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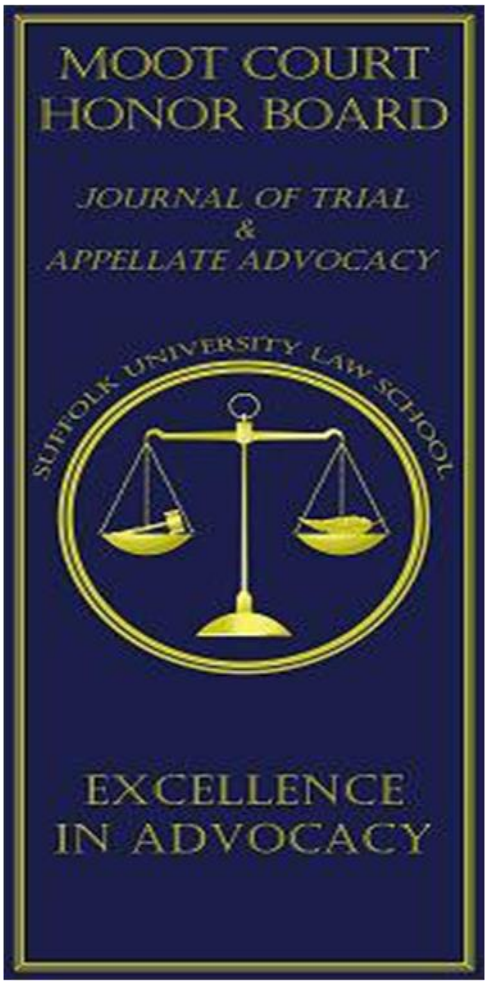

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EDITOR'S NOTE

Dear Reader:

On behalf of the Suffolk University Law School Moot Court Honor Board, I am proud to present the first Issue in Volume XXIV of the *Suffolk Journal of Trial & Appellate Advocacy*. This Issue contains one lead article and eight student-written pieces, each designed to be of practical use to lawyers and judges at the trial and appellate levels.

The Lead Article, *Reexamining the Admissibility of the Defendant's Non-Inculpatory Statements at Trial*, was written by Wes Porter, a practicing attorney, consultant, and former Professor of Law at the Golden Gate University School of Law and former Visiting Professor of Law at the University of Hawaii, William S. Richardson School of Law, where he taught Criminal Law, Criminal Procedure, Evidence, and trial skills courses. Attorney Porter explores the trial courts' treatment of a defendant's use of pretrial statements, addressing the constitutional considerations relating to the accused's ability to present a theory of defense, and offering discrete limitations on the defendant's use at trial of his non-inculpatory, pretrial statements. We are honored to have published a piece by an experienced litigator, who understands the intricacies of criminal law and can help influence the criminal justice system in a positive way.

The student-written pieces address topics that are of interest to members of the bar in Massachusetts and nationwide. The topics covered involve:

- an analysis of certain constitutional challenges brought by charter school opponents and the viability of future challenges to Massachusetts charter school law (Perry Gans);
- an analysis of contractual disputes between student-athletes and their universities, and the precedent created for future contractual claims of the same nature (Tyler Jordan);
- an empirical look at the terms of service of five of the largest U.S. internet-based companies, and a discussion of the disparity between the E.U.'s explicit prohibition on unfairness in offending terms of service clauses (Christopher Leblanc);
- a discussion of the history of compulsory education laws and the role of the justice system in relation to truancy (Amanda McNelly);
- a discussion of sentencing statutes, and the deviation from federal sentencing guidelines and variation among states' sentencing laws (Ashley Walsh);
- an analysis of the United States District Court for the Eastern District of New York's classification and regulation of virtual currencies (Nicholas Fusco);

- an analysis of the United States Supreme Court's view of excessive force under the Fourth Amendment and the protections of qualified immunity (Kevin Hennessey); and,
- an analysis of the Massachusetts' Supreme Judicial Court's interpretation of the Stored Communications Act, and a discussion of the intersection of privacy and family rights (Danielle Kohen).

My thanks and gratitude go out to the staff members of the Moot Court Honor Board who helped put this Issue together with noteworthy professionalism and dedication. Special thanks go out to our Executive Editor, Julianne Jeha, whose support and commitment is second to none, our Managing Editor, Anya Richard, who sought out and polished an exceptional lead article for publication in this Issue, and our Associate Managing Editor, Natalie Brough, who worked diligently to format this Issue into publishable quality. The Moot Court Honor Board is indebted to the entire Editorial Board for the tremendous amount of time and effort they devoted to this process. Finally, I would like to thank the Board's advisor, Professor Richard G. Pizzano, the Board's Staff Assistant, Janice Quinlan, and the Deans and Faculty of Suffolk University Law School for their continued support of the Moot Court Honor Board and *Suffolk Journal of Trial & Appellate Advocacy*.

Thank you for reading the first Issue in Volume XXIV of the *Suffolk Journal of Trial & Appellate Advocacy*. I am confident practitioners, professors, students, and judges will benefit from our scholarship. My best wishes in your endeavors and I hope you will find this Issue thought-provoking, relevant, and useful.

Sincerely,

Michelle A. Reid
Editor-in-Chief

REEXAMINING THE ADMISSIBILITY OF THE DEFENDANT'S NON-INCULPATORY STATEMENTS AT TRIAL

Wes Reber Porter[1]

[1] Wes Reber Porter is a practicing attorney, consultant and former law professor in Honolulu, Hawaii. Porter previously served as a federal prosecutor with the U.S. Department of Justice's Criminal Division, Fraud Section, the U.S. Attorney's Office for the District of Hawaii and the U.S. Navy Judge Advocate General Corps. He also served as a Professor of Law at Golden Gate University School of Law and a Visiting Professor of Law at the University of Hawaii's Richardson School of Law with a focus on criminal law, evidence and trial advocacy.

For their thoughtful review and comments on earlier drafts, thank you to David Reber, Erik Knuppel and Emily A.S.R. Porter.

The powerful machine of our criminal justice system feeds off of the accused's own incriminating statements. An overwhelming percentage of criminal cases are resolved by the defendant's admission of guilt at a plea colloquy.[2] In the rare criminal case that proceeds to trial, the government's evidence regularly includes a presentation of the defendant's pre-trial statement, his "confession."[3] By guilty plea or at trial, one way or another,

[2] Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS 16 (Nov. 20, 2014) https://www.nybooks.com/articles.2014/11/20/why-innocent-people-plead-guilty (explaining that over 90 percent of all criminal cases are resolved by guilty pleas and that the number is significantly higher in the federal system).

> In 2013, while 8 percent of all federal criminal charges were dismissed (either because of a mistake in fact or law or because the defendant had decided to cooperate), more than 97 percent of the remainder were resolved through plea bargains, and fewer than 3 percent went to trial. The plea bargains largely determined the sentences imposed.

Id. "Over the last 50 years, defendants chose trial in less than three percent of state and federal criminal cases—compared to 30 years ago when 20 percent of those arrested chose trial. The remaining 97 percent of cases were resolved through plea deals." INNOCENCE PROJECT, *Report: Guilty Pleas on the Rise, Criminal Trials on the Decline,* Innocence Staff Aug. 7, 2018, https://www.innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline/.

[3] *See* 18 U.S.C. § 3501(e) (2006) (effective Jan 3, 2012). Confession is defined as "any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing." *Id.*; United States v. Hoac, 990 F.2d 1099, 1107 (9th Cir. 1993); *see also* MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 4.1.

the government most certainly will use the accused's own words against him.[4]

The accused, by contrast, may struggle to tell his[5] side of the story at trial. Forgoing any meaningful constitutional analysis, trial courts rely instead on an inflexible application of the rules of evidence.[6] The criminal defendants have lodged primarily evidentiary arguments to make use of the favorable, non-incriminating portions of their pre-trial statements.[7] Trial courts categorically exclude the criminal defendant from independently admitting any part of his pretrial statement at trial.[8] Most trial courts similarly prohibit the defendant from contemporaneously presenting the non-inculpatory portions of his pretrial statement that have been omitted from the government's presentation.[9] Lastly, trial courts will forbid the defendant from even referring to the non-inculpatory portions of his pretrial statement in questioning government witnesses during cross-examination.[10]

"You have heard testimony that the defendant made a statement. It is for you to decide (1) whether the defendant made the statement, and (2) if so, how much weight to give to it." *Id.* The commentary to § 4.1 of the Ninth Circuit's criminal instructions states, "[t]his instruction uses the word 'statement' in preference to the more pejorative term, 'confession'. . . [which] implies an ultimate conclusion about the significance of a defendant's statement, which should be left for the jury to determine." *Id.* (citing *Hoac*, 990 F.2d at 1108 n.4).

