing a bill aimed at battling the opioid crisis in Iowa).

[130] *See* Sarah Holder, *The Cities Suing Big Pharma Over Opioids*, CITYLAB (Oct. 11, 2017), https://perma.cc/X5PN-3MNC.

[131] *See* Jackie Wattles, *Purdue Pharma Says it Will Stop Promoting Opioids to Doctors*, CNN (Feb. 11, 2018), https://perma.cc/T5Y2-52RX (highlighting Purdue's efforts to dial back its marketing of opioid drugs).

[132] *See* Richard C. Ausness, *Public Tort Litigation: Public Benefit or Public Nuisance?*, 77 TEMP. L. REV. 825, 897 (2004).

[133] *Id.*

[134] *Id.*

[135] Patty Wight, *Doctors in Maine Say Halt in OxyContin Marketing Comes '20 Years Late'*, NPR (Feb. 13, 2018), https://perma.cc/HXW5-YXM9.

[136] *Id.*

[137] *See* Diane Wagner, *Rome Files Suit Against OxyContin, Other Opioid Makers*, ROME NEWS-TRIB. (Mar. 3, 2018), https://perma.cc/DL9L-P96S ("The suit is asking the court to halt the companies' 'unfair or deceptive practices' and order them to abate the public health crisis. It's seeking compensation for the plaintiffs' actual costs of dealing with the epidemic locally, including interest; the establishment of an 'abatement trust fund' similar to that in the tobacco company settlement; punitive damages; attorneys' fees; and 'all other relief as provided by

Public mass-tort litigation also achieves corrective justice.[138] Corrective justice, the underlying theory behind unjust enrichment, "focuses on a quantity that represents what rightfully belongs to one party but is now wrongly possessed by another party and therefore must be shifted back to its rightful owner."[139] Many lawsuits filed by communities against opioid manufacturers and distributors seek recoupment or reimbursement for their financial expenditures as a result of the ongoing opioid crisis.[140] Communities are alleging damages and seeking restitution so that they can repair the social systems that the opioid crisis has destroyed.[141]

While imperfect, public mass-tort litigation allows communities to obtain redress on behalf of their citizens, and, at the same time, effect social change.[142] Traditional solutions have failed to provide relief, and the unique circumstances of the opioid crisis require unique solutions.[143] Litigation gives these communities leverage to create public policy solutions by seeking a large global settlement, which will reimburse them for their expenditures, restrain pharmaceutical companies, and spur investment in addiction treatment.[144]

Critics suggest that litigation is not the answer to the opioid crisis.[145] They point out that most overdoses are not caused by prescription medication.[146] Instead, the overdoses are caused by street drugs like heroin or black-market fentanyl.[147] Because street drugs are the leading cause of overdoses, critics argue that the pharmaceutical companies' liability for the opioid crisis is specious and that the litigation is opportunistic and unnecessary.[148] Whether or not prescription opioids are the cause of most overdoses, there is no minimizing the role that the pharmaceutical industry played in creating this crisis.[149] Industry-wide practices—like aggressive and deceptive marketing—flooded the nation with highly-addictive

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law and/or as the Court deems appropriate and just.'").

[138] Ausness, *supra* note 132, at 898.

[139] Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 408 (1992).

[140] *See* Deprez & Barrett, *supra* note 19.

[141] *See* Haffajee & Mello, *supra* note 63.

[142] *See* Lytton, *supra* note 121; *See generally* Cummings, *supra* note 121.

[143] *See The Unprecedented Opioid Epidemic*, *supra* note 97, at 9.

[144] *See* Deprez & Barrett, *supra* note 19.

[145] *See, e.g.*, Cliff Katz et al., *Litigation Won't Cure America's Opioid Epidemic*, N.Y. LAW J. (Feb. 14, 2018), https://perma.cc/B7HH-7JP3; Robin Newhouse, *Lawsuits Are No Solution to the Opioid Crisis*, LAS VEGAS SUN (Mar. 1, 2018), https://perma.cc/8NDW-BQNZ.

[146] *See* Katz et al., *supra* note 145.

[147] *See* Katz et al., *supra* note 145.

[148] *See* Katz et al., *supra* note 145.

[149] *See* Moghe, *supra* note 22.

substances leading to widespread addiction.[150]

Critics also suggest that litigation is inadequate to solve the crisis because it fails to provide the targeted public policy solutions necessary to quell the ongoing crisis.[151] But nobody is suggesting that litigation, in and of itself, is *the solution* to the opioid crisis.[152] Instead, litigation provides a means through which communities can obtain redress and force the opioid industry to invest in public policy solutions that will make great strides toward abating the crisis.[153] The funds obtained in a settlement will provide "desperately needed resources for opioid addiction treatment and law enforcement."[154] Other future payments can be "earmarked for other support services for persons with addiction—such as housing and employment assistance—and for distributing the overdose-reversal drug naloxone."[155] The lawsuits have the power to change industry practices, raise awareness, and build the case for greater regulation.[156]

Although critics are correct when they argue that litigation will not solve the opioid crisis, their argument misses the mark.[157] Where other traditional solutions have failed, litigation offers communities the best option for stemming the crisis.[158]

B. *Opioid Litigation Will Result in a Large Global Settlement Like the Tobacco Master Settlement Agreement*

The lawsuits in response to the opioid crisis will result in a large global settlement much like the tobacco litigation of the 1990s.[159] The strategies are the same, the claims are similar, and the faces are familiar.[160] What will ultimately drive the success of opioid litigation is not the validity of the substantive claims or the theories on which those claims are based, but the power associated with public mass-tort litigation.[161] Pharmaceutical

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[150] *See* Moghe, *supra* note 22.

[151] *See* Katz et al., *supra* note 145.

[152] *See* Jerry Mitchell, *With 175 Americans Dying a Day, What Are the Solutions to the Opioid Epidemic?*, CLARION LEDGER (Feb. 2, 2018), https://perma.cc/M294-BBE2.

[153] *See* German Lopez, *The Growing Number of Lawsuits Against Opioid Companies, Explained*, VOX, https://perma.cc/CD46-AF6J (last updated May 15, 2018 5:22 PM EDT).

[154] Haffajee & Mello, *supra* note 63.

[155] Haffajee & Mello, *supra* note 63.

[156] Haffajee & Mello, *supra* note 63.

[157] *See, e.g.*, Katz et al., *supra* note 145; Newhouse, *supra* note 145.

[158] *See* McGraw, *supra* note 18.

[159] *See* Deprez & Barrett, *supra* note 19.

[160] *See* Deprez & Barrett, *supra* note 19.

[161] *See* Jerry Mitchell, *Judge: Stop the Legal Fights and Curb the Opioid Epidemic*, CLARION LEDGER (Jan. 29, 2018), https://perma.cc/6KUB-ST2Q.

companies cannot afford—neither financially nor politically—to defend each individual lawsuit.[162] The blunt instrument of litigation will not be kind to the pharmaceutical companies.[163]

1. Differences Between Opioid Litigation and Tobacco Litigation

That is not to say that the plaintiffs will not face their challenges.[164] Tobacco litigation and opioid litigation are indeed different.[165] With tobacco, customers were using the product as instructed which caused them to get sick.[166] With opioids, however, customers are not necessarily using the pills as directed, "so it is harder to blame the pharmaceutical companies for the effects of that misuse . . . ."[167] Moreover, pharmaceutical companies will argue that they are not to blame for individuals misusing the drugs or using more than prescribed.[168] And their argument has some merit; there are many potential parties that have played a role in the opioid crisis, including doctors, pharmacies, distributors, the government, and the patients themselves.[169] The availability of other potential wrongdoers allows opioid manufacturers to point fingers and reduce their exposure.[170]

Plus, any global settlement will be far less than the massive $200 billion tobacco settlement because of the relative scale of the industries, the companies' profits, and the damage done.[171] Fortunately, the damage caused by the opioid crisis, although devastating, has not reached the same

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[162] *See* Ayesha Rascoe, *Trump Urges Lawsuit Against Opioid Companies, Tougher Sentences for Dealers*, REUTERS (Mar. 1, 2018), https://perma.cc/W2BZ-ZLWJ ("Hundreds of states, counties and cities have sued drugmakers and distributors, saying that manufacturers have deceptively marketed opioids and distributors have failed to take action against indications the painkillers were diverted for improper uses."); Laura Strickler, *Cities, Counties Meet With Drug Companies to Discuss Opioid Settlement*, CBS NEWS (Jan. 31, 2018), https://perma.cc/72WU-7RVV ("Representatives from the country's largest opioid manufacturers and distributors met with lawyers from over 200 cities, counties and states in federal court . . . in an attempt to hammer out a sweeping settlement of claims related to the opioid crisis.").

[163] *See* Strickler, *supra* note 162.

[164] Lauren A. Rousseau, *An Avalanche of Lawsuits Holds Hope for the Opioid Epidemic*, JURIST (Mar. 12, 2018), https://perma.cc/W4PT-NV6A.

[165] *See id.*

[166] Semuels, *supra* note 13.

[167] Semuels, *supra* note 13.

[168] *See* Rousseau, *supra* note 164.

[169] Semuels, *supra* note 13.

[170] Semuels, *supra* note 13.

[171] James F. Tierny, *It's Time to Take on Big Opioid Like We Did With Big Tobacco*, BUZZFEED NEWS (Jan. 10, 2018), https://perma.cc/DD43-BW73.

scale as that caused by tobacco.[172] Moreover, the Master Settlement Agreement applied only to forty-six states and a handful of territories.[173] With opioid litigation, there are hundreds of individual communities, meaning that each plaintiff's relative "slice of the pie" is going to be much smaller than those of the parties to the Master Settlement Agreement.[174]

The plaintiffs also face a hurdle because some pharmaceutical companies, like Purdue, have changed their policies and included clearer warnings about how addictive the pills are.[175] This is a challenge because now, the wrongdoing is no longer as clear as it might have been in, say, 2007, when Purdue admitted wrongdoing and entered into a multi-million dollar settlement with the federal government.[176]

2. Predictions

Despite the potential hurdles, the outcome of this litigation will be similar to the results of the 1990s tobacco litigation.[177] In fact, Purdue recently acknowledged in a letter that it was in negotiations with state Attorneys General about lawsuits accusing the company of creating a public health crisis with its mishandling of OxyContin.[178] Purdue has also floated proposals for a global settlement of all opioid claims against them and other drug makers.[179] These early settlement discussions reveal that the drug makers fear that they face significant exposure, despite vigorously defending against the claims.[180]

A Federal District Court in Ohio has consolidated hundreds of cases, introducing the prospect of discovery and bellwether trials, which unlike the tobacco litigation, may test the legal theories on which the claims are based.[181] This foray into multidistrict litigation, however, is unlikely to

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[172] *Id.*

[173] *See The Master Settlement Agreement: An Overview*, *supra* note 75, at 1.

[174] Jan Hoffman, *Can This Judge Solve the Opioid Crisis?*, N.Y. TIMES (Mar. 5, 2018), https://perma.cc/4T4H-TL4Y (identifying more than 400 federal lawsuits brought by cities, counties, and Native American tribes against pharmaceutical companies that played central roles in the opioid crisis).

[175] Semuels, *supra* note 13.

[176] Semuels, *supra* note 13.

[177] Diana Novak Jones, *Opioid Suits are the New Tobacco Litigation, Atty Says*, LAW360 (Dec. 6, 2017), https://perma.cc/XZU5-UG8D.

[178] Jef Feeley & Jared S. Hopkins, *Purdue Pharma Discloses Negotiations with AGs on Opioids*, BLOOMBERG (Nov. 30, 2017), https://perma.cc/3QN5-CBHQ.

[179] *Id.*

[180] *See id.*

[181] Jeff Overley & Emily Field, *Opioid MDL To Get Litigation Track Amid Settlement Talks*, LAW360 (Mar. 7, 2018), https://perma.cc/MA6Q-LAY6.

change the overall outcome.[182] The litigation strategy and the end goal remain the same: echo the strategy of tobacco litigation and reach the same result.[183]

IV. What the Master Settlement Agreement Can Teach Us About a Global Settlement for the Opioid Lawsuits

A. *The Master Settlement Agreement*

The Master Settlement Agreement ("Agreement") is a one-of-a-kind agreement, unprecedented not only in scope, but also in the legal grounds on which it was founded.[184] Although the Agreement was ground-breaking in that it provided billions of dollars to forty-six states and six other jurisdictions, in the twenty years since its inception, it has been the subject of considerable criticism.[185] Four participating cigarette manufacturers agreed to make annual payments in perpetuity to the settling states.[186] The states, in turn, agreed to give up future claims against those manufacturers in exchange for the funding and restrictions of cigarette marketing.[187] The Agreement was considered a success for all parties.[188] The settlement avoided "further expense, delay, inconvenience, burden and uncertainty of litigation" and sought to reduce smoking and improve public health.[189]

The Agreement was a success in that, since its inception, cigarette consumption has reduced.[190] Between 1998 and 2017, cigarette consumption declined by nearly forty percent.[191] One cause of the decline

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[182] *See* Rousseau, *supra* note 164.

[183] *See* Rousseau, *supra* note 164.

[184] *See generally* Sloan & Chepke, *supra* note 83 (analyzing the Master Settlement Agreement).

[185] *See, e.g.*, Jim Estes, *How the Big Tobacco Deal Went Bad*, N.Y. TIMES (Oct. 6, 2014), https://perma.cc/QHM3-FDNK; Spencer Chretien, *Up In Smoke: What Happened to the Tobacco Master Settlement Agreement Money*, CITIZENS AGAINST GOV'T WASTE (Dec. 12, 2017), https://perma.cc/TXP5-SS8A; Jonathan Rauch, *Can a Little Lawsuit Shut Down a Big Tobacco Racket?*, THE ATLANTIC (Aug. 2005), https://perma.cc/PQ43-AT9J; Tamara Tragakiss, *Connecticut's Tobacco Windfall: A Billion Dollars Up In Smoke*, YANKEE INST. (July 2009) *available at* https://perma.cc/7U8K-D3ML (all describing various criticisms of the Master Settlement Agreement).

[186] *The Master Settlement Agreement: An Overview*, *supra* note 75, at 1.

[187] *The Master Settlement Agreement: An Overview*, *supra* note 75, at 1.

[188] *See Fifteen Years After the Tobacco Master Settlement Agreement: Successes and Challenges*, NAT'L ASS'N OF ATTORNEYS GENERAL, https://perma.cc/882M-AHPL (last visited Apr. 2, 2019) [hereinafter *Fifteen Years After the Tobacco Master Settlement Agreement*].

[189] *The Master Settlement Agreement: An Overview*, *supra* note 75, at 2.

[190] *See Fifteen Years After the Tobacco Master Settlement Agreement*, *supra* note 188.

[191] *See Tobacco and Smoking*, GALLUP, https://perma.cc/SLX7-CRTB (last visited Apr. 2, 2019).

was the increase in the price of cigarettes—an increase required to meet settlement funding goals—leading to reduced demand, especially among youth.[192] During that same time, the Agreement's participating manufacturers have paid over $119.5 billion, providing a much-needed cash infusion to the states and territories that are parties to the Agreement.[193] The marketing provisions in the Agreement changed how cigarette companies market their products; "[c]artoons, billboards, free samples, branded merchandise, sponsorships, and brand appearances in movies have been eliminated or drastically reduced."[194] For the most part, the Agreement benefits public health because it: (1) changed smoking culture by highlighting the public health issues associated with tobacco; (2) led to a reduction in smoking, limited tobacco marketing; and (3) provided much-needed funding for the states.[195]

But the Agreement is not without its flaws.[196] The most prevalent being that Agreement did not mandate tobacco prevention spending.[197] So the settling states have used only a fraction of the funds that they have received for tobacco or public health related programs and services.[198] Much of the money has funded unrelated state programs or found its way into states' general funds.[199] State tobacco prevention spending calculated between fiscal years 1999 and 2018 totals approximately $11.5 billion—far less than the more than $100 billion the states have received since the settlement.[200] Moreover, the Centers for Disease Control and Prevention recommends that, each year, all fifty states should allocate a total of $3.3 billion for tobacco prevention.[201] But in fiscal year 2018, states nation-wide have budgeted only $721.6 million—less than one-quarter of the recommended amount.[202]

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[192] *Fifteen Years After the Tobacco Master Settlement Agreement*, *supra* note 188.

[193] *Actual Annual Tobacco Settlement Payments Received by the States, 1998-2018*, CAMPAIGN FOR TOBACCO-FREE KIDS (Nov. 9, 2018), https://perma.cc/AUL7-RZYD.

[194] *See Fifteen Years After the Tobacco Master Settlement Agreement*, *supra* note 188.

[195] *See* Shital A. Patel, *The Tobacco Litigation Merry-Go-Round: Did the MSA Make it Stop?*, 8 DEPAUL J. HEALTH CARE L. 615, 658–63 (2005); *Fifteen Years After the Tobacco Master Settlement Agreement*, *supra* note 188.

[196] Sloan & Chepke, *supra* note 83, at 162–63.

[197] *See* Andrew Nehring, *State Tobacco Settlement Funds Go Up in Smoke*, CITIZENS AGAINST GOV'T WASTE (May 12, 2016), https://perma.cc/NS72-VBM9.

[198] *See id.*

[199] *15 Years Later*, *supra* note 74.

[200] *See Total Annual State Tobacco Prevention Spending FY1999 – FY2018*, CAMPAIGN FOR TOBACCO-FREE KIDS, https://perma.cc/D6XA-5RFG (last visited Apr. 2, 2019).

[201] *A State-by-State Look at the 1998 Tobacco Settlement 20 Years Later*, CAMPAIGN FOR TOBACCO-FREE KIDS (Dec. 13, 2018), https://perma.cc/L8BY-C9NU.

[202] *Id.*

In addition to their irresponsible spending, states also securitized the settlement payments.[203] Looking to increase cash-flow in the near term, states borrowed against the future payments and issued bonds, which in turn reduced the amount of income dedicated to public health causes.[204] As the settlement payments decreased over time, the payments to bondholders—often powerful financial institutions—increased, leading to a deficit and leaving the taxpayers holding the bag.[205]

Not only does the Agreement encourage financial irresponsibility, it "create[s] a public-private supercartel: a market-fixing scheme that is locked in by law, yet is accountable to no particular government authority; that is immensely profitable to the parties at the expense of millions of hapless consumers; and that is enforced with penalties that clobber any would-be defectors."[206] This "cartelization" is a product of the barriers to entry set forth in the Agreement.[207] Manufacturers not in the group of original participating manufacturers must pay into the Agreement or set aside large sums in escrow against future claims if they want to sell cigarettes within the participating jurisdictions.[208]

These barriers to entry essentially preserved the market share of the original participating manufacturers, which at the time of the agreement was about 99%.[209] They also eliminated price competition and facilitated price fixing, creating a system where rather than passing the costs of the settlement along to shareholders, the companies raised the prices of cigarettes, effectively passing the costs along to the smokers who were supposed to benefit from the settlement.[210] This system does not benefit only the tobacco companies, but also the participating jurisdictions: the more cigarettes cost, the more settlement money fills state coffers.[211] These arguments, and others, have led to challenges arguing that the Master Settlement Agreement is unconstitutional; however none of those

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[203] *See* Daniel Bases & Stephanie Kelly, *Tobacco Bond Prices Weaker After U.S. Proposes Cigarette Nicotine Cut*, REUTERS (July 28, 2017), https://perma.cc/652M-4W6B.

[204] Chretien, *supra* note 185.

[205] Chretien, *supra* note 185; *see also* Cezary Podkul, *How Wall Street Tobacco Deals Left States With Billions in Toxic Debt*, PROPUBLICA (Aug. 7, 2014), https://perma.cc/NT8W-WKGL (discussing financial deals involving tobacco settlement funds, in which a number of states have promised $64 billion to pay $3 billion worth of Capital Appreciation Bonds).

[206] Rauch, *supra* note 185.

[207] Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Governments' Tobacco Litigation*, 33 CONN. L. REV. 1143, 1173–75 (2001).

[208] Rauch, *supra* note 185.

[209] Rauch, *supra* note 185.

[210] Little, *supra* note 207, at 1173–75.

[211] *See* Rauch, *supra* note 185.

challenges have been successful.[212]

While the marketing provisions of the Agreement have been marginally successful, they have failed to effect meaningful change.[213] The Agreement allows for several different forms of marketing not unlike pre-Agreement campaigns, only limited in the targeting of youth.[214] For example, tobacco companies are not prohibited from advertising with signage at point-of-sale locations regardless of their proximity to schools; nor are they limited in advertising on the internet or through direct-mail.[215] The provisions do, however, limit the direct and indirect targeting of youth, which has stopped companies from advertising to youth through some mediums such as cartoon characters.[216]

The Master Settlement Agreement is not a perfect document, but it provided a unique—though inadequate—solution to a unique problem.[217] The Agreement provides precedent and a framework for a global settlement of the opioid lawsuits.[218]

B. *The Ideal Opioid Settlement*

The lessons learned from the tobacco Master Settlement Agreement can provide much-needed insight to the communities seeking a similar agreement to bring an end to the ongoing opioid litigation.[219]

First, to avoid many of the constitutional challenges lodged against the Master Settlement Agreement, Congress should solidify the settlement through an act of law.[220] Like the parties to the Master Settlement Agreement, the parties to the opioid litigation settlement should petition Congress for a global resolution, only this time around, Congress should actually ratify it.[221] The saying goes "strike while the iron is hot" and

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[212] *See* Sloan & Chepke, *supra* note 83, at 176.

[213] *Summary of the Master Settlement Agreement (MSA)*, CAMPAIGN FOR TOBACCO-FREE KIDS 1–2 (July 17, 2017), https://perma.cc/9BZL-4CCZ.

[214] *See generally* Dennis Eckhart, *The Tobacco Master Settlement Agreement: Enforcement of Marking Restrictions*, TOBACCO CONTROL LEGAL CONSORTIUM 3 (2004), *available at* https://perma.cc/22NW-GRD5.

[215] *Summary of the Master Settlement Agreement (MSA)*, *supra* note 213.

[216] *Summary of the Master Settlement Agreement (MSA)*, *supra* note 213.

[217] *See generally*, Sloan & Chepke, *supra* note 83 (analyzing the Master Settlement Agreement).

[218] *See* Rousseau, *supra* note 164.

[219] *See generally* Cheryl Healton, Dean, College of Global Public Health, New York University, Applying Lessons Learned from the Master Settlement Agreement with Big Tobacco to Other Industries (Feb. 14, 2018), *available at* https://perma.cc/EC42-TQNY.

[220] *See The Master Settlement Agreement: An Overview*, *supra* note 75, at 1.

[221] *See The Master Settlement Agreement: An Overview*, *supra* note 75, at 1.

ideally this should take place while the issue is on Congress's radar.[222]

One of the areas where a global opioid settlement and the Master Settlement Agreement will differ is the area of marketing.[223] While both products are inherently addictive, and both products were marketed as safe, the marketing for each differs vastly.[224] For example, tobacco companies overtly targeted youth and disadvantaged populations, while opioid manufacturers directed most of their marketing efforts at physicians.[225] That said, an opioid settlement, rather than focusing on targeted advertising campaigns, should prohibit or limit opioid manufacturers' and distributors' sales teams from marketing and promoting opioids to physicians, something that the companies have already begun doing.[226] The agreement should also require that the companies sponsor public service announcement-type media spots warning consumers of the dangers of the drugs and providing information about addiction treatment options.[227] But the problem now is not so much the marketing or over-prescription of opioids, it is the downstream effect of those actions, the solutions to which should be the main focus of any future settlement.[228]

Because the damage caused by the opioid crisis is not as widespread as that caused by tobacco, the settlement will be far less than the eye-popping amount paid by the tobacco companies.[229] Where there are far more plaintiffs involved in the opioid litigation, each party will receive a small percentage of the total.[230] This leads to the problem of how to allocate those

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[222] *See* Stephanie Armour, *Opioid Crisis Gets Washington's Attention*, WALL ST. J., https://perma.cc/32QU-4NTR (last updated Mar. 8, 2018).

[223] *See* Semuels, *supra* note 13.

[224] *See* Zachary A. Sigel, *Suing Big Pharma for the Opioid Epidemic is Too Little, Too Late*, MEDIUM (Oct. 11, 2017), https://perma.cc/PH9A-5FGX ("[A] critical difference between opioids and tobacco is the supply chain. Unlike tobacco, which was sold directly to consumers and used as directed, opioids run through several intermediaries before reaching consumers.").

[225] *Compare* Van Zee, *supra* note 31, at 221–25 (discussing how Purdue marketed aggressively to medical providers), *with Tobacco Industry Marketing*, AM. LUNG ASS'N, https://perma.cc/7963-VW4X (last visited July 31, 2018) (discussing how tobacco companies market the product directly at the consumer).

[226] *See* Andrew Liptak, *OxyContin Maker Purdue Will No Longer Market Opioid Drugs to Doctors*, THE VERGE (Feb 11, 2018), https://perma.cc/6SVB-T4E7.

[227] *Cf.* Sapna Maheshwari, *Why Tobacco Companies are Paying to Tell you Smoking Kills*, N.Y. TIMES (Nov. 24, 2017), https://perma.cc/7857-ZGYQ (discussing how tobacco companies are being forced to produce and publish through media "corrective statements" about the health risks and addictive nature of smoking).

[228] *See* Joanna Walters, *America's Opioid Crisis: How Prescription Drugs Sparked a National Trauma*, THE GUARDIAN (Oct. 25, 2017), https://perma.cc/5KKZ-2Q6D.

[229] Tierny, *supra* note 171.

[230] *See* Hoffman, *supra* note 174.

resources.[231] Rather than use the political and inherently unfair process seen in the Master Settlement Agreement, the parties should use a neutral third-party to allocate the funds.[232]

Ultimately, any global settlement will focus on financial payouts to the plaintiff communities and the establishment of addiction treatment programs.[233] For the settlement to be successful, the plaintiff communities must take seriously their obligation to protect their constituencies.[234] This means not squandering the funds like many settling states did with their Master Settlement Agreement payouts.[235]

Once the parties determine how to allocate the funds, the agreement should mandate that the parties can only use the funds for programs that directly contribute to addiction treatment, education, rehabilitation, and certain limited law enforcement functions.[236] The agreement should prohibit the use of the funds for any purpose unrelated to the opioid crisis, and the plaintiff communities should be prohibited from securitizing any settlement payments.[237] These measures will go a long way in ensuring that the settlement puts public health principles first and allows communities to combat the crisis effectively.[238]

CONCLUSION

Litigation is the best option for communities affected by the opioid crisis. It gives them the ability to close budget gaps caused by the crisis and also effect powerful social change. With these lawsuits, cities, towns, and counties around the country are wielding the blunt and powerful tool of litigation and beating the opioid industry into submission. The strategy

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[231] *See* Sloan & Chepke, *supra* note 83, at 176.

[232] *See* Sloan & Chepke, *supra* note 83, at 176 ("[W]hen the agreement was being written, it was not a given that each state's share would equal its relative portion of excess Medicaid expenditures or any other index of medical costs. In fact, its writing was a very political process wherein State Attorneys General had to lobby for their states to receive larger portions of the settlement."). *See generally* KENNETH R. FEINBERG, WHO GETS WHAT: FAIR COMPENSATION AFTER TRAGEDY AND FINANCIAL UPHEAVAL (2012) (describing how decisions are made to allocate compensation in the aftermath of a tragedy).

[233] *See* Tierny, *supra* note 171.

[234] Tierny, *supra* note 171.

[235] *See* Tragakiss, *supra* note 185, at 2 ("Connecticut has received nearly $1.29 billion from the settlement since distributions began in Fiscal Year 2000. Of that, only $23 million, or less than 2% of the total Tobacco Settlement Funds, have been used on programs specific to reducing the number of smokers or anti-tobacco efforts.").

[236] Tierny, *supra* note 171.

[237] *See* Chretien, *supra* note 185.

[238] Tierny, *supra* note 171.

echoes that of the tobacco litigation in the 1990s, and the result will be the same. Sooner, rather than later, the parties will agree to a large global settlement. A settlement that will reimburse the communities for their expenditures and take steps to abate the crisis. Using the tobacco Master Settlement Agreement as the precedent and the framework, the parties can craft an agreement that radically alters the marketing of prescription opioids and funds anti-addiction and treatment programs nationwide. However, unlike the Master Settlement Agreement, any opioid settlement must mandate that settlement funds be spent only on opioid addiction-related programs. While litigation will not solve the crisis, it provides the best option for communities and the country at large.

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Outer Space and International Geography: Article II and the Shape of Global Order

P.J. BLOUNT*

INTRODUCTION

In an 1898 serialized science fiction novel, Thomas Edison travels to space in true Victorian fashion, taking with him a menagerie of scientists from Earth including geologists and miners to go and attack Mars. As their adventures ensue, the intrepid group of explorers finds an asteroid made of gold that is actively being mined by the Martians:

> The more we saw of this golden planet the greater became our astonishment. What the Martians had removed was a mere nothing in comparison with the entire bulk of the asteroid. Had the celestial mine been easier to reach, perhaps they would have removed more, or, possibly, their political economists perfectly understood the necessity of properly controlling the amount of precious metal in circulation. Very likely, we thought, the mining operations were under government control in Mars and it might be that the majority of the people there knew nothing of this store of wealth floating in the firmament.[1]

Ever since this publication, one of the ongoing themes found in both science fiction and science fact is a human desire to access that "store of wealth floating in the firmament." Interestingly, this early work recognizes not just the technical difficulties with extracting resources from space but also the governance obstacles of such activities.

Today, these same difficulties and obstacles remain despite the tremendous advances in both technology and governance. Setting aside the

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[1] GARRETT P. SERVISS, EDISON'S CONQUEST OF MARS (1898).

technical issues, the current challenge for both law and policy flows primarily from Article II of the Outer Space Treaty, which prohibits states from "appropriating" space, the Moon, and other celestial bodies. The problem is that Article II is notoriously ambiguous in its wording and its implications for property rights, both in terms of real property and in terms of chattel property over extracted space resources. While this ambiguity has been a boon to scholars looking for tenuous situations to write articles on, it is now being cast as an obstacle for an emerging group of private enterprises that aim to extract and to use for commercial purposes the vast resources that are floating in the firmament. This article will delve into this ambiguity in order to elucidate the content of the Article II norm in light of its history and of state practice.

This article will first contextualize Article II to better understand its origins. This section will argue that the original intent behind the adoption of Article II was to settle questions of international geography, namely the nature of state territory in space, which accounts for its silence in terms of property. This discussion will lay the foundation for the ensuing analysis of property in the outer space environment. The second section of this article will examine a variety of precedents that help reveal the nature of Article II as understood by the state parties to the Outer Space Treaty in relation to space resources. This analysis will examine state practice with regard to territorial claims, real property claims, and chattel property claims, which all touch on the legal content of Article II. Finally, this article will address the future of the non-appropriation principle and argue that it can accommodate both the maintenance of stability and security in space as well as proposed commercial use and exploitation of space resources. This section will conclude by arguing that states should avoid a race to bottom in terms of developing legal regimes surrounding property rights and resource extraction in space by balancing the benefit of the commercial activity with the values and principles that underpin international space law.

Before starting in this endeavor, it is important to note what this article will not do. First, this article will focus squarely on the law and policy found within the bounds of the Outer Space Treaty and customary international law. It will not delve into the Moon Agreement in depth, though reference will be made as needed. This is because the Moon Agreement, while positing a workable system for the use and exploitation of extraterrestrial resources, has not been widely accepted and serves a minor role in the contemporary regime. Second, this article will not attempt to offer a solution to the Article II problem. While it will suggest that there are core values that need to be implemented in any regime or institution that regulates resource extraction, whether domestic or international, it will stop short of detailing specific recommendations for those regimes.

I. A Funny Thing Happened on the Way to the Moon

The non-appropriation principle first found its way into the vocabulary of international space law in the 1961 United Nations General Assembly (UNGA) resolution on outer space. Resolution 1721 (XVI) "commends" states to use space according to two principles:

> (a) International law, including the Charter of the United Nations, applies to outer space and celestial bodies;
>
> (b) Outer space and celestial bodies are free for exploration and use by all States in conformity with international law and are not subject to national appropriation.[2]

This is the first time that a UNGA resolution refers to "principles" guiding space activities.[3] As a result, these two principles maintain a place of primacy in space law and touch on the legality of all space activities engaged in or attributable to states. To add weight to this proposition, this resolution was decided without a vote, meaning that if not unanimous there was, at least, little controversy in the content of these provisions.[4] Of course, it is prudent to note that a UNGA resolution is not binding on states, but unanimous adoption of "principles" is at the very least strong indication of international political will.[5]

What we see then, at the earliest inception of rules regulating space, is an emerging consensus as to the application of international law as a governing system, and the exclusion of space and celestial bodies from "appropriation," whatever that may mean.[6] Over fifty years later, these principles remain at the core of the international space law regime as Articles I, II, and III of the Outer Space Treaty. But, to be quippy, a funny thing happened on the way to the Moon. While the application of international law to outer space has remained non-controversial, the content of Article II has increasingly been the target of criticism by

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[2] G.A. Res. 1721, U.N. GAOR, 16th Sess., Supp. No. 17, vol. XVI, at 6, U.N. Doc. A/RES/1721 (XVI) (1961).

[3] *See, e.g.*, G.A. Res. 1348, U.N. GAOR, 13th Sess., Supp. No. 18, vol. I, at 5–6, U.N. Doc. A/RES/1348 (XIII) (1958); G.A. Res. 1472, U.N. GAOR, 14th Sess., Supp. No. 16, at 5, U.N. Doc. A/RES/1472 (XIV) (1959) (illustrating that while earlier resolutions do not mention items such as "benefit of all mankind" and "peaceful purposes," which later becomes principles guiding outer space activity, they fall short of referring to them as such").

[4] *Resolutions Adopted by the General Assembly at its 16th Session*, UNITED NATIONS, https://perma.cc/4927-DS7T (last updated June 4, 2019).

[5] *See* BIN CHENG, STUDIES IN INT'L SPACE LAW 136–37 (1997) (arguing that under certain circumstances UNGA resolutions can create "instant" customary law, but he argues against these early resolutions taking on such status).

[6] G.A. Res. 1962, U.N. GAOR, 18th Sess., Supp. No. 15, vol. XVIII, at 15, U.N. Doc A/RES/1962 (vol. XVIII) (1963) (confirming a set of "legal principles" that govern outer space).

scholars, politicians, and commercial actors alike. This criticism posits that non-appropriation, instead of being a critical principle in international space law, is a central downfall in the entire regime.

This section seeks to trace this history, and contextualize non-appropriation within the competing narratives on its purpose to better understand how the consensus seen in the early UNGA resolutions has eroded. It will argue that non-appropriation was a mechanism through which the outer space environment could be brought into the logics of international geography, and that this has left severe ambiguity as to the nature of property rights in space and over space resources.

A. *International Geography*

Before jumping into the specifics of the non-appropriation principle, it is important to characterize it within the larger legal system. While international space law is a *lex specialis*, it exists within the confines and logics of international law. Resolution 1721 (XVI) acknowledged that states, as the traditional subjects of international law, agreed that international law would be the governing system in outer space. At the time, this was critically important. International law, and importantly its core goals, were significantly remade after World War II through the adoption of the UN Charter, which deployed a specific geography that will be referred to as the "international geography" herein.

The post-1945 settlement of international law represents the most recent in a number of reorganizations of "world-scale" governance.[7] Stemming from the European tradition, the history of international law is marked by the accommodation of new areas or spaces that do not fit within the scope of the reigning contemporary spatial order. Indeed, the roots of international law attempt to explain how the high seas and the newly discovered (by the Europeans, at least) New World fit within the settled spatial order at the time.[8] Similarly, the Peace of Westphalia redeployed geography within Europe to establish the concept of territorial sovereignty through the establishment of the state as an entity.[9] Throughout each of these iterations of geography, the developing international legal system sought to categorize all physical areas and impose on each a specific legal geography.

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[7] *See* SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES 14 (2006).

[8] *See* CARL SCHMITT, THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM 42–44, 86, 140 (2003); MANFRED LACHS, THE LAW OF OUTER SPACE: AN EXPERIENCE IN CONTEMPORARY LAW-MAKING 19–20 (2010); IAN CLARK, LEGITIMACY IN INTERNATIONAL SOCIETY 35–38 (2005).

[9] SCHMITT, *supra* note 8, at 143–45.

The result of World War II, in legal terms, was no different. The UN Charter imposes a specific legal geography at the world-scale, which shapes the contours of global order. This order again attempts to encompass all spatial areas on Earth and apply specific legal categorization to each area. At the highest level, the system differentiates between spaces that are state territories or spaces that are non-territorial, such as global commons.[10] Territory is the space within a state's borders, and is therefore subject to the local rules of that state. The UN system allows states to become members of the UN, which grants them the right to have their "territorial integrity" respected by other members.[11] The UN system does allow for non-self-governing areas, which are those overseen by another state or the UN. These spaces are excluded from UN membership, but the governing authority is given the duty to "their progressive development towards self-government or independence," indicating the goal that these spaces become territory.[12] This second category is notable because the UN Charter began the process of delegitimizing colonization and conquest by force as the age of empires wound to a close. The international geography deployed by the UN Charter is one in which land area is (or as soon as is feasible in the future will be) part of the territorial sovereignty of a state. It attempts to create a seamless geography of hard borders that are legally impervious from interference from external entities.[13] Territory in this system becomes synonymous with legal personhood, and the right to exclude others from it are connected less with notions of ownership and more with notions of political autonomy of each state as a sovereign equal.

The 1945 system adopted the traditional rules governing the high seas since they were traditionally outside of state territory, as indicated by the historical three-mile rule, which represented the physical limitations of state control in terms of the distance a cannonball could fire.[14] Early on the system was presented with the problem of the status of Antarctica. Under the traditional rules, states had made imperialist claims to the Antarctic continent. Antarctica, though, was not so much the introduction of new physical space as much as it was a problem of sorting out competing claims that emerged within the previous legal system. Antarctic law functions based on the permanent suspension of territorial claims to the landmass by

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[10] *See* P.J. Blount & Christian J. Robison, *One Small Step: The Impact of the U.S. Commercial Space Launch Competitiveness Act of 2015 on the Exploitation of Resources in Outer Space*, 18 N.C. J. L. & TECH. 160, 170–72 (2016) (discussing global commons as a typology of spatial order).

[11] U.N. CHARTER, art. 2, para 4.

[12] U.N. CHARTER, art. 76(b).

[13] *See* SCHMITT, *supra* note 8, at 185, 187 (referring to the "bracketing" of war).

[14] SCHMITT, *supra* note 8, at 183.

the states that maintained them at the dawn of the modern system.[15]

Therefore, outer space became the first challenge to the new system of international law in terms of the introduction of new spatial possibilities, and it cannot be overstated that new spatial possibilities had the potential to shake the new system to its core. A critical goal of a seamless international geography was the elimination of war. The architects of the system would have been acutely aware that historically a major cause of war was the military conquest of new territories, which was the hallmark of the preceding imperial system of world-scale governance. While the orbiting of *Sputnik I* ushered a myriad of issues into world politics, central to these was how to keep conflict resulting from territorial conquest of space. Such conquest was de-legitimized as a matter of international law in the post-1945 settlement, which rejected imperialism as a mechanism of world-scale governance. However, this depended on the seamless international geography imposed by the UN Charter, which did not contemplate space activities. Extending international law into space was the first step in making space part of the international geography and rejecting notions of imperial conquest. The non-apporpriation principle, in effect, categorizes space and celestial bodies as "not territory" so as to revoke the incentives that drive such conquest.

Article II must be read in terms of its fit within the international legal system as a rejection of imperial processes within outer space or on celestial bodies. Its core goal, similar to international law in general, is not to characterize territory or things as "ownable," but instead to promote international peace and security by delineating between the spatial area in which a state has sovereignty and spatial areas in which the state does not. Rather than "ownability," the non-appropriation principle is about "rulability," that is whether or not a state can govern a territory.

B. *The Outer Space Treaty and the Geography of Space*

It is within this context that we must approach the non-appropriation principle as codified in Article II of the Outer Space Treaty. This subsection will attempt to show how Article II functions within the text of the treaty as a whole, and indicate the ambiguities inherent in the construction of Article II.

Article II states simply that "outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."[16]

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[15] Antarctic Treaty, Dec. 1, 1959, T.I.A.S. No. 4780, 402 U.N.T.S 71, 12 E.S.T. 794, (entered into force June 23, 1961).

[16] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. II, Sept. 25, 1967, 610

Before delving into the text of the provision itself, it should be noted that the non-appropriation principle was well established by the time that the Outer Space Treaty was negotiated through consecutive consensus adopted UNGA resolutions.[17] Further, the Outer Space Treaty was a product of the consensus process of the UN Committee on the Peaceful Uses of Outer Space (UNCOPUOS).[18] At the international level there was consensus on the principle. Indeed, as Gangale shows us, the principle was not the subject of intense debate either during the negotiation process nor the ratification process.[19]

The states that were adopting the treaty did not understand Article II to be in conflict with either international law or domestic law. It is submitted that this is because states primarily understood Article II as an articulation of international geography rather than an articulation of a limitation on the right to use outer space and celestial bodies, a right that takes a primary position in Article I of the Outer Space Treaty. As a result, the *travaeux preparatoires* does little to elucidate the content of Article II as it relates to ideas of property.[20] While Article II itself is ambiguous, it is important to remember that it must be read within the overall purpose and scope of the treaty as other treaty provisions can add significantly to our understanding of Article II.[21]

The first thing to note is that Article II effectuates a ban on "national appropriation," but this term is not defined. Even more problematic, the legal term is unique to the space context and is not found in other international agreements governing non-territorial areas. Indeed, international law is most often concerned with the "acquisition" of territory.[22] Non-appropriation does, however, ring true to the anti-imperial aspirations of the Outer Space Treaty, which tracks with the ideological common ground between the two Cold War superpowers of the US and

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U.N.T.S. 205 (entered into force Oct. 10 1967) [hereinafter Outer Space Treaty].

[17] Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, Dec. 13, 1963, U.N.G.A. Res. 18/62 (stating that the 1963 Declaration of Legal Principles is widely accepted as a statement of customary international law); G.A. Res. 1962, U.N. GAOR, 18th Sess., Supp. No. 15, vol. XVIII, at 15, U.N. Doc A/RES/1962 (vol. XVIII) (1963) (confirming a set of "legal principles" that govern outer space).

[18] Sergio Marchisio, *The Evolutionary Stages of the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS)*, 31 J. SPACE L. 219, 224 (2005).

[19] Thomas Gangale, *The Legality of Mining Celestial Bodies*, 40 J. SPACE L. 187, 193 (2015–2016).

[20] *Id.* at 196–205.

[21] Vienna Convention on the Law of Treaties art. 31, Dec. 28, 1979, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

[22] MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW, 161 (7th ed. 2013); R.Y. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 1–2 (1963).

the USSR. It also tracks with the newly deployed international geography, which for the first time in global history attempted to contain all terrestrial spaces within the bounds of national borders that marked states as holders of legal personhood within the system. This legal autonomy was protected by a legal prohibition against the use of force, which was intended to harden those borders against conquest.

The discrepancy between the idea of appropriation and the idea of acquisition is not a large one. "To appropriate" means to "take exclusive possession of," and "to acquire" means to "get as one's own."[23] Both of these imply the idea of ownership, but "to appropriate" is a more active form in that it requires an affirmative act, whereas "to acquire" includes possibilities of coming into possession without affirmative action. In other words, if one finds a painting on the sidewalk and keeps it, that individual has both acquired and appropriated the painting. Whereas if the painting is left as an inheritance in a will, it has been acquired but not appropriated. The distinction may seem subtle, but it is an important one in light of the text following the ban on national appropriation, which enumerates ways in which appropriation might happen. This text names three ways in which appropriation is disallowed.

First, Article II disallows national appropriation by "a claim of sovereignty." Under international law, an "apparent display of sovereignty" is "at the heart of acquisition of sovereignty."[24] Historically, this concept is linked directly to the idea of planting a flag on new territory as a way of claiming it for the state, as well as the removal of the previous sovereign's flag upon defeating that sovereign. Flag planting was an overt imperial act through which a state added new territories, and the flag itself represented not only the sovereign, but also the military force that the sovereign might employ to defend the claim. Article II then can be read as outlawing the practice of "claiming sovereignty" in an imperial manner over newly discovered areas in the outer space environment.

Second, Article II makes clear that national appropriation cannot occur as the result of use or occupation by a state. Indeed, the international law system does not recognize simple claims of sovereignty, for these to convert into territorial acquisition there must be a showing of "effective occupation," even in the case of newly discovered uninhabited territory.[25] This second Article II prohibition separates the idea of occupation from territorial acquisition in space. It is important to note that the ban on "national appropriation" by "occupation or use" is not equivalent to a ban

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[23] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 18, 106 (Phillip Babcock Gove ed., 3d ed. 2002).

[24] DIXON, *supra* note 22, at 162.

[25] DIXON, *supra* note 22, at 167.

on occupation or use of outer space and celestial bodies. Indeed, such an interpretation would destroy the internal logic of the Outer Space Treaty. Article I of the Outer Space Treaty specifically gives states the right to "use" outer space and celestial bodies. Further, Article XII acknowledges that states may have "stations" and "installations" on the Moon and other celestial bodies, meaning that some form of occupation is indeed allowable under the Outer Space Treaty. If Article II is understood as a ban on occupation and use, then the entire treaty descends into incoherency. Article II, in this respect, must be understood as banning something very specific, which is the acquisition of territory over which the sovereign has full authority that results from occupation or use.

The final prohibition in Article II is the most open ended as it bans "national appropriation . . . by any other means."[26] This open endedness, of course, makes it quite difficult to apply.[27] It is unclear what might constitute another means of appropriation.[28] Some indication can be found in the two previous prohibitions, which track with historical methods under international law for the acquisition of national territory.[29] Therefore, it is safe to say that other methods, maybe less likely ones, are also illegal such as conquest by force or the use of a bilateral treaty.[30] The problem is that this clause's indefiniteness leaves open an array of activities that may or may not constitute an appropriation under Article II.[31] For instance, if a state were to recognize a real property interest in a tract on a celestial body, would that amount to an Article II appropriation?[32] This question will be returned to below.

The text does contain an important clue to sorting out Article II in such a way that it makes sense in relation to the rest of the treaty, which, as already noted, allows for use and occupation.[33] Astute readers have likely already been pondering the meaning of the adjective "national" in front of appropriation.[34] Article II does not ban all appropriations, it bans appropriations of a national character, that is appropriations that link

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[26] United Nations Treaties and Principles on Outer Space art. II, 2008 U.N.T.S. 11.

[27] *See* Stephen Gorove, *Interpreting Article II of the Outer Space Treaty*, 37 FORDHAM L. REV. 349, 349 (1969).

[28] *See* Gorove, *supra* note 27 at 349.

[29] *See* Gorove, *supra* note 27 at 350.

[30] DIXON, *supra* note 22 at 167–69 (noting that the Article IV ban on weapons of any sort on celestial bodies confirms the idea that military conquest is banned).

[31] NEED THROUGH ILL

[32] *See* Robert Kelly, Note, *Nemitz v. United States, a Case of First Impression: Appropriation, Private Property Rights and Space Law before the Federal Courts of the United States*, 30 J. Space L. 297, 305–09 (2004).

[33] Outer Space Treaty, *supra* note 16.

[34] Outer Space Treaty, *supra* note 16.

physical areas of outer space to the legal personhood of the state.[35] The post 1945 international geography associated legal autonomy with territory.[36] The idea of the United Nations is built on sovereign equality of independent territories, and the UN Charter is directed at establishing "friendly relations among nations."[37] The post-1945 international geography is one concerned with solidifying nations by linking them with distinct territory, and the introduction of the vastness of space served to destabilize the new balance struck among nations.[38] As a result, the non-appropriation principle is directly connected to the idea of national or state action through which a state may appropriate part of the vastness of space into its own legal personality as a state.[39] This is confirmed by Article VI of the Outer Space Treaty, which holds states responsible for the "national activities" of non-governmental actors.[40] Again, in context the "national" indicates a nexus with the state and therefore a nexus with national territory.[41] It should be noted that even in the various UNGA resolutions "appropriation" is preceded by "national" further indicating that the core concern of the principle is with actions that create a nexus between an area in outer space and the territorial identity of a state.[42]

This section has argued that as a matter of international law, Article II is concerned with the acquisition of territory by a state and the extension of sovereignty over that territory. This interpretation places Article II in a state of coherence with the rest of the treaty, but it does not solve the deeper problem of the status of property rights by private entities in the space environment. This is because, while Article II is, in this author's opinion, purposely silent on the issue of property, it is not entirely disconnected from the concept of property. Quite the contrary, in the international geography deployed by the UN Charter the idea of property is directly connected to a state's territory and its sovereign authority over that territory. This issue will be taken up in the next subsection.

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[35] Outer Space Treaty, *supra* note 16.

[36] THE POLITICS OF GLOBALITY SINCE 1945 2–4 (Rens van Munster & Casper Sylvest, eds., 2016).

[37] U.N. CHARTER, art. 1, para. 2.

[38] THE POLITICS OF GLOBALITY SINCE 1945 3 (Rens van Munster & Casper Sylvest, eds., 2016).

[39] Fabio Tronchetti, *The Non-Appropriation Principle Under Attack: Using Article II of the Outer Space Treaty in its Defence*, (50th International Colloquium on the Law of Outer Space) 1 (2017).

[40] Outer Space Treaty, *supra* note 16.

[41] Outer Space Treaty, *supra* note 16.

[42] G.A. Res. 72/77, U.N. GAOR, International Cooperation in the Peaceful Uses of Outer Space, U.N. Doc. A/Res/72/77 (2017).

C. *Property*

It is this author's anecdotal experience that, in general, when the idea of space law is first suggested to someone unfamiliar with the concept that person's most likely response is: "you mean like who owns the Moon?" Methodological considerations of this survey aside, this response is revealing. The law in this case is quickly associated with the question of the division of spatial territory into legal categorizations. Other topics, such as liability for torts or contracts involved in space activities are secondary in the general legal imagination. We, as a society, want to know who owns a place because it is fundamental to our conception of law.[43] Ownership is an effect of the legal situation of the territory in which you are standing, so while the idea of territory is separate from property, the nature of property is an effect of territorial division.[44] This is because as a matter of contemporary international law, property is a local issue and its nature changes as an individual moves from one autonomous territory to another.[45]

Article II is silent on property. It neither confirms that property rights may exist, nor does it affirmatively deny such rights.[46] This leaves a deep rift between the concepts of territory and property, which is one of the reasons that Article II is so hotly debated.[47] This rift exposes the tension between the post-1945 territorial settlement and the roots of international law, because it forces the question of whether property rights can exist without sanction by a state.[48] Thus, to truly grasp the meaning of Article II, it is important to understand that international law itself is a product of the development of a Western liberal world order. International law emerges from the European continent in the form of rules that European powers used to stabilize the region and differentiate it from other regions that could be subjected to European power.[49] Indeed, until 1945, the idea of

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[43] SCHMITT, *supra* note 8, at 42. (This is why Schmitt argues that "[l]aw is bound to the earth and related to the earth.").

[44] *See* Anna Stilz, *Nations, States, and Territory*, 121 ETHICS 572, 572 (2011) (To be clear, this is not a natural or necessary structure. For instance, if the political will was extant, then states could adopt within international law universal articulations of property rights. The fact that states did not do this pushes the notion of property to the territorial sovereign to decide.)

[45] *See* John G. Sprankling, *The Emergence of International Property Law*, 90 N.C. L. REV. 461, 463 (2012).

[46] *See* Outer Space Treaty, *supra* note 16.

[47] *See* Timothy Justin Trapp, *Taking Up Space by Any Other Means: Coming to Terms With the Nonappropriation Article of the Outer Space Treaty*, 4 U. ILL. L. REV. 1681, 1691 (2013).

[48] *See generally* JOHN LOCKE: TWO TREATISES OF GOVERNMENT, SECOND TREATISE 368 Sec. 123 (Peter Laslett ed. 1970) (2d ed. 1698).

[49] SCHMITT, *supra* note 8, at 140; CLARK, *supra* note 8, at 35; *see* Manti Koskenniemi,

"civilized" reigned supreme in determining which territories had rights under international law and which might be subject to imperial power.[50] Not surprisingly, in the early days Europe was "civilized" and the rest of the world was not.[51] As subsequent iterations of international legal order were articulated and more places became "civilized" in a European sense, the global spatial order was reworked, but within a framework built on pre-existing Western values.[52]

Of great importance to the topic at hand, a Western liberal system meant that natural law theory and specifically a Lockean conception of property was integrated into the international legal system. John Locke's theory of property was that in a state of nature, humans could expend labor to improve a spatial area and that they thereby gained a natural right of ownership over that area effectively converting it into property.[53] Lockean philosophy is often used to justify property rights in outer space, and invoked as a natural right that supersedes international law and Article II specifically.[54] This argument assumes that if an individual were to go into space and exert labor to develop a celestial body, then that portion over which labor was exerted should become the property of that individual as a natural right that exists outside the scope of the state. Such a right has been acknowledged in international law, and there are numerous nineteenth and early twentieth century cases that acknowledge such rights in situations when an individual has labored to improve land in a territory that is *res nullius* and which is subsequently subject to a claim of sovereignty.[55] This conception casts property as a natural right that precedes the establishment of sovereignty over territory.

The Lockean argument has three important limitations in its application to outer space. The first limitation is theoretical. Locke's natural right only exists in a state of nature, and it acknowledges that government becomes a necessary condition for maintaining that right. In Locke's state of nature, the natural right is a moral one, but is still subject to superior force of others. As a result, Locke's state of nature demands the

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International Law in Europe: Between Tradition and Renewal, 16 EUR. J. INT'L L. 113, 117 (2005).

[50] *See* Emmanuelle Tourme-Jouannet, *The International Law of Recognition*, 24 EUR. J. INT'L. L. 667, 668–69 (2013).

[51] *See* Jessie Szalay, *What Was The Enlightenment?*, LIVESCIENCE (July 7, 2016), https://perma.cc/B8H9-KGJ8.

[52] CLARK, *supra* note 8, at 156.

[53] L. Benjamin Ederington, *Property as a Natural Institution: The Separation of Property from Sovereignty in International Law*, 13 AM. U. INT'L L. REV. 263, 266–70 (1997).

[54] *See* Gangale, *supra* note 19, at 189 (noting that "'national appropriation' does not in any way derogate the natural law principle of creating property through the mixing of labor and soil").

[55] *See generally* Ederington, *supra* note 53.

establishment of positive property rights protected within society through governmental functions to ensure that force does not become the true measure of property rights. Locke's theory to some extent embraces the idea that, though property may naturally occur, the state becomes a necessary entity for its preservation.

The second limitation is the extent to which we can say Lockean theory is part of the post-1945 international legal system, which is avowedly positivistic. One of the issues that the negotiators of the UN system had to account for, to ensure a seamless international geography, was the need to have all global powers be a party to the new system despite their ideological differences. The problem of non-participation was all too evident in the failure of the League of Nations. The negotiators needed to accommodate not just Western liberal political systems, but Marxist systems as well. Marxist systems, obviously, maintain a fundamentally different conception of property that rejects Lockean ideals. This is why, under international law, property is treated as a local issue. Like other human rights, states were left substantially free to order property within their borders in any way that was deemed fit by the governing authority. Property became a function of a state's domestic law, and to this day all states maintain different sets of rights applicable to property ownership within their borders based on the physical characteristics of the territory and the political ideology of the government. This positivistic turn in international law uproots Locke as a foundational theory in order to achieve a seamless global geography through the inclusion of non-Lockean systems.

The final limitation to the Lockean argument is that Articles II and III of the Outer Space Treaty serve to eliminate the state of nature. Locke's state of nature is best understood as a thought experiment to imagine how law emerges when there is no law. Locke's notion was linked to spaces that sat outside of legal jurisdiction.[56] While the space environment is for the most part untouched by humans and still exists in its "natural state," space is not a state of nature in Lockean terms because a governance system has been imposed on it. Article III of the Outer Space Treaty effectively extends international law into the space domain, meaning that a legal regime exists there. Further, Article I and II serve to acknowledge that states do not view outer space as *res nullius*, that is as belonging to no one and therefore subject to conversion into property through labor. Instead, the Outer Space Treaty, in addition to the non-appropriation principle, states that space is the "province of all mankind," which most commentators have deemed to create a *res communis* or in more modern

[56] *See* SCHMITT, *supra* note 8, at 97.

terms a global commons.[57] While the use of ancient Roman legal terms has rightfully been critiqued,[58] it is very clear that the legal status of space is different in kind than the theoretical state of nature as described by Locke.

The problem that results is that states are free to explore and use space, as are their authorized private actors, but states are unable to appropriate space "by any other means." This results in significant limitations on a state's ability to protect property rights that could result from such use. If a state were to sanction a private claim for real property in space, it could amount to an assertion of sovereignty over the territory containing the claimed property. Thus, claims of real property that assert exclusive control over a spatial territory in space are likely prohibited by Article II, due to the fact that state parties are disallowed from enforcing such rights. This should not be surprising as similar claims to the high seas, deep seabed, or Antarctica would have similar difficulties due to a state's inability to enforce those rights. This however, is not the end of the story, because states can and do recognize property rights in movable property that is attained outside its borders and specifically from global commons.

While each of the above mentioned global commons excludes the possibility of claims for real property, each has a unique regime for the exploitation of the resources found within. The Antarctic regime bans all commercial use, whereas the deep seabed regime establishes an international organization for the management of rights over extracted resources. The high seas regime allows private actors to extract resources at will, as long as they are in compliance of the laws of their local flag state (which often incorporate international obligations), and gain direct property rights over those resources, namely fish. This illustrates that under international law, the legal recognition of rights in extracted resources is a possibility in a global commons as part of the international geography. The question is whether Article II allows such recognition. The answer to this is murky at best due to the ambiguous language of the Outer Space Treaty. However, we can look to state practice to see how states are interpreting their obligations under Article II.

II. Space Property in State Practice

State practice on the nature of property rights in space is scant. Few states have the technological capability simply to make it to celestial bodies much less to maintain activities or return resources. The record is not

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[57] *See* LACHS, *supra* note 8, at 43–46. *But see* Henry Hertzfeld, Brian Weeden & Christopher D. Johnson, *How Simple Terms Mislead Us: The Pitfalls of Thinking About Outer Space as a Commons* (58th IISL Colloquium on the Law of Outer Space) 533, 534 (2015).

[58] PHILIP DE MAN, EXCLUSIVE USE IN AN INCLUSIVE ENVIRONMENT: THE MEANING OF THE NON-APPROPRIATION PRINCIPLE FOR SPACE RESOURCE EXPLOITATION 18–33 (2016).

devoid of state practice, though. There are hints at how states interpret their obligations under Article II that help to clear up some of its ambiguous language. This practice falls into the following categories: direct state action in space relating to territory and resources, private claims to real property in space, and private ownership of extracted celestial material.

A. *States in Space*

Three states have effectively gone to celestial bodies and returned with celestial material from space to Earth: the United States, the Soviet Union, and Japan. Each of these states' actions constitute state practice under Article II. This section will address two aspects of these missions: first, the way that states behaved in relation to possible territorial claims made by their landings; and second, the way in which states have behaved in relation to the extracted portions of those celestial bodies.

1. Territorial Claims

To be clear, no state has ever claimed any part of a celestial body as its sovereign territory. The lack of these types of claims is an important indicator of the content of Article II, but analysis should not stop there as there is definite nuance to the way in which states, and specifically the United States, have treated their interactions with celestial bodies.

In 1959, the Soviet Union became the first state to launch a spacecraft that reached the surface of the moon, *Luna-2*. This craft engaged in scientific experiments, but a notable aspect of it was that it contained a spherical device with pendants or medallions that were intended to scatter on the surface of the Moon upon impact, presuming they survived the impact. These medallions contained the state symbol of the USSR, and the words "USSR September 1959" (in Russian of course).[59] The placement of a state symbol on the Lunar surface bears significant resemblance to imperial practice of planting a flag, a symbol of state sovereignty, on newly discovered territory as an assertion of a state's rights to that territory. However, there is no indication that the Soviet Union ever asserted such rights to the territory touched by these medallions. At the time, *Luna-2* was painted as a victory for the Soviet space program, which was quickly racking up "firsts" in space much to the United States' dismay. Days after the *Luna-2* impact, Soviet premier Nikita Khrushchev landed in the United States for a state visit. Though tensions were high between the Cold War leaders, Khrushchev presented President Eisenhower with a replica of the

[59] Richard Cavendish, *The Soviet Union is First to the Moon*, HISTORY TODAY (Sept. 9, 2009), https://perma.cc/3VPY-WRKB; Becky Ferreira, *The Other First Moon Landing*, MOTHERBOARD (Sept. 14, 2009), https://perma.cc/XXY9-6W6H?type=image.

Luna-2 sphere, as both a sign of international friendship and a Cold War jab.[60] It should also be noted that the Soviet Union, upon signing the Outer Space Treaty made no mention of any claim effectuated by the *Luna-2* landing, and its acceptance of the treaty can be seen as disclaiming any residual claims that it may have retained.

The United States became the first nation to land a human on the Moon in 1969 with its *Apollo 11* mission. *Apollo 11* astronauts, and those of the subsequent *Apollo* missions, planted a United States flag on the surface of the Moon. Similar to *Luna-2*, this act has all the trappings of traditional imperial claims to newly discovered territory. In fact, the *Apollo* missions amplify this through the use of an actual flag, which carries specific significance when associated with a sovereign power, and also through the accompanying human presence, which could be argued to give more substance to a possible claim than a spacecraft alone. Unlike *Luna-2*, the Moon landing occurred in the wake of the Outer Space Treaty, and the United States at the time was keen to ensure that it complied with the treaty in order to maintain international peace and security. As a result, each of the *Apollo* landers, which remained on the lunar surface along with the flags they carried, had a plaque attached to them that served to disclaim any notion of conquest by the United States. The *Apollo 11* placard specifically did this stating: "Here men from the planet Earth first set foot upon the Moon, July 1969 AD. We came in peace for all mankind."[61]

There are two important aspects to this placard. First, it characterizes the astronauts simply as "men" rather than as representatives of a specific sovereign.[62] Second, it echoes the notion found throughout international space law that space should be used for peace and for the benefit of all humankind. What this placard serves to do is represent the actions of the *Apollo* astronauts as being on the behalf of the entire global population. While the United States certainly wanted its mark on that landing, thus the flag, the words that it used to describe the landing did not assert any claim of sovereignty. This is of course echoed by Neil Armstrong's words, broadcast internationally, that this was "one small step for man, one giant leap for mankind."

What can be gathered from the actions of these two states is that claims of an imperial nature, that is those made through discovery of new

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[60] Ferreira, *supra* note 59.

[61] *Apollo 11 Plaque Left on the Moon*, NASA, https://perma.cc/U7FM-RWZE (last visited Sept. 7, 2019).

[62] *See* Outer Space Treaty, *supra* note 16, art. V (tracking with the Outer Space Treaty, which declares Astronauts to be "envoys of mankind" rather than envoys of their respective states).

territory in space, do not fall within the confines of that which is allowed by Article II. This of course tracks with the anti-imperial language that these two superpowers were able to agree on when negotiating the Outer Space Treaty.

There is one small coda that should be included here. In 1976, eight equatorial countries issued the Bogata Declaration as a protest to what they felt was an inequitable division of the Geosynchronous Orbit (GEO).[63] The declaration stated that each of the countries claimed sovereignty over the portion of the GEO orbit that was directly above their territory. This claim was built on the idea that GEO is a natural resource, and that its unique physical characteristics linked it directly to the territory below. Colombia went so far as to include this claim in its Constitution.[64] In general, the international community has never recognized these claims. Additionally, all of these states are participants in the International Telecommunication Union (ITU), which coordinates GEO usage, five are state parties to the Outer Space Treaty, and two more have signed but not ratified the Outer Space Treaty.[65] Also of note is that the ITU was reorganized in the early 1990s in part to better address the claims of developing nations to access to telecommunications including GEO.[66] As a result, the Bogota Declaration is likely now little more than a historical footnote, and its rejection by the international community indicates a rejection of territorial claims in space.

2. Sample Return

There are three examples of states engaging in sample return missions. A sample return mission is a mission that endeavors to collect matter from space and return it to the surface of the Earth.

The first of these missions was *Apollo 11*, and each subsequent *Apollo* mission returned to the surface of the Earth with lunar material.[67] Interestingly, the *Apollo 11* astronauts filled out a customs form acknowledging the importation of the material.[68] The lunar samples that

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[63] *See* Declaration of the First Meeting of Equatorial Countries, JAXA, https://perma.cc/C9SB-FYFZ (last visited Oct. 27, 2017).

[64] COLOM. CONST. art. 101.

[65] *Status of International Agreements Relating to Activities in Outer Space as at 1 January 2017*, U.N. Doc. A/AC.105/C.2/2017/CRP.7 (Mar. 28, 2017).

[66] *See* George A. Codding Jr., *The International Telecommunications Union: 130 Years of Telecommunications Regulation*, 23 DENV. J. INT'L L. & POL'Y 501, 508 (1994).

[67] Sarah Coffey, *Establishing a Legal Framework for Property Rights to Natural Resources in Outer Space*, 41 CASE W. RES. J. INT'L L. 119, 126 (2009) (pointing out that "over six missions *Apollo* returned 842 lbs. of material").

[68] *Apollo 11 General Declaration*, U.S. CUSTOMS AND BORDER PATROL (July 24, 1969), https://perma.cc/K589-ZDKE.

were returned, are administered by NASA. In addition to research done by the United States with these samples, the United States distributed these samples to other states for the purposes of scientific research and also as diplomatic gifts. Both of these uses of the lunar samples can be argued to support the goal of using space for the benefit of humankind, and they have been unprotested.

Shortly, after *Apollo 11*, the Soviet Union also successfully returned lunar samples using the robotic *Luna-20* mission, the U.S.S.R.'s first of three sample return missions. Similar to U.S. practice, these samples were studied by the Soviet Union and distributed to other states for scientific study.[69] Significantly, the United States and the U.S.S.R. exchanged lunar samples as a way to mark an expansion of cooperation between the two states.[70] The U.S. representative in this exchange stated that, "[a]lthough the quantity of material is small . . . its significance is very great."[71] Unlike the *Apollo* samples, Soviet lunar samples have been offered for sale on the private market. In 1993, 0.2 grams of the *Luna-16* lunar sample was sold by the Soviet government through the auction house Sotheby's.[72]

Finally, in 2003 Japan launched its *Haybusa* mission. This mission flew to a near-Earth asteroid, collected samples, and returned to the surface of the Earth in 2010.[73] There were many issues with this mission and the sample return was not as robust as expected, but Japan confirmed that particulate matter from the asteroid was returned by the craft. The Japanese Space Agency (JAXA) administers these samples for scientific research, and requires that any samples delivered for this purpose be returned to JAXA.[74] JAXA makes clear through its frequently asked questions, the ownership of these samples is not transferred by virtue of a project being selected to do research:

> Q6. Will I own distributed samples?

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[69] *See Apollo Sample Catalogues*, LUNAR AND PLANETARY INST. (Dec. 3, 1978), https://perma.cc/9EQ5-4K8C.

[70] *U.S. and Soviet Exchange Lunar Soil to Mark Pact*, N.Y. TIMES (June 11, 1971), https://perma.cc/JQY4-GSG8.

[71] *Id.*

[72] Mike Bosworth, *What Has Happened to NASA's Missing Rocks?*, BBC (Feb. 20, 2012), https://perma.cc/9JBF-2SPZ; *see, e.g.*, Douglas Martin, *Space Artifacts of Soviets Soar at a $7 Million Auction*, N.Y. TIMES (Dec. 12, 1993), https://perma.cc/M733-LAR8 (commenting that interestingly, this same auction saw the Soviet government sell title to a lunar rover that was still on the surface of the Moon.).

[73] *Hayabusa Asteroid Itokawa Samples*, NASA, https://perma.cc/4B4L-AZTV (last visited Oct. 27, 2017).

[74] *Terms and Conditions for the International Announcement of Opportunity for Hayabusa Sample Investigation*, JAXA https://perma.cc/J2H6-T9MV (last visited Sept. 7, 2019).

> A6. Definitely NO. Samples belong to JAXA. Allocated sample must be returned to the Curator as soon as the proposed investigation is completed. Exceptions are those investigations that consume samples, but this fact needs to be mentioned clearly in the proposal.[75]

Japan has not distributed these samples widely, likely based on the small amount that was collected, but it has partnered with NASA and transferred some of the particle samples to NASA for research.[76]

Three important aspects of state practice in regards to samples from celestial bodies should be noted. The first is that no state has ever objected to another state engaging in a sample return mission, or challenged another state's ability to effectively own and control these samples. Second, these samples may definitely be used in ways that provide a "benefit to all mankind." These benefits can flow through scientific research or through gains in international peace and security through diplomatic uses. Finally, there is at least one example of state practice in which a state has used a sample for commercial gain. As a result, we can say that state practice clearly indicates that Article II does not prohibit states from extracting material from celestial bodies, and that states seem to have some set of rights to dispose of that material as they see fit.

B. *Private Claims to Celestial Bodies*

There have been numerous attempts by individuals and commercial entities to claim all or part of particular celestial bodies as real property. Most of these attempts have been little more than publicity stunts, but many have sought to employ clever mechanisms to assert these rights by getting a state to somehow endorse the claims. These claimants usually argue that though Article II bars states from claiming territory, it does not bar a private individual from owning territory. This argument is rooted in a Lockean conception of property as a human right that exists as a function of natural law rather than domestic state governance. Interestingly though, the tactics of these claimants make explicit the role of the positive local law of the state as the arbiter of what can and cannot be private property. This puts their natural law claims into an untenable feedback loop that requires positive law to establish property rights.

There are several such examples of these attempts. One of the most prominent is Dennis Hope's Lunar Embassy, which claims to sell plots on the Moon and other celestial bodies to its customers. The Lunar Embassy web page claims that it is "the only company on Earth with the legal right

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[75] *FAQs*, JAXA, https://perma.cc/4T6R-Z953 (last visited Sept. 7, 2019).

[76] *Hayabusa Sample Investigator's Guidebook: For the International Announcement of Opportunity*, JAXA (May 8, 2017), https://perma.cc/4PQ8-JBEL.

to sell land in outer space period."[77] This legal right is based on fairly dubious ground. According to the Lunar Embassy:

> Well, in 1980, a very bright, young and handsome Mr. Dennis Hope, went to his local US Governmental Office for claim registries, the San Francisco County Seat, and made a claim for the entire lunar surface, as well as the surface of all the other eight planets of our solar system and their moons (except Earth and the sun). Obviously, he was at first taken for a crackpot, until, 3 supervisors, 2 Floors and 5 hours later, the main supervisor accepted, and registered his claim.[78]

There is not any additional information as to what specific type of claim is registered, but what can be gathered from this statement is that Hope bases the validity of his claim on the basis of its registration by a municipal bureaucrat, which he argues rises to the level of state recognition. Further, Hope sent letters to the U.S.S.R. and the UN registering his claim and his intent to own these surfaces. Hope's letters never received formal responses, and therefore he operates as if they are uncontested. It should be noted that the Chinese government has blocked the company from operating in China on the basis that it is fraudulent.[79]

A second case is that of Nemitz v. United States. Nemitz, the plaintiff in this case, filed a security interest, under the California Uniform Commercial Code, in the asteroid Eros. Then, when NASA landed a probe on the asteroid, Nemitz sent NASA a bill for parking asserting that the security interest gave him property rights in the asteroid. The bill itself was minimal, but Nemitz's goal was recognition rather than riches.[80] NASA refused to recognize the claim by Nemitz, and eventually the matter was referred to the State Department.[81] The State Department denied Nemitz's claim based on Article II, stating "In the view of the Department, private ownership of an asteroid is precluded by Article II of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. Accordingly, we have concluded that your claim is without legal basis."[82] Nemitz then

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[77] Dennis M. Hope, *What's It All About?*, LUNAR EMBASSY, https://perma.cc/J6GJ-KQ9K (last visited Sept. 7, 2019).

[78] Dennis M. Hope, *Frequently Asked Questions*, LUNAR EMBASSY, https://perma.cc/54TN-HZWD (last visited Aug. 13, 2018).

[79] *Chinese Lunar Land Sale a Great Idea but Illegal Says Government*, SPACE DAILY (Dec. 7, 2005), https://perma.cc/XU4E-RYMD.

[80] *See generally, The Eros Project for Space Property Law*, EROS PROJECT, https://perma.cc/A6SP-NT8M (last visited Sept. 7, 2019).

[81] *See* Kelly, *supra* note 32, at 298.

[82] *OrbDev Appeals to State Dept. For Eros Rent Ruling*, SPACE DAILY (Aug. 28, 2003), https://perma.cc/PVA8-HNM2.

filed suit in the US District Court for the District of Nevada. This claim was dismissed by the court for failure to state a claim. Specifically, the Court stated that registration of a security interest does not create "property interests."[83] Nemitz appealed to the 9th Circuit, which upheld the lower court without a written opinion.[84]

There are other such examples of these types of claims. For instance, in the early 1980s Lamar Savings and Loan Association "filed a request with the Texas savings and loan commissioner to acquire permission to open a branch office on the Moon."[85] This request would ultimately be rejected. While all of these claims tend to philosophically support the idea of property as a fundamental human right, they all in some way attempt to get the claims recognized by the government through the use of local rules. This reveals the thinness of appeals to natural law for the establishment of such claims, in that each claimant recognizes the need for positive legal recognition to vindicate their claims. Indeed, the central problem with using these cases as precedent, either for or against property rights, is that these claimants universally lack any sort of possession, which the Nemitz court found to be dispositive. To circumvent the possession issue, another would-be claimant has been shooting a laser beam at Mars for years. He argues that this could give him a "legitimate claim" to the Martian surface based on the physical contact of the laser beam with Mars, which is cast as Lockean labor that adds value to the Martian surface by helping to spark the terraforming process.[86] What all of these claims lack though, is a clear nexus between the *lex loci* being used to justify the claim and the celestial body being claimed. This is clearly an issue of sovereignty. Recognition that someone has made a claim through procedural registration with a governmental body is quite different from a governmental body having territorial jurisdiction over that body, which is a necessary precursor to granting real property rights.

C. *Private Ownership of Celestial Material*

While both NASA and JAXA claim sole ownership of their extraterrestrial samples, there are several cases in which samples have

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[83] Order Granting Defs. Mot. to Dismiss, 2, April 27, 2004, CV-N-03-0599-HDM(RAM).

[84] *Appellate Court*, EROS PROJECT, https://perma.cc/UV8H-E5WB (last visited Sept. 6, 2019).

[85] NATHAN C. GOLDMAN, AMERICAN SPACE LAW: INTERNATIONAL AND DOMESTIC 142–43 (2d ed. 1988).

[86] *FAQ: Frequently Asked Questions . . . and More*, MARS FOR SALE, https://perma.cc/TL3Y-KYGS (last visited Nov. 5, 2017) (stating that claimant is using his sale of Mars to build support for ensuring the future usefulness of the Outer Space Treaty); Nick Whigham, *Can One Man's Strange Claim to Ownership of Land on Mars Revamp International Space Law?*, NEWS LIMITED (July 18, 2017, 1:12 PM), https://perma.cc/3N7S-SDVY.

entered into private hands, including the Soviet sale mentioned above. This has not yet been the case with any of JAXA's samples, but NASA has numerous samples of which the whereabouts are unknown. Many of the lost Moon rocks are diplomatic gifts that the United States sent to world leaders.[87] Interestingly, NASA has aggressively pursued claims of ownership when it finds private parties in possession of lunar samples. Recently, for example, a NASA investigator was subjected to a lawsuit over a sting operation in which he detained and interrogated a 74-year-old widow of a NASA engineer for suspected theft of stolen property.[88]

There are two important U.S. cases on whether individuals can own and sell lunar samples that are from the U.S. *Apollo* missions, over which NASA maintains that it has title. The first case is *United States v. One Lucite Ball Containing Lunar Material*.[89] In this case, a U.S. citizen travelled to Honduras and purchased one of the diplomatic gifts made from *Apollo* lunar samples. The gift was a plaque with the lunar sample inside a lucite ball and the flag of Honduras. It was being offered for sale by a Honduran general. The purchaser then sought to sell the sample to an undercover NASA investigator and the sample was subsequently seized. In the aftermath, the Honduran government requested the return of the sample asserting ownership rights. The court held that "[w]hen President Lopez Arellano accepted the gift on behalf of the Honduran government and people and placed it in the Presidential Palace, the lunar rock and plaque became part of the patrimony of the Republic of Honduras."[90] The court goes on to apply Honduran law and concludes that neither the seller nor the buyer in this case could have gained good title since the Honduran government never authorized the transfer of the sample. The court does not reach the question of whether a purchaser with good title could then own the sample. However, this decision does indicate that the transfer of title to Honduras means that such a sale would be governed by the *lex loci*, which could allow for such a transfer.

The second case of interest is the recent *United States v. Ary*.[91] In this case, Nancy Carlson was a private citizen who bought a lunar sample return bag through a United States forfeiture proceeding.[92] The bag was previously stolen from a museum and, after three years, was mistakenly

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[87] Mark Bosworth, *What Has Happened to Nasa's Missing Moon Rocks?*, BBC, (Feb. 20, 2012), https://perma.cc/Q4VD-QJK9.

[88] Fred Bardbash, *NASA 'Sting' Operation Against 74-year-old Widow of Apollo Engineer Draws Court Rebuke*, WASH. POST (Apr. 14, 2017), https://perma.cc/LTV9-R8WS?type=image.

[89] United States v. One Lucite Ball, 252 F. Supp. 2d 1367, 1372 (S.D. Fla. 2003).

[90] *Id.* at 1373.

[91] United States v. Ary, 224 F.Supp.3d 1186, 1186 (D. Kan. 2016).

[92] *Id.* at 1190.

auctioned off with other property confiscated by the U.S. Marshall Service. The Plaintiff then had the bag tested, which revealed that it did indeed contain particulate lunar material. NASA then moved to set aside the original forfeiture sale of the bag, claiming that the bag was sold in error and that NASA was not notified of the sale.[93] It argued that "NASA's policy and practice is not to transfer ownership of lunar material to any private individual."[94] The Plaintiff argued that NASA had been involved in the forfeiture proceedings and at the least had constructive notice of the sale, and that title to the bag vested in the U.S. Government, rather than NASA specifically, and therefore the sale was a proper transfer of title.[95] The court concluded that while NASA lacked notice, it had no remedy against the Plaintiff as a bona fide purchaser:

> By statute, the interest of a former owner is declared to be extinguished upon forfeiture, as the lack of a timely petition in the forfeiture proceeding means that "the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee." 21 U.S.C. § 853(n)(6). Under this provision, legal title to the bag passed to the United States. Title was subsequently conveyed to Ms. Carlson upon completion of the auction sale.[96]

According to the court, to the extent that NASA was deprived of its property through lack of notice, its remedy was against the United States directly. While the lunar material was not at the heart of the court's decision in this case, it does indicate that the United States is authorized to sell this material, which is consistent with the Soviet sale of lunar material. Again, it should be noted that the court applies the *lex loci* in making its decision on the transfer of title.

While these decisions are not conclusive on the notion of private ownership of extracted extraterrestrial material, they both indicate that the state has the ability to dispose of such material through a commercial sale, and that the subsequent private ownership can be legal depending on the local law of the state.

III. New Local Rules

This array of state practice brings us back to the inherent ambiguity of the Outer Space Treaty. If space is to be "used" under Article I, and states can authorize "nongovernmental" actors under Article VI, but they cannot

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[93] *Id.* at 1190–91.

[94] *Id.* at 1190.

[95] *Id.* at 1190–91.

[96] *Id.* at 1193.

claim space and other celestial bodies as territory, then the question remains whether commercial exploitation of resources is possible under the Outer Space Treaty. Indeed, it is exactly this ambiguity that the failed Moon Agreement attempted to clarify by providing for an international system to govern resource extraction.[97] Interestingly, one of the things that led to the failure of the Moon Agreement was opposition within the U.S. by "advocates of free enterprise in space" who "argued that the treaty would increase the entrepreneur's estimate of risk and stifle investment and development in space."[98] However, thirty years later, advocates of free enterprise have begun to advocate for clear rules governing resource extraction. To date, two states, the United States and Luxembourg, have responded to this new call for regulatory certainty.

Before looking at those rules, let us first engage with a quick recap of how property rights fit into the international legal system. As argued in Section II, Article II is primarily about the concept of territory and fitting a new spatial reality, i.e. human space exploration, into the freshly established international law system and its imagined geography or world-scale order.[99] While the international law system established after WWII does recognize "the right to own property alone as well as in association with others,"[100] this right, like most other human rights, is subject to local governance within a territory.[101] The right to own property then changes as one crosses borders and enters new political and legal systems.[102] This is an important feature within the international legal system because it made it possible for states with divergent ideologies to come together as sovereign equals.[103] Territory is absolute, but property is subject to local rules rather than international rules.[104] Indeed, the state practice above, and in particular the *One Lucite Ball* case, places *lex loci* rules as primary in

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[97] *See* Agreement Governing the Activities of States on the Moon and Other Celestial Bodies art. 11, July 11, 1984, 18 I.L.M 1434 (explaining the Moon Agreement has entered into force, it has a low number of ratifications and none from major space powers).

[98] GOLDMAN, *supra* note 66, at 26.

[99] *See* Outer Space Treaty, *supra* note 16.

[100] Universal Declaration of Human Rights, art. 17, Dec. 10, 1948, https://perma.cc/LXH2-4ZGC.

[101] *See* United Nations General Assembly, *Role of Local Government in the Promotion and Protection of Human Rights – Final Report of the Human Rights Council Advisory Committee, Thirtieth Session, Before the Human Rights Council*, HRC 30/49, 3, 7–9 (2015).

[102] *See generally* MICHELE GRAZIADEI & LIONEL SMITH, COMPARATIVE PROPERTY LAW 193–95 (2017).

[103] *See* Peter Rutledge, *Toward a Functional Approach to Sovereign Equality*, 53 VA. J. INT'L L. 181, 186 (2012).

[104] See generally GRAZIADEI & SMITH, supra note 102, at 193–95.

making determinations about property.[105] In order for local rules to be applied, there needs to be some nexus between the territory in which those rules govern and the property at question.[106] As a result, claims over real property in outer space lack true ratification by governments, because they exist outside the territorial jurisdiction of the state; whereas, claims over extraterrestrial material that has been transported into the territory of the state, thereby creating a nexus, will be resolved through local rules.[107]

Currently, multiple commercial entities are attempting to raise the necessary capital to engage in transportation to and mining of celestial bodies.[108] These initiatives are high risk for investors and potentially offer a high return on the investment, but in light of Article II some investors are reluctant to put their money in these ventures without some clarity as to whether that investment will be protected legally.[109] In other words, investors are concerned with whether these companies can own and therefore dispose of the resources they extract under the *lex loci*.[110] Both the United States and Luxembourg have passed legislation that is intended to make these investors feel secure in the legal rights to the extracted resources.[111]

The United States passed the first of these laws in December 2015 as part of the Commercial Space Flight Competitiveness Act.[112] Title IV of this legislation states that

> A United States citizen engaged in commercial recovery of an asteroid resource or a space resource under this chapter shall be entitled to any asteroid resource or space resource obtained, including to possess, own, transport, use, and sell the asteroid resource or space resource obtained in accordance with applicable law, including the international obligations of the United States.[113]

The law further states that "the United States does not thereby assert

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105 United States v. One Lucite Ball, 252 F. Supp. 2d 1367, 1372 (S.D. Fla. 2003).

106 *See id.*

107 *See id.*

108 Benjamin Sutherland, *Space Exploration Will Open Up in 2018*, STEEMIT, https://perma.cc/YGC3-GXNU (last visited Sept. 7, 2019).

109 *See generally* Outer Space Treaty, *supra* note 16, art. II.

110 *See* Outer Space Treaty, *supra* note 16, art. II.

111 *See generally* U.S. Commercial Space Launch Competitiveness Act, Pub. L. No. 114–90, 129 Stat. 704, (2015); *Loi du 20 juillet 2017 sur l'exploration et l'utilisation des ressources de l'espace*, art. 1, LE GOUVERNEMENT DU GRAND-DUCHÉ DE LUX., https://perma.cc/558C-FH2N (last visited Sept. 7 2019).

112 *See generally* U.S. Commercial Space Launch Competitiveness Act, Pub. L. No. 114–90, 129 Stat. 704, (2015).

113 *Id.* at 721.

sovereignty or sovereign or exclusive rights or jurisdiction over, or the ownership of, any celestial body," thereby disclaiming such exploitation as an appropriation inconsistent with Article II.[114]

Luxembourg, as part of a strategy to attract the space industry to its territory, followed suit passing a law in summer 2017.[115] This law states that "Les ressources de l'espace sont susceptibles d'appropriation."[116] The law then goes on to say that such appropriation must comply with Luxembourg's international obligations: "L'exploitant agréé ne peut exercer l'activité visée au paragraphe 1 er qu'en conformité avec les conditions de son agrément et les obligations internationales du Luxembourg."[117] While the Luxembourg legislation does use the word "appropriation" to describe the act that it is making legal, it also uses a disclaimer about the international obligations of the state.[118] The Luxembourg law goes further than the U.S. law in that the bulk of its text describes the nature of the authorization that Luxembourg will grant for these activities.[119]

What is significant about both of these laws is that they are narrowly tailored to only grant rights to the extracted resources.[120] Neither law implies that a commercial entity will gain rights similar to "real property" rights in the area of their extraction operations, because real property is directly correlated to the territory in which it sits.[121] Indeed, both laws explicitly note that the international obligations of the state will be a limitation on an entity's ability to claim the property rights over the extracted resources, though the U.S. articulation of this principle is much stronger.[122] These laws create a nexus between the state and the chattel property in question through personal jurisdiction rather than territorial

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114 *Id.* at 722.

115 Laurent Shummer & Blazej Gladysz, *Luxembourg Law on the Exploration and Use of Space Resources Entered Into Force*, ARENDT (Aug. 2, 2017), https://perma.cc/BJ3B-5LSU.

116 *Loi du 20 juillet 2017 sur l'exploration et l'utilisation des ressources de l'espace*, art. 1, LE GOUVERNEMENT DU GRAND-DUCHÉ DE LUX., https://perma.cc/558C-FH2N (last visited Sept. 6, 2018) (translating to "space resources are capable of being appropriated").

117 *Id.* art. 2(3) (translated to "the authorised operator may only carry out the activity referred to in paragraph 1 in accordance with the conditions of the authorisation and the international obligations of Luxembourg").

118 Gov't of the Grand Duchy of Lux., *Draft Law on the Exploration and Use of Space Resources*, SPACERESOURCES.LU, https://perma.cc/XU9F-HFRM (last visited Sept. 7, 2019).

119 *Compare*, Gen. Assemb. Res. 1721, U.N. GAOR, 16th Sess., Supp. 17, at 6, U.N. Doc. A/RES/1721(XVI) (1961), *with* U.S. Space Exploration Policy, Exec. Directive No. 31, N.S.P.D. (Jan. 14, 2004).

120 *See* U.S. Space Exploration Policy, Exec. Directive No. 31, N.S.P.D. (Jan. 14, 2004).

121 *Id.*

122 *Id.*

jurisdiction.[123] The U.S. law applies to U.S. citizens and the Luxembourg law applies to entities authorized by the state.[124] This allows the two states to avoid the restrictions of Article II by not asserting their jurisdiction in such a way that implies sovereignty over the area of a celestial body, while at the same time confirming that a state may authorize a non-governmental entity to use space in accordance with Articles I and VI of the Outer Space Treaty.

These laws have stirred much debate among academics as to their legality under the Outer Space Treaty.[125] Despite the criticism, there is growing consensus that these laws represent, at a minimum, valid possible interpretations of Article II obligations.[126] In fact, such an interpretation is consistent with the Russian sale of Lunar material, as well as the recognition in *One Lucite Ball* that the *lex loci* applies to the disposal of tangible property.[127] Whether or not these interpretations become an internationally accepted standard is yet to be seen, but surely more states will begin to pass laws on space resources.[128]

If international consensus supports that states may authorize non-governmental entities, then numerous challenges are on the horizon.[129] This is especially so in light of the rudimentary nature of these laws.[130] The U.S. law is devoid of any details on authorization or safety for these entities, and while the Luxembourgish law addresses authorization, it is more concerned with the financial solvency of the authorized entity rather than details about how such activities shall be carried out.[131] While entities will likely be controlled by local rules rather than international rules, the

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123 *See generally* P. J. Blount, *Jurisdiction in Outer Space: Challenges of Private Individuals in Space*, 33 J. SPACE L. 299 (2007); Frans von der Dunk, *Effective Exercise of 'In-space Jurisdiction': The US Approach and the Problems it is Facing*, 40 J. SPACE L. 147 (2015) (discussing jurisdiction in outer space).

124 *See* U.S. Space Exploration Policy, Exec. Directive No. 31, N.S.P.D. (Jan. 14, 2004).

125 Blount and Robison, *supra* note 10, at 161–62; Thierry Labro, *Luxembourg Space Exploration Laws Criticised*, LUX. TIMES (Barbara Tasch, trans. Aug. 2, 2017), https://perma.cc/F6XM-ZCEZ.

126 *See Position Paper on Space Resource Mining*, INT'L INST. OF SPACE LAW, 1–3 (Dec. 20, 2015), https://perma.cc/JUQ3-QXK9.

127 *See generally* U.S. v. One Lucite Ball Containing Lunar Material, 252 F.Supp.2d 1367 (S.D. Fla. 2003) (holding the government's evidence established probable cause that the moon rock and display plaque were stolen from the Republic of Honduras and then introduced into the United States).

128 *See generally id.*

129 *See* Labro, *supra* note 125.

130 *See* Labro, *supra* note 125.

131 *A Legal Framework for Space Exploration*, GRAND DUCHY OF LUX., (July 13, 2017), https://perma.cc/286V-D9EX.

idea of international coordination for safety is one that states should begin to take quite seriously.[132] One of the central goals of the Outer Space Treaty is to avoid conflict through the facilitation of communication and coordination among states to lessen the risk of accidents or conflicts in space.[133] Article VI requires that states keep close tabs on their non-governmental actors due to the strategic nature of the space environment.[134] While the commercial exploitation of space should not be unnecessarily hampered, it is important to remember that commercial exploitation is not a primary goal of the treaty regime, which is squarely focused on international peace and security.[135] As a result, states should be aware of the risk of a "race to the bottom" in the enactment of such laws, similar to the flags of convenience problem on the high seas.[136] Safety, security, and sustainability for all space actors are all critical notions that states should give serious thought to when enacting local rules.[137]

In order to preserve space for peaceful purposes as new space activities emerge, states will need to establish mechanisms to ensure that risk of harmful interference is minimized.[138] Indeed, there is precedent for such mechanisms in the ITU management of the geosynchronous orbit (GEO).[139] This system is not a full blown legal system, but it has provided a reliable mechanism for states to give notice of their activities in GEO.[140] This regime does not provide "rights" to the orbit, but instead gives states the ability to make a planned use known to the international community so that other states can plan their space activities accordingly.[141] While a regime such as that found in the Moon Agreement is politically untenable at this time, a system that allows states to coordinate based on notice and registration could be an effective way to ensure that space remains conflict

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[132] *See Luxembourg Set to Become Europe's Commercial Space Exploration Hub with New Space Law*, OGIER, (Aug. 3, 2017), https://perma.cc/U9CR-9D6E.