[4] *See* FED. R. CRIM. P. 11(b)(1) ("[T]he defendant may be placed under oath, and the court must address the defendant personally in open court."); *see also* FED. R. EVID. 801(d)(2)(A) (defining "not hearsay" as a statement made by a party, like the criminal defendant, and offered by the party opponent).

[5] Throughout this Article, male possessive pronouns ("his" and "him") are used to reference the accused.

[6] *See infra* Section III (discussing the constitutional rights at issue when presenting the theory of the defense, fundamental fairness and enumerated, rights under the Sixth Amendment); *see also* FED. R. EVID. 801(d)(2)(A); *infra* Section II (describing how trial courts address the matter of defendant's non-inculpatory pretrial statements under evidentiary rules alone) and Section V (highlighting some evidentiary arguments denied by trial courts).

[7] *See* Williamson v. United States, 512 U.S. 594 (1994) (rejecting defendant's argument that his pretrial statement was "statement against interest" and exception to inadmissible hearsay under Rule 804(b)(3)).

[8] *See infra* Section II (discussing how trial courts treat defendant's pretrial statement under purely evidentiary considerations); *see also* FED. R. EVID. 801(d)(2)(A). The "not hearsay" definition turns on who is offering the out-of-court statement. *Id.* A party opponent may offer the other party's statement as "not hearsay" but a party may not admit his own out-of-court statements as it is inadmissible hearsay. *Id.*

[9] *See infra* Section V (arguing trial courts should allow accused to contemporaneously admit portions of defendant's pretrial statement that the government omitted in its presentation); *see also* FED. R. EVID. 106 (partially codifying common law "rule of completeness" as it relates to "writings and recordings"); FED. R. EVID. 611(a) (controlling the manner of trial and providing similar fairness considerations for court as it relates to "oral statements").

[10] U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . [and] to be to be confronted with the witnesses against him . . . ." *Id.*; *see also infra* Section VI (discussing defendant's Sixth Amendment right to

To make some use of the non-inculpatory portions of his pretrial statement, this Article argues that the criminal defendant deserves a more meaningful constitutional analysis from the lower court.[11] The analysis draws upon the defendant's constitutional right to advance a "theory of the defense,"[12] the doctrine of fundamental fairness[13] grounded in the Due Process Clause,[14] and trial-related, constitutional protections enumerated in the Bill of Rights, particularly under the Sixth Amendment.[15] Common law evidentiary doctrines[16] and the codified rules of evidence[17] that govern our adversarial trial system similarly support a criminal defendant's wider use of his own pretrial statements at trial. This Article urges trial courts to reexamine, through the lens of fairness to the criminally accused at trial, the constitutional protections and evidentiary rules that govern the accused's use of his own non-inculpatory, pretrial statements at trial.

"confront" the witnesses against him at trial, including his use of his non-inculpatory statements to formulate questioning of law enforcement witnesses).

[11] Trial courts may refer to the defendant's privilege against incrimination under the Fifth Amendment or his right to confront witnesses under the Sixth Amendment. *See supra* Section II. This Article envisions a more robust constitutional analysis that incorporates: the right to present a theory of the defense; fundamental fairness under the Due Process Clause; the right to a trial before an impartial jury; and the defendant's right to confront the witnesses against him.

[12] *See infra* Section II.a (reviewing the defendant's constitutional right to advance his theory of the defense to the jury in a criminal trial); *see also* United States v. Rutgerson, 822 F.3d 1223 (11th Cir. 2016); Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 203 (1982).

[13] *See* Lisenba v. California, 314 U.S. 219, 236 (1941).

> As applied to a criminal trial, *denial of due process* is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it . . . [the Court] must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."

Id. (emphasis added); *see also* Duncan v. Louisiana, 391 U.S. 145, 149-50 n.14 (1968); Rochin v. California, 342 U.S. 165, 169 (1952) (describing whether it "offend[s] those canons of decency and fairness which express the notions of justice").

[14] Courts consider the notion of fundamental fairness in criminal trials to be constitutional because of its connection to the Due Process Clause. *See* U.S. CONST. amend. V and XIV.

[15] *See* U.S. CONST. amend. VI; *see infra* Sections III.b, III.c (discussing Supreme Court's renewed attention toward defendant's Sixth Amendment right to jury trial and to confront witnesses against him).

[16] *See* FED. R. EVID. 106. "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time." *Id.*; *see also infra* Section V (discussing common law, evidentiary doctrine of the "rule of completeness" as incorrectly applied by courts as to defendant's non-inculpatory statements); CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5072 (2d ed. 2005).

[17] FED. R. EVID. 102, 106, 611(a), 403.

The introduction in Part I of this Article outlines how the trial courts currently treat the defendant's use of his pretrial statements. When excluding the non-inculpatory portions of the defendant's pretrial statement, lower courts fail to conduct any meaningful constitutional analysis and rely instead upon a strict application of the rules of evidence. Part II summarizes the defendant's constitutional right to present his "theory of the defense" at trial. Lower courts readily agree that the defendant is entitled to present his theory of the defense, yet too often limit his ability to support his theory with evidence other than his own testimony under oath at trial.

Part III outlines the constitutional considerations relating to the accused's ability to present his theory of the defense. This section first discusses the doctrine of fundamental fairness under the Due Process Clause and then discusses the Supreme Court's renewed focus on two trial-related, constitutional protections under the Sixth Amendment: the defendant's right to a trial before an impartial jury and his right to confront the witnesses against him. Last, this section explores the faulty judicial reasoning that continues to improperly compel the defendant to waive his privilege against self-incrimination to realize these other constitutional protections afforded to him at trial.

Part IV contends that the defendant has a constitutional right, consistent with his theory of the defense, to independently admit some of his non-inculpatory, pretrial statements at trial. Part V discusses how fundamental fairness and common-law evidentiary doctrine support the contemporaneous admission into evidence of the defendant's non-inculpatory, pretrial statements when the government presents his confession at trial. Part VI argues that the defendant's constitutional right to a meaningful cross-examination of government witnesses, particularly law enforcement witnesses, similarly embraces a permissible use for his pretrial statements. Trial courts must allow the accused, during cross-examination, to refer to portions of his pretrial statement that, consistent with his theory of the defense, challenge the nature and quality of the investigation.

Lastly, Part VII sets out proposed discrete limitations on the defendant's use at trial of his non-inculpatory, pretrial statements and a proposed balancing test to apply in ruling on the admissibility of such statements so as not to subvert the fundamental underpinnings of the criminal justice system.

I. INTRODUCTION

The American criminal justice system requires a sea-change in criminal procedure and policy related to trial courts' admissibility

determinations governing the criminal defendant's pretrial statements. Trial courts effectively gloss over any meaningful constitutional analysis and proceed to a one-sided, government-oriented application of the rules of evidence.[18] More is required from a criminal justice system which is designed to ensure constitutional protections for the accused at trial and preserve an adversarial jury system that is premised on fairness to all parties.[19]

a. How it currently works?

The accused, prior to trial, may move to suppress his incriminating pretrial statement on constitutional grounds under the voluntariness standard[20] of the Fifth Amendment and the proscriptions of *Miranda v. Arizona*.[21] Once the defendant's suppression motions are denied,[22] however, the trial court almost exclusively relies upon the rules of evidence to

[18] *See* FED. R. EVID. 801(d)(2), advisory committee notes to proposed rules. "Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule." *Id.* (citing John S. Strahorn, Jr., *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484, 564 (1937)); *see also* EDMUND MORRIS MORGAN, JOINT COMM. ON CONTINUING LEGAL EDUC., BASIC PROBLEMS OF EVIDENCE 265 (1962); JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1048 (2d ed. 1925). "No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness . . . and the rule requiring firsthand knowledge . . . calls for generous treatment of this avenue to admissibility." *Id.*

[19] *See* Duncan v. Louisiana, 391 U.S. 145 (1968). A jury trial is central to the American criminal trial system. *Id.*

[20] *See* Dickerson v. United States, 530 U.S. 428 (2000) (reaffirming voluntariness as the Fifth Amendment standard for the defendant to challenge a confession compelled by government coercion); *see also* Miranda v. Arizona, 384 U.S. 436 (1966).

[21] 384 U.S. 436 (1966). The *Miranda* Court concluded that the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be "accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself." *Id.* at 439. Accordingly, the Court laid down "concrete constitutional guidelines for law enforcement agencies and courts to follow." *Id.* at 442. Those guidelines established that the admissibility in evidence of any statement given during custodial interrogation of a suspect would depend on whether the police provided the suspect with four warnings. *Id.* at 479 (requiring the following warnings prior to any questioning: (1) of his right to remain silent; (2) that anything he says could be used against him in a court of law; (3) that he has a right to the presence of an attorney; and (4) that if he cannot afford an attorney one will be appointed to him before any questioning).

[22] The defendant's motions to suppress raise constitutional challenges to the government's conduct *during the investigative stage of the case*. These motions are distinguishable from the constitutional challenges at issue in this Article. This Article argues that the notions of fundamental fairness during the criminal trial and the accused's trial-related constitutional rights present alternative considerations for the trial court when making admissibility determinations about the defendant's pretrial statement. *See infra* Sections IV, V and VI.

determine admissibility of the defendant's pretrial statements during the criminal trial.[23] Trial courts, adhering to a strict construction of the rules of evidence, only allow the government to admit the defendant's pretrial statement.[24] The government, moreover, may redact the defendant's statement so as to present a version of the accused's confession to the jury that is most favorable to the government.[25]

By contrast, under current judicial interpretation, the accused can make almost no use of his own pretrial statements during trial. The governing rules of evidence do not distinguish the criminal defendant from any other "party" on trial, including parties to a civil action.[26] The portions of the defendant's pretrial statement to law enforcement that do *not* incriminate him, unless the government otherwise agrees,[27] are categorically excluded at trial under the rules of evidence.[28] Trial courts also preclude the jury from contemporaneously considering the non-inculpatory portions of the defendant's pretrial statement when the government presents the

[23] Generally, the admissibility of evidence at trial is governed by the applicable evidence code, the parties' motions *in limine* and the trial court's determinations under Rule 103(d).

[24] *Compare* FED. R. EVID. 801(c) (defining inadmissible hearsay as an out-of-court statement offered for the truth of the matter asserted), *with* 801(d)(2)(A) (defining a statement made by a party and offered by a party-opponent as "not hearsay"), *and* FED. R. EVID. 801(d)(2) advisory committee's notes to proposed rules (detailing how "admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule"). This one-sided construct of the evidence code did not turn out as scholars predicted in the early days of common law evidence jurisprudence. *See* John S. Strahorn, Jr., *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 564, 568 (1937) (discussing the "circumstantial utterance theory of admissions [as] the simplest explanation of their relation to the hearsay rule").

[25] *See infra* Section II.b (offering an illustrative example of the government redacting and culling of the defendant's pretrial statement); *see also infra* Section V (arguing that the common law evidentiary doctrine of "the rule of completeness," partially codified in Rule 106, should allow the defendant to contemporaneously admit the non-inculpatory portions of his statement with the government's presentation).

[26] *See* FED. R. EVID. 102, 106, 611(a), 403 (governing the defendant's use of the non-inculpatory portions of his pretrial statements). Rules 102, 106, 611(a), and 403 apply equally in criminal and civil trials. *See id.*; *cf.* FED. R. EVID. 609 (explicitly acknowledging and providing for the difference between impeachment by prior convictions when the criminal defendant is the witness at trial as compared to any other witness).

[27] The government can agree to contemporaneously admit the defendant's non-inculpatory statements, as discussed in the second proposal outlined in this Article. *See, e.g.*, PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 1.02.

> The evidence consists of the testimony of the witnesses, the exhibits admitted in evidence, *and stipulations*. A stipulation is an agreement between both sides that [certain facts are true] [that a person would have given certain testimony] . . . . You may accept those facts as proved, but you are not required to do so.

Id. (emphasis added).

[28] *See supra* note 24; FED. R. EVID. 801(c), (d)(2)(A) (explaining the difference between hearsay and nonhearsay).

incriminating portions in its case-in-chief.[29] Lastly, lower courts even limit the defense's viable avenues of cross-examination and questions that may be asked during cross-examination of government witnesses if the line of inquiry touches upon his non-inculpatory, pretrial statements.[30]

The drafters of the rules of evidence intended this outcome for the criminally accused,[31] but, as argued in this Article, the Framers of Constitution did not.[32]

The criminal defendant deserves a more meaningful constitutional analysis regarding the admission of his non-inculpatory, pretrial statements so that he may properly support and argue his theory of the defense at trial.[33] As it stands now, if his trial were a motion picture, the portions of the

[29] *See infra* Section V (discussing how the accused's constitutional rights and common law evidentiary doctrine should command a different admissibility outcome when the government presents select portions of the defendant's pretrial statement as his confession at trial); *see also infra* note 148.

[30] *See* U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to . . . be *confronted with the witnesses against him* . . . ." *Id.* (emphasis added). *See also* United States v. Ortega, 203 F.3d 675, 682 (9th Cir. 2000) (holding that defendant could not question a law enforcement witness on cross-examination using his own pretrial, exculpatory statements); United States v. Bensimon, 172 F.3d 1121, 1128 (9th Cir. 1999) (holding that whether limitations on cross-examination are so severe as to violate the Confrontation Clause is a question of law reviewed *de novo*). In *Ortega*, the accused actually raised the precise confrontation clause challenge that is argue for in the third proposal of this Article. 203 F.3d at 679-81. The trial court held that the defendant was not permitted to use his exculpatory statements *because* he waived his privilege against self-incrimination by testifying at trial. *Id.* at 682-83. Of course, procedurally, the defendant made his decision to testify *after* the court foreclosed his cross-examination using his non-inculpatory statements during his case-in-chief. *Id.*

[31] The admission of statements by party opponents, under Federal Rule 801(d)(2)(A), operates less as an evidentiary rule and more like the doctrine of estoppel. *See* FED. R. EVID. 801(d)(2)(A). The reception of admissions, therefore, need not be justified on grounds of trustworthiness; the significance of an admission is "*inter partes*, like estoppel or *res judicata*, which some- times make truth irrelevant." Roger C. Park, *The Rationale of Personal Admissions*, 21 IND. L. REV. 509, 510 (1988). "[A] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of an oath." *Id.* (citing EDMUND MORRIS MORGAN, JOINT COMM. ON CONTINUING LEGAL EDUC., BASIC PROBLEMS OF EVIDENCE 266 (1962)). The doctrine of judicial estoppel, sometimes known as the doctrine of preclusion of inconsistent statements, prevents a party from asserting a position contrary to an earlier successful position in another proceeding. *See* 1 John Moore, MOORE'S FEDERAL PRACTICE § 8.3[9], at 106-07 (1994). In other words, under the doctrine of judicial estoppel, where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not take a contrary position in a subsequent case simply because his interests have changed. *Id.*; *see also* Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208, 211-15 (1st Cir. 1987).

[32] *See infra* Sections IV, V (arguing that the accused should be able to admit or otherwise make use of his non-inculpatory, pretrial statements under the doctrine of fundamental fairness grounded in the Due Process Clause and the Supreme Court's renewed focus on trial-related constitutional rights under the Sixth Amendment).

[33] *See infra* Section II (outlining the criminal defendant's constitutional right to advance a "theory of the defense" at trial, so long as supported by evidence).

accused's pretrial statements potentially favorable to him which align with his theory of the defense end up on the cutting room floor. But why?

b. An illustrative example of the Ponzi schemer's confession

For illustrative purposes, consider a fraud case involving a classic Ponzi scheme. The scheme to defraud involved multiple participants with varying levels of involvement and the requisite criminal intent.[34] For purposes of demonstrating the constitutional violations and fundamental unfairness to the accused described in this Article, consider the following voluntary, pretrial statement made to law enforcement officials by a promoter of the fraud scheme:

1. *I didn't do this. These seminars were not my idea. I didn't have anything to do with the seminars.*
2. *You should talk to [another suspect]. He was the mastermind.*
3. *[The other suspect] did this before with other communities. He did this in [other jurisdictions] with other people promoting his scheme.*
4. *I knew what I was doing was wrong.*
5. *I knew the [victims] likely didn't understand what they were getting into.*
6. *But I never thought [the other suspect] was committing crimes.*
7. *I didn't ever imagine that what Michael was asking me to do was illegal.*

*(Law enforcement then informed the defendant about the extent of the fraud including the number of victims and dollar amount)

8. *I'm so sorry. I feel so sorry for those people.*
9. *I didn't even know the extent of what happened after [victims] showed up to the seminars.*

[34] For example, a scheme to defraud, like a criminal conspiracy, may involve different participants and varying levels of involvement and culpability: (1) the mastermind; (2) the "pitch people" who made the false statements to the victims; (3) the "promoters" who recruited or promoted the scheme by attracting prospective victims; and (4) the "cover-up people" who papered over the scheme with doctored "account statements" and subsequent communications to the victims.