[133] *See* Blount, *supra* note 123, at 310.

[134] Outer Space Treaty, *supra* note 16.

[135] Outer Space Treaty, *supra* note 16.

[136] *See Luxembourg Set to Become Europe's Commercial Space Exploration Hub with New Space Law*, *supra* note 132.

[137] *See Luxembourg Set to Become Europe's Commercial Space Exploration Hub with New Space Law*, *supra* note 132.

[138] *See Sharing the Sky – ITU's Role in Managing Satellite and Orbit Spectrum Resources*, INT'L TELECOMM. UNION, https://perma.cc/9UKU-7AX9 (last visited Sept. 7, 2019) [hereinafter *Sharing the Sky*].

[139] *See* Guilnem Penent, *Governing the Geostationary Orbit: Orbital Slots and Spectrum Use in an Era of Interference*, IFRI (Jan. 20, 2014), https://perma.cc/XRM8-SCYB.

[140] *See Sharing the Sky*, *supra* note 138.

[141] *See Sharing the Sky*, *supra* note 138.

free.[142]

CONCLUSION: SPACE FOR THE BENEFIT OF ALL

One of the core values embedded in the international space law regime is that states should ensure that space is used for the benefit of all. While this value likely rises to the level of customary international law, it is an amorphous obligation that is an aspirational value rather than a hard legal obligation. The principle, however, should not be minimized as new space activities, including space resource extraction, emerge. Rather, states should continue to ensure that even commercial uses of space provide benefits to the global population. Commercial entities should not be prohibited from making a profit from the use and exploration of space, but the space regime treats space as a very different sort of place than those found terrestrially. It would be folly to swing the pendulum too far in favor of commercial profit. This could allow private entities to destabilize the strategic space environment, which would destabilize the terrestrial security environment. The result would be a use of space for the detriment of all humankind.

This is not to say that there is a need to go as far as equitable sharing of profits from resources as envisioned in the Moon Agreement. While that would certainly be one way to accomplish using space for the benefit of all, it is one that might overly hinder commercial exploitation and the failure of the Moon Agreement shows that there is no political will to establish such a system. Through the Outer Space Treaty, states have agreed to hold themselves to a higher standard than they do terrestrially in order to serve the entire human population. In the adoption of local rules for new space activities, states have a moral and legal obligation to hold their nongovernmental actors to similar standards. While Article VI makes clear that states may authorize the use of space by non-governmental actors, that use is still governed by Article I, which requires the use to be "for the benefit of all countries." As resource extraction develops, Article II and the question of property rights does not pose the biggest challenge. Instead, the biggest challenge is avoiding a profit driven race to the bottom which would gut the underlying values on which the international community based the space regime.

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[142] *See Sharing the Sky supra* note 138.

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Some Remarks Further to *Outer Space and International Geography: Article II and the Shape of Global Order* by P.J. Blount

FRANS VON DER DUNK*

INTRODUCTION

This should by no means be read as a request for commiseration, but as someone making a living with not only teaching and researching but also consulting on space law, I often face a certain gut-level misapprehension and mistrust of "the law" on the part of non-lawyers from all sorts of other space-related disciplines. We are viewed as trouble-makers, game-spoilers who point out to scientists and engineers that their wonderful ideas and projects will likely give rise to important legal consequences and tell entrepreneurs who risk their money and their lives for the benefit of all humankind that they first need a license.

In particular, in the U.S. commercial sector, I daresay, time and again claims can be heard that law and regulation is only stifling the progress of the human race and human societies, that the less there is of law and regulation, the better. Specifically with a view to commercial space endeavors, of which the thrust for space mining is only the most recent manifestation, the U.S. government is regularly urged to step out of the Outer Space Treaty,[1] presumably hindering the full deployment of private enterprise's brains and brawn to develop new and exciting services and markets.[2]

It would be quite enlightening for such regulation-bashers to have a look

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1 *See generally* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, D.C.-London-Moscow, January 27, 1967, T.I.A.S. No. 6347, 18 U.S.T. 2410 [hereinafter Outer Space Treaty].

2 *See generally* Henry R. Hertzfeld & Frans von der Dunk, *Bringing Space Law into the Commercial World: Property Rights without Sovereignty*, 6 CHI. J. INT'L L. 81 (2005).

at what happened in the Netherlands a few years ago. The Dutch national space law of 2007,[3] establishing a licensing system for private space activities, had not been made applicable to small satellites as these were not "guided" in outer space.[4] When a few years later a Dutch company entered the market for piggy-back launches of small satellites not further guided in outer space, this omission was restored—not on the initiative of the Dutch government itself, but upon the insistence of the private company at issue.[5] The company realized that only in that way they could both judge their business and liability risks much more precisely, and create a much higher level of trust with the validity and legitimacy of their business operations. After all, they now operated under licenses granted by the Dutch government which was thereby also committed to defend the interests of the company in the international arena.

Likewise, also P.J. Blount's article, *Outer Space and International Geography: Article II and the Shape of Global Order*, makes clear once more that the simplistic view of regulation as being bad for private enterprise is, if not simply misguided and mistaken, at least grossly lopsided and failing to recognize certain realities in the real world out there. This, again, also when it comes to space mining.

Article II reads in full: "Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."[6] Blount provides a thoughtful, balanced, and comprehensive analysis of this Article, one of the key provisions of the Outer Space Treaty,[7] and what it means for such projects as those aiming to mine asteroids for commercial gain. This analysis should be mandatory reading for everyone involved in such developments, whether as entrepreneur, criticaster, political commentator, concerned member of the general public, or potential regulator and legislator. It provides sufficient substance to the argument that even in the United States it is better for a private company – at least, if it has bona fide intentions – to work within a legal framework of some substance as it also ensures that the country itself has something at stake, both legally and otherwise.

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[3] Law Incorporating Rules Concerning Space Activities and the Establishment of a Registry of Space Objects, January 24, 2007, *Stb.* 2007, 80 (for English version, see https://perma.cc/4RZ3-3JEX) [hereafter Dutch National Space Law]; CHRISTIAN BRUNNER & EDITH WALTER, NATIONALES WELTRAUMRECHT / NATIONAL SPACE LAW 201 (2008).

[4] Dutch National Space Law, *supra* note 3, §§ 1(b), 2(1), 3(1).

[5] *See* TANJA MASSON-ZWAAN, *Registration of Small Satellites and the Case of the Netherlands, in* SMALL SATELLITES 174, 174–94 (Irmgard Marboe, ed., 2016).

[6] Outer Space Treaty, *supra* note 1, art. II.

[7] *See* STEVEN FREELAND & RAM JAKHU, *Article II, in* 1 COLOGNE COMMENTARY ON SPACE LAW 44–63 (Stephan Hobe, Bernhard Schmidt-Tedd & Kai-Uwe Schrogl, eds., 2009).

THE KEY ROLE OF ARTICLE II OF THE OUTER SPACE TREATY

What precisely is at stake here, then? Blount helpfully frames it as the establishment of a new "international geography" over a long period starting as early as the Peace of Westphalia of 1648[8] and culminating in the immediate aftermath of the Second World War with the creation of the United Nations,[9] determining the legal status of all the various areas potentially subject to human activity, and hence to potential disputes, perhaps even wars. As for the area of outer space specifically, when this came to be included into the realm of human activity in the late 1950s it had to be logically integrated into this "international geography." Thus, in the Outer Space Treaty of 1967 a key provision was included regarding (the absence of) territorial sovereignty in outer space which took the shape of Article II.

Most importantly, the Treaty including this clause was agreed upon by both the United States and the Soviet Union. While they were the two super and space powers of the day, and as such locked in a space race as well as in a Cold War more broadly speaking, both desired to prevent any land grab in outer space reminiscent of the colonization-era back on Earth. The legal concept of *terra nullius*, no man's land that was however susceptible to becoming some state or other's land further to certain conditions being fulfilled,[10] was no longer seen as a viable one for outer space; either the concept of *terra communis* (in the context of the Outer Space Treaty most prominently referenced by the notion of "province of all mankind")[11] or perhaps even a stronger version thereof labelled "common heritage of mankind"[12] should be made to apply to the area, as proposed by the Moon

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[8] The Treaty of Peace between Spain and the United Provinces of the Netherlands, Münster, May 14, 1648; The Treaty of Peace Between France and the Holy Roman Empire, Münster, Jan. 1649; The Treaty of Osnabrück: Treaty of Peace between the Holy Roman Empire and Sweden, Münster, Jan. 1649.

[9] *See generally* Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, U.S.T.S. 993, 24 U.S.T 2225 [hereinafter UN Charter].

[10] *See, e.g.*, REBECCA M.M. WALLACE, INTERNATIONAL LAW 93–100 (3d ed. 1997); GIDEON BOAS, PUBLIC INTERNATIONAL LAW 181–90 (2012).

[11] Outer Space Treaty, *supra* note 1, art. I (sticking the label of "province of all mankind" to the use and exploration of outer space rather than to outer space as an area, but the result is that the area legally speaking very much comes to resemble the concept of *terra communis*—which on Earth most famously stuck to the high seas, just like "outer space" not "terra" in the literal sense of the word); *see also* STEPHAN HOBE, *Article I, in* 1 COLOGNE COMMENTARY ON SPACE LAW 25–43 (Stephan Hobe, Bernhard Schmidt-Tedd, Kai-Uwe Schrogl, eds., 2009).

[12] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Dec. 18, 1979, 1363 U.N.T.S. 3, 18 I.L.M. 1434 (entered into force July 11, 1984) (introducing the concept of the "common heritage of mankind" itself, although unfortunately some States and experts tried to claim that "province of all mankind" and "common heritage of mankind"

Agreement.[13]

This is where Blount's piece makes it clear how important it is to be aware of the fine lines between sovereignty and ownership, between the international need for some clarity on the status of certain areas versus the private desire to own something for the sake of exploiting it. In other words, how important it is to argue accurately and expertly rather then generally and broadly, and how important it is to know where certain legal rules come from, historically speaking, and what they were supposed to address as compared to what they are now called upon to address, with often confusing and sometimes backfiring results.

As for the concept of territorial sovereignty,[14] from roughly the fifteenth through the nineteenth century claiming new national territories had been very much a (Western) European habit applied to non-European parts of the world. In their arrogance, these European countries equated territories populated by non-European peoples to wild and uncivilized territories, which presumably legitimized them in taking over control. In particular, the Portuguese, the Spanish, the Dutch, the French and the English created huge colonial empires in that manner. And while their attitude was very Europe-centric, the legal notion that planting a flag was an act of establishing sovereignty quickly stuck and became accepted worldwide as part and parcel of the law of nations.

By 1967, the year of birth of the Outer Space Treaty, the process of decolonization not only had largely destroyed any notion of the legality of such colonization,[15] but colonization itself was also considered responsible for tremendous human suffering and for many armed conflicts that had raged over the centuries. The United States and the Soviet Union were determined not to repeat that mistake of the old European colonial powers when it came to decide on the legal status of outer space.

As Blount's article makes very clear, the result was Article II, precisely worded for the purpose; and apparently it served that purpose well, for even when the Apollo missions in 1969 through 1972 planted several U.S. flags on the Moon, the United States made very sure that no one would misinterpret such ceremonial actions as claims of sovereignty, and no serious doubt was

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essentially amounted to the same, considerably blurring the discussion and the substantial differences between the two concepts) [hereinafter Moon Agreement]; *see also* FRANS VON DER DUNK, *International Space Law*, in HANDBOOK OF SPACE LAW 99, 101–03 (Frans von der Dunk & Fabio Tronchetti eds., 2015).

[13] *See, e.g.*, von der Dunk, *supra* note 12, at 55–60.

[14] *See* BOAS, *supra* note 10, at 180–94.

[15] *See, e.g.*, BOAS, *supra* note 10, at 194–204; *see also* ANTONIO CASSESE, INTERNATIONAL LAW 105–08 (2001); MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW ch. 19 (7th ed. 1997).

raised by other nations or other parts of the world community to U.S. intentions in this regard.

ARTICLE II OF THE OUTER SPACE TREATY AND THE COMMERCIALIZATION OF OUTER SPACE

Space activities, however, constitute a realm where developments can go very fast. Back in 1967, few predicted—let alone were concerned with—the potential for privately-driven commercial space activities, apart from satellite communications. As Blount also briefly addresses, Article VI of the Outer Space Treaty, making states internationally responsible for activities of non-governmental entities and requiring them to authorize and supervise them, was the closest the drafters of the Treaty came to addressing any potential future involvement of the private sector in outer space activities.[16]

Even as for satellite communications, moreover, commercialization and privatization were far from self-evident. It was illustrative that even the United States, the leading free-market economy and its most outspoken political supporter, by statute established ComSat,[17] a government-driven consortium with a legitimized monopoly position, to develop a healthy satellite communications infrastructure rather than leave it to the private sector to do so. Only with the appearance on the market in the early 1980s of private satellite communication operators such as PanAmSat and OrionSat in the United States and SES in Europe, did something like a private commercial satellite communication sector begin to develop. This ultimately gave rise to the privatization of the major international satellite service providers INTELSAT, INMARSAT and EUTELSAT in the early 2000s,[18] legally buttressed by the 2000 ORBIT Act in the United States[19] and the 1994 Satellite Directive in the European Union.[20]

So when less than a decade ago the first serious plans were hatched by

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[16] *See, e.g.*, VON DER DUNK *supra* note 12, at 45–55; M. GERHARD, *Article VI, in* 1 COLOGNE COMMENTARY ON SPACE LAW 25–43 (Stephan Hobe, Bernhard Schmidt-Tedd, Kai-Uwe Schrogl eds., 2009).

[17] *See generally* Communications Satellite Act of 1962, H.R. 11040, 87th Cong. § 102 (1962); 1 INSTITUTE OF AIR AND SPACE LAW AT COLOGNE U., SPACE LAW: BASIC LEGAL DOCUMENTS (Karl-Heinz Bockstiegel, et al., eds., 2005).

[18] *See also* VON DER DUNK, supra note 12, at 282–301; *see generally* PATRICIA MCCORMICK & MAURY MECHANICK, THE TRANSFORMATION OF INTERGOVERNMENTAL SATELLITE ORGANISATIONS (2013).

[19] Open-Market Reorganization for the Betterment of International Telecommunications Act, H.R. 3261, 106th Cong. § 2 (2000).

[20] *See generally* Commission Directive Amending Directive 88/301/EEC and Directive 90/388/EEC in Particular with Regard to Satellite Communications, 94/46/EC, of 13 October 1994, OJ L 268, 18.10.1994, p. 15.

the private sector to target asteroids for mining their mineral resources for commercial gain, it became evident that neither Article II nor any other part of the Outer Space Treaty or international space law at large was able to address the specific legal parameters for and ramifications of such activities.

This in fact allowed those now having something at stake to try and give the legal discussion their own twist. This ranged all the way from declaring that since Article II spoke of national appropriation it did not prohibit private appropriation (by such entrepreneurs as Dennis Hope and his Lunar Embassy) to clamouring for denunciation of the Treaty (by some other entrepreneurs who claimed that this clause effectively killed any private initiative in the realm) respectively claiming that only a detailed international regime would be able to legitimize private mining activities (by some countries who would like to see the Moon and other celestial bodies qualify as the "common heritage of mankind").

And that is also why Blount's scholarly, detailed, balanced and non-partisan analysis is so important. Laying bare the complex relationship between territory and private property rights, he accurately debunks the sly reading of the prohibition on national appropriation as allowing for private appropriation, the basis for the claims of Lunar Embassy and their ilk. He carefully deconstructs the claimed relevance of denouncing the Outer Space Treaty, as the provisions of Article II form part of a much broader and more generally accepted set of principles constituting customary international law anyway. Finally, he firmly disarms any politically-charged ideas that commercial exploitation would only be possible subject to an international regime of a presumably all-encompassing character—he even unveils that the most vociferous proponent of these ideas has itself sold lunar dust without seeking or receiving consent of the rest of the world.

The distinctions elaborated on as between "territory" in outer space and material resources out there, and between "sovereignty" and "property," effectively dismantles all these extreme positions. They clarify that (1) the Moon and other celestial bodies cannot be legally treated as the backwaters of any particular country, allowing the principled freedom of every state to go there (or allow its citizens to go there) to rule supreme;[21] (2) such freedom is only limited by rules of international law such as the ones addressing harmful interference and the requirements of authorization and continuing supervision;[22] (3) within the boundaries of the two previous points commercial mining should be allowed;[23] (4) that such commercial mining

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[21] *See generally* Outer Space Treaty, *supra* note 1, art. I (stating the fundamental freedom for all States to use and explore outer space, meaning that in principle only at an international level any limitations to such freedom can be discerned or established).

[22] *See* Outer Space Treaty, *supra* note 1, arts. IX, VI.

[23] *See* FABIO TRONCHETTI, *Legal Aspects of Space Resource Utilization*, *in* HANDBOOK OF SPACE

would not necessarily be subject to a regime akin to that originally envisaged by the United Nations Convention on the Law of the Sea;[24] and (5) new rules would be required following some key principles of the Outer Space Treaty and international space law more broadly speaking to protect the interests of third parties and humankind at large.[25]

This means neither that Lunar Embassy can claim title to (sur)real estate on the Moon or other celestial bodies,[26] nor that there is a need for a state to step out from the Outer Space Treaty in order to allow its citizens to start commercial mining operations, provided they comply with relevant existing and future rules of international law.[27]

SPACE MINING: THE NEED FOR AN UPDATE OF THE LEGAL FRAMEWORK

That is not to say that current space law could not do with a helpful update in particular with regard to the issue of space mining – as Blount correctly surmises, probably the main reason why the discussion on Article II of the Outer Space Treaty and what it is supposed to mean is so prominently back on the table these days.

Blount himself respectfully refrains from providing unequivocal statements in that respect, and obviously it is true that ultimately the states of the world, in line with the baseline freedom of space activities posited by Article I of the Outer Space Treaty, would have to decide on what updates would be desirable and would make most sense.

Nevertheless, if the conclusion would indeed be that Article II does not in principle stand in the way of space mining activities even if licensed by a single state (as opposed to what the United Nations Convention on the Law of the Sea had established for deep seabed exploitation activities), as Blount convincingly argues with respect to the recent U.S.[28] and Luxembourgish[29]

LAW 769, 769–813 (Frans von der Dunk & Fabio Tronchetti, eds., 2015).

[24] United Nations Convention on the Law of the Sea, arts. 133–191, Dec. 10, 1982, 1833 U.N.T.S. 3 (entered into force Nov. 16, 1994) (providing for an *international* licensing regime applicable to mining the deep seabed pursuant to declaring that area to be the "common heritage of mankind"); *see also* TRONCHETTI, *supra* note 23, at 792–98.

[25] *See* Outer Space Treaty, *supra* note 1, art. VII; Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T 2389, 961 U.N.T.S. 187 (entered into force Sept. 1, 1972).

[26] *See, e.g.*, Von der Dunk et. al., *Surreal Estate: Addressing the Issue of "Immovable Property Rights on the Moon,"* 57 SPACE, CYBER, AND TELECOMM. L. PROGRAM FAC. PUBL'NS 149 (2004).

[27] *See* Hertzfeld, *supra* note 2, at 94.

[28] *See generally* U.S. Commercial Space Launch Competitiveness Act, Pub. L. No. 114-90,129 Stat. 704, 705 (2015) (Title IV addresses space mining).

[29] *Loi du 20 juillet 2017 sur l'exploration et l'utilisation des ressources de l'espace*, art. 1, LE

laws, it would be interesting to pursue this line of thought a little further.

I have regularly made the comparison between the high seas (as opposed to the deep seabed) and the realm of outer space, in the sense that both would qualify as a "global commons," a "province of all mankind" available to all states within the realm of international law.[30] The default consequence of that status for the high seas has always been that, while not "appropriable" by states in any sovereignty- or territory-related sense,[31] its living resources can be harvested (and thus legitimately owned and sold for profit) by individuals and individual companies from every state[32]– precisely the distinction that Blount's sharp analysis also makes.

While the consequence of the comparison of "outer space resources" with "high seas resources" obviously would lead to a full-fledged legality of space mining within the limits indicated above as to compliance with applicable international law, the comparison is not without its problems.

First, an argument could be made that the resources of the high seas at issue are living resources, that is self-reproductive and autonomously mobile, whereas the resources targeted by space miners are perhaps very mobile but propelled by laws of physics which brook no deviations, and certainly not reproductive in any normal sense of the word. Careful management of living resources would allow them to be qualified as renewable, non-exhaustible resources, whereas by definition non-living resources are exhaustible and non-renewable. Should that not warn against too easily equating the two scenarios?

However, upon closer view, what matters under applicable law—at least so far—is not so much their nature (living versus non-living) but their value as economic commodities. While humans have granted living economic commodities certain rights, often by law (at least if enjoying some level of animal intelligence and development) such as to non-cruel treatment as compared to non-living commodities; that has never stood in the way of cattle, birds, and fish being owned and sold for profit as products, as a whole or in pieces. It is noteworthy that also the United Nations Convention on the

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GOUVERNEMENT DU GRAND-DUCHÉ DE LUX., https://perma.cc/558C-FH2N (last visited Sept. 7, 2019) (law on the exploration and utilization of space resources).

[30] *See generally, e.g.*, Frans von der Dunk, *Asteroid Mining: International and National Legal Aspects*, 26 MICH. ST. U.-DCL J. INT'L L. 83, 101 (2017).

[31] United Nations Convention on the Law of the Sea, *supra* note 24, art. 89 ("No State may validly purport to subject any part of the high seas to its sovereignty.").

[32] *Cf.* United Nations Convention on the Law of the Sea, *supra* note 24, art. 87(1)(e), (2) (providing for the freedom of fishing subject to "due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area," which includes of course due regard for international obligations stemming from other treaties such as related to overfishing, the prohibition on whaling, rules on marine pollution and suchlike).

Law of the Sea includes within the freedoms of the high seas the freedoms to lay submarine cables and pipelines and to construct artificial islands and other installations permitted under international law[33]—the general idea clearly was to encompass all economic, exploitative uses of the area.

Conversely, the United Nations Convention on the Law of the Sea recognized the renewable nature of living resources largely by addressing the actual threats to such renewability: states are to cooperate in the conservation and management of those living resources[34] as well as impose relevant obligations upon their own nationals to comply with related international measures.[35] To some extent—namely, as far as the international community of states would be willing to agree to—later treaties would then further elaborate on such measures by focusing on over-fishing of certain fish stocks[36] or addressing marine pollution partly because of its threats to the living resources.[37]

This also aligns with Blount's analysis on the differentiation between the prohibition of appropriation of outer space and its celestial bodies as mainly driven by political considerations (notably the fear of land-grabbing in outer space giving rise to state-to-state conflicts, possibly escalating into armed conflicts) and the considerations regarding private ownership, which are of a fundamentally economic nature and importance.

Therefore, at the highest level the comparison should still hold, even if at a lower level the differences between fish as living resources and minerals as non-living resources may need to be heeded. Ultimately, if we allow by law the private ownership of live resources with a certain level of consciousness and intelligence, there would not be a single principled reason for not allowing private ownership of non-living resources.

A second flaw in the comparison goes to the nature of the activities necessary for economic exploitation. Simply put: the moment a fisherman catches sight of a certain substantive amount of fish that would be available for catching, normally he is able to immediately start the harvesting process. Even if more sophisticated tools are used—general analytical information about fertile fishing grounds mixed with own experience, maybe even

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[33] United Nations Convention on the Law of the Sea, *supra* note 24, art. 87(1)(c)–(d).

[34] United Nations Convention on the Law of the Sea, *supra* note 24, art. 118–119.

[35] United Nations Convention on the Law of the Sea, *supra* note 24, art. 117.

[36] *See, e.g.*, Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, T.I.A.S. No. 01-1211, 2167 U.N.T.S. 3 (entered into force Dec. 11, 2001) [hereinafter Fish Stocks Agreement].

[37] *See, e.g.*, International Convention for the Prevention of Pollution From Ships, Nov. 2, 1973, 1340 U.N.T.S. 61 (entered into force Oct. 2, 1983) [hereinafter International Ship Convention].

satellite information gathered—it would usually be a matter of a few days, or at best weeks, before the fisherman is present in the catchment area and able to start using his nets. Cost-wise, we would probably be speaking of operations in the range of no more than a few hundreds of thousands, perhaps a few millions of dollars overall.

By contrast, picture an asteroid mining company aiming for a particular asteroid by way of a mining operation. It first needs to find potentially interesting asteroids, likely looking out for them as far away as the asteroid belt between Mars and Jupiter—some 300,000,000 miles or more from Earth. Once it finds a few interesting ones, likely reconnoitering missions would have to be developed, built, launched and flown, in order to allow close-up inspection: is the asteroid at all worth going there? If so, what are its characteristics? How should actual mining operations be tackled? Presumably only then would the company initiate the actual mining mission—most likely years, maybe even decades as well as hundreds of millions of dollars if not more after the first major decisions taken.

The difference in time-scales and dollar-scales means that while a fisherman runs relatively little risk of being outsprinted to the lucrative catchment area (and even if he would be, he would suffer relatively surmountable losses) the mining company runs serious risks of being overtaken[38]—and may be financially destroyed as a consequence. Thus, in particular the industry itself would benefit hugely from an update to the current, vague, and non-distinctive set of principles applicable to space mining, presuming it at least provides substantial guarantees against such pirating activities.

By way of a third major comparative issue, fishing on the high seas has taken place by now for millennia, which also meant that a considerable body of international law has developed taking care of the general public interests potentially threatened by commercial exploitation for private gain. The United Convention on the Law of the Sea already provides a number of further limitations to the baseline freedom of the high seas, for instance, when it comes to peaceful uses.[39] In addition, a host of treaties has been developed to impose further prohibitions, obligations and requirements limiting the freedom, such as the aforementioned ones on overfishing[40] and marine pollution.[41]

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[38] Outer Space Treaty, *supra* note 1, art. XI (requiring states to regularly inform each other and the UN Secretary-General of their space activities and results, in particular scientific results—and reconnoitering missions to asteroids, even if for ultimately exploitative purposes, may well provide a number of interesting scientific insights as well).

[39] *E.g.*, United Nations Convention on the Law of the Sea, *supra* note 24, art. 88.

[40] *See* Fish Stocks Agreement, *supra* note 36, at 4.

[41] *See* International Ship Convention, *supra*, note 37, at 61.

By contrast, the Outer Space Treaty or indeed space law as a whole offers little more beyond the current, somewhat qualified prohibition on harmful interference of Article IX.[42] This is precisely why Blount's call for further discussion of what the appropriate public safeguards to private exploitation should be, once agreement on its legality *per se* is no longer politically challenged, and how at the same time the rights and interests of bona fide space entrepreneurs could be protected, is very much to the point. As Blount phrases it, "states should avoid a race to bottom in terms of developing legal regimes surrounding property rights and resource extraction in space by balancing the benefit of the commercial activity with the values and principles that underpin international space law."[43]

While it is important to be alert on possible risks to such a race to the bottom, to "cheap licensing and to hell with the consequences," in view especially of the dire experiences in the law of the sea, there are two reasons which may help space law escape too many harmful scenarios of "flags of convenience." One is legal, the other practical in nature.

Legally speaking, the beauty of international space law is the principle of state liability, meaning that the launching state(s) is/are liable for damage caused by space objects also in case these are owned, launched, and/or operated by private operators.[44] All such states therefore have a direct and substantial interest in ensuring that whatever private operator launches under their aegis, he is relatively unlikely to cause major accidents—since the bill, at least for international third-party damage, will have to be footed by the national treasuries. Any sloppy approach à la flags of convenience would thus immediately backfire. Many states therefore have taken the opportunity, through national space laws, to impose profound conditions upon those operators interested in undertaking the relevant space activities, and even to derogate part or all of such international third-party liability to the actual operators by way of the license.[45]

In addition, it is noteworthy that a cheap licensing state in the context of the law of the sea bears only a small portion of the risk of cheap licensing anyway. A ship operated under lenient conditions of a cheap flag state as to the qualifications of the captain and the crew as well as the safety measures

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[42] *See, e.g.*, SERGIO MARCHISIO, *Article IX*, *in* 1 COLOGNE COMMENTARY ON SPACE LAW 25–43 (Stephan Hobe, et. al., eds., 2009).

[43] P.J. Blount, *Outer Space and International Geography: Article II and the Shape of Global Order*, 52 NEW ENG. L. REV. 95, 96 (2018).

[44] *See* Outer Space Treaty, *supra*, note 1, art. VII; Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, T.I.A.S. No. 7762, 961 U.N.T.S. 187 (entered into force Sept. 1, 1972) [hereinafter Liability Convention]; *see, e.g.*, VON DER DUNK, *supra* note 12, at 45-55, 82-84.

[45] *See, e.g.*, IRMGARD MARBOE, *National Space Law*, *in* HANDBOOK OF SPACE LAW 127 (Frans von der Dunk & Fabio Tronchetti, eds., 2015).

on board can cause accidents anywhere on the seas and oceans of the world. The licensing state may just have a few per cent of a chance that any disaster will spoil *his* beaches with oil or will cause *his* harbour to become non-operational for some time to come. By contrast, the launch phase of a space endeavour is still by far the most dangerous and risky part of the operation. Any failure in the realm of safety would therefore immediately backfire against the launching state, who is most likely to bear the consequences of any sloppy licensing.

UPDATING THE EXISTING LEGAL FRAMEWORK: SOME FURTHER THOUGHTS

Once the need to update the existing legal framework is agreed upon, a major problem, unspecified and to some extent unhelpful as that existing legal framework is, immediately unveils itself: we have very little to work with—as yet no experience whatsoever with any commercial exploitation of mineral resources of celestial bodies and very little even by way of scientific governmental missions to celestial bodies.

There is just one thing we can be sure of: not only the nature of mining missions will vary hugely, but they will address celestial bodies of rather different dimensions. With such celestial bodies as the Moon and Mars, enormous pieces of floating rock, it is clear that going to them means landing on them and harvesting resources on them means some sort of digging into them—and neither of them will make any noticeable difference in their composition, orbits, or other key aspects of their existence. It does not lessen the need to consider establishing rules regarding, for instance, environmental pollution or access to facilities of other states,[46] but the clear distinction guiding Blount's analysis between sovereignty and property, between territory and resources, and between prohibition respectively tolerance pursuant to Article II continues to hold and serve as point of departure for any further legal development.

By contrast, relevant asteroids are much smaller in size, and actually can be as small as only a few hundreds of meters long or even less. Consequently, the distinction between landing on it and grabbing it can become blurred, any harvesting can substantially change composition and orbit of the celestial body at issue or even completely destroy it—effectively, precisely that would be the intention in many cases—and the legal distinction between sovereignty and property, between territory and resources, and between illegality and legality would become blurred as well.

There is no easy solution to this conundrum, although that should not

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[46] Outer Space Treaty, *supra* note 1, art. XII (requiring free access by states to all facilities on celestial bodies belonging to or operating under the jurisdiction and control of other states).

stop space lawyers from addressing it already now. It is interesting to look in this respect to the much-derided Moon Agreement, even as certain key provisions, precisely on potential commercial exploitation, ultimately caused it to fail.[47] The Moon Agreement also contains parts that are generally recognized as more simply reflecting and elaborating accepted principles of the Outer Space Treaty, however,[48] and could therefore well serve as helpful pointers in the current debate.

Thus, the Moon Agreement specifically allows for "specific legal norms [to] enter into force with respect to any . . . celestial bodies" other than the Moon itself.[49] Even more interestingly, the Moon Agreement speaks of "extraterrestrial materials which reach the surface of the Earth by natural means" to which the Moon Agreement by its own terms does not apply.[50] While the second part of the latter provision, speaking about "natural means," makes clear that this clause was not intended for any materials to be landed on Earth by human intervention, the reference to "extraterrestrial materials" as a fundamentally different category from "celestial bodies" is interesting in the light of the above-noted conundrum.

Would there be any particular cut-off size above which we should speak of a celestial body which you cannot own but upon which you can land and then, presumably, harvest its resources whereas below that threshold we should rather address it as extraterrestrial materials where grabbing rather than landing would be the operative verb, where the distinction between territory and resources, between sovereignty and property, and hence between illegality and legality, would no longer operate?

Should we, following the combined suggestion of Article 1(1) and Article 1(3), work towards a specific regime for small celestial bodies which really should qualify as extraterrestrial materials, even if the first clause (allowing for a regime separate from that of the Moon Agreement) only addresses celestial bodies and the second clause (fundamentally excluding them from application of the Moon Agreement) only addresses extraterrestrial materials?

CONCLUDING REMARKS

Not only is there, as per Blount's analysis, no need from a private

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[47] Moon Agreement, *supra* note 12 (noting that the Moon Agreement as of today enjoys the ratification of only 18 states, of which only Australia could be said to be a major spacefaring nation); *see* Status of International Agreements Relating to Activities in Outer Space as of 1 Jan. 2018, 57th Session, U.N.Doc. A/AC/105/C.2/2018/CRP.3 (2018).

[48] *See, e.g.*, VON DER DUNK, *supra* note 12, at 101–03.

[49] Moon Agreement, *supra* note 12, art. 1(1).

[50] Moon Agreement, *supra* note 12, art. 1(3).

enterprise-perspective to get rid of the obligations of the Outer Space Treaty —reiterating that, in addition, the contents of the Outer Space Treaty are generally considered to represent customary international law, so that denouncing the Treaty de facto would still not relieve relevant states from relevant obligations;[51] it actually serves the interests of private entrepreneurs for the Outer Space Treaty to remain in force and be enforced as much as possible. Only that Treaty provides space entrepreneurs with the legitimacy of their activities vis-à-vis possible political or economic opponents, and it allows them to call upon their own state to defend such interests in the global politico-economic arena.

Or, to put it differently: suppose the United States would indeed denounce the Outer Space Treaty. What would then, politically speaking, keep other countries from doing the same, which over time may cause a breakdown also of the customary value of its contents so that a number of years from now not even legally speaking "harmful interference"[52] with their activities would be prohibited. . .?

In particular, in the space mining context this is of major importance. Only a truly global market for the resources extracted from asteroids (whether returned to Earth, as seems the principal goal only for platinum, or used in outer space, as is likely to happen with water and most other minerals) could possibly turn this into a profitable business. If other countries from their politico-legal perspective would come to see such extracted resources as akin to blood diamonds or stolen art, in other words subject-matter of illegitimate trade, that certainly would not be very helpful.

The Outer Space Treaty, including notably its Article II, legally speaking is by far the best instrument to help convince others of the legitimacy of those operations, as long as within the boundaries of existing and future international law, and rather than feeling undercut by Blount's article, private enterprise should embrace it as a major tool for making space mining work—for themselves as much as, ultimately, for the benefit of all humankind.

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[51] *See* Vladlen S. Vereshchetin & Gennady M. Danilenko, *Custom as a Source of International Law of Outer Space*, 13 J. SPACE L. 22, 32–33 (1985).

[52] *Cf.* Outer Space Treaty, *supra* note 1, art. IX. *See generally* TRONCHETTI, supra note 23, at 778, 782–92 (discussing the general impact of the Moon Agreement and the Outer Space Treaty relative to the legal controversies surrounding the exploitation of extraterrestrial resources).

Enterprise Rights in Extraterrestrial Resources: Commentary on *Outer Space and International Geography: Article II and the Shape of Global Order*

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INTRODUCTION

Professor Blount is to be commended for his scholarly examination into the question of rights in extraterrestrial resources, and I appreciate the opportunity to submit the following comments. In the exercise of discretion, Professor Blount refrained from expressing his opinion on solutions to the issues raised by off-Earth mining; however, I will proffer some thoughts on the proper and appropriate legal regime for extraterrestrial resource utilization. There are two main points that I would like to impart by this commentary: first, the non-appropriation principle set forth in Article II of the Outer Space Treaty[1] (hereinafter "OST") is beneficial to space commerce and is absolutely essential for the peaceful exploration and use of outer space; and second, the focus on the concepts of "ownership" and "property rights" in extraterrestrial resources is misplaced, rather it is the *enterprise rights* of the private sector to utilize extraterrestrial resources for commercial purposes which must be developed and protected, separate and distinct from claims of ownership.[2]

Article II of the OST provides: "Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of

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[1] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Oct. 10, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter OST].

[2] *See generally* Leslie I. Tennen, *Towards a New Regime for Exploitation of Outer Space Mineral Resources*, 88 NEB. L. REV. 794 (2010).

sovereignty, by means of use or occupation, or by any other means."[3] As noted by Professor Blount, the non-appropriation principle was one of the first legal rules adopted by the community of nations at the beginning of the space age. It cannot be overstated that the prohibition of national appropriation has been indispensable for the peaceful movement of mankind into space. It is a major reason why we do not live under the harrowing specter of orbiting nuclear weapons and other weapons of mass destruction. The maintenance of space for peaceful purposes is a tangible benefit of space law and has fostered an environment in which mankind has been able to conduct extraterrestrial activities free from concerns of defensive considerations and armaments.[4]

Article II is also essential for the orderly commercial development of space and space resources within the framework of law. In his article, Professor Blount stresses international law, while I refer here more generally to the rule of law. Not only does the non-appropriation principle relieve the private sector of the burden of including the development of physical defenses, fortifications and security apparatus to protect hardware and operations in mission plans, and saving the concomitant costs, it also encourages the participation of the private sector in developing commercial space ventures and operations.[5] Companies do not need to fear that the substantial investments of time and resources necessary to conceive, plan and conduct a mission will be rendered useless by a state suddenly declaring sovereign rights to the location of the mission or the resources therein. Similarly, these investments by the private sector are also secure from the possibility that another private entity can declare exclusive ownership over a scarce resource beyond all needs of, and feasible use by, that entity and its particular space mission. In this regard, Article II promotes the free market by preventing any entity from obtaining an anti-competitive monopoly in a resource.

HISTORICAL ANTECEDENTS OF ARTICLE II

The non-appropriation principle was unanimously approved by the General Assembly within only a few years of the launch of Sputnik.[6] While support of the global community was important for this action, it would

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[3] OST, *supra* note 1, art. II.

[4] *See* P.M. Sterns & L.I. Tennen, *Institutional Approaches to Managing Space Resources*, 41 PROC. ON L. OUTER SPACE 33, 35 n.11 (1999) (citing statement by Eilene Galloway).

[5] *See generally* EDWARD R. FINCH & AMANDA LEE MOORE, ASTROBUSINESS: A GUIDE TO COMMERCE AND LAW OF OUTER SPACE (1984); Mark Sundahl, *The Outer Space Treaty and the Free Enterprise Act: Is International Space Law a Help or a Hindrance?*, SPACE NEWS (May 21, 2017), https://perma.cc/79EV-YJJG.

[6] G.A. Res. 1721, U.N. GAOR, 16th Sess., Supp. No. 17, at 6, U.N. Doc. A/4987 (1961).

not have been possible without the approval of both the United States and the U.S.S.R. It may seem that the prohibition of national appropriation in space was a drastic development, and from the perspective of some modern companies seeking to commercialize space, an unwarranted abdication of important rights necessary for their future success.

The non-appropriation principle philosophically followed the historical antecedents set by the international community for the high seas and Antarctica. The high seas, as distinct from territorial waters or exclusive economic zones, were held to be beyond the reach of claims of state sovereignty. In a similar vein, sovereign claims to areas of Antarctica were placed on hold by the Antarctic Treaty, and such claims have not received international acceptance or recognition.

The world was only a few years removed from the unprecedented destruction of WWII and the Korean conflict, and was coming to grips with the implications of living in a nascent and chilling nuclear age. There was both fatigue of conventional war and fear of nuclear confrontation. Neither side was looking to provoke WWIII. There were limits to how far they could push each other, with the most dangerous example being the Cuban Missile Crisis of 1962. It was one thing to have comparatively limited conventional skirmishes in different places around the globe, but quite another to expand belligerency, contentiousness and armed confrontation into the new realm of space. The U.S.S.R. was in a favored position to claim sovereign rights based on historical precedents of explorers, as they had, among other firsts, the first satellite, the first space object to arrive at the Moon and impact its surface, and the first human in Earth's orbit. Thus, the U.S.S.R. could claim wide areas of cis-lunar space and the Moon as its territory. However, any such claims by the U.S.S.R. certainly would have been met with objections by the United States and other states, and would have carried the risk of provoking an international crisis.

The challenge faced by the superpowers and the international community was to find a means by which space could be explored and used without becoming a battleground for conquest. The solution was a two-prong approach: first, space and celestial bodies are to be used exclusively for peaceful purposes; and second, the peaceful use of space is enhanced by denying states the ability to claim space as their national territory. Obviously, the interests of all states were promoted by the preservation of space for peaceful purposes. On a national level, the U.S. interests were promoted by this solution as it prevented the U.S.S.R. from claiming ownership of space, including Earth orbits, and the Moon, and denying access to space and celestial bodies by other states and by extension, their private entities. The U.S.S.R. was in favor as the communal nature of space and celestial bodies is consistent with socialist philosophy,

and would feed into their ability to extol the virtues of communism.[7] The principles of non-appropriation and peaceful purposes have been the foundation to preserve space for exploration and use by all states. The preservation and promotion of space for peaceful purposes is supported by numerous additional provisions of the OST, including Article I (access to explore and use space by all states); Article III (activities in space are subject to international law); Article IV (prohibition on establishment of military fortifications and placement of weapons of mass destruction); and Article IX (activities are to be conducted with due regard for the interests of others).

Examinations of the prohibition of national appropriation frequently lead to discussions of the nature of property *vis-a-vis* celestial objects and extraterrestrial resources. Much of the focus has been on whether space is *res communis*, belonging to all, or *res nullis*, belonging to none. Cogent arguments can be made for both propositions, as in actuality there are elements of both.[8] As discussed by Professor Blount, this seeming contradiction has inspired commentators to look at non-appropriation through the lens of traditional and historical theories of property rights.[9] These discussions contain many insightful and creative expositions, which are helpful in identifying the range of concepts and interests encompassed within the passel of property rights. Nevertheless, to the extent the goal is to discern common elements of property rights to be applied to space in a "one size fits all" framework, that effort is misplaced. The attempts to develop analytical constructs to recognize exclusive ownership and property rights in space are interesting, but run contrary to and undermine the foundations of the current international legal regime based on the rights of states to free access to space and to explore and use the Moon and celestial bodies for peaceful purposes. As such, it is contentious and divisive, and invites opposition at the international level, as occurred in the discussions in COPUOS[10] in the wake of the U.S. enactment of the "Space Resource Exploration and Utilization Act of 2015."[11] The latter declares an entity can claim ownership of space resources which are "commercially recovered."

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[7] *See* JOHN SPRANKLING, THE INTERNATIONAL LAW OF PROPERTY 180 (2014).

[8] *See* VIRGILIU POP, WHO OWNS THE MOON? EXTRATERRESTRIAL ASPECTS OF LAND AND MINERAL RESOURCES OWNERSHIP 73–97 (2009).

[9] *See* PHILIP DE MAN, EXCLUSIVE USE IN AN INCLUSIVE ENVIRONMENT: THE MEANING OF THE NON-APPROPRIATION PRINCIPLE FOR SPACE RESOURCE EXPLOITATION 18–33 (2016).

[10] Mahulena Hofmann & Federico Bergamasco, *Mining in Outer Space: Legal Aspects*, 2019 EUR. YEARBOOK. INT'L ECON. L. 313; *see* Tanja Masson-Zwaan & Neta Palkovitz, *Regulation of Space Resource Rights: Meeting the Needs of States and Private Parties*, QUESTIONS OF INT'L L. 14–15 (Jan. 30, 2017), https://perma.cc/LA47-GCBQ.

[11] *See generally* 51 U.S.C. §§ 51301–51303 (2015) [hereinafter Space Act].

ENTERPRISE RIGHTS

It is submitted that the better approach is to focus on and develop the affirmative rights to use and explore the celestial bodies as articulated and encouraged in the *corpus juris spatialis*, including commercial uses. The OST and the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies[12] (hereinafter "MA") recognize the right of states to conduct a wide range of activities on and below the surface of the Moon and other celestial bodies in the exploration and use of outer space. These activities include: conducting explorations and investigations of the surface and subsurface; establishing facilities, installations, and stations on the surface and subsurface; collecting mineral and other substances; and utilizing such mineral and other substances in support of missions.[13]

The rights of the private sector to use and profit from space resources are enterprise rights, which exist independently of any claim of ownership of the surface or subsurface of a celestial body. The legal regime established by the OST contains the basic jurisprudential structure that protects the legitimate interests of the private sector to develop and utilize space resources by considering them in the nature of a usufruct similar to high seas fishing, offshore oil drilling, and logging rights, which does not require the imposition of concepts and constructs of terrain property rights.[14]

A legal regime which builds upon the structure of the OST and articulates the enterprise rights in extraterrestrial resources, including the rights to derive and develop products and services utilizing such resources, would serve the purposes of enhancing the commercialization of space as well as promoting international peace and security. The Grand Duchy of Luxembourg recently enacted the Law on the Exploration and Use of Space

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[12] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, July 11, 1984, 1363 U.N.T.S. 3 [hereinafter MA].

[13] A caveat must be raised here in that art. 6.2 of the MA provides that in the course of scientific investigations, states can use mineral and other substances in quantities sufficient for the support of the mission. A strict interpretation of this provision would limit the use of extraterrestrial resources to purely scientific missions, to the exclusion of any commercial utilization. It is submitted that a more expansive interpretation is appropriate, given the spirit, intent and purpose of the OST and the emphasis on the enlargement of opportunity for both exploration and use in the *corpus juris spatialis*. Moreover, most if not all properly developed commercial mission plans would have some scientific implications and thus should have little difficulty incorporating a scientific investigation into the activities of a mission. Nevertheless, any reliance on the provisions of art. 6.2 of the MA could be complicated by the provisions of art. 11 regarding the international regime which states "undertake to establish." *See infra* text accompanying notes 33-36.

[14] *See* SPRANKLING, *supra* note 7, at 181–83, 189.

Resources.[15] According to the commentary note accompanying the law, the analogy was made to earth mining and fishing on the high seas.[16] Nevertheless, the Luxembourg Law does not expressly utilize the term "usufruct," nor articulate the usufruct character of space resources,[17] but rather makes the broad pronouncement in Article 1 that "Space resources are capable of being appropriated." The remainder of the law established a procedure for the authorization and supervision for exploration and use of space resources. It does not apply to other aspects of a mission that require authorization and supervision, such as the launch and operation of space objects, nor to issues regarding registration, which are subject to separate legal requirements and processes yet to be developed in Luxembourg Law.[18]

The focus on the "ownership" or "appropriation" of space resources illustrates the flaw in the approach adopted by the U.S. Space Act and the Luxembourg Law—they purport to grant ownership of space resources without regard to any purpose. The U.S. Space Act recognizes the private ownership of space resources which are "commercially recovered," that is collected, extracted, or otherwise obtained or recovered, and the Luxembourg Law provides that such resources can be appropriated, but neither specifies what, if any, uses can be made of such resources. Thus, it would be permissible pursuant to the statutory language for a company to recover a scarce and potentially valuable resource, such as the water ice on the lunar South Pole, and horde and stockpile the resource indefinitely for potential future commercial advantage.

The U.S. Space Act is limited to space resources which are "commercially recovered," while the Luxembourg Law contains no such limitation. This raises the question as to what specific activity is necessary to constitute a "commercial recovery" of the resource under the U.S. Space Act. Would it be necessary for a company to actually remove the resource from its natural setting and relocate it to another place in the general vicinity for storage? That would entail a considerable amount of cost and effort, invariably create waste, and place the resource at risk of damage or destruction, while not serving a practical purpose. Alternatively, would it be sufficient for a company to merely establish a physical presence around

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[15] *Loi du 20 juillet 2017 sur l'exploration et l'utilisation des ressources de l'espace*, LE GOUVERNEMENT DU GRAND-DUCHÉ DE LUX., https://perma.cc/558C-FH2N (last visited Sept. 28 2019).

[16] *See* Zwaan & Palkovitz, *supra* note 10, at 12–13.

[17] Milton Smith, *The Commercial Exploitation of Mineral Resources in Outer Space*, *in* SPACE LAW: VIEWS OF THE FUTURE 48-50 (T.L. Zwaan, W.W.C. De Vries, P.H. Tuinder and I.I. Kuskuvelis eds., 1988).

[18] Zwaan & Palkovitz, *supra* note 10, at 12–13.

the perimeter of the resource? Is any physical presence or activity necessary, or would remote sensing discovery of a resource on or in an asteroid be sufficient for a company to claim the ownership rights?

Clearly, the blanket recognition of ownership of "recovered" resources raises a multitude of legal concerns, and ultimately fails to grant any certainty to the private sector. The situation is even more murky as to what activity is necessary for an entity to appropriate space resources under the Luxembourg Law. Moreover, recognition of property rights by either the U.S. Space Act or the Luxembourg Law is not the same as the authorization and continuous supervision of private entities, which is required by Article VI of the OST for the entire mission, not just for the collection or recovery of a resource.

The process of granting or denying authorization by a state necessarily examines all phases of a proposed mission to, *inter alia*, ensure safety, satisfy national security concerns, and confirm compliance with international obligations. These are common elements of state licensing/authorization procedures.[19] Applications for proposed private missions to recover or otherwise appropriate space resources merely for the right to claim exclusive ownership thereof, devoid of any specific use, could be expected to face difficulty in the regulatory process, and to attract opposition from other private entities as well as from some foreign governments. Neither the U.S. Space Act nor the Luxembourg Law override the obligations to comply with the OST. Thus, the rights and benefits accorded to the private sector by the U.S. Space Act and the Luxembourg Law may be largely illusory without a specific context for a proposed mission.

What, then, if the private entity included a specific use for the resource in its application for authorization? Exactly, that is the point. When a use is specified, the inquiry shifts from the "commercial recovery" or appropriation of the resource to what happens to the resource after recovery—that is, what can the private entity do with the resource; what products or services can be made or performed with the resource; and what transfers or other dispositions can be made of the resource? These are enterprise rights, not property ownership rights, and the interests of the private sector are in the use, not just the recovery, of the resources. The proposed use of the resource may be the determinative factor in regulatory assessments of whether a specific mission will receive authorization from the state.

The articulation of enterprise rights will serve the interests of the commercial sector by providing the certainty and specificity it has been

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[19] *See generally* NATIONAL REGULATION OF SPACE ACTIVITIES (Ram S. Jakhu ed., 2010); JULIAN HERMIDA, LEGAL BASIS FOR A NATIONAL SPACE LEGISLATION (2004).

seeking. This elaboration will also serve the interests of the international community by eliminating the contentious disputes over property rights and seeking a consensus on the range of uses which can be made of space resources. Thus, the development of space law can further enhance international peace and security as it promotes the opportunities for the private sector in space.

The pace of maturation of enterprise rights in space resources will be driven by the technological capability and entrepreneurial vision of the private sector, and will be a corresponding and continuing work in progress. Different models may be necessary for different circumstances, such as the specific celestial body, the type of resource, its scarcity, difficulty of acquisition, etc.[20] The common regolith of the Moon does not necessarily need to be treated in an identical manner to the rare water ice at the South Pole, and the resources of an asteroid do not necessarily need to be subject to the identical legal regime as the resources of the Moon. Some areas of celestial bodies—or even the entire body itself—may be so unique and important for scientific study or other reasons that commercial utilization should not occur.[21] A blanket declaration that all resources are the property of the entity recovering or obtaining the resource fails to consider these salient factors. What is needed is a flexible approach that considers all of these various elements.

PRIVATE APPROPRIATION

A popular assertion by proponents of private ownership of space resources is that Article II of the OST prohibits "national appropriation," but fails to mention "private appropriation"—therefore, the latter is not prohibited. It is axiomatic that provisions of a treaty are to be read and interpreted in the context of all relevant parts of the international agreement.[22] Although private entities are not mentioned in Article II, they are expressly referenced in the first sentence of Article VI, which defines the term "national" (as used in the treaty) to include activities of both governmental agencies and non-governmental entities. The national character of private entities conducting activities in space is confirmed by the second sentence of Article VI, which requires that states authorize and continuously supervise the activities of their non-governmental entities in

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[20] *See* C. WILFRED JENKS, SPACE LAW 275 (1965).

[21] MA, *supra* note 12, art. 7.3. *See generally* Ivan Almár, *New Concepts for an Advanced Planetary Protection Policy, in* PROTECTING THE ENVIRONMENT OF CELESTIAL BODIES 31–32 (Mahulena Hofmann, Petra Rettberg & Mark Williamson eds., 2010) (discussing the concept of "planetary parks").

[22] Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331.

space. It is further confirmed by the declarations in Articles VI and VII that states are internationally responsible and liable for national activities in space.

An additional comment on the requirement that states authorize the activities of their non-governmental entities in space, a state cannot authorize a private entity to conduct an activity which the state itself is prohibited from conducting under international law. The state lacks the authority to legally countenance the violation of treaty obligations by the subterfuge of utilizing the private sector to accomplish the prohibited conduct. No treaty would have meaning if states could circumvent prohibitions on conduct by outsourcing the activity to its private entities.[23]

With regard to the derivation of ownership by the trafficker in purported lunar deeds mentioned by Professor Blount, the entire claim is beyond specious. While a county recorder performed a ministerial act of recording a self-prepared and self-serving piece of paper, there is no basis to assert that the county recorder could convey the legal ownership of the Moon to anyone, nor that the recording of the piece of paper constituted a legal grant or recognition of the ownership purportedly reflected in the paper. County recorders do not grant or convey property by recording deeds, nor do the recorders verify or vouch for the substantive validity of any document they record. To the contrary, the function of the county recorder is to maintain a repository of documents that are open to the public. They are only responsible to confirm that documents submitted meet minimum requirements for recording, such as signature, notarization, etc.—not that the document is legally sufficient to accomplish its purpose.

Nor can the mere sending of a letter to government officials or the United Nations confer any presumptive rights to claim ownership of the Moon. The absence of a response from government officials or the UN does not operate as a grant or recognition of ownership rights. Governments do not have any obligation to respond to every crackpot scheme that someone sends to them, and silence by a government does not equal consent, particularly where there is no obligation to respond.

The claim of ownership of the Moon or other celestial bodies by a private entity is meaningless unless it is recognized and enforced against other parties. The recognition or enforcement of private appropriation would require state action, and any such state action would constitute national appropriation by any other means in violation of Article II of the

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[23] JENKS, *supra* note 20, at 201; P. Sterns et al., *Preliminary Jurisprudential Observations Concerning Property Rights on the Moon and Other Celestial Bodies in the Commercial Space Age*, 39 PROC. ON L. OUTER SPACE 50, 56 (1997); Van Traa-Engelman, *Clearness Regarding Property Rights on the Moon and Other Celestial Bodies*, 39 PROC. ON L. OUTER SPACE 38, 42 (1997).

OST.[24]

KEEP-OUT ZONES

Some proponents of space commercialization assert that ownership of space resources alone is not sufficient to protect their interests, and that it is necessary to establish a so-called keep-out zone extending a "reasonable distance" from a resource recovery facility within which other entities are to be excluded. Article II makes it clear that the occupation of an area on a celestial body does not give rise to any right of ownership. None of the provisions of the *corpus juris spatialis* pertaining to the establishment of facilities and stations on celestial bodies include a right to claim exclusive occupation of an area forming a perimeter around the structure as a keep-out zone. To the contrary, Article 9.1 of the MA provides that parties shall utilize only that part of the surface and subsurface necessary to satisfy the needs of the station. Thus, the establishment and occupation of a facility on a celestial body does not vest the operator with any ownership right to the surface, subsurface, or the resources in place. Similarly, the use of an area, which could include the collection or extraction of resources, does not support a claim of ownership of the area utilized. The declaration of a keep-out zone is a claim of exclusive right of occupation to the exclusion of others, which by its nature is a violation of the non-appropriation principle, as well as of other provisions of the OST, such as the right to explore all areas of celestial bodies in Article I. An entity conducting a mission has an interest to be protected in the right to establish and conduct the mission or operations without interference from other entities.[25] These rights are expressly recognized and protected in the current *corpus juris spatialis* rendering unnecessary the imposition of keep-out zones.

States have the right to protect the security and safe operation of their installations, but do not have the unfettered ability to exclude other states from areas on celestial bodies, including areas in the vicinity of facilities and other structures. States must conduct their activities so as to not harmfully interfere with the activities of any other state.[26] In addition, states must allow representatives of the other states to visit facilities on celestial bodies, subject to advance notice and appropriate arrangements for security and the needs of the installation.[27] While the OST conditions

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[24] *Position Paper on Space Resource Mining*, INT'L INST. OF SPACE LAW (Dec. 20, 2015), https://perma.cc/3XJM-BNWD.

[25] Hofmann & Bergamasco, *supra* note 10, § 3.2 (noting this right extends to the maintenance of the natural celestial environment).

[26] OST, *supra* note 1, art. IX; MA, *supra* note 12, arts. 5, 8.3.

[27] OST, *supra* note 1, art. XII; MA, *supra* note 12, art. 15.1.

this right of visitation on the basis of reciprocity, the MA does not impose this condition. With or without reciprocity of visitation, the requirements of advance notice and appropriate arrangements for security of the facility go a long way toward protecting the legitimate interests of an entity to conduct operations without interference, negating the claim in favor of the imposition of keep-out zones. Of course, emergency or exigent circumstances presenting a risk to human life take precedence, and OST Article V, MA Article 10, and the Return and Rescue Agreement[28] require that all aid and assistance be rendered to astronauts in distress.

"CLAIM JUMPING" IN SPACE

Similar to keep-out zones, the assertion has been made that the purported interests of an entity to exclusive occupation of an area for resource extraction require protection from "claim jumping." The fear of having a facility on a celestial body overrun by cosmic miscreants is vastly overstated. Only a handful of nations possess the technological capability to conduct missions to celestial bodies, and the number of private entities possessing the ability to just launch a payload into Earth's orbit is extremely limited. While several companies have announced their intention to conduct missions to mine lunar and asteroidal resources, it will be years before any of them are close to overcoming the technological and financial hurdles to becoming fully operational. After a facility is established, a potential claim jumper would need to develop technology specifically designed to overrun that facility or otherwise wrest control or terminate the operations conducted *in situ* on the Moon or other celestial body. It is interesting to note that none of the companies currently announcing plans for resource extraction operations have either identified elements of other entities' proposed operations that are designed to or could be used to interfere with their own mission plans, or included defensive components into their publicly announced plans.[29]

The source of potential claim jumpers—that is, entities that conceivably could conduct a mission to interfere with *in situ* operations—are: the government of the operator; private companies from the same country as the operator; a foreign government; a foreign private company; and a rogue entity. A private company operating a space mining facility must receive the approval of its own government to conduct its mission pursuant to Article VI of the OST. It is unlikely that the state granting the

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[28] Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, Dec. 3, 1968, 19 U.S.T. 7570.

[29] OST, *supra* note 1, art. IV (noting that the inclusion of fortifications and weapons in planned installations would violate Article IV of the OST).

authorization will conduct a mission to interfere *in situ* with the activities it approved. Should an issue with the authorized entity arise, there are traditional remedies available to the government which are much more rapid, responsive, effective and economical to contend with the problem, and which, importantly, can be accomplished on Earth. These remedies range from the cancellation, revocation, or termination of the authorization to conduct the mission, to the administrative and legal procedures available and appropriate pursuant to the local law including, in proper cases, seizure of mission control facilities, bank accounts, and other assets, as well as criminal charges against company officials. In addition, the *in situ* facility will be dependent upon receiving materials and services from Earth to support the operations, which could include telecommunications, software, and items such as fuel, replacement parts, and other supplies. These materials and services could be delayed or withheld to compel compliance with governmental requirements, subject of course to humanitarian considerations.

Claim jumping is unlikely from other domestic private entities of the state of the operator. Just as the operator must receive authorization from the state, so must any other private entity seeking to conduct a mission to the celestial body. The specific form and structure of the authorization procedures vary from state to state, and provide a mechanism for entities seeking approval to apply for a license or other form of an official grant of authority.[30] An application which disclosed that the *raison d'etre* for a mission was to interfere with the operations *in situ* of a licensed third party would have little prospect of receiving governmental approval. Even if this intention was somehow hidden within other proposed operations, the authorization process can be expected to include a review of mission plans to determine whether the mission would potentially cause interference with the activities of any other entity. Should the potential for interference be found, the application can be denied. Moreover, a previously licensed third party would be alert to possible intentional or unintentional interference with its own operations, and would object or otherwise intervene in the application process of another entity. In the event a second entity was to obtain approval to conduct certain activities, and while *in situ* sought to "claim jump" or otherwise interfere with the first licensed entity, many of the same remedies mentioned above would be available to the aggrieved party including, in appropriate cases, resorting to the courts for injunctive relief.

Where a foreign private entity seeks authorization from its own government to conduct a mission which could cause interference with the activities of a licensed private entity, the local law of the foreign

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[30] *See generally* NATIONAL REGULATION OF SPACE ACTIVITIES, *supra* note 19.

government may grant standing to that licensed entity to raise its concerns during the authorization process. Alternatively, the licensed entity could request its own government to raise the concerns on its behalf with the foreign government. Article IX of the OST provides that states are to conduct international consultations where their activities could potentially cause harmful interference with the activities of other parties. This would apply whether the foreign activity was proposed or conducted by a private entity or the foreign government itself. These consultation provisions of Article IX certainly are not a perfect or complete solution, but are an existing legal process for the peaceful resolution of disputes, and a framework which can be further elaborated as an application of the rule of international law as discussed by Professor Blount. The potential for foreign interference with *in situ* operations is not sufficient justification to warrant the imposition of keep-out zones or other measures purportedly to protect against claim jumping, which are contrary to the non-appropriation principle. International consensus was reached that the framework for consultations was a suitable process when states were the only entities conducting missions in space. This framework is no less suitable as a foundation for the expansion of the private sector into space, as the appropriate state is internationally responsible and liable for the activities of its authorized private entities. If harmful interference were to occur, and the governments involved were not able to resolve the matter by consultations or other diplomatic means, it would signify a much larger breakdown in their relations than is presented by the specific scenario taking place on a celestial body.

This brings us to the final potential source of claim jumper—a rogue entity, not subject to or affiliated with a government, and operating outside of the rule of law. There are individuals and companies that have the economic resources to develop missions to celestial bodies. It is another matter, however, whether they could acquire the means to conduct such a mission for purposes of interplanetary piracy. Space missions are difficult and complex, and require long lead times and significant human and material resources to initiate, plan, organize, implement, and operate. Many of the hardware and software resources, in particular, are not readily available and cannot be acquired without government approval. And while the rogue entity would not care about government approval, the supplier of the materials would care as the sale or transfer could not remain secret, especially after the mission was launched and underway, and the companies and their management personnel would be in overwhelming legal, including criminal, jeopardy. That will be a strong disincentive for anyone to cooperate with making illegal transfers of materials or services to a rogue entity, and there would need to be a very long sequence of illegal transactions to successfully complete a claim

jumping mission. Thus, although the possibility of claim jumping by a supervillain rogue entity cannot be completely ruled out, it does not appear to be of significant concern.

ABROGATION OF THE NON-APPROPRIATION PRINCIPLE

It often has been asserted that the non-appropriation principle in Article II of the OST should be abrogated as a detriment to the commercial development of space. Aside from the danger to international peace and security discussed above that would result from the abrogation of Article II, there are additional reasons why the absence of the non-appropriation principle would not benefit the private sector. Withdrawal from the OST would not relieve a state of the obligation to comply with the non-appropriation principle because it is widely considered to have become a principle of customary international law, binding on all states irrespective of any specific treaty expression. Even if the non-appropriation principle suddenly disappeared from international law, space would not be opened to a new "gold rush," with celestial bodies and resources free for the taking by those who go out now and stake claims. States have already established a physical presence by landing or impacting on the Moon, Mars, Venus, Jupiter, and Saturn, and have discovered moons, asteroids, comets, and other objects within and without the solar system. These states, in particular Russia as the successor to the Soviet Union, could resurrect the right to claim ownership to orbits, trajectories, and celestial objects based on their historical "firsts" of discovery and exploration. These rights of ownership could result in overlapping claims, creating uncertainty and subjecting private ventures to multiple layers of conflicting authorities imposing financial and other burdens on their ability to conduct missions. Far from creating a clean slate for the private sector to exploit, the abrogation of Article II would result in a much more complex and daunting environment for private enterprise.

WHAT ARE CELESTIAL BODIES?

Article II prohibits national appropriation of "outer space, including the Moon and other celestial bodies," but the term "celestial bodies" is not defined in the OST. Thus, it can be asserted that in the absence of an accepted definition, asteroids are not celestial bodies, and therefore are free for the taking. The OST identifies only one specific celestial body by name, that is the Moon of the Earth. The references to the Moon in the context of the provisions of the OST do not include moons of other planets. Just as the moons of other planets are not mentioned, the planets themselves are not specifically identified by name in the OST. The only reference other than to the Moon of Earth is the general term "other celestial bodies." Clearly, this

term is intended to be inclusive and expansive in its scope, encompassing, *inter alia*, the planets of our solar system and their moons. There is nothing within the OST to indicate that "other celestial bodies" should be limited to the planets and their moons,[31] and there are no expressly identified bodies which are excepted or excluded. It would have been a simple matter for the drafters of the treaty to insert an express exclusion for asteroids, comets or any other celestial body if that had been the international intent, just as Article 1.3 of the MA excepts extraterrestrial material that reaches the surface of the Earth by natural means. Moreover, as discussed by Professor Blount, state practice in missions to asteroids and comets, as well as to planets and their moons, have not included any claim of ownership or appropriation by the operators of the missions. Therefore, the term "other celestial bodies" should have an inclusive interpretation, and encompass celestial bodies of all natures unless and until an international agreement is reached to exclude one or more specifically identified category of object.[32]

MOON AGREEMENT

The MA was opened for signature forty years ago, and has been in force since 1984. However, it has been ratified or signed by only a small fraction of the number of states that have become party to the OST.[33] The most significant impediment to acceptance of the MA is Article 11, which declares the Moon and its resources to be the common heritage of mankind and subject to a future international regime. Article 11 of the MA expressly provides that resources in place are not subject to appropriation by states or private entities. The right to use the Moon and its resources is confirmed throughout the provisions of the treaty, however, the enterprise rights in extracted or recovered resources are not articulated in any detail. These enterprise rights would be included in the subjects to be considered by the future international regime, which states parties to the MA "undertake to establish" prior to exploitation of the resources becoming feasible.

I have included references to provisions of the MA, other than Article 11, which correspond or complement the OST throughout the foregoing comments. Although the MA has achieved only limited acceptance, it should not be disregarded. It is a treaty in force and binding upon all states

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[31] *See* MA, *supra* note 12, art. 1.1 (providing that the treaty applies to other celestial bodies within the solar system).

[32] Hofmann & Bergamasco, *supra* note 10, § 3.2.2.

[33] *Status of International Agreements Relating to Activities in Outer Space as of 1 January 2019*, UNITED NATIONS OFF. FOR OUTER SPACE AFFS., https://perma.cc/F6ZY-AJTM (last visited Oct. 11, 2019) (highlighting that as of January 1, 2019, 109 states are party to the OST, and another 23 have signed but not ratified the agreement. On January 19, 2018, Armenia became the 18th state party to the MA, and an additional 4 states have signed the treaty).

which are party through formal ratification as well as those that have signed the agreement.[34] Signatories include space active states such as India, which has been conducting a multi-year Martian orbiter mission, and in 2019 launched a landing and rover mission to the Moon (which unfortunately failed on final landing approach). Parties and signatories to the MA include members of ESA, namely Belgium, France, the Netherlands, and Austria, and those states must comply with its provisions for any mission in which they participate. A detailed discussion of Article 11 of the MA is beyond the scope of these comments, but for present purposes it is important to note that the MA does not prohibit exploration and use of the Moon and its resources, nor does it impose a moratorium on commercial development pending the potential establishment of the international regime. A moratorium would apply only to those states which have accepted the MA, and therefore would be a significant disincentive for states to become party to the agreement.

Article 11 may actually be an incentive for states to accept the MA, especially for states which seek to encourage commercial development of extraterrestrial resources. Article 11.5 provides that "States Parties to this Agreement hereby undertake to establish an international regime, including appropriate procedures, to govern the exploitation of the natural resources of the Moon as such exploitation is about to become feasible. This provision shall be implemented in accordance with Article 18 of this Agreement."

Article 18 provides a procedure for state parties to formally review the MA. Significantly, after the Agreement has been in force for five years, that is, after 1989, one third of the state parties can request that the Secretary General of the UN convene a conference to consider, *inter alia*, the implementation of Article 11.5. This conference shall be held if a majority of the state parties concur. It is clear that the increasing technical and financial capabilities of private companies to mine lunar materials are advancing the day in which "such exploitation is about to become feasible." One measure of feasibility could be the enactment of national laws applicable to extraterrestrial resources, such as the U.S. Space Act and the Luxembourg Law. Thus, at any time, only six states that are party to the MA are necessary to request the conference to consider the establishment of an international regime, and the concurrence of only four more state parties is required to compel the Secretary General to convene the conference.[35]

Once convened, a small universe of 22 countries, including the ones

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[34] Vienna Convention, *supra* note 22, art. 18(a).

[35] II COLOGNE COMMENTARY ON SPACE LAW 415–16 (Stephan Hobe, Bernhard Schmidt-Tedd, Kai-Uwe Schrogl eds., 2013).

which have signed but not ratified the MA, could establish and control the international legal framework within which extraterrestrial resources are commercially exploited. The formal role, if any, of states which have not signed or ratified the MA in this conference is to be determined, but in any event could be expected to be different, and therefore somewhat diminished, from that of states which have accepted the MA.[36] Even if the legal framework that emerged from the conference was binding only on the states that have ratified or signed the MA, it nevertheless would constitute a set of internationally accepted standards of conduct, and would influence and impact the manner in which missions by all states will be planned and conducted. If nothing else, it would add a new layer of uncertainty for the commercial sector, which would complicate the legal, regulatory, and financial obstacles to conducting a mission.

CONCLUDING REMARKS

The concept of "enterprise rights" separate from "national appropriation" or ownership of space resources has been criticized as "a distinction without a practical difference" in regard to non-spacefaring nations. This argument asserts that non-spacefaring states have a right to share in the benefits of space resources, derived from the common heritage principle of the MA. Further, the sharing of benefits can "presumably" be accomplished by participation in a revenue stream, a form of taxation, or some other financial means,[37] similar to the arrangement in the U.N. Convention on the Law of the Sea.[38] However, a legal regime based on enterprise rights in the use of space resources has several practical differences which are advantageous to the interests of non-spacefaring nations compared to a regime founded on claims of ownership.

First, the determination, articulation and elaboration of enterprise rights by definition will include consideration of the rights of all stakeholders, including participation in the benefits derived from the use of space resources by all states, not just the non-spacefaring states that have

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[36] *Id.* at 416 (taking the view that only states which are party to the MA would be participants in the conference. However, since the conference is to be convened by the Secretary General, interested members of the UN not party to the MA could be expected to petition for a seat at the table. Nevertheless, even if such other states are allowed to participate in some manner, states which are party to the MA would control the process, and could manage the agenda, exercise authority over the procedures, and reserve to themselves certain rights and privileges, for example the ability to propose and/or vote on resolutions.).

[37] GLOBAL SPACE GOVERNANCE: AN INTERNATIONAL STUDY 403 (Ram S. Jahku and Joseph N. Pelton eds., 2017).

[38] United Nations Convention on the Law of the Sea, art. 82, Dec. 10, 1982, 1833 U.N.T.S. 3 (entered into force Nov. 16, 1994)

accepted the MA. Domestic laws centered on ownership of resources countenance broad dominion over the disposition of space resources and exclude any assurances that benefits would be shared with non-spacefaring nations or anyone else in any way. By its very nature the focus on ownership of space resources creates the dilemma of how to recognize let alone protect the legitimate interests of stakeholders including the non-spacefaring states.

Second, viewing the sharing of benefits through the lens of some form of distribution of a revenue stream, whether by a system of taxation, royalties or some other tribute exacted by an unspecified and undefined entity, is distorted, limited and myopic, and considers only one aspect of the exploitation of space resources. Sharing in revenues implies a sustained profit, and under this construct non-spacefaring nations would not have a right to receive anything from ventures which are not profitable. Yet financial reward is not the only potential benefit that may be derived from activities to extract, and use, space resources. Even if the venture fails to produce a direct profit from activities *in situ*, there are other potential benefits which could be obtained from the technology employed in the activities and otherwise. This does not mean that there should be a mandatory transfer of technology, although some of the technology developed and adapted for the venture could in appropriate circumstances be shared by a variety of means, including licensing of proprietary intellectual property. In addition, the technology could be shared by direct or indirect application to specific local circumstances. Again, these are matters of enterprise rights, which need to be determined notwithstanding declarations in domestic laws that space resources can be owned or appropriated.

Third, and most importantly, the focus on claims of ownership fails to serve the interests of non-spacefaring states and the broader global community in maintaining international peace and security. Unilateral domestic recognition of claims of ownership of space resources inevitably will give rise to international objections based on the non-appropriation principle. As such, the enactment of these legal regimes is unnecessarily contentious, provocative, confrontational and destabilizing. It is precisely the divisive character of the focus on property ownership that has contributed to the calls for the establishment of a dedicated fighting space force as a new branch of the military.[39] While the ownership regimes

[39] The exploration and use of outer space has been built on a foundation that armed conflict should not be exported from the Earth into the heavens. This fundamental principle of international relations is reflected in the OST, especially in Article IV which provides that the Moon and other celestial bodies shall be used exclusively for peaceful purposes. The establishment of military facilities, testing of weapons, and conducting military maneuvers on

established by the laws of the United States and Luxembourg have not yet been applied to actual ventures on the Moon or other celestial bodies, there is no question but that private enterprise is moving in that direction, and when that occurs, the tension feeding the global divide will intensify unless these issues are satisfactorily addressed.

A legal regime which is focused on the definition, elaboration and articulation of enterprise rights based on the use rather than the ownership of extracted space resources avoids exacerbating these tensions, and allows for the development of appropriate rules in tandem with the advancements in and application of required technological capabilities. All stakeholders will be able to participate in the global discussion, and the interests of the non-spacefaring states will be given voice. In this way space law will be able to further the fundamental purpose expressed in Article I of the OST, that of promoting the peaceful exploration and use of outer space "for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, [which] shall be the province of all mankind."

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celestial bodies are prohibited. In addition, states are forbidden from placing nuclear weapons or any other kind of weapon of mass destruction in Earth orbit. It is naïve to conclude that an armed military conflict on the Moon would not spread to Earth. Once it does spread to Earth whatever happens in space likely will not be determinative of the outcome. *See generally* Leslie Tennen, *Is a Military Space Force Justified*, 1(19) ROOM 92 (2019).

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An "Obvious Truth": How Underfunded Public Defender Systems Violate Indigent Defendants' Right to Counsel

*Molly Heidorn**

"[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."[1]

INTRODUCTION

One of the most fundamental tenets of the American criminal justice system is that it is adversarial—the prosecutor brings forth charges against the defendant, and the defendant is provided with certain protections: the presumption of innocence, the right to confront one's accusers, the right to a public trial by a jury of one's peers, and the right to have the evidence proven beyond a reasonable doubt.[2] However, protection of these rights is only ensured when the most basic of a criminal defendant's constitutional rights is effective in practice—the right to counsel.[3]

The Sixth Amendment guarantees every criminal defendant the right to counsel, a constitutional protection that exists regardless of the defendant's

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[1] Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[2] Monroe Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 57 (1998).

[3] *See* U.S. CONST. amend. VI; *Gideon*, 372 U.S. at 344.

income.[4] This has been called "Gideon's promise"[5]—the Supreme Court's declaration that indigent criminal defendants have a constitutional right to court-appointed counsel.[6] More importantly, indigent defendants have a constitutional right to "effective assistance [of counsel] . . . sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the [Sixth] Amendment envisions."[7] In other words, the right to counsel exists to preserve the adversarial system and to ensure a fair trial or disposition for anyone accused of a crime.[8]

A defense counsel is effective and fulfills this adversarial role when he or she has the necessary time, funding, and resources to properly investigate, independently fact-check, conduct legal research, hire experts, and prepare each defendant's case.[9] However, inadequate funding of a public defender system undermines a lawyer's ability to carry out these duties, which are necessary to preserving the adversarial nature of the American criminal justice system and to protect indigent defendants' Sixth Amendment right to counsel.[10] Indeed, "Gideon's promise" has remained largely unfulfilled to date.[11] Numerous lawsuits filed across the United States against state public defender agencies, which allege constitutional violations for a state or county's failure to properly fund public defender agencies, evidence this unfulfilled promise.[12]

This Note argues that an inevitable violation of indigent defendants' constitutional rights under the Sixth Amendment occurs when state public defender agencies are underfunded. Part I.A discusses the lineage of Sixth

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[4] *See* U.S. CONST. amend. VI; *Gideon*, 372 U.S. at 344.

[5] *See generally* GIDEON'S PROMISE, https://perma.cc/4JX7-BYFX (last visited Jan. 5, 2019) (describing Gideon's Promise as an organization that strives to train the new generation of public defenders who want to fight inequality in the criminal justice system and ensure quality representation despite onerous caseloads and lack of funding).

[6] *Gideon*, 372 U.S. at 344.

[7] Strickland v. Washington, 466 U.S. 668, 687–88 (1984).

[8] *Gideon*, 372 U.S. at 344 (recognizing that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him").

[9] *See Strickland*, 466 U.S. at 680.

[10] *Id.*

[11] *See generally* Lorelei Laird, *Starved of Money for Too Long, Public Defender Offices Are Suing—and Starting to Win*, ABA J. (Jan. 1, 2017), https://perma.cc/QP7F-UJ2R (providing an overview of the Sixth Amendment violation argument that stems from underfunded public defender systems).

[12] *See, e.g.*, Yarls v. Bunton, 231 F.Supp. 3d 128, 129 (M.D. La. 2017), *appeal dismissed*, 905 F.3d 905 (5th Cir. 2018); Cox v. Utah, No. 2:16–cv–53–DB, 2016 WL 6905414, at *2 (D. Utah 2016), *appeal dismissed*, No. 16–4205 (10th Cir. Apr. 24, 2017); Kuren v. Luzerne County, 146 A.3d 715, 715 (Pa. 2016).

Amendment cases that eventually culminated in the infamous *Gideon v. Wainwright* case in which the Supreme Court declared that state criminal defendants charged with serious offenses are constitutionally entitled to court-appointed counsel.[13] Part I.B discusses *Gideon*. Part I.C reviews the line of post-*Gideon* cases, which in sum state that all indigent criminal defendants are entitled to court-appointed counsel if he or she faces potential jail time for a criminal charge.

Part II.A reviews the "birth" of the public defender movement. Part II.B briefly explains the general structure and funding mechanisms of state public defender agencies. Part II.C compares two state public defender systems which are funded differently: Massachusetts, which is entirely state-funded, and Pennsylvania, which is entirely county-funded.

Part III.A discusses *Gideon*'s mandate—a criminal defendant's right to counsel, which exists to preserve the right to a fair trial and the right to have one's case subjected to meaningful adversarial testing. Part III.B explores the consequences of underfunded public defender systems, such as wrongful convictions, excessive caseloads, and inadequate resources. Part IV analyzes two ways in which a criminal defendant may establish a violation of his or her right to effective assistance of counsel: an ineffective assistance of counsel claim, or a constructive denial of counsel claim.

Finally, Part V examines several cases in which indigent defendants alleged constructive denial of counsel due to underfunded public defender systems, and were both successful and unsuccessful in suing their respective states for Sixth Amendment violations. Part V.A analyzes two lawsuits which were recently dismissed, not on their merits, on federalism and procedural grounds. Part V.B examines *Kuren v. Luzerne County*, a model case in which the Pennsylvania Supreme Court held that pre-trial claims of constructive denial of counsel are justiciable and paved the way for indigent defendants in Pennsylvania to obtain relief for constitutionally-deficient public defender systems. Part V.C discusses two recently-filed lawsuits which allege constructive denial of counsel, and the movement in the United States to protect indigent defendants' Sixth Amendment right to counsel by securing adequate funding for indigent representation.

I. Background

A. *The Sixth Amendment and the Right to Counsel: Pre-*Gideon

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[14] The constitutional command that every criminal defendant has a

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[13] *Gideon*, 372 U.S. at 344.

[14] U.S. Const. amend. VI.

right to counsel is seemingly straightforward.[15] However, prior to 1963, this right was in effect only exercised by wealthy defendants who could afford to hire an attorney, and by criminal defendants charged with federal crimes; at that time, they were the only indigent defendants constitutionally entitled to court-appointed counsel.[16] Thus, the question remained: Were states constitutionally required to provide counsel to indigent defendants charged with criminal offenses in state courts?[17]

In 1932, the Supreme Court initially faced this question when it considered whether denial of court-appointed counsel to state criminal defendants charged with capital crimes violated the Fourteenth Amendment by effectively denying the defendants' right to a fair trial.[18] In *Powell v. Alabama*,[19] nine young black defendants, known as the "Scottsboro Boys,"[20] were falsely accused of raping two young white women.[21] The defendants were represented by "an inexperienced, out-of-state lawyer and an aging, half-hearted local attorney" who were appointed the day before trial, leaving no time for investigation, research, or trial preparation.[22] The defendants were convicted and several of the Scottsboro Boys' appeals made their way to the Supreme Court.[23]

In holding that the defendants' right to a fair trial had been violated, the Court noted several factors, including the fact that the defendants were charged with a capital crime, the "ignorance and illiteracy of the defendants, their youth, [and] the circumstances of public hostility."[24] Ultimately, the failure of the Alabama trial court to appoint counsel in a manner which allowed the defense attorneys adequate time for preparation, coupled with the factors noted above, amounted to constitutional error.[25] However, the

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[15] *See* Johnson v. Zerbst, 304 U.S. 458, 465 (1938) ("The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights . . .").

[16] *See id.* at 463.

[17] *See* WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 150 (1955) (noting that prior to 1932, "no case dealing with the duty of appointing counsel had yet emerged").

[18] Powell v. Alabama, 287 U.S. 45, 61 (1932) (deciding "whether the denial of the [Sixth Amendment right to] assistance of counsel contravenes the due process clause of the Fourteenth Amendment to the Federal Constitution").

[19] *See generally id.*

[20] *See* Alan Blinder, *Alabama Pardons 3 'Scottsboro Boys' After 80 Years*, N.Y. TIMES (Nov. 21, 2013), https://perma.cc/A3K4-KPD8.

[21] BEANEY, *supra* note 17, at 151–52.

[22] BEANEY, *supra* note 17, at 153.

[23] *Powell*, 287 U.S. at 49.

[24] *Id.* at 71.

[25] *Id.* ("[W]e think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process."); BEANEY, *supra* note 17, at 153–54

Court emphasized its narrow holding:

> All that it is necessary now to decide, as we do decide, *is that in a capital case*, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.[26]

The *Powell* holding left open the question of whether state courts were constitutionally required to provide counsel to indigent criminal defendants charged with non-capital crimes.[27] A decade later, the Supreme Court answered this question in the negative.[28] In *Betts v. Brady*, the Court was faced with the issue of whether the failure to appoint counsel for indigent defendants violated the Due Process Clause of the Fourteenth Amendment.[29] The Court reasoned that each case had to be examined on its own particular facts.[30] Specifically, the Court stated that "in one setting [what may] constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial."[31]

Therefore, post-*Betts*, an indigent criminal defendant charged with a non-capital offense in a state court was not constitutionally entitled to court-appointed counsel unless he or she could establish that the absence of counsel would undermine the fundamental fairness of the criminal proceeding.[32] Essentially, the Supreme Court rejected the argument that the absence of counsel in a criminal proceeding automatically violates a criminal defendant's right to a fair trial.[33] Rather, court-appointed counsel was only

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(explaining that the majority opinion in *Powell* found the insufficient preparation time coupled with the "mob hostility, judicial partiality, and the denial of equal protection through exclusion of Negroes from the jury" resulted in the "lack of effective appointment of counsel . . . which constituted a denial of due process").

[26] *Powell*, 287 U.S. at 71 (emphasis added).

[27] *See id.* (emphasizing the narrow holding of the case as applied to the case's specific facts).

[28] *See* Betts v. Brady, 316 U.S. 455, 471–73 (1942).

[29] *Id.* at 461.

[30] *Id.* at 462.

[31] *Id.*

[32] *Id.* at 471–73 (finding that the defendant was not deprived of a fair trial since he was a man "of ordinary intelligence and ability to take care of his own interests . . . [I]f the situation had been otherwise and it had appeared that the petitioner was . . . at a serious disadvantage by reason of the lack of counsel, a refusal to appoint would have resulted in the reversal of a judgment of conviction").

[33] *See id.* at 465 (rejecting the rationale that the Sixth Amendment right to counsel "expresses

constitutionally required when facts of that specific case warranted it.[34] Indeed, the Court held:

> [W]hile want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.[35]

Justice Black dissented in *Betts*, and argued that the Sixth Amendment is applicable to the states through the Fourteenth Amendment.[36] His dissent began by restating the holding from *Powell* that the right to counsel is "fundamental" and necessary to a fair trial,[37] and noting that laymen "require[] the guiding hand of counsel" because ignorance about the law prevents a person from knowing how to establish his or her innocence in the face of prosecution by the state.[38] The dissent condemned the idea that an innocent man be subjected to a higher risk of conviction merely because of his indigence.[39] As a result, Justice Black would have held that the state trial court's failure to appoint counsel for the indigent defendant in *Betts* amounted to constitutional error.[40] His view would be vindicated two decades later when he authored the unanimous opinion in the landmark case that overturned the Court's holding in *Betts*.[41]

B. *The Right to Counsel in State Courts:* Gideon v. Wainwright

Two decades after its decision in *Betts*, the Supreme Court did an about-face and extended the right to court-appointed counsel to indigent criminal defendants charged with felony offenses in state courts.[42] The petitioner, Clarence Gideon, was charged in Florida state court with felonious breaking and entering.[43] Gideon requested court-appointed counsel, citing the Sixth

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a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment").

[34] *Betts*, 316 U.S. at 471–72 (noting that "[e]very court has power, if it deems proper, to appoint counsel where that course seems to be required in the interest of fairness").

[35] *Id.* at 473.

[36] *Id.* at 474 (Black, J., dissenting).

[37] *Id.* at 475 (citing Powell v. Alabama, 287 U.S. 45, 70 (1932)).

[38] *Id.* at 476 (citing *Powell*, 287 U.S. at 68).

[39] *Id.* ("A practice cannot be reconciled with 'common and fundamental ideas of fairness and right', which subjects innocent men to increased dangers of conviction merely because of their poverty.").

[40] *Betts*, 316 U.S. at 474 (Black, J., dissenting).

[41] *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

[42] *Id.* at 342, 345 (rejecting the rationale in *Betts* that "the Sixth Amendment's guarantee of counsel is not [a] fundamental right[]").

[43] *Id.* at 336–37.

Amendment.[44] The judge denied his motion, stating that Florida law only required him to appoint counsel in capital cases.[45] After a jury trial in which Gideon presented an opening statement, conducted cross-examination of state witnesses, presented his own defense, and provided a closing argument, Gideon was convicted and sentenced to five years of imprisonment.[46]

In overturning Gideon's conviction, the Supreme Court noted that the facts of the *Betts* case were "strikingly like the facts upon which Gideon here bases his federal constitutional claim."[47] In both cases, the defendants were charged with non-capital offenses, requested and were denied court-appointed counsel, conducted their own defenses, and were ultimately convicted.[48] Justice Black, writing for a unanimous court, revisited the question of whether denial of court-appointed counsel was "so 'offensive to the common and fundamental ideas of fairness' as to amount to a denial of due process."[49] Drawing from the reasoning in his *Betts* dissent, Justice Black concluded that the right to counsel is essential to a fair trial, and more importantly, the right to counsel is necessary to preserving the adversarial nature of the American criminal justice system.[50] As a result, state courts were constitutionally required to provide court-appointed counsel for indigent defendants charged with felony offenses.[51]

C. *The Expansion of the Right to Counsel: Post-*Gideon

The right to court-appointed counsel was subsequently extended to indigent defendants charged with petty and misdemeanor offenses in state courts.[52] In *Argersinger v. Hamlin*, the Supreme Court held that "no person shall be imprisoned for any offense . . . unless he was represented by counsel at his trial."[53] This case underscored the principle that the right to counsel is a prerequisite to the right to a fair trial.[54] The *Argersinger* holding was

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[44] *Id.* at 337.

[45] *Id.*

[46] *Id.*

[47] *Gideon*, 372 U.S. at 338.

[48] *See id.* at 338–39.

[49] *Id.* at 339.

[50] *See id.* at 344 (concluding that "[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours"); Betts v. Brady, 316 U.S. 455, 475 (1942) (arguing that the "right to counsel is fundamental").

[51] *Gideon*, 372 U.S. at 344.

[52] Argersinger v. Hamlin, 407 U.S. 25, 33, 37 (1972).

[53] *Id.* at 37.

[54] *Id.* at 33 ("The requirement of counsel may well be necessary for a fair trial even in a petty-offense prosecution.").

clarified in *Alabama v. Shelton*, where the Supreme Court held that a defendant who faces even the potential of incarceration is entitled to a court-appointed lawyer at the outset of the case.[55] The right to counsel has also been extended to juveniles in delinquency proceedings.[56] Thus, the cumulative effect of *Powell, Gideon, Argersinger,* and *Shelton* is that any defendant facing the potential of imprisonment for a criminal offense who is too poor to hire his or her own lawyer is entitled to court-appointed counsel.[57]

This constitutional right to counsel is triggered once adversarial proceedings have been initiated against a criminal defendant.[58] The right to counsel is especially important during pre-trial proceedings because "certain pretrial events may so prejudice the outcome of the defendant's prosecution that, as a practical matter, the defendant must be represented at those events in order to enjoy genuinely effective assistance at trial."[59] Indeed, the purpose of the Sixth Amendment is to provide criminal defendants with a competent adversary against the prosecutor—someone skilled in the rule of law who will be able to subject the state's case to meaningful adversarial testing.[60] Without a competent adversary, a criminal defendant's Sixth Amendment right to counsel may be violated.[61]

II. The Creation and Evolution of the Public Defender

A. *The Birth of the Public Defender*

Post-*Gideon*, states were constitutionally required to provide court-appointed counsel, also called public defenders, to indigent defendants charged with felonies.[62] However, the public defender movement mobilized long before the Supreme Court declared it a state obligation.[63] Many states

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[55] Alabama v. Shelton, 535 U.S. 654, 674 (2002).