> *10. I should have known what was going on because [victims] were so happy, talking about getting rich and telling their friends.*

In many ways, the above-described pretrial statement from the defendant represents a typical "confession" to law enforcement. Some parts of the statement are incriminating and thus helpful to the government. However, others are not self-inculpatory; other parts of a defendants' pretrial statement provide information, investigative leads, and additional suspects for law enforcement. Information and leads may not only offer law enforcement investigative steps to pursue during an ongoing investigation but even if not pursued, they should be admissible if relevant to the defendant's theory of the case at trial.

At the criminal trial of the promoter that follows, the government will introduce prosecution-favorable portions of the defendant's pretrial statement as a "confession." The confession will be presented to the jury as follows:

- *I knew what I was doing was wrong.*
- *I knew the [victims] likely didn't understand what they were getting into.*
- *I'm so sorry.*
- *I feel so sorry for the [victims].*
- *I should have known what was going on because the [victims] were so happy, talking about getting rich and telling their friends.*

- OR -

~~*I didn't do this. These seminars were not my idea. I didn't have anything to do with the seminars. You should talk to [another suspect]. He was the mastermind. He did this before with other communities. He did this in [other jurisdictions] with other people promoting it, like [other suspects].*~~ ***I knew what I was doing was wrong. I knew the [victims] likely didn't understand what they were getting into.*** ~~*But I never thought Michael was committing crimes. I didn't ever imagine that what Michael was asking me to do was illegal.*~~ ***I'm so sorry. I feel so sorry for the [victims]. I should have known what was going on because the [victims] were so happy, talking about getting rich and telling their friends.***

At trial, the defense may object to the government's presentation of his "confession" on evidentiary grounds, including that it is hearsay and unfairly prejudicial to the accused. Under current practices, the trial court will likely overrule these objections and allow the government's presentation as offered above. Next, the court will not contemporaneously admit the redacted portions of the accused's pretrial statement under the partially-codified "rule of completeness" in Rule 106. Lastly, the defendant may seek to make use of some of his non-inculpatory, pretrial statements (paragraphs #1, 2, 3 and 9 above) to formulate questions during cross-examination of law enforcement witnesses. But the trial court will likely rule that such use is impermissible as well.

c. Proposed trial uses of the accused's pretrial statement

This Article argues that the defendant enjoys a constitutional right to advance his theory of the defense to the jury *during the criminal trial*. His theory of the defense can include his intention to sponsor a specific jury instruction, explore avenues of inquiry during cross-examination of government witnesses, or argue to the jury in summation. The trial court's rulings affecting these strategies turn on the defendant's articulation of some evidence in support of the defense theory. The trial court's admissibility determinations to exclude the non-inculpatory portions of the defendant's pretrial statements have constitutional implications under the doctrine of fundamental fairness and the accused's enumerated constitutional rights under the Sixth Amendment.

This Article contends that, under some circumstances at trial,[35] the lower courts must permit the jury to consider the favorable, non-inculpatory portions of the defendant's pretrial statement that support his theory of the defense.[36] The jury should be allowed to weigh a fuller and more complete version of his pretrial statement contemporaneously with the government's

[35] This Article focuses on three possible uses for the accused's non-inculpatory, pretrial statements:

i. independent admission in support of the defendants' theory of the defense;
ii. contemporaneous admission with the government's presentation of the accused's inculpatory statements as his confession at trial; and
iii. use of the portions of the defendant's non-inculpatory, pretrial statements which criticize the underlying investigation as a means of cross-examining the government's witnesses.

[36] *See infra* Section IV (describing the constitutional support for the defendant to independently admit the non-inculpatory portions of his pretrial statement during his defense case-in-chief).

presentation of his "confession" in its case-in-chief.[37] Lastly, the defendant, in some instances, should be allowed to refer to the non-inculpatory portions of his pretrial statement during cross-examination of government witnesses to support his theory of the defense that is critical of the government's investigation.[38]

II. DEFENDANT'S "THEORY OF THE DEFENSE" AT TRIAL

A defense is a "set of identifiable conditions or circumstances which may prevent a conviction for an offense."[39] The criminally accused is entitled to advance a "theory of the defense" during his criminal trial.[40] The theory of the defense can materialize in the form of a specially-crafted, jury instruction presented at trial.[41] Similarly, the defense theory can define the scope of permissible inquiry during cross-examination of government

[37] *See infra* Section V (recounting the constitutional and common law evidentiary arguments for the defendant to contemporaneously admit the non-inculpatory portions of his pretrial statement during his government's case-in-chief).

[38] *See infra* Section VI (arguing that the constitution protects the defendant's right to confront the government's evidence and witnesses, including to make some use of, and explicitly reference, the non-inculpatory portions of his pretrial statement during his cross-examination of law enforcement witnesses).

[39] *See* Robinson, *supra* note 12 (discussing, *inter alia*, the "failure of proof" defenses available to the accused at trial).

[40] *See* Stephen Labaton, *Lessons of Simpson Case Are Reshaping the Law*, N.Y. TIMES (Oct. 6, 1995) (emphasis added) (quoting Philip B. Heymann, Professor, Harvard Law Sch.), https://www.nytimes.com/1995/10/06/us/lessons-of-simpson-case-are-reshaping-the-law.html.

> The single most important thing to remember about [the O.J. Simpson] case is that it involved a trial that is so vastly different from what criminal justice is in the United States today . . . It reveals an immense disparity in our criminal system, based on how much wealth a defendant has. In reality, the only reason our system works and does not grind to a standstill, *the only reason most defendants reach plea agreements and do not fully exploit the benefits of the system, is because they can't afford it*.

Id. "The public's perception will be that if you have enough money and celebrity-hood and high-priced lawyers, then you can beat the rap . . . This is going to prompt all kinds of tinkering to give more power to prosecutors." *Id.* (quoting Roy Black, Lawyer, Florida).

[41] Model criminal jury instructions can include versions of the "theory of the defense" instruction. *See, e.g.*, Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, FEDERAL JURY PRACTICE AND INSTRUCTIONS, § 19.01 (6th ed. 2006); PATTERN CRIMINAL JURY INSTRUCTIONS CH. 6.01 (SIXTH CIRCUIT COMMITTEE ON PATTERN CRIMINAL JURY INSTRUCTIONS); Eighth Circuit Criminal Jury Instruction § 8.05; Ninth Circuit Introductory Comments to Chapter 6 (Specific Defenses). While a general instruction is not required, it would read as follows:

> *(Name) has raised the defense of (state the defense). (State the defense) is a legally recognized defense to a federal criminal charge. I will instruct you on the law defining this defense (now) (shortly).*

Id.

witnesses. Trial courts also grant the defense wide latitude when arguing its theory of the defense in closing.[42]

a. Defendant's theory of the defense is constitutional

The accused's right to instruct the jury on his theory of the defense is constitutionally protected and inextricably tied to his fundamental right to a fair trial.[43] His right to present his theory of the defense at trial is grounded in the requirements of due process during the criminal trial.[44] The Supreme Court has relied on the defendant's general "right to present a defense," although a defendant's right to present witnesses must "comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."[45] The Ninth Circuit described "[t]he right to have the jury instructed as to the defendant's theory of the case is . . . 'basic to a fair trial.'"[46] The Fourth Circuit has held

[42] *See* FED. R. CRIM. P. 30. "At the close of evidence or such earlier time as the trial court reasonably directs, any party may file written requests that the court instruct the jury on the law set forth in the requests." *Id.*; *see also* United States v. Rutgerson, 822 F.3d 1223 (11th Cir. 2016) (holding that the instruction given by court accurately conveyed the substantive law and the core of the defense theory, and defendant's counsel was permitted to argue his theory of defense extensively in closing argument). Unfortunately, the Eleventh Circuit in *Rutgerson* relied upon the extensive defense argument in closing as a basis to not overturn his conviction for failure to give a "theory of the defense" instruction. *See id.*

[43] The defendant has a constitutional right to raise a legally acceptable defense and to present evidence in support of that defense. *See, e.g.*, Taylor v. Illinois, 484 U.S. 400, 408-09 (1988); Chambers v. Mississippi, 410 U.S. 284, 294-95 (1973); *cf.* United States v. Barham, 595 F.2d 231, 244 (5th Cir. 1979) (holding that the defendant, however, is not "entitled to a judicial narrative of his version of the facts, even though such a narrative is, in one sense of the phrase, a 'theory of the defense'").