[56] In re Gault, 387 U.S. 1, 34–42 (1967).

[57] *See Shelton*, 535 U.S. at 674; *Argersinger*, 407 U.S. at 33; Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Powell v. Alabama, 287 U.S. 45, 65 (1932).

[58] *See* Brewer v. Williams, 430 U.S. 387, 398 (1977) (noting that the right to counsel attaches "at or after the time that judicial proceedings have been initiated against him 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment'").

[59] Rothgery v. Gillespie Cnty, 554 U.S. 191, 217 (2008).

[60] *See* McNeil v. Wisconsin, 501 U.S. 171, 177–78 (1991) ("The purpose of the Sixth Amendment counsel guarantee . . . is to protect the unaided layman at critical confrontations with his expert adversary, the government . . .") (internal citations omitted).

[61] *See id.*

[62] *See Gideon v. Wainwright, the Watershed Movement*, SIXTH AMEND. CTR., https://perma.cc/ZKS3-82KJ (last visited Sept. 23, 2019) (noting that the *Gideon* decision resulted in "a relatively new idea: the professional legal defender for the public").

[63] *See Understanding Gideon's Impact, Part 2: The Birth of the Public Defender Movement*, SIXTH

already had systems in place to provide court-appointed counsel to indigent defendants under certain circumstances even when the Supreme Court initially rejected this idea in *Betts*.[64] Indeed, Justice Black noted in his *Betts* dissent that "[i]n thirty-five states, there is some clear legal requirement or an established practice that indigent defendants in serious non-capital as well as capital criminal cases . . . be provided with counsel on request."[65]

However, the idea of a public defender was the "brainchild" of Clara Shortridge Foltz, California's first female lawyer.[66] At the 1893 Chicago World's Fair,[67] Foltz advocated for the creation of an office which provided legal services for those who could not afford an attorney, and one that would match the resources and power of the prosecutor's office.[68] In particular, Foltz emphasized the importance of protecting innocent defendants.[69] In further support of her argument regarding the necessity of public defenders, Foltz cited prosecutorial misconduct, the power of the state, and police perjury.[70]

Foltz also made the astute observation that while the Constitution indeed grants an accused the right to a trial, the right to counsel, and the right to confront his or her accusers, these rights were essentially only

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AMEND. CTR., https://perma.cc/L2RD-E7PS (last visited Jan. 8, 2019) (noting that in 1893, Clara Shortridge Foltz, California's first female lawyer, "came up with the idea of a defense office for the public as a counterbalance to the office of the public prosecutor . . . [S]he lobbied long and hard for state governments to adopt her 'defender bill.'").

[64] *See* Betts v. Brady, 316 U.S. 455, 477 n.2 (1942) (Black, J., dissenting); *The Post-Betts Era*, SIXTH AMEND. CTR., https://perma.cc/N5RJ-3DDJ (last visited Sept. 23, 2019) (noting that "[w]ith the exception of Virginia, each state in the Union had a long-standing constitutional right to the assistance of counsel. But only in six states . . . did the state courts affirmatively interpret the right to counsel . . . [to mean that] the government was obliged to provide for counsel in criminal cases at public expense.").

[65] *Betts*, 316 U.S. at 477 (Black, J., dissenting).

[66] Laurence A. Benner, *The California Public Defender: Its Origins, Evolution and Decline*, CAL. LEGAL HIST. 173, 174 (2010).

[67] *See* Barbara Babcock, *Women's Rights, Public Defense, and the Chicago World's Fair*, 87 CHI.-KENT. L. REV. 481, 482 (2012) (describing how the Fair also hosted several legal and political forums, such as a nationwide meeting of women lawyers where Foltz delivered a speech on the need for public defender offices); Barbara Maranzani, *Chicago was Home to a Serial Killer During the 1893 World's Fair*, HIST. (May 1, 2013), https://perma.cc/22RY-GE2S (describing the Chicago World's Fair as a food, art, and technology exposition that drew a crowd of 26 million visitors on its 600-acre fairground).

[68] Babcock, *supra* note 67, at 481, 487 (noting that the Chicago World's Fair was a post-Civil War event between May and September 1893, during which time over half of the country's population attended. The fair drew notable women leaders associated with the women's suffrage movement such as Susan B. Anthony and Elizabeth Cady Stanton).

[69] Babcock, *supra* note 67, at 492.

[70] Babcock, *supra* note 67, 492–93.

exercised by wealthy defendants who could afford their own attorneys.[71] Moreover, she described the current state of criminal justice and its protections for criminal defendants as a "pathetic machinery [that] is provided for the defense of the innocent."[72] Foltz's view that every accused person is entitled to representation, regardless of wealth or poverty, was indeed realized in the Supreme Court's decision in *Gideon*.[73]

B. *The Structure and Funding of State Public Defender Systems*

About two decades after Foltz's speech at the Chicago World's Fair, the first public defender agency was founded in Los Angeles, California.[74] As noted by Justice Black in his *Betts* dissent, a majority of states had already begun to provide public defender services for their indigent defendants prior to the *Gideon* decision.[75] In the fifty years since the mandate in *Gideon*, three types of public defender systems have emerged: contract or flat-fee attorneys, assigned counsel programs, and public defender programs.[76]

Contract attorneys are private attorneys who contract to provide representation for a county's entire population of indigent defendants for a fixed sum.[77] Assigned counsel systems consist of private attorneys who agree to represent indigent defendants and are paid on a case-by-case basis or at an hourly rate.[78] These attorneys are also employed when a defendant has a conflict with the local public defender office.[79] In contrast, public defender programs are agencies created by the state or county, staffed by salaried part-time or full-time public defenders, and usually include support staff.[80] Most states use a combination of the three types of public defender systems.[81]

State public defense is funded through several different methods: state funding; county funding; or alternative funding, which includes federal

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[71] Babcock, *supra* note 67, at 493 (explaining that Foltz's argument highlighted that "burdening a constitutional right by making it costly can virtually obliterate it").

[72] Babcock, *supra* note 67, at 493.

[73] *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963); *see also* Babcock, *supra* note 67, at 493 (noting that Foltz argued that every defendant is entitled to "full, adequate, and free" representation).

[74] Benner, *supra* note 66, at 174.

[75] *See* Betts v. Brady, 316 U.S. 455, 477 (1942) (Black, J., dissenting). *See generally* Mosher, *Understanding Gideon's Impact*, *supra* note 63.

[76] Kate Taylor, *System Overload: The Costs of Under-Resourcing Public Defense*, JUST. POL'Y. INST. 4 (July 2011), https://perma.cc/SHK3-2PKY.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

grants or annual congressional appropriation,[82] private grants, court costs, and fines and fees.[83] As of 2008, twenty-three states provided 100% of funding for their public defender systems, five states provided between 85–99% of funding, three states provided 50–84% of funding, eighteen states provided more than 50% of funding, leaving Pennsylvania as the only state in which public defender systems are entirely county-funded.[84] Nationwide, however, 92% of indigent defense funding is provided by the states, with the remaining funds provided by local governments.[85]

C. *Comparing Two Opposite Ends of the Spectrum: Massachusetts and Pennsylvania*

The source of funding for a public defender system affects how public defense services are provided in each county or state, and a comparison of two public defender programs that are funded differently provides a tangible example.[86] The public defender system in Massachusetts is entirely state-funded.[87] In contrast, Pennsylvania public defender systems are entirely county-funded.[88] Funding is not the only disparity between the two systems, but the source and structure of funding provides insight into how each states' public defender system operates.[89]

In Massachusetts, the Committee for Public Counsel Services (CPCS) is a judicial branch agency consisting of board members from the judicial, legislative, and executive branch that oversees the state-wide agency.[90] CPCS

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[82] *See Indigent Defense Grants, Training and Technical Assistance*, U.S. DEP'T OF JUST., https://perma.cc/36XT-FGZX (last updated Oct. 24, 2018) (listing examples of federal support for public defender programs, such as grants, training programs, and wrongful conviction programs).

[83] *See Know Your State*, SIXTH AMEND. CTR., https://perma.cc/H3FB-GPES (last visited Sept. 23, 2019) (listing the funding source of each state); *see also Indigent Defense Services in the United States, FY 2008–2012 – Updated*, U.S. DEP'T OF JUST., https://perma.cc/KCE7-VYFP (last updated Apr. 21, 2015) (providing information on each state regarding the statutory authority that creates the state's public defender system, expenditures for fiscal years 2008–2012, and source of funding).

[84] Holly R. Stevens et al., *State, County and Local Expenditures for Indigent Defense Services Fiscal Year 2008*, GEORGE MASON U. 5 (Nov. 2010), https://perma.cc/B969-R5SW.

[85] *See Indigent Defense Services in the United States, FY 2008–2012 – Updated*, *supra* note 83.

[86] *See* Taylor, *supra* note 76, at 7.

[87] Stevens et al., *supra* note 84, at 33.

[88] Stevens et al., *supra* note 84, at 55.

[89] *Compare Know Your State: Massachusetts*, SIXTH AMEND. CTR., https://perma.cc/ZF85-9XCM (last visited Sept. 23, 2019), *with Know Your State: Pennsylvania*, SIXTH AMEND. CTR., https://perma.cc/NDT2-Z722 (last visited Sept. 23, 2019).

[90] *See Know Your State: Massachusetts*, *supra* note 89; *Our Organization*, COMM. FOR PUB. COUNS. SERV., https://perma.cc/V3UG-JMU7 (last visited Sept. 23, 2019).

provides indigent representation through the assigned counsel model, called "bar advocates," as well as an established public defender agency which is staffed with full-time public defenders and support staff, such as social workers and administrative assistants.[91] Bar advocates provide approximately 90% of indigent representation; whereas, full-time public defenders handle the majority of serious felony cases.[92] The Massachusetts legislature appropriates funds for CPCS.[93]

In Pennsylvania, statutory provisions require that each county shall establish its own public defender system.[94] Two main models of public defense exist in Pennsylvania: public defender agencies and appointed counsel, also called "conflict counsel" since these attorneys are appointed when the public defender agency has a conflict of interest.[95] Except for Philadelphia, county commissioners oversee the funding of public defender systems.[96]

Indigent defense services in Philadelphia are markedly different from the rest of Pennsylvania's public defender agencies, in part because Philadelphia is the only county that is statutorily exempt from the general mandate that counties establish their own system of indigent representation.[97] The Defender Association of Philadelphia (Defender Association) is an independent, non-profit organization founded in 1934[98] that more closely mirrors CPCS in structure than Pennsylvania's other public defender agencies.[99] There are several advantages that the Defender Association has over its neighboring Pennsylvanian counties: increased

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[91] Stevens et al., *supra* note 84, at 33.

[92] Stevens et al., *supra* note 84, at 33; *Know Your State: Massachusetts*, *supra* note 89.

[93] *See* Lavallee v. Justices in Hamden Superior Court, 442 Mass. 228, 232–33, 241 (2004).

[94] 16 PA. CONST. STAT. § 9960.3 (1969).

[95] COMM. ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM, FINAL REPORT OF THE PENNSYLVANIA SUPR. COURT COMM. ON RACIAL AND GEND. BIAS IN THE JUSTICE SYS. 167 (2003), https://perma.cc/NN5G-QZFC [hereinafter THE PENNSYLVANIA INTERBRANCH COMMISSION].

[96] THE TASK FORCE AND ADVISORY COMMITTEE ON SERVICES TO INDIGENT CRIMINAL DEFENDANTS, A CONSTITUTIONAL DEFAULT: SERVICES TO INDIGENT CRIMINAL DEFENDANTS IN PENNSYLVANIA 55 (Dec. 2011), https://perma.cc/FNV7-U7ZA.

[97] 16 PA. STAT. ANN. § 9960.3.

[98] *See Mission & History*, DEFENDER ASS'N OF PHILADELPHIA, https://perma.cc/Q3LZ-L366 (last visited Sept. 23, 2019).

[99] *Compare* Stevens et. al., *supra* note 84, at 33 (describing CPCS as an independent agency that overlooks the state-wide agency that includes a public defender division which is staffed by full-time attorneys), *with* THE PENNSYLVANIA INTERBRANCH COMMISSION, *supra* note 95, at 173 (describing the Defender Association as having "greater political independence afforded the office due to its structure as a non-profit corporation" and "structured differently from public defender offices elsewhere in the Commonwealth, nearly all of which are county agencies overseen by county commissioners . . . Therefore, the Association has much greater control over its own budget and expenditures than other public defender offices.").

levels of funding, training for new attorneys, large support staff, greater control over its budget and expenditures, and organizational insulation from political pressures.[100] Additionally, the amount spent per capita on indigent defense in Philadelphia is approximately $17.23 for the Defender Association and $5.15 for court-appointed counsel; whereas, all other Pennsylvania counties spent approximately $3.34 per capita for salaried public defenders and $0.85 for assigned counsel.[101] Although it remains inadequate, the Defender Association's increased level of funding allows its attorneys to have more time and resources to adequately prepare and represent its clients.[102]

In contrast, Pennsylvania's other counties receive funding from property taxes, which leads to disparate funding for indigent defense because wealthier counties can apportion more money toward public defense while their residents are less likely to need free legal representation.[103] In sum, "the counties most in need of indigent defense services are often the ones that least can afford to pay for it."[104] Even the agencies with increased levels of funding, like the Defender Association and CPCS, carry the burden of onerous caseloads and insufficient funding—the consequences of which are constitutionally-deficient public defender systems across the United States that undermine indigent defendants' Sixth Amendment right to counsel.[105]

ANALYSIS

III. Public Defender Systems Need Increased Funding to Meet their Constitutional Obligations under *Gideon*

A. *The Constitutional Mandate of Gideon*

The Supreme Court held that the Sixth Amendment right to counsel is essential to a fair trial, stating in the landmark *Gideon v. Wainright* case that,

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100 THE PENNSYLVANIA INTERBRANCH COMMISSION, *supra* note 95, at 173–74.

101 THE PENNSYLVANIA INTERBRANCH COMMISSION, *supra* note 95, at 173.

102 *See* THE PENNSYLVANIA INTERBRANCH COMMISSION, *supra* note 95, at 173 (noting that "that although inadequate, the office was funded at a considerably higher level than all other defender offices in the Commonwealth").

103 *See* Taylor, *supra* note 76, at 7 (noting that "less affluent counties may have less money to spend on public defense to begin with, while at the same time a higher percentage of their residents will likely qualify for public defense services").

104 Taylor, *supra* note 76, at 7.

105 *See* THE PENNSYLVANIA INTERBRANCH COMMISSION, *supra* note 95, at 174 (noting that the Defender Association carries caseloads of approximately 100,000–150,000 open cases with a full-time staff of 202 attorneys, "inadequate general operation resources, especially in comparison with the district attorney's office," and "insufficient and outdated computerization").

"reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."[106]

A fair trial is one in which the accusations against a defendant are subjected to an adversarial process.[107] Indeed, the American criminal justice system is premised on the idea that any person charged with a criminal offense will have his or her case subjected to "partisan advocacy."[108] Thus, the Sixth Amendment grants criminal defendants the constitutional right to be represented by an effective and zealous advocate who will ensure that the prosecution's case is subjected to "meaningful adversarial testing."[109] When a criminal defense attorney has satisfied his or her role as a partisan advocate, and has subjected the state's case to an adversarial process, then the Sixth Amendment's guarantee has been satisfied.[110]

For this adversarial process to be effective, the substantive and procedural rights of criminal defendants must be recognized.[111] Some of these rights include the right to cross-examine one's accusers,[112] the right against self-incrimination,[113] the right to a jury trial,[114] and the right to have the charges proven beyond a reasonable doubt.[115] The Supreme Court stated that these rights cannot be recognized without providing *effective* representation for those accused of criminal offenses.[116] Thus, the right to counsel is a prerequisite to ensuring a criminal defendant's right to a fair trial.[117]

Effective assistance of counsel is necessary to ensure a fair trial; denial of this right results when inadequate funding undermines a lawyer's ability

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106 372 U.S. 335, 344 (1963).

107 Strickland v. Washington, 466 U.S. 668, 684–85 (1984).

108 U.S. v. Cronic, 466 U.S. 648, 655 (1984); *see also* Holmes v. South Carolina, 547 U.S. 319, 324 (2006) ("[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.") (internal citations omitted).

109 *Cronic*, 466 U.S. at 656.

110 *Id.* at 656–57.

111 Freedman, *supra* note 2, at 60.

112 U.S. CONST. amend. VI.

113 U.S. CONST. amend. V.

114 U.S. CONST. amend. VI; U.S. CONST. amend. XIV.

115 Strickland v. Washington, 466 U.S. 668, 684–85 (1984).

116 *Id.* at 686.

117 *See* U.S. v. Cronic, 466 U.S. 648, 654 (1984) (reasoning that "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have") (citing Walter v. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)); Argersinger v. Hamlin, 407 U.S. 25, 31 (1972) ("The assistance of counsel is often a requisite to the very existence of a fair trial.").

to represent his or her client in a truly adversarial manner.[118] Therefore, failure to adequately fund public defender systems may result in the violation of indigent defendants' Sixth Amendment right to counsel.[119]

B. *The Consequences of Lack of Funding*

The mandate of *Gideon* and its progeny imports a duty upon the states to provide court-appointed counsel to criminal defendants who cannot afford their own attorneys.[120] Therefore, states or their local municipalities are required to provide funding for indigent defense.[121] However, many states currently do not provide adequate funding for their public defense systems, resulting in a multitude of issues which undermine the Supreme Court's mandate in *Gideon*[122]—that every defendant is entitled to zealous representation which subjects his or her case to the adversarial testing envisioned by the Sixth Amendment.[123]

In evaluating the efficacy of a public defender system, the American Bar Association has outlined "Ten Principles."[124] These principles include, *inter alia*: a public defender agency that is independent from political influences; caseload management; sufficient time and space within which to meet clients; adequate training to ensure competent representation; and resources equivalent to that of the state's prosecutor office.[125]

Failure to adequately fund public defender systems not only prevents attorneys from subjecting the state's case to adversarial testing, but also results in the violation of many of the "Ten Principles," such as high turnover rates for attorneys,[126] lack of resources, burdensome caseloads,[127]

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[118] *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (explaining that the right to a fair trial "cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him").

[119] *See, e.g.*, Kuren v. Luzerne County, 146 A.3d 715, 751 (Pa. 2016).

[120] *Gideon*, 372 U.S. at 344.

[121] *See* Stevens et. al., *supra* note 84, at 1–8.

[122] *See* Adam Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85, 88 (2007) (noting that "unlike other areas of law, everyone is in agreement: the under-funding of indigent defense is a serious problem"); *see generally* Taylor, *supra* note 76.

[123] *See Gideon*, 372 U.S. at 344.

[124] *See* Standing Committee on Legal Aid and Indigent Defendants, *ABA Ten Principles of a Public Defense Delivery System*, AM. BAR ASS'N (2002), https://perma.cc/3N4X-LMCB.

[125] *See id.* at 1–3.

[126] *See, e.g.*, Stevens et. al., *supra* note 84, at 12.

[127] *See, e.g.*, *The Crucible of Adversarial Testing: Access to Counsel in Delaware's Criminal Courts*, SIXTH AMEND. CTR. 133 (2014), https://perma.cc/4ZDF-2FDS (noting that "where the attorney is forced to triage services in favor of one client over another – then both the system and the attorney are in breach of their ethical and constitutional obligations to that defendant").

understaffed public defender programs,[128] and resources not to par with those provided to prosecutors' offices.[129] The inability to hire a sufficient number of attorneys skilled in criminal defense is also a negative consequence of an underfunded public defender office.[130]

Conversely, a public defender system that has adequate funding can hire more attorneys, which reduces caseloads and allows for the attorneys to engage in the meaningful adversarial testing envisioned by the Sixth Amendment—the ability to spend time independently fact-checking the state's accusations,[131] conducting legal research, filing appropriate pre-trial motions, conducting investigation,[132] and hiring experts when necessary.[133] The complaint in a 2017 lawsuit filed in Missouri[134] highlighted the severe impact of underfunding its public defender system and how it impacted the lawyers who represent the state's indigent defendants:

> The study determined that a constitutionally adequate attorney would need to spend a minimum of 106.6 hours on a non-capital murder/homicide case; at least 47.6 hours on an A/B felony; at least 25.0 hours on a C/D felony; at least 63.8 hours on a felony sex offense; at least 11.7 hours on a misdemeanor; at least 9.8 hours on a probation violation; and at least 19.5 hours on a juvenile case.[135]

Yet, the state's public defenders' excessive caseloads meant they were only able to spend a fraction of the recommended time on each case:

> Unreasonably high workloads meant that [] attorneys were able to spend, on average, only 84.5 hours on each non-capital murder/homicide case; 8.7 hours on each A/B felony; 4.4 hours on each C/D felony; 25.6 hours on each felony sex offense; 2.3 hours

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128 Taylor, *supra* note 76, at 6.

129 *See, e.g.*, Gershowitz, *supra* note 122, at 91 (providing examples of jurisdictions in which the prosecutors' offices were better funded than the local public defender agencies).

130 *See* Tony Tramontana, *Do You Want an Insurance Lawyer Defending You in a Criminal Trial?*, SOC. JUST. SOLUTIONS (Dec. 27, 2016), https://perma.cc/H4YX-AJAT (recalling a case where an indigent defendant was wrongfully convicted of murder and spent three decades in prison after being represented by an oil and gas attorney and "slip-and-fall attorney").

131 *See* Tigran Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 RUTGERS L. REV. 333, 340–44 (2012) ("A prompt investigation into the facts is a core function of defense counsel. Without it, a lawyer can be hamstrung in every aspect of representation.").

132 *See, e.g.*, Laird, *supra* note 11 (detailing a case where a defendant's alibi defense to attempted homicide charges was supported when his private attorney tracked down security footage, and noting that an overburdened public defender might not have had the time to obtain the exculpatory footage prior to it being erased).

133 *See* Taylor, *supra* note 76, at 6.

134 *See infra* Part V.C.

135 Class Action Petition for Injunctive and Declaratory Relief at 15–16, Church v. Missouri, No. 2:17-CV-04057 (W.D. Mo. Apr. 7, 2017), *available at* https://perma.cc/43HR-GTH7.

> on each misdemeanor; 1.4 hours on each probation violation; and 4.6 hours on each juvenile case.[136]

In some cases, the lack of funding leads to disastrous outcomes.[137] For example, counties that utilize the flat-fee contract system have realized the financial disincentives that attorneys have in providing zealous representation for their indigent clients.[138] Flat-fee contracts are awarded to the lowest bidder and the fee is intended to cover compensation for the attorney, overhead and administrative costs, and expert witness and investigator fees.[139] Therefore, the attorney is incentivized to spend less time and effort on each case in order to maximize the final amount of compensation that he or she will take home at the end of the day.[140]

This type of public defense system is highly criticized, and it embodies the consequences of underfunding indigent defense.[141] For example, the American Civil Liberties Union (ACLU) filed a class-action lawsuit against two counties in Washington in 2013 due to their use of flat-fee contract systems.[142] The court found that the defendant-counties placed a premium on reduced costs over ensuring that effective representation was being provided to its indigent citizens.[143] Moreover, the court found that this lack of funding resulted in a systematic deprivation of the counties' indigent defendants' Sixth Amendment right to effective assistance of counsel.[144] This holding was based on the factual findings in the record which included:

> Most interactions occurred in the courtroom: discussions regarding possible defenses, the need for investigation, existing physical or mental health issues, immigration status, client goals, and potential dispositions were, if they occurred at all, perfunctory and/or public. There is almost no evidence that [the attorneys] conducted investigations in any of their thousands of cases, nor is there any suggestion that they did legal analysis regarding the

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136 *Id.* at *16.

137 *See generally, e.g.*, Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122 (W.D. Wash. 2013).

138 *The Right to Counsel in Utah: An Assessment of Trial-Level Indigent Defense Services*, SIXTH AMEND. CTR. 3–4, 66 (2015), https://perma.cc/C3EB-2PMT ("[T]he attorney is not rewarded with additional pay for the additional work involved in zealous advocacy. Rather, the attorney is hurt financially the more he does for his clients.").

139 *Id.* at VI, 3–4 (finding that public defender contracts which allot a "single fixed fee to provide services in an undefined number of cases . . . have negative financial incentives to dispose of cases quickly, rather than effectively").

140 *See id.*

141 *See generally id.* (detailing the negative consequences of Utah's underfunded public defender system).

142 *See* Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122 (W.D. Wash. 2013).

143 *Id.* at 1124.

144 *Id.*

> elements of the crime charged or possible defenses or that they discussed such issues with their clients. Substantive hearings and trials during that era were rare. In general, counsel presumed that the police officers had done their jobs correctly and negotiated a plea bargain based on that assumption.[145]

The court reasoned that mere appointment of counsel is not sufficient to ensure the protection of defendants' Sixth Amendment rights.[146] Rather, the representation must be effective in subjecting the state's case to adversarial testing.[147]

Another consequence of inadequate funding is the potential for wrongful convictions. In the *Wilbur* case, the court noted that "[t]he system is broken to such an extent that confidential attorney/client communications are rare, the individual defendant is not represented in any meaningful way, and actual innocence could conceivably go unnoticed and unchampioned."[148] The Court went on to emphasize that the "lack of a representational relationship that would allow counsel to evaluate and protect the client's interests that makes the situation . . . so troubling and gives rise to the Sixth Amendment violation in this case."[149]

The case of Felipe Vargas provides a concrete example.[150] Mr. Vargas was arrested in Grant County, Washington on charges of child molestation and spent seven months in jail before the alleged victim recanted.[151] He was appointed a contracted public defender, Mr. Earl, who was handling over 500 cases at the time he was appointed to represent Mr. Vargas.[152] Due to Mr. Earl's inability to take time to properly interview Mr. Vargas, the court increased Mr. Vargas's bail to $100,000.00 despite Mr. Vargas's twenty-year employment history in the area—an argument that Mr. Earl did not make because he made little to no attempt to investigate or develop an attorney-client relationship with Mr. Vargas.[153] Mr. Earl was disbarred mid-way through his representation of Mr. Vargas, and when Mr. Vargas's new attorney took the time to interview witnesses, he learned of the alleged victim's recantation and successfully had the charges dismissed.[154]

Mr. Vargas's case exemplifies that inadequate funding can undermine

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145 *Id.*

146 *Id.* at 1131.

147 *Id.*

148 *Wilbur*, 989 F. Supp. 2d at 1127.

149 *Id.*

150 *See* Vargas v. Earl, No. CV-06-146-JLQ, 2008 WL 5102310 (E.D. Wash. Nov. 26, 2008).

151 Bill Morin, *Man Left in Jail Wins $3 Million*, THE SPOKESMAN-REV. (Jan. 31, 2009), https://perma.cc/J4CL-NZ5U.

152 *Id.*

153 *Vargas*, 2008 WL 5102310, at *2.

154 *Id.* at *3.

the adversarial nature of the justice system when an attorney is overburdened with cases, unable to independently investigate and research potential defenses, afford expert witnesses or investigators, or adequately prepare for trial.[155] The *Wilbur* case and Mr. Vargas's story are just some of the egregious examples that result from the failure to adequately fund public defense in the deprivation of an indigent defendant's Sixth Amendment right to counsel.[156]

IV. Failure to Adequately Fund Public Defender Systems Results in the Violation of Indigent Criminal Defendants' Sixth Amendment Right to Counsel

A. *Ineffective Assistance of Counsel*

The Sixth Amendment requires states to provide indigent defendants with effective assistance of counsel.[157] When a state fails to adequately fund its public defense system and undermines public defenders' abilities to effectively represent their clients, the state is culpable for Sixth Amendment violations.[158] In fact, the Supreme Court has explicitly stated that the "[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."[159]

To meet its obligations under the Sixth Amendment and to ensure each defendant a fair trial, the state must provide indigent defendants with the assistance of counsel.[160] More importantly, the state must provide indigent defendants with *effective* assistance of counsel.[161] Therefore, a criminal defendant may establish a Sixth Amendment violation when he or she is provided with ineffective assistance of counsel.[162] Effective assistance of

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155 Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1131 (W.D. Wash. 2013).

156 *See id.* at 1137 ("The notes of freedom and liberty that emerged from Gideon's trumpet a half a century ago cannot survive if that trumpet is muted and dented by harsh fiscal measures that reduce the promise to a hollow shell of a hallowed right.").

157 Strickland v. Washington, 466 U.S. 668, 686 (1984).

158 *See id.*

159 *Id.*

160 Argersinger v. Hamlin, 407 U.S. 25, 31 (1972).

161 *See Strickland*, 466 U.S. at 686; U.S. v. Cronic, 466 U.S. 648, 654 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771, n.14 (1970)) ("[I]t has long been recognized that the right to counsel is the right to the effective assistance of counsel."); Powell v. Alabama, 287 U.S. 45, 53 (1932) (reversing convictions based on violations of defendants' due process rights where the trial judge appointed counsel too close to the start of trial, preventing reasonable time to prepare, resulting in the denial of effective assistance of counsel).

162 *See generally Strickland*, 466 U.S. 669 (establishing a two-prong test to evaluate whether an attorney has provided constitutionally-mandated effective assistance of counsel).

counsel is representation that is "sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the [Sixth] Amendment envisions."[163] Thus, a criminal defendant is denied his or her Sixth Amendment right to effective assistance of counsel when the criminal conviction results from a process that is not truly adversarial.[164]

However, the constitutional standard to establish ineffective assistance of counsel is a high bar to meet.[165] The Supreme Court outlined a two-part test in *Strickland v. Washington*.[166] To establish a Sixth Amendment violation under *Strickland*, a criminal defendant must first establish that his or her attorney's performance was deficient.[167] The attorney's representation is measured by an objective standard of reasonableness.[168] The hallmark of deficient performance is the failure to subject the state's case to the adversarial testing envisioned by the Sixth Amendment.[169]

If a defendant can establish the attorney's representation was deficient, he or she must then show that this deficient performance prejudiced the outcome of his or her case.[170] In other words, was the attorney's deficient performance outcome determinative?[171] Thus, in evaluating whether a defendant was denied his or her right to effective assistance of counsel, the defendant must establish that trial counsel's performance was deficient and that, but for this deficient performance, the outcome of the case would have

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[163] *Id.* at 687–88.

[164] *See id.* at 686; Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1131 (W.D. Wash. 2013) (explaining that "[w]hile the outright failure to appoint counsel will invalidate a resulting criminal conviction, less extreme circumstances will also give rise to a presumption that the outcome was not reliable. For example, [failure] to subject the prosecution's case to meaningful adversarial testing . . . . ").

[165] *See* Burt v. Titlow, 134 S. Ct. 10, 13 (2013) (noting that "[w]hen a state prisoner asks a federal court to set aside a sentence due to ineffective assistance of counsel . . . the federal court [must] use a 'doubly deferential' standard of review that gives both the state court and the defense attorney the benefit of the doubt."); David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1740 (1993).

[166] Cullen v. Pinholster, 563 U.S. 170, 190 (2011).

[167] *Id.* at 687–88.

[168] *See* Padilla v. Kentucky, 559 U.S. 356, 366 (2010) (noting that the "prevailing norms of practice [are] reflected in American Bar Association standards and the like [as] guides to determining what is reasonable"); *Strickland*, 466 U.S. at 687–88.

[169] *See* Buck v. Davis, 137 S. Ct. 759,775 (2017) ("It is only when the lawyer's errors were 'so serious that counsel was not functioning as the counsel guaranteed . . . by the Sixth Amendment' that *Strickland*'s first prong is satisfied.") (internal citations omitted); *Strickland*, 466 U.S. at 690 ("In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.").

[170] *Strickland*, 466 U.S. at 692.

[171] *See id.* at 693.

been different.[172]

However, because the constitutional standard is so high in determining whether counsel was ineffective, the *Strickland* analysis is referred to as the "warm body" test: "in all but the most egregious cases, any defense counsel still capable of fogging a mirror will be 'effective.'"[173] As a result, it is true that the Sixth Amendment's "constitutional ideal is too often betrayed by courtroom realities."[174]

B. *Constructive Denial of Counsel*

The *Strickland* standard is often used to establish Sixth Amendment violations in individual cases and during post-conviction proceedings, making it arguably inapplicable to establishing systematic Sixth Amendment violations resulting from underfunded public defender agencies.[175] Thus, a criminal defendant may also establish a Sixth Amendment violation by alleging constructive denial of counsel—a standard that, if met, allows the defendant to argue that there exists a presumption of the denial of the right to counsel before specific violations occur.[176] Indeed, in *United States v. Cronic*,[177] the Supreme Court "recognized a narrow exception to *Strickland*'s holding that a defendant who asserts ineffective assistance of counsel must demonstrate not only that his attorney's performance was deficient, but also that the deficiency prejudiced the defense."[178]

Cronic outlines two scenarios, apart from the *Strickland* standard, in which a state may be liable for Sixth Amendment violations: actual or constructive denial of counsel.[179] Actual denial of counsel results from the complete failure of the state to appoint an attorney for an indigent defendant.[180] Constructive denial of counsel results when "counsel entirely

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[172] *See id.* at 691–92 ("[A]ny deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.").

[173] Luban, *supra* note 165, at 1740.

[174] Monroe Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911 (2005).

[175] *See* Laird, *supra* note 11.

[176] *See* Bell v. Cone, 535 U.S. 685, 695 (2002); Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122 (W.D. Wash. 2013) (noting that "[w]hile the outright failure to appoint counsel will invalidate a resulting criminal conviction, less extreme circumstances will also give rise to a presumption that . . ." the Sixth Amendment has not been satisfied).

[177] 466 U.S. 648, 658–59 (1984).

[178] Wright v. Van Patten, 552 U.S. 120, 124 (2008) (internal citations omitted).

[179] Kuren v. Luzerne County, 146 A.3d 715, 737 (Pa. 2016) (citing *Cronic*, 466 U.S. at 659–60).

[180] *See Cronic*, 466 U.S. at 658–59 (noting that "[t]here are . . . circumstances that are so likely to prejudice the accused . . . [m]ost obvious, of course, is the complete denial of counsel."); *Actual Denial of Counsel in Misdemeanor Courts*, SIXTH AMEND. CTR. 3–6 (2015), https://perma.cc/45XT-WR2X.

fails to subject the prosecution's case to meaningful adversarial testing"[181] or "where counsel is called upon to render assistance under circumstances where competent counsel very likely could not [subject the state's case to meaningful adversarial testing], the defendant need not show that the proceedings were [in fact] affected."[182] When a state underfunds its public defender system, attorneys with excessive caseloads are not able to "subject the prosecution's case to meaningful adversarial testing" due to their inability to investigate, independently fact-check, conduct legal research, and file pre-trial motions.[183] Therefore, indigent defendants may have a claim under *Cronic* that underfunded public defender systems result in the constructive denial of their Sixth Amendment right to counsel.[184]

V. Indigent Defendants Represented by Underfunded Public Defender Systems Have a Claim for Pretrial Constructive Denial of Counsel

A. *Lawsuits Alleging Sixth Amendment Violations and Their Common Theme*

Lawsuits alleging Sixth Amendment violations due to underfunded public defender systems have been filed across the country, albeit not all of them successfully.[185] For example, a lawsuit was filed in 2016 on behalf of indigent defendants against the Orleans' Public Defender.[186] Although ultimately dismissed by the federal district court on federalism grounds,[187]

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[181] *Cronic*, 466 U.S. at 659.

[182] Bell v. Cone, 535 U.S. 685, 696 (2002) (citing *Cronic*, 466 U.S. at 659–62).

[183] *Cronic*, 466 U.S. at 659; *see supra* Part III.A, III.B.

[184] *See, e.g.*, *Class Action Petition for Injunctive and Declaratory Relief*, 2, 49, Mar. 9, 2017, No. 17AC-CC00130, https://perma.cc/6Q2H-HFSA (alleging constructive denial of counsel due to inadequate funding, which undermines public defenders' abilities to provide "meaningful assistance" of counsel).

[185] *See, e.g.*, Yarls v. Bunton, 231 F. Supp. 3d 128, 129 (M.D. 2017), *appeal dismissed*, 905 F.3d 905 (5th Cir. 2018); Cox v. Utah, No. 2:16–cv–53–DB, 2016 WL 6905414, at *1 (D. Utah 2016), *appeal dismissed*, No. 16–4205 (10th Cir. Apr. 24, 2017).

[186] *Yarls*, 231 F. Supp. 3d at 129.

[187] *Id.* at 132–33 (expressing doubt that a § 1983 lawsuit is the "correct forum to remedy this serious systemic problem" and finding that the funding crisis is "a problem to be resolved by the State legislature"). *See also Id.* at 132–33 (expressing doubt that a § 1983 lawsuit is the "correct forum to remedy this serious systemic problem" and finding that the funding crisis is "a problem to be resolved by the State legislature."). *See also* Yarls v. Bunton, No. 16-31-JJB-RLB, 2017 U.S. Dist. LEXIS 135976, at *8 (M.D. La. Aug. 23, 2017) (denying plaintiffs' motion for relief from judgment and reasserting its position that the claims were non-justiciable while simultaneously recognizing the "systemic/funding issues" with the public defender's program); Yarls v. Bunton, 905 F.3d 905 (5th Cir. 2018) (dismissing plaintiffs' appeal as moot, since the Louisiana legislature reallocated $5 million for indigent defense following the filing of the lawsuit).

the complaint alleged that due to inadequate funding, the Orleans Public Defenders was understaffed, its current attorneys were overburdened with cases, and indigent defendants were placed on a waiting list.[188] Many of these defendants remained incarcerated while they awaited formal indictment—charges could not be formally filed until the defendants could be assigned an attorney.[189] The defendants' cases likely suffered as a result because they did not have attorneys to conduct pretrial interviews and investigations, make bail arguments, file pre-trial motions, such as motions to preserve evidence, or conduct plea negotiations.[190]

In a case out of Washington County, Utah, indigent defendants filed a similar § 1983 claim[191] for pretrial constructive denial of counsel.[192] Specifically, the plaintiffs alleged the systematic deprivation of their constitutional right to counsel due to the underfunded public defender system currently in place—the flat-fee contract system whereby the county hires a public defender based on whomever submits the lowest bid to represent the county's indigent defendants for a specified amount.[193]

Due to inadequate funding, the indigent defendants argued that the current system lacked "sufficient attorney and professional staff, training, workload limits, adequate contracting standards, adequate attorney qualification standards, [] other indigent defense policies and procedures," and incompetent supervision of the contracted attorneys.[194] The plaintiffs further alleged that the attorneys failed to return phone calls in a timely manner, failed to interview and counsel clients before trial or guilty plea hearings, and failed to take cases to trial, not based on the merits of the case, but due to burdensome caseloads.[195]

The county public defenders were also forced to seek funds from the court every time they required an expert witness or investigator for a case, and to pay for their own continuing legal education and support services, unlike the county's prosecutors.[196] The plaintiffs also noted the disparate treatment between funding for indigent defense and the prosecutors' office:

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188 Second Am. Class Action Compl., 2, Jan. 31, 2017, No. 3:16-CV-00031.

189 *Id.*; *see also* Brewer v. Williams, 430 U.S. 387, 398 (1977) (noting that the right to counsel attaches once formal judicial proceedings have been initiated against a defendant).

190 Second Am. Class Action Compl., *supra* note 188, at 2.

191 42 U.S.C. § 1983 (1996) (establishing a civil cause of action when the state deprives a constitutional right to a United States citizen or other person within its jurisdiction).

192 Cox v. Utah, No. 2:16–cv–53–DB, 2016 WL 6905414, at *3–4 (D. Utah 2016), *appeal dismissed sub nom.*, No. 16–4205 (10th Cir. Dec. 8, 2016), No. 16–4205 (10th Cir. Apr. 24, 2017) (noting that plaintiffs alleged "deprivation of meaningful and effective representation").

193 *Id.* at *1–2.

194 *Id.*

195 *Id.*

196 *Id.*

Washington County "budgeted $760,688 for its indigent defense program and $2,816,540 for prosecutions."[197] Notwithstanding these allegations, the district court ultimately granted the defendants' motions to dismiss, finding that "even if a pretrial cause of action for constructive ineffective assistance of counsel were recognized in this District, Plaintiffs would fail to meet the standards required to bring such an action in this case."[198] The plaintiffs unsuccessfully appealed this ruling to the Tenth Circuit.[199]

While the Louisiana and Utah cases are examples of courts which failed to recognize a pretrial cause of action for constructive denial of counsel, other courts have found it to be a cognizable claim.[200] Notwithstanding different interpretations regarding the justiciability of this claim, the successful and unsuccessful cases all have one common theme—lack of funding leads to Sixth Amendment violations.[201] These violations may result from an ineffective assistance of counsel claim, or from a constructive denial of counsel claim, namely, that public defenders do not have the time and resources necessary to provide zealous representation or to submit the prosecution's case to meaningful adversarial testing.[202]

B. *States that Underfund Public Defender Systems Are Liable to Indigent Defendants for Violations of their Sixth Amendment Right to Counsel:* Kuren v. Luzerne County

The Pennsylvania Supreme Court recently recognized that pretrial claims for constructive denial of counsel are viable causes of action, and

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[197] *See Cox*, 2016 WL 6905414, at *1; Ben Winslow, *Judge Tosses Lawsuit Over Your Right to a Lawyer in Utah*, FOX13 (Nov. 7, 2016), https://perma.cc/8QRF-NJ49 (noting that during a hearing regarding the lawsuit, the attorney pursuing the lawsuit "argued the state budgeted $18 million for prosecutors — and zero for public defense attorneys").

[198] *Cox*, 2016 WL 6905414, at *4-5 (finding that the plaintiffs failed to meet their "hefty burden . . . in order to bring a pretrial claim of constructive ineffective assistance [where] claims must be based on more than the alleged deprivation of meaningful and effective representation").

[199] *Id.* at *1.

[200] *See, e.g.*, Luckey v. Harris, 860 F.2d 1012 (11th Cir. 1988); Kuren v. Luzerne County, 146 A.3d 715 (Pa. 2016); Hurrell-Harring v. New York, 930 N.E.2d 217 (N.Y. 2010).

[201] *Compare* Yarls v. Bunton, 231 F. Supp. 3d 128, 128 (M.D. La. 2017), *appeal dismissed*, 905 F.3d 905 (5th Cir. 2018) (denying plaintiffs' appeal as moot since the Louisiana legislature reallocated funding following the filing of the lawsuit), *and* Duncan v. Michigan, 774 N.W.2d 89 (Mich. Ct. App. 2009), *rev'd* 784 N.W.2d 51, 51 (Mich. 2010) (holding that pretrial claims of Sixth Amendment violations are not justiciable), *with Kuren*, 146 A.3d at 737 (recognizing a cause of action for indigent defendants to allege constructive denial of their right to counsel based on an inadequately funded public defender system).

[202] *See, e.g., Kuren*, 146 A.3d at 730 (noting that "the United States Department of Justice maintains that a civil claim for constructive denial of counsel is cognizable under the Sixth Amendment").

created an avenue of relief for indigent defendants who claim Sixth Amendment violations due to the underfunding of their local public defender agency.[203] In so holding, the Court explicitly acknowledged that the Pennsylvania public defender system is in crisis, and provides a model for other troubled public defender systems to follow in alleging and remedying Sixth Amendment violations due to inadequate funding.[204]

The case began when Al Flora, the Chief Public Defender of the Luzerne County Office of the Public Defender (OPD) submitted a report to the county's Board of Commissioners (Commission) detailing how his office required more funding in order to meet its Sixth Amendment obligations.[205] Flora noted in his report several results of inadequate funding: caseloads exceeding national standards; insufficient support staff; insufficient number of attorneys; absence of appellate attorneys, which forced trial attorneys inexperienced in the complex nature of criminal appeals to handle their clients' appeals; inadequate space to facilitate confidential meetings; and inadequate information technology.[206] Without adequate funding, Flora indicated that his office would have to decline further representation of the county's indigent defendants due to overwhelming caseloads and an insufficient number of attorneys.[207]

After the Commission refused to provide increased funding, the OPD began to decline representation of indigent defendants who were not incarcerated and those who were facing minor offenses as of December 2011.[208] In fact, the Commission actually decreased OPD's funding by 12% in January 2012.[209] Flora was forced to reallocate funding normally used for expert witnesses in juvenile proceedings and capital murder trials to pay the salaries of the four full-time attorneys that he would have had to layoff otherwise due to the decreased funding.[210] A hiring freeze plus the resignation of several OPD attorneys further strained the OPD's ability to adequately represent its clients.[211] In April 2012, the OPD was understaffed

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[203] *Id.* at 751.

[204] *Id.* at 717–18 ("These offices are chronically underfunded and understaffed, and are hard-pressed to meet the baseline demands of the Sixth Amendment, raising the disconcerting question of whether counties are complying with Gideon.").

[205] *Id.* at 718–19.

[206] *Id.* at 719.

[207] *Id.* (indicating that it is a public defender's ethical duty to refuse additional cases when he or she believes that burdensome caseloads or lack of resources undermines his or her ability to provide adequate representation); *see* Eldred, *supra* note 131, at 339, 385.

[208] *Kuren*, 146 A.3d at 719.

[209] *Id.*

[210] *Id.*

[211] *Id.*

by three full-time and two part-time attorneys.[212] The remaining OPD staff consisted of four full-time attorneys, thirteen part-time attorneys, four secretaries, one administrator, and one investigator for the office's entire caseload.[213] The understaffed office also faced a lack of resources, as the attorneys were forced to share computers, desks, and phones.[214]

Faced with an obstinate Commission which was the only avenue of funding for OPD, Flora went to the courts to seek relief.[215] The complaint alleged that the inadequate funding provided to OPD undermined its public defenders' abilities to perform six functions necessary to ensure quality representation and comport with the Sixth Amendment: ability to research and learn relevant areas of law; attorneys being assigned at the earliest possible stage in a criminal proceeding; attorney presence at a case's critical stages; the ability to conduct pre-trial investigation and research, comply with discovery rules, and the ability to hire investigators; the ability of the attorneys to meet confidentially with their clients on a regular basis and properly explain the defendant's substantive and procedural rights; and the ability to conduct their work in a reasonable and timely manner.[216] The Court acknowledged the allegations that "on a system-wide basis, the traditional markers of representation being provided by the OPD either are absent or significantly compromised"[217] and reiterated that "[t]he right to counsel is fundamental, pervasive, and necessary to protect a defendant's right to a fair trial."[218]

In a victory for indigent defendants, the Pennsylvania Supreme Court held that:

> [A] cause of action exists entitling a class of indigent criminal defendants to allege prospective, systemic violations of the right to counsel due to underfunding, and to seek and obtain an injunction forcing a county to provide adequate funding to a public defender's office . . . so long as the class action plaintiffs demonstrate the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law.[219]

The Court found that to hold otherwise would be "fundamentally

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[212] *Id.*

[213] *Id.*

[214] *Kuren*, 146 A.3d at 719.

[215] *Id.*

[216] *Id.* at 723.

[217] *Id.* at 748.

[218] *Id.* at 737.

[219] *Id.* at 718 (noting that the Court did not hold that Luzerne County had, in fact, violated the indigent defendants' Sixth Amendment rights); *Kuren*, 146 A.3d at 748 (recognizing a cause of action which provided a "legal avenue of relief" for the claim of pretrial constructive denial of counsel).

irreconcilable" with *Gideon*'s mandate, and stated that "the denial of the right to counsel . . . poses a significant, and tangible threat to the fairness of criminal trials, and to the reliability of the entire criminal justice system."[220]

C. *The Fight for the Right to Funding*

The fight to uphold "Gideon's promise" and to obtain increased funding for indigent defense is not over as more lawsuits are sprouting up across the country.[221] The United States Department of Justice has even explicitly expressed its support for the cause by filing numerous Statements of Interest on behalf of indigent defendants alleging Sixth Amendment denial of counsel due to inadequately funded public defender offices.[222] For example, despite a federal judge dismissing a class-action lawsuit regarding Louisiana's underfunded public defender system,[223] the Southern Poverty Law Center[224] filed a new lawsuit alleging similar constitutional violations resulting from Louisiana's undisputed budget crisis.[225] Louisiana's public defender system is the "only [one] in the country that relies primarily on traffic ticket revenue, court fees and fines."[226] The lawsuit notes that in 2016, public defender offices received a "fraction" of the budget of the

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[220] *Kuren*, 146 A.3d at 743–44.

[221] *See, e.g.*, Verified Petition for Class Certification, Allen v. Edwards, https://perma.cc/4FHZ-9LJS (19th La. Dist. Ct. filed Feb. 6, 2017) (No. 655079); Class Action Petition, Church v. Missouri, https://perma.cc/2TEY-JL7R (Mo. Cir. Ct. filed Mar. 9, 2017) (No. 17AC-CC00130); *Kuren*, 146 A.3d at 749 (noting that acknowledging the viability of a cause of action for constructive denial of counsel will likely prompt similar lawsuits in Pennsylvania's other counties).

[222] *See Court Filings in Support of Access to Justice*, U.S. DEP'T OF JUSTICE, https://perma.cc/RG48-MQPG (last updated Oct. 24, 2018); Lauren Kirchner, *The Best Defense is a Good Offense: DOJ Challenges Local Public Defense Programs*, PROPUBLICA (Aug. 25, 2015, 11:52 AM EDT), https://perma.cc/N8SW-55ZW.

[223] *See* Yarls v. Bunton, 231 F. Supp. 3d 128, 129 (M.D. La. 2017); Ken Daley, *Federal Judge Dismisses ACLU Lawsuit Aimed at Boosting New Orleans' Indigent Defense Funding*, THE TIMES-PICAYUNE (Feb. 2, 2017), https://perma.cc/W3QP-8FE9.

[224] *See About Us*, SOUTHERN POVERTY L. CTR., https://perma.cc/UBZ6-F2NV (last visited Sept. 23, 2019) (describing the organization as one that was founded "to ensure that the promise of the civil rights movement became a reality for all").

[225] *See* Verified Petition for Class Certification, Allen v. Edwards, https://perma.cc/4FHZ-9LJS (19th La. Dist. Ct. filed Feb. 6, 2017) (No. 655079); Sue Lincoln, *Price of Justice: Indigent Defense*, WRKF (Mar. 10, 2017), https://perma.cc/H75D-WCF3 (describing the budget crisis in Louisiana and its impact on the public defender system, including lack of parity of funding with the prosecutor's office, defendants being represented by attorneys inexperienced in criminal law, and defendants being subjected to lengthy pretrial detention due to a shortage of attorneys).

[226] Ken Daley, *New Indigent Defense Lawsuit Targets Gov. Edwards State Public Defenders Board*, NOLA (Feb. 6, 2017), https://perma.cc/3NMH-EJR8.

prosecutors' offices and oftentimes had to conduct their own investigations due to inadequate funding for investigators.[227] Moreover, a 2016 Annual Report by the Louisiana Public Defender Board reported that, on average, public defenders in the state handled caseloads double the recommended caseload limit.[228] Additionally, the state spends a meager $238.69 per case, on average.[229]

A 2017 lawsuit filed on behalf of indigent defendants in Missouri by the ACLU[230] alleged actual and constructive denial of the indigent defendants' right to counsel.[231] Specifically, the complaint alleged excessive caseloads, lack of representation at critical stages during prosecution, unnecessary delays and lengthy pretrial detention, guilty pleas made not fully knowingly or voluntarily, lack of investigation, lack of attorney-client communication, lack of training and supervision for public defenders, and failure to appoint counsel in juvenile proceedings.[232]

The consequences of the "scandalously underfunded" Missouri public defender system, which allots only $356 per case and is ranked forty-nine out of fifty states in funding, has resulted in high turnover of public defenders, "chronically overworked" staff, and "its clients left for months without representation."[233] The reality is that an underfunded public defense system may have a ripple effect—prosecutions are stalled, the accused may be left jobless and homeless, and jails fill up with unrepresented indigent

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[227] *See* Debbie Elliott, *Public Defenders Hard to Come by in Louisiana*, NPR (Mar. 10, 2017, 5:29 PM ET), https://perma.cc/5NM6-YBTA; Greg LaRose, *New Orleans City Council Hints Towards More Public Defender Funding, at DA's Expense*, NOLA (Nov. 16, 2016), https://perma.cc/P82D-NKWD (noting that district attorney's proposed budget for 2017 is $6.68 million, while the public defense's proposed budget is $1.6 million).

[228] Elliott, *supra* note 227 (citing LA. PUBLIC DEFENDER BOARD, 2016 ANNUAL BOARD REPORT (Jan. 2017), https://perma.cc/M6H6-VDYJ).

[229] *See* Class Action Petition for Injunctive and Declaratory Relief, *supra* note 184, at 3.

[230] Rachel Lippmann, *ACLU Sues State of Missouri, Alleges High Caseloads in Public Defender's Office Unconstitutional*, ST. LOUIS PUB. RADIO (Mar. 9, 2017), https://perma.cc/K7LF-UVKK (describing the class-action lawsuit which alleges constitutional violations due to underfunded public defense systems in Missouri, leading to overburdened attorneys handling excessive caseloads).

[231] *Class Action Petition for Injunctive and Declaratory Relief*, *supra* note 184, at 49 (alleging violations of the Sixth and Fourteenth Amendments, as well as state constitutional violations). Following federal district court proceedings, *see* Church v. Missouri, 268 F. Supp. 3d 992 (W.D. Mo. 2017), this case was ultimately dismissed by the Eight Circuit on immunity grounds, *see* Church v. Missouri 913 F.3d 736 (8th Cir. 2019).

[232] *Class Action Petition for Injunctive and Declaratory Relief*, *supra* note 184, at 13–29.

[233] Jordan Smith, *Missouri's Underfunded Public Defender Office Forces the Poor to Languish in Jail*, THE INTERCEPT (Mar. 13, 2017), https://perma.cc/QTS4-LMC2; *see* Class Action Petition for Injunctive and Declaratory Relief, *supra* note 184, at 3.

defendants who lack the knowledge to avail themselves of legal recourse.[234]

For example, Shondel Church, a named plaintiff in the Missouri lawsuit, was charged with felonious theft after a family dispute over his father's belongings after his father passed away.[235] When Church was arraigned and bail was set, he did not have representation and was subsequently jailed because he could not afford his $5,000 bond.[236] After six weeks in jail, Church finally met his attorney, who believed that Church had a winnable case.[237] Notwithstanding this, Church's attorney advised him to plead guilty because he likely would not go to trial for another six months.[238] Church agreed to plead guilty, but was assigned two other public defenders in the five months between his initial arrest and guilty plea disposition, which lead to unnecessary and lengthy pre-disposition detention.[239] Unfortunately, Church's case is not an anomaly, in Missouri or around the country.[240]

The recent Louisiana and Missouri cases are likely just several of many lawsuits yet to come, as the public defense funding crisis is resulting in systematic Sixth Amendment violations across the United States.[241] Indeed, the Court of Appeals in New York succinctly stated the current state of public defense in the United States: *Gideon*'s mandate is "in essence a costly, largely unfunded and politically unpopular mandate upon local government, [which] has functioned to deprive . . . indigent defendants . . . of constitutionally and statutorily guaranteed representational rights."[242]

CONCLUSION

Since 1963, the Supreme Court has repeatedly held that indigent

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[234] Smith, *supra* note 233.

[235] Smith, *supra* note 233.

[236] Smith, *supra* note 233.

[237] Smith, *supra* note 233.

[238] Smith, *supra* note 233.

[239] Smith, *supra* note 233.

[240] *See, e.g.*, Smith, *supra* note 233 (detailing "a woman who has been in jail for more than two years waiting for her attorney to have enough time to investigate her case").

[241] *See, e.g.*, Dan Boyd & Katy Barnitz, *Lack of Funds Hits Public Defender Department Hard*, LAS CRUCES SUN-NEWS (Dec. 19, 2016), https://perma.cc/799H-NPPT (discussing "chronic funding problems" with New Mexico's public defender agency and its impact on the agency's ability to ethically and constitutionally represent its clients); Justin A. Hinkley, *'State Needs to Step In' on Public Defenders, Official Says*, LANSING ST. J., https://perma.cc/7YHD-QDQB/ (last updated Jan. 6, 2017) (discussing a study by the Michigan Indigent Defense Commission that is investigating the budget shortage and associated problems regarding effective assistance of counsel); Merritt T. Heminway, *Maine Voices: Maine's Poor Face Dismal Criminal Defense System*, PORTLAND PRESS HERALD, https://perma.cc/BBJ8-83BK (last updated Mar. 8, 2016).

[242] Hurrell-Harring v. State, 930 N.E.2d 217, 219 (N.Y. 2010).

defendants charged with criminal offenses in state courts have a constitutional right to court-appointed counsel.[243] The right to counsel is the right to effective assistance of counsel, which is necessary to ensure a fair trial.[244] Public defenders must have the tools necessary to effectively represent their indigent clients—funds to hire expert witnesses and investigators, adequate time to prepare each case, the ability to interview and counsel their clients in confidential settings, and the time necessary to research potential legal defenses and file appropriate pre-trial motions.[245] Inadequate funding of public defender systems undermines a public defender's ability to perform these important functions which are necessary to ensure that the state's case is subjected to the adversarial testing envisioned by the Sixth Amendment.[246] When a public defender system is severely underfunded, a breakdown in the adversarial process occurs—the result is a systematic deprivation of indigent defendants' Sixth Amendment right to counsel.[247]

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[243] *See, e.g.*, Alabama v. Shelton, 535 U.S. 654, 674 (2002); Argersinger v. Hamlin, 407 U.S. 25, 33 (1972); Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[244] *See* U.S. v. Cronic, 466 U.S. 648, 654 (1984) (citing Walter v. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

[245] *See* Kuren v. Luzerne County, 146 A.3d 715, 723 (Pa. 2016).

[246] *See Hurrell-Harring*, 930 N.E.2d at 219.

[247] *See Kuren*, 146 A.3d at 744 (adopting a set of factors that may be used to analyze whether a public defender system is constitutionally deficient); *Hurrell-Harring*, 930 N.E.2d at 219.

Trademarks and Twitter: The Costs and Benefits of Social Media on Trademark Strength, and What This Means for Internet-Savvy Celebs

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INTRODUCTION

In November 2015, Kylie Jenner released a line of "Lip Kits"— makeup sets consisting of the same shade of lip liner and lipstick.[1] At first, Ms. Jenner announced and promoted these kits solely through the use of her various social media platforms.[2] For example, she would announce a new shade of her product on her Twitter[3] account, and then show off how the new shade compared to other shades, or how the shade looked in different lighting through short videos on her Snapchat account.[4] These Lip Kits, bearing the name "Kylie Lip Kit," sold

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[1] Cassandra Huysentruyt Grey, *Kylie Jenner*, VIOLET GREY, https://perma.cc/Z2XD-NGE8 (last visited Sept. 25, 2019).

[2] *Id.*

[3] *See generally Getting Started*, TWITTER, https://perma.cc/2EB9-CMK2 (last visited Sept. 25, 2019) (describing the Twitter social media platform as the place to find out about what's happening in the world right now. The article further explains how the Twitter social media platform is centered on the "tweet"— a short blurb of text the user can post about anything, which can then either be sent to everyone who follows the user's account, or can be specifically sent to another individual user).

[4] *See* Grey, *supra* note 1. *See generally* Elyse Betters, *What's the Point of Snapchat and How Does it Work?*, POCKET-LINT (Jan. 20, 2017), https://perma.cc/AVC8-4UW7 (describing Snapchat as "a popular mobile app that allows you to send videos and pictures, both of which will self-destruct after a few seconds of a person viewing them" and "a fun messaging app. You can capture a photo or brief video with it, then add a caption or doodle or filter/lens over top, and send the finished creation (called a snap) to a friend. Alternatively, you can add your snap to your 'story,' a 24-hour collection of all your snaps that's broadcasted to the world or just your followers.").

out in a matter of minutes each time her website was restocked with them.[5] Thereafter, Ms. Jenner and her team quickly trademarked the name "Kylie Lip Kit" for her new products.[6] With each announcement through her social media accounts, Ms. Jenner was able to reach millions of followers, and thus millions of potential consumers.[7] Ms. Jenner has since expanded to a full line of "Kylie Cosmetics," which includes eyeliners—"Kyliners", face highlighters—"Kylighters", eyeshadow palettes—"Kyshadows", and more.[8] These various products were created and added to her website only after the vast popularity of her initial product.[9] The prominence of these social media platforms, which Ms. Jenner used so effectively to market and advertise her product, could not have been fathomed fifteen years ago.[10] Because of just how prominent these platforms have become, it may be time to reconsider how we gauge trademark strength.[11] When a well-known celebrity promotes their own product and merchandise by utilizing social media, it is clear they can achieve significant success for these products.[12] There are, however, real intellectual property challenges and dangers in the use of these platforms as well.[13] Courts have neither incorporated the positive aspects of these platforms into their analysis of trademark strength nor considered, to a significant extent, the inherent

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[5] *See* Effie Orfanides, *Kylie Jenner Lip Kits Sell Out in Minutes, But is the Product Any good?*, MORE BEAUTY, https://perma.cc/JPV4-UMXM

(last visited Sept. 25, 2019) (I will use Kylie Jenner as an example throughout this paper as I feel she is a particularly good example of a celebrity who uses social media effectively to sell her own branded merchandise. She is certainly not the only celebrity to do so, however.); Kara Brown, *Here's How Much Celebrities Make in the Instagram Product Placement Machine*, JEZEBEL (Jan. 19, 2016), https://perma.cc/6HEZ-CRTT.

[6] *See* Kylie Lip Kit By Kylie Jenner, Trademark Registration No. 5085603 (listing the Kylie Lip Kit as filed for registration in March 2016, and fully registered as of November 2016).

[7] *See Kyliejenner*, TRACKALYTICS, https://perma.cc/5M93-MPUN (last visited Sept. 28, 2019).

[8] *See generally* KYLIE COSMETICS, https://perma.cc/W5GL-UJSM

(last visited Sept. 25, 2019) (showing the various additional makeup products that Ms. Jenner has added to her cosmetics line since her initial lip kits).

[9] *See* Monika Markovinovic, *Kylie Jenner Launches KyShadow Palette after the Success of Her Lip Kits*, HUFFINGTON POST (July 26, 2016, 12:59 EDT), https://perma.cc/VF26-XM9P.

[10] Drew Hendricks, *Complete History of Social Media: Then and Now*, SMALL BUSINESS TRENDS (May 8, 2013), https://perma.cc/QR9Q-ZGJT.

[11] *See Internet Growth Statistics*, INTERNET WORLD STATS, https://perma.cc/92CT-EV6V (last updated Sept. 24, 2019).

[12] *See* Tom Gerencer, *Kylie Jenner Net Worth: A Lip Kit Empire*, MONEY NATION (Aug. 12 2016), https://perma.cc/V7PP-ZFA2.

[13] *See* Lisa P. Ramsey, *Brandjacking on Social Networks: Trademark Infringement by Impersonation of Markholders*, 58 BUFF. L. REV. 851, 863–64 (2010); Natalie Vincent, *Top 10 Fake Celebrity Twitter Accounts*, LAPTOP MAG. (July 29, 2011, 11:16 AM), https://perma.cc/VP9G-SCFS.

challenges. With the continued growth and prominence of these platforms, it is time for the courts to reassess and refurbish their analysis.

This Note focuses on the rise of social media, and what that means for trademark strength analysis, particularly in the context of celebrity trademarks. Part I of this Note describes the typical analysis of trademark strength, and then gives a brief overview of the rise of social media and what the world of social media looks like today. Part II describes why this issue is important, primarily because there has been such a rapid change, courts are still figuring out how to address it. Part III analyzes the benefits of social media for celebrities who sell their own merchandise via these platforms and the positive effect it can have on the strength of their trademark. Part IV then discusses the opposite—namely the inherent dangers of social media use and how this use can be detrimental to trademark strength. It then suggests a different approach courts could take to when dealing with these issues. Part V concludes this Note.

I. Background

A. *The Development of Trademark Law and Social Media*

1. Trademark Strength: An Introduction

An analysis of the rise of social media, and what that means for celebrity trademarks, necessarily requires a comprehensive overview of the current trademark strength analysis. Trademark strength "properly understood, refers to the scope of protection afforded a trademark by courts based on that mark's inherent and acquired: (1) tendency to signify to consumers a consistent source of the products to which the mark is affixed; and (2) ability to influence a consumer's purchasing decisions."[14] Preventing consumer confusion between brands is, and always has been, the quintessential policy concern of trademark law.[15] A determination of the strength of a trademark dictates how far a court will go to protect said trademark from consumer confusion, based on the understood consumer association of the particular trademark with the particular good.[16] Trademark strength considerations have everything to do with consumer awareness of a particular trademark and how well the mark is associated with a particular source.[17] Therefore, trademark strength is an important consideration for brands and organizations because when a court or

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[14] Timothy Denny Greene & Jeff Wilkerson, *Understanding Trademark Strength*, 16 STAN. TECH. L. REV. 535, 535 (2013).

[15] *See* Peter W. Smith, *Trademarks, Parody, and Consumer Confusion: A Workable Lanham Act Infringement Standard*, 12 CARDOZO L. REV. 1525, 1526 (1991).

[16] Greene & Wilkerson, *supra* note 14.

[17] Greene & Wilkerson, *supra* note 14.

administrative agency considers whether a junior mark (one that came into the market at a later date) infringed upon, or diluted, a senior mark, one of the key factors of the analysis is the strength of the senior trademark itself.[18] There are several important factors that are used to measure the strength of a trademark.[19]

As an initial matter, trademarks are typically broken down into five categories of "conceptual" strength: (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; and (5) fanciful.[20] This is what is known as the "Abercrombie spectrum of distinctiveness" (hereinafter "the *Abercrombie* spectrum"),[21] and trademarks are considered stronger the higher up on the continuum they fall.[22] Generic marks, the weakest type of trademarks, are commonly referred to as "the genus of which the product is a species."[23] A mark is generic if it simply indicates the good or service the mark refers to.[24] For example, the potential mark "All News Channel" was found to be a generic trademark for a television station that was, in fact, all news.[25] Generic marks are considered so weak that they can never receive federal trademark protection.[26]

Moving up the *Abercrombie* spectrum, the next level of trademark strength is marks that are considered descriptive.[27] Descriptive marks describe the good or service itself.[28] An example of a descriptive mark would be "Arthriticare" as used with a medication that alleviates arthritis symptoms.[29] Descriptive marks may receive federal trademark protection, but only upon showing of a "secondary meaning" of the mark.[30] Secondary

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[18] *See* Network Automation, Inc. v. Advanced Sys. Concepts, Inc., 638 F.3d 1137, 1149 (9th Cir. 2011).

[19] *See* Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9 (2d Cir. 1976) (laying out the categories for conceptual trademark strength—generic, descriptive, suggestive, arbitrary, and fanciful); J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:83 (5th ed. 2018) (describing the trademark strength analysis as a combination of commercial and conceptual strength considerations).

[20] *Abercrombie & Fitch Co.*, 537 F.2d at 9, 11 (analyzing the word "Safari" as paired with various pieces of fashion merchandise and whether that term could be trademarked).

[21] *See* MCCARTHY, *supra* note 19, at § 11:2.

[22] *Abercrombie & Fitch Co.*, 537 F.2d at 9–10.

[23] *Id.* at 9 ("A generic term is one that refers, or has come to be understood as referring, to the genus of which the particular product is a species.").

[24] *See id.*

[25] In re Conus Commc'ns Co., No. 74/001, 879, 1992 WL 205048 at *3 (T.T.A.B. 1992).

[26] *See generally* Application of G. D. Searle & Co., 360 F.2d 650, 656 (C.C.P.A. 1966) (holding that a generic term for a certain product cannot be registered).

[27] *See Abercrombie & Fitch Co.*, 537 F.2d at 9.

[28] *Id.* at 10.

[29] Bernard v. Commerce Drug Co., 964 F.2d 1338, 1341 (2d Cir. 1992).

[30] Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 769 (1992).

meaning is a showing by the mark-holder that the trademark, as associated with a particular product, has pervaded the marketplace to such an extent that consumers readily associate the mark with the particular set of goods or service.[31] If a descriptive mark can show secondary meaning it may receive federal trademark protection, but without this showing it cannot.[32]

The next three levels on the *Abercrombie* spectrum are described as inherently distinctive—that is, they do not require a showing of secondary meaning to obtain federal registration.[33] The next level of strength on the *Abercrombie* spectrum are suggestive marks.[34] Suggestive marks are those marks that may be indicative of an aspect of the good, but generally signify the good to the consumer only after what has been referred to as "a mental leap."[35] An example of a suggestive mark would be the mark "Feather Light" for a brand of face cream—the mark may be indicative of an aspect of the good,, but it is not be immediately apparent what the good itself is, based on the mark alone.[36] After suggestive, the next level on the *Abercrombie* spectrum is arbitrary marks—marks that have nothing to do with the product being sold, but are still words from the general lexicon.[37] An example of this would be the term "Shell" as a trademark for a petroleum supplier; the mark and the product itself seem to have no relation to one another.[38] Finally, the strongest marks are fanciful.[39] Fanciful marks are words that have been created particularly for the trademark

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[31] *Id.*

[32] Jason K. Levine, *Contesting the Incontestable: Reforming Trademark's Descriptive Mark Protection Scheme*, 41 GONZ. L. REV. 29, 34 (2006).

[33] *Id.* ("Unlike generic marks, arbitrary or fanciful, and suggestive marks possess inherent distinctiveness and are deserving of protection.").

[34] Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9 (2d Cir. 1976).

[35] *See id.*; Stix Prods., Inc. v. United Merchs. & Mfrs., Inc., 295 F. Supp. 479, 488 (S.D.N.Y. 1968); Zobmondo Ent., LLC v. Falls Media, LLC, 602 F.3d 1108, 1114 (9th Cir. 2010) (quoting Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery, 150 F.3d 1042, 1047 n.8 (9th Cir. 1998)) (describing a mental leap as one in which "a consumer must use imagination or any type of multistage reasoning to understand the mark's significance . . . the mark does not describe the product's features, but suggests them").

[36] Charles of the Ritz, Inc. v. Elizabeth Arden Sales Corp., 161 F.2d 234, 237 (C.C.P.A. 1947).

[37] Anthony L. Fletcher, *Separating Descriptive Sheep from Generic Goats*, 103 TRADEMARK REP. 487, 496 n.41 (2013).

[38] *Abercrombie & Fitch Co.*, 537 F.2d at 9; Fletcher, *supra* note 37, at 496 n.41 (quoting Restatement (Third) of Unfair Competition § 13, cmt. b (1993) ("An 'arbitrary' word is an 'existing word whose lexicographic meaning has no apparent relation to the particular product or business with which it is used.' An example would be SHELL for petroleum products.")).

[39] Fletcher, *supra* note 37, at 496 n.41.

itself.[40] Examples of fanciful trademarks are Kodak,[41] Exxon,[42] and Google.[43] Fanciful marks are the strongest as because they are made-up words, it is unlikely consumers will confuse the mark as indicative of another source .[44]

As an additional wrinkle in this trademark strength analysis, there are certain categories of trademarks that are considered inherently descriptive (the second level on the *Abercrombie* spectrum) in any case in which they are used.[45] This means that these specific marks will have to show secondary meaning, or consumer association, in every case to receive full trademark protection.[46] One example of a mark in this inherently descriptive category is marks consisting of surnames. The Lanham Act, which governs federal trademark law, explicitly dictates that surnames are inherently descriptive.[47] This is based on the long-standing policy that everyone has the right to use his or her own name in relation to the good or service they are selling.[48] Courts and the legislature have not wanted to limit one's ability to use their own last name in relation to their goods or service by granting someone else a trademark over it, without this additional showing of secondary meaning.[49]

2. Commercial Strength and Consumer Perception

Where a trademark falls on the *Abercrombie* spectrum is important, but it is also only one facet of how trademark strength is gauged.[50] One of the

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[40] Fletcher, *supra* note 37, at 496 n.41 ("Fanciful words, the strongest, are coined by a user to identify itself or its goods or services [and] are inherently distinctive . . . . [T]hey [have] no meaning other than as an identifying symbol.").

[41] *See* Eastman Kodak Co. v. Rakow, 739 F. Supp. 116, 117 (W.D.N.Y. 1989).

[42] Exxon Corp. v. XOIL Energy Resources, Inc., 552 F. Supp. 1008, 1014 (S.D.N.Y. 1981).

[43] MCCARTHY, *supra* note 19, at § 11:8.

[44] *See Abercrombie & Fitch Co.*, 537 F.2d at 9.

[45] *See* 15 U.S.C.A. § 1052 (2006) (listing several categories, including marks that are geographically descriptive, as requiring a showing of secondary meaning); *see also* Qualitex Co. v. Jacobson Products Co., Inc., 514 U.S. 159, 166 (1995) (holding that the use of color as a valid trademark required a showing of secondary meaning in all cases); Walmart-Stores, Inc., v. Samara Bros., Inc., 529 U.S. 205, 216 (2000) (holding the use of product design as trade dress required a showing of secondary meaning in all cases).

[46] *See Abercrombie & Fitch Co.*, 537 F.2d at 9.

[47] 15 U.S.C.A. § 1052(e)(4) (2006) ("No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—(e) Consists of a mark which . . . (4) is primarily merely a surname.").

[48] David B. Findlay, Inc. v. Findlay, 218 N.E.2d 531, 535 (N.Y. 1966) ("The defendant has the right to use his name. The plaintiff has the right to have the defendant use it in such a way as will not injure his business or mislead the public.").

[49] *See id.* at 534.

[50] *See* MCCARTHY, *supra* note 19.

underlying bases of trademark law is consumer perception of the brand—the ability for a consumer to be able to see a specific trademark—and know the source of the goods immediately.[51] Therefore, a two-part test for trademark strength has developed: (1) conceptual strength of the mark, or where the mark falls on the *Abercrombie* spectrum, and (2) "[c]ommercial [s]trength: the marketplace recognition value of the mark."[52] A trademark's strength is not only based on where it falls on the *Abercrombie* spectrum, or its conceptual strength, but also on how well the mark is actually perceived by consumers in the marketplace.[53] The vast majority of circuits follow this two-prong approach when evaluating trademarks.[54]

As suggested above, a trademark may be considered weak if it is found to be commercially weak in the context of the marketplace, even if it is inherently distinctive per the *Abercrombie* spectrum.[55] Although "many arbitrary and suggestive terms may be conceptually and inherently strong . . . if they receive little publicity through only meager advertising and feeble sales, they are relatively weak marks in the place where it counts: the marketplace."[56] There are a variety of cases that have held as much, and have found specific trademarks to not be especially strong due to the lack of consumer association with the good or service in the marketplace.[57]

A determination of the commercial strength of a mark requires either circumstantial or direct evidence, or a combination of the two.[58] An example of direct evidence of the commercial strength of the mark is

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[51] *See* Greene & Wilkerson, *supra* note 14.

[52] MCCARTHY, *supra* note 19.

[53] MCCARTHY, *supra* note 19; *see* Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9 (2d Cir. 1976).

[54] *See* Plus Products v. Plus Discount Foods, Inc., 722 F.2d 999, 1005–06 (2d Cir. 1983); Fisons Horticulture, Inc. v. Vigoro Industries, Inc., 30 F.3d 466, 479 (3d Cir. 1994); Sun Banks of Florida, Inc. v. Sun Federal Sav. and Loan Ass'n, 651 F.2d 311, 315 (5th Cir. 1981); Sullivan v. CBS Corp., 385 F.3d 772, 775–77 (7th Cir. 2004); Brookfield Commc'ns, Inc. v. West Coast Entm't Corp., 174 F.3d 1036, 1058 (9th Cir. 1999); King of the Mountain Sports, Inc. v. Chrysler Corp., 185 F.3d 1084, 1093 (10th Cir. 1999); John H. Harland Co. v. Clarke Checks, Inc., 711 F.2d 966, 974–75 (11th Cir. 1983).

[55] MCCARTHY, *supra* note 19.

[56] MCCARTHY, *supra* note 19.

[57] *See, e.g.*, Oxford Industries, Inc. v. JBJ Fabrics, Inc., No. 84 Civ. 2505, 1988 WL 9959, at *4 (S.D.N.Y. 1988); Seattle Endeavors v. Mastro, 123 Wash. 2d 339, 344–45 (1994); Frank Brunckhorst Co. v. G. Heileman Brewing Co., 875 F. Supp. 966, 976 (E.D.N.Y. 1994); National Distillers Products Co., LLC v. Refreshment Brands, Inc., 198 F. Supp. 2d 474, 481 (S.D.N.Y. 2002) (indicating that the finding of an inherently distinctive mark does not guarantee the strength of the mark).

[58] MCCARTHY, *supra* note 19.

consumer surveys regarding perceptions of the mark.[59] Circumstantial evidence of commercial strength, which is more frequently used, is evidence such as the advertising and promotional expenditures for the mark.[60] Further, this determination of commercial trademark strength is not a simple yes or no question, but "a matter of degree: is the mark strong enough that the junior user's mark is likely to cause confusion?"[61]

Advertising and promotional costs are two of the most frequently used types of circumstantial evidence of the commercial strength of the mark.[62] These expenses are not necessarily determinative of the strength of the mark on their own, but can be indicative of the amount of consumers the mark-holder has reached, and therefore indicative of a greater likelihood of consumers associating the mark with this particular brand.[63] In determining the strength of the mark, these expenditures are compared with similar brands and expenditures within the marketplace.[64] Thus, it is possible for a weak mark to become stronger overtime from public dissemination of the mark, which can be indicated by advertising and promotional expenses.[65] On the other hand, even a fanciful mark—the strongest mark on the *Abercrombie* spectrum—will fare poorly in the customer confusion analysis if no one in the public actually associates the mark with the particular good or service being sold.[66] This analysis of commercial strength of a mark is where social media may have its most prominent effect.[67]

3. The Rise of Social Media and its Effect on Trademark Law

Almost all organizations are now on some form of social media, and it is clear that these organizations have recognized the most significant

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[59] MCCARTHY, *supra* note 19.

[60] *See* MCCARTHY, *supra* note 19.

[61] MCCARTHY, *supra* note 19.

[62] *See* MCCARTHY, *supra* note 19.

[63] Brookfield Commc'ns, Inc. v. West Coast Entm't Corp., 174 F.3d 1036, 1058 (9th Cir. 1999) ("Advertising expenditures can transform a suggestive mark into a strong mark."); *see* MCCARTHY, *supra* note 19.

[64] *See* Fossil, Inc. v. Fossil Group, 49 U.S.P.Q.2d 1451, 1457 (T.T.A.B. 1998) ("If a party plaintiff in a Board proceeding is to rely simply on sales and advertising figures in an effort to establish that its mark is famous, then it is incumbent upon that party plaintiff to place the sales and advertising figures in context, for example, by showing that the product is the leading product in its category, the second leading product in its category, etc. Raw sales and advertising figures—unless they are extraordinarily large . . . are simply not sufficient by themselves to establish that the mark is famous.").

[65] MCCARTHY, *supra* note 19.

[66] MCCARTHY, *supra* note 19.

[67] MCCARTHY, *supra* note 19.

benefit that these platforms can provide—extreme cost effectiveness with regard to advertising expenditures.[68] As discussed in the preceding section, one important aspect in determining trademark strength is the association consumers have between the mark and the product itself.[69] A company can offer evidence probative of this consumer connection, in a proceeding for trademark infringement or dilution, by showing the amount of individuals the consumer has reached via advertising and promotion costs.[70] Social media has changed the way organizations advertise and promote to consumers over the past decade and a half unlike any other means of advertising:[71] with a click of a button, it is now possible to reach millions of potential consumers almost instantly.[72]

As a whole, the amount of potential consumers who use the Internet in general has risen astronomically over the past fifteen years.[73] A major component of this Internet use has been social media websites—websites where users have accounts or profiles and can interact with others who have accounts on that same site.[74] Six Degrees, the first social media website, was created in 1997.[75] This social media platform allowed users to create profiles and interact with others on the site, features that later became popular on the majority of social media platforms.[76]

The social media boom truly began in the early 2000s, with the introduction of various blogging platforms in which users could write electronic journal entries that could be shared with others.[77] The social media platforms of today are vast and varied, with everything from general platforms where users complete a full profile and the purpose is to

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[68] Doug Sherwin, *Companies Now Watch Social Networks for Trademark Infringement*, THE DAILY TRANSCRIPT (May 6, 2011), https://perma.cc/5NEV-K9UH; Darin M. Klemchuk & Roxana Sullivan, *Brand Enforcement on Social Networking Sites*, A.B.A., https://perma.cc/BC9E-ZL7L
(last visited Sept. 16, 2019).

[69] MCCARTHY, *supra* note 19.

[70] *See* MCCARTHY, *supra* note 19.

[71] *See* Klemchuk & Sullivan, *supra* note 68.

[72] *See Internet Growth Statistics*, *supra* note 11.

[73] *See Internet Growth Statistics*, *supra* note 11 (indicating that the number of Internet users between 1995 and 2010 skyrocketed from 16 million users to 3.67 billion in 2016—over half of the entire world's population).

[74] *Social Media*, MERRIAM-WEBSTER, https://perma.cc/YY4N-MYKL (last visited Sept. 25, 2019) (defining "social media" as "forms of electronic communication (as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos)").

[75] Hendricks, *supra* note 10.

[76] Hendricks, *supra* note 10.

[77] Hendricks, *supra* note 10.

share content with others,[78] to blogging websites where users write journal entries to be shared with others,[79] to even more streamlined platforms that allow you to share only a picture and a caption.[80] Today, some of the major players, and most popular platforms, in the social media arena include Facebook,[81] Twitter,[82] Snapchat,[83] and Instagram.[84] Despite how varied these platforms are, they all have the same recurring theme: easy communication and interaction of users. It is in the very name—*social* media.[85]

Because of the ease of communication these platforms provide, organizations have been using these sites to reach out to potential clients since the very early days of social media.[86] There has been fifteen years of growth for this subset of the Internet, which has entirely changed how

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[78] *See* Daniel Nations, *What Is Facebook?*, LIFEWIRE, https://perma.cc/8K2F-4KQU (last updated Mar. 29, 2019) (describing the social media platform as "a social networking website where users can post comments, share photographs and past links to news or other interesting content on the web, chat live, and watch short-form video . . . . Shared content can be made publicly accessible, or it can be shared only among a select group of friends or family, or with a single person.").

[79] *See* Susan Gunelius, *Is Tumblr The Right Blogging Tool for You?*, LIFEWIRE, https://perma.cc/5LXR-QU5E (last updated June 24, 2019).

[80] *See* Elise Moreau, *What Is Instagram, Anyway?*, LIFEWIRE (last updated June 25, 2019), https://perma.cc/32MP-PDTQ (describing the social media platform Instagram as "a social networking app made for sharing photos and videos from a smartphone. Similar to Facebook or Twitter, everyone who creates an Instagram account has a profile and a news feed. When you post a photo or video on Instagram, it will be displayed on your profile. Other users who follow you will see your posts in their own feed. Likewise, you'll see posts from other users who you choose to follow.").

[81] *See* Nations, *supra* note 78; *The Top 20 Valuable Facebook Statistics*, ZEPHORIA, https://perma.cc/JAQ6-H4BL (last updated July 24, 2019) ("Worldwide, there are over 2.41 billion monthly active Facebook users.").

[82] *See Getting Started with Twitter*, *supra* note 3; Kit Smith, *58 Incredible and Interesting Twitter Stats and Statistics*, BRANDWATCH BLOG (Jan. 3, 2019), https://perma.cc/MHG9-QGN2 (describing that as of January, 2019, there were 1.3 billion accounts on Twitter and 330 million monthly active users).

[83] *See* Betters, *supra* note 4; Craig Smith, *145 Snapchat Statistics, Facts and Figures*, DMR, https://perma.cc/MKG6-JXNM (last updated Sept. 6, 2019) (describing Snapchat as having 203 million daily active users as of July, 2019); *see also Statistics and Facts About Snapchat*, STATISTA, https://perma.cc/6DRH-RL23 (last visited Sept. 25, 2019) (describing Snapchat's importance, as it is the most popular social media platform for millennials).

[84] *See* Moreau, *supra* note 80; Todd Clark, *22+ Instagram Stats that Marketers Can't Ignore this Year*, HOOTSUITE (Mar. 5, 2019), https://perma.cc/VQQ7-GYED (describing Instagram as having over 500 million active users).

[85] *See* Hendricks, *supra* note 10.

[86] *See generally* Jeffrey W. Treem & Paul M. Leonardi, *Social Media Use in Organizations: Exploring the Affordances of Visibility, Editability, Persistence, and Association*, 36 N.W. U. COMM. Y.B. 143, 143–144 (2012).

companies advertise and market,[87] and there are many benefits for doing so.[88] As indicated before, it is now possible to reach millions of potential clients almost instantaneously with the push of a button.[89] Advertising no longer requires the classic model of simply spending significant funds to reach out to clients via magazines, billboards, or television advertisements.[90] It is now possible to reach essentially the same number of individuals as these traditional methods with the cost it takes to write a Tweet. However, the low cost of promotion is not the only benefit of these platforms.[91] Social media has also changed the way many organizations handle public relations and customer support because of the ease with which it is now possible to interact with clients directly.[92] Now if a customer has an issue with a defective product, they can—and many do—post about their issue on these social media platforms.[93] If a brand is monitoring these sites, it is possible for them to see the complaint and to be able to respond to it in a timely manner, in a way that rectifies or potentially mitigates the issue.[94]

One particularly interesting aspect of the rise of social media is the ease with which certain celebrities have harnessed these platforms with significant success to sell their own products and merchandise.[95] This will be discussed in greater detail in subsequent sections, but there are now individuals who have gained prominence and fame for any reason, including acting or singing, and turned it into a social media brand.[96] The idea of a celebrity using their image and likeness to sell their own product is nothing new—Elizabeth Taylor had her own perfume line for decades before the rise of social media.[97] However, this technique has reached its

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[87] *See* EMPLOYMENT ALERT, *Employers Increase Social Media Outreach*, 29 NO. 3 EMP. ALERT 11, 11 (West 2012) (describing that at that time over 52% of organizations were utilizing social media as a platform for outreach).

[88] Christina Newberry, *23 Benefits of Social Media for Business*, HOOTSUITE (May 2, 2018), https://perma.cc/2HJH-6FU4 [hereinafter *23 Benefits of Social Media*].

[89] *See Internet Growth Statistics*, *supra* note 11.

[90] *See* TRACEY L. TUTEN, ADVERTISING 2.0: SOCIAL MEDIA MARKETING IN A WEB 2.0 WORLD, 2–3 (2008).

[91] *See 23 Benefits of Social Media*, *supra* note 88.

[92] *See 23 Benefits of Social Media*, *supra* note 88.

[93] Richard Eldridge, *How Social Media Is Shaping Financial Services*, HUFFINGTON POST, https://perma.cc/C6S7-9EB7 (last updated Jan. 21, 2017).

[94] *Id.*

[95] *See* Julianne Carell & Lindsay Schallon, *Kylie Jenner Makeup Updates: Everything You Need to Know About Kylie Cosmetics' New Launches*, GLAMOUR, https://perma.cc/F7LH-SC4M (last updated Mar. 12, 2017).

[96] *See* Rachel Gee, *Influencers Top List of the Biggest Celebrity Endorsers in 2016*, MARKETING WEEK (Jan. 24, 2017, 5:19 PM), https://perma.cc/P848-8N7D.

[97] *See Elizabeth Taylor*, FRAGRANCENET, https://perma.cc/V68T-EMLR (last visited Sept. 16,

peak today, where many well-known celebrities either have a perfume line, a clothing line, or the increasingly common celebrity beauty care line.[98] Social media has changed, in many respects, how celebrities promote their products.[99] Celebrities on these social media platforms now have an outlet by which they can reach millions of built-in consumers in their fans.[100] For example, they may announce that a product will be released on a certain day on Instagram, show samples of it on Snapchat, and then announce a sale time for the product on Twitter.[101] These internet-savvy celebrities can now reach millions of followers with their advertisements through their social media presence, and sell something that was initially completely unrelated to how they built their fame and social media prominence.[102]

The rise of social media has also created potential legal complications for organizations, and this is particularly acute in the realm of the social media handles[103] of celebrity figures.[104] Imposter social media accounts that use the name, image, and likeness of celebrities have been a longstanding issue of social media.[105] There are fake social media handles of the likes of everyone from Oprah Winfrey to Chuck Norris, and even God.[106] The statistics on just how many fake social media accounts exist are staggering.[107] At first, this was an issue of cybersquatting: individuals swooping up celebrity or organizational names in a move to attempt to get compensation for the name.[108] A separate legal issue, however, is how these accounts affect a celebrity's trademark and brand name.[109] Some cases have confronted this issue, but they have done so in the broader context of

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2019).

[98] *See* Chloe Metzger, *10 Celebrities With Awesome Beauty Lines*, ALLURE (Dec. 2, 2015), https://perma.cc/V3ZE-CFSP.

[99] Deepa Seetharaman, *What Celebrities Can Teach Companies About Social Media*, WALL ST, J. (Oct. 14, 2015), https://perma.cc/Q6V2-FHQ9.

[100] *Id.*

[101] *See* Maria Bobila, *Kylie Jenner's Lip Kit Traffic 'Broke' Google Analytics*, FASHIONISTA (Mar. 29, 2016), https://perma.cc/UQG9-A3YR.

[102] *See* Gee, *supra* note 96.

[103] *See Handle*, TECHTERMS, https://perma.cc/K5TG-8HHS (last visited Sept. 25, 2019) (defining an online "handle" as "another word for a username. It can refer to the name you use in chat rooms, web forums, and social media services like Twitter.").

[104] Alexis Sobel Fitts, *It's Easier Than Ever to Impersonate A Celebrity Online — And We've All Been Duped*, HUFFINGTON POST (Aug. 4, 2019, 9:57 AM ET), https://perma.cc/JQ9Q-AKVW.

[105] Thomas J. Curtin, *The Name Game: Cybersquatting and Trademark Infringement on Social Media Websites*, 19 J.L. & POL'Y 353, 353 (2010).

[106] Vincent, *supra* note 13.

[107] Heather Kelly, *83 Million Facebook Accounts are Fakes and Dupes*, CNN (last updated Aug. 3, 2012, 5:27 AM ET), https://perma.cc/WMG5-KSLT.

[108] Curtin, *supra* note 105, at 354.

[109] Ramsey, *supra* note 13.

corporations.[110] The rest of this Note will discuss how individuals, who have garnered social-media celebrity status, can use social media to strengthen their trademarks. It will also discuss the difficulties they could face, including the possibility of trademark dilution.

II. Why Social Media's Effect on Celebrity Trademark Strength Matters

Courts have, to some extent, faced cases involving social media and trademarks.[111] Many of these, however, have not dealt with trademark strength explicitly, but rather with either the issue of someone infringing on a mark via social media platforms,[112] or "username squatting."[113] Social media use as a whole has become a prominent aspect of our day-to-day life, especially with younger generations, and thus it does need to be acknowledged and considered further.[114] Additionally, this is important because social media has completely changed the advertising marketplace, a major factor of trademark strength analysis.[115] The courts and administrative agencies responsible for resolving trademark disputes have not responded adequately when evaluating social media presence as a factor in the trademark strength analysis.[116] At the same time, social media platforms have significant potential for abuse.[117] That is especially true in the context of celebrity use of social-media, and considering what their reach via these platforms mean for their trademarks.[118]

A. *Social Media Has Definitively Changed How the Strength of Marked Should Be Considered*

The topic of trademarks and social media in general is important because social media has completely changed the playing field for marketing and advertising.[119] Further, though it was not explicitly differentiated from the other factors, courts have begun factoring in social

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[110] *See* Wm. Wrigley Jr. Co. v. Swerve IP, LLC, No. 11-C-9274, 2012 WL 4499063, at *4 (N.D. Ill. Sept. 28, 2012); Swatch, S.A. v. Beehive Wholesale, LLC, 888 F. Supp. 2d 738, 753 (E.D. Va. 2012); Lorillard Tobacco Co. v. Cal. Imports, LLC, 886 F. Supp. 2d 529, 538 (E.D. Va. 2012); Lopez v. Gap, Inc., 883 F. Supp. 2d 400, 417 (S.D.N.Y. 2012).

[111] *See generally* Complaint La Russa v. Twitter, Inc., No. CGC-09-488101, 2009 WL 1569936 (Cal. Super. Ct., May 6, 2009) (discussing a case brought for infringement over social media).

[112] Ramsey, *supra* note 13, at 853.

[113] Complaint La Russa v. Twitter, Inc., No. CGC-09-488101, 2009 WL 1569936 (Cal. Super. Ct., May 6, 2009).

[114] *See Internet Growth Statistics*, *supra* note 11.

[115] *See* MCCARTHY, *supra* note 19, § 11:83.

[116] Ramsey, *supra* note 13; Kelly, *supra* note 107; Vincent, *supra* note 13.

[117] Ramsey, *supra* note 13; Kelly, *supra* note 107; Vincent, *supra* note 13.

[118] Seetharaman, *supra* note 99.

[119] *See Internet Growth Statistics*, *supra* note 11.

media, and the reach of new technology, into their analysis of the strength of trademarks.[120] This makes sense as new forms of media can reach so many, and thus affect how the public perceives the marks of celebrities via social media platforms.[121] Courts, however, need to expand the analysis of social media platforms in the trademark strength analysis.[122] Thus, trademark practitioners in general need to be aware that this is something that courts have and will examine—to a certain extent.[123]

B. *A Need for Change of the Trademark Strength Analysis*

Further, the combination of these two topics is important because social media is so pervasive that there may come a point where it is necessary to make adjustments to the trademark strength analysis.[124] In cases involving social media, courts as a whole have been using the typical trademark infringement analysis, and to date have considered social media reach as a relatively inconsequential factor in considering the strength of a trademark.[125] Given the pervasive and expansive nature of these platforms into day-to-day life, however courts need to further develop the trademark strength analysis to consider two factors more strongly: (1) social media presence and how that affects strength of the mark, and (2) appropriate remedies for the blurring of marks from fake social media accounts.[126] At this time, courts have not developed significant case law on this issue.[127] However, due to the substantial rise in social media usage over the past decade and a half, there will soon come a time when courts are forced to factor in the pros and cons of social media presence when analyzing a significant number of trademark cases.[128]

ANALYSIS

For celebrities who use social media as a means to promote their brand—a la Kylie Jenner, as discussed above—social media can be a truly

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[120] *See generally* Complaint La Russa v. Twitter, Inc., No. CGC-09-488101, 2009 WL 1569936 (Cal. Super. Ct., May 6, 2009) (describing a cause of action for trademark infringement over the use of a fake Twitter handle).

[121] *See Internet Growth Statistics*, *supra* note 11.

[122] *See generally La Russa*, 2009 WL 1569936 (describing a cause of action for trademark infringement over the use of a fake Twitter handle).

[123] *See* Treem & Leonardi, *supra* note 86.

[124] *See Internet Growth Statistics*, *supra* note 11; Seetharaman, *supra* note 99.

[125] *See* Ramsey, *supra* note 13; *see generally La Russa*, 2009 WL 1569936 (describing a cause of action for trademark infringement over the use of a fake Twitter handle).

[126] *See* Ramsey, *supra* note 13, at 853.

[127] *See* Ramsey, *supra* note 13, at 853.

[128] *See* Ramsey, *supra* note 13, at 863–64; *Internet Growth Statistics*, *supra* note 10.

double-edged sword.[129] On the one hand, it is easy to use these platforms to create consumer awareness, and thus strengthen a trademark.[130] Especially for celebrities with substantial, built-in followings, it can be extremely cost effective to promote products via these sites.[131] The ability to reach such a mass number of potential consumers at such a low cost necessitates a reconsideration of how trademark strength is determined.[132] At the same time, these same social media platforms can be used in ways that are clearly detrimental to the user's trademark as well.[133] So far, courts have focused on the infringement as a cause of action in such cases involving trademark disputes on social media; however, as discussed in the following sections, a dilution claim may be more appropriate in the case of the celebrity trademarks on which this Note focuses.[134] This is not an issue that will be going away any time soon, as these social media platforms are only becoming increasingly popular.[135] Courts need to be aware of this dichotomy, the costs and benefits of social media as applied to trademarks, and potentially make changes to the trademark strength analysis.

III. Pro: How Celebrity Social Media Presence Can Strengthen a Trademark

It is easy to see the benefits of social media use for brands and companies.[136] Social media has completely changed the way brands advertise, significantly decreasing the cost it takes for brands to promote their product.[137] Further, there is a direct correlation between effective social media presence and trademark strength.[138] A trademark's commercial strength, at the most basic level, comes down to how well consumers perceive the trademark—and whether consumers would associate this particular mark with a specific product.[139] Celebrities who advertise their own product via their social media accounts and presence

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[129] *See* Treem & Leonardi, *supra* note 86; *but see* Ramsey, *supra* note 13; Vincent, *supra* note 13; Kelly, *supra* note 107.

[130] The Data Team, *Celebrities' Endorsement Earnings on Social Media*, THE ECONOMIST (Oct. 17, 2016, 15:16 PM), https://perma.cc/G7LW-URPF.

[131] *Id.*

[132] *See Internet Growth Statistics*, *supra* note 11.

[133] *See* Ramsey, *supra* note 13; Vincent, *supra* note 13; Kelly, *supra* note 107.

[134] *See* Ramsey, *supra* note 13; Vincent, *supra* note 13; Kelly, *supra* note 107.

[135] *See Internet Growth Statistics*, *supra* note 11.

[136] *See generally* Treem & Leonardi, *supra* note 86.

[137] Christina Newberry, *Social Media Advertising 101: How To Get The Most Out Of Your Budget*, HOOTSUITE (last modified May 6, 2019), https://perma.cc/MC8Z-FR5Z [hereinafter *Social Media Advertising*].

[138] *See* Greene & Wilkerson, *supra* note 14.

[139] *See* Greene & Wilkerson, *supra* note 14.

can do exactly that.[140] These celebrities can have strong brand recognition simply by promoting their product online, promoting to a built-in audience who follow these celebrities on these platforms for a reason that is, at first, completely unrelated to the promoted product.[141] The dissemination and amount of potential consumers that celebrities who use social media platforms can efficiently reach is staggering, and what better way to get individuals to associate a trademark name with a specific product than reaching these mass numbers of fans and potential consumers.[142]

Moreover, the dissemination of a specific trademark over these platforms is extremely cost effective—not requiring much more than the click of a button to reach millions of potential consumers in certain circumstances.[143] Classical advertising modes can be extremely expensive, requiring the promotion of a mark over billboards, websites, or television channels—all of which require significant costs.[144] Corresponding with the rise of social media and its insignificant expenditures, there have also been strong arguments that classical advertising is declining in effectiveness, as many services now allow consumers to "opt-out" of seeing the traditional advertising altogether.[145]

Therefore, it is time for courts to more strongly consider social media when conducting trademark strength analysis.[146] Currently, courts consider things such as sales and advertising costs as circumstantial evidence of the commercial strength of a trademark, but not the social media presence of an organization—which could be significant.[147] Further, the classic sales of a product factor can certainly be shown as accrued from the celebrity products which are promoted over social media platforms.[148] For example,

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[140] *See* JJ Duncan, *The 50 Most Influential Celebrities Online*, ZIMBIO, https://perma.cc/QAP5-BPG9 (last visited Sept. 25, 2019).

[141] *See* Madeline Berg, *The Social 100: Twitter's Most Followed Celebrities*, FORBES (June 29, 2015), https://perma.cc/E7TG-J647.

[142] *See id.*

[143] *Id.* (listing the staggering amount of potential consumers these celebrities can reach with only a Tweet—which can be sent out with the click of a button); *see Getting Started with Twitter*, *supra* note 3.

[144] *Traditional Media vs. Social Media Advertising*, LYFEMARKETING, https://perma.cc/7V2C-MZWG (last visited Sept. 25, 2019).

[145] *See* Douglas Holt, *Branding in the Age of Social Media*, HAR. BUS. REV., Mar. 2016, https://perma.cc/W8ZC-FD8D (describing that advertising used to be more effective, as consumers had fewer options to avoid seeing the advertisements. Today, however, many platforms allow consumers to "click out of" seeing classic modes of advertising—including television advertisements).

[146] *See generally* Greene & Wilkerson, *supra* note 14 (describing the typical trademark strength analysis).

[147] *See* MCCARTHY, *supra* note 19.

[148] *See* Gerencer, *supra* note 12.

as of August 2016, Ms. Jenner was estimated to have made $20.5 million from her own branded merchandise,[149] with this figure having been estimated not even a year after the release of her first Lip Kit product.[150] In 2019, Forbes named Ms. Jenner the world's youngest self-made billionaire, with the majority of her wealth coming from these online sales marketed primarily through her social media. Courts, however, have not yet significantly dealt with the promotion of products on these social media platforms, or how it should be integrated into the trademark analysis.[151] A celebrity announcing a new product via a tweet is not what would classically be considered advertising, or classic advertisement expenditures. There are, however, some similarities.[152]

In terms of key differences from classic advertising methods, social media promotions require minimal cost compared to, as an example of a classical promotional method, taking out an advertisement in a magazine.[153] One of the prototypical examples used as circumstantial evidence of the trademark's strength, would be a company purchasing a Super Bowl advertisement.[154] The aforementioned company would pay a substantial amount to have their product advertised during this highly watched event.[155] Thus, it is considered strong circumstantial evidence that since so many individuals watch the Super Bowl, a substantial amount of consumers would thereafter associate the advertised product with the source of the good on the basis of this vastly watched advertisement alone.[156]

As for Ms. Jenner, she eventually did move to advertising via billboards, one of the classic examples of circumstantial evidence of trademark strength.[157] The first several releases of her Lip Kits, however, were announced and promoted solely via her social media platforms.[158] Ms. Jenner would announce the date of the launch of her next shade of Lip Kit via her Twitter account, and then show samples of what the new shade

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[149] Gerencer, *supra* note 12 (describing "branded merchandise" as "merchandise like Lip Kits, clothing, books and posters").

[150] Gerencer, *supra* note 12.

[151] Curtin, *supra* note 105 (discussing the issue with social media courts have considered namely, infringement and cybersquatting).

[152] *See Social Media Advertising*, *supra* note 137.

[153] *See 23 Benefits of Social Media*, *supra* note 88.

[154] *See, e.g.*, Kaitlyn Tiffany, *Brands Pay for the Privilege of Uttering the Phrase "Super Bowl"*, VOX, https://perma.cc/6VG8-WCQW (last updated Feb. 3, 2019, 6:18 PM EST).

[155] *Id.*

[156] Greene & Wilkerson, *supra* note 14, at 563.

[157] *See* Greene & Wilkerson, *supra* note 14, at 563; Gerencer, *supra* note 12; Kaylen Schaefer, *Kylie Jenner Built a Business Empire out of Lip Kits and Fan Worship*, VANITY FAIR (Oct. 21, 2016), https://perma.cc/3SN4-YJ6Y.

[158] *See* Grey, *supra* note 1.

of the makeup looked like via her Snapchat and Instagram accounts.[159] There was little cost for Ms. Jenner to do this, short of possibly having hired someone to manage these social media platforms on her behalf—as opposed to the increased cost of classic advertising, such as a magazine advertisement for each new shade of her product.[160] At the same time, this is where social media can truly overlap with the trademark strength analysis: although there may have been minimal costs to Ms. Jenner to send out these promotional posts over social media, the heart of the trademark strength analysis is not the amount spent, but rather the amount of consumers she reached.[161] As of the date of this Note, Ms. Jenner reaches 28.3 million followers via her Twitter account.[162] A posting of her product on her Instagram account currently reaches 146 million potential consumers.[163] Meanwhile, Super Bowl L, the third most watched television program in history and one of the classic examples of trademark dissemination to consumers, reached 111.9 million in 2016.[164] This is a one-time event that is considered the epitome of reaching potential consumers, and therefore builds one's trademark recognition. One post by Ms. Jenner on Instagram reaches more potential consumers than this event.[165]

So how do courts deal with this? First, it should be noted that not every celebrity uses their social media presence as extensively or effectively as Ms. Jenner.[166] What is clear, however, is that social media is a direct way for many celebrities to take their built-in followings on these platforms and turn posts on these platforms into a substantial financial benefit in a way which is unique from classic advertisement.[167] Such a circumstance has not yet presented itself in front of the courts in a significant way, but it is important to recognize that these platforms are becoming increasingly

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159 *See* Grey, *supra* note 1.

160 *See 23 Benefits of Social Media*, *supra* note 88 (describing the cost efficiency of social media. The costs would be minimal by comparison to traditional advertising, but there are costs to any decision—for example time to monitor account, prepare statements that go on to social media platforms, hiring outside consulting firms about social media advertising, pictures of product, etc.); *Traditional Media vs. Social Media Advertising*, *supra* note 144.

161 *See* MCCARTHY, *supra* note 19.

162 Kylie Jenner (@KylieJenner), TWITTER, https://perma.cc/9Z9W-UM9C (last visited Sept. 25, 2019); *see also* Kylie Cosmetics (@KylieCosmetics), TWITTER, https://perma.cc/PC85-F9EG (last visited Sept. 25, 2019) (containing a separate twitter handle exclusively for her makeup line that has an additional 858 thousand followers).

163 Kylie Jenner (@KylieJenner), INSTAGRAM, https://perma.cc/AMP6-8L37 (last visited Sept. 25, 2019).

164 *Super Bowl 50 Draws 111.9 Million TV Viewers, 16.9 Million Tweets*, NIELSEN (Feb. 8, 2016), https://perma.cc/P8VZ-4UBR.

165 *See id.*

166 *See* Gerencer, *supra* note 12.

167 *See 23 Benefits of Social Media*, *supra* note 88.

popular, and thus the courts will likely be faced with analyzing a celebrity's social media presence when considering the strength of their trademarks directly before long.[168]

Social media presence should, therefore, be developed into a circumstantial evidentiary consideration separate and distinct from mere advertising costs.[169] Social media promotions will frequently have low costs, as previously discussed.[170] At the same time, these social media promotions can reach an appreciable number of potential consumers, what the commercial trademark strength analysis is truly all about.[171] Courts facing these issues, however, should separately consider social media presence and dissemination for someone, like a celebrity, who reaches such a large audience at such a low cost.[172]

It is clear there are significant trademark-strength benefits to social media use for well-known celebrities selling their own product.[173] Celebrities can use their social media platforms to reach a previously unfathomable number of followers and, if selling a product, use these platforms to reach potential consumers in a way that was inconceivable a decade and a half ago.[174] Further, celebrities can reach these burgeoning amounts of potential consumers with minimal costs—at least significantly less cost than those of traditional advertising methods.[175] It is clear that Ms. Jenner has an extremely strong trademark: her Lip Kits sold like wildfire almost instantaneously when they were released, and it would be easy to prove that a majority of consumers associate her Lip Kits with the source of the goods—her.[176] Ms. Jenner built her strong trademark primarily through the use of her social media accounts.[177] As described before, courts have not yet significantly considered how to factor social media presence into evaluating the strength of a trademark, but the day will soon come when they need to do so.[178] An individual or company's social media presence should be an analysis separate and distinct from advertising costs, as it

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[168] *See* Andrew Perrin, *Social Media Usage: 2005-2015*, PEW RESEARCH CENTER (Oct. 08, 2015), https://perma.cc/C9R5-46VU.

[169] *See Traditional Media vs. Social Media Advertising*, supra note 144.

[170] *Traditional Media vs. Social Media Advertising*, supra note 144.

[171] *See* MCCARTHY, *supra* note 19 (discussing consumer recognition of the mark as a primary focus of trademark law).

[172] *See generally* Curtin, *supra* note 105 (describing the issues with social media that courts have considered thus far: namely infringement and cybersquatting).

[173] *See generally 23 Benefits of Social Media*, *supra* note 88.

[174] *See 23 Benefits of Social Media*, *supra* note 88; Perrin, *supra* note 168.

[175] *See 23 Benefits of Social Media*, *supra* note 88.

[176] *See* Greene & Wilkerson, *supra* note 14, at 563; Gerencer, *supra* note 12.

[177] *See* Grey, *supra* note 1.

[178] *See* Perrin, *supra* note 168.

truly is a separate and distinct issue in this day and age.[179]

IV. Con: How Social Media Usage Can Lead to the Potentiality of Dilution

When considering how significantly social media has affected trademarks, it would be misleading to focus only on the positive aspects, as there are certainly significant negative effects to a celebrity's social media use as well.[180] This is particularly apropos in the area of celebrity trademarks.[181] There have been two main issues that courts have focused on when considering the combination of social media usage and trademarks up to this point: (1) Cybersquatting and (2) Infringement.[182] These are certainly significant issues, although they have been considered and dealt with fairly substantially.[183] For celebrity trademarks used over these social media platforms, there could be a third and more effective option for enforcement of their trademark rights: dilution.[184]

There are essentially two issues that celebrities who chose to promote their items over their social media platforms now face.[185] The first issue is fake social media accounts—accounts claiming to be the celebrity, and passing off their posts as those of the celebrity.[186] The second issue involves users on these social media platforms marketing and selling fake versions of the real product the celebrity sells.[187] So far, trademark cases dealing with social media have focused on the first issue: fake accounts.[188] The cause of action that has been brought in the majority of cases so far has been limited to infringement of the celebrity's trademark and name.[189] This is much the same issue as that faced with domain-name cybersquatting in the early days of the Internet—when there was a race to register the most popular brand's trademarked names as domain names, or URLs, in an effort to then be able to extort money from these companies in order to retrieve the domain name.[190] In the current social media context of

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[179] *See generally* Curtin, *supra* note 105.

[180] *See* Ramsey, *supra* note 13.

[181] Ramsey, *supra* note 13.

[182] *See generally* Ramsey, *supra* note 13; Curtin, *supra* note 105 (discussing issues of trademark infringement and cybersquatting via social media platforms).

[183] *See supra* text accompanying note 182.

[184] *See generally* Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 507 F.3d 252 (4th Cir. 2007) (describing the criteria for dilution by blurring and dilution by tarnishment).

[185] *See supra* text accompanying note 182.

[186] *See supra* text accompanying note 182.

[187] *See supra* text accompanying note 182.

[188] *See supra* text accompanying note 182.

[189] *See supra* text accompanying note 182.

[190] *See* Curtin, *supra* note 105, at 354.

cybersquatting, an individual would register the celebrity name as an account on one of these social media platforms in an effort to either pass off their views as those of the celebrity's, or separately, in an effort to extort money from the celebrity to recover the account handle.[191]

These fake account handles are still fairly pervasive on social media, but the infringement cases that would seemingly naturally follow them are not.[192] The reason why these infringement cases are not more common is twofold.[193] First, social media users as a whole are becoming increasingly aware and vigilant regarding fake accounts.[194] These fake accounts have been pervasive since the very beginning of social media, and therefore a user who has been actively using this technology for a substantial amount of time is more likely to be skeptical about an unsubstantiated claim that a celebrity-user is whom they say they are.[195] Users are, therefore, less likely to be confused in regard to the source of a trademark from one of these accounts, as they are more likely to be skeptical to begin with regarding these celebrity accounts.[196] This is especially true in the context of the younger generations who use these platforms; younger users are increasingly savvy when it comes to the Internet, and therefore more likely aware of the potentiality of these fake accounts.[197]

The second reason that these infringement cases are not frequently pursued is because of the fact that the social media platforms themselves are becoming increasingly more vigilant about patrolling fake accounts on their sites.[198] Many of these platforms now have symbols indicating the "verified," or authenticated, celebrity accounts on their site, to indicate to

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[191] *See* Curtin, *supra* note 105, at 354.

[192] *See* Complaint La Russa v. Twitter, Inc., No. CGC-09-488101, 2009 WL 1569936 (Cal. Super. Ct., May 6, 2009) (laying out what an infringement case regarding social media use would look like); Vincent, *supra* note 13; Kelly, *supra* note 107.

[193] *See* Mary Madden & Amanda Lenhart et al., *Teens, Social Media, and Privacy*, PEW RESEARCH CENTER (May 21, 2013), https://perma.cc/S6AG-DVB4 (describing the increasing competence teens have with social media usage).

[194] *See* Sarah Vizard, *Consumer Trust in Brands on Social Media Falls as Line Between Marketing and Non-commercial Blurs*, MARKETING WEEK (June 8, 2016), https://perma.cc/GS7W-W5SN (discussing the increasing awareness/distrust consumers have regarding the online content they are shown.).

[195] *Id.*

[196] *See* Madeline Buxton, *The Social Scam: For A-Listers, Imposters Still Loom Large*, REFINERY29 (May 2, 2018), https://perma.cc/5LL8-CEUE?type=image; *see also* Madden & Lenhart et al., *supra* note 193 (describing that, as of 2013, teens were becoming increasingly tech savvy).

[197] *See* Buxton, *supra* note 196; *see also* Madden & Lenhart et al., *supra* note 193.

[198] Pete Cashmore, *Twitter Launches Verified Accounts*, MASHABLE (June 11, 2009), https://perma.cc/TMS4-LJW4 (discussing Twitter's "Verified Accounts" system, which authenticates celebrity users, and thereafter shows a blue checkmark next to their account name).

every day users that these accounts have been proven to be legitimate.[199] Further, most social media sites now also have systems in place that allow a user to report a fake celebrity account when they find it, and thereafter if the account is found to not be who it claims to be, it is promptly removed.[200]

There are still issues to be resolved with social media usage, and, as suggested before, a claim for dilution may be a better route for someone like Ms. Jenner to pursue rather than a typical trademark infringement case.[201] Ms. Jenner has dealt with both of the aforementioned issues: individuals pretending to be her on certain platforms, and, more recently, fake versions of her products being sold via these sites.[202] There were even fake versions of Kylie Jenner's Lip Kits allegedly being sold with dangerous chemicals.[203] This was all brought to her attention via social media comments from her fans and followers.[204] Using social media, Ms. Jenner was able to bring attention to these fake products and warn her social media followers against purchasing any products that were not sold and authenticated through her particular website.[205] This was not a one-time occurrence however, and Ms. Jenner has had to take to her social media platforms a number of times to address the issue of these fake, and potentially harmful, products.[206] This is another clear benefit of social media—she was able to see the issue her consumers were having with these false products and address it directly.[207] Despite Ms. Jenner addressing these false products over her social media accounts, fake versions of her Lip Kits continue to pop up, and therefore a claim for dilution may be more appropriate.[208]

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[199] *Id.*

[200] Jennifer Leighton, *How to Delete a False Facebook Page*, AZ CENTRAL, https://perma.cc/MZ8Q-NFHA (last visited Sept. 25, 2019) ("Although you are unable to directly delete any Facebook account that you did not create yourself, you can report false accounts to Facebook administrators, who can then research the account and delete it if it's confirmed to be false.").

[201] *See* Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 507 F.3d 252, 264–65 (4th Cir. 2017) (describing the criteria for a claim of dilution).

[202] Jenna Amatulli, *Kylie Jenner Warns Her Fans About 'Dangerous' Fake Lip Kits*, HUFFINGTON POST (Oct. 27, 2016 12:50 PM ET), https://perma.cc/T9RC-9XQF.

[203] *Id.* (describing that the knockoff versions looked exactly like Kylie Lip Kits, while allegedly containing harmful chemicals such a gasoline and glue, and also commenting that there were reports of side effects, with consumers of these fake kits complaining that the kits caused their lips to swell or stick together all while the colors consumers received from these fake kits were not the same shades that Ms. Jenner sold).

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] Amatulli, *supra* note 202.

It is important to realize that dilution is a cause of action that is used specifically and exclusively for famous trademarks.[209] The mark-holder has to reach a certain level of recognition before they can successfully pursue a dilution claim.[210] Ms. Jenner would easily satisfy this "fame" requirement, as her trademark is clearly well known.[211]

Dilution comes in two forms: dilution by blurring and dilution by tarnishment.[212] Dilution by blurring has been defined as the "association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark."[213] Dilution by tarnishment has been defined as the "association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark."[214]

For a claim of dilution by blurring, a celebrity like Ms. Jenner could argue that having so many fake accounts, and fake versions of her product, on these social media platforms "impairs the distinctiveness of the famous mark"—her name and brand.[215] Dilution by blurring "occurs when consumers see the plaintiff's mark used on a plethora of different goods and services or specifically when a defendant uses a plaintiff's trademark to identify the defendant's goods or services.[216] Blurring creates the possibility that the mark will lose its ability to serve as a unique identifier of the plaintiff's product."[217] Under this theory, a celebrity like Ms. Jenner could argue that her name—and thus her mark—will become less distinctive of her actual goods and services because her trademark issued so regularly in association with these fake accounts and fake goods, that her name—and thus her mark—will become less distinctive of her actual goods and services.[218] Ms. Jenner's argument under dilution by blurring is that her trademark will lose its function as a unique identifier if it is regularly used with these fake accounts, or as paired with fake versions of

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[209] 15 U.S.C.A. § 1125(c)(2)(A) (2006).

[210] *Id.* (defining that a mark is famous when it is "widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner").

[211] *See* Grey, *supra* note 1.

[212] *See* Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 507 F.3d 252, 264 (4th Cir. 2007).

[213] 15 U.S.C.A. § 1125(c)(2)(B).

[214] *Id.* § 1125(c)(2)(C).

[215] *See Louis Vuitton Malletier S.A.*, 507 F.3d at 264–65.

[216] *Id.*

[217] AutoZone, Inc. v. Tandy Corp., 373 F.3d 786, 801 (6th Cir. 2004); Eli Lilly & Co. v. Natural Answers, Inc., 233 F.3d 456, 466 (7th Cir. 2000); LONNIE E. GRIFFITH, ET AL., 87 C.J.S. TRADEMARKS, ETC. § 102 (2019).

[218] *See* GRIFFITH, ET AL., *supra* note 217.

her product.[219]

An even stronger argument, however, would be dilution by tarnishment for the fake versions of her products that are being promoted over social media.[220] The fake versions of her products being sold are clearly harmful if they do in fact contain glue and other such materials.[221] If these fake products become pervasive in the marketplace, and if consumers come to associate the harmful ingredients in these fake products with her brand name, this will certainly "harm the reputation of [her] famous mark."[222] This is a more compelling argument than infringement, and therefore would be more likely to be successful.[223] This would not be an appropriate case for classic trademark infringement—this is not a circumstance where there are two competing trademarks that are similar and thus could potentially confuse a consumer.[224]

The dilution issue here, with both the fake accounts and the fake products, is that since these problems are so pervasive, consumers may come to think less of the brand itself.[225] That is an issue for a dilution claim to solve—not classic infringement.[226] Once again, these are issues that have the potential to become more frequent, as social media becomes increasingly more prominent, and trademark dilution may be the more appropriate claim in such instances.[227]

CONCLUSION

There are both pros and cons to social media usage when it comes to celebrity trademarks. On the one hand, these platforms create a space in which brands and companies can both reach significant amounts of potential consumers at little to no cost, while at the same time being able to easily address issues consumers have regarding their products. This is a level of communication and interaction that was unheard of a decade and a half ago. All of this is particularly significant in the context of celebrities, and celebrity trademarks, as many of these individuals use these platforms to promote their own products. These celebrities inherently have a built-in following over these platforms that they can reach with promotions of their

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[219] *See id.*

[220] *See Louis Vuitton Malletier S.A.*, 507 F.3d at 264.

[221] Amatulli, *supra* note 202.

[222] *See Louis Vuitton Malletier S.A.*, 507 F.3d at 268–69.

[223] *See generally id.* (describing the criteria for a claim of dilution).

[224] *See* Amatulli, *supra* note 202.

[225] *See Louis Vuitton Malletier S.A.*, 507 F.3d at 268–69.

[226] *See* Amatulli, *supra* note 202.

[227] *See Internet Growth Statistics*, *supra* note 11.

product, at little cost compared to traditional advertising. At the same time, there are clear disadvantages to the use of these sites by brands in general, and even more specifically for celebrities. There are dangers that either someone will copy the celebrity's trademark in a fake account, or go on to sell fake versions of the celebrity's product via these platforms. These issues could both be harmful to a celebrity brand and trademark. Courts will see these issues with increasing frequency as social media becomes evermore ubiquitous in our day-to-day lives. That being said, it is clear that many celebrities have weighed the costs and benefits associated with the use of social media in promoting their brand and trademark, and have found the financial benefits outweigh the potential costs. Using these platforms can be especially lucrative, if done effectively. It is clear that these are novel issues that courts are just beginning to face, but will increasingly forced to do so. They should be considering how best to do so now.

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Harvesting Hope: Regulating and Incentivizing Organ Donation

*Alison Shea**

INTRODUCTION

There are currently 113,379 people waiting for a lifesaving organ transplant.[1] Despite a record-breaking 33,606 transplants performed in 2016, a significant organ shortage remains.[2] As ten minutes pass, another person is added to the waiting list, while twenty-two others will die today, waiting.[3] Besides the unspeakable tragedy inherent to the senseless loss of life, the organ shortage crisis creates debilitating problems that permeate different levels of society, creating a broad spectrum of issues.[4] These issues, caused by a failure to properly regulate organ donation, cause distributive injustice—restricting access to lifesaving medical treatment based on socioeconomic criteria masqueraded as safety standards.[5]

Despite mankind's fascination with transplantation since the dawn of time, society has failed to provide functional means for effectively

* J.D., 2018, New England Law | Boston; B.A., 2011, Biology/Neuroscience, Salve Regina University. During the time between the penning and publication of this Note, my mother died waiting for a kidney transplant. While she was not fortunate enough realize her dream of becoming an organ recipient, she indeed became an organ donor — a vision of unconditional love. This Note is humbly dedicated to Susan Shea, my mother; and to Mike (Dad), Mary, and Charlie Shea, and Dwight Carlone, the family that sustains me. Save a life, please become an organ donor today: www.organdonor.gov.

[1] *Data*, UNITED NETWORK FOR ORGAN SHARING, https://perma.cc/PF43-X83L (last visited Sept. 16, 2019).

[2] *See* Susan Scutti, *US Organ Transplants Increased Nearly 20% in Five Years*, CNN (Jan. 9, 2017, 2:02 PM), https://perma.cc/2WB8-4L89.

[3] *See Data, supra* note at 101.

[4] *See* Arthur J. Matas et al., *Incentives for Organ Donation: Proposed Standards for an Internationally Acceptable System*, 12 AM. J. TRANSPLANTATION 306, 308 (2012).

[5] *See id.*

promoting, acquiring, and distributing organs for transplantation.[6] While technology exponentially drives organ transplantation forward, legislative failures continue to create and feed an ever-widening gap between the supply and demand of organs.[7] While the organ shortage may be affected by technological developments, it can only be solved through meaningful regulation.[8]

Regulation is the most effective means for resolving the organ shortage because regulation drives the distribution, and thus, the availability, of organs.[9] The symbiotic relationship between medical technology and legislation remains an undisputed notion amongst ethicists, surgeons, patients, and politicians alike, concluding that "[u]ltimately the potential for organ transplantation will depend not only on advanced medical technology, but also on the progress in the legal technology of organ donation."[10]

This Note will provide a comprehensive overview of the medical and legislative histories that have sculpted modern day organ transplantation; explore the legislative and ethical issues surrounding current transplantation systems; provide examples of the regulatory framework used in other countries; and present plausible solutions for improving the regulation and allocation of organs – specifically kidneys – for transplantation in the United States. Part I of this Note provides background information centering around the technological development and the legislative history surrounding organ donation in the United States. Part II describes the ways in which former and current legislation failures have caused the organ shortage crisis in the United States. Part III provides the consequences of regulatory failures. Part IV proposes a legislative resolution to the United States organ shortage crisis.

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[6] *See* Badri Shrestha, *Historical Perspectives in Kidney Transplantation: An Updated Review*, 25 PROGRESS IN TRANSPLANTATION 64, 64 (2015).

[7] *See* Alden M. Doyle et al., *Organ Transplantation: Halfway through the First Century*, 15 J. AM. SOC. NEPHROL. 2965, 2968–69 (2004).

[8] *See* Lisa M. Derco, *America's Organ Donation Crisis: How Current Legislation Must Be Shaped By Successes Abroad*, 27 J. CONTEMP. HEALTH L. & POL'Y 154, 156 (2010).

[9] *See* Sally Satel et al., *State Organ-Donation Incentives Under the National Organ Transplant Act*, 77 L. & CONTEMP. PROBS. 217, 218–19 (2014).

[10] *See* BERNARD M. DICKENS ET AL., *Legislation on Organ and Tissue Donation*, in ORGAN AND TISSUE DONATION FOR TRANSPLANTATION 95 (Jeremy R. Chapman et al. eds., 1997) (quoting W.N. Gerson, *Refining the Law of Organ Donation: Lessons from the French Law of Presumed Consent*, 19 J. INT'L L & POL. 1013, 1013–32 (1987)).

I. Background

A. *Organ Donation, A Mythical Dream to Medical Reality*

1. Roots of Organ Donation

From ancient mythological beings to Christian Scripture, the concept of fortifying an individual with foreign body parts has been universally prevalent throughout culture, spanning the progression of time and technology.[11] Indeed, the advancement of transplantation shadows the development of civilization—from crude foundations in the prehistoric Bronze Age, to experimentation during the Renaissance, followed by refinement during the Age of Enlightenment, and continuous progression in postmodern medicine.[12]

During the late eighteenth century, John Hunter (later referred to as the "father of British scientific surgery" and credited with coining the term "transplantation"), concluded "transplantation is founded on a disposition in all living substances to unite when brought into contact with each other."[13] Scientific advancements continued to spur transplantation technologies in the pursuit of mastering the science as an art.[14]

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[11] *See* B. EVSLIN ET AL., THE GREEK GODS 7 (Scholastic Inc. ed., 1966) (referencing the "hundred-handed Briareus"); ROBIN WATERFIELD & KATHRYN WATERFIELD, THE GREEK MYTHS: STORIES OF THE GREEK GODS AND HEROES VIVIDLY RETOLD 132 (Toucan Books Ltd. London 2011) (describing the man and beast attributes of the Minotaur); Hossein Shayan, *Organ Transplantation: From Myth to Reality*, 14 J. INVESTIGATIVE SURGERY 135, 135 (2001); Shrestha, *supra* note 6, at 64 (describing the elephant head of the Hindu deity Ganesha); Rene J Duquesnoy, *History of Transplant Immunobiology*, https://perma.cc/GS7K-TJS6 (last visited Sept. 16, 2019); *See also Ezekiel* 36:26 ("And I will give you a new heart, and I will place in you a new spirit. And I will take away the heart of stone from your body, and I will give to you a heart of flesh."); *Luke* 22:50–51 ("And one of them struck the servant of the high priest and cut off his right ear. But in response, Jesus said, 'Permit even this.' And when he had touched his ear, he healed him.").

[12] *See* Avneet Singh Chawla, Ranjan Chandra & Yatish Agarwal, *Tissue and Organ Transplantation: Myths, Miracles, and Triumphs*, CHRON. OF MED., July-Sept. 2014, at 144 (describing prehistoric evidence for the transplantation of bones and teeth during the Bronze Age); Shayan, *supra* note 11, at 135 (noting that skin grafts were first performed in 800 BC by the Indian surgeon Sushruta and detailing the first account of a cadaver-assisted transplant, occurring in 348 AD when the leg of a deceased man was transplanted to a Roman deacon; this event later became known as "the miracle of the black leg"); *see also* HISTORY OF TRANSPLANTATION – TIMELINE, https://perma.cc/C55Q-38ED (last visited Sept. 16, 2019) (referencing Fourth-Century Chinese texts that describe the first recorded body-to-body transplantation of an organ, performed when surgeon Tsin Yue-Jen successfully switched the hearts of two soldiers).

[13] Shrestha, *supra* note 6, at 64; *see* Shayan, *supra* note 11, at 136; *see generally* HISTORY OF TRANSPLANTATION – TIMELINE, *supra* note 12.

[14] *See* HISTORY OF TRANSPLANTATION – TIMELINE, *supra* note 12.

The early twentieth-century saw the dawn of modern-day transplantation techniques following a boom of experimental transplantation in the nineteenth century and increased popularity of therapeutic transplantation.[15] The theory of biological incompatibility and the techniques of anastomotic suturing of blood vessels, arterial and venous reconstruction, and cold preservation of harvested organs, led to the successful cross-transplantation of kidneys between two dogs.[16] In 1902, the first successful kidney autotransplant experiments were performed by Emerich Ullman in Vienna.[17] The first human kidney transplant experiments were performed in 1909 using animal kidneys, however, despite the immediate success of the surgery, the transplanted kidneys stopped functioning after an hour.[18] Similarly, the first human-to-human cadaveric kidney transplant was performed in 1933 using successful surgical procedures, but incompatibility issues (unknown at the time) rendered the kidney unfunctional and the recipient subsequently died.[19] Although transplantation procedures were becoming more successful, the survival rates of the grafts were generally unsuccessful due to a fundamental lack of understanding surrounding the interplay of immunology and transplantation.[20]

2. The Discovery of Immunology

Unbeknownst to the pioneers developing transplantation techniques, a successful transplant requires a meticulous balance between anesthesiology, surgical technique, and immunology.[21] Despite the surgical advancements put forth by transplantation pioneers, the overall balance for success was lacking advancement in anesthesiology and immunology.[22] While the developments of anesthesia and aseptic technique contributed greatly to the overall success of transplantation, the most significant contribution came

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[15] *See* Shrestha, *supra* note 6, at 65 (detailing significant advancements in transplantation stemming from Samuel Bigger's successful corneal transplant of a gazelle in 1837—a process that was refined and, in 1906, used successfully in humans; and the development of vascular theory in transplantation put forth by Alexis Carrel, whose discoveries were awarded the 1912 Nobel Prize in Medicine); Shayan, *supra* note 11, at 135–36 (describing how allogenic skin grafting became a standard of therapeutic procedure during the 1800's despite the infrequent long-term survival of the grafts).

[16] *See* HISTORY OF TRANSPLANTATION – TIMELINE, *supra* note 12.

[17] *See* Shrestha, *supra* note 6, at 65.

[18] *Kidney Transplantation: Past, Present, and Future*, STANFORD, https://perma.cc/H27P-FTR8 (last visited Sept. 16, 2019).

[19] *See* Shrestha, *supra* note 6, at 65.

[20] *See* Duquesnoy, *supra* note 11.

[21] *See* Shayan, *supra* note 11, at 136.

[22] *See* Shayan, *supra* note 11, at 136.

from the study of immunology.[23]

Several scientists recognized the individuality of patients affecting the success of transplantation without fully understanding the impact of immunology.[24] During the 1930's, transplant-immunology research waned and scientists began to believe that, aside from corneal transplantation which carried a low rate of rejection, all skin and organ transplants would fail by rejection.[25] The dismal success rates of non-corneal transplantation very well could have caused the extinction of solid organ transplantation entirely, if not for the Second World War.[26] In response to burns incurred by soldiers, the War Wounds Committee of the British Medical Council tasked scientist Peter Medawar with investigating allograft skin rejection.[27] Medawar, often referred to as the "father of modern transplant immunology," discovered that allograft transplant rejection was caused by an immunological reaction.[28] Medawar's discovery opened the floodgates for scientists seeking the best ways to achieve allograft recipient immunosuppression including tissue-typing (matching donor and recipient antigens), radiation, and chemical immune-suppression.[29] After scientists ruled out the risks associated with full body radiation, the common therapeutic approach to mitigating allograft rejection became tissue-typing, chemical induced immunosuppression, desensitization, and paired donation—techniques modern day scientists are still working to perfect.[30]

3. Modern Day Transplantation

Upon discovery of immunosuppression and successful allograft skin transplants between identical twins, Medawar hypothesized that a kidney transplant between identical twins could achieve long-term survival.[31] In 1954, Medawar's hypothesis was proven correct when Dr. John Murray performed a kidney transplant between identical twin brothers—the

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[23] *See* Shayan, *supra* note 11, at 137.

[24] *See* Shayan, *supra* note 11, at 137; Duquesnoy, *supra* note 11 (quoting Tagliacozzi, a Renaissance-era surgeon, "The singular character of the individual entirely dissuades us from attempting this work on another person. For such is the force and power of individuality, that if anyone should believe that he could achieve even the least part of the operation, we consider him plainly superstitious and badly grounded in physical science.").

[25] *See* Duquesnoy, *supra* note 11.

[26] *See* Duquesnoy, *supra* note 11.

[27] *See* Shayan, *supra* note 11, at 137.

[28] *See* Shayan, *supra* note 11, at 137.

[29] *See* Shayan, *supra* note 11, at 137.

[30] *See* Robert A. Montgomery, *Renal Transplantation Across HLA and ABO Antibody Barriers: Integrating Paired Donation into Desensitization Protocols*, 10 AM. J. TRANSPLANTATION 449, 449 (2010).

[31] *See* Shayan, *supra* note 11, at 138.

recipient surviving with the allograft intact for eight years (before succumbing to medical issues not associated with the transplant) and his donor for fifty-six.[32] Dr. Murray performed a similar transplant between twin sisters in 1956 with the recipient surviving until 2011.[33] Although immunosuppression was not available for these surgeries, it was not needed because the donors and recipients were identical twins, thus proving Medawar's theory.[34] In 1962, Murray completed the first successful kidney donation from a cadaver to a living recipient.[35] Sixty-three years after Murray completed the first successful kidney transplant, modern medicine is still working to advance kidney transplant technology and mitigate the risk of rejection.[36] Current transplantation generally requires compatibility between ABO blood types and tissue compatibility between the antibodies of the recipient and antigens of the donor.[37] These matches can be made through living donation, cadaveric donation, or, potentially, alternative methods.[38] While scientists continuously develop and refine therapies for successful transplantation, sociopolitical landscapes are struggling to catch up with advancing transplantation technology, thus inhibiting the growth and success of organ donation while creating "life or death" issues for potential recipients and their families.[39]

B. *Legislative History of Organ Donation*

The novel technologies and capabilities of organ transplantation provoked the need for political, ethical, legal, and social considerations.[40] Following the introduction of immunosuppression therapy in the 1960's, the demand for organs exponentially increased while the supply grew sluggishly.[41] The ever-growing need for organ donation created controversy for both cadaveric-kidney transplantation and living-donor facilitated kidney transplantation, posing several ethical issues demanding legislative

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[32] Shrestha, *supra* note 6, at 65.

[33] J.E. Murray, *Edith Helm (April 29, 1935–April 4, 2011): The World's Longest Surviving Transplant Recipient*, 11 AM. J. TRANSPLANTATION 1545, 1545–46 (2011).

[34] *See* Shrestha, *supra* note 6, at 65.

[35] Sterling Sims, *A Brief History of Organ Transplantation*, 5 PENN. BIOETHICS J. 10, 10 (2014).

[36] *See* Robert A. Montgomery, *Renal Transplantation Across HLA and ABO Antibody Barriers: Integrating Paired Donation into Desensitization Protocols*, 10 AM. J. TRANSPLANTATION 449, 449 (2010).

[37] *See* Erika L. Rager, *The Donation of Human Organs and the Evolving Capacity for Transplantation*, 65 N.C. MED. J. 18, 19 (2004).

[38] *See* Dorry L. Segev et al., *Kidney Paired Donation and Optimizing the Use of Live Donor Organs*, 293 J. AM. MED. ASS'N 1883, 1883 (2005).

[39] *See* Sims, *supra* note 35, at 12.

[40] *See* Doyle, *supra* note 7, at 2968.

[41] *See* Sims, *supra* note 35, at 10.

action.[42] The legal framework for regulating organ donation is largely state-based, legislative, and absent federal uniformity.

1. The Uniform Anatomical Gift Act

In 1968, after technological advances shifted transplantation from experimental to therapeutic, Congress enacted the Uniform Anatomical Gift Act (UAGA).[43] However, rather than implementing a unified federal system for managing organ collection and allocation, Congress delegated organ transplantation management to the states by enacting the UAGA merely as a model for states to permissively adopt.[44] While Congress hopefully intended to provide consistency throughout the states by eliminating incongruity amongst the states (which ultimately impedes organ procurement), and to combat the organ shortage crisis by modeling distributive mechanisms.[45] To achieve this goal, the UAGA provided suggested regulations for cadaver donation—namely, that, upon death, anyone over the age of eighteen could donate any or all organs, either to a specific recipient or for use in accordance with the discretion of the hospital.[46] The UAGA was adopted, in various forms, by all the states, by 1971.[47]

The UAGA has been revised twice: first, in 1987 to stipulate that a person's consent to donate could not be revoked after death without showing that consent was invalid; and then again, in 2006, to prohibit a person from revoking the consent of a donor decedent after the death of a donor who had legally registered while alive.[48] In addition to these revisions, a series of laws pertaining to Medicare and Medicaid requirements for organ transplantation were enacted, easing some of the financial burdens for recipients, but failing to address organ shortages.[49]

The UAGA fails to provide uniformity because it allows states to self-regulate organ donation, inherently causing distributive injustice between citizens of different states.[50] Absent a unified federal system, interstate

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[42] *See* Sims, *supra* note 35, at 10–11.

[43] *See* Laurie Lenkel, The Laws Governing Organ Donation (Mar. 2014) (unpublished Ph.D. dissertation, Northeastern University) (on file with the College of Professional Studies, Northeastern University).

[44] *See* Kathleen S. Andersen & Daniel M. Fox, *The Impact of Routine Inquiry Laws on Organ Donation*, 7 HEALTH AFF. 65, 67 (1988).

[45] *See* Derco, *supra* note 8, at 158–59.

[46] Sims, *supra* note 35, at 11.

[47] *See* Sims, *supra* note 35.

[48] *See* Lenkel, *supra* note 43.

[49] *See generally* Lenkel, *supra* note 43.

[50] *See* Abena Richards, *Don't Take Your Organs to Heaven...Heaven Knows We Need Them Here:*

disparity regarding organ donation will continue to be passively encouraged by the UAGA.[51] Thus, the current system perpetuates regional divergence, rendering geography an arbitrary arbiter of life.[52]

2. National Organ Transplant Act

The National Organ Transplant Act (NOTA) was enacted in 1984 "to encourage organ donation and to improve procedures for efficient organ procurement leading to successful transplantation."[53] NOTA provided language that explicitly prohibited the sale of organs, authorized the creation of grants for organ procurement organizations, created the Scientific Registry of Transplant Recipients, established the Organ Procurement Transplant Network (OPTN), and provided oversight for these activities through the creation of an administrative unit inside of the DHHS.[54]

The establishment of the OPTN has been heralded as the most successful outcome established by NOTA.[55] NOTA defines the purpose of the OPTN as "to arrange for the acquisition and preservation of donated organs and provide quality standards for the acquisition of organs."[56] The OPTN works to accomplish these goals by improving the efficiency and parity of organ allocation, and increasing the amount of donated organs through education (both publicly and professionally) about organ donation and transplantation.[57] The OPTN is comprised of several different members including laboratories, patient advocacy groups, transplant centers, and Organ Procurement Organizations.[58]

3. Other Legislation

In addition to the primary guiding organ transplantation legislation contained in NOTA and the UAGA, several other pieces of legislation help to sculpt the legislative landscape.[59] Federal legislation includes the End Stage Renal Disease Act of 1972, the Organ Donation and Recovery Improvement Act of 2004, the Consolidated Omnibus Budget Reconciliation

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Another Look at the Required Response System, 26 N. ILL. U. L. REV. 365, 374–76 (2006).

[51] *See id.* at 406.

[52] *See id.*

[53] *See* S. REP. NO. 98-382, at 4 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3974.

[54] *See* Kelly Lobas, *Living Organ Donations: How Can Society Ethically Increase the Supply of Organs?*, 30 SETON HALL LEGIS. J. 475, 478–79 (2006).

[55] *See* Derco, *supra* note 8, at 159.

[56] *See* 42 U.S.C. § 273(b)(3)(C) (2006).

[57] *See* Rager, *supra* note 37, at 19.

[58] *See* Rager, *supra* note 37, at 19.

[59] *See* Lenkel, *supra* note 43.

Act of 1985, and several Medicare incentive policies, while states have begun to enact first person and presumed consent laws.[60]

In 1972, the End Stage Renal Disease Act was enacted, allowing Medicare and Medicaid to pay for dialysis and transplant surgery, but not the long-term immunosuppression therapy required to maintain transplant recovery, decimating logic and cost effective reasoning.[61] Lack of immunosuppression coverage not only creates the risk of jeopardizing a recipient's success rate, it also adds financial burdens to already strained federal health coverage programs and could even potentially return recipients to the waiting list—pushing demand even further away from supply.[62]

The Organ Donation and Recovery Improvement Act of 2004, in addition to NOTA, created grants for OPOs and established a task force to submit mandatory bi-yearly reports to Congress. The reports described the rates of organ donation and recovery and provided recommendations for education programs to improve public awareness surrounding organ donation.[63]

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) pertained to several areas of health care regulation, including organ transplantation and allocation.[64] COBRA required hospitals to establish relationships with OPOs, provided that OPOs must work with hospitals to coordinate transplants. COBRA also established a mandatory "required request" policy through which any hospital that received Medicare or Medicaid funding became obligated to inform all families of potential donors about organ donation, including the right to decline.[65]

In 1998, the Health Care Financing Administration introduced five Medicare policies aimed at encouraging organ donation.[66] These five policies require that hospitals participating in Medicare must notify the local OPO of every death, require that personnel educating families about organ donation are trained by the local OPO, maintain a written agreement to work with organ, tissue, and eye banks, acknowledge potential donor screening will be

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[60] *See Center for Bioethics*, ETHICS OF ORGAN TRANSPLANTATION, https://perma.cc/N53A-REF4 (last visited Sept. 16, 2019).

[61] *See* Richard Harris, *Medicare Pays for a Kidney Transplant, but Not the Drugs to Keep it Viable*, NPR (Dec. 22, 2016, 4:48 AM ET), https://perma.cc/7W6X-4BQZ.

[62] *See* Eugene F. Yen et al., *Cost-Effectiveness of Extending Medicare Coverage of Immunosuppressive Medications to the Life of a Kidney Transplant*, 4.10 AMER. J. TRANSPLANTATION 1703, 1703–08 (2004).

[63] *See* 42 U.S.C. § 273 (2006).

[64] *See* 29 U.S.C. § § 1161–68 (1985).

[65] *See id.*

[66] ETHICS, *supra* note 60, at 32.

conducted by appropriate recovery agencies, and work with such recovery agencies to determine the donation potential of individual facilities.[67]

II. Failure to Legislate Organ Donation Presents Medical and Ethical Issues

A. *Federal Legislation Creates Inequity*

1. Federal Legislation Does Not Provide Uniformity

In the absence of a federal, unified system for organ allocation, several organizations, generally derived from federal legislation and working within the bounds of state laws, work together to comprise the organ collection and allocation system.[68] Organs that are currently transplantable in the United States include, kidneys, livers, hearts, lungs, pancreata, and small intestines, with each respective organ following a specific policy.[69] Organ transplantation, however, follows a general schematic determined by the nature of the transplant: cadaveric or living donor.[70]

B. *Processes Regulating Cadaveric Organ Transplantation*

Cadaveric organ transplantation occurs when an organ is harvested from a decedent upon death and transplanted into someone on the organ transplant waiting list.[71] Several organizations function collectively to identify, allocate, and coordinate transplantation surgeries across the United States.[72] Cadaveric organ donation is governed by the OPTN, which was established by NOTA, and is subject to the regulations imposed by the home state as adopted from UAGA.[73]

Organ Procurement Organizations (OPOs) are privately held, nonprofit organizations that are certified members of the OPTN.[74] While membership within the OPTN is not explicitly required, transplant centers, OPOs, and other organizations must be members of the OPTN as a prerequisite for receiving Medicare funding associated with the costs of transplant.[75] Unsurprisingly, every transplant center in the United States is a member of

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[67] ETHICS, *supra* note 60, at 32.

[68] *See* Richards, *supra* note 50, at 371.

[69] Rager, *supra* note 37, at 19.

[70] *See* Jed Adam Gross, *E Pluribus UNOS: The National Organ Transplant Act and Its Postoperative Complications*, 8 YALE J. HEALTH POL'Y L. & ETHICS 145, 152 (2008).

[71] *See id.*

[72] *See* Rager, *supra* note 37, at 19.

[73] *See* Lenkel, *supra* note 43.

[74] *See* Rager, *supra* note 37, at 19.

[75] *See* Rager, *supra* note 37, at 19.

the OPTN, which also tracks transplant survival rates and performs reviews for centers who fail to meet survival quotas; therefore, every transplant center is indirectly governed by DHHS and, even more indirectly, by NOTA.[76] OPTN membership requires all transplant centers to be staffed by a medical director, clinical transplant coordinator, social support staff, transplant surgeons, and transplant physicians.[77]

The United Network for Organ Sharing (UNOS) is a private, nonprofit organization that is contracted by the DHHS to oversee OPOs.[78] The policies put forth by UNOS are automatically adopted by the OPTN, creating an almost interchangeable dynamic between UNOS and the OPTN.[79] UNOS is responsible for maintaining a national waiting list and, based on a points system, allocating organs to OPOs for transplantation in the most qualified recipient.[80] A centralized computer system maintained by UNOS connects OPOs to transplant centers, which are divided into regions across the United States.[81] UNOS stratifies waiting list candidates by organ type.[82]

As of February 2017, 118,395 candidates for transplant were listed on the national waiting list—98, 272 seeking kidneys, the highest in demand—vastly surpassing the second highest waiting list, the liver, with 14,361 waiting list candidates.[83] UNOS receives approximately 350 calls from OPOs each day regarding donatable cadaveric organs.[84] Any cadaveric organ that becomes available for donation is processed through the UNOS allocation system, with each organ following unique methods in accordance with matching criteria approved by the UNOS Board of Directors and transplant community.[85]

When a cadaveric kidney becomes available for donation, the process for allocation begins with a computer screening performed by UNOS that eliminates any waiting list candidates who are incompatible because of blood type, height, weight, or other medical factors; once the list is pared down by compatibility, candidates are prioritized based on a points

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[76] *See* Rager, *supra* note 37, at 19.

[77] *See* Rager, *supra* note 37, at 19.

[78] *See* Sims, *supra* note 35, at 14.

[79] *See* Sims, *supra* note 35, at 14.

[80] *See* Sims, *supra* note 35, at 14.

[81] *See* Rager, *supra* note 37, at 19.

[82] *See Waiting List Candidates by Organ Type*, UNITED NETWORK FOR ORGAN SHARING, https://perma.cc/T9YV-A57V (last visited Sept. 16, 2019).

[83] *See Data*, ORGAN PROCUREMENT AND TRANSPLANTATION NETWORK, https://perma.cc/5KYE-FALH (last visited Sept. 16, 2019).

[84] *See* Rager, *supra* note 37, at 20.

[85] *See How We Match Organs*, UNITED NETWORK FOR ORGAN SHARING, https://perma.cc/ E4F3-ZC8G (last visited Sept. 16, 2019).

system.[86] Kidney allocation is based upon a candidate's waiting time, immunological compatibility, whether the candidate had previously been a living donor, distance from the donor hospital, the individual benefit of survival, and whether the candidate has pediatric status.[87] These factors are weighed using a points system that assigns numeric values based upon a waiting list candidate's characteristics.[88] Kidney points are determined based upon tissue/blood type compatibility, registered waiting time, age, prior donor status, and sensitivity as assigned by the Calculated Panel Reactive Antibody score—which provides a percentage of the candidate's unacceptable antigens.[89]

The points assigned to each candidate are then classified according to an algorithm that quantifies a score determined by the points, regional availability, anticipated success rate, and other medical factors pertaining to both the donor and potential candidates (such as the history or presence of hypertension or diabetes).[90] Typically, kidneys are then allocated according to classification to candidates based upon regions, with each region and OPO within the region having an equitable opportunity decided by sequential order.[91] However, regional classifications are prioritized only after extreme candidate characteristics, and those with CRPA scores of 100% receive national priority.[92]

Following the surgery, the medical team and hospital that performed the transplant, as well as the OPO that coordinated the transplant, receive hundreds of thousands of dollars in payment from the recipient's insurance company, Medicare, and/or Medicaid, while the donor's family receives no compensation—even when the donor's family can only afford to bury their life-saving, heroic loved one in an unmarked grave.[93] These compensation figures have the potential to exponentially increase because each deceased organ donor has the ability to save up to eight lives with solid organ donation and affect up to fifty people through tissue transplantation.[94]

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[86] *See id.*

[87] *Id.*

[88] *See Organ Procurement Transplantation Network Policies*, ORGAN PROCUREMENT TRANSPORTATION NETWORK 100–21 (2018), https://perma.cc/75EQ-85N5 (last visited Sept. 16, 2019).

[89] *See id.*

[90] *See id.*

[91] *See id.*

[92] *See id.*

[93] *See* Derco, *supra* note 8, at 154–55 (2011).

[94] *See* Transplant Services, *The Impact of One Organ Donor*, UPMC (Apr. 26, 2015), https://perma.cc/CJD4-VKAN.

C. *The Processes Regulating Living Organ Donation*

Since humans can survive with only one kidney but are normally born with two, kidney transplantation, like liver transplantation, can be achieved with a living donor, thus simultaneously presenting additional opportunities for donation and increased risks for ethical dilemmas.[95] Living organ donation, developed in response to the shortage of deceased organ donors, provides better post-transplantation success rates for kidney transplant recipients—the most commonly transplanted living donor organ.[96] Because of the explicit prohibition on the sale of organs promulgated in NOTA, living donors cannot be compensated for donation.[97]

Directed donation is the most common form of living donation wherein the donor names a specific person as the recipient.[98] The donor is typically a relative, friend, or previously unknown person who has come forward after learning of the recipient's need for a transplant.[99] To donate, a direct donor is screened through the transplant center and, upon approval, transplantation surgery is scheduled to sequentially procure the organ from the donor and secure it within the recipient.[100] After the surgery, the donor's body will recover within weeks while the recipient is closely monitored by the transplant team throughout the remainder of the recipient's life to ensure that the donated organ is working properly and immunosuppression therapy is inhibiting rejection.[101]

D. *Current Legislative Failures*

1. Failures of UAGA

The UAGA fails to stipulate the exact means in which states should handle organ transplantation; rather it only established that citizens over the age of eighteen are entitled to choose to be an organ donor, the legal recognition of the Uniform Organ Donor Card, and the order of priority for obtaining next of kin consent in the event that a decedent had not

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[95] *See* LIVING DONATION, DONATE LIFE AMERICA, https://perma.cc/KT6M-3DQ9 (last visited Sept. 16, 2019) (differing from heart and lung transplantation).

[96] *See* Eghlim Nemati et al., *Does Kidney Transplantation with Deceased or Living Donor Affect Graft Survival?*, 6 NEPHRO. UROL. MON. 1, 5 (2014).

[97] S. REP. NO. 98-382, at 2–3 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3975.

[98] *See Living Donation*, UNITED NETWORK FOR ORGAN SHARING, https://perma.cc/5ASM-JGLS (last visited Sept. 16, 2019).

[99] *See id.*

[100] *See Living Donors*, NAT'L KIDNEY REGISTRY, https://perma.cc/WTF7-XA3Y (last visited Sept. 16, 2019).

[101] *See id.*

documented preferences for organ donation.[102]

2. Failures of NOTA

Despite NOTA's formation of the OPTN and its operation through UNOS, only 175,644 cadaveric kidney transplants have been performed from January 1, 1988—January 31, 2017.[103] Although studies indicate that 95% of Americans support organ donation, only about 40% are registered donors.[104] Social and psychological researchers speculate that the disparity between those who support organ donation and those who actually register is likely caused by several factors including distrust in the medical community, misconceptions about organ donation (generally fueled by fictional medical dramas), religious beliefs, and an unwillingness to make plans about death.[105]

Aside from the establishment of the OPTN, NOTA is generally viewed as a failure.[106] One of the most significant ways it fails is through its ambiguous language regarding the prohibition on the sale of organs.[107] NOTA states that it is "unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transplant affects interstate commerce."[108] Those found in violation of this prohibition can be fined $50,000 and imprisoned for up to five years.[109] NOTA further stipulates that "'valuable consideration' does not include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing and lost wages incurred by the donor of a human organ in connection with the donation of the organ."[110] NOTA, however, does not provide a definition for what "valuable consideration" does include.[111] The Department of Justice (DOJ) has attempted to provide clarity by providing that, for the purposes of NOTA, "valuable consideration" refers only to a

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[102] *See* Rager, *supra* note 37, at 19.

[103] *See National Data*, ORGAN PROCUREMENT AND TRANSPLANTATION NETWORK, https://perma.cc/FQF4-KXEE (last visited Sept. 16, 2019).

[104] *See* Janice Wood, *Why Don't More People Register As Organ Donors?*, PSYCHCENTRAL, https://perma.cc/RM77-KEXQ (last visited Sept. 16, 2019).

[105] *See* Tiffanie Wen, *Why Don't More People Want to Donate Their Organs?*, THE ATLANTIC (Nov. 10, 2014), https://perma.cc/8TGP-ETZ6.

[106] *See* Derco, *supra* note 8, at 172.

[107] *See* Derco, *supra* note 8, at 159.

[108] 42 U.S.C. § 274e(a) (2006).

[109] Derco, *supra* note 8, at 159.

[110] 42 U.S.C.A § 274e(c)(2) (2006).

[111] *See* Fred H. Cate, *Human Organ Transplantation: The Role of Law*, 20 J. CORP. L. 69, 80 (1994).

commercial transaction because NOTA intended to prohibit the sale of organs.[112] Under the interpretation provided by the DOJ, which is supported by the legislative history of NOTA, the buying and selling of organs is prohibited, but state incentives for organ donation are not expressly prohibited.[113] Lacking a concrete definition of "valuable consideration" and taking into account the substantial monetary fines and imprisonment associated with violating NOTA, states have chosen to broadly interpret the meaning of the "valuable consideration" prohibition in order to prevent any harsh consequences.[114] Because states are forced to take an overly cautious approach to the definition of "valuable consideration," state-based incentives for organ donors that could be used to mitigate the organ shortage crisis are not offered.[115] A clear definition of permissible state-based donor incentives would allow states to provide legal incentives for organ donors and, in doing so, increase the number of donated organs.[116]

NOTA's prohibition on exchanges of "valuable consideration" does not only preclude financial exchanges between donor and recipient, but any form of compensation to the donor from anyone, including the state and federal government.[117] Therefore, any donor—even a non-directed donor blindly donating a life-saving organ—cannot receive any benefits, including tax breaks, tuition payment, or even funeral expenses from anyone, including state and federal governments, without felony implications.[118] Although the NOTA prohibition is intended to protect vulnerable parties from being exploited in a commercial-market system, its overbreadth has caused more harm than good.[119]

3. Failures in Cadaveric Kidney Donation

Although UAGA provides a suggested legislative framework for organ donation, legislation varies widely from state to state causing significant disparity amongst the eleven regions.[120] In 2016, the distribution of cadaveric-kidney donations ranged from 467 in Region 1 to 2,448 in Region 5, with a total of 13,431 cadaveric-kidney donations performed.[121] These

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[112] Derco, *supra* note 8, at 160.

[113] *See* Derco, *supra* note 8, at 160.

[114] Derco, *supra* note 8, at 160.

[115] *See* Satel, *supra* note 9, at 227.

[116] *See* Satel, *supra* note 9, at 218-20.

[117] *See* Satel, *supra* note 9, at 220.

[118] *See* Satel, *supra* note 9, at 220.

[119] *See* Derco, *supra* note 8, at 173.

[120] *See* Derco, *supra* note 8, at 154–55.

[121] *See Transplant:Region of Center by Transplant Year (2015 - 2016), U.S. Transplants Performed, Organ Procurement and Transplantation Network*, U.S. DEPT. HEALTH AND HUMAN SERVICES,

numbers indicate that while all states have adopted some form of the UAGA, its implementation is not equal.[122] Similarly, quantitative statistical analysis, measured by early-adopting states, late-adopting states, and non-adopting states, indicates that the 2006 UAGA amendments have failed to increase the frequency of cadaver-organ transplants.[123]

ANALYSIS

III. Legislative Failures Create Ethical Issues

Organ transplantation yields a unique breed of ethical issues, surrounding both general and specific aspects of transplantation.[124] The two primary areas of ethical concerns pertain to organ procurement and distribution—in other words, where organs can be taken from and to whom should they be given.[125] Even though cadaveric and living donor transplantation present different ethical issues, bioethicists, the transplant community, and legislators agree that resolving the organ shortage crisis is the most effective and only way to solve these ethical concerns.[126] This theory arises from the belief that the organ shortage crisis breeds desperation resulting in circumstances where patients must choose between morals and life, including participating in the black-market organ transactions and transplant tourism.[127] Therefore, the solution to resolving ethical concerns about organ transplantation, lies solely in increasing the number of organs available for transplant.[128] However, policies aimed at increasing the number of donated organs must be sculpted with special care to define the ethical boundaries of organ procurement and allocation so as to not legitimize and proceduralize ethical ambiguity or abuse.[129] Clearly defined policies will also aid in increasing the number of organ donors by dispelling public fears and misperceptions about harvesting organs for transplantation

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https://perma.cc/U3UN-DEAV (last visited Sept. 16, 2019).

[122] *See id.*

[123] *See* Lenkel, *supra* note 43.

[124] *See* Aaron Spital, *Ethical and Policy Issues in Altruistic Living and Cadaveric Organ Donation*, 11 CLINICAL TRANSPLANTATION 77, 77–78 (1997).

[125] *See National Health and Medical Research Council*, ETHICAL GUIDELINES FOR ORGAN TRANSPLANTATION FROM DECEASED DONORS, https://perma.cc/T25X-M7CY (last visited Sept. 16, 2019).

[126] *See* Anthony Gregory, *Why Legalizing Organ Sales Would Help to Save Lives, End Violence*, THE ATLANTIC (Nov. 9, 2011), https://perma.cc/39JZ-E2DF.

[127] *See* Tammy Leitner & Lisa Capitanini, *Market for Black Market Organs Expands*, NBC CHICAGO 5 (May 19, 2014, 10:50 PM), https://perma.cc/5A37-MQEN.

[128] *See id.*

[129] *See Center for Bioethics*, *supra* note 60, at 20.

that could dissuade otherwise willing donors, such as premature death declarations, organ farming, and substandard medical treatment for designated donors.[130] These boundaries must be evaluated and defined for each of the three methods through which organs can be procured: cadaveric, living-donor, and alternative organs.[131]

A. *Ethical Issues Involving Cadaveric Donation*

1. Defining Death

Cadaveric-kidney donations occur when kidneys are harvested from a deceased person and transplanted into a living person.[132] One of the earliest controversies to plague the legal, public, and medical communities regarding cadaveric organ transplantation was how to define death.[133] While death had previously been a more obvious state, the introduction of life-support technology and the growing need to harvest organs in a timely manner to preserve viability prompted the need for a clear definition.[134] In 1968, the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Death declared "brain death" as an alternative definition to determine death in addition to the previously used definition of "when his or her heart stopped beating and he or she could no longer breath voluntarily."[135]

Prior to this definition, critical organs, such as the heart and lungs, were often rendered nonfunctional in the recipient's body while the new definition allowed doctors to keep a deceased donor on life support to preserve the viability of the organs.[136] The Ad Hoc Committee, in order to limit any conflicts of interest, included a provision governing that a physician responsible for determining a patient's death could not be involved in a transplant using organs donated from the patient.[137] While this definition was circulated in the medical community—resulting both in acceptance and controversy—in 1981, the President's Commission for the Study of Ethical Problems in Medicine and Biomedical Research published *Guidelines for the Determination of Death*, which laid the foundation for all fifty states to define death as the termination of brain activity which could be

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130 *See Center for Bioethics*, *supra* note 60, at 20.

131 *See Center for Bioethics*, *supra* note 60, at 20.

132 *See Center for Bioethics*, *supra* note 60, at 20.

133 *See* Doyle, *supra* note 7, at 2968.

134 *See* Doyle, *supra* note 7, at 2968.

135 *See* Sims, *supra* note 35, at 10.

136 *See* Sims, *supra* note 35, at 10.

137 *See* Sims, *supra* note 35, at 10.

made based purely on clinical grounds.[138] The guidelines reinforced the Uniform Brain Death Act of 1980, a model statute defining death as the irreversible cessation of circulatory or respiratory function or the irreversible cessation of all brain functioning, including the brain stem, with the requirement that the determination of death must be made pursuant to accepted medical standards.[139]

2. Consent

Although the definition of death pertaining to cadaveric organ transplant has been reasonably settled, the issue of consent remains.[140] Consent refers to the informed permission of an organ donor to have his or her organs harvested and used for transplantation.[141] Consent can be given by the donor pre-death by indicating as such on a driver's license or in an advance directive.[142] If consent has been given during life, then upon death, the wishes of the decedent will be honored and the organs will be harvested for transplant.[143] If, upon death, a decedent's wishes regarding organ donation have not been made known, a designated member of hospital personnel will approach the decedent's family to provide them with information about organ donation.[144] In these circumstances, the family is able to provide consent on behalf of the decedent.[145] The hierarchy of authority assigned to family members varies by state, but is generally given first to the spouse; absent a spouse, then to an adult child; if there are no adult children then authorization is given to any adult siblings; in the event that these family members do not exist or cannot be contacted, authority will be given to a legal guardian.[146]

B. *Living Donation Ethical Issues*

Living organ donation was developed in response to cadaveric organ

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[138] *See* Doyle, *supra* note 7, at 2968.

[139] *See* Doyle, *supra* note 7, at 2968.

[140] *See* Laura A. Siminoff et al., *Factors Influencing Families' Consent for Donation of Solid Organs for Transplantation*, 286 AM. MED. ASS'N 71, 71–72 (2001).

[141] *See* Christine S. Chung & Lisa Soleymani Lehmann, *Informed Consent and the Process of Cadaver Donation*, 126 ARCH. PATHOL. LAB. MED. 964, 964 (2002).

[142] *See How Organ Donation Works*, DMV.ORG, https://perma.cc/A7XJ-DN5P (last visited Sept. 16, 2019).

[143] *See Center for Bioethics*, *supra* note 60, at 6.

[144] *See Donation Process*, CENTER FOR ORGAN RECOVERY & EDUCATION, https://perma.cc/73J3-TH4P (last visited Sept. 16, 2019).

[145] *See Center for Bioethics*, *supra* note 60, at 20.

[146] *Center for Bioethics*, *supra* note 60, at 20.

shortage.[147] Through living organ donation, a person in need of certain types of transplants can find someone willing and able to donate the needed organ, thus bypassing any waiting time in the cadaveric organ pool.[148] In addition to avoiding time on the waiting list, living donation presents several benefits to the donor and the recipient.[149] These benefits include the ability to pre-arrange transplantation, which increases the likelihood of success by providing the opportunity for pre-transplant anti-rejection therapy, allowing for: closer matches through genetic relation or paired exchange, increased overall survival time for the transplanted organ, and the mutual psychological benefits of a life-saving act.[150] Despite the benefits of living donor transplantation, some critics discourage the practice citing health consequences for the donor including the pain, discomfort, and risk of infection associated with any surgery, and psychological coercion, sourced either internally or externally.[151] These drawbacks are the root of the ethical concerns surrounding living organ donor transplantation.[152]

1. Consent

As with cadaveric organ donation, consent similarly presents ethical concerns for living donor organ transplantation.[153] Even though a living donor is alive to provide consent, the ethical concerns involve the nature of consent.[154] Critics of living organ donation indicate that while a person may consent to be a living organ donor, that consent could be the result of psychological pressure to help rather than of the donor's own volition.[155] This could be especially true if the person has chosen to donate in order to save the life of a loved one.[156] The coercive pressure tainting the consent could come from other family members or even from within a donor who feels they must donate in order to save the life of a loved one.[157]

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147 Living Donation, *supra* note 95.

148 *See Would You Donate a Kidney? Here's How It Works*, MI BLUES PERSPECTIVES, https://perma.cc/WR3U-JYPH (last visited Sept. 16, 2019).

149 *See Center for Bioethics*, *supra* note 60, at 25.

150 *See* BENEFITS OF LIVING DONATION, LIVING KIDNEY DONORS NETWORK, https://perma.cc/274Z-9LSW (last visited Sept. 16, 2019).

151 *See Center for Bioethics*, *supra* note 60, at 25.

152 *See* Samuel D. Hensley, *Informed Consent in Living Organ Donors*, THE CENTER FOR BIOETHICS & HUMAN DIGNITY (June 15, 2005), https://perma.cc/YFJ9-FSKH.

153 *See id.*

154 *See* Kirsten Kortram, *The Need for a Standardized Informed Consent Procedure in Live Donor Nephrectomy: A Systematic Review*, 98 TRANSPLANTATION J. 1134, 1134 (2014).

155 *See Center for Bioethics*, *supra* note 60, at 25.

156 *See Center for Bioethics*, *supra* note 60, at 25.

157 *See Center for Bioethics*, *supra* note 60, at 25.

The risk of coercive consent is largely mitigated by the living donor screening process.[158] To become a living organ donor, a person must pass a series of arduous testing, comprised of medical and psychological elements.[159] These tests provide transplant centers with critical information upon which transplantation is contingent; such as, whether the donor's blood and tissue types are compatible with those of the recipient; whether the donor is physically and medically capable of donating an organ; and whether the donor is psychologically capable of appreciating the decision to donate and able to provide informed consent, absent coercion.[160]

Coercion screening also includes ensuring that the donor is donating for the purpose of saving a life and not to receive any gain from the recipient or the recipient's family.[161] Donor-screening is performed by a specialized team that is segregated from the staff associated with assisting the recipient to prevent the cross-sharing of information, protect privacy rights for both the donor and the recipient, and to mitigate conflicts of interest between the donor and recipient medical teams.[162]

Despite the importance of consent, there is no standard procedure for obtaining a living donor's consent. However, the Advisory Committee on Organ Transplantation has released recommendations for a standardized form.[163] Although these recommendations exist, transplant centers are not bound by them; instead, each transplant center is responsible for maintaining and defending their consent procedures to sustain membership in the OPTN.[164]

IV. Solutions for Solving the Organ Shortage Crisis

A. *Increasing Living Organ Donor Transplantation*

1. Kidney Exchange Programs

In addition to directed living organ donation, two additional methods of living organ donation have been developed in response to the organ shortage crisis.[165] These two types of living donation, known as "paired

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158 *See* Kortram, *supra* note 154.

159 *See Test For Living Donation*, UNOS TRANSPLANT LIVING, https://perma.cc/6QC2-HBMN (last visited Sept. 16, 2019).

160 *See* Kortram, *supra* note 154, at 1142.

161 *See* Kortram, *supra* note 154, at 1142.

162 *See* Linda Wright et al., *Ethical Guidelines for the Evaluation of Living Organ Donors*, 47 CAN. J. SURG. 408, 410 (2004).

163 *See* Kortram, *supra* note 154, at 1134–35.

164 *See* Kortram, *supra* note 154, at 1134–35.

165 *See* Paolo Ferrari et al., *Kidney Paired Donation: Principles, Protocols, and Programs*, 30 NEPHROL. DIAL. TRANSPLANT 1276, 1276 (2015).

donation" (also called "kidney exchange") and "non-directed donation" (also known as "chain donation"), occur when pairs of incompatible donors and recipients trade kidneys so that each recipient receives a compatible organ.[166] Paired kidney donations (also known as "paired kidney exchange") and "chain donation" occur when multiple recipients receive kidneys from multiple donors who have "swapped" recipients.[167]

In paired kidney exchange, a living donor who is medically cleared for transplant but unable to give directly to the recipient—because of tissue or blood type incompatibility—is entered into a registry called the Kidney Paired Donation (KPD) System.[168] The KPD system is maintained and registered by UNOS as part of its contractual agreement with the OPTN.[169] Once a donor-recipient "mismatch" pair is registered in the system, they are algorithmically compared with other donor-recipient "mismatch" pairs.[170] If another pair or pairs of donor-recipients can be used to create match congruity, the donors and recipients will be swapped so that each recipient receives a compatible kidney.[171] This process can be done within the same hospital or across multiple hospitals, so long as each recipient receives a kidney within three weeks of the first transplant.[172] An illustration of this event is as follows: Tom is medically cleared to be a kidney donor to his wife, Nancy.[173] While Tom is medically capable of donating, his ABO blood type is A while his wife's is B, thus she can only receive a B or an O type kidney.[174] Several states away, Connie, blood type O, has been cleared to donate to her sister Barbara, blood type A.[175] Although O is the universal donor, Barbara and Connie are tissue type incompatible, meaning Barbara's body will likely reject Connie's kidney through antibody-antigen reaction. Both pairs have been listed in the KPD.[176] UNOS, realizing Tom is capable of compatibly

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[166] *See* A.D. Waterman et al., *Incompatible Kidney Donor Candidates' Willingness to Participate in Donor-Exchange and Non-Directed Donation*, 6 AM. J. TRANSPLANTATION 1631, 1631–32 (2006).

[167] *See* Robert A. Montgomery et al., *Domino Paired Kidney Donation: A Strategy to Make Best Use of Live Non-Directed Donation*, 368 THE LANCET 419, 419 (2006).

[168] *See I Have a Living Donor Who Doesn't Match, What Can I Do?*, UNITED NETWORK FOR ORGAN SHARING (2018), https://perma.cc/R4LK-QGJ2.

[169] *See Kidney Paired Donation for Patients*, ORGAN PROCUREMENT AND TRANSPLANTATION NETWORK, https://perma.cc/2NKX-X5F7 (last visited Sept. 16, 2019).

[170] *See* Katie M. Palmer, *The Science Behind a Crazy 6-Way Kidney Exchange*, WIRED (Mar. 9, 2015, 2:43 PM), https://perma.cc/6ACB-VQ8P.

[171] *See id.*

[172] *See Medical Board Policies*, NAT'L KIDNEY REGISTRY, https://perma.cc/W6EQ-FMP6 (last visited Sept. 16, 2019).

[173] *See* Ferrari, *supra* note 165, at 1277–78.

[174] *See* Ferrari, *supra* note 165, at 1276.

[175] *See* Ferrari, *supra* note 165, at 1276.

[176] *See* Ferrari, *supra* note 165, at 1276–77.

donating to Barbara, while Connie is capable of compatibly donating to Nancy, contacts the respective transplant centers and arranges for Tom and Connie to "swap" kidneys, providing both of their loved ones with a perfect match.[177]

As demonstrated, paired kidney exchange is an effective solution for incompatible recipients and donors.[178] In addition to saving the lives of the recipients, facilitating paired kidney exchanges removes the recipients from the cadaveric waiting list, helping to resolve the disparity between organ supply and demand.[179] This can also be achieved through non-directed living donation.[180]

Non-directed donation (or "chain donation") occurs when the donor does not name a specific recipient and the organ is given based solely on medical compatibility, sometimes without the donor ever meeting the recipient.[181] In this unique form of donation, an altruistic donor presents to a transplant center with the desire to donate but without an intended recipient.[182] Upon acquiring medical clearance, the transplant center alerts the OPO, in turn alerting UNOs, who selects the recipient based on standard criteria, using the KPD system.[183] Once UNOS has identified the recipient, the donated organ acts as the missing "link" in a chain of paired kidney exchanges.[184] Chains offer unlimited potential for transplantation through a domino effect but require an altruistic, non-directed donor to form.[185] The longest kidney chain to date, including thirty-four recipients and twenty-six hospitals, spanning the continental United States, was started by the altruistic donation of just one donor.[186]

Living donor transplantation falls within the scope of NOTA's prohibition on the sale of organs, explicitly outlawing donors (living or cadaveric) from receiving "valuable consideration," thus creating an ethical

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177 *See* Segev, *supra* note 38, at 1883.

178 *See* C. Bradley Wallis et al., *Kidney Paired Donation*, 26 NEPHROL. DIAL. TRANSPLANT 2091, 2093–94 (2011).

179 *See id.* at 2094.

180 *See id.* at 2091–92.

181 *See* Montgomery, *supra* note 167.

182 *See* Marc L. Melcher et al., *Kidney Transplant Chains Amplify Benefit of Nondirected Donors*, 148 J. AM. MED. ASS'N SURG. 165, 165–66 (2013).

183 *See Living Non-Directed Organ Donation*, ORGAN PROCUREMENT AND TRANSPLANTATION NETWORK, (Dec. 2015), https://perma.cc/B4KD-9JQA.

184 *See id.*

185 *See* Montgomery, *supra* note 167, at 419; *see also* Caroline Praderio, *Kidney Transplant Chains Will Restore Your Faith in Humanity—Here's How They Work*, INSIDER (Oct. 13, 2016, 4:27 PM), https://perma.cc/F66T-J98W.

186 *Longest Kidney Chain Ever Wraps up at UW Hospital and Clinics*, UW HEALTH (Apr. 14, 2015), https://perma.cc/2Y5J-RHHT.

concern of whether a kidney received from a paired kidney exchange constituted "valuable consideration."[187] In 2007, just one year after the first kidney chain, Congress passed the Charlie W. Norwood Living Donation Act, which amended NOTA, to clarify that paired donation does not count as valuable consideration for purposes of living donor transplantation.[188] Even though this amendment legitimizes paired kidney exchange, it fails to incentivize living organ donation.[189]

B. *Incentivizing Living Organ Donation*

Despite the financial restrictions imposed by NOTA, there remain methods for incentivizing living organ donation.[190] Non-financial incentives for living organ donation most commonly include providing the donor with a state based tax incentive or providing the donor with special benefits such as medical leave or insurance.[191] In 2004, Wisconsin became the first state to offer a tax deduction for living donor citizens, targeted at recovering expenses accrued during donation through travel or lost wages.[192] Bioethicists are concerned that financial incentives, even if state based, threaten to exploit those who are socioeconomically disadvantaged and may feel pressured to donate their organs to gain financial perks.[193] However, other bioethicists argue that, absent a system where valuable consideration is directly exchanged between donors and recipients, state-based incentives are reasonable because they can be closely regulated while also saving lives—especially in the midst of an ever-increasing organ shortage.[194] In 2003, the American Medical Association testified before Congress, endorsing the initiation of studies to test the effectiveness of incentivized donation, including financial incentives, because of the severity of the organ shortage crisis.[195] While the ethical boundaries of financially compensating organ donors remains murky, the benefits are clear when comparing the incentive systems used in other countries.[196]

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[187] *See* Derco, *supra* note 8, at 159–60.

[188] Charlie W. Norwood Living Organ Donation Act of 2007, Pub. L. No. 110-144 (2007) (amending 42 U.S.C. 274e § 301).

[189] *See* Derco, *supra* note 8, at 159–61.

[190] *See* Derco, *supra* note 8, at 167.

[191] *See Center for Bioethics*, *supra* note 60, at 26.

[192] *See Center for Bioethics*, *supra* note 60, at 26.

[193] *See* Anya Adair & Stephen J. Wigmore, *Paid Organ Donation: The Case Against*, 93 ANN. R. COLL. SURG. ENG. 191, 191–92 (2011).

[194] *See* Satel, *supra* note 9, at 218–19.

[195] *Center for Bioethics*, *supra* note 60, at 27.

[196] *See* Jennifer Monti, *The Case for Compensating Live Organ Donors*, 3 ISSUE ANALYSIS, 1, 5–7 (2009).

In evaluating the potential outcomes and effectiveness of legislative schematics, it is imperative to evaluate the techniques and outcomes employed by other nations.[197] One of the most important national systems to evaluate is the one used by Iran—the only country in the world both without an organ shortage and that allows the sale of organs.[198] In Iran, the sale of organs takes place within a state-regulated system, starving the black market while ensuring the safety of both the donor and recipient.[199] Iranian donors independently contact a state-run organization that refers the donors to transplant centers for evaluation.[200] If capable of donation, the donor receives a government stipend, health insurance, and compensation from the recipient.[201]

While the Iranian model is ethically polarizing, its effectiveness is untouchable.[202] After enacting this system in 1988, eleven years later, Iran no longer had an organ waiting list.[203] Additionally, uncompensated cadaveric donations have increased more than tenfold and the black market for organ sales is nearly nonexistent.[204] Some drawbacks of the Iranian model include donor regret, negative health impacts, and disappointment with the value of the stipend.[205] The United States can gain unique perspective from evaluating the Iranian model, and those of other countries, in determining the most effective means for legislating organ donation.[206]

While Iran is the only country to allow for the sale of organs, several countries, including France, Canada, and the United Kingdom offer some form of reimbursement to organ donors.[207] These statutory schemes range from requiring travel and accommodation reimbursement (France), federal incentives for employment insurance, short-term disability, and tax credits (Canada), and permittable, not mandatory, reimbursement of lost wages, travel expenses, and accommodation costs (United Kingdom).[208] While these methods vary in approach and effectiveness, they are in staunch contrast to

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197 *See* Matas, *supra* note 4, at 306–07.

198 Derco, *supra* note 8, at 163.

199 *See* Monti, *supra* note 196, at 7–8.

200 Derco, *supra* note 8, at 164 (stating if the recipient is unable to afford compensation, a charitable organization will provide it on behalf of the recipient).

201 Monti, *supra* note 196, at 7.

202 *See* Monti, *supra* note 196, at 6–7.

203 Derco, *supra* note 8, at 164.

204 *See* Derco, *supra* note 8, at 164.

205 *See* Derco, *supra* note 8, at 165–66 (explaining that many donors expected the stipend to change their lives and were disappointed when it did not).

206 *See* Monti, *supra* note 196, at 7.

207 Derco, *supra* note 8, at 167.

208 Derco, *supra* note 8, at 167.

the United States where incentives are not just lacking statutory guidance, but ambiguously outlawed through the NOTA "valuable consideration" clause.[209] Even if the United States does not incentivize living organ donation, methods could be taken to increase the availability of cadaveric organ donation.[210]

C. *Increasing Cadaveric Transplantation*

Cadaveric organ donation figures can help resolve the organ shortage crisis because each cadaveric organ donor has the potential to save eight lives and affect over fifty more lives.[211] There are several legislative methods for increasing cadaveric donation including education, mandated choice, presumed consent, and incentivized donation.[212]

Education is the least controversial and marginally effective method for increasing cadaveric donation.[213] By legislating an increase in budgetary funds, UNOS can increase awareness regarding organ donation by promoting organ donation through ad campaigns, informational sessions, and community outreach.[214] Popularizing organ donation is a logical step towards increasing cadaveric donation, however, it will not solve the organ shortage crisis.[215]

Mandated choice and presumed consent are additional methods for increasing cadaveric organ donation.[216] Mandated choice refers to the practice of requiring every citizen of majority age to indicate their organ donation wishes on tax forms or driver's licenses.[217] Upon a person's death, the wishes that had previously been determined by the decedent would be followed by the hospital.[218] While this method does not concretely increase cadaveric availability, it does increase conversations surrounding organ donation and ensures that the wishes of the decedent are known and

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[209] *See* Derco, *supra* note 8, at 160–61.

[210] *See Center for Bioethics*, *supra* note 60, at 21.

[211] *See Center for Bioethics*, *supra* note 60, at 20.

[212] *Center for Bioethics*, *supra* note 60, at 21–22.

[213] *See* Tonguc Utku Yilmaz, *Importance of Education in Organ Donation*, 6 EXPERIMENTAL & CLINICAL TRANSPLANTATION 370, 374 (2011).

[214] *See generally* Usha Bapat, *Organ Donation, Awareness, Attitudes, and Beliefs Among Post Graduate Medical Students*, 20 J. KIDNEY DIS. TRANSPLANTATION 174 (2009).

[215] *See* Rheana Murray, *Heartbreaking Video Sends Powerful Message About Organ Donation*, TODAY (June 3, 2015, 6:31 PM EDT), https://perma.cc/PP8Z-GKFG.

[216] *See Center for Bioethics*, *supra* note 60, at 21–22.

[217] *Center for Bioethics*, *supra* note 60, at 21.

[218] *See* Hayley Cotter, *Increasing Consent for Organ Donation: Mandated Choice, Individual Autonomy, and Informed Consent*, 21 HEALTH MATRIX 599, 604 (2011).

honored.[219]

Presumed consent, also known as "opt-out," is a system that is gaining popularity, and is used by many European nations.[220] Under a presumed consent regime, the organs of a decedent are harvested unless the decedent had specifically requested against donation during their lifetime.[221] Presumed consent systems are becoming popular in the United States.[222] Several states have proposed legislation to enact presumed consent regimes.[223] While some believe presumed consent to be an obvious choice to increasing the availability of cadaveric organ donors, others argue that enacting presumed consent will actually decrease the availability of cadaveric organs because the public perception of automatically harvesting organs can be inflammatory.[224] These opponents argue that the best method for increasing organ donor availability is through education, particularly by providing specialized training for hospital personnel designated to approach families regarding cadaveric donation.[225]

Financial incentives for cadaveric donation are similar to those of living donation, but with the family receiving the incentive rather than the donor.[226] These incentives are generally described to include different strategies including assistance with funeral costs, charitable donations made in the donor's name, tangible recognition in the form of memorials, and actual payment to the family of the donor.[227] Many surgeons, including the American Society of Transplant Surgeons, support financial assistance with funeral costs or charitable recognition as an effective strategy for promoting cadaveric organ donation.[228] Proponents argue that, since the donor is deceased, receiving the incentive cannot be coercive, while opponents argue that the mere availability of the incentive is coercive enough in nature, and thus should not be offered.[229]

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[219] *See id.* at 619.

[220] *See* Casey Leins, *Should the Government Decide if You're an Organ Donor?*, U.S. NEWS (Feb. 12, 2016), https://perma.cc/KEL2-PM4F.

[221] *See id.*

[222] *See* Richard H. Thaler, *Opting In vs. Opting Out*, N.Y. TIMES (Sept. 26, 2009), https://perma.cc/HG75-LQ2P.

[223] *See* Madison Park, *California, New York Mull Changes to Organ Donor Laws*, CNN (May 10, 2010, 8:10 AM), https://perma.cc/DT2X-H3YB.