[44] *See* California v. Trombetta, 467 U.S. 479, 485 (1984) ("Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense."). A right to a fair trial in a federal court is protected under the Due Process Clause of the Fifth Amendment. *See* United States v. Agurs, 427 U.S. 97, 107 (1976). A right to a fair trial in a state court is protected under the Due Process Clause of the Fourteenth Amendment. *See* Kentucky v. Whorton, 441 U.S. 786, 790 (1979) (Stewart, J., dissenting); Giles v. Maryland, 386 U.S. 66, 98 (1967) (Fortas, J., concurring); Lisenba v. California, 314 U.S. 219, 236 (1941).

[45] *See* Chambers v. Mississippi, 410 U.S. 284, 294-95 (1973); *see also* Martin A. Hewett, Note, *A More Reliable Right to Present A Defense: The Compulsory Process Clause After Crawford v. Washington*, 96 Geo. L. Rev. 273, 287-88 (2007) (discussing the Court's decision in *Chambers* in terms of the accused's fundamental right to present his theory of the defense).

[46] United States v. Escobar de Bright, 742 F.2d 1196, 1201 (9th Cir. 1984) (citing United States v. Sielaff, 615 F.2d 402, 403 (7th Cir. 1979)).

> The general principle is well established that a criminal defendant is entitled to have a jury instruction on any defense which provides a legal defense to the charge against him

that "a defendant . . . is constitutionally entitled to [a defense] instruction . . . if the evidence supports it."[47]

Because the defendant's right to present his theory of the defense to the jury is constitutionally protected as fundamental to a fair trial, the procedures and policies securing these constitutional guarantees in practice become vital to the analysis.[48] Trial courts instead turn the constitutional analysis on its head. Courts use trial-related constitutional rights more often as a basis to deny relief to the accused than to grant it.[49]

Lower courts improperly refer to the defendant's option to testify in his own defense at trial as the best method to advance his theory of the defense.[50] This is another layer of unfairness to the accused that also has constitutional implications. At trial, courts essentially pit one constitutionally guaranteed right against other constitutional protections at a time when the defendant needs those other protections the most. Courts readily steer the accused into a scenario where he must waive his Fifth Amendment privilege against self-incrimination in order to have an evidentiary basis for presenting his theory of the defense as is necessary to have a fair trial and effectively confront the government evidence including the witnesses testifying against him. The Framers of the Constitution intended for the accused's different constitutional rights work in tandem for the accused during his criminal trial, not that the accused be required to sacrifice some of those rights to secure the others.

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and which has some foundation in the evidence, "even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility."

Id.

[47] Kornahrens v. Evatt, 66 F.3d 1350, 1354 (4th Cir. 1995) (requiring evidence to properly support a defense instruction is consistent with other jury instructions that could favor the defendant at trial such as a "lesser included offense" instruction); *see also* Hopper v. Evans, 456 U.S. 605, 611 (1982) (holding "due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction").

[48] "In plain terms[,] the right to present a defense" is among "the most basic ingredients" of due process of law." Washington v. Texas, 388 U.S. 14, 19 (1967). The Supreme Court has consistently held that a criminal defendant has a constitutional right to "a meaningful opportunity to present a complete defense" including right to a trial that comports with "fundamental fairness" derived from the Fifth and Fourteenth Amendments' Due Process Clauses. *Trombetta*, 467 U.S. at 485. *See* U.S. CONST. amends. V, XIV.

[49] *See infra* Section III.c. (addressing the inherent conflict when trial courts refer to the defendant's Fifth Amendment privilege against self-incrimination as a basis to deny other trial-related constitutional protections).

[50] *See* Mark A. Summers, *Taking Confrontation Seriously: Does Crawford Mean That Confessions Must Be Cross-Examined?* 76 ALB. L. REV. 1805, 1815 (2013). "[A] criminal defendant is clearly not unavailable as a witness in any absolute sense. She has the right to testify on her own behalf." *Id.* (citing Rock v. Arkansas, 483 U.S. 44, 51 (1987)).

b. Evidence in support of the defendant's theory

Trial courts recognize that the defendant is entitled to advance his "theory of the defense" before the jury; yet, courts differ significantly on how the defendant can support that theory of the defense with evidence.[51] A defendant is purportedly entitled to a jury instruction relating to a defense theory for which there is any foundation in the evidence, even though the evidence may be "weak, insufficient, inconsistent, or of doubtful credibility."[52] It follows that whether there is supporting evidence for an accused's theory of the defense may turn on the court's admissibility determinations and whether he is allowed to explore certain lines of inquiry with government witnesses during cross-examination.

Unfortunately, despite the accused's request, the court does not always give his theory of the defense jury charge. Trial courts deny the defendant's request for a theory of the defense instruction primarily on two grounds: first, that the instruction is inadequately supported by the evidence;[53] and, second, that the theory is fairly represented in the applicable standard jury instructions in a criminal case.[54] Of these two grounds to deny a defense instruction, the former highlights the importance of allowing the accused to admit or otherwise make use of his non-inculpatory statements in support of his theory of the defense.

[51] *See, e.g.*, United States v. Hoffecker, 530 F.3d 137, 176-77 (3d Cir. 2008) (upholding trial court's refusal to give the requested "theory of defense" instructions as "merely statements of the defense's factual arguments"); United States v. Davis, 183 F.3d 231, 250 (3d Cir. 1999) ("A court errs in refusing a requested instruction only if the omitted instruction is correct, is not substantially covered by other instructions, and is so important that its omission prejudiced the defendant."); United States v. Chowdhury, 169 F.3d 402, 407 (6th Cir. 1999) (quoting United States v. Frost, 125 F.3d 346, 372 (6th Cir. 1997)) (rejecting a "theory of the defense" instruction that merely represented the "defendant's view of the facts of the case, rather than a distinct legal theory").

[52] *Compare Escobar de Bright*, 742 F.2d at 1198 (quoting United States v. Sielaff, 615 F.2d 402, 403 (7th Cir. 1979)) (holding that defendants are entitled to the theory of the defense instruction "even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility"), *with* United States v. Wofford, 122 F.3d 787, 788-89 (9th Cir.1997) (quoting United States v. Morton, 999 F.2d 435, 437 (9th Cir. 1995)) ("A 'mere scintilla' of evidence supporting a defendant's theory, however, is not sufficient to warrant a defense instruction.").

[53] *See Kornahrens*, 66 F.3d at 1354.

[54] *See infra* Section II.d. The second ground for denying a theory of defense instruction reflects those criminal trials wherein the defendant relies on the theory that the government did not meet its burden of proof at trial or an affirmative defense with its own standard instructions such as self-defense or establishing an alibi.

c. Sparse appellate relief on the defendant's theory instruction

The chances for relief for the criminal defendant are bleaker on appeal. A defendant may challenge the failure of the district court to provide a jury instruction sought on appeal.[55] A trial court's decision not to include a requested jury instruction can be reversible error.[56] A jury verdict against the accused may be overturned, however, "only if the instruction that was sought accurately represented the law in every respect and only if viewing as a whole the charge actually given, the defendant was prejudiced."[57]

The accused can be hard-pressed to demonstrate such prejudice on appeal once convicted at trial. Where a defendant claims that a trial court erred for failing to give his requested instruction, appellate courts overturn the conviction only if: (1) "that instruction is legally correct;" (2) it "represents a theory of defense with basis in the record that would lead to acquittal;" and (3) "the theory is not effectively presented elsewhere in the charge."[58]

The criminal defendant may rest his hopes upon the government's high burden of proof during the criminal trial. He has a constitutional right to remain silent at trial, present no witnesses and evidence in his case and hold the government to its burden. As is argued elsewhere in this Article, however, the accused should be allowed to rely upon the panoply of constitutional rights at trial, the government's high burden of proof, *and* his own viable theory of the defense. He should not be compelled to choose one constitutional protection over another.

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[55] *See* United States v. Montero–Camargo, 177 F.3d 1113, 1123 (9th Cir. 1999), *amended by* 183 F.3d 1172 (9th Cir. 1999). Federal appellate courts review *de novo* whether the district court correctly construed a hearsay rule. *See id.* Further, federal appellate courts review exclusion of evidence under a hearsay rule for abuse of discretion. *See* United States v. Matta–Ballesteros, 71 F.3d 754, 767 (9th Cir. 1995) (*amended by* 98 F.3d 1100 (9th Cir. 1996)).