[224] *See Presumed Consent Not Answer to Solving Organ Shortage in U.S., Researchers Say*, JOHNS HOPKINS MEDICINE NEWS AND PUBLICATIONS (Nov. 29, 2011), https://perma.cc/PYV7-NYM3 [hereinafter *Presumed Consent*].

[225] *See id.*

[226] *See* Satel et al., *supra* note 9, at 221–22.

[227] *See Center for Bioethics*, *supra* note 60, at 22–23.

[228] *See Center for Bioethics*, *supra* note 60, at 22–23.

[229] *See* Francis L. Delmonico et al., *Ethical Incentives—Not Payment—for Organ Donation*, 346

D. *Alternative Methods*

In addition to resolving the organ shortage crisis through the legislation and education of traditional transplant techniques, alternative sources for organs can also be utilized.[230] Alternative organs include xenotransplantation, in which animal organs are transplanted across different species.[231] Some success has been seen with xenotransplantation experiments, particularly with baboon hearts and pig organs, however, animal-based organs present specialized risks of exposing humans to infectious microorganisms unique to animals, such as certain bacteria and viruses.[232]

Artificial organs and organs derived from stem cells both present demonstrable solutions to the organ shortage crisis.[233] Artificial organs include engineered devices designed to mimic the function of natural organs.[234] While artificial organs pose minimal risks for infection and rejection compared to animal or human sourced organs, the cost of production and overall effectiveness of such devices raise substantial practical and ethical concerns.[235] Nevertheless, science continues to pursue implantable devices that could potentially replace organ transplantation in general.[236]

Stem cell derived organs, like artificial organs, are engineered from a cluster of stem cells that have been manipulated to grow into organs or clusters of specialized cells.[237] While the scientific community continuously works to develop organs engineered from stem cells, ethical concerns surrounding the embryonic origination of the cells often become politicized, stalling research and creating moral objections to such practices.[238] Similarly, aborted fetuses have been proposed as alternative organ sources, but moral objections and ethical concerns surrounding the potential for organ farming (conceiving a child for the purpose of harvesting its organs) have halted the development of a policy to allow for organ transplantation.[239]

NEW ENG. J. MED. 2002, 2003–04 (2002).

230 *See Alternative Solutions to Lack of Organ Donors*, TUTORHUNT (Sept. 23, 2011), https://perma.cc/A6F4-VQ4T.

231 *See id.*

232 *See Center for Bioethics*, *supra* note 60, at 28.

233 *See Center for Bioethics*, *supra* note 60, at 28.

234 *See Center for Bioethics*, *supra* note 60, at 28.

235 *See Center for Bioethics*, *supra* note 60, at 28.

236 *See Center for Bioethics*, *supra* note 60, at 28.

237 *See* Nicholas Wade, *New Prospects for Growing Human Replacement Organs in Animals*, N.Y. TIMES (Jan. 26, 2017), https://perma.cc/8JZH-RCWV.

238 *See Center for Bioethics*, *supra* note 60, at 28.

239 *See id.*

While each strategy for increasing the availability of donated organs has unique concerns surrounding effectiveness, ethical boundaries, and feasibility, the general consensus amongst the transplant community supports implementing some strategy to combat the organ shortage crisis.[240]

E. *Proposed Solutions for Reforming Organ Donation*

The United States' current sole reliance on altruistic organ donation is a failure.[241] Requiring purely altruistic organ donation, the existence of which has been described as a philosophical impossibility, has created a massive organ shortage crisis, prompting the needless loss of life.[242] Effective legislation must be enacted promptly to prevent further death.[243] This can be achieved by implementing a unified system comprised of regulated incentives and increased education, implementing a presumed consent policy, and continuing to fund research into alternative organ sources.[244]

F. *A Federal Unified System*

Organ donation in the United States requires a unified, national system.[245] A federal system is easily achievable based upon the current regulatory structure.[246] Until federal regulation is heightened, states will continue to create their own policies, thus promoting geographic disparity.[247] Creating a federal system through which organs are procured and distributed nationwide would harmonize transplants and ensure equitable distribution across the fifty states.[248] Further, enacting a federal schematic for organ donation permits an additional layer of oversight for implementing systems that can be used to promote and incentivize organ donation.[249]

G. *A Closely Regulated Incentive-Market*

Under a single unified system, the United States would have more

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[240] *See Ethicists Propose Solution for US Organ Shortage Crisis*, SCIENCE DAILY (May 11, 2015), https://perma.cc/2V32-NT8V.

[241] *See* Satel et al., *supra* note 9, at 217.

[242] *See* Greg Moorlock et al., *Altruism in Organ Donation: An Unnecessary Requirement?*, 40 J. MED. ETHICS 134, 134–35 (2014).

[243] *See* Satel et al., *supra* note 9, at 227.

[244] *See Ethicists*, *supra* note 240.

[245] *See Ethicists*, *supra* note 240.

[246] *See* Satel et al., *supra* note 9, at 217.

[247] *See generally* Satel et al., *supra* note 9; Jordan Michael Smith, *The Gross Inequality of Organ Transplants in America*, THE NEW REPUBLIC (Nov. 8, 2017), https://perma.cc/W5KJ-L43U.

[248] *See generally* Satel et al., *supra* note 9; Jordan Michael Smith, *supra* note 247.

[249] *See generally* Satel et al., *supra* note 9.

ability to provide equitable and closely regulated incentives for both cadaveric and living organ donation.[250] Imposing federal incentives, such as medical care or income tax benefits, can also be mimicked on a state level, thus compounding incentives and further promoting organ donation.[251] Maintaining federal incentives in addition to state incentives allows for a baseline of national fairness and permits use of federal tax dollars.[252] If federal incentives effectively increase the number of organ donors, even just for kidney donation alone, the government stands to save billions of dollars from the estimated thirty-four billion dollars that Medicare spends annually on dialysis treatments (the alternative therapy to kidney transplantation).[253] Even though every dialysis patient is not necessarily a candidate for transplant (some are medically incapable while others simply choose not to be), a substantial amount of Medicare spending could be saved and potentially re-allocated for donor incentivization and funding for education.[254] Through careful consideration of international methods, the United States can establish a heavily regulated yet optimally efficient system for organ donor incentivization while avoiding the ethical pitfalls and inefficiencies encountered by other nations.[255]

While the Iranian model for organ donation has proven to be most effective in eliminating organ shortages, the ethical concerns and public perception surrounding the sale of organs are likely to prevent the United States from adopting a similar system.[256] However, in evaluating the effectiveness of the Iranian model, financial incentives in some form are required for increasing the availability of donated organs.[257] Navigating the precarious bioethical terrain, between safely incentivizing donation and exploiting the poor for the health of the rich, requires careful legislative consideration and deliberate policymaking.[258]

A well-regulated system must provide both the donor and recipient with respect, benefits, and protection from harm.[259] To achieve this, the system must respect the autonomy of the donor by providing enough

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[250] *See* David A. Peters, *A Unified Approach to Organ Donor Recruitment, Organ Procurement, and Distribution*, 3 J.L. & HEALTH 157, 159–60 (1989).

[251] *See id.*

[252] *See id.*

[253] *See* Ron Shinkman, *The Big Business of Dialysis Care*, NEJM CATALYST (June. 9, 2016), https://perma.cc/MP5W-T77K.

[254] *See id.*

[255] *See* David Kaserman, *Markets for Organs: Myths and Misconceptions*, 18 J. CONTEMP. HEALTH L. & POL'Y 567, 568–69 (2002).

[256] *See id.*

[257] *See* Derco, *supra* note 8, at 164.

[258] *See Center for Bioethics*, *supra* note 60, at 26.

[259] *See* Matas et al., *supra* note 4, at 306–08.

information required to give informed consent, ensuring that the donor's health is promoted throughout the process, and providing gratitude and an adequately valued incentive through which the donor will feel that the gift given has enriched the life of the recipient as well as their own life.[260] This system must be arduously regulated by setting clear guidelines for donor evaluation and selection, protected by adherence to the guidelines set, and transparent to deter abuse of both the donor and recipient by providing oversight on a national and potentially international level.[261] Once this system is legitimized and tested, presumed consent can be implemented on top of financial incentives, to further increase the availability of cadaveric organ donation.[262]

H. *A Nation of Presumed Consent*

The United States, following the trend of European nations, can implement a presumed consent model through which organs would be harvested upon death.[263] While this approach has proven to be both effective and controversial, implementing it in the United States would further the international trend of presumed consent.[264] The idea of automatically harvesting organs is polarizing in the sense that it provides miraculous hope for those in need of organs and their families but also perpetuates an unrealistic actual fear in others, particularly those unaffected by transplantation, that their organs could be taken against their wishes.[265] This fear, while real to those who harbor it, is not based in reality because upon death organs are useless to those who previously used them; and—in some cultures—organs are removed prior to burial rites. The option then comes to whether these organs should be incinerated upon death or given to those whose lives depend on the gift.[266] Another baseless fear that could hinder acceptance of presumed consent is the fear that members of the medical community will not provide the same level of care to an organ donor in order to harvest the organs of an individual.[267] This fear has become unfortunately popular despite the fact that medical personnel do not know the status of an

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[260] *See* Matas et al., *supra* note 4, at 306–08.

[261] *See* Matas et al., supra note 4, at 308.

[262] *See* Matas et al., *supra* note 4, at 308.

[263] *See* Leins, *supra* note 220.

[264] *See* Leins, *supra* note 220.

[265] *See* Thaler, *supra* note 222.

[266] *See* Thaler, *supra* note 222; *see also Preparing the Body for Burial or Cremation*, EVERPLANS, https://perma.cc/HKK9-7GG2 (last visited Sept. 16, 2019).

[267] *See* Tara Parker-Pope, *The Reluctant Organ Donor*, N.Y. TIMES (Apr. 16, 2009, 11:20 AM), https://perma.cc/A92D-Q8M4.

organ donor until after expiry.[268] Regardless of the legitimacy of myths concerning organ donation, these fears will continue to inhibit the supply of organ donors until the public becomes properly educated about the need for organ donation and the process behind it.[269]

I. *Education*

Without proper education, any system that the United States implements will fail.[270] Policies can promote organ donation through incentives and/or presumed consent, but organ donors do not exist if people do not choose to donate—and people will not choose to donate without appropriate education about organ donation.[271] The burden of educating the nation about organ donation falls on the government because the organ shortage crisis is a public health crisis.[272] Fortunately, in the era of social media and connectivity, educating the masses does not impose a significant financial or logistical burden; rather, educating the public is obstructed by simply being overlooked and underestimated.[273]

CONCLUSION

The organ shortage crisis will continue to grow until legislation provides a solution. Without prompt and efficient legislation, nearly 100,000 Americans will remain waiting, under torturous hope for the gift of life that may never come. While legislative solutions languish, every day Americans will be added to the waiting list, while dozens already on it will perish—dying of hope. The demand for organ donation began with experiments performed by the most primitive of societies, yet cannot be satisfied thousands of years later, despite the advanced progression of the highest form of civilized society—American society. Until the United States government properly educates, legislates, and regulates organ donation, it will continue to fail some of its most vulnerable citizens, the sick. The need for organ transplantation does not discriminate, affecting every demographic, regardless of age, race, gender, or socioeconomic status. The United States has the ability to implement an effective system through which donors are matched with recipients, and death becomes life.

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[268] *See id.*

[269] *See id.*

[270] *See Presumed Consent*, *supra* note 224.

[271] *See* Parker-Pope, *supra* note 267.

[272] *See* Stu Strumwasser, *The Tragedy of American Organ Donations: So Many More People Could Be Saved*, SALON (Mar. 23, 2014, 6:00PM UTC), https://perma.cc/MDE6-EY55.

[273] *See id.*

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"Swear Not at All"[1]: Time to Abandon the Testimonial Oath

IAN GALLACHER*

"[T]he oath is entrenched as a vehicle for the relay of the truth . . . . Nothing, it seems, is as effective in helping to ascertain the truth in the courtroom."[2]

"[O]aths are words, and words is wind,
And wind is mutable: then, I conclude,
'Tis childishness to stand upon an oath."[3]

INTRODUCTION

There can be few courtroom situations more familiar to Americans than the testimonial oath.[4] A person is called to the witness stand and instructed to raise his or her right hand and to repeat the familiar words.[5] Once the ritual is concluded, the person exists in an

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1 *Matthew* 5:34 (King James).

2 Nadine Farid, *Oath and Affirmation in the Court: Thoughts on the Power of a Sworn Promise*, 40 NEW ENG. L. REV. 555, 557 (2006).

3 ANONYMOUS & THOMAS KYD, ARDEN OF FEVERSHAM Act 1 (E-Book ed. 2013), *available at* https://perma.cc/9X8E-FQU2 (highlighting the line spoken by Alice, wife of Arden, to her lover Mosbie. Alice and Mosbie spend the play attempting to kill her husband so that they might be together. They finally succeed, but are caught and, along with their accomplices, are led off to be executed at the end of the play). *Compare* SAMUEL BUTLER, HUDIBRAS, CANTO II, 107–08 (1664).

4 The only phrase in the entire justice system that could run the testimonial oath close in familiarity is the *Miranda* incantation. *See generally* Miranda v. Arizona, 396 U.S. 868 (1969).

5 *See infra* Parts F–H (discussing the beguiling question as to what words are considered

evidentiary state of grace and is temporarily transformed from a "person" into a "witness" who can speak and be heard by the court and jury; whereas before taking the oath anything the "person" said could, and would, be disregarded. While in that state of grace, the "witness" can engage in giving "testimony"—something only a sworn witness can do.[6]

The oath is ritually chanted[7] by witnesses in every court, state and federal, in this country, and films and television shows that focus on the doings of American courts would be less credible to their audiences if they did not show witnesses taking the oath before testifying.[8] It is hard to imagine many citizens in this country who do not know that before they can testify in court, they must take an oath to tell the truth, the whole truth, and nothing but the truth.

However, why they have to take this oath, and what exactly they are swearing to, might be less clear to prospective witnesses. They are agreeing to tell the truth, certainly, but what is "the truth"?[9] Can the truth really be divided into portions, as the concept of "the whole truth" seems to imply? Since witnesses have sworn to tell the truth, how can the notion of telling anything but the truth be entertained? Astute witnesses might also recognize that despite the oath they have taken, the questions they are asked to answer give them very little scope to actually tell the "whole truth," whatever that might mean, and any attempts they make to expand on their answers will be limited by objections from lawyers and rulings from judges.[10] If witnesses have experience of a trial, they likely will know that the judge will instruct the jury that, their oath notwithstanding, the jurors are free to ignore the

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"familiar" in the context of recitation of the testimonial oath. For now, we can assume that they will include the famous tricolon "the truth, the whole truth, and nothing but the truth.").

[6] *See generally Testimony*, ONLINE ETYMOLOGY DICTIONARY, https://perma.cc/V2S9-TL5Z (last visited Aug. 21, 2019); Dave Wilton, *Testify*, WordOrigins.org (Apr. 22, 2007), https://perma.cc/6MMN-U77Z (noting that "[t]he word has inescapable religious overtones but it has no relationship with testicles, and any suggestion that "testimony" comes to the courtroom via a pagan form of oath-taking involving the holding of male genitalia while promising to tell the truth is a modern fantasy with no historical or linguistic support.").

[7] *A Reconsideration of the Sworn Testimony Requirement: Securing Truth in the Twentieth Century*, 75 MICH. L. REV. 1681, 1681 [hereinafter *A Reconsideration of Sworn Testimony*] (explaining how one commentator, noting the "pro forma dispatch" with which the oath is administered, has said that oath-taking "may appear more a genuflection performed out of habit than a ceremony sacred or significant to the law. . .").

[8] Kevin Yee, *Reasonable Doubt: When Courtroom Swearing is Encouraged*, STRAIGHT (Feb. 6, 2017), https://perma.cc/5477-QTZS.

[9] *See infra* Part F.

[10] *See infra* Part H.

witness's testimony if they choose to; even if the judge does not give this instruction, the informed witness will know that jury nullification is still a possibility.[11]

While the form of the oath is generally known to them, witnesses might be surprised to learn that their religious beliefs may be probed, in open court, in order for the court to determine what specific form of the oath should be administered, or if they can be permitted to testify at all.

Indeed, witnesses likely know, although the oath they take usually will not inform them directly of this,[12] that they are testifying under penalty of perjury. But what perjury is and what the penalties are for committing an act of perjury are likely less clear to witnesses, as is the effect that this knowledge, or lack of it, might have on their testimony.[13]

Additionally, the witness might not know that everyone involved in the proceeding—the judge, the lawyers, and even the jury[14]—has sworn an oath

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[11] *See infra* Part K.

[12] *See* Michael H. Graham, *Oath or Affirmation to Testify Truthfully*, 4 HANDBOOK OF FED. EVID. § 603:1 n.1 (8th ed. 2018) (stating that a typical oath is "Do you swear to tell the truth, the whole truth and nothing but the truth, so help you God?"). *Compare* 28 U.S.C. § 1746 (allowing for the possibility of unsworn declarations and articulating specifically that the information is given pursuant to the dangers of perjury: "Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit . . . such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury . . ."), *with* FED. R. EVID. 603 (showing the same unwillingness as the Code to specify exactly what form the oath should take). In one significant sense, though, the Code deviates from the testimonial approach, in that the witness makes this declaration after providing information ("the foregoing is true and correct") rather than swearing the oath before testifying. It is also interesting to see that while this language retains a promise to tell the truth, it has abandoned the familiar tricolon (the truth, the whole truth, and nothing but the truth) and has substituted the more modern "true and correct." "Correct," here, is surely unnecessary: anything true must also be correct, and anything incorrect cannot be true. This change suggests that Congress, at least, is open to the possibility of change to the oath language.

[13] *See infra* Part I.

[14] *See, e.g.*, Jonathan Belcher, *Religion-Plus-Speech: The Constitutionality of Juror Oaths and Affirmations Under the First Amendment*, 34 WM. & MARY L. REV. 287 (1992); Kathleen M. Knudsen, *The Juror's Sacred Oath: Is There A Constitutional Right to A Properly Sworn Jury?*, 32 TOURO L. REV. 489, 490–94 (2016) (observing "[t]he word 'juror' identifies an individual who took an oath. . ." and jurors are, in fact, asked to swear two oaths, once before voir dire and once before the beginning of the actual trial. As Knudsen concludes, however, while a sworn jury "is an implied constitutional requirement," there is no explicit federal constitutional or statutory requirement that a jury be sworn.). *See also* United States v. Turrietta, 696 F.3d 972

in order to be able to participate, and that these oaths—especially the jury oath—can have a profound impact on the process.[15]

In fact, for such a common act performed thousands of times each day in courtrooms around the country, surprisingly little is known about the oath by those involved in the trials in which they are such an integral part.[16] In particular, although we rely on it to secure evidence on which decisions determining the fate of civil and criminal litigation are made in this country, we know little if anything about how successful the oath is in securing the "truthful" testimony it purports to produce, though anecdotal evidence suggests that many are doubtful that it has any effect at all.

Why, then, do we persist in requiring a pagan, mystical ritual that includes magical words and gestures of such, at best, questionable efficacy? And are there alternatives to the oath that might be more effective in securing reliable testimony?

This article will seek to explore these questions. After first looking at how the oath is treated by the other participants in the trial process,[17] and the oath in culture,[18] the Bible,[19] and history,[20] and examining in detail the various parts of the oath and their meaning,[21] this article will consider alternatives to the oath, including simply dropping it from contemporary trial practice and replacing it with a pre-testimony, written declaration of an

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(10th Cir. 2012) (citing the trial court's failure to administer oath to jury was not plain error).

[15] Martinez v. Illinois, 572 U.S. 833, 839 (2014) ("There are few if any rules of criminal procedure clearer than the rule that 'jeopardy attaches when the jury is empaneled and sworn.'"). This might seem like a technical distinction—a formalistic bright-line rule that has little practical significance—but at least two courts have held that a defendant who was tried by an unsworn jury was in no jeopardy and accordingly, and despite acquittal, the defendant could be re-tried. *See* Spencer v. State, 640 S.E.2d 267 (Ga. 2007); United States v. Green, 556 F.2d 71 (D.C. Cir. 1977) (holding that a defendant who was tried by an unsworn jury was in no jeopardy and accordingly, despite acquittal, the defendant could be re-tried); *Turrietta* 696 F.3d. at 974 (deeming conviction by an unsworn jury to be harmless error and such conviction has been allowed to stand).

[16] There is, to be fair, a substantial amount of scholarly literature devoted to the study of oaths, much of which will be cited to in this article. At the risk of seeming pessimistic, however, one must concede that the volume of legal scholarly output on any given subject is not necessarily an accurate predictor of how much is known about that subject by anyone other than legal academics. And legal academics, on the whole, are typically not participants in trials, as witnesses, litigants, or as practitioners.

[17] *See infra* Part A(1).

[18] *See infra* Part B(1).

[19] *See infra* Part B(2).

[20] *See infra* Part C–H.

[21] *See infra* Part F–G.

intent to tell the truth. Testimony with no preceding oath might be a strange notion to those of us who grew up in the Anglo-American system of jurisprudence, and would make all filmed depictions of trials made until now seem archaic. But replacing the testimonial oath with a written declaration might be the most consistent, and honest, approach to a secular proceeding designed to produce factual accuracy.

A. *Judge, Attorney, and Jury Oaths*

Although the testimonial oath gets most of the attention when trial oaths are studied, and is the principal focus of this article, the oaths taken by judges, attorneys, and juries are also important, both to the trial process itself and, especially when they are ignored, to our understanding of the role the oath plays in contemporary trial culture. In order to form as clear a picture as possible about the oath's ability to bind witnesses to tell the truth while testifying, it is helpful to consider how effective the oath is in binding the other trial participants.

1. Judges

Judges take oaths of office before sitting as active judges. In federal court, and unlike the testimonial oath, the language required for the oath is specified:

> I ___ ___, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.[22]

The oath does not use the word "truth," but it can be implied in the obligation to discharge the duties of a judge "impartially:" judges who fail to tell the truth while performing their duties could be said to be partial to one side or the other, and therefore breaking their oath.

This might seem like an academic point, warning of a hypothetical, but not actual, danger, but perhaps it is not. In a 2015 law review article, and writing about a specific case in which he was involved, Professor Albert Alschuler claimed that Judge Frank Easterbrook of the Seventh Circuit "made six rulings in favor of the government [that] the government had not

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[22] 28 U.S.C. § 453 (providing the judge the option to swear or affirm, but requiring the use of "solemnly"). This indicates a religious underpinning to the oath language. That underpinning is made explicit by the inclusion of "[s]o help me God" as mandatory language at the conclusion of the oath.

sought. All of these rulings were questionable or worse."[23] The article

> also documents eight falsehoods told by Judge Easterbrook in written opinions and statements from the bench. These falsehoods included statements that the trial court gave instructions it did not, that both the defender and the government made arguments they did not make, that litigants in the Supreme Court made arguments they did not make, that the defendants and the government waived or forfeited arguments they did not waive or forfeit, that the Supreme Court said things it did not say, and that several of defendant's sentences had expired when they had not expired.[24]

Professor Alschuler also claimed that Judge Easterbrook's

> appearance on the panel that heard [the defendant's] appeal was not the result of random assignment. It shows that the government played no part in producing his falsehoods. It describes the judge's bullying of counsel on both sides and urges his colleagues to recognize the problems his conduct poses for their court.[25]

These allegations against Judge Easterbrook were the latest in a string of concerns expressed about the judge's behavior. A 1994 bar association evaluation by the Chicago Council of Lawyers described Judge Easterbrook's "use of precedent as 'unreliable and inappropriate.' They also claimed that he 'mischaracteriz[es] the record below in order to reach certain results.' Judge Easterbrook, [the report stated,] 'can communicate a lack of respect for the facts of a case and for precedent.'"[26]

Professor Alschuler does not specifically accuse Judge Easterbrook of violating his oath, but he does say of the judge that "[t]he truth is not in him."[27] And it is possible to see how, if the allegations made by Professor Alschuler are accurate, a case could be made that Judge Easterbrook had, at least in this one case, failed to act impartially and violated his judicial oath.[28]

At least one judge has openly suggested that judges should be permitted some leeway with regard to the truth when writing a judicial opinion. Judge Easterbrook's former colleague on the Seventh Circuit, Judge Richard Posner, commenting on Judge Cardozo's writing technique in the *Palsgraf*

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[23] Albert W. Alschuler, *How Frank Easterbrook Kept George Ryan in Prison*, 50 VAL. U. L. REV. 7, 8 (2015).

[24] *Id.*

[25] *Id.*

[26] *Id.* at 9–10 (quoting Chicago Council of Lawyers, *Evaluation of the United States Court of Appeals for the Seventh Circuit*, 43 DEPAUL L. REV. 673, 747, 757–58 (1994)).

[27] *Id.* at 49.

[28] *See* Alschuler, *supra* note 23.

case,[29] observed that Judge Cardozo's famous positioning of Mrs. Palsgraf "many feet away" from the explosion that caused all her troubles was made up by the judge, noting that it was used "to telling effect from a rhetorical standpoint."[30] He continues that

> [t]he inaccurate positioning of Mrs. Palsgraf at the other end of the platform many feet away from the explosion adds to the mystery, the fascination, of the case. How did a handful of firecrackers cause a heavy scale at the other end of a long platform to collapse? At once the reader is intrigued . . . If not misled.[31]

Judge Posner went on to quote Judge Cardozo's defense for misstating facts: "I often say that [a judge writing a judicial opinion] must permit . . . , and that quite advisedly and deliberately, a certain margin of misstatement."[32]

There is something deeply disturbing in this casual acceptance of an asymmetrical application of the truth during litigation. What Judges Posner and Easterbrook are saying, if Professor Alschuler is to be believed, is, in essence, that witnesses must testify truthfully under criminal penalty of perjury about the facts of a case. However, judges, who have also taken an oath requiring them to be truthful, can make up facts if they aid the telling of the narrative from a rhetorical perspective or simply because they like their facts and law better than the facts as testified to and the law as published.[33] Disturbing or not, however, that appears to be the situation.

2. Attorneys

Attorneys also take an oath before they are admitted to practice.[34] The lawyer's oath has been described as a "solemn promise of ethical conduct by

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[29] Palsgraf v. Long Island R.R. Co., 248 N.Y. 339 (1928); RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 38 (1990) (observing that Cardozo's presentation of the facts of that case "is both elliptical and slanted").

[30] POSNER, *supra* note 29, at 43.

[31] POSNER, *supra* note 29, at 43.

[32] POSNER, *supra* note 29, at 43 (quoting SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO: THE CHOICE OF TYCHO BRAHE V, 339, 341 (Margaret E. Hall ed., 1947)).

[33] Alschuler, *supra* note 23 (noting that one is left to imagine how these judges would react to a lawyer or witness brought before them accused of making up facts and who offered, as a defense, the telling effect, from a rhetorical standpoint, that their fabrications had on the case narrative); *see generally* POSNER, *supra* note 29.

[34] *See generally* Carol Rice Andrews, *The Lawyer's Oath: Both Ancient and Modern*, 22 GEO. J. LEGAL ETHICS 3 (2009) (discussing in detail the history of the lawyer's oath and its contemporary functions).

the lawyer."[35] Professor Andrews notes that "many lawyers today swear to a 'do no falsehood' oath, which is substantially the same as one recorded over 350 years ago in a 1649 English book that reported oaths 'both ancient and modern.'"[36] In contemporary American legal practice, however, the oath's role is mostly ceremonial, with the mechanism for maintaining ethical standard in the profession having been moved to the rules of attorney conduct.[37] Nonetheless, Professor Andrews sees a role for the attorney oath today, noting that while it "will never regain its central position as the source of ethical guidance and regulation, . . . it can more clearly and accurately state the core ethical duties of a lawyer. In that way, the oath can better inspire lawyers to live up to the ideals of the profession."[38]

Professor Andrews' optimism is admirable, and her aspirational view of the lawyer's oath is one to be celebrated and embraced. Yet the perception that the legal profession is experiencing a crisis of professionalism[39] suggests that lawyers are willing to disregard the rules—and the oath—when they perceive an advantage to themselves—or, perhaps more commonly, their clients—to do so. Viewed this way, the lawyer's oath is apparently no more successful than any other oath in history in securing performance consistent with the promises sworn to.

3. Juries

As with judges and lawyers, juries must swear an oath before participating in the trial process.[40] That oath

> is not a mere 'formality' which is required only by tradition. The oath represents a solemn promise on the part of jurors to do their duty according to the dictates of the law to see that justice is done.

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[35] *Id.* at 4.

[36] *Id.* (quoting THE BOOK OF OATHS AND THE SEVERAL FORMS THEREOF, BOTH ANCIENT AND MODERN FAITHFULLY COLLECTED OUT OF SUNDRY AUTHENTIC BOOKS AND RECORDS NOT HERETOFORE EXTANT, COMPILED IN ONE VOLUME 29–30 (1649)).

[37] *Id.* at 50.

[38] *Id.*

[39] *See* W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 3 (1999) (identifying what he calls "a burgeoning [academic] genre—the 'profession in crisis' jeremiad"); *see, e.g.*, Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411 (2005) (noting, without wishing to join this lamentation, that academics are not alone in decrying the state of lawyering at present); *see also* Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805 (1998); Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283 (1998).

[40] *See* Belcher, *supra* note 14.

> This duty is not just a final duty to render a verdict in accordance with the law, but the duty to act in accordance with the law at all stages of trial.[41]

But jurors do not always act in accordance with the oath they have taken, and jury nullification is often the result. Jury nullification is defined as

> a jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness.[42]

Jury nullification is not a new phenomenon. It became "commonplace" in the seventeenth and eighteenth centuries,[43] when juries—much like juries today—would render a verdict against the evidence "to nullify what [they] viewed as the unjustifiably harsh result that would flow from an 'honest' enforcement of a penal statute."[44] Because nullification involved the implicit violation of the jurors' oath, it was called "pious perjury" by a 1711 commentary on the law.[45]

Pious,[46] or not,[47] and regardless of whether the jury believes itself to be—or perhaps even is—justified in nullifying a verdict that would be proper under the facts and law of the case, jury nullification is still a violation of the jury's oath to reach a verdict based solely on the law and the evidence of the case.

So we have a situation where every participant in the trial process—judge, attorney, jury, and witness—has taken an oath of one sort or another, and all appear willing, under the right circumstances, to violate that oath and to do what they want, unconstrained by their promise to not do the very

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[41] People v. Pribble, 249 N.W.2d 363, 366 (Mich. Ct. App. 1976).

[42] *Jury Nullification*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[43] James Oldham, *Truth-Telling in the Eighteenth-Century English Courtroom*, 12 LAW & HIST. REV. 95, 105 (1994).

[44] *Id.*

[45] *Id.* at 106 (citations omitted).

[46] *See, e.g.*, David C. Brody, *Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of its Nullification Rights*, 33 AM. CRIM. L. REV. 89, 91 (1995) (describing jury nullification as an "act of mercy"); Arie Rubenstein, Note, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 COLUM. L. REV. 959 (2006) (providing another example that illustrates contemporary scholars using different words but still conveying approval of jury nullification).

[47] Kimberly Del Frate, Comment, *The Elephant in the Room: Attorney Accountability for Jury Nullification Arguments in Criminal Trials*, 52 CAL. W. L. REV. 163, 171 (2016) (pointing out that while scholars and commentators tend to be supportive of jury nullification, "judges commonly define jury nullification as a lawless, anarchical practice").

thing they are now doing.[48] It seems reasonable to ask, therefore, what on earth we think we are doing when we make people take oaths and what benefits we honestly believe we are gaining from this practice.

B. *The Oath in Culture*

Despite its dismal record of failure throughout history to secure truth-telling in court, it is certainly true that the oath has been with us for a while. The oath, in fact, has been a feature of human interaction for at least as long as there is a written historical record, with its use being "traced to a pre-religious, indeed pre-animistic period of culture."[49] The present-day testimonial oath has two parts, with a ritual gesture (the raising of the right hand) and a three-fold promise to tell the truth, the whole truth, and nothing but the truth.[50] However, the original form of the oath had a third part, in which the oath-taker invoked a curse that would kill or harm the speaker if the oath was broken. As Silving notes,

> [c]urses were not symbols of magic, but rather operative magic performances. Thus, by use of a particular curse, man could determine both disaster and victim. Indeed, that victim could be himself. The oath was a self-curse, uttered in conditional form, operating irrevocably upon occurrence of the condition. Thus the

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[48] An example of this, albeit in a case involving the citizenship oath rather than the testamentary oath, can be found in the case of Faisal Shahzad, who attempted to blow up a car bomb in New York's Times Square. Shahzad was born in Pakistan, but settled in the United States and became an American citizen, swearing an oath of allegiance to the United States when he did so. When asked by the judge who was about to sentence him to life in prison about that oath of allegiance, Shahzad said "I sweared . . . but I didn't mean it." Astonishingly, this angered Osama bin Laden, who wrote to one of his followers: "[Shahzad] was asked about the oath that he took when he obtained American citizenship . . . [a]nd he responded by saying that he lied. You should know that it is not permissible in Islam to betray trust and break a covenant. . . In one of the pictures, brother Faisal Shahzad was with commander Mehsud . . . please find out if Mehsud knows that getting the American citizenship requires taking an oath to not harm America. This is a very important matter because we do not want *mujahidin* to be accused of breaking a covenant." It is impossible to know quite what to say about such a remarkable assertion as this, coming from the man responsible for the deadliest attack on America and Americans since Pearl Harbor. *See* MARK BOWDEN, THE FINISH: THE KILLING OF OSAMA BIN LADEN 137 (2012).

[49] Helen Silving, *The Oath: I*, 68 YALE L.J. 1329, 1331 (1959) (citations omitted) [hereinafter Silving, *Oath I*].

[50] *See* Graham, *supra* note 12, at n.1 (acknowledging that, although there are many variations to be found in different state statutes, this is the standard form of the oath); FED R. EVID. 603 (requiring only that "[b]efore testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience").

> self-curse could be utilized as a means of guaranteeing that a promise would be performed.[51]

1. Children in English-Speaking Cultures[52] and the Oath

Children in English-speaking cultures, much more clearly than adults, remember and still utilize the self-curse as a means of securing truth-telling.

> Children reinforce the truth by swearing upon their honour [sic.], their heart, their Bible, their own life, or, preferably, their mother's. Spitting, linking fingers, holding their hand up to God, and making crosses upon their body, accompany their declarations.
>
> If this catalogue seems impious, it should be emphasized that the asseverations . . . are not treated lightly by those who use them. An imprecation such as 'May I drop down dead if I tell a lie' is liable to be accorded the respect of its literal meaning, and distinct uneasiness may follow its utterance, even when the child concerned is fairly certain that he has not departed from the truth.[53]

While examples of the self-cursing nature of oaths taking effect are rare, they are not unheard of.[54] And while the childish forms of securing truthful testimony rarely outlive adolescence, there are examples of those surviving into adulthood as well.[55]

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[51] Silving, *Oath I*, *supra* note 49, at 1330.

[52] I do not mean by this limitation that children in other countries do not retain a cultural awareness of the history of the oath that is at least as developed as children in English-speaking countries. Rather, it is an attempt to keep this article to a reasonable length.

[53] IONA OPIE & PETER OPIE, THE LORE AND LANGUAGE OF SCHOOLCHILDREN 121 (1960).

[54] *Id.* at 122 n.1 (noting one such instance in their book: "The fate of Ruth Pierce on 25 January 1753 was inscribed on the Market Cross of Devizes, Wiltshire, 'as a salutary warning against the danger of impiously invoking the Divine vengeance.' According to the inscription she protested that she had paid her full share for a sack of wheat she was buying with three other women and said that she might drop down dead if she had not. 'She rashly repeated this awful wish, when, to the consternation of the surrounding multitude, she instantly fell and expired, having the money concealed in her hand.' In a report of the Coroner's inquest in *The Western Flying Post*, 29 January 1753, the further detail is added that the amount Ruth Pierce was concealing in her hand was three pence.") (citations omitted).

[55] *Id.* at 127 n.1 ("During the proceedings of the Lynskey Tribunal held in London in 1948 to inquire into abuses at the Board of Trade, Mrs. John Belcher, wife of the ex-Railway Clerk, Parliamentary Secretary to the Board of Trade, won the sympathy of everyone present with her frank evidence as she twice licked her fingers and crossed her throat in this schoolgirlish affirmation of honesty."). It is impossible to tell how many witnesses, if any, take the testimonial oath with their fingers crossed behind their backs, although one suspects that the number might

Interestingly, the truth-telling effect of children's oaths appears not to have been extensively studied by those seeking to test the reliability of children as witnesses at trial.[56] And while asking children to pinky swear or to take an oath on their mother's life might seem incongruous with the might, grandeur, and seriousness of a contemporary court,[57] if such an oath were to allow a child to testify to information about which only she or he knew, then surely the judicial system would be better served than it would by requiring the child to remain mute.[58]

2. The Oath in the Bible[59]

The Bible provides contradictory advice concerning the oath, confirming that oath-taking was something done frequently in the pre-Christian world,

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not be zero.

[56] *See, e.g.*, Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. CAL. L. REV. 1017, 1057–58 (2000) (surveying the field of literature concerning the ability of children to distinguish between telling the truth and lying and the ability of a court to test the potential reliability of a child's testimony: "[m]ost courts do not require young children to understand the meaning of the word 'oath,' and many allow children simply to promise to tell the truth. Although researchers have established that even older children have difficulty with the term 'oath,' surprisingly little research has explored whether promising is meaningful to young children.").

[57] When confronted with an issue like this, it is worth recalling the laudable flexibility of FED. R. EVID. 603, which only requires that the oath taken by the witness "must be in a form designed to impress that duty [to tell the truth] on the witness's conscience." The court, then, can craft an oath that is effective for each individual witness, including children.

[58] OPIE & OPIE, *supra* note 53, at 126 n.1 (recording one instance in which a child-like oath was apparently taken seriously, although it must be said that the newspaper reporting on this incident, the News of the World, is not one known in Britain for the depth or rigor of its reporting: "How seriously [oaths taken on the life on a child's mother] are regarded by adults also, in some levels of society, may be seen in the police court report on a 16-year-old Dorset boy accused of murder. It was his mother who asked: 'Will you swear over my dead body you did not do it?' The boy replied: 'I tell you I didn't. I swear over your dead body.'"). *But see* State v. Zamorsky, 387 A.2d 1227 (Sup. Ct. N.J. 1978) (holding that a trial judge having six-year old girl "cross her heart" instead of giving her the formal oath was impermissible: "[s]ince the traditional forms by which an oath is to be taken or an affirmation made are designed to accomplish [the purpose of testifying truthfully,] we perceive no sound reason for deviating from them by eliciting the commitment to tell the truth in some other manner, such as, in this case, by crossing one's heart. We think the practice should not be encouraged.").

[59] As with limiting the discussion of oath-taking among children to the English-speaking world in the interests of keeping this article as short as possible, I limit the discussion here to the Bible because of its centrality to the Anglo-American tradition of testimonial oath-taking, not from a belief that the Bible is a more important source of information or religious belief than any other.

but also suggesting that Christians should avoid taking oaths. In Genesis, for example, Abraham takes an oath to deal fairly with Abimelech[60] and a fair amount of oath-taking is reflected in the rest of the Old Testament,[61] but in the New Testament we are told on at least two occasions not to swear oaths.[62] Yet elsewhere in the New Testament, oaths are offered freely in support of various propositions, with Saint Paul being particularly inclined to offer an oath to bolster whatever he is saying.[63]

It is unfair to expect consistency from a document composed over time, and one that reflects a variety of cultures and beliefs. But the Bible, and its ambivalent approach to oath-taking, is crucial to our understanding of how this practice came to form such a central role in contemporary Anglo-

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[60] *Genesis* 21:22–24 (King James) ("And it came to pass at that time, that Abimelech and Phichol the chief captain of his host spoke unto Abraham, saying, God *is* with thee in all that thou doest: Now therefore swear unto me here by God that thou wilt not deal falsely with me, nor with my son, nor with my son's son: *but* according to the kindness that I have done unto thee, thou shalt do unto me, and to the land wherein thou hast sojourned. And Abraham said, I will swear.").

[61] *See, e.g.*, *Deuteronomy* 6:13 (King James) ("Thou shalt fear the LORD thy God, and serve him, and shalt swear by his name."); *Ecclesiastes* 5:4 (King James) ("When thou vowest a vow unto God, defer not to pay it: for he hath no pleasure in fools: pay back that which thou hast vowed."); *Ezra* 10:5 (King James) ("Then arose Ezra, and made the chief priests, the Levites, and all Israel, to swear that they should do according to this word. And they sware."); *Joshua* 6:22 (King James) ("But Joshua had said unto the two men that had spied out the country, Go into the harlot's house, and bring out thence the woman, and all that she hath, as ye sware unto her.").

[62] *See, e.g.*, *Matthew* 5:37 (King James) (Christ says "[a]gain, ye have heard that it hath been said by them of old time, Thou shalt not forswear thyself, but shalt perform unto the Lord thine oaths: But I say unto you, Swear not at all; neither by heaven; for it is God's throne: Nor by the earth; for it is his footstool: neither by Jerusalem; for it is the city of the great King. Neither shalt thou swear by thy head, because thou canst not make one hair white or black. But let your communication be, Yea, yea; Nay, nay: for whatsoever is more than these cometh of evil."); *James* 5:12 (King James) ("But above all things, my bretheren, swear not, neither by heaven, neither by the earth, neither by any other oath: but let your yea be yea; and *your* nay, nay; lest ye fall into condemnation.").

[63] *See, e.g.*, *Romans* 1:9 (King James) ("For God is my witness, whom I serve with my spirit in the gospel of his Son, that without ceasing I make mention of you always in my prayers"); 2 *Corinthians* 1:23 (King James) ("Moreover I call God for a record upon my soul, that to spare you I came not as yet unto Corinth."); *Galatians* 1:20 (King James) ("Now the things which I write unto you, behold, before God, I lie not."); *Philippians* 1:8 (King James) ("For God *is* my record, how greatly I long after you all in the bowels of Jesus Christ."); 1 *Thessalonians* 2:5 (King James) ("For neither at any time used we flattering words, as ye know, not a cloke of covetousness; God is witness"); 1 *Thessalonians* 2:10 (King James) ("Ye *are* witnesses, and God *also*, how holily and justly and unblameably we behaved ourselves among you that believe").

American secular trials. When the Emperor Constantine decided to enshrine the Christian practice of oath-taking into the Justinian Code, he did so in error since, as we have seen, the Christian world was at best ambivalent about the value of oaths.[64] Nonetheless, the Justinian code claimed historical precedence when it stated that "[w]e have long since directed that witnesses, before they give their testimony, must be put under the sanctity of an oath . . . ."[65] And while, as Silving notes, the Roman adoption of the oath in the Fourth Century was not the exclusive source of oath taking in the West,[66] the Justinian Code became the source for the oath's adoption "by all of European Christendom."[67]

C. *The Oath in History*

History certainly provides no comfort to anyone who believes that oaths serve any practical purpose. Indeed, as early as the fourth century B.C., Plato was dismayed by what he perceived as the high levels of perjury in Grecian society when he proposed a utopian society that did not include oaths:

> When a man brings a charge against someone, he should put his accusations in writing without taking an oath; the defendant should similarly write out his denial and hand it to the officials unsworn. It would be dreadful, you see, to know quite well, in view of the frequent law-suits that occur in the state, that although pretty nearly half our citizens . . . have perjured themselves, they go on mixing with each other at common meals and other public and private gatherings without the slightest qualms.[68]

Despite this early warning that oaths were not doing what they were supposed to do, trial practice in England evolved with oaths at its core. There developed, however, an asymmetrical approach to oath taking, with

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[64] Silving, *Oath I, supra* note 49, at 1337 ("Testimonial oaths were finally institutionalized in Roman jurisprudence in the fourth century A.D., when Constantine, erroneously believing that he was following Christian practice, required witnesses' statements to be sworn.").

[65] ANNOTATED JUSTINIAN CODE, 4.20.9 (Ed. Fred H. Blume), https://perma.cc/6DDA-6RGM.

[66] Silving, *Oath I, supra* note 49, at 1336 ("Although the testimonial oath was firmly established in Rome in the erroneous belief that it was a Christian tradition, it is not exclusively derived from this Roman misconception.").

[67] Silving, *Oath I, supra* note 49, at 1337.

[68] Despite this early warning, Plato was not entirely opposed to oath-taking; he believed that jury members should take oaths before sitting at trial, voters in elections, and judges (of choruses and artistic performances, as well as judges of athletic and equestrian events) should take oaths as well. He also believed that aliens should be permitted to offer and accept binding oaths. *See* PLATO, THE LAWS, BOOK XII 457, 458 (Trevor J. Saunders, trans., Penguin Classics 1970).

prosecution witnesses testifying under oath but defense witnesses forbidden to be sworn before testifying.[69] Although this rule had been criticized by Coke as early as 1644,[70] it was not entirely eliminated until 1702.[71] As Langbein notes, this change in the law was likely "not for the purpose of enhancing the defensive posture of the defendants, but in order to expose defense witnesses to prosecution for perjury."[72] Even after this change, however, both in England and in America, the defendant was not allowed to testify. This was, presumably, to spare defendants from putting their souls at risk because it was assumed they would lie in order to save themselves from punishment.[73] This prohibition lasted in England until the passage of the Criminal Evidence Act in 1898,[74] and while most American states had lifted this prohibition sometime earlier,[75] it lasted in Georgia until 1961 when the Supreme Court intervened.[76]

The question of who was allowed to take the oath, and therefore who was allowed to testify, has been a complicated one. The early English position was that because the oath was a religious act, only Christians could take the oath because only they possessed the belief necessary to activate the relationship between the witness and God that would secure the truthfulness of the testimony. In 1609, Edward Coke made his view clear: "All infidels are in law *perpetui inimici*, perpetual enemies . . . for between

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[69] JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL, 51–52 n.200 (2003) (noting that this gave the prosecution testimony "enhanced credibility," and could inadvertently work to the defendant's benefit, particularly in cases involving various types of harm to children when the victim was disqualified from testifying because of infancy, but also in cases involving others, such as Quakers, who were prohibited from testifying in court because of their unwillingness to swear an oath).

[70] EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 79 (1644).

[71] LANGBEIN, *supra* note 69 at 52 n.204 (quoting 1 ANNE, STAT. 2 c. 9, § 3 (1702)).

[72] LANGBEIN, *supra* note 69, at 52.

[73] *See* LANGBEIN, *supra* note 69, at 52; People v. Thomas, 9 Mich. 314, 314 (1861) (commenting on the potential tactical advantage defendants had by the ability to give unsworn statements in their own defense: "If the people cannot compel [the defendant] to testify, neither can he force his testimony upon them. Otherwise there would be no reciprocal rights, and the prisoner would possess the double advantage of offering his sworn or unsworn statement at his option").

[74] *See* LANGBEIN, *supra* note 69, at 52 n.206 (citing CRIMINAL EVIDENCE ACT, 61 & 62 VICT., c. 36 (1898)).

[75] LANGBEIN, *supra* note 69, at 52; Ferguson v. Georgia, 365 U.S. 570, 577 (1961) (citing MAINE ACTS 1859, c. 104: "Before the end of the century every State except Georgia had abolished the disqualification.").

[76] Ferguson v. Georgia, 365 U.S. 570, 595 (1961).

them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace."[77]

Despite the broad language of Coke's opinion that only Christians were qualified to take the oath and therefore be witnesses in court,[78] Jews were allowed to testify in criminal cases as early as 1667,[79] although it took until 1744 and the case of *Omichund v. Barker*,[80] to allow for the general swearing-in of witnesses of any religion, as long as the witness believed in a god, believed in the obligations inherent in oath taking, and were otherwise competent. The court reasoned that regardless of the religion and the form the oath might take, "still the substance is the same, which is that God in all of them is called upon as a witness to the truth of what we say."[81]

Although *Omichund* was a case from the Court of Chancery, it clearly had a rapid and general effect, and on February 27, 1765, in the Old Bailey, a Muslim named John Morgan was sworn on the Koran and allowed to testify after being asked about the manner of swearing in Islam.[82]

In America, Coke's view of oath taking was soundly rejected in favor of the *Omichund* decision, with the Illinois Supreme Court writing in 1856 that Coke's opinion was "a rule as narrow, bigoted and inhuman as the spirit of fanatical intolerance and persecution which disgraced his age and

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[77] THE LAW REFORM COMMISSION, IRELAND, REPORT ON OATHS AND AFFIRMATIONS 7 (1990) [hereinafter THE LAW REFORM COMMISSION] (quoting *Calvin's Case*, 77 Eng. Rep. 377, 397 (KB 1609)).

[78] 3 EDWARD COKE, INSTITUTES OF THE LAW OF ENGLAND 165 (1797) (writing that the oath is "an affirmation or denial by any Christian . . . calling Almighty God to witnesses, that his testimony was true").

[79] *See, e.g.*, *A Reconsideration of Sworn Testimony*, *supra* note 7, at 1686 n.25 ("[C]ourt held that Jews sworn on the Old Testament had sufficiently invoked the necessary obligations and sanctions required by law."); *see also December 1679, Trial of Woman*, OLD BAILEY ONLINE, https://perma.cc/9M7K-E97E (last visited Oct. 18, 2019) (describing a 1679 case where a victim and his witnesses, all Jews, were sworn on the Pentateuch in order to be allowed to claim that a prostitute had stolen a ruby valued at £14 as well as a silver plate "and some other things").

[80] Omichund v. Barker, 125 Eng. Rep. 1310 (Ch. 1744).

[81] *Id.* at 1314–15 (explaining that the witness was still required to be religious, since any person who did not believe that God, or whatever god they believed in would punish them for testifying untruthfully were not bound or obligated to tell the truth after taking the oath).

[82] *A Reconsideration of Sworn Testimony*, *supra* note 7, at 1686 n.25 (stating that Morgan testified that "I touch the book, the Alcoran, with one hand, and put the other hand to my forehead; then I look upon it [and] I am bound to speak the truth."). *See generally*, *The Proceedings of Old Bailey*, OLD BAILEY ONLINE, https://perma.cc/VMZ2-JB4L (last visited Oct. 18, 2019) (suggesting that, in addition to the Morgan case, the court heard an additional forty-six trials on February 27, 1765).

country."[83] And in December of the same year, the North Carolina Supreme Court wrote that any test that prevented a witness who held non-traditional religious beliefs[84] was "wholly repugnant to the tolerant and enlightened spirit of our institutions and of the age in which we live."[85] In reaching this decision, the Court concluded that had the North Carolina legislature intended

> to exclude Jews and infidels, who believe in a God, and Christians, who do not believe in future rewards and punishments, from the *privilege* of taking the oaths which are required to enable them to testify as witnesses, or to take any office or place of trust or profit, in other words, to degrade and persecute them 'for opinion's sake,' then it is clear, that the statute, so far as this purpose is involved, is void and of no effect, because it is in direct contravention of the 19 sec of the Declaration of Rights: 'That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences.'[86]

But lest we become too smug about our historically enlightened approach to oath taking in general, and in North Carolina in particular, it is worth remembering that in 2003, a Muslim woman named Syidah Matteen declined to swear on the Bible prior to giving testimony in a courtroom in Guilford County, North Carolina, preferring to swear on the Qur'an.[87] Because no Qur'an was available, Ms. Matteen affirmed to tell the truth.[88] Later, however, Ms. Matteen returned to court with a number of Qur'ans that an Islamic Center had donated so that Muslim witnesses would have them available for swearing.[89] The court declined the donation and, when Ms. Matteen was called to give testimony in a later case, the court refused to allow her to take her oath on the Qur'an. In July 2005, the American Civil Liberties Union of North Carolina filed suit on Ms. Matteen's behalf seeking,

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[83] Cent. Military Tract R.R. Co. v. Rockafellow, 17 Ill. 541, 552 (1856).

[84] Shaw v. Moore, 49 N.C. 25, 26 (1856) (noting that in this case, the witness did not believe in punishment for sin after death and believed that "in another world all would be happy and equal to the angels").

[85] *Id.* at 31.

[86] *Id.* at 30.

[87] Frederick B. Jonassen, *"So Help Me?": Religious Expression and Artifacts in the Oath of Office and the Courtroom Oath*,12 CARDOZO PUB. L. POL'Y. & ETHICS J. 303, 345 (2014); *see also* Daniel Blau, *Holy Scriptures and Unholy Strictures: Why the Enforcement of a Religious Orthodoxy in North Carolina Demands a More Refined Establishment Clause Analysis of Courtroom Oaths*, 4 FIRST AMEND. L. REV. 223 (2006).

[88] Jonassen, *supra* note 87, at 346.

[89] Jonassen, *supra* note 87, at 346.

among other things, a declaration that a witness could swear on religious texts other than the Bible.[90] The case bounced up and down the North Carolina court system until 2007 when a superior court judge ruled that in North Carolina, "oaths are to be administered in a form, and upon such sacred texts, including texts other than the Holy Bible, that a witness or juror holds to be 'most sacred and obligatory upon their conscience.'"[91] How it is that a case could spend two years in the North Carolina court system with nearly 150 year-old binding precedent making this a non-issue is not something with which any trained lawyer or judge should be comfortable.

Until we are confronted with another situation in which a judge ignores an oath and fails to adhere to the law,[92] we are left with a situation, at least in North Carolina, where witnesses are expected to take a solemn oath[93] with their hands on "Holy Scriptures"[94] and take an overtly religious oath,[95]

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[90] Jonassen, *supra* note 87, at 348.

[91] Jonassen, *supra* note 87, at 349 (quoting Decl. J. at 3, 18, ACLU of N.C. v. North Carolina, https://perma.cc/9XBE-FBAE (Super. Ct. Div. May 24, 2007) (No. 2005 CVS 9872)).

[92] N.C. GEN. STAT. § 11-11 (2018) (requiring North Carolina judges to swear an oath to carry out their duties "to the best of my ability and understanding, and consistent with the Constitution and laws of the State; so help me, God"). It would be difficult to argue that a judge who ignored almost 150-year-old binding precedent was carrying out their duties to the best of their ability or consistent with the laws of North Carolina. Yet there is nothing in the record or the scholarly literature to suggest that the judge's breach of the judicial oath in the Matteen case was investigated, or even that investigating the potential breach of the oath was ever even considered. This is, in the context of the case, somewhat ironic.

[93] N.C. GEN. STAT. § 11-1 (2018) ("Whereas, lawful oaths for discovery of truth and establishing right are necessary and highly conducive to the important end of good government; and being most solemn appeals to Almighty God, as the omniscient witness of truth and the just and omnipotent avenger of falsehood, and whereas, lawful affirmations for the discovery of truth and establishing right are necessary and highly conducive to the important end of good government, therefore, such oaths and affirmations ought to be taken and administered with the utmost solemnity.").

[94] N.C. GEN. STAT. § 11-2 (2018) ("Judges and other persons who may be empowered to administer oaths, shall (except in the cases in this Chapter excepted) require the party to be sworn to lay his hand upon the Holy Scriptures, in token of his engagement to speak the truth and in further token that, if he should swerve from the truth, he may be justly deprived of all the blessings of that holy book and made liable to that vengeance which he has imprecated on his own head.").

[95] N.C. GEN. STAT. § 11-3 (2018) ("When the person to be sworn shall be conscientiously scrupulous of taking a book oath in manner aforesaid, he shall be excused from laying hands upon, or touching the Holy Gospel; and the oath required shall be administered in the following manner, namely: He shall stand with his right hand lifted up towards heaven, in token of his solemn appeal to the Supreme God, and also in token that if he should swerve from the truth he would draw down the vengeance of heaven upon his head, and shall introduce the intended

unless they have "conscientious scruples" about taking the oath, in which case they might choose to affirm instead of swear.[96] Because of Matteen, witnesses who are adherents to religions other than Christianity can swear on books that constitute their religion's version of "Holy Scriptures."

It is possible to look at the cultural and historical background of oath taking and conclude that people only break oaths for selfish or self-interested reasons. But life is more nuanced and complex than this simplistic view, and history is also replete with examples of people who broke oaths out of personal conviction that the circumstances that had caused them to take the oath had changed and their conscience would not permit them to honor their oaths any longer. In this country, for instance, George Washington provides an interesting, though somewhat opaque, example. There is no documentary proof that Washington took a single oath of allegiance to the British monarch, although it would have been almost unthinkable for him not to have taken several of these oaths. Although Washington did not obtain a royal commission during his military career as an officer in the Virginia militia, he served alongside British officers, ranked above some British officers, and fought for the King. He mentioned his service to the King many times throughout letters that he wrote during his time in the militia.[97] For example, in a letter to Robert Orme on March 15, 1755, Washington wrote, "[b]ut besides this, and the laudable desire I may have to serve (with my best abilities) my King & Country, I must be ingenuous enough to confess that I am not a little biased by selfish considerations."[98]

Additionally, in Washington's letters, he instructs people to enlist others into the militia.[99] As a part of his instructions, he states that "all recruits, so

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oath with these words, namely: I, A.B., do appeal to God, as a witness of the truth and the avenger of falsehood, as I shall answer the same at the great day of judgment, when the secrets of all hearts shall be known (etc., as the words of the oath may be).").

[96] N.C. GEN. STAT. § 11-4 (2018) ("When a person to be sworn shall have conscientious scruples against taking an oath in the manner prescribed by G.S. 11-2, 11-3, or 11-7, he shall be permitted to be affirmed. In all cases the words of the affirmation shall be the same as the words of the prescribed oath, except that the word 'affirm' shall be substituted for the word 'swear' and the words 'so help me God' shall be deleted.").

[97] George Washington, *George Washington Papers, Series 2, Letterbooks 1754 to 1799: Letterbook 1, Aug. 11, 1754-Dec. 25, 1755*, LIBRARY OF CONGRESS, https://perma.cc/6BT9-YPZ7 (last visited Mar. 9, 2019).

[98] George Washington, *George Washington to Robert Orme, March 15, 1755*, LIBRARY OF CONGRESS, https://perma.cc/4LEL-5YQN (last visited Mar. 9, 2019).

[99] George Washington, *George Washington to John Carlyle, October 3, 1755*, LIBRARY OF CONGRESS, https://perma.cc/4G9X-ZTLR (last visited Mar. 9, 2019).

soon as they are listed, are to take the oath, provided for that purpose, which is to be attested by the magistrate who administered them."[100] These likely were the oaths of supremacy and allegiance; there were other oaths in place at the time that someone in the militia might have to take, but only in certain situations, such as enforcing punishments on another officer for his failure to comply with certain regulations. Therefore, since any military officers were required to take the oaths of supremacy and allegiance, these are likely the oaths that Washington is referring to in his letters. The circumstantial evidence, then, suggests that Washington himself took these oaths upon being sworn into the Virginia militia.

Washington likely also took oaths of supremacy and allegiance while sitting in the Virginia House of Burgesses. Because the Virginia Assembly sat by permission of the King, all its members had to be sworn in by the Royal Governor or his deputies before convening.[101] Although there is no document specifically recording that the members of the House of Burgesses during Washington's time took the oath of allegiance, it would surprising were the practice of taking the oath to have fallen into disuse. So once again, while there is no direct evidence of Washington having taken an oath of allegiance to the British King, it is highly likely that he did, in fact, take such an oath on multiple occasions.[102]

While Washington's oath-taking past is likely but uncertain, we know that Benjamin Franklin took an oath of allegiance to George the Second in 1755, because of his position at the University of Pennsylvania:

> I A.B. do truly and sincerely acknowledge, profess, testify, and declare in my Conscience, before God and the World, That our sovereign Lord King George the second is lawful and rightful King of the Realm of Great Britain, and all other his Majesty's Dominions and Countries thereunto belonging .... And I do swear, That I will bear Faith and true Allegiance to his Majesty King George the second, and him will defend to the utmost of my Power, against all traitorous Conspiracies and Attempts whatsoever; which shall be made against his Person, Crown, or Dignity. And I will do my utmost Endeavour to disclose and make

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[100] George Washington, *George Washington, September 3, 1755, Recruiting Instructions*, LIBRARY OF CONGRESS, https://perma.cc/GU76-TMZG (last visited Mar. 9, 2019).

[101] *The Capital: A Manual of Interpretation*, COLONIAL WILLIAMSBURG DIGITAL LIBRARY (1990), https://perma.cc/HPZ4-WSNJ.

[102] Despite his apparent inconsistent approach to his own oath-taking, Washington spoke about the importance of oaths later in life. George Washington, *Washington's Farewell Address 1796*, YALE L. SCH. (Sept. 17, 1796), https://perma.cc/92FG-BSTB ("Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of justice?").

> known to his Majesty, and his Successors, all Treasons and traitorous Conspiracies, which I shall know to be against him or any of them . . . . So help me God.[103]

More recently, General Robert Lee took an oath of allegiance to the United States of America as an officer in its army before becoming an officer in the army of the Confederate States of America.[104] Lee signed the Oath of Amnesty on October 2, 1865, but was not pardoned and his citizenship was not restored until a posthumous joint congressional resolution in 1975.[105]

In contemporary times, we have the example of Edward Snowden, the source of information published in a series of articles in *The Guardian* and *The Washington Post*.[106] Snowden was, at the time he gathered the information, an intelligence contractor for Booz Allen Hamilton at the National Security Agency ("NSA").[107] Snowden considered himself to be a whistleblower and asserted that, "I know I have done nothing wrong."[108] Nonetheless, facing a criminal complaint, Snowden, who was in Hong Kong, declined to return to the United States but eventually travelled to Russia, where he apparently remains at the time of this writing.

Upon entering into employment with the NSA, Snowden swore the standard civil service oath.[109] It is possible that the last sentence of 5 U.S.C. §

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[103] National Archives, *Oaths of Trustees and Officers of the College, [10 June 1755]*, FOUNDERS ONLINE, https://perma.cc/G32G-YRQ2 (lasted visited Mar. 9, 2019).

[104] *General Robert E. Lee Confederate Service Record*, AM. CIVIL WAR, https://perma.cc/YSY2-CFHF (last visited Aug. 13, 2019). While President Gerald Ford said that "General Lee's character has been an example to succeeding generations, making the restoration of his citizenship an event in which every American can take pride" some have taken the position that Lee was a traitor. *Compare General Robert E. Lee's Parole and Citizenship*, 37 PROLOGUE MAG., Spring 2005, No. 1, https://perma.cc/FY3N-VA3L (last visited Aug. 13, 2019), *with* Eric Lamar, *Why Praise Robert E. Lee?*, WASH. POST (Aug. 23, 2017, 5:47 PM EDT), https://perma.cc/J593-4CM3.

[105] *General Robert E. Lee's Parole and Citizenship*, *supra* note 104.

[106] *See* Hanna Kim, *The Resilient Foundation of Democracy: The Legal Deconstruction of the Washington Post's Condemnation of Edward Snowden*, 93 IND. L.J. 533, 535–36 (2018).

[107] *Id.* at 535.

[108] Glenn Greenwald, Ewen MacAskill, & Laura Poitras, *Edward Snowden: The Whistleblower Behind the NSA Surveillance Revelations*, GUARDIAN (June 11, 2013, 9:00 AM EDT), https://perma.cc/AVN2-GFEY.

[109] 5 U.S.C.A. § 3331 (1966) ("An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: 'I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about

3331—"This section does not affect other oaths required by law"—was missing from the card from which Snowden likely read the oath.[110] This becomes significant when the other obligation Snowden admits to undertaking upon commencing to work for the NSA, embodied in Standard Form 312,[111] is considered.[112]

Snowden considers his oath to uphold the Constitution to be paramount, and that it was the NSA with its programs that allowed "the unfettered access of the U.S. government to internet and phone records"[113] to be in violation of the Constitution.[114] In fact, as Josh Blackman observes, the situation is more complicated than Snowden might like to believe:

> But the last bit [stating that "[t]his section does not affect other oaths required by law]" is interesting. It says that if your oath to the Constitution conflicts with some other promise you made, the Constitution must fall to the side. Imagine that. The Code of Federal Regulations has supremacy over the Constitution![115]

Without trying to resolve the knotty constitutional and statutory interpretation question here, and without addressing the question of whether he was justified in his actions or not,[116] what seems clear is that Snowden's oath and promise did not stop him in revealing information he was not authorized to reveal. Snowden's personal convictions, rightly or

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to enter. So help me God.' This section does not affect other oaths required by law.").

[110] Josh Blackman, *Snowden's Oath to Secrecy and Oath to the Constitution,* JOSH BLACKMAN'S BLOG (Dec. 23, 2013), https://perma.cc/EM9S-H57D?type=image (remembering taking the oath but not remembering the last sentence of § 3331 being on the card).

[111] *Standard Form 312, Classified Information Nondisclosure Agreement,* FAS, https://perma.cc/9D6Q-SHQM (last visited Aug. 15, 2019).

[112] *Id.* ("I hereby agree that I will never divulge classified information to anyone unless: (a) I have officially verified that the recipient has been properly authorized by the United States Government to receive it; or (b) I have been given prior written notice of authorization from the United States Government Department or Agency (hereinafter Department or Agency) responsible for the classification of information or last granting me a security clearance that such disclosure is permitted.").

[113] Eric Connon, Note, *Are Intelligence-Community Leakers Internationally Protected Whistleblowers of Simply "Whistling in the Dark?": Assessing the Protections Afforded to Intelligence-Community Whistleblowers under International Law,* 67 CASE W. RES. L. REV. 897, 898 (2017).

[114] *See* Blackman, *supra* note 110 ("That is an oath to the Constitution. That is the oath that I kept that Keith Alexander and James Clapper did not.").

[115] Blackman, *supra* note 110.

[116] Also not considered for our present purposes is the possibility that all of the talk about personal beliefs is simply cover for Snowden being an old-fashioned ideological spy.

wrongly, were stronger than his promise.[117]

A similar outcome can be discerned in the case of Kim Davis, the Kentucky clerk who, in 2015, declined to issue marriage licenses to gay couples based on her religious beliefs.[118] Ms. Davis had taken two oaths: the standard oath, required by the Kentucky Constitution of all officers,[119] and also the oath required of court clerks and deputies.[120] Because of the language of the oaths Davis had taken, she was in the interesting position of trying to justify her breaching of two oaths made to God by referring to her duty to God. Ms. Davis was sent to jail after she refused to issue licenses to gay couples and was only released when her assistants, acting in her absence, began issuing marriage licenses to all eligible couples who requested them, regardless of gender.[121] She lost her bid for re-election in November 2018.[122]

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[117] In an ironic twist, Snowden was roundly condemned for his actions by General David Petraeus, the director of the Central Intelligence Agency, who said "[o]aths do matter, and there are indeed consequences for those who believe they are above the laws that protect our fellow officers and enable American intelligence agencies to operate with the requisite degree of secrecy." Subsequently, though, Petraeus was himself involved in a national security scandal in which it was alleged that he had revealed national security secrets to his mistress, thereby potentially violating his oaths to the country and to his wife. David H. Petraeus, *Message from the Director: Former Officer Convicted in Leak Case*, CENT. INTELLIGENCE Agency (Oct. 23, 2012), https://perma.cc/W4YJ-LQ2J, *quoted in* Jeffrey B. Hammond, *I Swear to It: Oaths as Fundamental Language and Power*, 31 J.L. & RELIGION 92, 93 (2016).

[118] *Id.* at 98.

[119] KY. CONST. § 228 ("I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States and the Constitution of this Commonwealth, and be faithful and true to the Commonwealth of Kentucky so long as I continue a citizen thereof, and that I will faithfully execute, to the best of my ability, the office of . . . according to law; and I do further solemnly swear (or affirm) that since the adoption of the present Constitution, I, being a citizen of this State, have not fought a duel with deadly weapons within this State, nor out of it, nor have I sent or accepted a challenge to fight a duel with deadly weapons, nor have I acted as a second in carrying a challenge, nor aided or assisted any person thus offending, so help me God.").

[120] KY. REV. STAT. ANN. § 30A.020 (West 2019) ("I, . . . do swear that I will well and truly discharge the duties of the office of . . . County Circuit Court Clerk, according to the best of my skill and judgment, making the due entries and records of all orders, judgments, decrees, opinions, and proceedings of the court, and carefully filing and preserving in my office all books and papers which come into my possession by virtue of my office; and that I will not knowingly or willingly commit any malfeasance of office, and will faithfully execute the duties of my office without favor, affection, or partiality, so help me God.").

[121] Associated Press, *Kentucky Clerk Jailed Over Gay Marriage Licenses Loses Re-election Bid*, NBC NEWS (Nov. 7, 2018, 9:49 AM EST), https://perma.cc/U6LH-3WGU.

[122] *Id.*

As with Mr. Snowden, and without regard to personal opinions as to the correctness of her decision, Ms. Davis apparently violated her oaths of office not out of self-interest or personal gain, but because of a deep-seated personal conviction. Nonetheless, the oaths she took were not strong enough to bind her to a course of action that diverged from her personal beliefs, and in her actions, and those of Mr. Snowden, we can see the limits of an oath's effect in contemporary society. Put simply, people appear to be willing to be bound by an oath if the required action conforms to their personal beliefs and self-interest. If either of those conflict with the behaviors required by the oath, however, belief or self-interest will win out over the oath. The implications of this for the testamentary oath are ominous.

D. *Why Compel the Witness to Engage in Ritualized Behavior?*

If the oath's bonds are as weak and unreliable as they seem to be, and always have been, in securing predictable behavior and truthfulness, it is reasonable to ask why we continue to persist with it. And an even more basic question also comes to mind: what does the oath actually mean? These questions, it turns out, are not nearly as simple as they might first appear. In order to answer them, we are forced to consider the nature of ritualized behavior in our secular court system, the definitions of the words used in the three-part promise witnesses make before testifying, and the evidence we have as to how the judicial system views that promise.

At first consideration, it might appear odd that such an old ritual as the oath has remained so much a part of the contemporary trial. While trials are no stranger to ritual,[123] the oath is a remarkably long-lived one. The implicit assumption underlying the oath is that witnesses, left in their natural state, will lie with unpredictable regularity,[124] and so the oath is necessary to elevate a mere person into a judicial state of grace whereby that someone becomes a "witness" and that person's voice, previously dumb, can be unstopped so that their words can become "testimony."[125]

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[123] *See, e.g.*, Miriam Aziz, *Law and Art: A Postcard from Europe*, 27 YALE J.L. & HUMAN. 343, 348 (2015) ("A trial is a performance, with rules of engagement that govern interaction. It is a choreography: turn the sound down and you will see a dance/theatre piece *extraordinaire* with a lot of improvisation!").

[124] *See, e.g.*, *A Reconsideration of Sworn Testimony*, *supra* note 7, at 1684 ("The requirement that witnesses be sworn has its foundation in the usually unexpressed assumption that all testimony is inherently corrupt due to the self-interest or indifference of the witness.").

[125] *See, e.g.*, Sanford Levinson, *Constituting Communities Through Words That Bind: Reflections on Loyalty Oaths*, 84 MICH. L. REV. 1440, 1448 (1986) (speaking of loyalty oaths, marriage oaths, and religious oaths, Levinson writes, "[p]erhaps the most interesting aspect of all these oaths is

This trans-substantive power of the oath appears to lie at the core of Rule 603, the only rule to discuss testimonial oaths in the federal system.[126] "Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with the duty to do so."[127] The assumption here, of course, is that without the oath or affirmation, the witness's conscience will continue to slumber and the jury will not hear the truth.[128] Speaking about Pennsylvania's 1772 oath, still used in its courts in 2006,[129] one tipstaff put all this more succinctly: "It may make witnesses think before they go up there, 'Hey, maybe I should tell the truth.'"[130]

But if the concept of the transformative effect of the oath doesn't quite capture its essence, maybe we need to substitute the concept of "shibboleth,"[131] a password that shows which community one belongs to—witnesses or non-witnesses. Sherman Clark suggests that oaths "mark out and fence off the crucial borders of community membership. On this

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their role as signifiers of a transformed consciousness. The transformation signified is often a purportedly 'new' (or, at least, substantially changed) identity on the part of those taking the vow.").

126 FED. R. EVID. 603 (providing the only federal provision that requires an oath to be administered before a witness testifies in court). *Cf.* U.S. CONST. amend. IV (marking important territory for oaths: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.").

127 *Id.*

128 *See, e.g.*, Clinton v. State, 33 Ohio St. 27, 33 (1877) ("The purpose of the oath is not to call the attention of God to the witness, but the attention of the witness to God; not to call upon Him to punish the false-swearer, but on the witness to remember that He will assuredly do so. By thus laying hold of the conscience of the witness and appealing to this sense of accountability, the law best insures the utterance of truth.").

129 Gabrielle Banks, *Truthfully, Our Court Oath is Elaborate*, PITT. POST-GAZETTE (Aug. 10, 2006), https://perma.cc/4YS7-NSLE ("You [and each of you] do swear by Almighty God, the Searcher of all hearts, that the evidence you shall give this court [and Jury] in this issue now being tried shall be the truth, the whole truth, and nothing but the truth and as you shall answer to God on the last great day.").

130 *Id.*

131 *Judges* 12:5-6 (King James) ("And the Gileadites took the passages of Jordan before the Ephraimites: and it was *so*, that when those Ephraimites which were escaped said, Let me go over; that the men of Gilead said unto him, Art thou an Ephraimite? If he said, Nay; Then said they unto him, Say now Shibboleth: and he said Shibboleth: for he could not frame to pronounce *it* right. Then they took him, and slew him at the passages of Jordan: and there fell at that time of the Ephraimites forty and two thousand.").

account, the oath says something like this: 'whatever else you do or believe—whatever diversity we encompass—this much you agree to. These things are fundamental prerequisites to being inside rather than outside.'"[132] Despite an earlier, flexible approach to own oath-taking, this is certainly how George Washington saw the oath in December 1775, when he wrote that "it is high time a test act was prepared and every man called upon to declare himself; that we may distinguish friends from foes."[133]

The loyalty oath Washington was speaking of is, of course, a very different thing from the testimonial oath,[134] but the idea of the oath as a means of separating people into one group from the other—witnesses from non-witnesses, for example—seems uncontroversial enough. And while the punishment for refusing to swear an oath is less drastic than the fate that befell the Ephraimites who could not pronounce "shibboleth,"[135] it is serious enough to suggest that saying the password by swearing the testimonial oath is a good idea for those asked to take it.

So, we have the history of the oath and at least a sense of why we still have it as a device that, we believe, awakens witnesses to the importance of truthfulness and locates them in a community of people who have experienced this transformation. In order to determine whether we should retain the oath, though, we must look more closely at what it actually is. And this is where things start to turn decidedly peculiar.

E. *To Swear or Affirm*

The problems with the oath and oath-taking start early because before we can begin to contemplate the words the witness must say or agree to, we first have to decide what those words will be. And this, it turns out, is not nearly as simple as we might expect it to be.

As we saw when considering the *Matteen* case in North Carolina,[136] witnesses must elect to swear an oath or affirmation before testifying. What is remarkable about this process is that it all transpires in full sight of the jury and other court participants. Witnesses testifying in North Carolina,

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[132] Sherman J. Clark, *Promise, Prayer, and Identity*, 38 TULSA L. REV. 579, 585–86 (2003).

[133] HAROLD HYMAN, TO TRY MEN'S SOULS: LOYALTY TESTS IN AMERICAN HISTORY 74 (1959).

[134] *See, e.g.*, Clark, *supra* note 132, at 583 (discussing "academics who in the 1950s refused to take loyalty oaths, and who lost their jobs as a result"); *see also A Reconsideration of Sworn Testimony*, *supra* note 7, at 1698–99.

[135] Suzanne Kemmer, *The Story of the Shibboleth*, RICE UNIV., https://perma.cc/4SQT-PC9D (last visited Nov. 8, 2019).

[136] *See* Jonassen, *supra* note 87, at 345–49.

and in all other states,[137] either willingly or under subpoena, must subject themselves to a public inquiry about the nature and strength of their religious beliefs and convictions before the appropriate oath form is selected and the witness takes the oath or affirmation. A witness who chooses to swear an oath on the Qur'an is revealed to everyone in the courtroom as a Muslim, a witness who chooses to affirm is revealed as someone who either does not have religious convictions or whose religious convictions compel them to not take an oath,[138] and a person who takes an oath on the Bible is revealed as someone who appears to have Christian religious convictions.[139]

The jury therefore receives a lot of information about a witness that might influence it when evaluating that witness's testimony, even though the personal beliefs of the witness might have, and indeed most likely would have, nothing to do with the testimony the witness is offering.[140] As Professor Vestal notes, "[a]ny time the finder of fact is aware of the religious beliefs of a witness there is a possibility of prejudice influencing the credibility determination."[141] And because every juror must select the nature of his or her oath and, if religious, what form that oath will take, every jury member is presented with a chance to make this prejudiced[142] credibility

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[137] Allan Vestal, *Fixing Witness Oaths: Shall We Retire the Rewarder of Truth and Avenger of Falsehood?*, 27 U. FLA. J.L. & PUB. POL'Y 443, 448 (2016) (providing that all fifty states have a religious oath and a secular affirmation).

[138] *See* LANGBEIN, *supra* note 69 (noting that Quakers, for example, often follow the instructions from *Matthew* 5:37 and decline to swear oaths).

[139] A person who has no religious convictions might freely swear an oath on a Bible, because such an oath would be meaningless to them. The problem of perjury, of course, would remain for such a witness.

[140] *See* Vestal, *supra* note 137, at 450–51 (offering an example of the problems this can engender: In 2011, a defendant in a sexual harassment case took the stand in his own defense. The defendant, Dr. Abbas Husain, "is of Indian descent but [his] religion is not disclosed in the reported decisions . . . He raised his right hand and spoke the oath but did not place his hand directly on the Bible." After the trial, in which the jury found in favor of the plaintiff and awarded her $12,500, "one juror noted . . . that she was surprised that the defendant had not placed his hand on the Bible before he testified." The trial judge let the verdict stand and Abbas appealed, claiming in part that "his action was based on his 'religious belief that the left hand should never be placed on a holy book.'"); *see also* Davis v. Hussain, 220 N.J. 270, 288 (2014) (reversing and remanding for further proceedings to allow an inquiry into the juror's observation and the effect, if any, on the jury verdict).

[141] Vestal, *supra* note 137, at 452.

[142] Vestal, *supra* note 137, at 470 ("One of the most corrosive features of our contemporary national life is the open hostility with which some Americans confront those whose religious beliefs differ from theirs." (citing *How Americans Feel About Religious Groups: Jews, Catholics & Evangelicals Rated Warmly, Atheists and Muslims More Coldly*, PEW RESEARCH CTR. (July 16, 2014),

determination with every witness at every trial.

But things are even worse than this. As things stand, the oath-taking process requires the witness to elect whether to testify under oath or whether to affirm. And if the witness elects to testify under oath, the witness must then let the court know which oath form the witness wishes to use. As the Irish Law Reform Commission concluded when looking at this practice, this is a paradoxical situation in which an as-yet-unsworn witness, who is so mistrusted that some form of binding promise to be truthful is required in order to allow the witness to testify, is then asked to select—without offering support or substantial inquiry—the form of promise that will most effectively compel them to tell the truth.[143] Because the witness is not under oath when making this selection and is therefore not subject to the penalty of perjury, the witness can presumably lie with impunity about which oath-form is most effective in securing the witnesses truthful testimony.

What emerges from this contemplation of the oath ritual is an image of a legal system stumbling around in a fog of its own making, trying to incorporate aspects of ancient ritual into a contemporary trial with an attempt to reconcile ancient and contemporary cultural traditions and failing to come up with a coherent process to accomplish anything valuable. In attempting to respect a witness's religious and cultural preferences, the court subjects that witness to a potentially humiliating public inquest into those preferences and accepts without question, and without the protection of a potential perjury prosecution, the unsworn word of the witness. To describe the process as short-sighted is generous in the extreme.

F. *"The Truth"*

But that is only the beginning of the oath's problems. Things become far worse when trying to understand the nature of the testamentary oath itself. The problems begin immediately when we get to the first of the three promises the witness makes: the promise to tell "the truth." It seems, at first glance, to be a simple promise to make, but even a moment's contemplation will reveal the difficulty here. Not to put too fine a point on it, but what is the "truth" the witness is promising to tell?

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https://perma.cc/LFP3-YWG8)).

[143] Law Reform Comm'n, *Report on Oaths and Affirmations* § 4.1 (Dec. 1990), https://perma.cc/9485-PNQU ("Whereas the use of the oath is on the one hand grounded in a level of distrust or suspicion of the witness, and therefore requires that he put his soul in peril, in such instances it relies on him to indicate truthfully what form of oath will bind his conscience. Clumsily, if not zealously, the law then denies him the competence to testify if he cannot do so.").

As a threshold matter, it is important to note that what the witness is promising to tell is "the" truth. The use of the definite article here is significant, in that the witness is not promising to tell the Austenian "a" truth,[144] or "my" (the witness's) truth, or the "truths" of the Declaration of Independence,[145] or even a promise "to answer the questions I am asked truthfully," but rather to tell "the" truth.

This is, of course, an impossible task. A witness seeking to tell the truth would talk without interruption until stopped by death or laryngitis. Were the oath taken literally, trials would turn into real-life versions of a Jim Carrey movie,[146] albeit without the humor or happy ending.

The familiar starting place for this inquiry into the meaning of truth would be a dictionary,[147] and yet a look at the Oxford English Dictionary, the most complete assembly of English language words, meanings, and origins, is of little help here. The first suggested meaning—"the quality or state of being true"[148]—does not apply at all,[149] and the second meaning—"that which is true or in accordance with fact or reality"[150]—is only of general help.

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144 JANE AUSTEN, PRIDE AND PREJUDICE 1 (1813) ("It is a truth universally acknowledged that a single man in possession of a good fortune must be in want of a wife.").

145 THE DECLARATION OF INDEPENDENCE para. 2 (1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, . . ."). There are several problems with the Declaration, and the Constitution which came after it, when viewed through the lens of truth, the most glaring, perhaps, being the way slaves were treated by the Constitution and the Declaration's contention that "all" men are created equal. I am gliding over the way women were treated only because the Declaration does not explicitly mention them, although this, too, is a serious problem for the truthfulness of the document.

146 LIAR LIAR (Universal Pictures 1997). In the movie, Carrey plays Fletcher Reede, a lawyer (of course) who lies constantly. Depressed and frustrated at his father's inability to tell the truth, even in domestic matters, Reede's son makes a birthday wish that his father can only tell the truth for a day. The wish is granted, and hilarity ensues. Somehow, a happy ending is contrived and, presumably, everyone lives happily and truthfully (although not compulsively) ever after.

147 AMBROSE BIERCE, THE DEVIL'S DICTIONARY 151 (2003) (defining "truth" as: "An ingenious compound of desirability and appearance. Discovery of truth is the sole purpose of philosophy, which is the most ancient occupation of the human mind and has a fair prospect of existing with increasing activity to the end of time."). It is impossible to pass up the chance to offer Ambrose Bierce's proposed definition from The Devil's Dictionary. The pessimism lurking behind Bierce's satire is striking for someone writing about the oath, a device designed to discover, and reveal, the truth.

148 *Truth*, LEXICO, https://perma.cc/3SE6-K8MU (last visited Dec. 16, 2019) [hereinafter *Truth* Lexico].

149 It is a meaning still retained in English though: "a true friend," for example.

150 *Truth* Lexico, *supra* note 148.

The etymology of the word is equally unhelpful, mirroring the Oxford English Dictionary's recognition of the word's original meaning as "faith, faithfulness, fidelity, loyalty, veracity, quality of being true . . . ."[151] We do learn, though, that the word only acquired its contemporary connotation of "accuracy" or "correctness" in the 1560s.[152]

Seeking to deepen our understanding of the most central component of the oath, it is perhaps worth noting that the oath's use of the definite article limits the inquiry. We are not speaking simply of "truth," nor are we looking at the witness's "my" truth or any other form of truth, but rather "the" truth. But while this limits the inquiry into what "the truth" might be, it also complicates it, ignoring such divisions as scientific and Christian truth.[153] Without a detailed inquiry into each individual witness's religious or secular beliefs,[154] and what the meaning of "the" truth might be to each witness, we can only guess at what witnesses mean when they swear to tell "the" truth.

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[151] *Truth*, ONLINE ETYMOLOGY DICTIONARY, https://perma.cc/AS45-HME8 (last visited Nov. 10, 2019) [hereinafter *Truth* Etymology Dictionary] (noting that the term "true" comes to us through Old English "triewd" (West Saxon), "treowd" (Mercian), Proto-Germanic "treuwaz" and, eventually back to the Proto-Indo-European "drew-o, a suffixed form of the root 'deru-' 'be firm, solid, steadfast.'"); Nancy Cook, *The Call to Witness: Historical Divides, Literary Narrative, and the Power of Oath*, 98 MARQ. L. REV. 1585, 1623 (2015) (relying on Webster's Dictionary, Cook suggests that the etymological root of truth is the word for "tree"). More correctly, it seems that the two words share a common root—the Proto-Indo-European "drew-o," but by the time the words had reached the Proto-Germanic stage they had diverged, with the root for tree being "trewam." Thus, while "truth" and "tree" are, at a very distant remove, related, it is unlikely that we can use the one meaningfully to help define the other.

[152] *Truth* Etymology Dictionary, *supra* note 151.

[153] *See, e.g.*, George F. Thomas, *The Meaning of Truth*, 36 CHRISTIAN SCHOLAR 172, 172–75 (1953) ("The conception of the *nature* of truth that has increasingly dominated the modern world is mainly a product of scientific ways of thinking. According to this view, truth consists of the aggregate of truths about the various aspects or fields of reality; it is specialized knowledge of facts and laws, information about many different subjects."). Professor Thomas contrasts this with the Christian conception of truth, which, affirms, "in the first place, that the *primary value* of truth lies, not in the power it gives us, but in the life it opens up to us. 'I am the Way, the Truth, and the Life,' says Christ in the Fourth Gospel. It is no accident that 'truth' is associated with 'life' and 'the way' to life, that eternal life which is more than food and raiment and without which it profits a man nothing to gain the whole world." Perhaps unhelpfully, Professor Thomas concludes his brief contemplation of the difference between scientific and Christian truth by remarking that we should "beware of contrasting 'sacred' with 'secular' truths." The problem here lies in the Christian's insistence that Christ is "the" truth, leaving the secular witness, or those listening to that witness's testimony, to wonder what "the" truth means to that witness.

[154] Even though we inquire into the witness's religious beliefs, that inquiry cannot reasonably be said to be a detailed one.

Even worse, this does not help us in our quest to understand what "truth" is. At least we have company in our confusion, because the meaning of "truth" has troubled us for a long time. An examination of scripture, poetry, and philosophy emphasizes the difficulties in defining "truth." When Jesus comes before Pilate, he is asked "Art thou a king, then?" and he answers "Thou sayest that I am a king. To this end was I born, and for this cause came I into the world, that I should bear witness unto the truth." And Pilate said to him "What is truth?"[155]

Keats' poetic answer to the question of what truth is—"Beauty is truth, truth beauty—that is all / Ye know on earth, and all ye need to know"[156]—certainly has aesthetic elegance. But it fails to advance our more prosaic need to understand what the word actually means.

Bertrand Russell tried to cut the Gordian knot binding up the meaning of truth in this bravura passage:

> It may be said—and this is, I believe, the correct view—that there is no problem at all in truth and falsehood; that some propositions are true and some false, just as some roses are red and some are white; . . . What is truth and what falsehood, we must merely apprehend for both seem incapable of analysis.[157]

Sadly for us, Russell's "youthful aberration"[158] is swiftly cut down by Barnett Savery, who concludes (without analysis, it should be noted), that "there are no adequate grounds, nor enough inadequate ones, to substantiate a belief in such a delightful fancy."[159] Instead of Russell's simple approach, Savery gives us nine densely-argued pages in which he defines both the emotive and relativity theory of truth and suggests, perhaps

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[155] *John* 18:37–38 (King James); *see also* Thomas, *supra* note 153, at 172. Given the context of the question, Professor Thomas is surely correct in classifying the question posed to Jesus as "cynical" when asked by Pilate. Nonetheless, as Professor Thomas notes, the question can also be asked "in a spirit of honest perplexity." "I believe that most men and women in academic circles who raise the question in our time are not cynical but perplexed." This is good to hear. Nonetheless, I cannot help feeling a certain uneasiness upon realizing that my question aligns so closely with that of Pontius Pilate.

[156] John Keats, *Ode on a Grecian Urn*, POETRY FOUND., https://perma.cc/7CHV-K3WE (last visited Dec. 16, 2019).

[157] Barnett Savery, *The Emotive Theory of Truth*, 64 MIND 513, 515 (1955), https://perma.cc/539A-FDPH (quoting Bertrand Russell, *Meinong's Theory of Complexes and Assumptions*, MIND, N.S. XIII, no. 52, 523–24 (Aug. 1904)).

[158] Barnett Savery, *The Emotive Theory of Truth*, 64 MIND 513, 515 (1955), https://perma.cc/539A-FDPH.

[159] *Id.* at 515 (noting that Russell "probably during his life-time will assert all possible views about all the philosophical problems with which he concerns himself").

unhelpfully, that "a relativity theory is more appropriate, indicating, however, that there is a very close relationship between the emotive theory and the relativity theory."[160]

The difficulty of nailing down what "truth" is can be seen in this passage by Susan Haack who is not, to be sure, attempting to make truth a difficult concept to understand but is, rather, making clear that what we sometimes think of as truth is not truth:

> I take for granted that truth, true-ness, is not to be identified with acceptance-as-true; for what is accepted as true may not be true, and what is true may not be accepted as such. Nor is truth to be identified with belief, or even with warranted belief; for what is believed, even what is believed on good evidence, may not be true, and what is true may not be believed. Nor is truth to be identified with knowledge; for while what is known must be true, what is true may not be known. Nor is truth to be identified with agreement; for while, if we agree that p, we agree that p is true, we may agree that p when p is not true, and we may not agree that p when p is true. And neither is truth is to be identified with sincerity, truthfulness, or candor; for while a sincere truthful person may be disposed to speak the truth as he believes it to be, if his belief is mistaken his sincere assertion will be false.[161]

One solution to this definitional problem might be to consider what need the word fills. And here we can glean a possible escape from the philosophical maze we are lost in by looking at the meaning of "fact," a word closely related to truth. Considered in the context of "fact," "truth" seems to take on a slightly different meaning. Indeed, the apparent dichotomy between "truth" and "fact" is so well understood that it forms a slightly ironic piece of character development in the film *Indiana Jones and the Last Crusade*, where the protagonist, Dr. Henry "Indiana" Jones, is addressing a class of archeology students, telling them that the essence of archeology is "the search for fact. Not truth. If it's truth you're interested in, Doctor Tyree's Philosophy class is right down the hall."[162] In other words, facts are the building blocks out of which truth is formed, and "truth" is the interpretation of fact. Taken this way, Indiana Jones's words would be entirely familiar in the law school classroom or courtroom, with witnesses providing facts and the jury interpreting those facts in order to determine

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[160] *Id.* at 513–14.

[161] Susan Haack, *The Whole Truth and Nothing but the Truth*, 32 MIDWEST STUDIES PHIL. 20, 22 (2008).

[162] INDIANA JONES AND THE LAST CRUSADE (Paramount Pictures 1989).

the truth about a dispute.[163]

But the Oxford English Dictionary seems to ignore this comfortable distinction between "fact" and "truth." After its first unhelpful definitions of truth, the dictionary offers additional pages of definitions and supporting textual references that include: "something that conforms with fact or reality;" "the fact or facts; the actual state of the case; the matter or circumstance as it really is;" and "[c]onformity with fact, reality, a standard, a pattern, etc."[164] As far as the dictionary is concerned, then, "fact" and "truth" appear to mean essentially the same thing. And Black's Law Dictionary seems to agree, giving the definition of truth as "[a] fully accurate account of events: factuality."[165]

One thing people would seem to be able to agree with though is that, "truth," whatever it might mean, is the polar opposite of lying, with a bright line separating them. To some philosophers, though, there is an indeterminate region between truth and lying:

> Aristotle makes a rhetorical distinction between the truth in speech and the truth of belief—*what a man says, he does not necessarily believe.* Thus, Aristotle accuses Heraclitus of a historically ubiquitous affliction: he essentially calls the skeptic a bullshitter—not quite a liar, but a performer who speaks without recourse to representing a truly held belief or thought.[166]

Basing her work on that of Harry G. Frankfurt, Eugenie Brinkema expands on this distinction between lying and bullshitting:

> Bullshit is, however, distinct from lying—and the value of Frankfurt's essay is largely in how carefully he distinguishes the two—because "the essence of bullshit is not that it is *false* but that it is *phony*." Again, it is in a relation of the speaker and not a rhetoric of the sentence that the telltale mark is to be found, for a fake or a phony need not be in any respect (apart from authenticity itself) inferior to the real thing what is wrong with a counterfeit is not what it is like, but how it was made. On the level of production, lying contains none of this indifference to truth: "telling a lie is an

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[163] This comports well with the formalistic view of all litigation, but criminal litigation in particular, in which a crime cannot be said to have been committed until the jury finds someone guilty of it. So, while the witnesses testify to the facts, it is up to the jury to take those facts and combine them into the truth: a crime was or was not committed, and the defendant is or is not guilty of having committed it.

[164] XI The Oxford Dictionary 435–36 (Vivian Ridler ed., 11th ed. 1970).

[165] *Truth*, BLACK'S LAW DICTIONARY (9th ed. 2009).

[166] Eugenie Brinkema, *Psychoanalytic Bullshit*, 21 J. SPECULATIVE PHIL. 61, 62 (2007) (quoting ARISTOTLE, METAPHYSICS, IV. 3.737).

> act with a sharp focus. It is designed to insert a particular falsehood at a specific point in a set or system of beliefs, in order to avoid the consequences of having that point occupied by the truth the liar is inescapably concerned with truth-values. In other words, the liar addresses him—or herself to the field of truth in order to deceive through contradiction to that truth (one could not, by this definition, lie by accident). The bullshitter, by contrast, "is not constrained by the truths surrounding that point or intersecting it."[167]

This is all grist to a philosopher's mill, making for a fascinating theoretical inquiry, but it also has some practical significance for the lawyer trying to identify the meaning of "truth" in the context of the testamentary oath. A witness who claims to hold an advanced degree from a well-respected university, for example, is telling the truth if the facts bear out the claim and is lying if the facts show that the witness never matriculated at the university. But what of the witness who matriculated and attended classes, but did not complete all requirements for the degree and left without graduating? If that witness subsequently claims to have the degree, is the witness lying or, in Brinkema's analysis, bullshitting?

Some New York judges, at least, appear to accept an area lying between truthfulness and lying.

> One must "distinguish puffing and elaboration from purposeful misstatement" . . . . "Perjury is hard to prove. . . . It's expected that people must lie to avoid embarrassments, support family and friends, and protect their interests. . . . Perjury, or at least exaggerated claims are commonplace in motor vehicle personal injury cases, a direct if unintended consequence of the No Fault Insurance statute which requires a showing of serious injury before any recovery can be had for pain and suffering."[168]

In other words, true testimony is not the opposite of untruth necessarily, but rather is the opposite of perjured testimony. The judges quoted above would appear to take the pragmatic course of accepting a degree of puffing and elaboration—what Brinkema and Frankfurt would call bullshitting—but would draw the line at perjury. This has the advantage of tying the question of what truth is back to an objective standard: rather than engage in subjective inquiry of the witness, we can simply look to the law of perjury. If the testimony we are considering constitutes perjury, it is not true.

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[167] *Id.* at 63 (quoting HARRY G. FRANKFURT, ON BULLSHIT (2005)).

[168] COMM. ON CRIMINAL ADVOCACY, *The State of Truth: Judges Speak*, *in* 56 N.Y. CITY B. ASS'N RECORD 38, 45 (2001) [hereinafter *The State of Truth: Judges Speak*] (reporting the opinions of fifty-nine federal, state, and city judges located in the New York metropolitan area).

The appeal of this approach, though, fades quickly upon a closer look. Without getting into a detailed discussion of whether or not the threat of perjury is sufficient to compel a witness to tell the truth, a quick look at the crime of perjury, at least as defined by Congress, reveals a more complex reality than this simple approach might suggest.

The United States Code sets out the meaning of "perjury" in federal proceedings.[169] But even a scan of this language demonstrates the problem: "perjury," it seems, involves the willful subscription as true anything that the witness does not believe to be true. This is subtly, but significantly, different from what we might have thought "truth" might mean, in that "truth," and especially "the truth," is, we might reasonably assume, a condition apart from human interpretation. The truth simply is the truth, no matter what we might think. "Perjury," on the other hand, requires us to interpret the evidence, conclude that it is not true, and testify to it regardless.

The problem can be seen in the following unlikely, but not impossible, situation: W is called as a witness in D's trial for causing a traffic accident. W knows and dislikes D and is determined to do D harm. Accordingly, when W is asked to testify about the color of the traffic light D drove through immediately prior to the accident, W testifies that the light was red, even though W believes the light was green. Under the definition of perjury supplied by the Code, W has testified to something as true that he does not believe to be true and has therefore committed perjury. Subsequent evidence in the form of a traffic camera, however, shows that at the crucial moment W's view was blocked by a passing vehicle and that the traffic light was, in fact, red as W had (he believed falsely) testified. W's testimony was, therefore, true and yet W could, at least under the definition of perjury supplied by the Code, be prosecuted for perjury for intending to testify falsely.[170] Whether or not such a hypothetical situation could ever arise in

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[169] 18 U.S.C. § 1621 ("Whoever . . . (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or (2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.").

[170] Blumenfield v. United States, 306 F.2d 892, 897 (8th Cir. 1962) (citations omitted) (noting that in practice, as one would expect and hope, the federal courts have held that "[a] person

reality, even the possibility of it suggests that perjury is not a helpful concept when trying to determine what is, and is not, "truth." Perhaps, after all, Russell's approach is the most effective: we just have to figure out what "truth" is for ourselves, and we have to recognize that our answer might not match that of others. It is not the most comfortable of conclusions to reach when considering this word that is central to our understanding of the oath and all it entails, but it appears to be the best we can do.

What we can be sure of, at least, is that "truth" is the antithesis of "untruth,"—the "matter" to untruth's "anti-matter"—and that a witness who swears to tell the truth must *ipso facto* also be swearing not to tell anything other than the truth.

G. *"The Whole Truth"*

At least we could be sure of that until the witness swears the next part of the oath. If "truth" is the opposite of "untruth," then anything that is less than the truth is untruth and is surely excluded from testimony by the promise to tell the truth. In what appears to be a belts-and-suspenders approach that complicates rather than simplifies matters, though, the oath now requires the witness to promise to tell the "whole truth."

The idea that truth can be divided has been around for a while: the Oxford English Dictionary traces the concept back to 1658[171] ("a half-truth hath filled the world with looseness"),[172] and the ambiguous nature of the concept is also reflected in the dictionary's reference to a quotation from Cardinal Newman ("a half-truth is often a falsehood.")[173] Cardinal Newman's "often" here is surely being too optimistic: if the notion of "half-truth" has any meaning at all, it must surely include the reality that if only half of a concept is true, the other half must *ipso facto* be untrue, and since "truth" is a unitary concept that cannot allow the possibility of something that is less than the truth to exist in its universe, a half-truth can never be

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cannot be convicted of perjury if his answers are legally truthful"). While this result is not helpful for our purposes here, it is reassuring for purposes of practical lawyering: to hold otherwise would leave the actual business of conducting trials open to philosophical attacks of the sort best contained in academic articles like this.

[171] In fact, it has been around much longer. *See* Plato, *Apology*, MIT, https://perma.cc/A23N-9UVQ (last visited Nov. 10, 2019). In Plato's Apology, Socrates, in his defense, says that his accusers "have hardly uttered a word, or not more than a word, of truth; but you shall hear from me the whole truth . . . ."

[172] THOMAS MANTON, EXPOSITION OF JUDE 153 (Sovereign Grace Pubbl'ns, Inc. reprt. ed. 2002).

[173] JOHN HENRY NEWMAN, HISTORY OF MY RELIGIOUS OPINIONS 358 (1865).

"the truth."

Yet philosophers continue to cling to the idea that truth is divisible. Here is Jacques Lacan in 1973: "I always speak the truth. Not the whole truth, because there's no way, to say it all. Saying it all is literally impossible: words fail. Yet it's through this very impossibility that the truth holds onto the real."[174] Whatever else Lacan might mean here, it is clear that he accepts the ability to divide truth into segments smaller than the whole without doing damage to the notion of "truth."[175]

The same must be said of the law even in the face of a logical argument that if "truth" means "conformity with fact" or something akin to the absence of falsity, then anything less than truth is not truth and would therefore fail the first part of the oath. Viewed this way, adding "the whole truth" to "the truth" is an unnecessary and confusing complication.

But at least when taken together, there can be no question that the witness is swearing not to say anything that is not true. That much surely is clear from the first two parts of the oath.

H. *"Nothing But The Truth"*

Apparently not, though, because the witness is then required to swear to testify to "nothing but the truth." Logically, this third of the oath promise can, and does, add nothing to the oath. If the witness is to be trusted, then the promise to tell the truth should be enough, and the promise to tell the whole truth—while not necessary under any reasonable definition of "the truth"—is at least a backstop to the original promise. But there is no logical reason for the witness to go on to promise to tell nothing but the truth. To seek the reason for this third of the oath's promises, we need to turn to an examination of the oath's rhetorical properties.

The recurrence of the number three as a significant phenomenon in the human experience has often been noted.[176] In rhetoric, the tricolon, or grouping of three statements, is recognized as having especial value.[177] The

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[174] Brinkema, *supra* note 166, at 70 (quoting JACQUES LACAN, TELEVISION: A CHALLENGE TO THE PSYCHOANALYTIC ESTABLISHMENT (1990), *available at* https://perma.cc/PH3F-UJZM).

[175] Interestingly, the Oxford English Dictionary has no entry for the "whole truth."

[176] *See generally* Bob Dorough, *Three is a Magic Number* (Jan. 23, 2011), https://perma.cc/T6ZM-2UVE (suggesting that the best and simplest description of the importance of groupings of three can perhaps—as is so often the case—be found in the work of Schoolhouse Rock).

[177] *See, e.g.*, MARK FORSYTH, THE ELEMENTS OF ELOQUENCE 84 (2013) ("Three is the magic number of literary composition . . .").

tricolon gives us faith, hope, and charity;[178] blood, sweat, and tears;[179] "we few, we happy few, we band of brothers[;]"[180] and "truth, justice, and the American way."[181] We have the good, the bad, and the ugly; we have eat, drink, and be merry; and we have the truth, the whole truth, and nothing but the truth.

Other languages are susceptible to the power of the tricolon as well, giving us Latin's "Veni, vidi, vici,"[182] France's "liberté, égalité, fraternité,"[183] and Germany's unfortunate "[e]in Volk, ein Reich, ein Führer."[184] Viewed through a rhetorical prism, then, it is hardly surprising that the stock oath structure forms a tricolon with "nothing but the truth" functioning as the third leg of the oath's tripod.

Yet rhetorical completeness notwithstanding, the phrase "nothing but the truth" adds nothing to the oath's two previous promises and is, in fact, a tautology: testimony that is "the truth" could not be anything but the truth, and testimony that is "the whole truth," even though that phrase itself

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[178] 1 *Corinthians* 1 (King James).

[179] Winston Churchill, Prime Minister, Parliament of United Kingdom, First Speech as Prime Minister to House of Commons (May 13, 1940), *available at* https://perma.cc/M5T3-S73Z (acknowledging that, as if to prove the point, Churchill actually offered the British people nothing but "blood, toil, tears, and sweat," but this tetracolon was presumably less effective than the reordered tricolon, and that is what most people remember today); *see* FORSYTH, *supra* note 177, at 102; *Blood, Sweat & Tears*, WIKIPEDIA, https://perma.cc/7J3K-NL4V (last updated Oct.15, 2019) (explaining that the rock band from the 1960s doubtless helped to cement this form of the phrase in some minds).

[180] WILLIAM SHAKESPEARE, HENRY V, Act IV, Scene iii, 60.

[181] *Superman*, WIKIPEDIA, https://perma.cc/98DX-ATRD (last updated Dec. 7, 2019) (highlighting how radio broadcasts of Superman give their own trio of famous tricolons. In addition to "truth, justice, and the American way," we also get "[f]aster than a speeding bullet! More powerful than a locomotive! Able to leap buildings in a single bound!" and "It's a bird! It's a plane! It's Superman!"). Rhetoric is not limited to the speeches of the great, the mighty, or the important.

[182] *Veni, Vidi, Vici*, WIKIPEDIA, https://perma.cc/7VP9-HUU3 (last updated Dec. 2, 2019) (noting that this much-paraphrased expression, meaning "I came, I saw, I conquered," is first attributed to Julius Caesar by Appian, who described Caesar's use of it in a letter to the Senate after the Battle of Zella).

[183] *Liberte, Egalite, Fraternite*, WIKIPEDIA, https://perma.cc/7VAB-2FJ5 (last updated Oct. 7, 2019) (noting the national motto of France and the Republic of Haiti, first used in a speech by Maximillian Robespierre in 1790).

[184] *Führer*, WIKIPEDIA, https://perma.cc/A2XW-GVS9 (last updated Dec. 17, 2019) (explaining that the literal translation is "one people, one empire, one leader"). The almost total identification of Adolf Hitler with the concept of the German "Führer" meant that, in a practical sense, the phrase could also be translated as one people, one empire, one Hitler to lead it.

carries little meaning in light of the oath's first promise to tell the truth, similarly could not contain anything but the truth. So, this third part of the oath's trio of promises is meaningless and, potentially, confusing in that its existence suggests that something other than the truth is possible, despite the assurances of the first two promises. At best, then, this third promise is a pointless afterthought, added to bring rhetorical, but not logical, completeness to the oath, and at worst it is affirmatively harmful to the oath's integrity. And while there might appear to be little harm in appeasing the rhetorical principle of organizing lists in groups of three, it does suggest a distressing lack of faith in the oath to actually do the job it exists to do and ensure that the witness will tell the truth. The addition of two extraneous promises to the original promise to tell the truth is a rhetorical clue that the legal system has little faith in the oath.

I. *The Illusory Threat of Perjury*

The existence of a ready-made secular punishment for the breaking of the testimonial oath is another sign that the system has little faith in the oath's ability, on its own, to produce truthful testimony. But with the threat of criminal prosecution and a maximum prison term of five years to back it up,[185] perjury should be a useful prop to support the oath.[186]

The reality, though, is somewhat different. Although perjury is a relatively easy crime to describe, both generally[187] and specifically, as it has

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[185] 18 U.S.C. § 1621.

[186] *See, e.g.*, United States v. Mandujano, 425 U.S. 564, 576 (1976) ("The power of subpoena, broad as it is, and the power of contempt for refusing to answer, drastic as that is—and even the solemnity of the oath—cannot insure truthful answers. Hence, Congress has made the giving of false answers a criminal act punishable by severe penalties; in no other way can criminal conduct be flushed into the open where the law can deal with it."). Of course, one is forced to ask that if the oath cannot ensure truthful testimony why we bother to continue to administer it. The anticipated answer—as a condition precedent to the imposition of perjury sanctions—surely is not correct: the existence of a perjury sanction should be enough of a condition precedent, given that ignorance of the law is no excuse and, in any case, the oath in its most standard form gives no actual warning of the existence of the perjury sanction awaiting (in theory) oath breakers.

[187] *See generally* 18 U.S.C. § 1621 (setting out the general definition of the federal crime of perjury: "Whoever—(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or (2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does

to do with testimony in court,[188] it is not a much prosecuted one. In the twelve month period ending December 31, 2018, for example, there were eighteen prosecutions for perjury in the federal court system.[189] In the four previous years, there were twenty-six, twenty-six, twenty-six, and thirty-two such prosecutions.[190] By way of comparison, there were 759, 741, 720, 951, and 1,042 prosecutions for drunk driving—not often thought of as a federal crime—and 7,095, 5,973, 5,103, 4,773, and 4,318 prosecutions for possession of firearms by prohibited persons.[191]

These numbers are in line from those reported in the 1960s and the 1930s. In the five years between 1966 and 1970, 355 cases of perjury were commenced in federal district court.[192] And in 1937, 187 cases of perjury were prosecuted in a total of twenty-eight states and the District of Columbia.[193] All in all, not statistics to significantly trouble the conscience of a potential perjurer.

Judges today are well aware of the problems of perjury in their courts. In a telling study published in 2001,[194] fifty-nine New York judges, thirty-six federal, and twenty-three state, responded to a questionnaire sent to them by the Committee on Criminal Advocacy.[195] The judges were asked to respond to a series of questions defining perjury as "testimony that you reasonably believed was intentionally false with respect to a material matter."[196] They were also given the chance to provide more narrative answers to several questions. And although the number of responding judges was relatively low, the results are fascinating and, for proponents of the oath, a little troubling.

Most of the responding judges reported that they had encountered

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not believe to be true; is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.").

188 *See generally* 18 U.S.C. § 1623 (2002).

189 United States Courts, *Table D-2—U.S. District Courts—Criminal Statistical Tables for the Federal Judiciary (December 31, 2018)*, U.S. COURTS (DEC. 31, 2018), https://perma.cc/7A8W-VEE6 (click link for "Download Data Table").

190 *Id.*

191 *Id.*

192 William J. Rogers, *Perjury: The Forgotten Offense*, 65 J. CRIM. L. & CRIMINOLOGY 361, 361 (1974).

193 *Id.* at n.7.

194 *The State of Truth: Judges Speak*, *supra* note 168.

195 *The State of Truth: Judges Speak*, *supra* note 168, at 38.

196 *The State of Truth: Judges Speak*, *supra* note 168, at 38.

perjury "occasionally" in both pre-trial matters and during trial.[197] Of judges who presided over both civil and criminal cases, "43% . . . responded that perjury was more prevalent in civil cases; 30% . . . reported that it was more prevalent in criminal cases; [and] 27% . . . reported no difference."[198]

In civil trials, "82% of judges . . . reported that they occasionally encountered perjury at trial by plaintiffs, while 80.5% . . . reported occasional perjury by defendants . . . . An equal 82% of judges . . . reported occasional perjury at trial by plaintiffs' fact witnesses, while 83% . . . reported occasional perjury by defendants' fact witnesses."[199]

By contrast, "17.5% . . . of the judges reported that criminal defendants frequently commit perjury at trial, while 42.5% of the judges reported that defendants commonly commit perjury at trial[, and] 40% of the judges reported that defendants occasionally commit perjury."[200] Disturbingly, the judges also reported that they experienced perjury from law enforcement personnel, with 81% reporting that they experienced occasional perjury, 5% suggesting that perjury from law enforcement personnel was frequent, and 7% reporting that such perjury was common.[201] "[A]n equal 7% . . . reported that [law enforcement personnel] never commit perjury."[202]

The judges' narrative comments went some way to explaining how the judges were able to respond that they had experienced perjury without, apparently, referring the case to a prosecutor's office. "The problem is *proving* that a witness has committed perjury. There are many times that you 'know' that perjury is being committed but do not have enough to make the necessary referrals."[203]

The study makes for depressing reading, then, but it is also no surprise that those directly involved in the criminal justice system perceive perjury to be a problem. The report merely reflects one of the more recent attempts to catalog a perennial problem: in 1955, for example, Alfred David Whitman claimed that "[p]erjury runs rampant throughout our judicial system" and that "[f]ew crimes except fornication are more prevalent or carried off with

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[197] *The State of Truth: Judges Speak*, *supra* note 168, at 42.

[198] *The State of Truth: Judges Speak*, *supra* note 168, at 42.

[199] *The State of Truth: Judges Speak*, *supra* note 168, at 42.

[200] *The State of Truth: Judges Speak*, *supra* note 168, at 43.

[201] *The State of Truth: Judges Speak*, *supra* note 168, at 43.

[202] The survey also contains statistics for criminal defendant fact and expert witnesses. The numbers from responding judges suggest that defendants' fact witnesses commit perjury, with only three percent of the responding judges reporting that they never perceived perjury from these witnesses.

[203] *The State of Truth: Judges Speak*, *supra* note 168, at 45.

greater impunity;"[204] a writer in England, in 1934, noted that "[i]t may be that having regard to the hundreds of persons who perjure themselves in the courts every day except Sunday, the percentage of those who are punished for this offence to that of those who commit it is smaller than in the case of any other;"[205] and in 1908, W. A. Purrington observed that "[o]ur modern procedure seeks to meet real, or merely avowed, conscientious objections to oath-taking by allowing affirmations under the mundane penalties or perjury,—pains and penalties so rarely inflicted as to have become the mere 'rumble of a distant drum.'"[206]

One senses the frustration perjury caused judges as far back as 1785 when Justice Willes, sentencing a convicted attorney, said:

> You have long been an Attorney of this court, and in your extensive practice, you must have discovered, that of all crimes, Perjury is the most dangerous to society. It perverts justice—it unhinges the law—it destroys liberty and property—and in the practice of the court, it is a most dangerous evil.[207]

Perhaps because their concern about perjury had reached a breaking point, the central court judges in London met at Lord Mansfield's chambers in November 1786 and "proposed a bill that would make perjury a capital crime."[208]

Even earlier, one anonymous commentator was fascinated by what he saw as "the sin of common [s]wearing and [p]erjury . . . ."[209] The writer

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[204] Alfred David Whitman, *A Proposed Solution to the Problem of Perjury in Our Courts*, 59 DICK. L. REV. 127, 127 (1955).

[205] *The Problem of Successful Perjury*, 78 SOL. J. 423 (1934); Harry Hibschman, *"You Do Solemnly Swear!" or that Perjury Problem*, 24 J. AM. INST. CRIM. L. & CRIMINOLOGY 901, 901 (1934) (highlighting that this appears to have been a particularly bad year for perjury in America). Harry Hibschman, a Washington State lawyer who lived and worked in New York, wrote that "I asserted the other day in a public address that there was perjury in fifty per cent of all contested civil cases, in seventy-five per cent of all criminal cases, and in ninety per cent of all divorce cases; and the audience laughed! So notorious is false swearing in court proceedings that an intelligent group of American citizens looks upon it as a joke."

[206] W.A. Purrington, *The Frequency of Perjury*, 8 COLUM. L. REV. 67, 70 (1908).

[207] James Oldham, *Truth-Telling in the Eighteenth-Century English Courtroom*, 12 L. & HIST. REV. 95, 99 (1994) (*quoted in* Morning Chron, November 28, 1985).

[208] *Id.* at 99–100 (explaining that this the time of the "bloody code," however, when crimes such as horse and sheep stealing, destroying the turnpike, cutting down trees, pickpocketing goods worth more than a shilling, being out at night with a blackened face, being an unmarried mother concealing a stillborn child, arson, forgery, and stealing from a rabbit warren—as well as murder—were all capital offenses).

[209] ANON., PERJURY, THE NATIONAL SIN, OR, AN ACCOUNT OF THE ABUSES AND VIOLATIONS OF

remarked that the fact that

> many are not struck dead with an Oath in their mouths, or come to some other fearful end, as some do,[210] is a luculent testimony both of God's great [p]atience, and of a [j]udgment to come; for vast numbers every day call aloud to God for [d]amnation; and great multitudes increase the black [l]ists of their [p]erjuries, till they are more in number than the [h]airs of their [h]eads, and equal the [s]and on the [s]ea-shore.[211]

Taken together, the statistics and the anecdotal impressions of judges and commentators on the prevalence of perjury in society, going back as far as the Fourth Century B.C. and Plato,[212] point to only one conclusion: perjury is an ineffective deterrent to truthlessness at trial. Witnesses are doubtless aware that they face the possibility of prosecution for perjury if they are untruthful at trial. Yet other than the threat of divine sanction of some form—perhaps not a significant threat in a secular society—and the threat of losing one's good name if one is perceived to be not telling the truth—surely not a problem to someone willing to not tell the truth during testimony—perjury is the only sanction for violating the testimonial oath. And if perjury is a sanction without meaningful teeth, there is nothing to suggest to a witness that truth-telling is more than one of a number of equally weighted options and that self-interest, or simple personal preference, should guide the witness's decision as to whether to tell the truth or not.

J. *"You May Decide to Believe All, Some, or None of the Witnesses' Testimony"*

Depressing though this perception of the precarious state of truth-telling in court might be, things deteriorate still further when contemplating the way courts themselves react to the oath. Perhaps in response to the same impulse that led the New York judges responding to a perjury survey to conclude, without any empirical support for their perceptions, that perjury is rampant in today's trials;[213] courts make their suspicions of the truthlessness of much of the testimony they hear public and invite juries to

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OATHS AMONG US OF THE NATION HUMBLY OFFERED TO THE CONSIDERATION OF THE HIGH COURT OF PARLIAMENT 3 (1690).

210 OPIE & OPIE, *supra* note 53, at 122 n.1 (explaining that sadly for the anonymous author, the fate of Ruth Pierce was still sixty-three years in the future).

211 *See* OPIE & OPIE, *supra* note 53.

212 *See* PLATO, *supra* note 68.

213 *See* Rogers, *supra* note 192, at 361.

share them. In plain language, judges typically tell juries to suspect that witnesses have lied to them, despite the oaths they have taken.

After trial testimony and closing arguments, judges instruct juries as to the law they must follow in order to reach a decision. These instructions also include general observations about the way trial was conducted, so as to provide a context within which the jury can evaluate what they have seen and heard. One of the standard instructions is on the credibility of witnesses:

> You, as jurors, are the sole and exclusive judges of the credibility of each of the witnesses called to testify in this case and only you determine the importance or the weight, if any, that their testimony deserves. After making your assessment concerning the credibility of a witness, you may decide to believe all of that witness' testimony, only a portion of it, or none of it.[214]

So, the jury is told that despite the witness's public commitment to truth telling, the witness might nonetheless be lying and that the jury can disregard all of the witness's testimony if it decides to. And worse, this is not an instruction crafted to respond to perceived problems with a specific witness but is rather a generic jury instruction written to be used at every trial. The unmistakable conclusion to be drawn from this is that all witnesses have the capacity to lie, even after they have taken the oath, and the likelihood of lying is so high that every jury should be cautioned about it and told that they may freely ignore any witnesses testimony if it believes that the witnesses credibility is open to question. Significantly, the jury is not reminded that the witness took an oath to tell the truth.

The judicial system, then, has a presumption against the truthfulness of witnesses or, at the most optimistic, is agnostic as to whether the oath is effective in producing truthful testimony. This might be seen as a pragmatic response to the capacity for every witness to lie under oath, but for the advocates of the oath it is a disturbing admission that the oath is an ineffective tool for securing the truth.

K. *"You Can't Handle the Truth!"*[215]

But for the oath, even worse is to come. Even though witnesses can be compelled to testify, and are therefore compelled to take the oath, the trial process in this country often makes it impossible for the witness to fulfill the terms of that oath. They are expected to testify truthfully, certainly, but they

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[214] KEVIN F. O'MALLEY, JAY E. GRENIG, & HON. WILLIAM C. LEE, 1A FEDERAL JURY PRACTICE & INSTRUCTIONS § 15:01 (6th ed.)

[215] A FEW GOOD MEN (Castle Rock 1992).

will rarely, if ever, be allowed to tell the "whole" truth.

This is not a new observation. In 1934, Harry Hibschman noted that:

> [n]o witness is allowed to do the thing he is sworn to do, "to tell the truth, the whole truth, and nothing but the truth." The party who called him does not want him to tell the whole truth because if he says anything unfavorable to that party, the party cannot impeach him—for the immediate purpose the evidence of the witness must be taken as true. The other party naturally does not want the witness to tell the whole truth if it is unfavorable to him. And the court cannot ordinarily interfere to bring out what the parties litigant suppresses. Every witness is, therefore, treated as a partisan, and usually becomes one.[216]

In fact, witnesses are hardly ever invited to tell whatever they know of the facts surrounding a trial. Rather, as everyone familiar with the process understands, witnesses are asked questions by attorneys: first the attorneys who called the witness, who will ask open-ended questions, and then by the attorneys for the other party or parties in the case, who will cross-examine using leading questions for which often the only available answers are "yes" and "no." But while cross-examination might be "the 'greatest legal engine ever invented for the discovery of truth,'"[217] it makes it almost impossible for the witness to fulfill the terms of the oath.

This gets touchy. Lawyers are not especially popular or respected in contemporary society,[218] and perhaps part of that reason is that lawyers—trial lawyers, at least—seem little interested in the truth.[219] The reason for this is simple: one way of articulating a lawyer's job is that the lawyer works to represent a client's interests: "the lawyer's duties are owed to the client and not to third parties, society as a whole, the public interest, or anything else."[220] A more cynical way of putting this when thinking about the litigation process is that "truth is at most an occasional byproduct of our system, perhaps welcomed but not pursued in its own right."[221]

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[216] Hibschman, *supra* note 205, at 908–09.

[217] California v. Green, 399 U.S. 149, 158 (1970) (quoting JOHN H. WIGMORE, 5 EVIDENCE § 1367, at 29 (3d ed. Little, Brown & Co. 1940)).

[218] *See, e.g.*, Kenneth W. Starr, *Truth and Truth-Telling*, 30 TEX. TECH L. REV. 901, 901 (1999) (stating that Tocqueville described lawyers as America's aristocracy).

[219] *See id.* at 902 ("My thesis today is that we have brought some of our unpopularity on ourselves. The reason is this: We have lost, or at least mislaid, some measure of our profession's traditional respect for the truth.").

[220] W. Bradley Wendel, *Whose Truth: Objective and Subjective Perspectives on Truthfulness in Advocacy*, 28 YALE J.L. & HUMAN. 105, 106 (2016) [hereinafter *Whose Truth*].

[221] Starr, *supra* note 218, at 902–03 (noting that Professor Dershowitz continuously stated

A lawyer at trial has a narrative to tell that explains a situation in his or her client's favor and the lawyer weaves that narrative not with truth but with facts.[222] The lawyer establishes those facts through, among other things, testimony from witnesses that must be truthful but need not—indeed, for the lawyer's purposes, often must not—be "the truth," and certainly need not be "the whole truth" or "anything but the truth."

This does not mean that lawyers need to lie,[223] ask their witnesses to lie,[224] or even coach their witnesses in such a way as to give them information about a case.[225] Skillful lawyers can craft a narrative with truthful testimony that nonetheless creates a false impression. Professor Wendel gives three examples of this type of truthful testimony that leads to a false impression, drawn from the experiences of his students in law school:

> Student A lived just outside the city limits while attending high school in town. His teacher asked him why his paper was not finished on time and he replied, "I was out of town." He was home the whole time, but his home was "out of town."
>
> Student B's mother asked him whether he took out the trash. He responded, "The trash is outside on the sidewalk, mom." Actually Student B was feeling lazy so he threatened to beat up his little brother if he did not take out the trash. The trash can did make its way out to the sidewalk, but Student B did not take it out.
>
> Student C was asked why she had not attended class yesterday. "I was sick," she said. She was indeed sick, but two days ago. Yesterday she was sleeping off a hangover.[226]

As Professor Wendel notes, "[a]ll of these statements are either evasions of the question or outright lies with respect to the conclusion a reasonable person would draw in the context of the conversation. That is not to say that

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that "a criminal trial is anything but a pure search for truth").

[222] *See* Bill Mortlock, *Pronouncements from the Bench*, 21 J. LEGAL PROF. 141, 142 (1996) ("[L]awyers aren't as much interested in establishing truth as in discovering facts . . . .").

[223] Charles Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 9 (1951) ("I don't see why we should not come out roundly and say that one of the functions of the lawyer is to lie for his client . . . .").

[224] *See* 18 U.S.C. § 1622 (stating that subornation of perjury is itself a crime).

[225] *See, e.g.*, *Whose Truth, supra* note 220, at 117–19 (discussing the unethical behavior of lawyers in Texas law firm representing plaintiffs in asbestos litigation who prepared generic document entitled "Preparing for Your Depositions" in which witnesses were given prompts like "[i]t is important to maintain that you NEVER saw any labels on asbestos products that said WARNING or DANGER").

[226] *Whose Truth, supra* note 220, at 128.

they would rise to the level of criminal perjury."[227] Had these statements been made under oath, then, they could, and likely would, be considered to be "the truth;" since the concepts of "the whole truth" and "nothing but the truth" are so ambiguous as to be functionally meaningless, answers like these would not violate the witnesses oath even though they create an entirely incorrect impression in the minds of the jury.[228]

We are in very murky territory now. A skillful, ethical, and extremely cautious lawyer can steer the narrow course between the Scylla of suborning perjury and the Charybdis of an unfavorable outcome for the client and create an incorrect impression from "truthful" testimony.[229] Indeed, some might argue that the lawyer is under an absolute obligation to do so if the situation requires it. In a situation like this, it is legitimate to ask what value the oath might have. Not only does it fail to produce testimony that gives the jury a clear view of the broader truth of the situation, it arguably helps to obscure the truth by lulling the jury into a sense of false security: the witness took an oath to tell the truth and appears (correctly) to be telling "the truth," so surely the resulting view of the testimony must be one of truthfulness. Maybe Colonel Jessup, the testifying witness in the climactic scene in *A Few Good Men*, is partially correct: perhaps we can handle the truth, but many times, as lawyers, we don't want it.[230]

L. *Alternatives to the Testamentary Oath*

We have come a long way from the belief that "the oath is entrenched as a vehicle for the relay of truth" and that "[n]othing, it seems is as effective in helping to ascertain the truth in the courtroom."[231] Rather, the oath—throughout its long history—has yielded time and again to ignoble self-interest, or well-intentioned conscience, or whatever else makes it easier or more convenient for the oath-taker to break the solemn pledge to act or not act in a particular way or, of most interest to us, to speak the truth.

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[227] *Whose Truth*, *supra* note 220, at 128–29.

[228] *See generally* Bronston v. United States, 409 U.S. 352 (1973) (ruling that "[i]f a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination").

[229] *See generally* Todd A. Berger, *The Ethical Limits of Discrediting the Truthful Witness: How Modern Ethics Rules Fail to Prevent Truthful Witnesses from Being Discredited Through Unethical Means*, 99 MARQ. L. REV. 283 (2015) (expressing how narrow this course is, and of the ethical dangers inherent in attempting to navigate it).

[230] This notwithstanding Lieutenant Kaffee's avowal that "I want the truth!" in A FEW GOOD MEN, *supra* note 215.

[231] Farid, *supra* note 2, at 557.

We have seen that the oath itself is a string of three promises that are almost, but not quite, intelligible when taken alone and which seem incoherent when taken together.[232] We have seen that judges,[233] attorneys,[234] and juries[235] also take oaths but feel free to break them when it suits them to do so, and that judges in particular assume that witnesses are breaking their oaths as well. Indeed, as we have seen, the system has a ready-made jury instruction to the effect that despite the oath the jury has seen a witness taking, the jury may, at its sole discretion, ignore as much of a witnesses testimony as it feels is appropriate;[236] it has a punishment, albeit a not frequently applied one, available for oath-breakers because of its certain knowledge that despite their oath, witnesses will lie.[237]

And we have seen that the system does not even allow witnesses to adhere to their oaths, because their testimony is cabined by lawyers' questioning that is designed to elicit answers that will provide support for case theories rather than expose "the truth" in any particular proceeding.[238]

Given what we know about the oath and its ineffectiveness, it seems reasonable to ask whether it should have any future in the American justice system. The rest of this article will consider that question, and in particular will consider the costs and benefits of abolishing the oath altogether, and of a radical transformation of the oath into a written, out-of-court, declaration of truth-telling.

1. Abolish the Oath

The most radical transformation of the oath, of course, would be to abolish it. Witnesses could be informed that truthfulness while testifying is expected of them and that failure to testify truthfully would open them to possible prosecution for perjury. Their testimony could then proceed without any ceremony.

Helen Silving, author of the most comprehensive American study of the oath, concluded that "abolition of the oath should be given serious consideration."[239] Silving came to this conclusion after an extensive review

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[232] *See supra* Parts F–H (discussing "the truth," "the whole truth," and "nothing but the truth").

[233] *See supra* Part A(1).

[234] *See supra* Part A(2).

[235] *See supra* Part A(3).

[236] *See supra* Part J.

[237] *See supra* Part I.

[238] *See supra* Part K.

[239] Helen Silving, *The Oath: II*, 68 YALE L.J. 1527, 1572 (1959) [hereinafter Silving, *Oath II*].

of oath practices in civil and common law countries,[240] noting that, at the time of writing, Chinese,[241] Slavic,[242] and several Swiss cantons[243] had abandoned the testimonial oath. In commenting on the Swiss abandonment of the oath, Silving observed that it was "avowedly traceable to tradition and absence of pragmatic need for such a device. It is probably an outgrowth of Swiss judicial proceedings, which are realistic, plain, and averse to dramatic effects."[244]

More than her analysis of other countries' practices, though, Silving based her opinion that the oath might best be abolished in her evaluation of human psychology:

> Since legal confession, however "voluntary," generally carries no absolution or mitigation in law, it becomes only a ritualistic performance, an admission of repressed guilt feelings, unrelated to the crime confessed. So viewed, all confessions and self-incriminatory statements may be "involuntary" . . . . The compulsive elements of apparently voluntary self-incrimination and confession are also present in the oath.[245]

Silving concludes that "[t]he law of the oath should be reassessed in the light of the contemporary concept of man and of his dignity."[246] And while she acknowledged that "a sudden abolition of the oath practice may cause a serious disruption of legal procedures" and that "[g]radual reduction of oath taking by confining its use to important matters, and to cases where other means of truth finding are unavailable, would seem a more desirable course," Silving was adamant that "[i]n no event should the 'oath of the accused' be tolerated even during the interim period." Silving believed that imposing the oath on those seeking to testify in their own defense was "an open invitation to perjury, in addition to being a '*tortura spiritualis*' of the accused."[247]

To Silving's concerns might be added the concern that the judicial system degrades itself in the eyes of those who participate in it and observe it when it persists in a ritual that has no discernible effect on truthful testimony—the thing it seeks to influence—and that, given the paucity of

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[240] *See generally id.*

[241] *See generally id.* at 1553–54.

[242] *See id.* at 1555–58.

[243] *See id.* at 1528; Silving, *Oath I*, *supra* note 49, at 1376–78.

[244] Silving, *Oath II*, *supra* note 239, at 1558.

[245] Silving, *Oath II*, *supra* note 239, at 1573.

[246] Silving, *Oath II*, *supra* note 239, at 1575.

[247] Silving, *Oath II*, *supra* note 239, at 1576.

perjury prosecutions year-by-year, it seems unwilling to protect by action. A system that demonstrates, almost at every turn, its disdain for a ritual, calls disdain upon itself if it fails to discontinue the ritual's practice.

This approach, though, has met with little support. The Law Reform Commission of Ireland issued an extensive Report on Oaths and Affirmations in 1990.[248] After extensive consideration of the history and the scholarly literature, the Commission concluded that:

> three broad possibilities for reform suggest themselves. First, the law could provide that any person should be entitled to affirm, instead of taking the oath, as of right and without having to satisfy the court as to his conscientious grounds (if any) for taking that course .... Second, the taking of oaths could be abolished completely, all witnesses being required, however, to make some form of affirmation before giving evidence. Third, the law could be altered so as to enable all evidence to be given without the taking of any oath or affirmation.[249]

Having set out this third possibility, the Commission immediately discarded it: "While we have mentioned the third option for the sake of completeness, it has not attracted any significant support and we do not think it merits further consideration."[250] While it is possible that the Commission's view, although arrived at in a different place and at a different time than the contemporary United States, would also be true here and now, a close contemplation of the oath and its deficiencies suggests that doing nothing is not a good policy.[251] The Commission chose to opt for its first option, proposing that "a prospective witness would have the choice of swearing an oath or making an affirmation without offering any reason for the choice. The witness's choice would be guided by his or her own conscience and by any instructions from the judge or from the counsel that might become necessary."[252] In this country, though, the Commission's second option would be a better choice.

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[248] *See* THE LAW REFORM COMMISSION, *supra* note 77 (quoting *Calvin's Case*, 77 Eng. Rep. 377, 397 (KB 1609)).

[249] THE LAW REFORM COMMISSION, *supra* note 77, §§ 4.2, 4.3.

[250] THE LAW REFORM COMMISSION, *supra* note 77, §§ 4.2, 4.3.

[251] Professor Allan Vestal, reporting on "numerous discussions with lawyers and judges whose judgment I respect," noted that while "[i]t is impossible to proves that . . . a ritual [where the witness commits to testifying truthfully] has a positive influence on witnesses, . . . I know that [lawyers and judges] are convinced of the value of having some affirmative commitment on the part of witnesses. If they are convinced, so am I." Vestal, *supra* note 137, at 476.

[252] THE LAW REFORM COMMISSION, *supra* note 77, §§ 4.3, 4.7.

2. Written Statement Before Testifying

There is no longer any reason why any witness in any trial—civil or criminal, state or federal—should be required to disclose his or her religious beliefs, either in public or in private, no matter how mainstream or idiosyncratic they might be. For that reason alone, the oath should be abolished and replaced with a universal affirmation. This is not the first time this radical step has been proposed,[253] and it is surely past time for action to remove an anachronistic and pointless ritual from our secular courts.

The mechanism for the oath's replacement is already at hand, and has been accepted as being effective—in the federal court system at least—for over forty years.[254] The provision for accepting unsworn declarations under penalty of perjury in federal court, expressed in 28 U.S.C. § 1746, has several distinct advantages over the oath, yet retains the oath's two most significant features.

Section 1746 requires a witness to declare, under penalty of perjury, that the foregoing document is true and correct and to sign the declaration.[255] Adopting this approach in lieu of the oath would mean that a witness could make a similar declaration about the testimony the witness is about to give,[256] and the witness could make that declaration in private, outside the view of the judge or the jury, thereby making it impossible for the factfinder to form any impressions about the witness's trustworthiness based on the way the witness takes the oath. Moreover, because the language would be standard and would make no reference to religious belief of any kind, the witness's personal beliefs would remain private and would not be subject to a public inquiry by the court, nor would the jury be given information with which to form correct or incorrect assumptions about the depth or nature of the witness's religious convictions. The signed document could be entered into evidence during the witness's testimony, thus preserving the declaration as a predicate to prosecution for perjury if needed.

This will doubtless be troubling to those who still believe the *Clinton v. Ohio* rationale for the continued vitality of the oath, that its purpose

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253 *See, e.g.*, Vestal, *supra* note 137, at 482 ("We should complete our evolution on this issue and eliminate witness oaths and affirmations in favor of a uniform, non-religious witness representation. It is time to bid a final farewell to the rewarder of truth and avenger of falsehood. It is time for our hypocrisy and meanness, on this small point at least, to end.").

254 *See* 28 U.S.C. § 1746 (adopted Oct. 18, 1976).

255 *See id.*

256 Silving, *Oath II*, *supra* note 239, at 1540 ("Administration of the oath prior to the testimony is interpreted by some commentators as equivalent to a failure to administer the oath, which would lead to reversal of a judgment based on such testimony.").

> is not to call the attention of God to the witness, but the attention of the witness to God; not to call upon him to punish the false-swearer, but on the witness to remember that He will assuredly do so. By thus laying hold of the conscience of the witness, and appealing to his sense of accountability, the law best insures the utterance of truth.[257]

But this cannot stand as a justification for the retention of the oath. If a person is truly religious, then the duty to tell the truth exists separate and apart from any oath taken in secular court, and the accountability a person of faith has for failing to tell the truth when required to do so is neither increased or decreased by the absence of a specific oath. A person of faith—whatever faith that might be—is surely already aware of God as that person imagines God to be, and no oath is necessary to call that person's attention to God.

A universal declaration also removes the paradoxical situation in which an unsworn witness is asked to select the form of oath that will most effectively bind them. By establishing one, secular, declaration of the intent to tell the truth, and by removing the performative aspects of oath-taking that can give juries information, correct or incorrect, with which to make a credibility decision, we would remove some unnecessary complications the present process introduced and could feel at least as assured, and perhaps more so, that the witness would actually tell the truth when testifying.[258]

A declaration on the lines of § 1746 would also remove the ambiguity of the oath's tricolon of promises, replacing them with a promise to tell the truth. This is still troublesome, because the meaning of "truth" is so elusive,[259] and still does not resolve the problem caused by the process whereby a witness is examined in such a way that "the truth" might be difficult for the witness to get across to the jury.[260] A simple modification of § 1746's language, though, might go some way to resolving these issues: instead of promising that the testimony would be "true and correct,"[261] the witness could promise to "answer all questions truthfully." This retains the problem of the meaning of truth but limits the scope of "truth" to the specific

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[257] Clinton v. State, 33 Ohio St. 27, 33 (1877).

[258] At least the declaration would be made under penalty of perjury, whereas under the current oath taking practice, a witness's election of which religious oath will bind the witness, or whether an affirmation will be more effective, is made outside the protections of perjury. A witness who lies about the efficacy of a religious oath has not committed perjury and cannot be prosecuted if the lie is revealed.

[259] *See supra* Part F.

[260] *See supra* Part K (examining various definitions of "truth").

[261] 28 U.S.C. § 1746 (1976).

questions asked, and it explicitly acknowledges the actual nature of a witness's duty at trial: to answer questions truthfully.

The proposed standard declaration retains two significant features of the oath, the promise and the gesture, even though both are modified: the oath's language having been discarded in favor of a more accurate distillation of what the witness is being asked to do, and the gesture is transformed from a raised hand to placing a signature on a form. And while the signing of a piece of paper might lack the grandeur and awe-inspiring force of a public oath, its primary purposes—to impose on the witness the importance of telling the truth and acting as a condition precedent to a charge of perjury if the witness should lie—are retained and clarified,[262] without any of the oath's attendant problems. The use of this process for over forty years in the federal courts should give some comfort that it is not a new and untested approach to secure truthfulness. We should feel secure in believing that the declaration can do no worse than the oath and stands a good chance of doing significantly better.

CONCLUSION

It would be possible to take a completely cynical view of the oath and to say that it is a pointless and empty ritual because everybody lies.[263] But that is not a fair perception of the truth-telling that goes on in contemporary courts: everybody may lie about everyday things, and even about some important life choices, but it is highly unlikely that everybody lies when testifying in court.[264] In fact, the universe of witnesses can likely be divided into three: the majority, who plan to, and do, tell the truth at trial and would do so regardless of being placed under oath or not; a small minority, who plan to, and do, lie at trial and would do so regardless of being placed under

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[262] A uniform declaration could retain Section 1746's warnings about testifying "under penalty of perjury," something that is implicit, but is not explicitly mentioned, in the oath.

[263] *See, e.g.*, SETH STEPHENS-DAVIDOWITZ, EVERYBODY LIES: BIG DATA, NEW DATA, AND WHAT THE INTERNET CAN TELL US ABOUT WHO WE REALLY ARE 105 (2017) ("Everybody lies . . . . People lie about how many drinks they had on the way home. They lie about how often they go to the gym, how much those new shoes cost, whether they read that book. They call in sick when they're not. They say they'll be in touch when they won't. They say it's not about you when it is. They say they love you when they don't. They say they're happy while in the dumps. They say they like women when they really like men . . . . People lie to friends. They lie to bosses. They lie to kids. They lie to parents. They lie to doctors. They lie to husbands. They lie to wives. They lie to themselves.").

[264] To be sure, I have no empirical evidence to support this optimistic view of the world, just an anecdotal sense that most people want to tell the truth in such a situation.

oath or not; and the remainder, who are uncertain of their intentions before trial but who are captured by the oath and tell the truth at trial because of it.[265]

The continued vitality of the oath in trial depends on the size of this third group: the oath has no relevance to those who act without regard to it, whether they tell the truth or lie. And it is impossible to gauge with any precision how large this third group is. There is certainly a great deal of truth-telling that goes on in today's courts, and a fair amount of lying as well, but whether the witnesses who tell the truth fall into the first or third category is impossible to say.

But marginal benefits are still benefits, and are to be preferred to marginal losses, assuming that the cost of obtaining them does not exceed the benefit gained. The question for us to ponder, then, is whether the costs of the oath outweigh the benefits. And the answer is surely that they do: the oath is an archaic and anachronistic ritual that imports pagan assumptions and religious ideology into secular courts of law, attempting to reconcile ancient and contemporary religious and cultural beliefs, and it does so while being, at best, an unreliable guarantee of truthfulness. Even in jurisdictions where religion is removed from the language of the oath, the very existence of an oath and its secular counterpart the affirmation mean that a witness must make a public declaration, not under penalty of perjury, that one or the other option will effectively require them to tell the truth, and then must make a public ritual of truth-promising that gives the jury a wealth of information, accurate or not, from which to make credibility assessments of the witness. The oath's promises themselves are largely incoherent, are inconsistent with contemporary trial procedure, and are so disbelieved that the judge has a boilerplate instruction ready to give to the jury that suggests that despite witnesses' promise to tell the truth, the jury should feel free to disbelieve the witness's testimony. Put simply, the oath process as it exists

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[265] Donald Rumsfeld, Sec'y of Def., U.S. Dep't of Def. Press Conference (Feb. 12, 2002) *available at* https://perma.cc/7PYK-8NGN ("Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones."). The framework Rumsfeld used for his statement appears to be related to the concept of a Johari window, a heuristic exercise developed by psychologists Joseph Luft and Harrington Ingham to promote a better understanding of a person's "relationship with themselves and others." In the Rumsfeldian taxonomy of knowledge, this would constitute a known unknown.

in contemporary American jurisprudence is a pointless, outdated ritual that has no place in the courtroom.

When compared to a process where a witness makes a private, written, declaration of an intent to tell the truth, under penalty of perjury, the oath's benefits are hard to discern. The jury still has the ability to determine credibility, based on the nature of the witnesses' answers to questions and the way witnesses comport themselves during examination. The promise to testify truthfully is more coherent, and would be overtly made under penalty of perjury, for whatever value that might have. And the witness is not being asked to place his or her immortal soul at hazard for purposes of a secular trial. Viewed in this way, the oath offers no benefits—even marginal ones—over a declaration process. It is time for trials to shed this vestige of our pagan past and move into the twenty-first century.

* * * *

Section 43(a) in a Vacuum: Cleaning Up False Advertising in an Unfair Competition Mess

*Massiel Sanchez**

INTRODUCTION

Advertising surrounds our everyday life.[1] Companies use advertising as a form of communication to influence us into obtaining their product or service.[2] Due to the rise of business competition, in 1946 Congress established a federal cause of action that allows competing companies to bring trademark and unfair competition claims under the Lanham Act.[3] Designed to protect consumers from deception,[4] unfair competition eventually led companies to file claims for false advertising.[5] Today, after many years of litigation under the new Act,

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[1] *See* Abey Francis, *Role of Advertising in the Present Business World*, LINKEDIN (Feb. 20, 2015), https://perma.cc/TN2M-RUZ6.

[2] *Definition of 'Advertisings,'* THE ECONOMIC TIMES, https://perma.cc/FX99-643R (last visited Sept. 6, 2019).

[3] *See* 15 U.S.C. §§ 1051–1141n (2012); *see also* Samson Crane Co. v. Union Nat'l Sales, 87 F. Supp. 218, 222 (D. Mass. 1949) ("[T]he primary purpose of the Act was to eliminate deceitful practices in interstate commerce involving the misuse of trade-marks . . . it sought to eliminate other forms of misrepresentations . . . even though they do not involve any use of what can technically be called a trade-mark.").

[4] *See* Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 763 (1992) ("[A]nd the protection of trademarks . . . serves the same statutory purpose of preventing deception and unfair competition."); *see also* Dolores K. Hanna et al., *The United States Trademark Association Trademark Review Commission Report and Recommendations to USTA President and Board of Directors*, 77 TRADEMARK REP. 375, 426 (1986) (describing the intended reach to be that of false designation or representation as to the geographical origin of the product).

[5] *See* Coca-Cola Co. v. Procter & Gamble Co., 822 F.2d 28, 31 (6th Cir. 1987) (holding that the plain meaning of § 43(a) of the Lanham Act allows false advertising claims to be brought because the statutory language "clearly encompasses a false description or misrepresentation about the characteristics . . . of a product."); L'Aiglon Apparel v. Lana Lobell, Inc., 214 F.2d 649, 651 (3d Cir. 1954) (interpreting § 43(a) of the Lanham Act to allow causes of action arising

the requirements for bringing a false advertising claim are well settled.[6] First, the company must have standing.[7] Second, the company must demonstrate that an advertising is either literally false, or if literally true, it is likely to mislead and confuse consumers.[8] But how should courts proceed when an advertising was true and later becomes false?[9] This issue was presented to the District Court of Massachusetts in *SharkNinja v. Dyson*[10] in a false advertising claim filed under § 43(a) of the Lanham Act, where an advertising was literally true and later became literally false.[11]

This Comment will argue that when a court is faced with a false advertising claim concerning an advertising which was literally true at the time of creation—but was later rendered false because of new products introduced to the market—the court need not find liability for a defendant who has already taken steps to remove the advertising campaign. It will also argue that a court should apply a reasonable standard, rather than strict liability when a defendant concedes that their advertising is now false and is in the process of removing the advertising claim from the market, a finding that is similarly applied in contempt cases. Part I provides an overview of the Lanham Act, § 43(a) of the Lanham Act, and how false advertising has been incorporated into the section. Part II reviews the Court's opinion and analyzes how the Court reached their conclusion. Part III scrutinizes the strict liability standard that courts have imposed on false advertising claims. Part IV explores the application of a reasonableness standard to false advertising claims where the advertising was true and became false.

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from false advertising); Courtland L. Reichman & M. Melissa Cannady, *False Advertising Under the Lanham Act*, 21 FRANCHISE L.J. 187, 187 (2002) ("False advertising under the Lanham Act is an increasingly popular cause of action . . ."); *see also* 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:25 (4th ed. 2014).

[6] *See, e.g., Two Pesos, Inc.*, 505 U.S. at 783 n.18 (Stevens, J., concurring) ("Since [§ 43(a)'s] enactment in 1946, however, it has been widely interpreted as creating, in essence, a federal law of unfair competition. For example, it has been applied to cases involving . . . actionable false advertising claims." (citing the Senate Report, S. REP. NO. 100-515, at 40 (1988))); Pacamor Bearings, Inc. v. Minebea Co., 918 F. Supp. 491, 497 (D.N.H. 1996) (discussing the history of court interpretations and how Congressional amendments have construed the current statute).

[7] Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 128, 140 (2014) (finding that Congress did not intend for all injured parties to have standing to sue, but instead concluding that Congress intended for only commercial injury, therefore applying two principles in determining standing, zone of interests and proximate causality).

[8] McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co., 938 F.2d 1544, 1549 (2d Cir. 1991).

[9] *See* Pizza Hut, Inc. v. Papa John's Int'l, 227 F.3d 489, 495 (5th Cir. 2000) (explaining the usual steps a plaintiff must take in order to prevail in a false advertising claim).

[10] SharkNinja Operating LLC v. Dyson Inc., 200 F.Supp. 3d 281 (D. Mass. 2016).

[11] *See id.* at 284.

I. Background

A. *The Lanham Act*

The Lanham Act, enacted in 1946, became another way for Congress to regulate businesses.[12] Created, in part, as a reaction to the Supreme Court's decision in *Erie Railroad v. Tompkins*[13] to create a federal law for unfair competition,[14] the Lanham Act "provides for a national system of trademark registration and protects the owner of a federally registered mark against the use of similar marks if any confusion might result . . . ."[15] The Lanham Act is divided in four sections, with the majority of the sections governing Trademark Law.[16] Unfair competition is regulated under § 43(a).[17]

B. *Section 43(a) of the Lanham Act*

1. History

Congress' initial intent with enacting § 43(a) of the Lanham Act[18] was to create a statutory basis to prohibit false designations of origins.[19] False

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[12] Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. REV. 807, 811–12 (1999) (discussing how Congress enacted various business regulation laws in the 1930s and 1940s after the Great Depression).

[13] *See generally* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[14] *See* Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 783 n.18 (1992) (Stevens, J., concurring) ("[Section] 43(a) is designed to 'codify the interpretation it has been given by the courts . . . .'"); MCCARTHY, *supra* note 5, § 27:7; Hanna et al., *supra* note 4, at 376; *see also* Burns, *supra* note 12, at 812–13 (discussing how Congress was prompted to enact a federal act because of the Supreme Court's decision in *Erie R.R. v. Tompkins*, which eliminated the doctrine of federal common law and left trademark and unfair competition protection for states to interpret).

[15] *Lanham Act*, BLACK'S LAW DICTIONARY 1011 (Bryan A. Gardner ed., 10th ed. 2014).

[16] *See* 15 U.S.C. §§ 1051–1141n (2012) (dividing the four sections of the Lanham Act as follows: the Principal Register for Trademarks §§ 1051–1072; the Supplemental Register for Trademarks §§ 1091–1096; General Provisions §§ 1111–1129; and the Madrid Protocol §§ 1141–1141n).

[17] Karen Dudnikov & Michael Meadors, *Unfair Competition*, TABBER'S TEMPTATIONS, https://perma.cc/B9YJ-XR4J (last visited Jan. 3, 2019).

[18] 15 U.S.C. § 1125 (2012).

[19] *See* Burns, *supra* note 12, at 815–16 (explaining how advertising was still in its infancy, appearing mainly in newspapers and radio, when § 43(a) was enacted, indicating that Congress did not imagine the immense market that advertising would produce, thus causing Congress to narrowly word the statute); Bruce P. Keller, *"It Keeps Going and Going and Going": The Expansion of False Advertising Litigation Under the Lanham Act*, 59 LAW & CONTEMP. PROBS. 131, 132 (1996) (discussing how Congress' focus was to have U.S. law conform with other international convention provisions which the United States was a party to, therefore leading

designations of origins is also known as "palming off," and is analyzed with different factors than false advertising.[20] False designations of origins applies when a manufacturer appropriates identifying marks of another and places the marks on his own product.[21] Presently, § 43(a) provides causes of actions for trade dress and other nontrademark designators; false representations of unregistered trademarks and service marks; false designations of origin; and false advertising.[22] Section 43(a) of the Lanham Act specifies that:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation or origin, false or misleading description of fact, or false or misleading representation of fact, which—
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> (a) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> (b) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.[23]

After many years of judicial interpretation from the federal courts, § 43(a) has become one of the main statutes for plaintiffs to file claims of unfair competition, mostly claims for false advertising.[24]

2. False Advertising Under § 43(a)

False advertising has been interpreted as a "represent[ation] that goods

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courts to construe a narrow interpretation of § 43(a)).

[20] Alpha Pro Tech v. VWR Int'l. LLC, 984 F. Supp. 2d 425, 453 (E.D. Pa. 2013) ("[A] false designation of origin claim. . . must allege: (1) that the defendant uses a false designation of origin; (2) that such use of a false designation of origin occurs in interstate commerce in connection with goods or services; (3) that such false designation is likely to cause confusion, mistake or deception as to the origin, sponsorship or approval of the plaintiff's goods and services by another person; and (4) that the plaintiff has been or is likely to be damaged.").

[21] *See* Gen. Pool Corp. v. Hallmark Pool Corp., 259 F. Supp. 383, 385 (N.D. Ill. 1966).

[22] *See* DORIS E. LONG, UNFAIR COMPETITION AND THE LANHAM ACT 12–16 (1993).

[23] 15 U.S.C. § 1125 (2012).

[24] *See* J. Thomas McCarthy, *Lanham Act § 43(a): The Sleeping Giant is Now Wide Awake*, 59 LAW & CONTEMP. PROBS. 45, 45–46 (1996) (discussing how federal courts have transformed § 43(a) from a narrow reading to an over-expansive interpretation of the statute).

or services possessed characteristics that they d[o] not actually have."[25] The First Circuit was one of the first courts to interpret § 43(a) narrowly, holding that the section did not apply to general false advertising claims, but was instead limited to certain misrepresentations about the goods themselves.[26] Although in the mid-1950s the Third Circuit found that a plaintiff may bring a false advertising suit under the Lanham Act,[27] it was not until almost thirty years after the Lanham Act was enacted that false advertising claims began to rise.[28] Over the years, court interpretation has made § 43(a) one of the most litigated sections of the Lanham Act.[29] This has led Congress to amend § 43(a) by allowing plaintiffs to assert two types of unfair competition claims: (1) infringement of unregistered marks, names and trade dress; and (2) false advertising.[30] There are five elements a plaintiff must establish to bring a claim of false advertising:

> (1) the defendant made a false or misleading description of fact or representation of fact in a commercial advertisement about his own or another's product; (2) the misrepresentation is material, in that it is likely to influence the purchasing decision; (3) the misrepresentation actually deceives or has the tendency to deceive a substantial segment of its audience; (4) the defendant placed the false or misleading statement in interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the misrepresentation, either by direct diversion of sales or by a lessening of goodwill associated with its products.[31]

Recently, the Supreme Court held that in order to bring a cause of

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[25] Pacamor Bearings, Inc. v. Mineabea Co., 918 F. Supp. 491, 497 (D. N.H. 1996).

[26] *See* MCCARTHY, *supra* note 5, § 27:8 (citing Samson Crane Co. v. Union Nat'l Sales, 87 F. Supp. 218, 222 (D. Mass. 1949)).

[27] *See* L'Aiglon Apparel, Inc. v. Lana Lobell, Inc., 214 F.2d 649, 651 (3d Cir. 1954) (interpreting § 43(a) of the Lanham Act to allow causes of action arising from false advertising).

[28] *See* MCCARTHY, *supra* note 5, § 27:8; *see also* Lillian R. Bevier, *Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception*, 78 VA. L. REV. 1, 1 (1992) ("[F]alse advertising litigation has increased steadily.").

[29] *See* Spotless Enters, Inc. v. Carlisle Plastics, Inc., 56 F. Supp. 2d. 274, 281 (E.D. N.Y. 1999) (describing the legislative history of § 43(a), explaining that Congress deliberately broadened the section, and illustrating that Congress expected courts to continue to utilize the Act for false advertising); *see also* Burns, *supra* note 12, at 810 (arguing that courts have inconsistently interpreted § 43(a)(1)(B) either too narrowly or too expansively, which has led to conflicting decisions, mainly because judges "latch on to different words in the provision to justify their decisions").

[30] *See* MCCARTHY, *supra* note 5, § 27:9 (describing how Congress codified the types into two prongs in the amendment of 1989 and further in the amendment of 1992, allowing each claim to have its own distinct section in the Act).

[31] Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave., 284 F.3d 302, 310–11 (1st Cir. 2002).

action for false advertising, "a plaintiff must plead (and ultimately prove) an injury to a commercial interest in sales or business reputation proximately caused by the defendant's misrepresentations."[32] However, the District Court of Massachusetts faced the newest interpretative challenge in *SharkNinja Operating LLC v. Dyson Inc.*[33]

II. Court's Opinion

A. *SharkNinja Operating LLC v. Dyson Inc.*

1. Background of Case

SharkNinja Operating LLC ("SharkNinja") and Dyson Inc. ("Dyson") are manufacturing competitors in the household vacuum market.[34] In July 2013, Dyson introduced their "twice the suction of any other vacuum" ("TTS") advertising campaign for their DC41 vacuum, and subsequently added the TTS advertising campaign to their new DC65 vacuum.[35] Dyson's TTS advertising campaign appeared in print, television, and internet advertising, as well as purchase displays in certain retail stores, and on the packaging for their DC41 and DC65 vacuums.[36] In May 2014, SharkNinja sent Dyson a letter informing them that in July 2014, SharkNinja would release a new vacuum which would render Dyson's TTS advertising campaign literally false because of the performance capabilities of this new vacuum.[37] In the letter, SharkNinja indicated that testing on the new vacuum proved that the DC65 "no longer had 'twice the suction of any other campaign.'"[38] Although the letter did not include any test results, SharkNinja stated that they expected Dyson to remove the TTS advertising campaign from the market once the new vacuum was officially released.[39] On July 8, 2014, SharkNinja began selling the new vacuum, the Shark Powered Lift-Away ("Shark Lift-Away"), on the market.[40] The following day, SharkNinja sent another letter to Dyson indicating that the new

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[32] Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 128, 140 (2014) (finding that Congress did not intend for all injured parties to have standing to sue, but instead concluding that Congress intended for only commercial injury, therefore applying two principles in determining standing, zone of interests and proximate causality).

[33] *See generally* SharkNinja Operating LLC v. Dyson Inc., 200 F.Supp. 3d 281 (D. Mass 2016).

[34] *Id.* at 282–83

[35] *Id.* at 283.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *SharkNinja*, 200 F. Supp. 3d, at 283-84.

[40] *Id.* at 284.

vacuum was officially on the market.[41] SharkNinja, again, did not include any test results with the letter, nor did it provide a sample vacuum of the Shark Lift-Away so that Dyson could conduct its own tests.[42]

Once SharkNinja released the Shark Lift-Away vacuum, Dyson purchased three units and sent them for testing.[43] The three units were received at Dyson's U.S. office on July 22, 2014—two units were then sent to Dyson's U.K. office and one to a third-party testing facility.[44] Dyson received the two internal test results in early August 2014 and received the third-party facility test results in early September 2014.[45] On September 10, 2014, SharkNinja provided Dyson with its own third-party test results. All four results confirmed that "the Shark Lift-Away had more than half the suction of the DC65 and the DC41."[46] Dyson conceded, as a factual matter, that the Shark Lift-Away rendered the TTS advertising campaign literally false once the vacuum was released on July 8, 2014.[47] Thereafter, SharkNinja filed a complaint against Dyson alleging false and misleading advertising in violation of § 43(a) of the Lanham Act with respect to their competing vacuum cleaners.[48]

The dispute between the parties concerned whether Dyson utilized reasonable and necessary procedures to remove the TTS advertising campaign from the market once Dyson received the test results confirming that the Shark Lift-Away vacuum indeed rendered its TTS advertising campaign false.[49] SharkNinja and Dyson both moved for summary judgment.[50]

2. Court's Analysis

The Court found that SharkNinja was entitled to partial summary judgment on Count 1—SharkNinja's claim for false advertising under the

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[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *SharkNinja*, 200 F. Supp. 3d, at 284.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 283 (addressing filed claims for deceptive trade practices in violation of Mass. Gen. Laws, ch. 93A and false advertising in violation of Mass. Gen. Laws, ch. 266, § 91).

[49] *Id.* at 284.

[50] *SharkNinja*, 200 F. Supp. 3d, at 286 (SharkNinja moved for partial summary judgment on its claim for false advertising under the Lanham Act (the ruling that this Comment is focusing on) and moved for summary judgment on Dyson's Lanham Act counterclaim; Dyson moved for summary judgment on a subsidiary issue of whether Dyson's false advertising was "willful and knowing").

Lanham Act.[51] The Court concluded that SharkNinja had "established, as a matter of law, that Dyson's TTS claim was 'material. . . ."[52] The Court further noted that "[w]hether or not Dyson acted reasonably promptly in removing its false TTS claim from the market is not relevant to Dyson's liability for false advertising under Section 43 of the Lanham Act."[53]

In issuing its decision, the Court relied on two cases from the Second Circuit, *Lyons P'ship, L.P. v. D & L Amusement & Entm't, Inc.*[54] and *Spotless Enters. v. Carlisle Plastics, Inc.*,[55] finding that courts use a strict liability regime as to whether "good faith" is an essential element of false advertising claims.[56] The Court concluded that "[g]ood faith is simply not a defense to a false advertising claim under the Lanham Act."[57] The Court further held that the case law and statute properly establish that when an advertiser puts a claim in the market, that advertiser bears all the risk of such claims becoming false.[58] Thus, the Court erred in partially granting SharkNinja's motion for summary judgement due to the Court's erroneous application of a strict liability standard to a case in which the facts indicate that liability need not be found.[59]

ANALYSIS

III. The *SharkNinja* Court Erred When It Applied a Strict Liability Standard to Advertising That Was True and Later Became False

Under § 43(a), courts apply a strict liability standard to determine if a defendant is liable for false advertising.[60] This standard has been interpreted and applied in § 43(a) cases due to the statute's location under an Act that is mainly focused on Trademark Law.[61] In a usual trademark

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[51] *Id.* at 290–91.

[52] *Id.* at 288.

[53] *Id.* at 288 n.6.

[54] Lyons P'ship, L.P. v. D & L Amusement & Entm't., Inc., 702 F. Supp. 2d 104 (E.D.N.Y. 2010).

[55] Spotless Enters., Inc. v. Carlisle Plastics, Inc., 56 F. Supp. 2d 274 (E.D.N.Y. 1999).

[56] *SharkNinja*, 200 F. Supp. 3d, at 287.

[57] *Id.* (citing Lyons P'ship, L.P. v. D & L Amusement & Entm't., Inc., 702 F. Supp. 2d 104, 113 (E.D.N.Y. 2010) and Spotless Enters. Inc. v. Carlisle Plastics, Inc., 56 F. Supp. 2d 274, 278 (E.D.N.Y. 1999)).

[58] *Id.*

[59] *Id.*

[60] *See* Randy Shaheen et al., *The Scope of Liability for False Advertising Claims*, ALL ABOUT ADVERT. L. (Oct. 19, 2012), https://perma.cc/7C3F-G7V9 (explaining how liability plays a role in the advertising market).

[61] *See* POM Wonderful v. Coca-Cola, 573 U.S. 102, 105 (2014) (illustrating Congress' intent

infringement case, courts apply a strict liability standard when determining whether the defendant is liable.[62] Courts faced with a trademark infringement claim apply a set of factors.[63] Although courts have continuously stated that the Lanham Act is a strict liability statute,[64] courts weigh the factors separately, including the intent of the defendant.[65] However, when courts were first faced with false advertising cases, they applied the "usual" standard that was applied under the Lanham Act for trademark infringement cases—a strict liability standard.[66] But, unfortunately, courts improperly ignored the notion that advertising was not, and is still not, the same as a trademark infringement case.[67]

The *SharkNinja* Court relied on two Second Circuit cases, *Lyons Partnership, L.P. v. D & L Amusement & Entertainment, Inc.*[68] and *Spotless*

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that all Sections under the Chapter were to be actionable against deceptive and misleading use of marks); Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 768 (1992) (explaining that § 43(a) protects unregistered marks the same way that § 2 protects registered marks); U-Haul Int'l v. Jartan, Inc., 793 F.2d 1034, 1042 (9th Cir. 1986) ("Not only do we see no significant distinction between false advertising and other cases under Lanham Act § 43(a) . . ."); Lyons Partnership, L.P. v. D & L Amusement & Entm't., Inc., 702 F. Supp. 2d 104, 113 (E.D.N.Y. 2010) ("An unfair competition claim under the Lanham Act is similar in spirit and substance to the other claims cognizable under the Act.").

[62] *See* Taubman Co. v. Webfeats, 319 F.3d 770, 775 (6th Cir. 2003) ("[T]he Lanham Act is a strict liability statute."); Streetwise Maps v. VanDam, Inc., 159 F.3d 739, 742 (2d Cir. 1998) ("The Lanham Act protects the rights of the first user of a trademark."); *see also* Nandana Indananda & Kawin Kanchanapairoj, *Application of Strict Liability to Intellectual Property Infringement in Thailand*, 15 IP LITIGATOR 1 (Nov.–Dec. 2009), https://perma.cc/29CP-9LRY (comparing the application of strict liability to intellectual property infringement in the United States and Thailand).

[63] *See* Borinquen Biscuit Corp. v. M.V. Trading Corp., 443 F.3d 112, 120 (1st Cir. 2006) ("(1) the similarity of the marks; (2) the similarity of the goods; (3) the relationship between the parties' channels of trade; (4) the relationship between the parties' advertising; (5) the classes of prospective purchasers; (6) evidence of actual confusion; (7) the defendant's intent in adopting its mark; and (8) the strength of the plaintiff's mark.").

[64] *Taubman Co.*, 319 F.3d at 775 ("[T]he Lanham Act is a strict liability statute.").

[65] *See* AT&T v. Winback & Conserve Program, 42 F.3d 1421, 1442–43 (3d Cir. 1994).

[66] *See* P&G v. Chesebrough-Pond's Inc., 747 F.2d 114, 119 (2d Cir. 1984) (finding that intent to deceive is not required); Brandt Consol., Inc. v. Agrimar Corp., 801 F. Supp. 164, 174 (C.D. Ill. 1992) (explaining that bad faith is not an element); *see also* Burns, *supra* note 12, at 845 (describing how courts have imposed a strict liability standard on their own, which sometimes has no connection between the injury and consumer welfare).

[67] *See* Burns, *supra* note 12, at 840 ("The obvious problem with the strict liability interpretation of section 43(a) is that it creates the potential of penalizing well-intended advertisers who have caused little consumer injury."); *see also* Bevier, *supra* note 28, at 48 ("[Courts] rarely challenge the good faith of plaintiffs. [Courts] do not question the necessity for a strict liability solution to the false advertising 'problem . . . .'").

[68] Lyons Partnership, L.P. v. D & L Amusement & Entm't., Inc., 702 F. Supp. 2d 104

Enterprises v. Carlisle Plastics, Inc.,[69] when it applied a strict liability standard.[70] The Court noted that:

> [t]he language of the statute is compulsory, and it includes no exceptions for cases in which a manufacturer undertakes good faith, commercially reasonable efforts to remove a false claim from the marketplace upon learning of its falsity. Good faith is simply not a defense to a false advertising claim under the Lanham Act.[71]

Although the Court was correct to assume that good faith is not a defense under the Lanham Act, the Court was incorrect in relying on the Second Circuit cases when applying the standard to the facts before it.[72]

In *Lyons*, the Second Circuit was faced with claims of copyright infringement and various claims of trademark infringement and unfair competition.[73] Even though the *Lyons* Court noted that an unfair competition claim under the Lanham Act does not require proof of an intent to deceive or bad faith, it was faced with a false designation of origin claim, where it found that "[a] false designation of origin . . . under the Lanham Act is similar to a trademark infringement claim except that it applies to unregistered as well as registered marks."[74] In fact, a false designation of origin claim is what Congress intended to prohibit when enacting § 43(a).[75] Therefore, Congress included it under the Lanham Act's unfair competition section—for courts to analyze the unfair competition claims in a similar fashion to a trademark infringement claim, but with an unregistered mark.[76] The *SharkNinja* Court ignored the difference between a false designation of origin and a false advertising claim, and therefore applied the same analysis and standard.[77]

In *Spotless*, the court was faced with a patent infringement claim where the defendant counterclaimed for false advertising.[78] In its analysis, the

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(E.D.N.Y. 2010).

[69] Spotless Enters, Inc. v. Carlisle Plastics, Inc., 56 F. Supp. 2d 274 (E.D.N.Y. 1999).

[70] SharkNinja Operating LLC v. Dyson Inc., 200 F. Supp. 3d 281, 287 (D. Mass. 2016).

[71] *Id.*

[72] *See Spotless*, 56 F. Supp. 2d at 277–78. *But see* AT&T v. Winback & Conserve Program, 42 F.3d 1421, 1442–43 (3d Cir. 1994) (considering the defendant's intent in adopting the mark as a factor).

[73] *Lyons*, 702 F. Supp. 2d at 104.

[74] *Id.* at 113.

[75] Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 777 (1992) (Stevens, J., concurring) (explaining that the Act was enacted to protect consumers from misrepresentations of geographic locations).

[76] *Id.* at 776.

[77] SharkNinja Operating LLC v. Dyson Inc., 200 F. Supp. 3d 281, 287–88 (D. Mass. 2016).

[78] Spotless Enters, Inc. v. Carlisle Plastics, Inc., 56 F. Supp. 2d 274, 275–76 (E.D.N.Y. 1999).

Spotless Court concluded that because prior cases have not required that an element of bad faith be proven, the Lanham Act has created a regime of strict liability.[79] Further, the *Spotless* Court relied on *P&G v. Chesebrough-Pond's Inc.*,[80] in finding that "proof of good faith does not immunize a defendant."[81] However, the *P&G* Court found that a plaintiff has the burden of showing that the advertising is false and misleading, and that simply because one party's evidence supporting the truth in advertising is unpersuasive, this does not automatically entitle the other party to relief.[82] Instead, the issue is one of fact and not law, and therefore a factfinder was in the best position for judgment.[83] Contrary to *P&G*, the *SharkNinja* Court did not use a factfinder, and instead, the Court granted summary judgment on a finding of liability against Dyson.[84]

The Court's application of a strict liability standard creates precedent that does and will affect businesses that are already in a position of removing a false advertising claim.[85] A strict liability standard would also hinder the market since businesses will be penalized for their unplanned, and sometimes unimaginable, advertising becoming false.[86] A court should only find liability for an advertising claim where the parties are in dispute as to whether the advertising claim is false and misleading.[87] The *SharkNinja* Court ignored the fact that SharkNinja commenced the false advertising suit after Dyson had already initiated the removal of the advertisement.[88] SharkNinja, in their Amended Complaint, conceded that "Dyson modified its website advertising on September 9, 2014,"[89] contrary to the original complaint, filed on September 26, 2014, where SharkNinja

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[79] *Id.* at 277–78.

[80] P&G v. Chesebrough-Pond's Inc., 747 F.2d 114, 114 (2d Cir. 1984).

[81] *Id.* at 119.

[82] *Id.*

[83] *See id.*

[84] *See* SharkNinja Operating LLC v. Dyson Inc., 200 F. Supp. 3d 281, 290–91 (D. Mass. 2016) (court partially allowed motion for summary judgment).

[85] *See* Burns, *supra* note 12, at 840 ("The obvious problem with the strict liability interpretation of section 43(a) is that it creates the potential of penalizing well-intended advertisers who have caused little consumer injury.").

[86] Bevier, *supra* note 28, at 41 ("Strict liability imposes all the costs of misrepresentation on the advertiser, even . . . for those that emerge from interpretations that could not cost-effectively have been foreseen or prevented.").

[87] *See Do I Have a Lanham Claim Against My Competitor for False Advertising?*, BONA L. PC https://perma.cc/PW5U-QTF3 (last visited Sept. 12, 2019).

[88] *See* Memorandum of Law for Defendants at 15-17, SharkNinja Operating LLC v. Dyson Inc., 200 F. Supp. 3d 281 (D. Mass. 2016) (No. 14-cv-13720- ABD).

[89] First Amended Complaint at 9, SharkNinja Operating LLC v. Dyson Inc., (No. 14-cv-13720-ABD) 200 F. Supp. 3d 281 (D. Mass. 2016).

alleged that Dyson "still has failed and refuses to remove its literally false point-of-sale advertising. . . ."[90]

Although SharkNinja indicated that its counsel sent Dyson various letters informing Dyson of the Shark-Lift-Away's release and the future falsity of Dyson's TTS advertising campaign, SharkNinja, unfortunately, did not provide any test results with the letters.[91] In fact, SharkNinja did not provide Dyson with any test results until mid-September, right before SharkNinja commenced suit, and therefore Dyson should not have been punished for SharkNinja's delay in providing test results that evidenced the falsity of the advertising claim.[92] For these reasons, courts should apply a different standard when determining whether a defendant is liable for removing a false advertising claim within a reasonable time.[93]

IV. Courts Should Apply a Reasonableness Standard to Cases with Similar Facts to *SharkNinja v. Dyson*

Advertising, in general, is always at risk of becoming false.[94] Applying a strict liability standard to cases where a defendant, before suit has commenced, has initiated a process to remove the false advertising claim would generate wasteful judicial time, as well as input an enormous cost to society.[95] Other standards are available for a court to implement, for instance, a deceit or fraud standard,[96] or a reasonableness standard.[97]

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[90] Complaint at 2, SharkNinja Operating LLC v. Dyson Inc. (No. 14-cv-13720-ABD), 200 F. Supp. 3d 281 (D. Mass. 2016).

[91] SharkNinja Operating LLC v. Dyson Inc., 200 F. Supp. 3d 281, 283-87 (D. Mass. 2016).

[92] *See* Schick Mfg. v. Gillette Co., 372 F. Supp. 2d 273, 282 (D. Conn. 2005) ("In a [false advertising] case, where a 'high probability of confusion' normally gives rise to a presumption of irreparable harm for the purposes of obtaining a preliminary injunction, that presumption is 'inoperative if the plaintiff has delayed either bringing suit . . . .'"); *see also* Bevier, *supra* note 28, at 48 ("[Courts] rarely challenge the good faith of plaintiffs. [Courts] do not question the necessity for a strict liability solution to the false advertising 'problem . . . .'").

[93] *See* Sandra Edelman, *A Diamond is Forever. What About Your Advertising Claim?*, LEXOLOGY (Oct. 4, 2016), https://perma.cc/2TPX-D72X (describing how the *SharkNinja v. Dyson* decision will impact companies in the market by imposing another burden of monitoring the market more or changing their advertising strategies).

[94] Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657, 696 (1985) ("False inferences can never be eliminated entirely by any method short of banning all advertising, so advertising will never be 100% reliable."); *see also* Bevier, *supra* note 28, at 15 ("Distinguishing [the false inferences] from the truth and punishing them ex post entails substantial error and enforcement costs for the legal system.").

[95] *See* Burns, *supra* note 12, at 845.

[96] Bevier, *supra* note 28, at 39.

[97] *See* Schick Mfg. v. Gillette Co., 372 F. Supp. 2d 273, 282 (D. Conn. 2005) (denying motion for civil contempt because the court found that the defendant was reasonable in the removal process even though the defendant did not abide by the thirty-day removal order).

Because of the high cost of litigation, and the cost on society, courts should apply a reasonableness standard when approaching cases that are practically resolved.[98] SharkNinja's allegations that Dyson did not remove the false advertising campaign in a reasonable time should not have been interpreted by the Court to conclude that Dyson is liable for false advertising under the Lanham Act.[99]

In *SharkNinja*, the Court found that the cases that Dyson relied on for support "do not stand for the proposition that a manufacturer may avoid liability or damages for false advertising under the Lanham Act if, after learning that its advertising is false, it takes prompt, commercially reasonable efforts to remove its false claims from the marketplace."[100] However, simply because Dyson's supporting cases did not directly assert an affirmative defense to SharkNinja's claims does not mean a court should reject the approach, since courts are frequently faced with issues of first impression.[101] Dyson's supporting cases mainly rely on a reasonableness standard, usually applied in cases regarding compliance with court-issued injunctions.[102]

In *Schick v. Gillette*,[103] for example, the court denied Schick's motion for civil contempt because the court found that Gillette had taken reasonably diligent efforts in removing the false advertising even though Gillette had failed to do so within the thirty-day period the court imposed.[104] *Schick* is analogous to *SharkNinja* in the sense that Dyson was reasonably diligent in removing the false advertising by implementing a plan to remove the TTS advertising campaign and create a new advertising campaign, by designing stickers to cover the TTS advertising campaign on the product boxes and displays, and by hiring a third-party vendor to go to retail stores and correct the TTS advertising campaign by covering it or removing it.[105] Further, Dyson stopped broadcasting the TTS advertising campaign in June 2014 and its circulation in April 2014, both before the Shark-Lift-Away was even released.[106] Additionally, SharkNinja was not able to prove

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[98] *See* Bevier, *supra* note 28, at 47 ("Not only do [courts] appear to believe that purging the marketplace of false inferences is costless, but they lack faith in the discernment and intelligence of consumers.").

[99] SharkNinja Operating LLC v. Dyson Inc., 200 F. Supp. 3d 281, 288 n.6 (D. Mass. 2016).

[100] *Id.* at 287.

[101] *First Impression*, LEGAL INFO. INST., https://perma.cc/8NA6-EX7N (last visited Sept. 12, 2019).

[102] *SharkNinja*, 200 F. Supp. 3d at 287.

[103] Ruling Re: Motion for Civil Contempt and Order to Show Cause at 2–3, Schick Mfg. v. Gillette Co., 372 F. Supp. 2d 273 (D. Conn. 2005) (No. 3-05-cv-174-(JCH)).

[104] *Id.*

[105] Memorandum of Law for Defendants at 4, *SharkNinja*, 200 F. Supp 3d 281.

[106] *Id.* at 5 n.1.

that Dyson's removal was unreasonable by any means.[107] By applying a strict liability standard, the *SharkNinja* Court will undoubtedly create precedent that will alter the future of the advertising market.[108] Most false advertising cases are not intentional, and the defendants are unaware of their advertising becoming false.[109]

CONCLUSION

The District Court of Massachusetts erred in applying a strict liability standard in *SharkNinja* when analyzing a false advertising claim under § 43(a) of the Lanham Act that was true and later became false. *SharkNinja* did not present any factual issues that needed determination of whether there was false advertising. Instead, both parties agreed that Dyson's TTS advertising campaign became literally false when SharkNinja introduced their new vacuum to the market in 2014. Even if the Court needed to determine certain factual issues, a grant of summary judgment is not appropriate and should have been denied. SharkNinja's complaint should have been interpreted by the Court as a complaint similar to a motion for contempt, alleging that Dyson did not remove the false advertisement in a reasonable time.

With the Court's application of a strict liability standard, it has created precedent of automatic liability for any company that has any type of advertising in the market. The burden of litigation alone causes companies to suffer immensely, misusing time and draining rightfully earned economic resources. Yet, the greatest impact is felt on consumers, whose tax dollars pay for judicial costs and who are not even harmed by the matter in litigation to begin with.

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[107] *Id.* at 20.

[108] *See* Bevier, *supra* note 28, at 31 ("[C]ourts deciding section 43(a) cases seem insensitive both to the effects of their rules on the kind and amount of information that advertisers will produce in the future . . . ."); Greg Stohr, *Coca-Cola Must Face Pomegranate Drink Suit, Court Says*, BLOOMBERG (June 12, 2014, 2:37 PM), https://perma.cc/PNB9-UPAE ("Lanham Act suits draw upon [the advertising] market expertise by empowering private parties to sue competitors to protect their interests on a case-by-case basis," (citing POM Wonderful v. Coca-Cola, 134 S. Ct. 2228, 2238 (2014)).

[109] Bevier, *supra* note 28, at 2 ("The 'false advertising' with which most of the cases deal turns out not to be deliberate but rather unintentional misrepresentation.").

Employment Discrimination: Pretext, Implicit Bias, and the Beast of Burdens

*Shannon Keating**

INTRODUCTION

A right of trial by jury for certain civil cases is declared in the United States Constitution under the Seventh Amendment.[1] Chief Justice Rehnquist asserted that a "trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense, the 'passional elements in our nature,' and thus keep the administration of law in accord with the wishes and feelings of the community."[2] However, with the current pervasiveness of summary judgment, there is less of an opportunity for a jury trial on the merits of a case.[3] This loss of opportunity for a jury trial on the merits has been particularly felt in employment discrimination cases, as summary judgment is more frequently granted in favor of the defendant employer instead of the plaintiff employee.[4]

Motions for summary judgment by defense counsel have frequently dispensed with employment discrimination cases.[5] There is frequently an

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[1] U.S. CONST. amend. VII ("the right of trial by jury shall be preserved").

[2] Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343–44 (1979) (Rehnquist, C.J., dissenting).

[3] *See* Hon. Mark W. Bennett, Essay, *From the "No Spittin', No Cussin' and No Summary Judgment" Days of Employment Discrimination Litigation to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judge's Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 711 (2013) (musing "[i]s it simply a coincidence that, when summary judgment was adopted in 1938, 19.9% of all federal civil cases were tried, and, by 2003, the number had dropped to 1.7%?").

[4] *See* Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 ST. LOUIS U. L.J. 111, 112 (2011).

[5] *See* Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The*

inability of plaintiffs to provide direct evidence of discrimination, therefore courts have utilized the *McDonnell-Douglas* three-stage, burden-shifting paradigm to analyze issues of indirect or circumstantial evidence.[6] There has been confusion regarding the third stage of the *McDonnell-Douglas* paradigm—where plaintiffs have an opportunity to rebut the defendant's legitimate non-discriminatory reasons for an adverse employment action.[7] Courts at both the federal and state level have had strikingly differing views on the level of pretext a plaintiff must show. Some courts required pretext plus, others pretext only, and others an intermediate standard.[8] In 2016, it was clear Massachusetts became a pretext only jurisdiction.[9] As a result of the Massachusetts Supreme Judicial Court's ("SJC") analysis and holdings in two recent employment discrimination cases, *Bulwer v. Mt. Auburn Hospital*[10] and *Verdrager v. Mintz*,[11] plaintiffs may more readily have the possibility of seeing their day in court with a trial by a jury of their peers.[12]

This Note argues that Massachusetts has lowered the burden of plaintiff employees to establish pretext by clarifying that Massachusetts is a pretext only jurisdiction and by outlining categories of indirect evidence from which discrimination may be inferred. This lowered burden is consistent with the greater understanding and evidence of support that implicit biases affect employment decisions, and that these are questions of fact that should be left to a jury to decide. This Note also argues that employers must be proactive in educating themselves and their workforce on diversity and stereotypical thinking in order to prevent discrimination.

Part I of this Note provides a legal background on federal and Massachusetts anti-discrimination laws regarding employment discrimination, including the evolution of the *McDonnell-Douglas* burden-shifting test, pretext, and summary judgment standards. Part II of this Note examines the two recently decided SJC decisions in *Bulwer*[13] and *Verdrager*[14]

Disparate Impact on Civil Rights and Employment Discrimination Cases, 158 U. PA. L. REV. 517, 549 (2010) ("summary judgment is granted disproportionately to dismiss civil rights and employment cases").

[6] *See generally* ALEXANDRA H. DEAL & LYNN G. WEISSBERG, *Overview of Employment Discrimination*, *in* MASSACHUSETTS EMPLOYMENT LAW § 5.1, § 5.2 (4th ed. 2017).

[7] *See id.*

[8] *See infra* Part III(A).

[9] *See* Bulwer v. Mount Auburn Hosp., 46 N.E.3d 24, 32 (Mass. 2016) ("Massachusetts is a pretext only jurisdiction").

[10] *See generally Bulwer*, 46 N.E.3d at 24.

[11] *See generally* Verdrager v. Mintz, 50 N.E.3d 778 (Mass. 2016).