[56] *See, e.g.*, United States v. Lyman, 592 F.2d 496, 504 (9th Cir. 1978) (holding that the failure to give a theory of the defense instruction upon request was a reversible error); United States v. Noah, 475 F.2d 688, 697 (9th Cir. 1973).

[57] United States v. Gonzalez, 407 F.3d 118, 122 (2d Cir. 2005).

[58] *See* United States v. Sheehan, 838 F.3d 109, 124-25 (2d Cir. 2016) (citing United States v. Quattrone, 441 F.3d 153, 177 (2d Cir. 2006)); *see also* United States v. Doyle, 130 F.3d 523, 540 (2d Cir. 1997); United States v. Garcia-*Cruz*, 978 F.2d 537, 540 (9th Cir. 1992). If, however, the proposed instruction is not supported by the law, or if the instructions actually given "fairly and adequately cover . . . the issues presented," a theory of the defense instruction need not be given. *See Garcia-Cruz*, 978 F.2d at 540. The court need not instruct the jury using the defendant's precise words, as "[a] defendant is not entitled to any particular form of instruction." United States v. Lopez-Alvarez, 970 F.2d 583, 597 (9th Cir. 1992).

d. Viable theories of the defense

The accused enjoys a constitutional right to advance several viable theories of the defense before the jury at trial. The nature of the defense theory dictates whether a specially-crafted jury charge is appropriate and, as argued here, whether the court's admissibility determinations as to defendant's pretrial statements have constitutional implications.

i. Defense theories based upon elements, defenses and the burden of proof

Viable defense theories include claims that (i) the government failed to prove an element of the offense, (ii) the defendant lacked the requisite criminal intent of the offense charged, or (iii) a recognized legal or affirmative defense applies at trial.[59] These theories do not, however, encompass the constitutional considerations and the prospective relief discussed in this Article. With these defense theories, the court's standard jury instructions most likely would adequately cover the defense theory, and therefore the accused's ability to argue his theory would not be unfairly restricted nor would admission of his non-inculpatory pretrial statements be flatly denied as unhelpful to the jury.[60]

ii. Defense theories related to the government's investigation

A criminal trial flows directly from, and is the product of, a government investigation.[61] Criminal investigations involve gathering evidence against the accused and securing statements from percipient witnesses including the accused. Some of these investigatory steps have constitutional implications.[62] Other investigatory decisions represent subjective judgements that our society, through the criminal justice system,

[59] *See* Robinson, *supra* note 12 at 203 (listing defense theories based on elements, defenses, and burden of proof).

[60] *See sources cited supra* notes 57-59 (discussing legal authority that allows trial courts to deny a "theory of the defense" instruction because it is adequately covered in the standard instructions).

[61] *See* FED. R. CRIM. P. 4(a) (setting out the connective tissue between the investigation and trial phases of criminal procedure, as an arrest warrant or summons on a complaint will "establish probable cause to believe that an offense has been committed and that the defendant committed it").

[62] *See* U.S. CONST. amends. IV, V, VI. The government investigators will seek out witnesses, conduct searches, gather evidence and possibly attempt to elicit a statement from the defendant as part of its criminal investigation. *See id.*

has entrusted to law enforcement.[63] Law enforcement officers must make subjective, investigatory decisions about the list of suspects, which leads to pursue, and the scope of the investigation.[64] Stated differently, law enforcement controls the "what" and the "who" of the investigation.

With the world watching, the criminally accused has, at times, succeeded at trial when attacking the government's investigation as a defense.[65] As with the defendant's pretrial statements, the government seeks to control what the jury learns about the underlying investigation. It follows that the defense's presentation of certain aspects of the investigation do not assist the jury in its adjudicative duties.[66] Similarly, modern trial courts have constrained the criminal defendant's ability to present another perspective on the investigation consistent with his theory of the defense. Trial courts, in so doing, have subscribed unwittingly to an axiom: the defendant is on trial, not the investigation.[67]

However, when the accused's theory of defense challenges the government's underlying investigation, it carries potential constitutional implications and, as argued in this Article, affects the trial court's

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[63] *See* ANTHONY A. BRAGA, EDWARD A. FLYNN, GEORGE L. KELLING & CHRISTINE M. COLE, HARV. KENNEDY SCH., MOVING THE WORK OF CRIMINAL INVESTIGATORS TOWARDS CRIME CONTROL, NATIONAL INSTITUTE OF JUSTICE, 1, 23 (Mar. 2011), https://www.ncjrs.gov/pdffiles1/nij/232994.pdf.

> Contrary to fictional portrayals, detectives do not work from facts to identification of suspects; they work from identification of suspects back to facts that are necessary to prosecute and convict them. The primary job of detectives is not to find unknown suspects, but to collect evidence required for a successful prosecution of known suspects. Although fictional detectives are constantly warning against the danger of forming a hypothesis too early, that is precisely what real detectives do most of the time.

Id. at 5.

[64] The criminal defendant only knows the duality of the criminal trial. As reflected in the caption of a criminal case, it is the government versus the accused. To the defendant, law enforcement functions as his accuser and, therefore, acts with some degree of bias and subjectivity against him.

[65] *See* Labaton, *supra* note 40 (discussing the O.J. Simpson case). The ability to openly critique the investigation during the criminal trial, however, may be a luxury reserved for only the most notable defendants. The government aims to exclude evidence critical of its underlying investigation. *See* United States v. Ortega, 203 F.3d 675, 679-81 (9th Cir. 2000). Trial courts have accommodated the government, excluding evidence bearing on the investigation and foreclosing avenues of defense questioning of law enforcement witnesses. *See id.*

[66] *See* FED. R. EVID. 403. The court cannot allow the defense to employ graymail tactics by presenting a recitation of the process by which one enters the system as the criminally accused. *See id.* The rules of evidence further protect against the "waste of time" and the "needless presentation of cumulative evidence." *Id.* However, the jury's time may not be wasted when it learns about subjective, investigatory choices made in the case and why law enforcement made those choices.

[67] *See* Weatherford v. Bursey, 429 U.S. 545, 559 (1977) (holding that the defendant is not entitled to conduct a wholesale review of the government's investigation).

admissibility determinations of the non-inculpatory portions of defendant's pretrial statement that support his theory. These defense theories do *not* relate to negating an element or a recognized legal defense.[68] Yet, the subjective, strategic decisions by law enforcement during the investigation are relevant in the criminal trial. For example, evidence of the strategic decisions within a developing investigation may be relevant because they impact the credibility of the government's witnesses and the reliability of the government's other evidence.[69]

For instance, the defendant may request that the court specially craft a jury instruction based upon his theory that (i) another person committed the offense (an identity defense), (ii) government investigators failed to follow up on reasonable, investigative leads that would have led to the identification of other suspects, or (iii) investigators selectively gathered only information and evidence consistent with their "tunnel vision" which prevents them from seeing the suspect as anything other than a defendant. Evidence supporting these defense theories is relevant[70] and can support the exercise of the defendant's right to cross-examine the government witnesses who shaped and carried out the investigation.

When foreclosing or limiting defense theories that challenges the government's investigation at trial, lower courts risk constitutional error by committing due process violations.[71] Trial courts must carefully weigh constitutional considerations before denying evidence, or barring questioning and arguments related to these defense theories about the government investigation. Similarly, trial courts must consider the constitutionality of restricting the defendant's ability to support his variety

[68] For example, the defense may believe that the investigation was underdeveloped, sloppy, or incomplete. The defense may wish to demonstrate in front of the jury that law enforcement narrowed down to one suspect, the defendant now at trial, too quickly when other investigatory steps and suspects should have been explored. When the theory of the defense relates to the quality, integrity and results of the government investigation, then the defendant's constitutional right to confront those witnesses against him should include the government law enforcement witnesses who conceived and conducted the investigation.

[69] In contrast, many other aspects of the underlying, criminal investigation are wholly irrelevant during the criminal case. For example, the ministerial, tactical chronology of events that immediately precede and follow the defendant's arrest do not make any "fact of consequence" more or less likely than without that evidence. *See* FED. R. EVID. 401. Execution of searches and pretrial detainment similarly are irrelevant at the criminal trial under most circumstances. *See id.* The criminal trial is not the proper forum to air grievances about accepted aspects of the criminal justice system and treatment of criminal defendants.

[70] *See* FED. R. EVID. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."). Decisions that narrow the investigation to a specific suspect do have "some tendency" to make a "fact of consequence," such as the government's required proof on the issue of identity, "less likely than without the evidence." *Id.*

[71] *See* cases cited *supra* notes 43-47 and accompanying text.

of defense theories with evidence including the non-inculpatory portions of the defendant's pretrial statement. The doctrine of fundamental fairness and certain trial rights under the Sixth Amendment, as discussed below, support this analysis.

III. FUNDAMENTAL FAIRNESS AND TRIAL-RELATED CONSTITUTIONAL RIGHTS

Since the turn of the twentieth century, the Supreme Court has reviewed the constitutionality of various aspects the criminal justice system based upon either an inherent notion of fundamental fairness during the criminal trial, or upon application of specific, trial-related protections enumerated in the Bill of Rights.[72] The accused's theory of defense, particularly a theory critical of the government's investigation, relates directly to both applications. Determinations regarding evidence offered by the accused related to the government's investigation could entail oft-overlooked constitutional considerations for the trial court. Such constitutional considerations include the accused's right to present his theory of the defense, fundamental fairness grounded in the Due Process Clause, and enumerated constitutional protections afforded to the accused *during the criminal trial* under the Sixth Amendment to the Constitution.

a. Fundamental fairness and violations of due process

The Constitution requires the government to conduct a fair trial of the criminal defendant. The Due Process Clause requires that notions of fundamental fairness govern all phases of the criminal trial.[73] The Supreme Court has held that the Due Process Clause protects against practices and policies that violate notions of fundamental fairness.[74] The criminal defendant may challenge any trial-related practice or policy as violating fundamental fairness under the Due Process Clause. A practice or policy offends the notions of fundamental fairness when "a fundamental principle

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[72] *See generally* Tracey L. Meares, *Everything Old is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105, 107 (2005); Craig M. Bradley & Joseph L. Hoffman, People v. Simpson: *Perspectives on the Implications for the Criminal Justice System: Public Perception, Justice and the "Search for Truth" in Criminal Cases*, 69 S. CAL. L. REV. 1267, 1272 (1996).

[73] *See* Meares, *supra* note 72 at 121.

[74] *See id.* at 123 ("[T]he Court, in relying on fundamental fairness recognized that the Due Process Clause is a constitutional guarantee that includes the interests of all of us, not just defendants.").

of liberty and justice which inheres in the very idea of a free government and is the unalienable right of a citizen of such government."[75]

Criminal defendants have relied upon the doctrine of fundamental fairness to challenge government practices and policies at trial.[76] The defense may challenge the fairness of practices and policies designed to streamline criminal justice and ease the government's path toward conviction by jury verdict. As the number of criminal trials decline, however, fundamental fairness due to the accused during his criminal trial should increasingly outweigh the interests of government efficiency and the ease of trial convictions.

Even before the steep decline in the number of criminal trials,[77] the Supreme Court has relied upon considerations of fundamental fairness in several instances to ensure the accused's constitutional rights are afforded to him at trial. For instance, relying on fundamental fairness *during the criminal trial*, the Court ensures that the government must prove its case by meeting the highest burden of proof: beyond a reasonable doubt;[78] the burden of proof should not be shifted to the criminal defendant on any element of the crime;[79] the government is required to produce reciprocal discovery to

[75] *See* Taylor v. Kentucky, 436 U.S. 478, 487 (1978); Hampton v. United States, 425 U.S. 484, 494 (1976) (Powell, J., concurring in the judgment); *see also* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (*overruled by* United States v. Balsys, 524 U.S. 666, 68 (1998)) (one of the "fundamental values" is . . . "our sense of fair play which dictates" a fair balance in the contest between the state and the individual); Twining v. New Jersey, 211 U.S. 78, 106 (1908) (*overruled by* Malloy v. Hogan, 378 U.S. 1, 11 (1964)).

[76] *See* Ian Langford, *Fair Trial: The History of an Idea*, 8 J. OF HUMAN RIGHTS 37, 48 (2009) (quoting JOHN FREDERICK ARCHIBOLD; ARCHIBOLD: CRIMINAL PLEADING, EVIDENCE, AND PRACTICE (2006) (defining a "fair trial" as when the accused is allowed "a reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage *vis a vis* his opponent").

[77] *See* Rakoff *supra* note 2, at 16; INNOCENCE PROJECT, *Report: Guilty Pleas on the Rise, Criminal Trials on the Decline,* Aug. 7, 2018, https://www.innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline/ ("Over the last 50 years, defendants chose trial in less than three percent of state and federal criminal cases—compared to 30 years ago when 20 percent of those arrested chose trial.").

[78] *See, e.g.*, *In re* Winship, 397 U.S. 358, 364 (1970) (holding that the highest standard of proof, beyond a reasonable doubt, was required in criminal cases by due process and fundamental fairness); Kentucky v. Whorton, 441 U.S. 786, 789 (1979) (holding that the trial court's failure to give jury instruction on presumption of innocence violated fundamental fairness); Taylor v. Kentucky, 436 U.S. 478, 490 (1978) (requiring, upon defense request, jury instruction on presumption of innocence).

[79] *See* Sandstrom v. Montana, 442 U.S. 510, 524 (1979) (holding that conclusive presumptions in jury instruction may not be used to shift burden of proof of an element of crime to defendant); *see also* Mullaney v. Wilbur, 421 U.S. 684, 702 (1975) (holding that the defendant may not be required to carry the burden of disproving an element of a crime for which he is charged); c*f.* Patterson v. New York, 432 U.S. 197, 211 (1977) (holding that defendant, however, may be required to bear burden of affirmative defense).

the defendant related to his affirmative defense of alibi[80] and the defendant is permitted to wear something other than his "prison clothes" at trial.[81]

Based on this line of cases, if a practice or procedure in a criminal case appears inherently unfair to the accused and is designed only to improve for government efficiency at trial, then the accused may raise a constitutional challenge under the doctrine of fundamental fairness and due process.[82] In addition to its attention to fundamental fairness, the Supreme Court has demonstrated renewed attention to certain trial-related, constitutional protections afforded to the accused under the Sixth Amendment, such as his right to a jury trial before an impartial jury and his right to confront the witnesses against him.[83]

b. Enumerated constitutional rights at the criminal trial

For the last century, the Court has reinforced the defendant's constitutional rights as they relate to the government's conduct during the investigative stage of the case. Specifically, the Court has held that the defendant has a right to be free from unreasonable searches and seizures,[84] and free from the compulsion of involuntary, coerced confessions.[85] Most of the constitutional jurisprudence in criminal procedure cases have focused on the relationship between government overreach and coercion during the investigative stages of cases and the accused's rights to be free from such intrusions. Yet, the Supreme Court remained relatively dormant as to the constitutional protections to be afforded to the accused *during the criminal trial*.[86]

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[80] *See* Wardius v. Oregon, 412 U.S. 470, 475-76 (1973) (holding that the defendant may not be required to provide disclosure to the prosecution of an alibi defense unless defendant is given reciprocal discovery rights against the state).

[81] *See* Estelle v. Williams, 425 U.S. 501, 512-13 (1976) (holding that, while convenient and efficient, the government cannot compel an accused to stand trial before a jury while dressed in "identifiable prison clothes").

[82] *See* cases cited *supra* notes 75, 78 and accompanying text; *see also* Langford, *supra* note 76, at 448.

[83] *See* Meares, *supra* note 71, at 123 ("[T]he Bill of Rights has become the central mechanism for the articulation of constitutional criminal procedure."); *see also In re Winship*, 397 U.S. at 377 (Black, J., dissenting) (arguing that the Fourteenth Amendment should be limited to the specific guarantees found in the Bill of Rights).

[84] *See* U.S. CONST. amend. IV. ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.").

[85] *See* U.S. CONST. amend V. ("No person shall be . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.").

[86] *See* FED. R. CRIM. P. 11(b)(1) (describing constitutional rights that must be knowingly and voluntarily waived in open court with the judge during a guilty plea).

Beginning in the early 2000s, the Supreme Court expanded its constitutional review in criminal procedure cases to include two trial-related protections enumerated in the Bill of Rights.[87] First, the Court crafted a modern application of the accused's Sixth Amendment "right to a trial before an impartial jury" to address the lower court's treatment of evidence supporting sentencing enhancements within mandatory sentencing schemes in the federal and state justice systems.[88] The Court next developed a new constitutional test and markedly changed the application of the confrontation clause to criminal cases.[89]

Trial courts now decide the admissibility of certain evidence including out-of-court statements, taking into account constitutional grounds,[90] as opposed to relying exclusively on evidentiary grounds. Importantly, the court's constitutional analysis has caused dramatic changes in the government's presentation during the modern criminal trial. The prosecution has had to alter its approach to trial presentation as these

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> [T]he defendant may be placed under oath, and the court must address the defendant personally in open court [and] . . . the court must inform the defendant of, and determine that the defendant understands, the following:
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> > (A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;
> > (B) the right to plead not guilty . . . to persist in that plea;
> > (C) the right to a jury trial;
> > (D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;
> > (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;
> > (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty. . ..