[12] *See Parklane Hosiery Co.*, 439 U.S. at 343–44 (Rehnquist, C.J., dissenting) (advocating generally for plaintiffs to have the ability of a trial by a jury of their peers).

[13] *Bulwer*, 46 N.E.3d at 24.

regarding employment discrimination and why they are important for Massachusetts employment discrimination litigation—particularly the impact they may have in decreasing the role of summary judgment and opening employment litigation to more discrete forms of discrimination. Part III addresses how the pretext only standard is the fairest standard for employment discrimination claims and that the expansion of categories of indirect evidence from which discrimination may be inferred aligns with the more refined understanding of how discrimination is manifested in the workplace. Part IV discusses how the new clarified standards have been applied in trial court decisions, concluding that there has already been an impact on outcomes allowing a path for discrimination claims to stand while also not creating a presumption of all employment discrimination claims proceeding to trial. Part V suggests that employers must take steps to ensure they are making fully informed business decisions by understanding implicit biases and educating their employees at all levels to address and prevent discrimination.

I. Background

When applying for most jobs there is a time in the application process where an applicant reads the phrase describing that the business is "an equal opportunity employer."[15] This phrase is repeated often in a company's mission toward diversity and inclusion, but there is often a gap between these words and a company's actions during employment.[16] Federal laws, state laws, and agencies that help protect employees facing workplace discrimination, all exist to ensure that employers are held accountable for discrimination.[17]

A. *Anti-Discrimination Employment Laws*

1. The Development of Federal Law

Anti-discrimination laws exist both on the federal and state levels.[18] At the federal level there are many statutes that cover employment discrimination, including Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), and the

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[14] *Verdrager*, 50 N.E.3d at 778.

[15] *See* Cheryl L. Wade, *"We Are an Equal Opportunity Employer": Diversity Doublespeak*, 61 WASH. & LEE L. REV. 1541, 1580 (2004).

[16] *See id.* (describing how companies frequently fail to address discrimination in the workplace).

[17] *See infra* Parts I(A)(1)–(2).

[18] *See generally Discrimination-Employment Laws*, NAT'L CONF. OF STATE LEGISLATURES, https://perma.cc/WF5K-KCFM (last visited Oct. 20, 2019).

Americans with Disabilities Act ("ADA").[19] Title VII protects persons from discrimination "on the basis of race, color, national origin, sex (including pregnancy and gender identity), or religion."[20] The ADEA protects people aged 40 or older against discrimination because of their age.[21] The ADA protects a qualified person with a disability from discrimination, and also requires reasonable accommodations for the disabled employee unless there would be an undue hardship on the employer.[22] All of these statutes also shield those engaging in protected activity—which includes protecting individuals who complain of discrimination, file a charge of discrimination, or are involved in an investigation of a lawsuit of employment discrimination.[23] The United States Equal Employment Opportunity Commission ("EEOC") is the federal agency responsible for the administrative enforcement of anti-discrimination statutes against a job applicant or an employee—if generally that employer has at least fifteen employees, with twenty employees being required for age discrimination suits.[24]

2. Massachusetts Law

Massachusetts's law prohibits discrimination by employers with six or more employees from discriminating against current and prospective employees based on "race, color, religious creed, national origin, ancestry, sex, gender identity, age, criminal record (inquiries only), handicap (disability), mental illness, retaliation, sexual harassment, sexual orientation, active military personnel and genetics."[25] Some of these protections are afforded under both federal statutes and Mass. Gen. Laws c. 151B ("151B"), the Massachusetts non-discrimination statute known as the Fair Employment Practices Act.[26] In Massachusetts, each claim for discrimination must first be filed with the EEOC or with the Massachusetts Commission Against Discrimination ("MCAD"). The MCAD is the

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[19] *See generally Laws Enforced by EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://perma.cc/5WAZ-PBVM (last visited Oct. 20, 2019) (listing additional federal statutes including the Pregnancy Discrimination Act, the Equal Pay Act of 1963, Sections 102 and 103 of the Civil Rights Act of 1991, Sections 501 and 5050 of the Rehabilitation Act of 1973, and the Genetic Information Nondiscrimination Act of 2008).

[20] 42 U.S.C. § 2000e-2(b) (2017).

[21] 29 U.S.C. § 631 (2017).

[22] 42 U.S.C. § 12112 (2017).

[23] *See Laws Enforced by EEOC*, *supra* note 19.

[24] *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://perma.cc/ZU6Y-6C8N (last visited Oct. 20, 2019).

[25] *Overview of Types of Discrimination in Massachusetts*, MASS.GOV, https://perma.cc/2EKN-YF5H (last visited Oct. 20, 2019); *accord* MASS. GEN. LAWS ch. 151B, §4 (2016).

[26] *See* MASS. GEN. LAWS ch. 151B, § 4 (2016).

independent state agency that "enforces the Massachusetts anti-discrimination laws[,] the investigation of complaints of [d]iscrimination as a neutral entity, the prosecution and adjudication of cases, and through preventative training."[27] After a complaint is filed with the MCAD, the claim is then investigated with the end-goal being a determination of probable cause or lack of probable cause by the MCAD.[28] Since 2007, the probable cause finding rate "has ranged from a low of about 13% in 2016 to a high of about 31% in 2007 [with] the average [probable cause] rate from 2007 through 2016 . . . approximately 21%."[29]

A probable cause finding is one in which the MCAD has found "sufficient evidence to support a conclusion that unlawful discrimination may have occurred."[30] If probable cause is found there is then an effort to find a resolution between the parties, but if no resolution is reached the case goes to a public hearing.[31] Public hearings are formal hearings with "witnesses testifying under oath before an MCAD Commissioner or their designee."[32] A lack of probable cause finding is a determination of insufficient evidence "upon which a fact-finder could form a reasonable belief that it is more probable than not that the respondent committed an unlawful practice."[33] Complainants are able to withdraw their cases from the MCAD and then commence a court action by filing a complaint in court after ninety days of filing with the MCAD if they so choose.[34]

The MCAD's predecessor was the Fair Employment Practices Commission, first established in 1946 to enforce the 1946 Massachusetts Fair Employment Practice Act.[35] Today, the MCAD's jurisdiction includes employment as well as housing, credit, public accommodations, and access

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[27] *About the Commission Against Discrimination*, MASS.GOV, https://perma.cc/35DV-ESAL (last visited Oct. 20, 2019).

[28] *See generally Guide to the MCAD Complaint Process*, MASS.GOV, https://perma.cc/VL2X-H4UB (last visited Oct. 20, 2019).

[29] *MCAD Statistics*, CONFORTO LAW GROUP, https://perma.cc/7B4K-G8Q9 (last visited Oct. 20, 2019) (noting that these statistics are not fully randomized because "[e]mployers, for example, may choose to settle the strongest cases before they are filed with the MCAD or before a Probable Cause determination is made . . . an employee may remove her employment discrimination case to Superior Court 90 days after it has been filed with the MCAD.").

[30] *Guide to the MCAD Complaint Process*, *supra* note 28.

[31] *Guide to the MCAD Complaint Process*, *supra* note 28.

[32] *Guide to the MCAD Complaint Process*, *supra* note 28.

[33] *MCAD 2012 Annual Report*, MASS. COMM'N AGAINST DISCRIMINATION 3 (2012), https://perma.cc/D5QE-F2PE.

[34] *File a Motion to Amend, Appeal, Remove, or Withdraw a Discrimination Complaint*, MASS.GOV, https://perma.cc/9V2S-2END (last visited Oct. 20, 2019).

[35] *See About the Commission Against Discrimination*, *supra* note 27.

to education.[36] The MCAD partners with the U.S. Department of Housing and Urban Development, the EEOC, and other local human rights commissions in order to serve the Commonwealth.[37] The MCAD is empowered by 151B to exclusively handle discrimination claims and its determinations are subject to judicial review.[38] In 2015, 79.9% of the newly received MCAD complaints were employment related claims—2,430 employment complaints out of 3,042 total complaints.[39]

B. *Massachusetts 151B—Pretext and the Burden of Proof and Persuasion*

In order to meet a prima facie claim of employment discrimination of disparate treatment under 151B in either state court or within the MCAD, an employee must prove four main elements: (1) membership in a protected class; (2) harm; (3) discriminatory animus; and (4) causation.[40] A protected class is one of the classes enumerated under the applicable nondiscrimination statute;[41] harm is an adverse employment action;[42] discriminatory animus means discrimination was present; and causation is the connection between all of them.[43] The most heavily disputed issues in these types of employment actions concern the elements of discriminatory animus and causation.[44] The law has recognized that there is inherent

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[36] *About the Commission Against Discrimination*, *supra* note 27.

[37] *See About the Commission Against Discrimination*, *supra* note 27; *see also* JUSTINE H. BROUSSEAU, MASSACHUSETTS CONTINUING LEGAL EDUCATION, PURSUING AND DEFENDING CASES AT THE MCAD § 29.1.2 (4th ed. 2015) (explaining that the MCAD and EEOC have a work-sharing agreement where the MCAD can process cases under federal antidiscrimination statutes, which allows the person filing a complaint to only file once with either EEOC or MCAD).

[38] *See* BROUSSEAU, *supra* note 37, § 29.1.1.

[39] *MCAD 2015 Annual Report*, MASS. COMM'N AGAINST DISCRIMINATION 11 (2015), https://perma.cc/GJ5S-WTM6.

[40] *See* DEAL & WEISSBERG, *supra* note 6, § 5.2 (emphasizing that the Massachusetts SJC has highlighted that the four elements listed are distinct from "prima facie proof of discrimination or the defense to such a prima facie case").

[41] *Compare* MASS. GEN. LAWS ch. 151B, § 4.1 (2018) (defining the protected classes covered by Massachusetts state anti-discrimination law), *with* 42 U.S.C. § 2000(e) (2018) (defining the protected classes covered by Title VII the federal anti-discrimination law which has fewer defined protected classes than Massachusetts state law).

[42] Yee v. Massachusetts State Police, 481 Mass. 290, 296—97 (2019) (explaining the adverse action in this case, which can also include something an employer does that hurts an employee, such as terminating the employee, not selecting the employee for a promotion, giving the employee a poor evaluation, harassing the employee with derogatory remarks or behaviors, or denying the employee's request for an accommodation of a disability).

[43] *See id. at 298-303.*

[44] *See generally* DEAL & WEISBERG, *supra* note 6, § 5.2.

difficulty for the plaintiff employee when there is no direct evidence available, and has adopted a burden-shifting order of proof framework that allows for a rebuttable presumption of discrimination.[45]

1. The *McDonnell-Douglas* Burden-Shifting Paradigm

In employment discrimination cases there is frequently a lack of direct evidence or a "smoking gun" that a plaintiff can show to support their case in proving that they suffered an adverse employment action due to discrimination.[46] Direct evidence "is evidence that, 'if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace.'"[47] This direct evidence is so rarely available that in 1976 the SJC adopted the same framework articulated first by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*,[48] to analyze indirect or circumstantial evidence.[49] This burden-shifting order of proof framework ensures that an employer's ostensibly indiscriminate business action or explanation for a particular decision cannot be permitted to excuse conduct that is in fact unlawfully discriminatory.[50]

In Massachusetts, at the first stage, the plaintiff has the burden of showing a prima facie case of discrimination.[51] The elements of a prima facie case of discrimination vary based on the facts of a particular case, but the plaintiff must produce evidence for a disparate treatment claim that a jury would find that the plaintiff had: (1) membership in a protected class; (2) adequate job performance; and (3) termination or otherwise was subject to adverse employment action.[52] In the second stage, the employer has the burden of articulating a nondiscriminatory reason for the adverse employment action.[53] The employer must produce "credible evidence to show that the reason or reasons advanced were the real reasons."[54] If the employer fails at this stage then there is a presumption of support for

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[45] *See* DEAL & WEISBERG, *supra* note 6, § 5.2.

[46] *See* C. Alexa Abowitz, *Shifting Through the Burdens: a Pretext for Clarification - A Study of the Changing Burdens of Proof in Discrimination Cases*, 88 MASS. L. REV. 1, 2 (2003).

[47] JOHN F. ADKINS ET. AL., 45 MASS. PRAC., EMP. L. § 8:40 (3d ed. 2018).

[48] *See generally* 411 U.S. 792 (1973).

[49] *See id.* at 802–805. *See also* Wheelock Coll. v. Massachusetts Comm'n Against Discrimination, 355 N.E.2d 309, 314 (1976).

[50] *See Wheelock*, 355 N.E.2d at 314.

[51] *Id.* (adopting the *McDonnell-Douglas* burden shifting analysis for Massachusetts).

[52] *See* Marjorie Heins, *Massachusetts Civil Rights Law*, 76 MASS. L. REV. 77, 93 (1991) (explaining the flexibility in the elements); Verdrager v. Mintz, 50 N.E.3d 778, 793 (Mass. 2016) (describing the burden a plaintiff must meet for a prima facie case).

[53] *Verdrager*, 50 N.E.3d at 793.

[54] Abramian v. President & Fellows of Harvard Coll., 731 N.E.2d 1075, 1084 (2000) (quoting Blare v. Husky Injection Molding Sys. Boston, Inc., 646 N.E.2d 111, 115 (1995)).

judgment in favor of the employee.[55] In the third and final stage, the employee must respond to the legitimate nondiscriminatory reasoning of the employer, and produce evidence that the articulated reason is pretextual or show direct evidence of discrimination.[56] This three-stage *McDonnell-Douglas* burden shifting paradigm "lightens the employee's burden by requiring the employer to provide information at the second stage which 'narrows the field of possible reasons' for its decision, it does not go so far as to shift the burden of persuasion to the defendants."[57] The *McDonnell-Douglas* three-stage framework was established in the context of summary judgment to give judges "a method of organizing evidence and assigning the burdens of production and persuasion. It was not written as a prospective jury charge[;] . . . the burden shifting rules involve questions of law more appropriately left to the trial judge to decide."[58] Importantly, regardless of this burden shifting, the onus of production is ultimately on the employee who has the ultimate burden to prove the employment discrimination.[59]

There has been an evolution of changing criteria in relation to this *McDonnell-Douglas* test in the federal courts.[60] Many cases concerning the third stage have reached the United States Supreme Court.[61] Federal case law has a history of lower courts being in disagreement about what the burden of proof is at the third stage and what standard there should be for pretext findings.[62] One way to describe pretext is that it is something "more

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[55] *See Blare*, 646 N.E.2d at 115.

[56] *See Verdrager*, 50 N.E.3d at 793; Conforto Law Group, *Proving Employment Discrimination Through Circumstantial Evidence*, BOS. EMP. ATT'Y BLOG (Jan. 15, 2016), https://perma.cc/RY2E-N3NG.

[57] 17A MASS. PRAC., PRIMA FACIE CASE § 28.1 (5th ed.).

[58] 18 MASS. PRAC., MUNICIPAL LAW AND PRACTICE § 10.5 (5th ed.) (explaining Massachusetts employment discrimination law).

[59] *See* 10 MASS. PRAC. PROCEDURAL FORMS ANNOTATED § 29:1 (6th ed. 2016) (describing the burden in employment discrimination claims in Massachusetts where the employee must first establish a prima facie case of discrimination, then the burden shifting framework shifts the burden back to the employer who must articulate "legitimate, nondiscriminatory reasons" for the employment decision and must show evidence in support of its reasons, and finally the "ultimate burden of persuading the fact finder remains at all times with the employee").

[60] *See, e.g.*, Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 135 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–53 (1981).

[61] *See, e.g., Reeves*, 530 U.S. at 133; *St. Mary's Honor Ctr.*, 509 U.S. at 502; *Burdine*, 450 U.S. at 248.

[62] *See generally Reeves*, 530 U.S. at 148–49 (explaining that an employee plaintiff may not always be required to show independent evidence of discrimination if combined with the employer's purported reason being false to show pretext); *St. Mary's Honor Ctr.*, 509 U.S. at 502 (explaining that an employee must show pretext by showing that the employer's adverse

than an unusual act and means something worse than a business error; pretext means deceit used to cover one's tracks."[63] A more complete explanation of how pretext is shown is by "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons."[64] This explanation shows the complexities and breadth of what could constitute pretext.[65]

During the third stage of the *McDonnell-Douglas* framework, there has been considerable disagreement over what exactly a plaintiff must show to prove that an employer's reasons were "pretext."[66] There was at one time a distinct split between courts that required "pretext-only" and courts that required "pretext-plus."[67] Pretext-plus required a "plaintiff to establish not only that the employer's articulated reasons for the adverse action were false but also that the real reason for the adverse employment action was discrimination . . . a prima facie case and proof of falsity of the employer's reason is not sufficient."[68] Pretext-only is less burdensome during the third stage as it requires no additional evidence, but rather requires that a plaintiff "may establish intentional discrimination by proof that the reason articulated by the employer is not the real reason, i.e., that it is a pretext."[69] The United States Supreme Court created some turmoil when it seemingly adopted a standard of pretext-plus for federal cases, but then later attempted to clarify its position in subsequent decisions, creating confusion for the proper use of the *McDonnell-Douglas* burden-shifting framework.[70]

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employment action was motivated by discrimination).

[63] Russell Specter & Paul J. Spiegelman, 21 AM. JUR. TRIALS 1, § 111.6 (Feb. 2019).

[64] Brett D. Baber, *Pretext: Proving the Employer's Discriminatory Intent Through Circumstantial Evidence*, 30 ME. B.J. 68, 69 (2015) (explaining that "there is no mechanical formula for finding pretext it is the type of inquiry where everything depends on the individual facts").

[65] *See id.* at 71.

[66] *See generally* Tristin K. Green, *Making Sense of the McDonnell Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment under Title VII*, 87 CAL. L. REV. 983 (1999) (explaining the issues that arise from a lack of the Court's explanation of the term "pretext" within the third stage of the *McDonnel-Douglas* framework).

[67] *See* Hon. Bernice B. Donald & J. Eric Pardue, *Bringing Back Reasonable Inferences: A Short, Simple Suggestion for Addressing Some Problems at the Intersection of Employment Discrimination and Summary Judgment*, 57 N.Y.L. SCH. L. REV. 749, 754 (2013).

[68] Robert C. Cadle, *Burdens of Proof: Presumption and Pretext in Disparate Treatment Employment Discrimination Cases*, 78 MASS. L. REV. 122, 127 (1993).

[69] *Id.* at 126.

[70] *See* Conforto Law Group, *supra* note 56; *see also* Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 149 (2000) (holding that discrimination cases should go to a jury when there

Massachusetts state courts look to federal precedent interpreting Title VII, but are not bound by such interpretations in construing 151B.[71] Massachusetts case law, similar to federal case law, has been somewhat unclear in outlining what approach to take in analyzing the appropriate pretext standard. In some cases the SJC held that the employee must only prove the legitimate nondiscriminatory reason was not the true reason for the adverse employment action.[72] Yet, in other cases, the holding of the SJC required employees to meet a second part in their evidence against the employer, such as the defendant would not have done the adverse action "but for" a discriminatory reason.[73] Understanding the intricacies of the *McDonnell-Douglas* burden-shifting framework is important in understanding how it is analyzed during motions for summary judgment in employment discrimination litigation.[74]

Wheelock College v. Massachusetts Commission Against Discrimination[75] was the first time the SJC examined an employee's burden of proof in a discrimination case under 151B and looked to *McDonnell-Douglas* as guidance.[76] The SJC held that an employee met their burden for pretext "by proving by a preponderance of the evidence that the [employer's] facially proper reasons given for its action against him were not the real reasons for that action."[77] Massachusetts remained a pretext-only jurisdiction when in *Blare v. Husky*[78] the SJC held that "a plaintiff who has established a prima facie case and persuaded the trier of fact that the employer's articulated justification is not true but a pretext is entitled to judgment."[79] However, a pretext-only holding was reexamined and criticized in *Abramian v.*

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is evidence that an employer offered an inaccurate explanation for its action, the plaintiff does not always have to introduce additional evidence of discrimination); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993) (holding which caused confusion and the creation of a pretext-plus requirement that employee must show that the purported reason was pretext plus that the employer's actions were motivated by discrimination); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–53 (1981) (holding that the employer has a burden of production, not persuasion, after an employee establishes a prima facie case, and must "produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus").

71 *See* Cadle, *supra* note 68, at 122 n.68.

72 *See* Cadle, *supra* note 68 at 129 n.71 (describing a pretext only standard).

73 *See* Cadle, *supra* note 68 at 129 n.71 (describing a heightened pretext standard).

74 *See* Cadle, *supra* note 68 at 128 n.68.

75 355 N.E.2d 309, 315 (Mass. 1976).

76 *Id.* at 314 (adopting the principle of burden shifting outlined in federal case law).

77 *Id.* at 315 (adopting a pretext only standard).

78 646 N.E.2d 111 (Mass. 1995).

79 *Id.* at 117 (declining to follow federal case laws heighten pretext standard).

President and Fellows of Harvard College[80] when the SJC explicitly outlined that it never intended such result in *Blare v. Husky*.[81] Until the recent decision of *Bulwer*,[82] there remained uncertainty on whether Massachusetts was firmly a pretext-only jurisdiction as so clearly discussed in *Blare v. Husky*.[83]

C. *Summary Judgment Standard*

In 1973, the Massachusetts Rules of Civil Procedure ("MRCP") adopted Rule 56—a summary judgment rule to conclude cases in the time between pleadings and the trial—which is almost identical to the federal rule for summary judgment.[84] The moving party for summary judgment under MRCP Rule 56 has the burden of affirmatively demonstrating—through the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any—that there is no genuine issue of fact on any material issue raised by the pleadings and that they are entitled to judgment as a matter of law.[85] In employment discrimination cases it is almost always employers utilizing summary judgment motions, while very few plaintiff employees rely on summary judgment motions.[86]

II. The Significance of Two Recent Massachusetts Cases on Pretext and Implicit Bias

A. *Clarity in Employment Discrimination Standards in Massachusetts*

1. *Bulwer v. Mt. Auburn Hospital*

Bulwer v. Mt. Auburn Hospital[87] was about a wrongful termination claim

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[80] 731 N.E.2d 1075 (Mass. 2000).

[81] *Id.* at 1085 (finding that pretext only did not mean that a jury instruction should be given that said a finding of pretext required a finding of discrimination because it "stripped the jury of its fact finding role").

[82] Bulwer v. Mount Auburn Hosp., 46 N.E.3d 24, 33 (Mass. 2016) (quoting Blare v. Husky Injection Molding Sys. Boston, Inc., 646 N.E.2d 111, 115 (Mass. 1995) ("Massachusetts is a pretext only jurisdiction")).

[83] *See generally id.*

[84] *See* MASS. R. CIV. P. 56, Reporter's Notes (explaining that this rule will be a device for terminating litigation when trials are unnecessary because there are no disputed issues); *see also* FED. R. CIV. P. 56.

[85] *See* MASS. R. CIV. P. 56(c).

[86] *See* Vivian Berger et al., *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 48 (2005) (noting that most employers' counsel indicate during mediation proceedings that they will file a motion for summary judgment and that "practically no plaintiffs in employment cases make such motions").

[87] *Bulwer*, 46 N.E.3d at 24.

on the basis of race and national origin.[88] The Massachusetts Appeals Court reversed an order of summary judgment in favor of the defendants.[89] The SJC agreed and further expounded on what an employee's burden of proof was at the third stage of the burden-shifting framework and remanded the case to the Superior Court for further proceedings.[90]

The plaintiff, Bulwer, began his residency program in 2005 at Mt. Auburn Hospital.[91] Bulwer's performance reviews were in conflict as he received both very positive and very negative reviews.[92] In 2006, the Clinical Competence Committee ("CCC") of the hospital, the panel responsible for reviewing the evaluations of the residents in the program to discuss their progress,[93] sent a letter to Bulwer that the hospital would not renew his residency contract.[94] Bulwer, upon learning of this decision, asked for an ad hoc committee to follow the "due process" policy of the hospital. However, the committee did not follow all of the requirements of the hospital's policy.[95] In fact, Bulwer was verbally informed in May 2006 that his employment would be immediately terminated.[96] In August 2006, Bulwer filed a charge of discrimination with the MCAD against the hospital, and later in February 2009, Bulwer filed his complaint in the Superior Court.[97] The employer hospital won summary judgment in the lower court on motion by the defendants after discovery was completed.[98] Bulwer appealed the grant of summary judgment on the grounds that there were disputed issues of material facts that should have gone to trial.[99]

The issue for the SJC in reviewing this case was whether Bulwer met his burden of providing evidence from which a reasonable jury could infer the elements of his claim—that the defendants had discriminatory animus and that the animus was the reason he was terminated.[100] The SJC looked at the standard of how a plaintiff may survive a summary judgment in the

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[88] *Id.* at 32.

[89] *Id.* at 28.

[90] *Id.* at 35, 41.

[91] *Id.* at 28.

[92] *Id.* at 28. ("diametrically opposing reviews from supervising physicians, some laudatory and others deeply critical").

[93] *See Bulwer*, 46 N.E.3d at 29.

[94] *Id.* at 31.

[95] *Id.*

[96] *Id.* (stating that there were additional concerns for the safety of patients that had arisen over the past weeks).

[97] *Id.*

[98] *Bulwer*, 46 N.E.3d at 32.

[99] *Id.*

[100] *See id.*

pretrial context.[101] Direct evidence may be provided, or indirect or circumstantial evidence using the *McDonnell-Douglas* three-stage burden-shifting paradigm can be utilized.[102] The third stage of the paradigm was at issue here—whether Bulwer had provided evidence that would allow a reasonable jury to infer that the employer's proffered reasons were not true but a pretext.[103] The SJC reiterated that the "burden of persuasion at summary judgment remains with the defendants, who, 'as the moving part[ies], ha[ve] the burden of affirmatively demonstrating the absence of a genuine issue of material fact on every relevant issue, even if [they] would not have the burden on an issue if the case were to go to trial.'"[104] To prevail in overcoming a defendant's motion for summary judgment an employee plaintiff "does not necessarily have to show that the employer intentionally discriminated in order to proceed to trial."[105]

The SJC held that Bulwer had met his burden, and then provided five categories of evidence from which a jury could infer that the Defendant's proffered reasons were in fact a pretext:

> (1) inconsistent performance evaluations; (2) evidence that similarly situated non-black employees were treated differently than plaintiff; (3) testimony from a colleague regarding three instances where she and other staff members noticed and reported deficient performance by Caucasian doctors who received more favorable disciplinary action than plaintiff; (4) statements made by plaintiff's evaluators which, when viewed in light of other evidence of disparate treatment, could be interpreted as broad generalizations based in racial bias; and (5) defendants' failure to follow their own procedures in deciding to terminate plaintiff.[106]

The SJC explained that summary judgment in a case such as Bulwer's would be inappropriate because it could not follow the defendants' version of events without assessing credibility or weighing the evidence, which the Court stated would be inappropriate at the summary judgment stage.[107]

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[101] *Id.*

[102] *Id.*

[103] *Id.* at 34.

[104] *Bulwer*, 46 N.E.3d at 34 (citation omitted).

[105] Katie Johnston, *SJC Ruling Clears Path For Claims On Discrimination*, BOSTON GLOBE (Feb. 29, 2016), https://perma.cc/6RTT-EW3H.

[106] Gwen Nolan King & Christine M. Netski, *Bulwer v. Mount Auburn Hosp., No. SJC-11875, 2015 WL 10376073 (Mass. Feb. 29, 2016)*, MARTINDALE (Apr. 11, 2016), https://perma.cc/J92B-QZSG.

[107] *Id.*

2. *Verdrager v. Mintz*

The SJC again weighed in on pretext and summary judgment in *Verdrager*.[108] In June 2004, Verdrager began her employment at Mintz Levin's Boston office as a fifth-year associate in the employment, labor, and benefits division ("ELB"), having previously worked at the New York office.[109] Verdrager brought an action against Mintz alleging that her demotion and later termination from employment at the large Massachusetts law firm was discriminatorily based on her gender, and that the demotion and termination were also retaliatory, because she opposed her discrimination.[110] In January 2013, both parties filed motions for summary judgment, and the judge granted the defendants' motion and dismissed all of the plaintiff's claims and the plaintiff appealed.[111]

The SJC outlined its analysis the same way it did in *Bulwer*, by establishing the four elements required for an employee to survive summary judgment,[112] as well as the availability of using indirect or circumstantial evidence using the three-stage burden-shifting paradigm.[113] There was agreement on the first and second stage that Verdrager met her prima facie case.[114] To satisfy the next stage of offering nondiscriminatory reasons for the adverse employment actions, the defendant offered reasons for Verdrager's demotion and later termination, which included the mixed reviews she received, the refusal of partners to work with her, and her violations of the firm's ethics policy.[115] The real contention was with the third stage, and the SJC described the issue again as "whether the plaintiff has provided evidence sufficient to allow a reasonable jury to infer that the employer's articulated justification is not true but a pretext."[116] The SJC found that there were at least four categories of evidence that a jury might have inferred that the nondiscriminatory reasons offered by the defendants were in fact pretextual.[117] Categories included: (1) evidence of similarly situated male employees being treated more favorably; (2) evidence of employees undermining the plaintiff's performance; (3) evidence of criticisms made against the plaintiff that could be interpreted as

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[108] 50 N.E.3d 778 (Mass. 2016).

[109] *Id.* at 785.

[110] *Id.* at 784.

[111] *Id.* at 792.

[112] *Id.* at 793 ("membership in a protected class, harm, discriminatory animus, and causation").

[113] *Id.* (referring to the *McDonnell Douglas* burden shifting test).

[114] *Verdrager*, 50 N.E.3d at 794.

[115] *Id.* at 794.

[116] *Id.* at 793 (describing pretext only standard).

[117] *Id.* at 794.

stereotypical thinking; and (4) evidence that employer's general practice and policy and treatment of women at the firm was discriminatory.[118]

The SJC did not put weight on the defendant's contention that summary judgment was appropriate because Verdrager's case relied on so-called "conclusory allegations, improbable inferences, and unsupported speculation."[119] The SJC flatly refused to entertain this because for employment discrimination claims there is no necessity to rely on direct evidence, only that the offered indirect evidence allow for reasonable inferences that discriminatory animus was the real cause of the adverse employment action.[120] The SJC emphasized that summary judgment is a disfavored outcome in employment discrimination because it "is not for a court to decide on the basis of [briefs and transcripts]" whether they are correct, "but is for the fact finder after weighing the circumstantial evidence and assessing the credibility of the witnesses."[121]

The plaintiff also argued that even if the defendants' reason for her firing were determined to be the true reason—that her engaging in self-help discovery was impermissible and was a for cause reason—that her termination would still be illegal because her acts would have constituted protected activity under 151B.[122] The SJC in its opinion elaborated that they did not have to address the self-help issue directly since they had previously decided on other grounds that summary judgment in favor of the defendants was in error, but the SJC still looked to this question, as it was a matter of first impression in Massachusetts.[123] The SJC held that such conduct of self-help discovery may in certain circumstances constitute protected activity under 151B,[124] "but only if the employee's actions are reasonable in the totality of the circumstances."[125] This requires looking at the facts of each case to determine whether the employee's actions were "reasonable under the circumstances" and if yes, then it would constitute protected activity.[126] The SJC's decision to adopt a standard of totality of circumstances in determining the permissibility of self-help discovery[127] has the effect of delegating and "vesting lower-ranking courts with the

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[118] *Id.* at 795–96.

[119] *See id.* at 798–99

[120] *See Verdrager*, 50 N.E.3d at 798–99.

[121] *Id.* at 799.

[122] *Id.* at 792.

[123] *Id.* at 803.

[124] *See* MASS. GEN. LAWS ch. 151B, § 4(26) (2017).

[125] *Verdrager*, 50 N.E.3d at 803.

[126] *Id.* at 804.

[127] *Id.* at 803.

ultimate authority to dictate results in a wide range of cases."[128] The totality of circumstances test outlined by the SJC takes into consideration the competing interests of both employer and employee and allows for each set of circumstances to inform the court on whether the self-help discovery will be found reasonable under the circumstances.[129] The SJC was unwilling to adopt any bright-line rule, as employees have an equally important interest and right "to be free of discrimination in their employment and . . . to speak out when they are subjected to treatment that they reasonably believe violates that right."[130] The SJC included a final balancing factor in close cases, as it looked to the "broad remedial purposes that the legislature has advanced through our laws against discrimination."[131] The SJC's holding and reasoning establishes that juries will likely decide the determination of these factors and four categories of evidence.[132]

The *Bulwer* and *Verdrager* decisions will greatly impact employment litigation in Massachusetts as they provide "the road map . . . going forward for all employment lawyers on both sides of the aisle in future discrimination cases."[133] Trial court judges will use these decisions in deciding motions for summary judgment and questions of law.[134] It is clear that Massachusetts is a "pretext only jurisdiction."[135] The categories of evidence outlined highlight how a jury may infer that nondiscriminatory reasons offered by defendants for adverse employment actions are pretextual.[136] The SJC applied consistent language in analyzing employment discrimination, summary judgment, and reliance on evidence of implicit bias.[137] The SJC emphasized the importance of jury trials and the totality of circumstances in protecting the broad remedial purpose of 151B.[138]

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[128] Michael Coenen, *Rules Against Rulification*, 124 YALE L. J. 644, 687 (2014).

[129] *Verdrager*, 50 N.E.3d at 803–04.

[130] *Id.*

[131] *Id.* at 806.

[132] *See generally* Peter M. Panken, *Retaliation: The New Tsunami in Employment Litigation: Getting Mad, Getting Even, Getting Sued*, ALI-CLE COURSE MATERIALS (2016).

[133] Johnston, *supra* note 105.

[134] *See infra* Part IV.

[135] Bulwer v. Mount Auburn Hosp., 46 N.E.3d 24, 32 (Mass. 2016) (rejecting the defendant's contention that the plaintiff must show at the third stage that the reasons offered were "pretext *concealing discriminatory purpose*" which "overstated the plaintiff's burden at the summary judgment stage").

[136] *See Verdrager*, 50 N.E.3d at 794.

[137] *See supra* Parts II(A)(1)–(2).

[138] *See Verdrager*, 50 N.E.3d at 804.

ANALYSIS

In the SJC decisions of *Bulwer* and *Verdrager,* Massachusetts has cemented itself as a pretext only jurisdiction while also establishing flexible but distinct categories from which inferences of discrimination may be drawn.[139] Pretext only is the fairest standard to apply in employment discrimination cases due to the increased awareness of stereotypical thinking and the belief that summary judgment is a disfavored remedy in discrimination cases.[140] Massachusetts trial courts have begun interpreting and applying the SJC's articulated standards of categories of evidence that may be used to draw inferences of pretext, which will impact decisions on summary judgment motions before the courts.[141] One effect is that lower courts will be more apt to deny motions for summary judgment because there are now clearer categories where reasonable inferences of discrimination have been highlighted by the SJC[142]—this may cause an influx of employment discrimination cases going to jury trials at a time when there is a trend overall towards a decrease in trials.[143] An increase in the number of jury trials will be more beneficial for employees rather than employers who are usually the moving party for summary judgment.[144]

III. Pretext Only Is the Fairest Standard for Employment Discrimination Claims

A. *Federal Courts Have Embraced a Heightened Pretext Standard and Have Favored Summary Judgment to the Detriment of Employees*

Summary judgment has been the go-to method of an employer's

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[139] *See* David C. Henderson, *Rulings Explain How Employer Adverse Actions Can Seem Pretextual,* NEW ENG. IN-HOUSE (Aug. 10, 2016), https://perma.cc/4SRW-6T3H (outlining the different categories of inferences of discrimination available in both *Bulwer* and *Verdrager*).

[140] *See generally infra* Part III.

[141] *See* Damien DiGiovanni, Verdrager v. Mintz, Levin: *Expanding the Use of Indirect Evidence to Prove Pretext,* BOS. BAR J. (Aug. 24, 2016), https://perma.cc/EB9P-8JZJ (noting that lower courts will "ultimately decide" how much to weigh the factors outlined by the SJC's decisions).

[142] *See Verdrager,* 50 N.E.3d at 799; Bulwer v. Mount Auburn Hosp., 46 N.E.3d 24, 34 (Mass. 2016).

[143] *See generally* Robert Sheridan, *Massachusetts SJC Lightens Plaintiffs' Summary Judgment Burden in Employment Discrimination Cases,* EMP'T MATTERS (Mar. 11, 2016), https://perma.cc/TVD4-NAMG.

[144] Nathaniel Koppel, *Job-Discrimination Cases Tend To Fare Poorly in Federal Court,* WALL STREET J., (Feb. 19, 2009 11:59 PM), https://perma.cc/57YL-W8YF (highlighting that in federal courts, 90% of employment discriminations which were ended by summary judgment it was the employers who moved for the summary judgment).

attorney in handling an employment discrimination claim.[145] One federal district court judge opined that "when the close-of-discovery bell rings, the Rule 56 dog salivates."[146] Employment discrimination cases are notoriously hard for the plaintiff to prevail.[147] For example, "federal plaintiffs bringing non-employment discrimination cases succeed in approximately fifty percent of cases, while employment discrimination plaintiffs succeeded in only about fifteen percent of cases."[148] One judge lamented the role that federal courts have assumed as unfavorable towards employment discrimination claims:

> [with] motions for summary judgment, in general, is the creation of a serious and potentially life-threatening illness to our federal civil justice system as we have known it. We have gone from trial by jury to trial by paper, from trial lawyers to paper-pushing litigators, from trial judges to pretrial case managers, and, as a result, civil jury trials in federal court are vanishing rapidly before our very eyes.[149]

A 2008 report by the Federal Judicial Center, the research arm of the federal courts, found that throughout the nation, federal judges as a whole terminated 12.5% of employment discrimination cases before trial through summary judgments.[150] Comparatively, the same report found, only "3% of contract cases and 1.7% of personal-injury and property-damage suits were dismissed via summary judgments."[151] Determining the pretext requirement directly impacts courts' decisions in summary judgment rulings as the difference between "pretext only" and "pretext plus"

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[145] *See, e.g.*, Berger et al., *supra* note 86, at 48 (providing anecdotal evidence that most employers' defense counsel intend to file a Rule 56 motion for summary judgment).

[146] Bennett, *supra* note 3, at 692 (quoting Judge Milton Shadur) (describing the "instinctive response" that attorneys have especially in employment discrimination cases); *see also* Cadle, *supra* note 68, at 132 ("employers use summary judgment motions with increasing frequency to test the sufficiency of plaintiffs' evidence prior to trial").

[147] *See* Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 558 (2001) (explaining that "plaintiffs in employment discrimination suits generally faire worse than most other kinds of civil plaintiffs").

[148] Richard J. Perry, Jr., *Fisher and James Hijack the McDonnell Douglas Paradigm, Rewriting Discrimination Law in the Second Circuit: An Explanation for the High Rate of Summary Judgment in Discrimination Lawsuits*, 33 BUFF. PUB. INT. L.J. 87, 87 (2015) (quoting Bernice B. Donald & J. Eric Pardue, *Bringing Back Reasonable Inferences: A Short, Simple Suggestion for Addressing Some Problems at the Intersection of Employment Discrimination and Summary Judgment*, 57 N.Y.L. SCH. L. REV. 749, 752 (2012–13)).

[149] Bennett, *supra* note 3, at 708.

[150] Nathaniel Koppel, *Job-Discrimination Cases Tend To Fare Poorly in Federal Court*, WALL STREET J., (Feb. 19, 2009 11:59 p.m.), https://perma.cc/P9HP-WLAZ (finding of the 90% of cases ended by summary judgment, it was the employers who moved for the summary judgment).

[151] *Id.*

influences the *McDonnell-Douglas* framework at the third prong.[152] Pretext only is a more favored standard by employee plaintiffs and pretext plus is more favored by employer defendants.[153] A plaintiff in a pretext only jurisdiction must only offer evidence that the employer's articulated justification is not true, but a pretext, and that a jury could have the possibility of finding for the plaintiff if the case went to trial.[154]

The federal courts have not settled this area of law conclusively.[155] Currently, the pretext standard at the federal level is dimly defined and is most distinctive for what has been left unstated: the United States Supreme Court has held that federal courts should not apply pretext-only, but also has not adopted pretext-plus. The United States Supreme Court has settled on a middle ground, a "pretext-may rule," which allows for more flexibility in how lower courts interpret case law and apply the standards to the facts at lower courts.[156] Nationwide, the bar sees these lower federal courts as more unfriendly or unfavorable towards plaintiffs claiming employment discrimination.[157] There even has been a steady decline in the

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[152] *See* Verdrager v. Mintz, 50 N.E.3d 778, 793 (Mass. 2016) (explaining that the burden of persuasion at third stage of the paradigm affects the outcome of a summary judgment motion).

[153] *See* Cadle, *supra* note 68, at 132 (explaining that summary judgment before pretext plus decisions had been disfavored in employment discrimination cases because such cases involve questions of an employer's motive and intent, which usually are factual inquiries inappropriate for summary disposition).

[154] *Compare* Blare v. Husky Injection Molding Sys. Boston, Inc., 646 N.E.2d 111, 115 (Mass. 1995) (requiring only a showing of pretext), *with* Abramian v. President & Fellows of Harvard Coll., 731 N.E.2d 1075, 1085 (Mass. 2000) (requiring more than just an initial showing of pretext for judgment).

[155] *See generally* Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) (describing a seeming step back from pretext plus but acknowledged that sometimes a prima facie case with pretext is not always enough to find discrimination); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) (rejecting plaintiff friendly pretext-only). *See also* Hon. Bernice B. Donald & J. Eric Pardue, *Bringing Back Reasonable Inferences: A Short, Simple Suggestion for Addressing Some Problems at the Intersection of Employment Discrimination and Summary Judgment*, 57 N.Y.L. SCH. L. REV. 749, 755 (2013) (explaining the lack of clarity in federal courts surrounding the standards used in discrimination claims).

[156] Donald & Pardue, *supra* note 155, at 755.

[157] Donald & Pardue, *supra* note 155, at 755 (explaining that this unsettled area of law means that it "may still be possible for courts to apply a variation of pretext-plus and grant summary judgment for defendants, even in cases where the plaintiff has presented evidence of pretext from which a jury could infer discrimination"). *See generally* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103 (2009) (analyzing plaintiff's struggles in employment discrimination cases in federal courts compared to other civil cases in areas such as lower overall success rates, win rates at pretrial and trial, and more appeals).

number of plaintiffs turning to federal courts to file their cases.[158]

B. *Massachusetts SJC Articulated Clear Standards of Pretext Only and Categories of Evidence for Pretext to the Benefit of the Employee*

1. Pretext Only and Summary Judgment

Summary judgment should generally be deemed inappropriate if the *McDonnell-Douglas* burden shifting has reached its third stage, where the plaintiff is articulating reasons that the defendant's actions were pretext.[159] There is a general agreement that employment discrimination cases are extraordinarily fact-driven and frequently rely on circumstantial evidence for a plaintiff to prevail. Summary judgment is a tool that must be looked at warily to dispose of these types of cases.[160] Additionally, employment discrimination cases most frequently turn on the motive and intent of the defendant about their decision-making at this third stage of the burden-shifting paradigm.[161] Motive and intent are generally questions of fact, which should be left to a fact-finder, not for summary judgment.[162] The standards outlined in *Bulwer* and *Verdrager* are clear that pretext only is the standard in Massachusetts.[163] The SJC also provided clarity and focus for lower courts to consider categories of evidence when reviewing a motion for summary judgment.[164]

The Massachusetts employment bar's response to the two decisions demonstrate that though the standards are not wholly new, the clarity has caught the attention of the employment bar in Massachusetts, as the decisions will impact employment discrimination suits and pre-trial proceedings.[165] The Massachusetts Continuing Legal Education organization even hosted a seminar regarding *Bulwer* and *Verdrager*, stating

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[158] *See* Clermont & Schwab, *supra* note 157, at 104 n.4 (describing the statistical analysis of the federal court docket and the sharp decline in employment discrimination claims filed).

[159] *See* John M. Greaney & Lynn S. Muster, *Summary Judgment: The History, Development and Application of Rule 56 Since Its Promulgation in 1974*, 92 MASS. L. REV. 135, 138 (2010) (explaining that the last stage often includes factual questions and the civil procedure rules have a "prohibition against judicial resolution of disputed facts").

[160] *See, e.g.*, *First Circuit Remands Case, Agreeing With Penn State Law Clinic Arguments*, PENN STATE NEWS (Jan. 10, 2017), https://perma.cc/Z7WN-4HUE.

[161] *See* Koppel, *supra* text accompanying note 150.

[162] *See* MASS. R. CIV. P. 56. *See also* Cadle, *supra* note 68, at 132 ("factual inquiries inappropriate for summary disposition").

[163] Bulwer v. Mount Auburn Hosp., 46 N.E.3d 24, 32 (2016) ("Massachusetts is a pretext only jurisdiction.").

[164] *See generally* Stephanie M. Renaud, *SJC Clarifies Pretext Standard for Discrimination Claims*, 27 No. 2 MASS. EMP. L. LETTER 4 (May 2016).

[165] *See generally id.*; DiGiovanni, *supra* note 141.

that the two decisions have "significantly changed the [employment litigation] landscape, particularly with regard to the disposition of summary judgment motions in employment discrimination."[166] The SJC incisively described that the burden of a plaintiff at summary judgment is lighter than it would be at trial—at summary judgment a plaintiff only has to show that the defendant's offered legitimate nondiscriminatory reasons were not true or hid a discriminatory purpose, while at trial the plaintiff's offered pretext would have to support a verdict.[167] The moving party during summary judgment has the burden to show there are no pertinent questions of fact at issue.[168]

The SJC also reiterated that there should be no weighing of evidence, assessing credibility, or resolving issues of material fact at the summary judgment stage.[169] The SJC's holding on the availability of self-help discovery under a totality of circumstances test in *Verdrager* also supports the conclusion that deciding cases by summary judgment, without a full opportunity to be heard, is not generally a fair means of disposal of an employment discrimination case.[170] There are inherent competing interests of an employer's right to privacy and an employee's interest of access to information that may prove discrimination, and this should be considered by a totality of the circumstances test.[171] The SJC focuses on the broad remedial purposes of Massachusetts' anti-discrimination laws when considering these issues.[172]

2. The Expansion of Categories of Evidence from which Reasonable Juries Could Find Pretext in Massachusetts Aligns with the Expanded Understanding of Implicit Bias

In *Bulwer* and *Verdrager*, the SJC looked at the plaintiff's offered evidence in support of their argument that the defendant's reasons were

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166 *Bringing & Defending Summary Judgment Motions in Employment Cases*, MCLE, https://perma.cc/FF55-FNGH (last visited Oct. 20, 2019) ("faculty analyze how *Bulwer* and *Verdrager* impact strategy in filing—and even the decision of whether to file a summary judgment motion at all. Bring your questions to join the dialogue!").

167 Renaud, *supra* note 164; *see also* DiGiovanni, *supra* note 141 (describing that the SJC's "specific factors used to determine pretext arguably may lower the threshold for plaintiffs").

168 Renaud, *supra* note 164.

169 Bulwer v. Mount Auburn Hosp., 46 N.E.3d 24, 32 (2016). *See* Verdrager v. Mintz, 50 N.E.3d 778, 794 (Mass. 2016) ("indirect evidence is sufficient at the summary judgment stage because, [c]ombined with establishment of a prima facie case . . . a showing of pretext eliminates any legitimate explanation for the adverse employment action").

170 *See Verdrager*, 50 N.E.3d at 806.

171 *See id.*

172 *See generally* MASS. GEN. LAWS ch. 151B, § 4 (2016); *Verdrager*, 50 N.E.3d at 806 (Mass. 2016).

pretextual and found in both instances that there had been sufficient showing of pretext at this stage in the case.[173] The SJC considered categories of evidence such as traditional indirect circumstantial evidence like inconsistency in evaluations and the treatment of the plaintiff being different from other similarly situated members outside of their protected class.[174] The SJC then expanded indirect evidence to include "stereotypical thinking" based on race, gender or another protect class, which could lead a jury to find in combination with other evidence an impermissible basis for the adverse employment actions.[175]

The addition of stereotypical thinking being a determinative factor in employment discrimination claims relying on indirect evidence should bring concern to employers in Massachusetts because "stereotypes are based upon subjective views historically held by others," meaning that this categorical evidence of pretext evidence will likely "make it extraordinarily difficult for employers to rebut through summary judgment."[176] This is because a judge must not make credibility determinations at the summary judgment phase.[177] If there were evidence of stereotypical thinking or actions then it would be more appropriate for a fact determination at trial and not for a summary judgment decision, either for or against the defendant.[178] This expansion is the only way for a court to handle the myriad of ways discriminatory bias may influence adverse employment actions.

In *Bulwer*, the SJC held that some evaluations of Bulwer's performance pointed to broad stereotypical thinking and included language such as: "'too confident for his own good' . . . 'intern is not supposed to be smart' . . . 'least respectful person' . . . 'not well suited for a career in medicine.'"[179] The comments on Bulwer's performance evaluations could be found by a jury to "reflect a subconscious sense" that a black man and

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[173] *See Verdrager*, 50 N.E.3d at 803 ("Summary judgment on this claim was inappropriate"); *Bulwer*, 46 N.E.3d at 28 ("defendants were not entitled to summary judgment and that the plaintiff has presented evidence sufficient to allow a jury to hear his claims").

[174] *See* DiGiovanni, *supra* note 141; *see also Verdrager*, 50 N.E.3d at 795.

[175] *See generally Bulwer*, 46 N.E.3d at 35–39 (discussing five categories of evidence from which discriminatory animus could be inferred by a jury).

[176] DiGiovanni, *supra* note 141.

[177] *See* MASS. R. CIV. P. 56.

[178] *See Verdrager*, 50 N.E.3d at 803 ("Summary judgment on this claim was inappropriate"); *Bulwer*, 46 N.E.3d at 28 ("defendants were not entitled to summary judgment and that the plaintiff has presented evidence sufficient to allow a jury to hear his claims").

[179] *Bulwer*, 46 N.E.3d at 36–37 (explaining that likely these comments alone would not be sufficient for a finding of discrimination, but taken together with other evidence, "may lend support to such a finding").

foreigner did not "know his place."[180] These comments would almost always lead the case to go to a jury trial because there would always be disputed material facts present due to the weight put on the perceptions of these alleged biases. Therefore, the cases would be inappropriate for summary judgment.[181]

In *Verdrager*, the SJC also found that the general practice and policies of the firm gave rise to pretext because there were other female attorneys who had earlier reported that there were members of the firm that were biased against women.[182] One commentator thought that the reliance on generalized complaints without any direct evidence regarding the plaintiff in the present case was cause for concern because, "the Court made it virtually impossible for the firm [to] win on summary judgment, since there [was] no feasible way to deny a perceived bias without creating a disputed material fact."[183]

IV. Massachusetts Trial Court's Application of Pretext and Implicit Bias

Trial courts have begun interpreting and applying the holdings of *Bulwer* and *Verdrager* to current employment discrimination cases.[184] In the case of *Campos*,[185] a Massachusetts Bay Transportation Authority ("MBTA") Transit Police Lieutenant brought an action of employment discrimination against the MBTA alleging that because he was Hispanic he was suspended for ten days and was retaliated against for his prior complaint of discrimination.[186] The MBTA made a motion for summary judgment and the trial court granted the motion.[187] The decision emphasized that at summary judgment the judge may consider "pleadings, depositions, answers to interrogatories, and response to requests for admission [. . .] together with the affidavits" but the judge must not make credibility determinations.[188] The plaintiff in *Campos* sought to show discriminatory animus through circumstantial evidence since there was no direct

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[180] *Id.* at 37.

[181] *See* David C. Henderson, *5 Sure-Fire Ways Employers Can Make Nondiscriminatory Reasons Seem Pretextual*, 30 WESTLAW J. EMP'T 1, 4 (2016) ("appearing to have acted with pretext almost guarantees that an employee's disparate-treatment claim will survive to reach a jury").

[182] *See Verdrager*, 50 N.E.3d at 795–96.

[183] DiGiovanni, *supra* note 141.

[184] *See, e.g.*, Campos v. Mass. Bay Transp. Auth., No. 2015CV0080B, slip op. at *1 (Mass. Super. Ct. Feb. 21, 2017); Youngblood v. City of Boston Pub. Sch., No., SUCV201500309C, 2016 WL 7189833, at *1 (Mass. Super. Ct. Oct. 31, 2016).

[185] *Campos*, No. 2015CV0080B, at *1.

[186] *Id.*

[187] *Id.*

[188] *Id.* at *8.

evidence.[189] However, in awarding summary judgment for the defendant the court citing *Bulwer* explained that there was not sufficient circumstantial evidence for a jury to infer there was a pretext covering discriminatory animus.[190] The decision clearly identifies the weaknesses in the plaintiff's attempts at presenting circumstantial evidence of bias that a reasonable jury could infer impermissible bias.[191] *Campos* is an example of how the granting of summary judgment will not be fully eliminated, *Campos* shows that summary judgment will remain an acceptable method of resolving cases .[192]

In *Youngblood,*[193] the judge considered a motion to dismiss the plaintiff's complaint for failing to allege any adverse employment action, and in determining whether the plaintiff satisfied her prima facie case for employment discrimination the court cited to both *Bulwer* and *Verdrager.*[194] Particularly of note was the discussion of the relationship between stereotypical thinking and employment decisions.[195] Applying the stereotypical thinking rationale discussed in *Verdrager,* the court in *Youngblood* analogized the supervisor's criticisms of Verdrager to the supervisor's comments to Youngblood, finding the comments by plaintiff's supervisor in *Youngblood* to be enough for her to allege a prima facie case.[196] In *Youngblood,* the supervisor reminded the plaintiff that her identity as a woman was secondary to her identity as a teacher; this is comparable to what occurred in *Verdrager,* where the supervisor commented that the plaintiff was "less concerned about professional development than she was about pursuing a discrimination claim."[197] The comment by the supervisor in *Youngblood* could be interpreted as holding a discriminatory animus towards the plaintiff.[198]

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189 *Id.* at *9–11 (describing evidence that plaintiff attempted to rely on, such as the investigation being racial discriminatory because of its length being an effort to economically disadvantage the plaintiff, yet the court points out the plaintiff was paid a full salary throughout the investigation).

190 *Campos,* No. 2015CV0080B, at *10 (describing the plaintiff's introduced evidence as only providing "benign circumstances" which did not rise to pretext).

191 *See id.*

192 *See id.*

193 Youngblood v. City of Boston Pub. Sch., No., SUCV201500309C, 2016 WL 7189833, at *1 (Mass. Super. Ct. Oct. 31, 2016)

194 *See id.* at *7.

195 *See id.* at *7–8 (explaining that the SJC's holding that criticisms of a plaintiff's superiors "reflected stereotypical thinking" about women, which may "lend support that the adverse employment action was made on an impermissible basis").

196 *See id.* at *8.

197 *Id.*

198 *Id.* (explaining the categories of indirect evidence available and that one viable

Without the *Verdrager* and *Bulwer* decisions, Youngblood would not have been as likely to prevail in her prima facie case.[199] The SJC's decisions in *Verdrager* and *Bulwer* "changed the landscape and showed a very sophisticated understanding by the court of pretext and stereotyping."[200] Like many employment discrimination claims, in *Youngblood*, there was no "smoking gun" of glaringly obvious discrimination.[201] By following *Verdrager* and *Bulwer*, the judge in *Youngblood* confirmed that Massachusetts courts will be considering stereotypical thinking and analyzing whether there could be reasonable inferences of discriminatory animus present even if it is subtle discrimination because subtle discrimination is nevertheless against the law and an impermissible basis for employment decisions.[202]

The trial courts in Massachusetts have only just begun to apply the precedent set in *Verdrager* and *Bulwer*, but the *Youngblood* decision highlights how stereotypical comments have created more avenues for a plaintiff to prevail in meeting the prima facie case and how that could be translated to identifying pretext in a summary judgment proceeding.[203] The SJC has provided a pathway for plaintiffs in employment discrimination cases to follow in order to overcome the summary judgment hurdle, but it remains to be seen whether there will be a statistical impact on decisions of summary judgment being denied for employer defendants.[204] The impact implicit biases will have on employment discrimination cases will likely amplify as the media raises awareness of it by covering the topic.[205] With

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interpretation of the comments made to the plaintiff was that the supervisor resented the plaintiff's "efforts to punish John Doe for the purported sexual harassment and to implement gender-based learning to prevent future sexual harassment" thus contributing to the alleged retaliation due to stereotypical thinking).

[199] *See* Eric T. Berkman, *Teacher Can Bring Retaliation Claim Against School District*, MASS. LAW. WKLY. (Nov. 17, 2016), https://perma.cc/25YF-UAB9.

[200] *Id.* ("ruling shows that *Verdrager*, too, is having reverberations in the lower courts").

[201] *See id.* (explaining that "evidence of gender stereotyping could support an inference that an adverse employment action was based on impermissible grounds").

[202] *See id.* (explaining that the judge recognizes that it is possible that "stereotyping is cloaked behind a supposed concern" and that "the supposed concern for students is cloaking an inability to recognize that this employee is being humiliated and debased by gender-based harassment").

[203] *See id.* (explaining that a prima facie case of discrimination did exist and dismissal of the plaintiff's claim was inappropriate).

[204] *Day in Court: Summary Judgment v. Trial*, F. ROBERT ALLISON, https://perma.cc/UH93-RCT2 (last visited Oct. 20, 2019) (finding that currently in all civil cases in Massachusetts less than 2% reach jury trial which is consistent with the national average).

[205] *See* Jeff Barnes & Ehsan Tabesh, *Combating Implicit Bias in the Workplace*, LAW360, https://perma.cc/P983-F3RP (last visited Oct. 20, 2019) (noting that "implicit bias" is a term that is on the national stage regularly including during the 2016 U.S. Presidential

this change in awareness, the landscape of employment discrimination in Massachusetts is becoming more up to date on the latest sociological understanding of discrimination.[206] Employers must be aware of how broad generalizations and comments can be interpreted as in fact discriminatory and may be enough to prove pretext in employment discrimination litigation.[207]

V. Impact on Employers and Litigation

A. *Employers Must Be More Educated on Stereotyping and Unconscious Biases*

Discrimination in the workplace today is often different than the discrimination of the past.[208] Discrimination today is frequently not as direct and overt, with discriminatory statements rarely being offered as evidence.[209] Nevertheless, as the SJC has recognized there can be unconscious biases that affect employment decisions and environments, sometimes these implicit biases are more damaging to the individuals that face them.[210] Unconscious or implicit biases can be explained as a form of discrimination that "is specifically tied to the human cognitive process for receiving and storing information [and] researchers have demonstrated that individuals tend to process incoming information by relying on cognitive shortcuts—in essence, stereotypes."[211] Employers in Massachusetts must become educated on unconscious biases and stereotypical thinking and educate their workforce.[212]

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election when candidate "Hillary Clinton tied it to the shooting of an unarmed black man").

[206] *See generally id.* (describing studies that have shown unconscious mental shortcuts may lead to discrimination).

[207] *See id.* ("employers have and should continue to take steps to combat unconscious bias").

[208] *See* Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 482 (2005).

[209] *See id.* at 482 ("smoking gun statements have become largely a remnant of the past"). *But see* Eden King & Kristen Jones, *Why Subtle Bias Is So Often Worse than Blatant Discrimination*, HARV. BUS. REV. (July 13, 2016), https://perma.cc/6FSQ-9P44 (noting that there are still cases of blatant bias in the workplace "from employees who give black coworkers nooses, to pay disparities in soccer, to supervisors' admonitions that women need to 'get along with the boys'").

[210] *See* King & Jones, *supra* note 209 (noting the damage that implicit bias can have on individuals in the workplace including that "slights on a daily, even hourly, basis, the negative effects of subtle discrimination may build and accumulate at a rapid pace").

[211] Lee, *supra* note 208, at 482.

[212] *See* Leora F. Eisenstadt & Jeffrey R. Boles, *Intent and Liability in Employment Discrimination*, 53 AM. BUS. L.J. 607, 670 (2016) (explaining that debiasing research is "a new avenue in the fight against discrimination" in the workplaces).

Organizations and workplace leaders can achieve a goal of reduction in workplace discrimination by actively working towards and seeking to reduce implicit bias.[213] Options include developing "a workplace environment that emphasizes egalitarian norms, conducts organizational reviews, boosts exposure to counter stereotypes and stigmatized group members, follows equal opportunity hiring practices, and implements diversity training programs and seminars and experiential learning techniques."[214] Though costs for employers in the near term may increase, the overall impact will be a better workplace and a protection from employment discrimination suits that can be costly in both time and money.[215] Most employers understand that overt discrimination has no place in the workplace, and more should understand that unconscious biases should also be addressed to ensure fairness in the workplace.[216]

How to educate employees about implicit bias is by first opening a dialogue and addressing that it exists.[217] In June 2016, the U.S. Justice Department announced a mandate that its 33,000 federal agents and prosecutors would receive training to address and prevent unconscious bias to prevent those biases from influencing law enforcement decisions.[218] The Justice Department training brought the department in line with other local police departments across in the country that also implemented training programs.[219] Sally Yates, then Deputy Attorney General, and other heads of departments were all a part of those mandated to take the training, as Yates said everyone has "implicit biases—subtle, unconscious stereotypes or characterizations nearly everyone makes about certain groups of people."[220] Awareness of the implicit biases is the first step; the awareness should be supplemented by implementation of "behavioral goals and strategies" which have been found to support the reduction of

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213 *See id.* at 670.

214 *Id.*

215 *See generally* Barnes & Tabesh, *supra* note 205 (explaining that there will be an increase in claims of discrimination based on implicit bias causing more litigation so it would be best to educate employers to counteract this impact).

216 *See* Barnes & Tabesh, *supra* note 205; King & Jones, *supra* note 209 (describing that most people are unaware of their implicit biases unless the implicit biases are directly addressed).

217 *See* Barnes & Tabesh, *supra* note 205 (advocating for employers to take steps to combat unconscious bias by calling attention of it to their managers through surveys and tests).

218 Julia Edwards, *Justice Dept. Mandates 'Implicit Bias' Training For Agents, Lawyers*, REUTERS (June 27, 2016, 12:07 PM), https://perma.cc/N4LB-Y3P3.

219 *Id.* (highlighting that police departments in New York City, Baltimore, Seattle, New Orleans and Los Angeles have also implemented programs to educate offices to recognize biases).

220 *Id.*

bias.[221] Harvard Business School researchers suggest programs that include "practicing mindfulness, empathy related techniques like perspective taking, adopting an identity-conscious perspective, and deliberately setting pro-diversity goals."[222] These initiatives may seem like minor steps but the impact should be powerful and beneficial to employers to work towards a reduction in discrimination morally.[223] There is also the legal protection bonus of addressing and protecting the business from new claims of discrimination since Massachusetts has now recognized a lowered burden for plaintiff employees to meet, in regards to pretext and implicit bias, when bringing claims of employment discrimination against employers.[224]

CONCLUSION

The standards of pretext only and the expansion of categories of evidence from which to infer pretext to include implicit biases as outlined by the SJC in *Bulwer* and *Verdrager* is the correct and fair approach to take in employment discrimination actions. They are the best standards to handle the competing interests of employers and employees and the overarching goal of the legislation to eradicate discrimination in Massachusetts. Pretext only standard allows for more cases to survive motions for summary judgment and ensures that fact determinations are left for the juries to decide. The expansion and acceptance of implicit biases as evidence from which a reasonable jury could find impermissible discrimination from also ensures that Massachusetts is moving forward in accordance with scientific studies, which acknowledge that implicit bias remains an obstacle within the workplace. The SJC has provided guidance to both plaintiff and defendant to prepare for a new era of discrimination claims which do not rely on any overt action or inflammatory comments but are nevertheless just as damaging. Employers must meet demands to become cognizant of the implicit biases within the workplace and work towards addressing and eradicating discrimination. It remains to be seen whether Massachusetts will see more jury trials on claims of discrimination but with more cases entering litigation there will soon be even more clarity on how the SJC's decisions will impact employment discrimination litigation in Massachusetts.

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[221] King & Jones, *supra* note 209.

[222] King & Jones, *supra* note 209 (describing the benefits of the different programs found to be effective in the reduction of bias in the workplace).

[223] *See* King & Jones, *supra* note 209.

[224] See *supra* Part IV.

Reformation of the Supreme Court: Keeping Politics Out

*Ellen Knight**

INTRODUCTION

Chief Justice Roberts recently advised the Senate to ensure Supreme Court Justice nominees are qualified for their positions and to "leave politics out of it."[1] To say 2016 was a contentious year in politics is an understatement.[2] However, 2017 proved to be a stout rival.[3] Justice Antonin Scalia died on February 13, 2016, leaving his seat vacant.[4] President Barack Obama nominated Merrick Garland—a U.S. Appellate Court Judge for the District of Columbia—who was seen as a moderate judge with an impressive legal mind.[5] Democrats and Republicans alike supported his appointment at the appellate court level.[6] However,

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[1] Adam Liptak, *John Roberts Criticized Supreme Court Confirmation Process, Before There Was a Vacancy*, N.Y. TIMES (Mar. 21, 2016), https://perma.cc/QAZ5-WV85.

[2] *See* Lucas A. Powe, Jr., *How Supreme Court Nominations Became So Contentious*, WASH. POST (Feb. 19, 2016), https://perma.cc/Z97G-WDQS.

[3] *See* Tom LoBianco, *Democrats Ready for Gorsuch Battle on Capitol Hill*, CNN (Feb. 1, 2017, 3:08 AM ET), https://perma.cc/K3SB-NSF6; Michael D. Shear & Adam Liptak, *A Supreme Court Pick is Promised. A Political Brawl is Certain*, N.Y. TIMES (Jan. 24, 2017), https://perma.cc/7CG5-VAPC ("This is a Supreme Court seat that was stolen from the previous President.").

[4] *See* Matt Ford, *This Just In: Scalia Dies*, THE ATLANTIC (Feb. 13, 2016, 5:42 PM), https://perma.cc/4Z3R-PGL6/ (discussing the news of Justice Scalia's death and his many accomplishments on the Court).

[5] *See* Bill Chappell & Carrie Johnson, *Merrick Garland is Named as President Obama's Supreme Court Nominee*, NPR (Mar. 16, 2016, 7:58 AM ET), https://perma.cc/3UN9-BCBQ ("Garland has earned bipartisan support . . . from senior Republican figures that include Utah Republican Sen. Orrin Hatch.").

[6] *See* Ian Millhiser, *Who is Merrick Garland?*, THINK PROGRESS (Mar. 16, 2016, 1:56 PM ET),

upon President Obama's announcement of his choice, Senate Majority Leader Mitchell McConnell stated that Senate Republicans would not meet with the nominee or vote on his proposed nomination.[7] Judge Garland's nomination expired on January 3, 2017.[8]

During his campaign, President Donald Trump comprised a short list of potential nominations for the vacant seat on the Court.[9] On January 6, 2017 Senate Minority Leader Charles Schumer stated the Senate Democrats would block any nomination made by President Trump or the Republicans, unless it was "bipartisan and mainstream" and would fight "tooth and nail."[10] The Republicans argued that President Obama could not nominate a new Justice because he had little time remaining in office and the American people would choose the next Justice through the newly elected President.[11] Judge Garland has the longest-blocked Supreme Court Justice nomination in history.[12]

The United States currently has a system that encourages partisanship and places the executive and legislative branches at odds over the judiciary.[13] Special interest groups put pressure on Senate members to support or reject certain nominees, which creates an atmosphere of partisanship in Supreme Court confirmation hearings.[14] Presidents make campaign promises to nominate Justices with particular ideologies, making the confirmation process inherently political.[15] In order to change the current system, the

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https://perma.cc/3EE3-CHTX.

[7] *See* Harold Pollack, *How to Fix the Supreme Court Vacancy Mess*, POLITICO (Feb. 15, 2016), https://perma.cc/U7PQ-JWQN.

[8] *See* Amy Howe, *Garland Nomination Officially Expires*, SCOTUSBLOG (Jan. 3, 2017), https://perma.cc/VTN6-6UWA.

[9] Ariane de Vogue, *Examining the Top Contenders on Trump's Supreme Court List*, CNN (Jan. 24, 2017, 6:20 PM ET), https://perma.cc/JG7J-NDGF (noting Trump's top contenders were pulled from a pool of "conservative legal circles").

[10] Mallory Shelbourne, *Schumer Ready to Leave Supreme Court Seat Open*, THE HILL (Jan. 22, 2017, 9:40 AM), https://perma.cc/P2W8-EXDL.

[11] *See* Amita Kelly, *McConnell: Blocking Supreme Court Nomination 'About a Principle, Not a Person'*, NPR (Mar. 16, 2016, 12:31 PM), https://perma.cc/ZUP5-ZR23.

[12] *See* Andrew Strickler, *Garland Sets Record for Longest Wait for High Court Pick*, LAW360 (July 26, 2016, 4:14 PM), https://perma.cc/MJA6-Q6K9.

[13] *See* William Grayson Lambert, *The Real Debate Over the Senate's Role in the Confirmation Process*, 61 DUKE L.J. 1283, 1290 (2012) (discussing the current confirmation process for Supreme Court Justices, which consists of two views senators often take when confirming nominees: assertive or deferential).

[14] *See* Horace Cooper, *Tilting at Windmills: The Troubling Consequences of the Modern Supreme Court Confirmation Process*, 33 S.U. L. REV. 443 (2006) (noting that the Supreme Court Justice nomination process has become more partisan and contentious since the nomination of Justices under President Nixon).

[15] *See* RICHARD DAVIS, ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS

desire to politicize the Court must also change.[16]

This Note will examine reform of the Supreme Court Justice nomination process and the structure of the Supreme Court itself to aid in the separation of politics from the judiciary. Part I will provide a brief background of the formation of the Supreme Court and its operation in the early years of the United States. Part I will also discuss how the transformation of the Court's purpose and its confirmation process allowed it to evolve into the Court we have today. Part II will examine how the entanglement of politics in the Supreme Court has created distrust of the Court and its decisions. Part III notes that the Court's involvement in politics extends current government inefficiency from the legislature to the judiciary and defeats the intent of the Framers. Part III will also discuss the importance of the Supreme Court's isolation from politics and how its entrenchment in politics has a negative effect on the Court. Part IV will argue that reform is required in both the confirmation process and also in the Supreme Court structure itself—including its size and term limits. Part V will conclude this Note.

I. Background

A. *Early Years and Formation of the Court*

The United States Constitution sets out in Article III, § 1, "the judicial power of the United States, shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."[17] The Framers of the Constitution created this basic structure to allow the Supreme Court and Congress to determine in what capacity the Court would act as circumstances within the country fluctuated.[18] It was not until the Judiciary Act of 1789 that the Court began to resemble the current arrangement of a single Chief Justice with Associate Justices.[19]

The Court first established the ability to review the constitutionality of laws passed by Congress under Justice Marshall's decision in *Marbury v.*

16–17 (2005) [hereinafter DAVIS, ELECTING JUSTICE].

[16] *See* Michael Comiskey, *Not Guilty: The News Media in the Supreme Court Confirmation Process*, 15 J.L. & POL. 1 (1999) (discussing how media coverage of the Supreme Court Justice confirmation process has contributed to the politicization of the Court).

[17] U.S. CONST. art. III, § 1.

[18] *See Supreme Court History*, PBS NEWSHOUR (Jan. 1, 2003, 4:21 PM), https://perma.cc/5NLR-R4E8 (noting that the early period of the Supreme Court was difficult in determining its duties and it did not hear its first case until 1792).

[19] *See* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 11 (2011). Comically, Thomas Jefferson was against the Justices wearing a wig as their English counterparts did, stating: "[f]or Heaven's sake, discard the monstrous wig which makes the English judges look like rats peeping through benches of oakum!" BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 15 (1993).

Madison.[20] It was not until 1857, in *Dred Scott v. Sanford*, that the Court would determine that a federal statute was unconstitutional.[21] The Supreme Court also asserted itself as the final arbiter in the constitutionality of state laws in *Fletcher v. Peck*.[22] Today, the concept of judicial review is widely accepted by Americans, but this has not always been the case.[23] For example, in 1831, the Supreme Court ordered a stay on the execution of a convicted Cherokee man until his appeal was heard by the Court.[24] Georgia showed blatant disregard for the Court's order and executed the man prior to his appeal.[25] President Andrew Jackson vehemently disagreed with the Court when Justice Marshall later wrote an opinion that struck down a Georgia statute and acknowledged that the Constitution did not allow for states to regulate sovereign Indian nations.[26] President Jackson stated, "John Marshall has made his decision; now let him enforce it."[27] The respect for the Court's decisions, and enforcement of those decisions, is common in recent history.[28] The Court's power lies in the confidence of the American people and the respect of the other two branches of government.[29] Justice Brennan noted that "[t]he act of interpretation must be undertaken with full consciousness that it is, in a very real sense, the community's interpretation that is sought."[30] Should the executive branch choose not to enforce the Court's decisions—or the American people lose confidence in the decisions—the Court loses its legitimacy.[31]

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[20] Marbury v. Madison, 5 U.S. 137, 147 (1803); *see* SCHWARTZ, *supra* note 19, at 22.

[21] *See* Dred Scott v. Sanford, 60 U.S. 393, 455 (1857); SCHWARTZ, *supra* note 19, at 41.

[22] Fletcher v. Peck, 10 U.S. 87 (1810); *see* SCHWARTZ, *supra* note 19, at 43. ("The Union would be imperiled if we could not make that declaration as to the laws of the several states," expressed Justice Holmes).

[23] *See* Hon. Richard E. Welch, III, *"They Will Not Open Their Ears": Should We Listen to the Supreme Court and Should They Listen to Us?*, 47 NEW ENG. L. REV. 93, 96 (2012) (discussing judicial review throughout American history).

[24] *See* Cherokee Nation v. Georgia, 30 U.S. 1, 12 (1831); Welch, *supra* note 23, at 97.

[25] *See* Welch, *supra* note 23, at 96–97.

[26] *See* Welch, *supra* note 23, at 97–98 (noting examples of the other branches' disregard of judicial review).

[27] Welch, *supra* note 23, at 98.

[28] *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 3 (2007) (noting various cases that established the Court's power and purview in its early history).

[29] *See* Gary Apfel, *Whose Constitution is it Anyway? The Authority of the Judiciary's Interpretation of the Constitution*, 46 RUTGERS L. REV. 771, 798–99 (1994); Eugene V. Rostow, *Supreme Court and the People's Will*, 33 NOTRE DAME L. REV. 573, 579–80 (1958).

[30] Justice William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, Speech at the Georgetown University Text and Teaching Symposium (Oct. 12, 1985) (transcript available at https://perma.cc/5HH5-Y86D).

[31] *See* James L. Gibson & Michael J. Nelson, *The Legitimacy of the Supreme Court: Conventional*

B. *Supreme Court Justice Appointment Process*

The appointment process of Supreme Court Justices, as outlined in Article II, § 2, Clause 2 of the Constitution, states, "[t]he President . . . shall nominate, and by and with the Advice and Consent of the Senate, and appoint . . . Judges of the Supreme Court."[32] This clause is interpreted to mean that the President nominates a Justice, and the Senate confirms or rejects that nominee.[33] During the early years of the Court, Justices were nominated by the sitting President and then confirmed by the full Senate, with little to no conflict.[34] The creation of the Senate Judiciary Committee in 1816 produced a body within the Senate that would review judicial nominations, but it was often informal and brief—unlike the heightened scrutiny seen in the Senate Judiciary Committee hearings of today.[35]

Perhaps one of the reasons why judicial nomination hearings were so informal and without contention was because senators were not elected by the general public and only needed to pacify a select few for reelection.[36] The ratification of the Seventeenth Amendment held senators accountable to their constituents—which brought the battle for Senate seat reelection to the judiciary.[37] However, this is not the sole reason for the current state of the nomination process because the process remained outside the view of the public with no testimony from nominees.[38] The original purpose for nominee testimony was for undecided senators to inquire about a nominee's qualifications, character, and knowledge of the Constitution.[39] Today,

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Wisdoms and Recent Challenges Thereto, 10 ANN. REV. L. & SOC. SCI. 201, 202 (2014) (discussing the legitimacy of the Supreme Court, and if the public's confidence in the Court effects its decisions).

[32] U.S. CONST. art. II, § 2, cl. 2.

[33] *See* Donald E. Lively, *The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities*, 59 S. CAL. L. REV. 551 (1986) (discussing the process of how Supreme Court Justices are appointed).

[34] *See* Charles W. "Rocky" Rhodes, *Navigating the Path of the Supreme Appointment*, 38 FLA. ST. U. L. REV. 537, 549 (2011) (noting the evolution of the Supreme Court Justice appointment process).

[35] *See* PAUL M. COLLINS & LORI A. RINGHAND, SUPREME COURT CONFIRMATION HEARINGS AND CONSTITUTIONAL CHANGE 34 (2013); Rhodes, *supra* note 34, at 550–51.

[36] *See* Rhodes, *supra* note 34, at 550.

[37] U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII; *see* WENDY J. SCHILLER & CHARLES STEWART III, ELECTING THE SENATE: INDIRECT DEMOCRACY BEFORE THE SEVENTEENTH AMENDMENT 1 (2015); Rhodes, *supra* note 34, at 556.

[38] *See* Rhodes, *supra* note 34, at 554 (emphasizing Harlan Fiske Stone as the first nominee to appear at his own hearing); *see also* Ronald D. Rotunda, *The Confirmation Process for Supreme Court Justice in the Modern Era*, 37 EMORY L.J. 559 (1988).

[39] *See generally* Denis Steven Rutkus, *Questioning Supreme Court Nominees About Their Views on Legal or Constitutional Issues: A Recurring Issue*, CONG. RES. SERV. (June 23, 2010),

nominees are questioned about their political views and ideology to determine how they would rule on potential future cases before the Court.[40]

In recent years, Senate Judiciary Committee hearings have entailed live television coverage, including exhaustive investigation into a nominee's personal life.[41] The introduction of the external forces of media, public opinion, and special interest groups changed the landscape of the Committee hearing process.[42] For example, special interest groups and the press had an enormous impact on the nomination of Justice Brandeis in 1916.[43] Interest groups sent letters to various senators and the Senate Judiciary Committee, arguing for a particular outcome of this judicial appointment.[44] In 1930, for the first time, special interest groups were invited to testify at a Senate Judiciary Committee hearing for John Parker.[45] In both cases, it is clear that the pressure applied by external forces affected how senators voted in Supreme Court Justice nominations.[46] It was not until 1987—during the nomination of Robert Bork—that the current structure of heavy involvement of outside forces on the nomination process permeated.[47] Over 300 groups publicly opposed Bork's appointment in various forms, while about 100 supported it.[48] The result was Bork's defeat—fifty-eight to forty-two—with the largest margin in Supreme Court history.[49] The process now consists of "legitimized scorched-earth ideology wars over

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https://perma.cc/77DE-XGKN.

[40] *See* Dawn E. Johnsen, *Jurocracy and Distrust: Reconsidering the Federal Judicial Appointments Process: Should Ideology Matter in Selecting Federal Judges?: Ground Rules for the Debate*, 26 CARDOZO L. REV. 463, 468 (2005); Chris Amico, *Are Supreme Court Confirmation Hearings Getting Longer?*, PBS NEWSHOUR (July 1, 2010, 11:55 AM), https://perma.cc/855P-HKFJ.

[41] DAVIS, ELECTING JUSTICE, *supra* note 15, at 31 ("Judge Bork had his video rental record exhumed and studied for possible rental of pornographic films. Judge Souter has his marital status questioned and felt obligated to produce ex-girlfriends to testify to his virility.").

[42] *See* DAVIS, ELECTING JUSTICE, *supra* note 15, at 28–29; Eric Lipton, *Supreme Court Nomination Drives Groups from Left and Right to Fight*, N.Y. TIMES (Mar. 16, 2016), https://perma.cc/8MDM-V74N.

[43] *See* DAVIS, ELECTING JUSTICE, *supra* note 15, at 25–28 (reporting that conservative groups came out to oppose Brandeis, while many labor groups supported his appointment).

[44] *See* DAVIS, ELECTING JUSTICE, *supra* note 15, at 26–28.

[45] *See* DAVIS, ELECTING JUSTICE, *supra* note 15, at 28–29 (noting that the NAACP published many articles and lobbied various senators to vote against Parker's appointment, while Hoover enlisted the help of the Society of Friends to campaign on Parker's behalf).

[46] *See* JOHN ANTHONY MALTESE, THE SELLING OF SUPREME COURT NOMINEES 5 (1998).

[47] *See id.* at 7; Nina Totenberg, *Robert Bork's Supreme Court Nomination 'Changed Everything, Maybe Forever,'* NPR (Dec. 19, 2012, 4:33 PM), https://perma.cc/KA7E-KQ8Y.

[48] MALTESE, *supra* note 46, at 7. *See generally Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Before the Comm. on the Judiciary United States Senate*, 100th Cong. IV–LII (1987) (providing a list of witnesses and materials presented).

[49] Totenberg, *supra* note 47.

nominations at the Supreme Court."[50] The Senate most recently altered the rules of the confirmation process to require only a majority vote to confirm a Justice, rather than a sixty vote threshold.[51] The process has gone from an investigation into the fitness and qualifications of a Supreme Court Justice nominee, to a display of partisanship where senators score points with their constituents by using the hearings as a campaign platform.[52]

C. *Structure of the Court*

Justices may "hold their offices during good behavior," which indicates that Justices have tenure for life, pursuant to the condition.[53] The Court has always maintained that its members should remain on the bench for life.[54] This was intended to ensure judicial independence for its members and to shield them from the outside influence of elections.[55] Alexander Hamilton was a great supporter of the good behavior requirement because he believed it would safeguard judicial isolationism while keeping Justices in check.[56] Due to advances in medicine, the average tenure of a Justice has increased from roughly seven and a half years from 1789 to 1820 to over twenty-six years from 1971 to 2006.[57] It may have given the founding fathers pause to know that a Justice's tenure could be longer than the rule of a medieval monarch.[58]

The size of the Court has varied throughout history.[59] Originally, the

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[50] Totenberg, *supra* note 47.

[51] Alana Abramson, *Republicans Just Used the 'Nuclear Option' to Confirm Neil Gorsuch. What's That?*, TIME (Apr. 4, 2017, 2:44 PM), https://perma.cc/P6P5-TWKW ("[I]t is the first time the option has ever been used on a Supreme Court nominee, and will likely permanently alter the confirmation process.").

[52] *See* Paul E. Vaglica, *Step Aside, Mr. Senator: A Request for Members of the Senate Judiciary Committee to Give Up Their Mics*, 87 IND. L.J. 1791, 1792 (2012) (discussing inefficiency and lost purpose of the confirmation process for Supreme Court Justices).

[53] U.S. CONST. art. III, § 1.

[54] *See* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 777 (2006); Stuart Taylor, Jr., *Life Tenure is Too Long for Supreme Court Justices*, THE ATLANTIC (June 2005), https://perma.cc/8SZB-WVT3.

[55] *See* Calabresi & Lindgren, *supra* note 54, at 777.

[56] *See* Lyle Denniston, *Constitution Check: Should Supreme Court Justices Have Limits on Their Time in Office?*, NAT'L CONST. CTR. (Sept. 24, 2013), https://perma.cc/2SEP-MBFU.

[57] *See* Calabresi & Lindgren, *supra* note 54, at 778–79 (noting Justice Douglas served over thirty-six years and Justice Black served over thirty-four).

[58] Taylor, *supra* note 54.

[59] *See* F. Andrew Hessick & Samuel P. Jordan, *Setting the Size of the Supreme Court*, 41 ARIZ. ST. L.J. 645, 647 (2009) ("Each of the six times that Congress has changed the size of the court, the motivation has been something other than a judgment about which size would be best for the Supreme Court as an institution.").

Court had six members who would travel to different circuit courts.[60] Justices heard cases throughout the circuits, which occupied most of their time.[61] Congress continued to add a member of the Court each time a new circuit was added.[62] Eventually, the Justices were able to convince Congress to abandon the idea of the members riding to different circuits and instead allowed the Justices to remain in one chamber.[63] By 1863, there were ten sitting Justices, corresponding with the ten circuits.[64] In 1869, Congress settled on nine Justices for the Supreme Court.[65] This was the last major reorganization of the Supreme Court.[66] The topic of the Supreme Court size was not again broached until President Roosevelt, in 1937, suggested membership be raised to fifteen to furtively prevent his New Deal legislation from being struck down as unconstitutional.[67]

While the United States has nine Justices in its highest court, other countries' high courts hold larger numbers.[68] India, a fellow former British colony,[69] sits up to thirty-one Justices.[70] Due to the size of the Indian Supreme Court, it has the ability to hear more cases, which provides the public with greater access.[71] This makes the Indian Supreme Court more approachable.[72] The United States also has courts with a high number of sitting judges.[73]

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[60] *See* Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court's Cult Celebrity*, 78 GEO. WASH. L. REV. 1255, 1264 (2010); Jonathan Turley, *Is the Supreme Court Too Small? A Proposal for the Expansion of the United States Supreme Court*, RES IPSA LOQUITUR (June 22, 2012), https://perma.cc/45UP-GAXY [hereinafter Turley, *Supreme Court*].

[61] *See* Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386, 1391 (2006).

[62] *See* Turley, *Supreme Court*, *supra* note 60.

[63] *See* Turley, *Supreme Court*, *supra* note 60 (noting Justices hated riding the circuits and sitting as judges in lower courts because travel was long and arduous).

[64] *See* Hessick & Jordan, *supra* note 59, at 669 (noting that the addition of California and Oregon created the tenth circuit).

[65] *See* Hessick & Jordan, *supra* note 59, at 670.

[66] *Last Major Circuit Reorganization*, FED. JUD. CTR., https://perma.cc/UWV7-R5CR (last visited Oct. 15, 2019).

[67] *See* Hessick & Jordan, *supra* note 59, at 670–71.

[68] Turley, *Supreme Court*, *supra* note 60 ("Germany (16), Japan (15), United Kingdom (12), India (31), Israel (15)").

[69] *See* Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts*, 61 AM. J. COMP. L. 173, 175 (2013) (noting the impact that the size of the Indian Supreme Court has on its legal system).

[70] *Id.* at 182.

[71] *Id.*

[72] *Id.* ("[A]nyone who has suffered a violation of a constitutional right—from the poorest villager in the tribal areas of Jharkhand to the wealthiest business man in a high rise in Bombay—can appear before the panel of the Supreme Court to have their case heard.").

[73] *See* Alexandra Sadinsky, *Redefining En Banc Review in the Federal Courts of Appeals*, 82

Federal appellate courts gather all the sitting judges in the circuit to hear cases that are very important.[74] This is done because the appellate courts believe cases with higher importance or complex issues deserve the consideration and opinion of other judges.[75] Also, the courts believe that hearing cases en banc ensures that the decisions reached by the court will be better received because more judges reviewed the matter.[76] Overall, the size of the court is not set in stone.[77]

II. The Entanglement of Politics in the Supreme Court

The Framers of the Constitution specifically wished for the Court to remain isolated from public opinion and the politics of the executive and legislative branches.[78] The public's confidence in the rulings of the Supreme Court are paramount to American democracy because the Nation was founded on the principles of rule of law and confidence in the court system.[79] However, many Americans today express distrust of the Court and believe its decisions are entrenched in politics.[80] The Court previously enjoyed a popularity rate of roughly 70% in the early 1990s, but today only has about 45% of the American people's confidence.[81] The erosion of public confidence in the judiciary is often attributed to the public's perception of the judiciary's entanglement in politics.[82]

The perception of the Court's involvement in politics often stems from

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FORDHAM L. REV. 2001, 2029 (2014).

[74] *See id.*; Turley, *Supreme Court*, *supra* note 60.

[75] *See* Turley, *Supreme Court*, *supra* note 60.

[76] *See* Sadinsky, *supra* note 73, at 2004 (stating the term "*en banc*" means that a case is heard by a full bench of judges).

[77] *See* Hessick & Jordan, *supra* note 59, at 645 (noting that the change in size is not necessarily always for the right reason).

[78] *See generally* Eric Hamilton, *Politicizing the Supreme Court*, 65 STAN. L. REV. ONLINE 35 (2012) (illustrating the importance of keeping the Supreme Court insulated from the politics of Congress and the President).

[79] *See* PATRICIA MOY & MICHAEL PFAU, WITH MALICE TOWARDS ALL? THE MEDIA AND PUBLIC CONFIDENCE IN DEMOCRATIC INSTITUTIONS 17 (2000); Adam Edelman, *More Americans Trust Judges Judy and Joe Brown than Any Supreme Court Justice: Survey*, N.Y. DAILY NEWS (May 7, 2013, 6:58 PM), https://perma.cc/6ZS7-94GM.

[80] *See* Above the Law, *Stat of the Week: Public Confidence in SCOTUS at Historic Low* (Feb. 19, 2016, 5:21 PM), https://perma.cc/GHT6-QQF7; *See generally* Hamilton, *supra* note 78.

[81] *See* Eric Posner, *The Supreme Court's Loss of Prestige*, SLATE (Oct. 7, 2015, 5:04 PM), https://perma.cc/HW3A-Z2QF (noting unpopular decisions such as *Citizens United v. FEC*, 558 U.S. 310 (2010), and the string of 5–4 decisions that consistently arise).

[82] *See* Robinson, *supra* note 69, at 204 (illustrating how the Court is perceived as an extension of existing political parties); David Paul Kuhn, *The Incredible Polarization and Politicization of the Supreme Court*, THE ATLANTIC (June 29, 2012), https://perma.cc/47JL-HTM3.

the other branches of government.[83] For example, presidential candidates often promise to appoint Justices based on a particular ideology.[84] President Nixon promised to appoint "law and order" Justices during his campaign in 1968.[85] This placed the judiciary in politics because people saw the decisions that came from Nixon-selected Justices as favorable to law enforcement and dismissive of civil liberties, rather than decisions based on analysis of the law.[86] Often the Supreme Court is pulled into the political arena by the other branches.[87] One of the most infamous public attacks on the Supreme Court is that of President Franklin D. Roosevelt when he instituted his court-packing plan.[88] During one of his "Fireside Chats,"[89] President Roosevelt said:

> We have . . . reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court that will do justice under the Constitution—not over it.[90]

Roosevelt's statement suggested that the Supreme Court should not be the final arbiter of the law because it did not believe his court-packing plan was constitutional.[91]

Senators also pull the Court into political debates, which fuel the public perception of an ideological bias.[92] In 1962, Senator James Eastland alleged that the Supreme Court supported communism through its decisions, which threatened American Democracy.[93] The barrage of impulsive criticism of the

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[83] *See* Hamilton, *supra* note 78.

[84] *See* Joel K. Goldstein, *Choosing Justices: How Presidents Decide*, 26 J. L. & POL. 425, 449 (2011).

[85] *Id.*

[86] *See id.* at 449 n.89 (noting President Nixon offered the South an opportunity for his Court to remedy the liberal decisions that came out of the Warren Court).

[87] *See* Barry P. McDonald, *Supreme Court Justices: Are They Supposed to be Politicians in Black Robes?*, CNN (Oct. 27, 2016, 5:49 PM), https://perma.cc/G9K4-WLTT (discussing the presidential candidates' opinions on where they believed the Supreme Court should stand in shaping policy).

[88] *See* Bethany Blackstone & Greg Goelzhauser, *Presidential Rhetoric Toward the Supreme Court*, 97 JUDICATURE 179, 182 (2013).

[89] *See* AMOS KIEWE, FDR'S FIRST FIRESIDE CHAT: PUBLIC CONFIDENCE IN THE BANKING CRISIS 20 (2007).

[90] Blackstone & Goelzhauser, *supra* note 88, at 182.

[91] *See* Blackstone & Goelzhauser, *supra* note 88, at 182.

[92] *See* Richard A. Arenberg, *Will Partisan Politics Infect the Supreme Court?*, THE HILL (July 14, 2016, 1:37 PM), https://perma.cc/95KE-4KRS (during President Donald Trump's campaign, he suggested that Republican senators should delay any Supreme Court Justice nomination by President Obama, following the death of Justice Scalia).

[93] *See* Norman Dorsen, *Senator Eastland's Attack on The United States Supreme Court: An*

Court by other branches of government has persisted and continues to grow.[94] This rhetoric has increased with the advent of mass media, which carries the message of judicial partisanship across the country.[95] What is left is a "simplistic partisan or excessively ideologically based analysis of the [C]ourt."[96]

ANALYSIS

III. The Politicizing of the Supreme Court Will Be Its Undoing

A. *Political Involvement of the Court by Other Branches of Government Persistently Undermines its Legitimacy*

In recent history, the Court has become riddled with politics—which breeds distrust from the public—thus defeating the original intent of the Framers.[97] One example of how the politicization of the Court has hurt the American people is the Court's refusal to hear particular cases during the long vacancy of Justice Scalia, due to an anticipation of possible 4–4 decisions.[98] Multiple cases remained unheard until the Court was back at full capacity.[99] The Court denied certiorari of a case regarding the ability of transgender students to use a bathroom of their choice in public schools.[100] The Court waited to take on cases that were highly divisive until it was at full strength with nine members.[101] This delay placed litigants, and other stakeholders, in a state of uncertainty.[102] The Court continued to pass on hearing highly divisive and important cases until a new Justice was

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Analysis and Response, 111 U. PA. L. REV. 693 (1963).

[94] *See* Stephen B. Bright, *Political Attack on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decision?*, 72 N.Y.U. L. REV. 308 (1997).

[95] *See* Lipton, *supra* note 42.

[96] Eric Black, *Something Changed: Picking a Supreme Court Justice is Now a Partisan Battle*, MINN. POST (Nov. 26, 2012), https://perma.cc/X3KH-9JJ6.

[97] *See* MOY & PFAU, *supra* note 79.

[98] *See* Lyle Denniston, *The Three Cases Stymied By a Supreme Court Vacancy*, NAT'L CONST. CTR. (Oct. 24, 2016), https://perma.cc/4BMB-GJ39 (noting three cases as unscheduled for hearing: Trinity Lutheran Church of Columbia, Inc. v. Pauley, 138 S. Ct. 891 (2016); Microsoft v. Baker, 138 S. Ct. 890 (2016); Murr v. Wisconsin, 136 S. Ct. 890 (2016)).

[99] *See* Posner, *supra* note 81.

[100] Gloucester City Sch. Bd. v. G. G., No. 16-273, 2017 WL 855755, *1 (Mar. 6, 2017); *See* Lawrence Hurley, *U.S. High Court Action Leaves Transgender Students in Legal Limbo*, REUTERS (Mar. 6, 2017, 5:00 PM), https://perma.cc/B5T5-943L.

[101] *See* Kenneth W. Moffett, et. al., *The Supreme Court is Taking Far Fewer Cases Than Usual. Here's Why*, WASH. POST (June 2, 2016 2:00 PM EDT), https://perma.cc/3CHP-NWU2.

[102] *See* Posner, *supra* note 81.

confirmed.[103]

The erosion of the Court's legitimacy, as cited by Chief Justice Roberts, is because of "a steady term after term after term focus on 5–4 decisions."[104] The close margin on court decisions has left the American public with uncertainty, where a single vote shapes the lives of many Americans.[105] From 1801 to 1940, only roughly 2% of the Court's decisions were split 5–4, but since then more than 16% of the Court's decisions hinged on a single vote.[106] The concept of the swing vote creates a theory that there are two competing sides of the Court—conservative and liberal.[107] Chief Justice Roberts again noted, "the Court is ripe for a similar refocus on functioning as an institution, because if it doesn't, it's going to lose its credibility and legitimacy as an institution."[108] Justice Felix Frankfurter worked endlessly to get a unanimous decision in *Brown v. Board of Education* because the Court—acting as one—would show a finality of the decision and leave no room to question whether segregation of schools would stand.[109] Alternatively, the 5–4 decision in *Bush v. Gore* suggested politicization of the Court's decision, with votes essentially aligned by party, which invited the public to doubt the ultimate opinion of the majority.[110] After *Bush*, the public viewed the Court as a group of nine people with far too much power because the presidency came down to the ultimate decision of one person.[111] Dissent and discussion is important to the Court's rulings; however, the constant string of decisions that are separated by one vote leaves people questioning if Justices' decisions are based on politics and personal opinion or the law.[112] The lack of confidence in the

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[103] *See* Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), https://perma.cc/G8DC-WT44; Hurley, *supra* note 100.

[104] Kuhn, *supra* note 82 (illustrating the public's frustration with a very important issue being decided by one Justice's vote).

[105] *See* Robert E. Riggs, *When Every Vote Counts: 5–4 Decisions in the United States Supreme Court, 1900–90*, 21 HOFSTRA L. REV. 667, 667–68 (Spring 1993); Kuhn, *supra* note 82 (noting the 5–4 decision on the Affordable Care Act, which ensured all Americans had access to health care).

[106] *See* Kuhn, *supra* note 82.

[107] *See* Riggs, *supra* note 105, at 669.

[108] Kuhn, *supra* note 82.

[109] *See Supreme Court Sows Distrust With Justices' Political Activity*, BOS. GLOBE (June 11, 2012 12:00AM), https://perma.cc/Z8D5-N2E2.

[110] *See* Dahlia Lithwick, *No More* Bush v. Gore, SLATE (Oct. 25, 2016, 1:21 PM), https://perma.cc/6YG3-J6UU.

[111] *See Ten Years After* Bush v. Gore, *What's Changed?*, NPR (Dec. 12, 2010, 8:00 AM ET), https://perma.cc/T6FW-L48T ("What made the *Bush v. Gore* decision so controversial is that you had a group of nominally conservative justices who nominally believe in states' rights, who nominally believe in judicial restraint, jumping into a state election contest for the first time in American history and essentially shutting it down.").

[112] *See* Kuhn, *supra* note 82.

Court's decisions, gridlock, and animosity involved in Justice appointments has hindered the Court's function and purpose.[113]

The Court's legitimacy is affected not only by its 5–4 decisions but also by contentious criticism from other branches of government.[114] Senator Ted Cruz publicly stated, "[w]e have an out of control Court . . . if I'm elected president, every single Supreme Court Justice will faithfully follow the law and will not act like philosopher kings."[115] This is an indication to the public that the Court has become dysfunctional and does not have a proper place in the American democracy.[116] This is a dangerous path to pursue as the Supreme Court was meant to serve as a check and balance on the other branches of government in an effort to prevent tyranny.[117] Although questioning government institutions is an important part of a democracy, the questioning has moved from criticism of a specific line of analysis within a decision toward thwarting the purpose and function of the Court as a whole.[118]

Another factor that has eroded the legitimacy of the Court is the defeating remarks from the Justices themselves.[119] In 1935, during the Gold Clause Cases,[120] Justice James Clark McReynolds was so inflamed after disagreeing with the majority that he stated, "this is Nero at his worst. The Constitution as we know it is gone!"[121] Similarly, Justice Antonin Scalia, in his dissent in *King v. Burwell,* said that the majority decision "will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites."[122] Such a dissent declares to the public that

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[113] *See generally* Hamilton, *supra* note 78, at 35; Denniston, *supra* note 98.

[114] *See* Brian Christopher Jones, *Disparaging the Supreme Court, Part II: Questioning Institutional Legitimacy*, 2016 WIS. L. REV. 239, 253–54 (2016).

[115] *Id.* at 254.

[116] *See id.* at 253.

[117] *See, e.g.*, Alan M. Dershowitz, *Checks and Balances Can Slow Trump*, BOS. GLOBE (Feb. 22, 2017, 2:10 PM), https://perma.cc/4NS9-EMHP (noting the Supreme Court and other federal courts hold power to strike down executive orders).

[118] *See* Jones, *supra* note 114, at 252–53.

[119] *See* Jones, *supra* note 114, at 250.

[120] *See generally* United States v. Bankers Trust Co., 294 U.S. 240 (1935); Nortz v. United States, 249 U.S. 317 (1935); Perry v. United States, 249 U.S. 330 (1935).

[121] MELVIN I. UROFSKY, DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT'S HISTORY AND THE NATION'S CONSTITUTIONAL DIALOGUE 13 (2015) (noting Justice McReynolds' statement was so inflammatory that it was omitted from the opinion).

[122] King v. Burwell, 135 S. Ct. 2480, 2507 (2015) (Scalia, J., dissenting); *see* Ryan Teague Beckwith, *The 7 Best Lines from Scalia's Obamacare Dissent*, TIME (June 25, 2015), https://perma.cc/8JSC-MMGB.

the majority opinion is not legitimate.[123] This chips away at the public's confidence of the Court and its authority as final arbiter.[124] People may assume that if a dissenting Justice can make such a remark in a decision, then perhaps the decision is not binding.[125] Additionally, Justice Samuel Alito was noted to have pursed his lips and rolled his eyes while Justice Ginsburg read her dissent in *Vance v. Ball State*.[126] Such conduct by Supreme Court Justices is at least unprofessional, and at worst, whittles away at the respect the American public has for the judiciary.[127]

B. *The Supreme Court's Entanglement in Elections and Media Exposure Made It Part of the Political Sphere*

Presidential candidates often state during a campaign their intentions to appoint Justices with certain ideologies to the Supreme Court or to federal courts.[128] Recently, President Donald Trump promised to nominate an ideologically conservative Justice to the Court.[129] As a result, an activist group launched a one million dollar advertisement to remind him of this campaign promise.[130] This places the judiciary in the crosshairs of politics and makes it impossible for anyone to focus on anything other than ideology during the nomination process.[131] With the President attempting to placate his base voters, and senators doing the same, this makes for a contentious confirmation process, especially in a divided government.[132]

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123 *See From Consensus to Collegiality: The Origin of the "Respectful" Dissent*, 124 HARV. L. REV. 1305, 1325 (2011) (discussing how the assertive "I dissent" is a protest, while the decorum of "I respectfully dissent" is used as a tool to further discourse on a particular issue) [hereinafter *Respectful Dissent*].

124 *See id.*

125 *See id.*

126 *See* Vance v. Ball State University, 133 S.Ct. 2434, 2455–66 (2013) (Ginsburg, J., dissenting); Debra Cassens Weiss, *Did Alito Roll His Eyes During Ginsburg Dissent?*, A.B.A. J. (June 26, 2013, 10:40 AM), https://perma.cc/GK9F-ZPQN (discussing Justice Alito's disrespectful conduct during a State of the Union Address in which President Barack Obama discussed the Court's decision in *Citizens United v. FEC*).

127 *See* Jones, *supra* note 114, at 250.

128 *See* Goldstein, *supra* note 84.

129 *See* Craig Huey, *Trump Promises Conservative Pro-Life Supreme Court Judges*, ELECTION FORUM (May 20, 2016), https://perma.cc/P4RB-CW5A.

130 *See* Mike DeBonis, *The Fight to Confirm Trump's Supreme Court Nominee Starts Now*, WASH. POST (Nov. 25, 2016, 06:00 AM), https://perma.cc/3JNV-JAL7 (discussing how the Judicial Crisis Network launched an expensive advertisement campaign with messages of President Donald Trump's campaign promise to nominate a conservative Justice to the Court).

131 *See* DAVIS, ELECTING JUSTICE, *supra* note 15.

132 Carl Hulse, *Supreme Court Fight is More About Trump Than Gorsuch*, N.Y. TIMES (Feb. 2, 2017), https://perma.cc/AT4M-FQCG (Senator Schumer stated "[Trump's] administration, at least at its outset, seems to have less respect for the rule of law than any in recent memory . . .

The media's interest in and access to in the Supreme Court nomination process has increased in recent history.[133] What once was a relatively private process is now a public affair that is reported on frequently.[134] Special interest groups use the media to drive their agenda—to confirm or reject a particular nominee.[135] Special interest groups have the ability to reach an exorbitant amount of people with their messages through the use of the Internet and social media.[136] Senators receive pressure from the lobbyists for special interest groups and from their constituents, who see advertisements on television or social media.[137] The media's scrutiny into the professional and personal background of a nominee is launched the minute the nominee's name is released.[138] Due to the increased scrutiny and pressure from special interest groups and the public, senators now act as if they are on stage and must perform for those whose vote they count on for re-election.[139] Although media exposure of the Supreme Court nomination process has provided the general public with important information about nominees and the nomination procedure, it has also created many problems.[140]

Inefficiency in Congress has pushed many policy decisions into the judiciary, forcing politics to spill over into the Court.[141] The persistent congressional gridlock has forced the people to seek resolution from the Supreme Court.[142] Dissenting in *King v. Burwell*, Justice Scalia stated that

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[t]here's a special burden on this nominee to be an independent jurist.").

133 *See* DAVIS, ELECTING JUSTICE, *supra* note 15, at 28–29.

134 *See* Richard Davis, *Supreme Court Nominations and the News Media*, 57 ALB. L. REV. 1061, 1068 (1993) [hereinafter Davis, *Supreme Court Nominations*].

135 *See id.* at 1069; Catherine Ho, *Interests Groups Gear Up for What May Be Biggest Supreme Court Fight Since Robert Bork*, WASH. POST (Mar. 11, 2016), https://perma.cc/9GSV-7PUU (Tom Korologos, who advised Bork during his confirmation hearings stated "[t]he Bork allies were all over me for not buying ads, not starting up war rooms.").

136 *See* Steven I. Friedland, *"Advice and Consent" in the Appointment Clause: From Another Historical Perspective*, 64 DUKE L.J. 173, 190 (2015) (discussing how social media has played a positive role in informing people on Supreme Court issues, but has also been a detriment to the nomination process).

137 *See* Davis, *Supreme Court Nominations*, *supra* note 134, at 1069–70; Daniel R. DePetris, *Supreme Court Showdown: Both Parties Share Blame*, THE NAT'L INT. (Apr. 14, 2017), https://perma.cc/T3KT-39JK.

138 *See* DAVIS, ELECTING JUSTICE, *supra* note 15, at 28–29.

139 *See* Friedland, *supra* note 136, at 190–91; Robert L. Borosage, *The Supreme Court Wasn't Designed for This Political Heat*, REUTERS (Feb. 17, 2016), https://perma.cc/3UN9-QKKL.

140 *See* Friedland, *supra* note 136.

141 Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 370–71 (2010) (noting the Legislature's decision to allow some issues to be decided by lawsuit rather than legislation).

142 *See* Brad Bannon, *Making Laws is Dirty Work, but Someone Has to Do It*, U.S. NEWS (July 11,

Congress used particular language in the Affordable Care Act, and should therefore be charged with making any necessary changes.[143] During oral arguments in *King*, Justice Scalia asked counsel for the Obama Administration, since "Congress adjusts, [and] enacts a statute that takes care of the problem . . . [w]hy is that not going to happen here?"[144] The Solicitor General, Donald Verilli, Jr. responded, "this Congress?"[145] His statement drew laughter from the courtroom[146] because all in attendance knew of Congress's inability to pass any disputed legislation in a timely manner.[147] The American people are looking for legislative answers from the Court because Congress only produces stalemates.[148] However, this is not how the Supreme Court was meant to function.[149]

IV. Reformation of the Supreme Court Will Allow It to Function as the Final Arbiter of Law in the United States

The current Supreme Court Justice confirmation process is heavily laden with the spectacle of senators questioning a nominee's political ideology to score points with their voting base—or various special interest groups who will support them in upcoming elections—and is not focused on the nominee's actual merits.[150] The substantial politicization of the confirmation process has resulted in agonizingly long delays[151] and contentious hearings that are harmful to the American public.[152]

2013, 12:20 PM), https://perma.cc/WJL3-REUK ("When the legislature stops legislating, the unelected Supreme Court rushes in to fill the vacuum.").

143 King v. Burwell, 135 S. Ct. 2480, 2507 (2015) (Scalia, J., dissenting).

144 Adam Liptak, *Justices' Words Are Combed for Clues as Major Decisions Loom at Court*, N.Y. TIMES (June 15, 2015), https://perma.cc/SAX3-JXU9.

145 *Id.*

146 *See id.*

147 *See* Michael J. Teter, *Recusal Legislating: Congress's Answer to Institutional Stalemate*, 48 HARV. J. on LEGIS. 1 (2011) ("If pro is the opposite of con, what is the opposite of progress? Congress.").

148 *See* Jonathan Rauch, *How American Politics Went Insane*, THE ATLANTIC (July/Aug. 2016), https://perma.cc/NN86-QZMK ("Routine business such as passing a farm bill or a surface-transportation bill now takes years instead of weeks or months to complete.").

149 *See* Eric Black, *How the Supreme Court Has Come to Play a Policymaking Role*, MINN. POST (Nov. 20, 2012), https://perma.cc/FNC5-YPV3.

150 *See* DION FARGANIS & JUSTIN WEDEKING, SUPREME COURT CONFIRMATION HEARINGS IN THE U.S. SENATE: RECONSIDERING THE CHARADE 18 (2014); Vaglica, *supra* note 52 (discussing inefficiency and lost purpose of the confirmation process for Supreme Court Justices).

151 *See* Strickler, *supra* note 12.

152 *See* Totenberg, *supra* note 47 (stating that the Oxford English Dictionary notes the word "bork" as a verb meaning "to defame or vilify a person systematically").

A. *The Use of the American Bar Association in the Judicial Confirmation Process Could Aid Senators in Making Informed Decisions Without Ideology and Lambast*

One solution to help lessen the politicization of the Supreme Court Justice confirmation process would be to allow senators to ask American Bar Association ("ABA") sanctioned questions only after reviewing the ABA ratings on judicial nominees.[153] Currently, the ABA has a Standing Committee on the Federal Judiciary that examines the professional qualifications of nominees to solely focus on their "professional competence and judicial temperament" and does not consider the candidate's ideology or any political affiliation.[154] The evaluation process consists of reviewing the nominee's academic and professional abilities in analysis and writing.[155] Anyone with possible information on the candidate's veracity as a judge is consulted such as: other state and federal judges, practicing lawyers, legal professionals, community leaders, and academic professionals.[156] Law school deans and professors review the nominees' previous opinions and other written works, and also conduct an in-person interview.[157] The most qualified people to vet a Supreme Court Justice would be attorneys and judges, who understand the analysis of law and the practical implications of judicial opinions.[158] Senators could still meet with the nominee, ask questions, and ultimately decide if the nominee should sit on the bench.[159] However, limiting the type of questions and evaluation to a nominee's professional character and aptitude should be the main focus of the

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[153] *See ABA Standing Committee on the Federal Judiciary, What It Is and How It Works*, A.B.A., 9–11 (2009), https://perma.cc/U39S-UN69 [hereinafter *ABA Standing Committee*].

[154] *See* Laura E. Little, *The ABA's Role in Prescreening Federal Judicial Candidates: Are We Ready to Give Up on the Lawyers?*, 10 WM. & MARY BILL RTS. J. 37, 40 (2001); *ABA Standing Committee*, *supra* note 153 (discussing the various information the ABA obtains on judicial nominees for congressional consideration).

[155] *See ABA Standing Committee*, *supra* note 153; Roberta Cooper Ramo & N. Lee Cooper, Comment, *The American Bar Association's Integral Role in the Federal Judicial Selection Process: Excerpted Testimony of Roberta Cooper Ramo and N. Lee Cooper Before the Senate Judiciary Committee of the United States Senate May 21, 1996*, 12 J. CIV. RTS. & ECON. DEV. 93, 102–03 (1996).

[156] *See ABA Standing Committee*, *supra* note 153, at 4.

[157] *See ABA Standing Committee*, *supra* note 153, at 4–5.

[158] *See* Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judicial Performance*, 78 S. CAL. L. REV. 23, 35 (2004) ("Under the ABA process, a group of elite and supposedly nonpartisan lawyers conduct a highly rigorous inquiry into the candidate's background.").

[159] *See* Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. REV. 619, 622 (2002) (discussing different models for evaluating judicial nominations that would aid in selecting the best legal minds for the Court).

confirmation process.[160]

1. De-escalation of Political Rhetoric in the Senate Judiciary Hearings Could Lead to Better Nominations

The President also contributes to the current confirmation process problem.[161] Presidents will often nominate judges who are relatively unknown, with short track records, in order to ensure an easier confirmation.[162] If a judge has a long record of controversial or revolutionary decisions, this would give the Senate Judiciary Committee a reason to block the nomination.[163] This prevents some of the best legal minds from joining the Supreme Court, as they would never survive the political battle that is the current confirmation process.[164] With less political animosity in the Senate Judiciary Committee hearings, Presidents could be more inclined to consult senators prior to the hearings to probe their thoughts.[165]

2. Limiting the Influence of Special Interest Groups in the Supreme Court Justice Confirmation Process Would Lessen Political Rhetoric

As discussed, special interest groups and lobbyists have had a detrimental impact on the Supreme Court Justice nomination process.[166] Requiring nominees to prove they have no ties to any special interest groups could prevent influence from such groups.[167] Another way to prevent the extreme influence of special interest groups is to prevent any video recording of the Senate Judiciary Committee hearings.[168] Currently, Committee hearings are a spectacle, with special interest groups pushing

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[160] *See* Rutkus, *supra* note 39.

[161] *See* Turley, *Supreme Court*, *supra* note 60.

[162] *See* Turley, *Supreme Court*, *supra* note 60 (noting Justices Sandra Day O'Connor, David Souter, Clarence Thomas, and Elena Kagan were not well known judges upon their nominations).

[163] *See* Turley, *Supreme Court*, *supra* note 60.

[164] *See* Turley, *Supreme Court*, *supra* note 60.

[165] *See* Ludmilla Saveleiff, *Hyper-Partisanship's Impact on the Supreme Court Nomination and Confirmation Process*, 10 GEO. J.L. & PUB. POL'Y 563, 586 (2012) (noting President Bill Clinton discussed Justice Ginsburg's nomination with Senator Orrin Hatch, prior to the hearing, which help set an amicable tone for the duration of the process).

[166] *See supra* Part III(B).

[167] *See* William G. Myers, III, *The Role of Special Interest Groups in the Supreme Court Nomination of Robert Bork*, 17 HASTINGS CONST. L.Q. 399, 418 (1990) (noting a task force was created by former New York Senator Hugh Carey to make recommendations that would help limit special interest group influence in Supreme Court Justice confirmations).

[168] *See* Joseph Faria & David Markey, *Supreme Court Appointments After Thomas Nomination: Reforming the Confirmation Process*, 7 ST. JOHN'S J. CIV. RTS. & ECON. DEV. 389, 408–09 (1991).

senators to ask personal or ideological questions of nominees to probe for weaknesses, rather than to focus on their merits or professional prowess as judges.[169] The Constitution does not provide for direct election of Supreme Court Justices, and instead senators confirm or reject a nominee based on the wishes of special interest groups and their constituents.[170] However, it is unlikely that the influence of special interest groups will ever be stymied in the Supreme Court Justice confirmation process until the process becomes less fervently political.[171]

B. *Supreme Court Justices Should Have a Limited Tenure With No Reappointment*

1. Term Limits Would Decrease Contention in the Confirmation Process

Another way to ensure the Supreme Court functions as the Founders intended is to enact term limits.[172] Supreme Court Justices are living longer than ever before with the average tenure of twenty-eight years on the bench.[173] Due to advances in medicine and technology, life spans are much longer than when the Framers wrote the Constitution.[174] Many agree that placing a term limit on Supreme Court Justices would decrease "the temperature on confirmation battles by making the stakes a bit lower."[175] Establishing a term limit would make the confirmation process less contentious because one party would not feel that it was stuck with a Justice

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[169] *See* DAVIS, ELECTING JUSTICE, *supra* note 15, at 31; Tom Shales, *At the Senate Hearings, More of the Mortifying Spectacle*, WASH. POST (Oct. 14, 1991), https://perma.cc/K99A-CXNE.

[170] *See* DAVIS, ELECTING JUSTICE, *supra* note 15, at 31; Faria & Markey, *supra* note 168, at 409 ("The American people exercise control over the process directly, first by pressuring elected officials preemptively, through letter-writing and other campaigns, and second by acting retributively at the ballot box.").

[171] *See* James Huffman, *Supreme Court Politics*, HOOVER INST. (Apr. 7, 2016), https://perma.cc/9LEY-N6EB ("Unless and until our courts can find a way to restore the rule of law to their own work, we can expect that a politicized confirmation process will long survive the tenure of Chief Justice Roberts and the other sitting members of the Supreme Court."); Nina Totenberg, *Senate Democrats in Political Quagmire Over Supreme Court Nomination*, NPR (Feb. 2, 2017, 4:56 AM ET), https://perma.cc/P9N3-H73E.

[172] *See* Christopher Ingraham, *Why It's Time to Get Serious About Supreme Court Term Limits*, WASH. POST (Feb. 13, 2016 8:47 PM EST), https://perma.cc/DUT9-CLQU ("'The Constitution was written at a time when life tenure meant living into your 50s because that's what life expectancy was.'").

[173] Bruce Moyer, *Term Limits for the Justices?*, 62 FED. LAW. 6, 9 (2015).

[174] *See* Adrienne LaFrance, *Down With Lifetime Appointments*, SLATE (Nov. 12, 2013, 7:15 AM), https://perma.cc/R6G5-86SN.

[175] Ingraham, *supra* note 172.

opposed to its ideology for the next three decades.[176] Staggered term limits of eighteen years would allow a President to fill two Court vacancies per term with no possibility of reappointment.[177] Establishing term limits for members of the Court would result in the tenure of an average Justice being over fourteen years—closer to the average tenure of a Justice between 1789 and 1970.[178] By creating term limits for Supreme Court Justices, the legislative and executive branches may be less inclined to place all their political capital on a fight for a particular candidate, knowing another spot on the bench would be vacant in the near future.[179] Removing the possibility of reappointment affords the judiciary insulation from the political forces that are rampant in elections.[180]

2. Term Limits Could Create More Democratic Accountability

Senators were meant to assert the will of the people during the confirmation process; however, the process has become ineffective due to the slow turnover of Court vacancies.[181] If a limit of staggered eighteen-year terms were established, then regular turnover would allow a variety of Justices to sit on the Court.[182] Currently, vacancies occur infrequently and often in multiples, allowing one party to pack the Court with Justices of their choosing.[183] In part because of the lack of term limits, many people believe the Court is out of touch with the American public.[184]

The Court has shown that it struggles with cases regarding new technology and other innovative issues.[185] In one case before the Court, Justice Roberts "insinuated that police might reasonably suspect a person

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[176] *See* Jamal Greene, *A Fixed Term Would Lower the Heat*, N.Y. TIMES (Mar. 19, 2016, 12:18 PM), https://perma.cc/CCN2-2833.

[177] Calabresi & Lindgren, *supra* note 54, at 813 (2005); Greene, *supra* note 176.

[178] *See* Calabresi & Lindgren, *supra* note 54, at 775 (2005) (noting the average tenure between 1970 and 2005 was twenty-six years on the bench).

[179] *See* Jonathan H. Adler, *A Question About Placing Term Limits on Supreme Court Justices*, WASH. POST (Feb. 16, 2016 8:10 PM EST), https://perma.cc/4M4E-JVTX.

[180] *See* Calabresi & Lindgren, *supra* note 54, at 876.

[181] *See* Calabresi & Lindgren, *supra* note 54, at 811 ("Although turnover occurred regularly from 1789 through 1970, since 1970 Justices have stayed on the Court for longer than ever before, and the democratic instillation of public values on the Court through the selection of new judges has been correspondingly infrequent and irregular.").

[182] *See* Calabresi & Lindgren, *supra* note 54, at 834.

[183] *See* Calabresi & Lindgren, *supra* note 54, at 811; Pollack, *supra* note 7.

[184] *See* Robinson, *supra* note 69, at 198; Carrie Johnson, *Is it Time to Reconsider Lifetime Appointments to the Supreme Court?*, NPR (Feb. 17, 2016, 6:00 AM), https://perma.cc/TEG2-ER8G.

[185] *See* Trevor Timm, *Technology Law Will Soon Be Reshaped by People Who Don't Use Email*, THE GUARDIAN (May 3, 2014, 7:30 AM), https://perma.cc/V5WM-LTZ7.

who carries two cellphones of being a drug dealer."[186] However, it is clear that Justice Roberts was unaware that many people carry two cellphones, including "a large portion of the DC political class . . . including many of his law clerks."[187] Justice Alito also criticized Justice Scalia for using eighteenth century law in a case regarding GPS tracking devices.[188] Term limits would allow for more turnover to permit younger Justices to determine these cases that involve modern technology and modern issues.[189]

C. *Expanding the Size of the Supreme Court Would Allow for Fuller and More Comprehensive Opinions*

One of the main concerns about the Supreme Court is that there is a large amount of power concentrated in the hands of a few people.[190] The number of Justices on the Court used to comport with the number of federal circuit courts, but the Court's size was fixed at nine without much debate or consideration of the pros and cons of such a number.[191] Adding more members to the Court would increase the Court's ability to share differing opinions due to having a larger group assembled.[192] Also, spreading the decision-making power throughout a larger group of individuals prevents the ill-advised concentration of power amid the few.[193]

In *Bush v. Gore*, many people began examining the size of the Court as the presidency came down to the decision of five people.[194] It started the conversation because "one of the most disturbing aspects of the case was not simply that some Justices appeared to depart from prior legal views but that the court insisted that its opinion could not be used as precedent and was 'limited to the present circumstances.'"[195] Therefore, the Justices only wanted their reasoning to be used to choose the next President.[196] A nineteen member Court would allow for additional opinions and differing points of

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[186] *Id.*

[187] *Id.*

[188] Timm, *supra* note 185; *see* United States v. Jones, 132 S. Ct. 945, 956–57 (2012) (Alito, J., concurring).

[189] *See* Calabresi & Lindgren, *supra* note 54, at 832; Johnson, *supra* note 184.

[190] *See* Turley, *Supreme Court*, *supra* note 60.

[191] *See* Tracy E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts of Appeals Image*, 58 DUKE L.J. 1439, 1456 (2009).

[192] *See id.* at 1473.

[193] *See* Turley, *Supreme Court*, *supra* note 60.

[194] Bush v. Gore, 531 U.S. 98, 109 (2000).

[195] *Id.*; Jonathan Turley, *The Fate of Health Care Shouldn't Come Down to 9 Justices. Try 19.*, WASH. POST (June 22, 2012), https://perma.cc/2RUC-Y38Y [hereinafter Turley, *9 Justices*].

[196] Turley, *9 Justices*, *supra* note 195.

view to make Court decisions more comprehensive.[197] A larger Court could help dispel the suggestion of political entanglement.[198] The United States is composed of people from all walks of life, and having a diverse assortment of Justices would be beneficial for the varying cases that come before it.[199] One example of a larger court size being beneficial is when the federal appellate courts hear a case en banc.[200] Federal appellate courts allow all of the sitting judges within the circuit to hear a case that is of great importance en banc.[201] This is because the appellate courts believe cases with complex issues or those with higher importance deserve the involvement and opinion of other judges.[202] The courts also believe that "en banc rehearings allow more complete consideration (since more judges are present) and provides perspective not available to the panel."[203] Therefore, it would be prudent to have a larger number of Justices hearing cases at the highest court in the United States.[204]

If there were nineteen Justices sitting on the Supreme Court, there would be an increased chance that one member would raise a point or argument that the others did not think of, creating more dialogue and better written decisions.[205] Also, the larger the group within the Court, the less influence one Justice has on a decision.[206] Although some countries have a number of members that would be unwieldy (Spain has 74 and France has 124), nineteen provides enough members for diversity, but not so many that it would hinder discussion.[207]

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197 *See* Turley, *Supreme Court*, *supra* note 60.

198 *See* Robinson, *supra* note 69, at 207 (noting the impact that the size of the Indian Supreme Court has on its legal system).

199 *See* Hessick & Jordan, *supra* note 59, at 678 (noting that having a more diverse Court may make its decisions more legitimate to a larger set of people).

200 *See* Sadinsky, *supra* note 73.

201 *See* Sadinsky, *supra* note 73, at 2030; Turley, *Supreme Court*, *supra* note 60.

202 *See* Turley, *Supreme Court*, *supra* note 60.

203 Sadinsky, *supra* note 73, at 2030 (noting having more judges available to review the case is beneficial because it allows for more discussion and analysis for the decision).

204 *See* Sadinsky, *supra* note 73, at 2030.

205 *See* Hessick & Jordan, *supra* note 59, at 681 ("The presence of a devil's advocate forces a group to test assumptions and can generally reduce the incidence of deliberative failures like group think and informational cascades.").

206 Jason Russell, *Congress Should Consider Adding More Supreme Court Justices*, WASH. EXAMINER (Nov. 16, 2016, 1:09 AM), https://perma.cc/EKC3-JYLW.

207 *See* Turley, *Supreme Court*, *supra* note 60.

CONCLUSION

Reform to the Supreme Court confirmation process, imposition of Justice term limits, and the size of the Court could remedy some of the problems plaguing the Court today. Placing term limits on sitting Justices and allowing more Justices to sit on the Court could lessen the contention and vitriol in the confirmation process. At this juncture, the confirmation process has become so contentious that the Senate voting rules to nominate a particular Justice have been changed.[208] It is unclear what effect this change will have on future Supreme Court Justice confirmation proceedings. However, it is clear that the political fight in the legislative and executive branches has spilled over into the judiciary and—without reform—countless battles loom on the horizon.[209]

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[208] *See* Abramson, *supra* note 51 (noting Republicans altered the Senate rules to require only a majority vote to confirm Justice Neil Gorsuch).

[209] *See* Erica Werner & Mark Sherman, *Democrats "Deeply Disappointed" as Neil Gorsuch's Senate Confirmation Hearing Begins*, TIME (Mar. 20, 2017), https://perma.cc/JYV6-EYSZ ("Senate Democrats remain furious about that GOP obstruction, and are under intense pressure from liberal base voters opposed to Trump, but they enter the hearing divided over how hard to fight his [C]ourt choice.").

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Combating the Opioid Crisis: The Department of Health and Human Services Must Update EMTALA

*Harley Clement**

INTRODUCTION

Medical care in hospital-based emergency departments has undergone a fundamental transformation over the past five decades, as it evolved to meet the changing economic, political, and cultural needs of society.[1] Prior to the 1960s, hospital emergency departments were small areas, often a single room, within a hospital in which only a limited number of after-hours emergencies were seen.[2] In those days, medical providers had no formal training or education in emergency medicine and employment positions within the department were often reserved for "doctors who could not keep a job, alcoholics, and drifters" or foreign medical school students.[3] Although the quality of care provided in emergency departments steadily improved by the 1960s and 1970s, Congress would not require emergency departments to provide care to all individuals regardless of their ability to pay until 1986.[4] This capitalistic approach to emergency medicine resulted in people being denied access to care, at times, while in the midst of a medical emergency.[5] Today, emergency rooms are large, complex departments that employ elite physicians with

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1 JESSE M. PINES et al., EMERGENCY CARE AND THE PUBLIC'S HEALTH 3 (2014).

2 INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, HOSPITAL-BASED EMERGENCY CARE: AT THE BREAKING POINT 37 (2007).

3 *Id.*

4 *See* 42 U.S.C. § 1395dd (2011).

5 Eric D. Dakhari, *Patient Dumping and the Emergency Medical Treatment Labor Act (EMTALA)*, THE NAT'L L. REV. (Oct. 11, 2016), https://perma.cc/Z9P6-RD2A.

extensive training in emergency medicine, and are equipped with state-of-the-art technology.[6] These departments often operate as the front door of a hospital and provide twenty-four hour access to acute medical care to anyone who needs it regardless of their ability to pay.[7] Despite this progress, society's needs continue to evolve, and so to must emergency departments and the laws that govern them.[8]

Today, the United States is in the throes of an opioid epidemic that claims the lives of 115 people every day, and is estimated to cost the national economy $504 billion annually.[9] To combat this crisis, states and federal agencies have proposed, and many states have implemented, a number of both legal and non-legal strategies aimed at the prevention, treatment, reversal, and recovery of opioid addiction.[10] For emergency departments to help combat this crisis, they need to be able to better treat individuals who have opioid use disorders.[11] Amending the Emergency Medical Treatment and Active Labor Act ("EMTALA") to include medication assisted treatment in its definition of "stabilization," to require Prescription Drug Monitoring Program ("PDMP") checks prior to prescribing opioids, and to provide incentives for emergency departments to hire personnel who are trained in opioid use disorders, is necessary for emergency departments to do their

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[6] PINES et al., *supra* note 1, at 3.

[7] PINES et al., *supra* note 1, at 3.

[8] *See generally* West's Encyclopedia of American Law, *Roscoe Pound*, LEGAL DICTIONARY, https://perma.cc/LN4V-7TH9 (last visited Oct. 24, 2019) (quoting Roscoe Pound, a leading figure in twentieth century legal thought and former dean of Harvard Law School as saying, "The law must be stable, but it must not stand still." The page further discusses the pragmatic theory of law as opposed to realism and originalism.).

[9] U.S. Dep't of Health and Human Services, *What is the U.S. Opioid Epidemic*, HHS, https://perma.cc/HLJ4-PFPN (last visited Oct. 24, 2019).

[10] *See* Casey Leins, *The State of the Opioid Crisis Ahead of 2018*, U.S. NEWS (Dec. 28, 2017, 12:01 AM), https://perma.cc/G62A-VMRK ("In October, President Donald Trump declared a public health emergency over the crisis. Earlier in 2017, the governors of Alaska, Arizona, Florida and Maryland issued a public health emergency. Massachusetts was the first state to declare the epidemic an emergency in 2014, followed by Virginia in 2016."); Francis Collins et al., *The Federal Response to the Opioid Crisis*, NAT'L INST. ON DRUG ABUSE (Oct. 5, 2017), https://perma.cc/NZ5A-NZAB (giving a detailed explanation of how the Department of Health and Human Services ("HHS"), Substance Abuse and Mental Health Services Administration ("SAMHSA"), Centers for Disease Control ("CDC"), National Institutes of Health ("NIH"), and the Food and Drug Administration ("FDA") have responded to the opioid crisis).

[11] *See generally* U.S. Dep't of Health and Human Services, *Drug Abuse Warning Network, 2011: National Estimates of Drug-Related Emergency Department Visits*, SAMHSA 7 (May 2013), https://perma.cc/SSZ7-L484 ("In 2011, over 125 million visits were made to EDs in general-purpose, non-Federal hospitals operating 24-hour EDs in the United States. DAWN estimates that over 5 million of these visits, or about 1,626 ED visits per 100,000 population, were related to drugs, a 100% increase since 2004.").

part in combating the opioid crisis.[12]

Part I of this Note will discuss the relevant background of EMTALA and the current state of the opioid crisis. Part II will discuss the public policy, economic, and moral justifications for why EMTALA should be amended to help combat the crisis. Part III will set forth recommendations as to how EMTALA should be amended. Finally, Part IV will discuss the legal and practical implications of amending EMTALA to include these recommendations.

I. Background

A. *EMTALA*

1. Origins

In retrospect, the adoption of EMTALA can be viewed as our Nation's first attempt to recognize an affirmative right to access medical care.[13] Enacted in 1986 as part of the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), EMTALA was the product of a shifting cultural mindset that changed the baseline for emergency care obligations in hospitals.[14] EMTALA was the culmination of case law evolving the no duty principle in common law jurisprudence,[15] congressional concerns about the impact of the 1983 Medicare prospective payment system,[16] waning enforcement of the

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[12] *See infra* Part III (discussing these amendments in more detail).

[13] *See* Harris Meyer, *Why Patients Still Need EMTALA*, MODERN HEALTHCARE (Mar. 26, 2016), https://perma.cc/D9HD-6WDX (quoting Democratic Congressman Pete Stark of California as saying, "It was the first universal healthcare law" and "it was the first federal legislation establishing an affirmative right to healthcare"); *see also* Emily Friedman, *The Law that Changed Everything—and It Isn't the One You Think*, H&HN (Apr. 5, 2011), https://perma.cc/47NJ-P3GX ("Before EMTALA, patients only had rights if they were already in care in hospitals. They had the right to refuse treatment, the right to have their personal medical information kept confidential, the right to change physicians, and the right to walk away, but they had no right to care in the first place. This was the first recognition of a patient's general legal right to receive health care.").

[14] *See* Sara Rosenbaum, *The Enduring Role of the Emergency Medical Treatment and Active Labor Act*, 32 HEALTH AFF. 2075 (2013), https://perma.cc/2UJY-BQN8 ("EMTALA is an enduring testament to society's evolving views that hospitals must provide emergency care not only to their established patients but to the broader communities they serve").

[15] Sara Rosenbaum et al., *Case Studies at Denver Health: 'Patient Dumping' In the Emergency Department Despite EMTALA, The Law that Banned It*, 31 HEALTH AFF. 1749, 1750 (2012), https://perma.cc/MB3W-WVJR ("EMTALA virtually swept away what had been the status quo: the 'no duty to treat' principle in common law. According to this principle, a physician does not have a duty to treat any patient unless there is a prior relationship between the physician and patient.").

[16] Friedman, *supra* note 13 ("Hospitals were going to receive a bundled payment for treating patients with a particular DRG, and there was a lot of fear [in Congress] that they would provide

Hill-Burton Act,[17] and public outcry over multiple accounts of "patient-dumping" that were featured prominently in the media.[18] Although only four pages in length, EMTALA plays a fundamental role in American health policy. It guarantees nondiscriminatory access to emergency medical care, and thus to the healthcare system, for all people regardless of ability to pay.[19] The EMTALA guarantees are so important that the Supreme Court cited preservation of EMTALA's national promise of nation-wide emergency care as a basis of Congress' power under the Commerce Clause to regulate the health economy.[20] However, at the same time, EMTALA has been a topic of controversy since its inception due to ambiguous language in the statute, interpretive guidelines that have been issued by the Centers for Medicare and Medicaid ("CMS"), and various federal court decisions that have collectively broadened EMTALA's reach to virtually all aspects of patient care in the emergency setting.[21] Modern detractors highlight emergency department over-crowding, a lack of federal funding, decreased physician autonomy, and expansion of EMTALA's application to non-traditional care facilities as fatal side-effects of the Act's enforcement.[22]

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fewer services than would be necessary for Medicare patients.").

[17] Friedman, *supra* note 13 (citing Larry S. Gage, president of the National Association of Public Hospitals and partner at Ropes & Gray as stating "[A] third reason for passage of EMTALA was that some hospitals were no longer obligated to provide indigent care under the Hill Burton Act. That law, passed in 1946, provided capital funds for reconstruction and improvement of hospitals, with the provision that they must make care available to low-income, uninsured patients, sometimes for 25 years . . . . So by 1986, some hospitals were aging out of the Hill-Burton obligations, and it was becoming less effective than it had been in terms of care of uninsured patients.").

[18] *See, e.g.*, Friedman, *supra* note 13 ("It is widely believed that the multiple horror stories about [patient] dumping were the primary cause of EMTALA's passage."); Meyer, *supra* note 13 ("The impetus for EMTALA was an epidemic of patient transfers that were widely seen as inappropriate and dangerous for patients . . . Public anger peaked after CBS' 60 Minutes [billfold biopsy feature aired in 1985]."); Rosenbaum et al., *supra* note 15 ("EMTALA was enacted in response to widespread evidence of 'patient dumping,' or providers' refusal to care for patients experiencing medical emergencies, often because they were uninsured.").

[19] Rosenbaum, *supra* note 14, at 2075 ("The Affordable Care Act reaffirmed EMTALA's preeminent position in American health law . . .").

[20] Rosenbaum, *supra* note 14, at 2075 (referencing Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (Ginsburg, J., dissenting)).

[21] *See* Joseph Zibulewsky, *The Emergency Medical Treatment and Active Labor Act (EMTALA): What It Is and What It Means for Physicians*, 14 BAYLOR U. MED. CTR. 339, 339 (2001), https://perma.cc/D47Z-XUMH.

[22] *See* Friedman, *supra* note 13 ("EMTALA is the largest unfunded mandate on providers that the government has ever instituted."); Beth J. Sanborn, *ACEP Condemns Rep. Diane Black's Suggestion to Scrap EMTALA*, HEALTHCARE FIN. (Oct. 24, 2017), https://perma.cc/3GE5-P6L4 (citing Tennessee Representative Diane Black as stating, "[EMTALA] took away [providers'] ability to decide that an emergency room is not the proper place for a non-emergent patient to

2. Mandates

In its most basic form, EMTALA creates two obligations—screening and stabilization.[23] The Act expressly mandates that all Medicare-participating hospitals with a dedicated emergency department must provide a medical screening exam to any individual who presents to that department and requests examination or treatment for a medical condition.[24] If a hospital determines during the medical screening exam that an individual has an emergency medical condition, it must stabilize that condition prior to discharge or provide for an appropriate transfer.[25] The hospital is required to provide these services regardless of the individual's ability to pay, and cannot delay services to inquire about the individual's method of payment or insurance status.[26] EMTALA also enumerates several administrative requirements including maintaining appropriate signage and physician on-call lists, and provides guidance on record retention and reporting violations.[27] Over time, the parameters of the Act have been defined through case law addressing questions stemming from ambiguity in the statute's original language, such as: what constitutes a medical screening exam, what constitutes an emergency medical condition, what constitutes stabilization, what constitutes a dedicated emergency department, and when has an individual presented to an emergency department, among other questions.[28] CMS' final interpretive guideline, published in 2003, sought to further define

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get treatment."); Hurley v. Eddingfield, 156 Ind. 416 (1901) (illustrating the no-duty principle in which the Indiana Supreme Court absolved a physician from liability for refusing 'for no reason whatsoever' to attend to a woman who previously had been his patient and who was dying in childbirth); Pamela L. Owens & Ryan Mutter, *Payers of Emergency Department Care, 2006*, HEALTHCARE COST AND UTILIZATION PROJECT (July 2009), https://perma.cc/MM4G-KY3G ("There is growing concern that EDs will not be able to sustain care for all persons in the current economic environment. Between 1993 and 2003, there was a 23% increase in ED visits and a closure of 425 hospital EDs . . . . Nearly one in five ED visits served the uninsured totaling 17.7% of all ED visits.").

[23] *See* 42 U.S.C. § 1395dd (2011).

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *See generally* Arrington v. Wong, 237 F.3d 1066 (9th Cir. 2001) (discussing when a patient presents to the emergency department for purposes of EMTALA); Summers v. Baptist Medical Center, 91 F.3d 1132 (8th Cir. 1996) (discussing what constitutes an appropriate medical screening exam for purposes of EMTALA); Vickers v. Nash General Hospital, 78 F.3d 139 (4th Cir. 1996) (discussing the scope of stabilization under EMTALA in a head injury case); Roberts v. Galen of Virginia, 525 U.S. 249 (1999) (discussing when a transfer is appropriate under EMTALA).

the Act's language and resolve these ambiguities.[29] Although full explanation of the Act's subtleties would be so extensive as to require a separate paper, the parts pertinent to this Note are summarized here.[30]

A hospital has a dedicated emergency department if: (1) it is licensed by the state as a dedicated emergency department; (2) is held out to the public as providing treatment for emergency medical conditions on an urgent basis or without an appointment; or (3) if during the previous calendar year, and based upon a representative sample of patient visits, a hospital department or facility provided treatment for emergency medical conditions on an urgent basis, without an appointment, for at least one-third of its visits.[31] In a hotly contested 2017 decision, the U.S. District Court for the District of Rhode Island strictly construed the holding out provision so as to apply EMTALA to an off-campus, hospital-owned, walk-in urgent care facility which furthered arguments that EMTALA has exceeded its original purpose and requires ill-equipped facilities to provide emergency care.[32]

Per the statute, an individual has presented to an emergency department if the individual is within at least 250 yards of the hospital property and requests treatment or examination for a medical condition or is transported by a hospital operated ambulance.[33] A medical screening exam ("MSE") is defined as a "process performed by qualified medical personnel designed to reach a reasonable clinical confidence as to whether an emergency medical condition exists for a specific patient using appropriate resources."[34] An emergency medical condition ("EMC") is defined by the statute as a medical condition with acute symptoms of sufficient severity such that "the absence of immediate medical attention could reasonably be expected to result in: placing the health of the individual in serious jeopardy, serious impairment to bodily functions, serious dysfunction of any bodily organ", or death.[35] Notably, severe pain and symptoms of substance abuse are expressly included as emergency medical conditions in the statute.[36] All emergency medical conditions must be stabilized, or an appropriate transfer arranged, prior to discharging the patient.[37] EMTALA generally defines stabilization

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[29] *See* 42 U.S.C. § 1395dd.

[30] *See infra* Part I(A)(2).

[31] *See* § 1395dd.

[32] *See* Friedrich v. South County Hosp. Healthcare Sys., 221 F. Supp. 3d 240 (D.R.I. 2016).

[33] Gregg Lepper, *2016 EMTALA Update: A Practical Look at the Impact of EMTALA*, GREENSFELDER, HEMKER & GALE, P.C. 11-12, https://perma.cc/2CVR-CT43 (last visited Oct. 24, 2019).

[34] *Id.* at 16.

[35] § 1395dd.

[36] *See id.*

[37] *Id.*

as meaning "no material deterioration of the condition is likely, within medical probability, to result from discharge or occur during transfer."[38] A hospital is only required to stabilize—not to cure—an emergency medical condition.[39] While EMTALA does not specifically prescribe the method by which a provider must stabilize an emergency medical condition, interpretive guidance from CMS suggests that a provider may have an EMTALA obligation to provide a patient with prescription drugs where such medication may stabilize the patient's emergency medical condition.[40] Alternatively, if a hospital is not able to stabilize the patient, the hospital may transfer the patient to another facility with the capabilities and capacity to treat appropriately.[41] Discharge from an emergency department is also considered a type of transfer by the statute.[42]

These statutorily imposed requirements are ubiquitous in American healthcare.[43] Although EMTALA was primarily intended to provide protection only to Medicare and Medicaid patients, the language of the statute applies to "anyone" who presents to an Emergency Department—including uninsured persons and those who do not qualify for existing types of health coverage such as undocumented immigrants.[44] Similarly, EMTALA was intended only to apply to facilities that participate in the Medicare and Medicaid reimbursement programs; however, this category encompasses 98% of all hospitals in the United States.[45]

3. Consequences of EMTALA Violations

Congress created a bifurcated enforcement mechanism for EMTALA within the Department of Health and Human Services ("HHS").[46] CMS oversees EMTALA investigations and maintains control over Medicare provider agreements, while assessing civil monetary penalties is the responsibility of the Office of the Inspector General ("OIG") within HHS.[47] The most severe penalty for an EMTALA violation is termination of a

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[38] *Id.*

[39] 42 U.S.C. § 1395dd.

[40] *State Operations Manual*, CMS, Interpretive Guidelines § 489.24(a)(1)(i) (July 16, 2010), https://perma.cc/73VW-FTUR.

[41] § 1395dd.

[42] *Id.*

[43] Friedman, *supra* note 13, at 6 ("[I]t is beyond argument that EMTALA has changed the culture of the emergency department nationally.").

[44] *See* § 1395dd; Rosenbaum et al., *supra* note 15, at 2.

[45] Zibulewsky, *supra* note 21, at 2.

[46] *The Emergency Medical Treatment and Labor Act: The Enforcement Process*, DEP'T OF HEALTH AND HUMAN SERV. OFF. OF THE INSPECTOR GEN. 6 (Jan. 2001), https://perma.cc/VT6A-3BHG.

[47] *See id.* at 7.

hospital's Medicare provider agreement, although this penalty is rarely enforced; more common are civil monetary penalties which are capped at $104,826 per violation.[48] EMTALA investigations are complaint driven and often the complaint comes from patients or their family members, other health care providers, or hospital employees.[49] CMS utilizes a peer-policing strategy to uncover potential violations by requiring receiving hospitals to report a suspected violation within seventy-two hours when it has reason to believe it received a patient who was transferred from another facility with an unstable emergency medical condition.[50] Whistleblower protections are also available for hospital employees and members of the medical staff.[51] Notably, and somewhat oddly, hospitals are not required to self-report; however, the OIG incentivizes self-disclosure by considering cooperation when determining the amount of civil monetary penalties.[52]

Today, compliance with the EMTALA mandates is paramount as rising health care costs have led to greater prosecution of fraud and abuse cases in recent years.[53] In 1987 there were thirteen documented EMTALA

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[48] *See generally* Office of the Inspector General, *Civil Monetary Penalties and Affirmative Exclusions: Background*, DEP'T OF HEALTH AND HUMAN SERV. OFF. OF THE INSPECTOR GEN., https://perma.cc/Z8PQ-4WHR (last visited Oct. 24, 2019); Robert A. Bitterman, *Feds Increase EMTALA Penalties Against Physicians and Hospitals*, EMERGENCY PHYSICIANS MONTHLY (Oct. 17, 2017), https://perma.cc/6C62-SQC3.

[49] *See, e.g.*, Center for Medicare and Medicaid Services., *State Operations Manuel*, CMS, https://perma.cc/PNZ5-JP2B (last visited Oct. 24, 2019).

[50] *See* Dep't of Health and Human Services & Centers for Medicare and Medicaid Services, *CMS Manual System: Pub. 100-07 State Operations Provider Certification*, CMS (May 29, 2009), https://perma.cc/H6XS-L64X (CMS' interpretive guidelines §489.20(m) states, "If a recipient hospital fails to report an improper transfer, the hospital may be subject to termination of its provider agreement according to 42 CFR 489.53(a).").

[51] 42 U.S.C. § 1395dd(i) ("A participating hospital may not penalize or take adverse action against a qualified medical person . . . or a physician because the person or physician refuses to authorize the transfer of an individual with an emergency medical condition that has not been stabilized or against any hospital employee because the employee reports a violation of a requirement of this section.").

[52] *See OIG's Provider Self-Disclosure Protocol*, OFF. OF INSPECTOR GEN. 2, 13 (April 17, 2013), https://perma.cc/KDB3-BQSC.

[53] *See* Dep't of Health and Human Servs. & Dep't of Justice, *Health Care Fraud and Abuse Control Program: Annual Report for Fiscal Year 2016*, OFF. OF INSPECTOR GEN. 1 (Jan. 2017), https://perma.cc/J6GX-EJM7 ("In FY 2016, investigations conducted by HHS' Office of Inspector General (HHS-OIG) resulted in 765 criminal actions against individuals or entities that engaged in crimes related to Medicare and Medicaid, and 690 civil actions, which include false claims and unjust-enrichment lawsuits filed in federal district court, civil monetary penalties (CMP) settlements, and administrative recoveries related to provider self-disclosure matters. HHS-OIG also excluded 3,635 individuals and entities from participation in Medicare, Medicaid, and other federal health care programs.").

violations—that number rose to 174 in 1997.[54] As of 2017, roughly 1,700 hospitals have received some form of penalty for an EMTALA violation.[55]

B. *Opioid Crisis*

1. Evolution & Current State of the Crisis

Opioids, derived from the poppy plant, include both prescription and illegal derivatives, including oxycodone, hydrocodone, codeine, morphine, fentanyl, and heroin.[56] Roughly 20% of patients in an office-based setting who report non-cancer pain or pain-related diagnoses are prescribed an opioid, making prescription opioids the primary method of pain management in the United States.[57] Prescriptions for opioids have tripled since 1999 although Americans still report the same amount of pain.[58] Messages funded by the pharmaceutical industry throughout the 1990s reassured the medical community that opioid pain relievers were not addictive, were the ideal treatment for chronic pain conditions, and suggested that providers should not needlessly allow their patients to suffer due to opiophobia.[59] Pharmaceutical companies, namely Purdue, which manufactures Oxycontin—the leading opioid prescription—conducted aggressive marketing campaigns using expanded sales forces to promote their opioid medications and encourage physicians to prescribe opioids not only for cancer pain but also as an initial treatment for moderate-to-severe non-cancer pain.[60] Over the past decade, drug companies and opioid-

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[54] Zibulewsky, *supra* note 21.

[55] Friedman, *supra* note 13.

[56] *Opioid Addiction 2016 Facts & Figures*, AM. SOC'Y OF ADDICTION MED. (2016), https://perma.cc/4ZNB-6FUE.

[57] Deborah Dowell, Tamara Hagerich & Roger Chou, *CDC Guidelines for Prescribing Opioids for Chronic Pain*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Mar. 18, 2016), https://perma.cc/C7Q5-FHEU; *see also Opioid Overdose: Prescription Opioid Data*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://perma.cc/S8ED-68PF (last updated June 27, 2019).

[58] *Opioid Overdose: Prescription Opioid Data*, *supra* note 57.

[59] *See* Andrew Kolodny, *Responding to the Prescription Opioid and Heroin Crisis: An Epidemic of Addiction*, PDMP ASSIST 14, https://perma.cc/EUY3-7K7P (last visited Oct. 24, 2019); Richard Gunderman, *Oxycontin: How Purdue Pharma Helped Spark The Opioid Epidemic*, THE CONVERSATION (Apr. 19, 2016), https://perma.cc/6UV7-2ZHA ("Starting in the early and mid-1990s, a small group of physicians, some receiving funding from drug firms, began arguing that the medical profession had been systematically undertreating pain, motivated by erroneous concerns about addiction. They lobbied to have pain recognized as the 'fifth vital sign,' and urged physicians to be more liberal in their prescribing of opioids. . . . In 2000, the Joint Commission, the organization that accredits hospitals, began requiring health care organizations to prove that they were assessing and treating pain.").

[60] Gunderman, *supra* note 59 ("The company also used a bonus system to incentivize its pharmaceutical representatives to increase OxyContin sales. The average bonus exceeded the

friendly groups spent $880 million on lobbying and political contributions—200 times more than the spending of groups advocating stricter opioid prescribing rules and eight times the amount spent by gun lobbyists.[61] By 2003, nearly half of all opioid prescribers were primary care physicians who are traditionally untrained in pain management.[62] The average prescription strength for pain medication in 1980 was 10 mg—by 2013, the average prescription strength was 250 mg.[63]

These irresponsible prescribing methods resulted in unintended opioid dependence that reached crisis levels in 2017.[64] In 2017, an average of 115 Americans died each day from an opioid overdose.[65] Since 1980, fatal drug overdoses have increased five-fold, with six out of ten overdoses now involving prescription opioids.[66] The Council of Economic Advisors to the President estimates that the economic burden of prescription opioid abuse in the United States is $504 billion per year, or 2.8% of gross domestic product.[67] In 2014, health care providers issued 259 million prescriptions for opioids—enough for every adult American to have their own prescription, making the prescription opioid market a thirteen billion dollar per year industry.[68]

2. Combating the Crisis

In October 2017, President Trump declared the opioid epidemic a national public health emergency and tasked HHS with aiding states hit hardest by the crisis. This declaration had an initial effect of ninety days and was subsequently extended for another ninety days in both January and April 2018.[69] Notably, a public health emergency, as opposed to a national emergency declared under the Stafford Act, is finite and generally unfunded by federal appropriations.[70] However, on February 9, 2018, Congress

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representatives' annual salaries.").

[61] Kolodny, *supra* note 59, at 13.

[62] Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, NCBI (Feb. 2009), https://perma.cc/2G9K-3G3Y.

[63] *Opioid Overdose: Prescription Opioid Data*, *supra* note 57.

[64] *Opioid Overdose: Prescription Opioid Data*, *supra* note 57.

[65] *Opioid Overdose: Prescription Opioid Data*, *supra* note 57.

[66] Caitlin C. Podbielski, *To Enable or Make Stable?: The EMTALA Dilemma in the Opioid Crisis*, AANS NEUROSURGEON (2017), https://perma.cc/4ULW-TPXT.

[67] *See* U.S. Dep't of Health and Human Services, *supra* note 9; Exec. Office of the President of the U.S., *The Underestimated Cost of the Opioid Crisis*, COUNCIL OF ECONOMIC ADVISORS 1 (Nov. 2017), https://perma.cc/7ZNZ-XN58.

[68] *Opioid Overdose: Prescription Opioid Data*, *supra* note 57; Podbielski, *supra* note 66.

[69] Brianna Ehley, *Trump Administration Extending Opioid Emergency Declaration*, POLITICO (Jan. 19, 2018, 8:14 p.m. EST), https://perma.cc/W5EV-RQS6.

[70] Tamara Keith, *In Opioid Crisis, Emergency vs. National Emergency*, NPR (Oct. 26, 2017, 1:43

included $6 billion in the national budget to fund prevention, law enforcement, and treatment services for individuals struggling with opioid abuse.[71] Additionally, the Food and Drug Administration (FDA), Centers for Disease Control (CDC), National Institute of Health (NIH), Department of Justice (DOJ), and the Department of Health and Human Services (HHS) have implemented initiatives to tackle the opioid crisis from law enforcement, pharmacological, and funding perspectives.[72] Likewise, private pharmaceutical companies, such as Oxycontin manufacturer Purdue, have ceased marketing opioids to American doctors in response to overwhelming legal action concerning misrepresentation of the addictive effects of opioid pain medications.[73]

II. Why EMTALA Must Be Updated

The opioid crisis has made its way into our hospitals' emergency departments, which have seen visits for misuse or abuse of prescription opioids increase 153% from 2004 to 2011.[74] Of the twenty-five million people who abuse some form of drug, only one in ten receives treatment.[75] Although the country is making significant advancements in combating the opioid crisis through increased funding for law enforcement, pharmacological, and addiction prevention and treatment services, the law regulating emergency medicine has not taken the same initiative.[76] EMTALA and CMS guidance pose a unique dilemma for physicians and hospitals.[77] As it relates to the opioid crisis, severe pain and symptoms of substance abuse are expressly

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p.m. EST), https://perma.cc/U58S-BT7K.

[71] Rachel Roubein, *Budget Deal Includes $6 Billion to Fight Opioid Abuse*, THE HILL (Feb. 7, 2018), https://perma.cc/74PC-T457.

[72] *See generally* Rich Lord & Maia Silber, *DEA is Cracking Down on Physicians Who Overprescribe Pills*, PITT. POST-GAZ. (Aug. 12, 2016), https://perma.cc/73QM-UXP4; Matt Ford, *Trump Informally Declares the Opioid Crisis a National Emergency*, THE ATLANTIC (Aug. 10, 2017), https://perma.cc/9CVK-MTXN; Sari Horwitz & Renae Merle, *DOJ Announces Charges Against 400 People for $1.3 Billion in Health Care Fraud*, WASH. POST (Jul. 13, 2017), https://perma.cc/LQ8V-Q32J; Erin Mershon & Andrew Joseph, *How U.S. States Have Used Emergency Declaration to Fight the Opioid Epidemic*, STAT NEWS (Aug. 9, 2017), https://perma.cc/VD2W-N7QE; Francis Collins, *The Federal Response to the Opioid Crisis*, NAT'L INST. ON DRUG ABUSE (Oct. 5, 2017), https://perma.cc/J6KE-LK4C.

[73] *OxyContin Maker Stops Promoting Opioids, Cuts Sales Staff*, REUTERS (Feb. 10, 2018), https://perma.cc/B6W7-4BNK.

[74] *Drug Abuse Warning Network Methodology Report, 2011 Update*, SAMHSA (Apr. 2013), https://perma.cc/HC33-CBX3.

[75] Leanna S. Wen, *Testimony for the Record to Members of the House Oversight Committee*, HEALTH DEP'T OF BALTIMORE, MD. (Nov. 28, 2017), *available at* https://perma.cc/42RM-JAQF.

[76] *See* 42 U.S.C. § 1395dd (2011).

[77] *See* Podbielski, *supra* note 66.

included in the statute as emergency medical conditions which require stabilization.[78] While EMTALA does not prescribe the method in which a provider must stabilize an emergency medical condition, interpretive guidance from CMS suggests that a provider may have an obligation under EMTALA to provide a patient with prescription drugs where such medication may stabilize the patient's condition.[79] In light of this obligation, the traditional practice of emergency room physicians has been to stabilize opioid use disorder patients with a single dose of, or a short-term prescription for, the opioids they seek.[80] According to Caitlin Podbielski, an associate in the healthcare practice group at Vedder Price, this practice creates an incentive "for those struggling with addiction to present to the emergency room for what practically amounts to a guaranteed fix."[81]

For doctors, this presents a conflict between their oath to alleviate suffering and their oath to do no harm.[82] Pain affects more people in the United States than diabetes, heart disease, and cancer combined.[83] The National Center for Complementary and Integrative Health estimates that between 50 and 100 million Americans have chronic pain conditions and maintains that pain is widely undertreated in America.[84] However, for emergency room physicians, it can be difficult to differentiate between legitimate chronic pain and drug-seeking behavior.[85] This distinction is complicated by a lack of information concerning a patient's prior medical and prescription history, and therefore in the emergency room setting

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[78] *See* § 1395dd(e)(3)(A); 42 C.F.R. § 489.24(b) (2013).

[79] *See State Operations Manual*, *supra* note 40.

[80] Podbielski, *supra* note 66.

[81] Podbielski, *supra* note 66.

[82] *See, e.g.*, Institute of Medicine, *Relieving Pain in America: A Blueprint for Transforming Prevention, Care, Education and Research* 1–4 (2011) ("The 2010 Patient Protection and Affordable Care Act required the Department of Health and Human Services (HHS) to enlist the Institute of Medicine (IOM) in examining pain as a public health problem."); Kelly K. Dineen & James M. Dubois, *Between a Rock and a Hard Place: Can Physicians Prescribe Opioids to Treat Pain Adequately While Avoiding Legal Sanction?*, 42 AM. J. L. & MED. 7, 8 (2016) ("On the one hand, relief from suffering is a primary obligation of physicians, and pain remains undertreated after decades of improvement efforts.").

[83] Lauren Love, *Why Primary Care Doctors Need to Rethink Chronic Pain Treatment*, U. OF MICHIGAN HEALTH LAB (July 18, 2017), https://perma.cc/C743-SUT9.

[84] *Id.*

[85] *See, e.g.*, Merilyn Serafini, *The Physicians' Quandary with Opioids: Pain vs. Addiction*, NEJM CATALYST (Apr. 26, 2018), https://perma.cc/5GHQ-GXAY; Hannah Knowles, *Who's Really in Pain and Who's Popping Oxycodone? The Tough Choices Doctors Face Writing Prescriptions*, THE SACRAMENTO BEE (Aug. 14, 2017), https://perma.cc/YD3J-GDVS; Travis N. Rieder, *An Ethical Dilemma for Doctors: When is it OK to Prescribe Opioids?*, STAT NEWS (Sept. 26, 2017), https://perma.cc/DJ5Z-PQ5K.

doctors have historically had to rely on what the patient tells them.[86] Further, doctors are incentivized to treat pain in the most effective way possible: which frequently means prescribing opioids.[87] However, one of the largest factors contributing to the over-prescribing of opioids is a physician's belief that EMTALA requires using opioid pain relievers to "stabilize" a patient who is complaining of severe pain, or exhibiting signs of substance abuse, which are expressly defined by EMTALA as emergency medical conditions.[88] As noted above, opioid addiction takes the lives of 115 people per day and costs the national economy $504 billion per year.[89] Amending EMTALA to require a heightened definition of stabilization for patients with severe pain and opioid use disorders; to require prescription drug monitoring program ("PDMP") checks prior to writing prescriptions for narcotics; and to incentivize emergency room departments to hire providers trained in opioid use disorders is necessary to help combat this public health crisis.[90]

III. How EMTALA Should Be Amended

A. *EMTALA Should Be Amended to Define Stabilization of Opioid Use Disorder Patients to Include Initiating Medication-Assisted Treatment.*

CMS has previously carved out specific stabilization requirements for "protected classes" including psychiatric patients and intoxicated persons.[91]

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[86] *See* Love, *supra* note 83.

[87] *See* Dineen & DuBois, *supra* note 82, at 12 ("Physicians have an obligation to treat pain, and opioids remain one of the most broadly effective medications for many types of pain . . . ."); Brian Zimmerman, *7 Things to Know about the History of the Joint Commission Pain Standards*, BECKER'S HOSPITAL REV. (Feb. 28, 2017), https://perma.cc/LDY3-KSQG ("The Joint Commission introduced standards for healthcare organizations regarding the treatment and assessment of pain in 2000. The standards were designed to address the lack of adequate pain treatment across the country."); *The President's Commission on Combating Drug Addiction and the Opioid Crisis*, THE WHITE HOUSE (Nov. 1, 2017), https://perma.cc/UW2C-BP5T [hereinafter *Commission on the Opioid Crisis*] (explaining that CMS requires patient satisfaction surveys to be completed that specifically ask patients to evaluate how well their doctor treated their pain. In 2017, the President's Commission on Combating Drug Addiction and the Opioid Crisis issued a final report recommending that "CMS remove pain survey questions entirely on patient satisfaction surveys, so that providers are never incentivized for offering opioids to raise their survey score" and suggesting that "ONDCP and HHS should establish a policy to prevent hospital administrators from using patient ratings from CMS surveys improperly.").

[88] 42 C.F.R. § 489.24(c) (1994).

[89] *See supra* Part II.

[90] *See infra* Part III.

[91] *See* Robert Bitterman, *Federal Law, EMTALA, and State Law Enforcement: Conflict in the ED?*, RELIAS (Jan. 1, 2006), https://perma.cc/Z3HW-HS46.

For example, a psychiatric patient is considered stabilized when they are "protected and prevented from injuring or harming themselves or others."[92] This is markedly different than the standard stabilization language which simply requires that "no material deterioration of the condition is likely to occur" from transfer or discharge of the patient.[93] Given this precedent, it is appropriate for CMS to further define stabilization of patients with opioid use disorders to include medication-assisted treatment.

Medication-assisted treatment, known as "MAT," is the use of medications combined with counseling and behavioral therapies to treat substance use disorders and prevent opioid overdoses.[94] "MAT is primarily used for the treatment of addiction to opioids such as heroin and prescription pain relievers that contain opiates."[95] In MAT, prescription medication, typically buprenorphine or methadone, operates to "normalize brain chemistry, block the euphoric effects of alcohol and opioids, relieve physiological cravings, and normalize body functions without the negative effects of the abused drug."[96] Critics of MAT have described the treatment as nothing more than substituting one drug for another.[97] However, research studies, including meta-data review, have demonstrated that MAT is clinically effective in: improving patient survival, increasing retention in treatment, and decreasing illicit opiate use and other criminal activity among people with substance use disorders.[98] In the first long-term study of patients treated with buprenorphine for addiction to opiates, half of participants reported that they were abstinent from opiates eighteen months after starting treatment.[99] Three and a half years after starting treatment, the abstinence rate rose to 61% and fewer than 10% met the diagnostic criteria for opiate dependence.[100] After buprenorphine became available in

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92 *EMTALA and Behavioral Health*, DIAMOND HEALTHCARE (Aug. 11, 2017), https://perma.cc/EQM4-JERD.

93 42 U.S.C. § 1395dd(e)(3)(A) (2011).

94 *Medication and Counseling Treatment*, SAMHSA, https://perma.cc/DH9S-ZCW2 (last visited Oct. 24, 2019).

95 *Id.*

96 *Id.*

97 German Lopez, *There's a Highly Successful Treatment for Opioid Addiction. But Stigma is Holding It Back.*, VOX (Nov. 15, 2017), https://perma.cc/MGY8-47ZG.

98 *Medication and Counseling Treatment*, *supra* note 94.

99 Eric Sarlin, *Long-Term Follow-Up of Medication-Assisted Treatment for Addiction to Pain Relievers Yields "Cause for Optimism"*, NAT'L INST. ON DRUG ABUSE (Nov. 30, 2015), https://perma.cc/H7Y7-G74G.

100 *Id.*

Baltimore, fatal heroin overdoses decreased by 37%.[101] In support of MAT's approach, the World Health Organization has declared buprenorphine and methadone "essential medicines" for the treatment of opioid addiction.[102] Similarly, in November 2017, the Food and Drug Administration approved the first once-monthly injection of buprenorphine for moderate to severe opioid use disorder in adults which eliminates the need for daily dosing and improves treatment retention.[103] In 2012, the Hazelden Betty Ford Clinic, one of the top drug treatment providers in the country, switched from an abstinence-only model to providing medication-assisted treatment.[104]

Opioid dependent patients often use the emergency department as their primary source of medical care because they are uninsured or otherwise unable to pay for services at a private physician practice.[105] As such, the emergency department provides a prime opportunity to screen patients for an opioid use disorder, under an EMTALA mandated medical screening exam, and initiate medication-assisted treatment to stabilize the patient's emergency medical condition.[106] Re-defining stabilization under EMTALA to include MAT for opioid use disorder patients would allow emergency room physicians to balance their competing duties to do no harm and to alleviate pain while contributing to the fight against the opioid crisis.[107] Studies have shown that patients who initiate MAT in the emergency department are more than twice as likely to remain engaged in treatment than patients who are referred for treatment.[108]

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[101] Robert P. Schwartz et al., *Opioid Agonist Treatments and Heroin Overdose Deaths in Baltimore, Maryland, 1995–2009*, AM. J. PUB. HEALTH (May 2013), *available at* https://perma.cc/7R4Q-LZCE.

[102] *Effective Treatments for Opioid Addiction*, NAT'L INST. ON DRUG ABUSE (Nov. 2016), https://perma.cc/V6L7-87J5.

[103] *FDA Approves First Once-Monthly Buprenorphine Injection, a Medication-Assisted Treatment Option for Opioid Use Disorder*, FOOD AND DRUG ADMIN. (Nov. 30, 2017), https://perma.cc/6YQV-R5JS.

[104] Maia Szalavitz, *Hazelden Introduces Antiaddiction Medication into Recovery for First Time*, TIME (Nov. 5, 2012), https://perma.cc/WW5D-HBEZ.

[105] *See* Wen, *supra* note 75, at 8 ("Medicaid covers one in three patients receiving treatment for substance use disorder . . . .").

[106] *See* Andrew Herring, *Emergency Department Medication-Assisted Treatment of Opioid Addiction*, CHCF (Aug. 2016), https://perma.cc/R5MR-3XX9.

[107] *See supra* Part II.

[108] Gail D'Onofrio et al., *Emergency Department–Initiated Buprenorphine/Naloxone Treatment for Opioid Dependence: A Randomized Clinical Trial*, 313 J. AM. MED. ASS'N 1636, 1641 (2015).

B. *EMTALA Should Mandate That the State Prescription Drug Monitoring Program Be Checked Prior to Writing a Prescription for an Opioid Medication as Part of Its Central Log Requirement for Each Patient.*

In addition to requiring emergency departments to provide an emergency medical screening exam to anyone who requests one, EMTALA also imposes several record-keeping requirements on participating hospitals.[109] One of those requirements is that the hospital must maintain a central log for "each individual who 'comes to the emergency department' seeking assistance and whether he or she refused treatment, was refused treatment, or whether he or she was transferred, admitted and treated, stabilized and transferred, or discharged."[110] CMS has stated that "the purpose of the central log is to track the care provided to each individual who comes to the hospital seeking care for an emergency medical condition."[111]

Prescription Drug Monitoring Programs ("PDMP") are statewide electronic data systems that collect, monitor, and analyze electronically transmitted prescribing and dispensing data submitted by pharmacies and practitioners.[112] Currently, forty-nine states and the District of Columbia have legislatively mandated the creation of a PDMP for their state.[113] However, according to the President's Commission on Combating Drug Addiction and the Opioid Crisis, unless mandated by law,[114] providers prescribing opioids are not routinely registering for their state's PDMP, evidenced by only 35% of licensed prescribers registering as of 2015.[115] "Furthermore, a study by the Johns Hopkins Bloomberg School of Public Health found that patient history was not checked via a PDMP database by the prescriber in 86% of prescriptions for opioids written in 2015."[116]

All PDMPs collect the following information: the type of drug dispensed, the quantity of drug dispensed, the number of days a given quantity is supposed to last, the date dispensed, prescriber and pharmacy

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[109] *See* 42 C.F.R. § 489.24(d)(3) (2011).

[110] *State Operations Manual*, *supra* note 40.

[111] *State Operations Manual*, *supra* note 40, § 489.20(r)(3).

[112] *Using Prescription Drug Monitoring Program Data to Support Prevention Planning*, SAMHSA 1, https://perma.cc/F4VV-HZWB (last visited Oct. 24, 2019) [hereinafter *Data to Support Prevention Planning*].

[113] *Id.* (stating Missouri does not have legislation mandating creation of a PDMP).

[114] *Commission on the Opioid Crisis*, *supra* note 87, at 54 (stating only five states have mandated PDMP use: Maine, New York, Minnesota, North Carolina, and Virginia).

[115] *Commission on the Opioid Crisis*, *supra* note 87, at 53.

[116] *Commission on the Opioid Crisis*, *supra* note 87, at 53.

identifiers, and patient identifiers.[117] Although designed as a screening device to detect providers who were abusing their prescribing powers, PDMP's are also a valuable tool to identify drug-seeking behavior.[118] However, PDMPs are currently limited in that there is no uniform way to access PDMPs across states and as such there is no national PDMP data, and they are not interoperable with electronic health record ("EHR") platforms.[119]

HHS should amend EMTALA to require emergency room physicians to check their state's PDMP prior to prescribing opioids, as part of the central log requirement. This would allow providers to better identify drug-seeking behavior and avoid being an easy target for patients with opioid use disorders who are seeking a "quick fix."[120] Notably, although not related to EMTALA specifically, HHS should require PDMP integration with EHR platforms for EHR developers to receive certification from CMS.[121] Additionally, all prescriptions for opioids that could result in overdose should require a co-prescription for naloxone—an injectable medication that immediately reverses the effects of an opioid overdose.[122]

C. *HHS Should Incentivize Emergency Departments to Hire Personnel Trained in Opioid Use Disorders and Certified to Initiate MAT.*

As stated in the final report issued by the President's Commission on Combating Drug Addiction and the Opioid Crisis, "[m]any emergency rooms and hospitals do not have sufficiently trained staff to diagnose an OUD [opioid use disorder] or to provide the range of MAT and psychosocial services that are needed to stabilize individuals" under the updated

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[117] *Data to Support Prevention Planning, supra* note 112.

[118] *See Data to Support Prevention Planning, supra* note 112, at 1–2.

[119] *See Data to Support Prevention Planning, supra* note 112, at 4.

[120] Podbielski, *supra* note 66; *see Data to Support Prevention Planning, supra* note 112, at 3–4.

[121] *Medicare and Medicaid Promoting Interoperability Program Basics*, CMS (May 9, 2018), https://perma.cc/R98X-KKJY (Under the Health Information Technology for Economic and Clinical Health Act ("HITECH") individual providers and hospitals are eligible to receive incentive payments of up to $65,000, or $2 million, respectively, from the Centers for Medicare and Medicaid ("CMS") in exchange for their adoption and "meaningful use" of a CMS certified EHR platform. One of the requirements for demonstrating meaningful use of an EHR is for a provider to electronically share collected health information with authorized users while maintaining privacy and security. HHS should require EHR developers to integrate state PDMP platforms into the EHR before gaining certification from CMS. Note that requirements are being updated for 2020).

[122] *See* Sarah Wakeman, *Saving Lives by Prescribing Naloxone with Opioid Painkillers*, https://perma.cc/M4N3-RQ77 ("Given the relative safety of naloxone and the death toll from opioids across this country, co-prescription of naloxone with opioid pain medication makes a lot of practical sense.") (last updated Sept. 26, 2017).

definition of stabilization recommended above.[123] As a result many OUD and overdose patients are discharged without being properly stabilized with MAT and are at an elevated risk for overdose related re-admissions.[124] As of 2016, only 24% of all OUD patients received MAT despite the overwhelming evidence of its efficacy in treating opioid addiction.[125] One barrier facing providers who wish to offer MAT is the certification process required to prescribe buprenorphine, or other FDA approved medications commonly used in MAT.[126] A more pressing barrier to MAT is the monetary cost associated with employing providers who are competent to offer the treatment and the additional strain on hospital resources.[127] Fortunately, "[s]ubstance use treatment does not necessarily require highly trained medical staff or inpatient treatment."[128] Andrew Herring, a prominent emergency room physician board-certified in addiction medicine and clinical instructor at the University of California, San Francisco, has supported using low-cost personnel in addiction treatment as a strategy "to both promote patient acceptance and to help expand care with a limited budget."[129] HHS should provide resources in the form of reimbursement policies to incentivize hospital emergency departments to hire personnel who are qualified to diagnose opioid use disorders and certified to initiate MAT—these personnel are necessary to achieve compliance with the recommended definition of stabilization.[130]

IV. Implications of Amendations

A. *Legal Implications*

Amending EMTALA's definition of stabilization to include MAT for

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[123] *Commission on the Opioid Crisis, supra* note 87, at 79–80.

[124] *Commission on the Opioid Crisis, supra* note 87, at 80.

[125] Herring, *supra* note 106, at 3.

[126] *See* Richard Ries & Andrew J. Saxon, *Most People with Opioid Addictions Don't Get the Right Treatment: Medication-Assisted Therapy*, STAT NEWS (Sept. 21, 2017), https://perma.cc/C3M8-JTR4.

[127] *See* Martha M. Jablow, *Interest in Medication-Assisted Treatment is Growing as a Means to Curb Opioid Epidemic*, ASS'N OF AM. MED. COLLEGES (Oct. 17, 2017), https://perma.cc/NT3T-TJE4.

[128] Herring, *supra* note 106, at 23.

[129] Herring, *supra* note 106, at 23 ("Addiction counselors, health educators, case managers, nurses, and/or health advocates can provide a backbone of community-based psychosocial and addiction related care for patients in an ED providing buprenorphine MAT. Trained nonmedical staff can implement many of the interventions for addiction. Peer counselors may naturally form therapeutic alliances with certain populations of patients with substance use disorders more readily than traditional medical staff. . . . Such staff can be embedded in the ED, where addiction related interventions can occur in the midst of regular operations, both reaching the patients and partnering with emergency clinicians to facilitate treatment and arrange timely discharge of patients with complex psychosocial needs.").

[130] *See generally supra* Part III(A).

patients with opioid use disorder heightens the acceptable standard of care for individual providers by requiring them to take affirmative actions that they are not currently required to take—namely initiating MAT in opioid use disorder and overdose patients and checking the PDMP prior to prescribing opioids. Therefore, providers who fail to initiate MAT or check the PDMP may be subject to liability in medical malpractice actions.[131] However, providers are currently at risk for malpractice actions and medical board discipline related to inappropriate prescribing methods stemming from the current ambiguity in EMTALA's definition of stabilization.[132] This ambiguity can result in a cause of action for medical malpractice in which plaintiffs may claim that a provider's prescription for opioids was negligent and contributed to their addiction, or worse, resulted in wrongful death.[133] Eliminating this ambiguity gives providers a clear procedure for stabilizing patients with opioid use disorders which will ultimately aid them in balancing their duty to alleviate pain with their oath to do no harm.[134] Additionally, states should advocate for medical malpractice protection for providers who co-prescribe naloxone and Good Samaritan protections for individuals who administer naloxone in the event of an overdose.[135]

Likewise, this amendation subjects hospitals to even more regulation in the emergency room—already the nation's most heavily regulated industry.[136] Failure on the part of a provider to initiate MAT or check the PDMP after determining that an emergency medical condition exists, such as an opioid use disorder or an overdose, will result in a violation of EMTALA for which the hospital may face civil monetary penalties or exclusion from the Medicare program.[137] These potential penalties are likely to result in strict compliance with the updated definition of stabilization in EMTALA and will ensure that opioid use disorder patients receive MAT,

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131 *See generally* Peter Mofett & Gregory Moore, *The Standard of Care: Legal History and Definitions: The Bad and Good News*, 12 W. J. EMERG. MED. 109 (Feb. 2011) (discussing the standard of care in medical malpractice actions and how the standard evolves over time).

132 *See, e.g., Prescribing Opioids–Navigating the Minefields*, MED. JUST. (July 25, 2014), https://perma.cc/D2V3-VUT6 (discussing how persistent pain is not in itself a defense to a charge of inappropriate prescribing in a medical malpractice or state board disciplinary hearing).

133 *See, e.g.*, MASS. GEN. LAWS ch. 229 § 2 (Massachusetts' wrongful death statute); MASS. GEN. LAWS ch. 231 § 60(B) (Massachusetts' medical malpractice statute).

134 *See* Dineen & Dubois, *supra* note 82.

135 Wen, *supra* note 75 (Explaining "the most critical part of the opioid overdose prevention campaign is expanding access to naloxone" and confirmed that Baltimore "successfully advocated for Good Samaritan legislation . . . and malpractice protections for doctors who prescribe naloxone.").

136 *See supra* Part III.

137 42 U.S.C. § 1395dd (1986).

and that the PDMP is checked prior to prescribing opioids.[138] Although this additional regulation may be perceived as unduly burdensome, there are practical ways to reduce costs of compliance as discussed below.[139]

B. *Practical Implications*

For every $1 spent on MAT, $38 would be saved in economic costs.[140] However, as stated in Part I, EMTALA is the largest unfunded mandate in our nation's history.[141] Emergency room overcrowding, rising health care costs, and the current economy's financial strain on emergency departments are all valid concerns of those who would oppose the recommendations in Part III above.[142] These recommendations set forth an ideal standard of care for a specific patient population; however, a hospital must remain profitable to ensure it remains accessible to all members of the community, requiring a balance between cost and social good.[143] Several cities across the country have found this balance and have devised innovative ways to implement these recommendations.[144] For example, Baltimore, Maryland, has secured $5.6 million in funds to create a "stabilization center" that will operate as a 24/7 urgent care facility exclusively for addiction and mental health disorders.[145] Baltimore's Health Commissioner, Dr. Leana Wen, has described the facility as "a comprehensive, community-based 'ER' dedicated to patients presenting with substance abuse and mental health complaints," that will provide MAT to opioid use patients.[146] Similarly, Palm Beach County Florida announced in February 2018 that it will open a 14-bed emergency room facility dedicated solely to opioid overdose patients.[147] Becky Walker, director of network management for the Southeast Florida Behavioral Network, says that this facility will offer patients MAT and wrap-

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138 *See Lessons Learned from EMTALA Enforcement*, J. HEALTH CARE COMP. (Sept. 2012), https://perma.cc/TKR4-L679 ("Although some areas [of EMTALA] remain unclear, it is beneficial for hospitals to adopt good healthcare compliance practices" to avoid potential EMTALA violations and the associated penalties.").

139 *See infra* Part IV(B).

140 *Confronting an Epidemic: The Case for Eliminating Barriers to Medication-Assisted Treatment of Heroin and Opioid Addiction*, LEGAL ACTION CTR. (Mar. 2015), https://perma.cc/AAN2-QL9P.

141 *See supra* text accompanying note 22.

142 *See supra* text accompanying note 22.

143 *See, e.g.*, Katie Sullivan, *Healthcare Leaders Must Balance Profits, Social Good*, FIERCEHEALTHCARE (Mar. 28, 2014), https://perma.cc/33RA-KFAH.

144 *See infra* notes 146–49.

145 Wen, *supra* note 75.

146 Wen, *supra* note 75.

147 Skyler Swisher, *Opioid Overdose Emergency Room Could be Coming to Palm Beach County*, SUN SENTINEL (Feb. 6, 2018), https://perma.cc/GBF6-29BC.

around psychosocial services.[148]

By creating dedicated facilities, hospitals eliminate concerns of overcrowding and depletion of resources, resulting from opioid use disorder patients being treated in traditional emergency rooms.[149] Financially, absent the up-front construction costs, the "stabilization" facilities will be profitable.[150] After initial inpatient treatment, personnel will be able to assist patients in obtaining Medicaid benefits, and the facility will then be reimbursed for the MAT and psychosocial services that they will offer as an outpatient service.[151] Given the lower acuity of patients, these facilities will be staffed primarily with lower-cost personnel who are trained in opioid use disorders and certified to initiate MAT thereby decreasing the financial burden on the hospital.[152] Ideally, these services will be reimbursed by CMS pursuant to the recommendation above in Part III(c).[153]

Alternatively, home induction of MAT is well-established in the medical community and does not need to occur under direct medical supervision.[154] Under this approach, upon discharge from the emergency room patients would be instructed to abstain from opioids and to administer their prescription for buprenorphine, or other appropriate medication, when withdrawals commence, and the patient would receive a referral to obtain outpatient psychosocial services.[155] This approach would fulfill the stabilization requirement defined above and significantly decrease the cost of hiring trained personnel; however, studies show that initiating MAT while in the emergency room dramatically increases retention rates, and initiating MAT in the emergency room is likely to be more effective than home induction.[156]

Requiring PDMP checks is not unduly burdensome on emergency room providers whether in the traditional setting or in one of the specialized "stabilization" facilities just described.[157] Practically, this recommendation simply requires logging into a database and searching a patient's

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148 *Id.*

149 David Aronberg, *Sober Homes Task Force Meeting Minutes*, PALM BEACH COUNTY OFF. OF THE STATE ATT'Y (Apr. 7, 2017), https://perma.cc/773M-X5QC.

150 *Id.*

151 *Id.*

152 *See id.* at 33, 37; *supra* Part III(C).

153 *See supra* Part III(C).

154 Herring, *supra* note 106, at 22.

155 Herring, *supra* note 106, at 22.

156 *See* Herring, *supra* note 106, at 11–12.

157 *See* Kara Gavin, *Prescription Tracking Tackles Misuse of Opioids and Other Drugs—But Results Vary*, U. OF MICH. HEALTH LAB (July 19, 2017), https://perma.cc/2YLD-2M2M ("[PDMP's] are faster, safer, and more convenient . . .").

prescription history; however, this process would greatly benefit from a streamlined access point in the hospital's EHR.

CONCLUSION

Despite efforts to combat the opioid crisis, opioid addiction and overdose rates continue to rise at an alarming rate. Studies have shown that initiating medication-assisted treatment in the emergency room is the most effective way to treat opioid addiction. Coupled with more informed prescribing methods through PDMP checks and hiring personnel trained in the screening and treatment of opioid use disorders, emergency room physicians are in a unique position to positively impact this epidemic. Updating EMTALA to include these recommendations is not unduly burdensome and can be accomplished in a cost-effective, practical manner that will ultimately be profitable for the hospitals that are required to follow them and potentially life-saving for their patients. For these reasons the Department of Health and Human Services should amend EMTALA to include these recommendations.