Id.

[87] *See supra* Section III (discussing Supreme Court's rejuvenation of enumerated rights under the Sixth Amendment including defendant's right to a fair trial, jury trial and to confront the witnesses against him); *see also* U.S. CONST. amends. V, XIV, § 1; United States v. Booker, 543 U.S. 220, 232-33 (2005); Crawford v. Washington, 541 U.S. 36, 61-62 (2004).

[88] *See infra* notes 92-106.

[89] *See infra* Section III.b (discussing the ripple affect caused by *Crawford* and its progeny); *see generally Crawford*, 541 U.S. at 61-62.

[90] *See infra* note 109 (describing *Crawford*'s quickly evolving list refining the new confrontation clause test and "testimonial" evidence requiring a live witness or past cross-examination).

decisions fundamentally interfered with the "business as usual" approach to criminal justice.[91]

i. Right to a jury trial before an impartial jury

Our adversarial system of criminal justice ensures that the defendant "enjoy[s] the right to a . . . trial before impartial jury" under the Sixth Amendment.[92] The Supreme Court, beginning in 2004, relied upon the enumerated, constitutional right to a jury trial to dramatically alter the landscape of criminal sentencing across the country in federal and state cases.[93] From approximately 1988 through 2004,[94] the government narrowly presented its trial evidence to prove only the elements of the charged conduct to the jury beyond a reasonable doubt.[95] Prosecutors strategically omitted any trial presentation of other "considerations" that they reserved instead for determination by the judge alone at sentencing under a lesser burden of proof.[96] That is, the government would present only the evidence necessary to prove the offense elements to the jury during the criminal trial by the higher burden of proof: beyond a reasonable doubt.

The prosecution affirmatively deprived the jury of any trial presentation to prove these other "sentencing considerations"[97] that, at a later hearing outside the presence of the jury, would serve to increase the accused ultimate sentence.[98] Following the jury verdict and prior to sentencing, the government merely furnished the trial judge with information, typically documentary evidence, supporting these sentencing considerations. The trial

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[91] *See* cases cited *infra* note 118 and accompanying text (discussing the Court's decisions which caused significant changes to the government's trial presentation of government expert testimony and reports); *infra* note 111.

[92] U.S. CONST. amend. VI.

[93] *See generally* Blakley v. Washington, 542 U.S. 296, 301-02 (2004); United States v. Booker, 543 U.S. 220, 236-37 (2005).

[94] *See* U.S. SENTENCING COMM'N, GUIDELINES MANUAL (1987) (amended 1989). This is known as the "mandatory guidelines era" because the United States Sentencing Guidelines ("Guidelines") were binding in federal courts. *See id.* The "era" of the mandatory Guidelines is defined as November 1, 1987, the date the Guidelines became "effective," to January 12, 2005, the date of the Supreme Court's decision in United States v. Booker, 543 U.S. 220, 227 (2005).

[95] *See, e.g.*, *Booker*, 543 U.S. at 227.

[96] *See id.* "Based upon Booker's criminal history and the quantity of drugs found by the jury, the . . . Guidelines required . . . [between 210 and 262 months in prison]. The judge, however, held a post-trial sentencing proceeding and concluded by a preponderance of the evidence that Booker had possessed an *additional 566 grams of crack* and . . . obstruct[ed] justice . . . . [Mandating a] sentence between 360 months and life imprisonment." *Id.* (emphasis added) (citation omitted).

[97] *See id.* (describing the additional weight of drugs and obstruction as "sentencing considerations" merely found by the trial court by preponderance of the evidence).

[98] *See id.*

court, at a judge-only sentencing hearing, made findings on applicable sentencing enhancements using a far lesser burden of proof, preponderance of the evidence.[99]

In its 2004 decision in *Blakely v. Washington*,[100] the Supreme Court rejected Washington state's streamlined, "business as usual" procedure that allowed prosecutors to segregate from the jury certain factual determinations that later served to enhance the accused's sentence imposed by the court.[101] Congress invested heavily, with time and money, in its own mandatory sentencing scheme to promote uniformity and consistency through the nation's federal courts.[102] In the 1980s, Congress authorized the United States Sentencing Commission and its standardization of federal sentencing though the United States Sentencing Guidelines.[103]

One year after *Blakely*, in two companion cases - *United States v. Booker*[104] and *United States v. Fanfan*,[105] the Court handed down a qualified rejection of a practice orchestrated by federal prosecutors within the federal system that was similar to the Washington state procedure in *Blakely*. The *Booker* Court torpedoed Congress, the Sentencing Commission, and their mandatory sentencing scheme as set forth in the Guidelines. Decades of sentencing jurisprudence also was impacted to guarantee that the defendant's constitutional right to a jury trial applied to even the slightest factual consideration not properly presented to the jury during the criminal trial.

Prosecutors had uniformly chosen their strategy of presenting matters related to sentencing for determination by judges rather than juries as a matter of efficiency, to streamline the path to conviction by jury verdict

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[99] *See id.*

[100] 542 U.S. 296 (2004).

[101] *See id.* at 312-14.

[102] *See* Sentencing Reform Act of 1984, 18 U.S.C. § 3551 (2018); *see also* Mistretta v. United States, 488 U.S. 361, 364 (1989) ("Congress delegated almost unfettered discretion to the sentencing judge to determine" a convicted defendant's sentence, but a review of the legislative history strongly suggests that the sentencing disparity that Congress hoped to eliminate did not stem from prosecutorial discretion, but instead from unchecked judicial discretion in formulating sentences); United States v. LaBonte, 70 F.3d 1396, 1400 (1st Cir. 1995) ("Three principal forces propelled the legislation: Congress sought to establish truth in sentencing by eliminating parole, to guarantee uniformity in sentencing for similarly situated defendants, and to ensure that the punishment fit the crime.").

[103] *See* S. REP. NO. 98-225, at 31, 38 1983 WL 25404. Senator Ted Kennedy argued that sentencing guidelines were necessary because "[f]ederal criminal sentencing is a national disgrace. *See id.* Under current sentencing procedures, judges mete out an unjustifiably wide range of sentences to offenders convicted of similar crimes." 130 CONG. REC. 1644 (1984).

[104] 543 U.S. 220 (2005).

[105] 542 U.S. 956 (2004). The jury findings in *Fanfan*, regarding the conspiracy and the 500 grams of powder, translated to an applicable sentencing guideline range of 63 to 78 months, whereas the judge at sentencing found additional drug weight, that equated to 188 to 235 months. *Booker*, 543 U.S. at 228.

(as well as the ultimate sentence sought).[106] It is significant that, in these cases, the government *did* provide the accused with a "jury trial before an impartial jury" under the Sixth Amendment as a matter of guilt to the crime charged.[107] But the defense eventually challenged this practice as depriving the accused of a "jury trial" on other aspects of the government's presentation. The Court relied upon the accused's constitutional right to a jury trial to end a widespread "business as usual" practice and policy by prosecutors in the state and federal systems.[108]

ii. Right to confront witnesses against the accused

At about the same time, in 2004, the Supreme Court again relied on an enumerated right under the Sixth Amendment to establish an entirely new test[109] for the defendant's right to confront witnesses against him *during the criminal trial*.[110] The Court, beginning with its 2004 decision in *Crawford v. Washington*[111] and its progeny[112], revived the once dormant Confrontation Clause. The *Crawford* Court created a new test for Confrontation Clause cases and rejected a series of "business as usual" government practices and

[106] *See Booker*, 543 U.S. at 244 (citing *Blakely*, 542 U.S. at 313) ("[T]he interest in fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment—has always outweighed the interest in concluding trials swiftly.").

[107] *See id.* at 227 (recounting that the jury found Booker guilty at trial of possession with intent to distribute controlled substances).

[108] *See id.* at 244-45 (rejecting the government practice of segregating matters related to the elements for the jury ad matter for the judge at sentencing).

[109] *See* United States v. Crawford, 541 U.S. 36, 62 (rejecting the "I know it when I see it" test for confrontation clause violations under the Sixth Amendment); *see also Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (*overruled by Crawford*, 541 U.S. 36) (holding that an out-of-court statement was admissible if it falls within a "firmly rooted hearsay exception" or otherwise demonstrated an "indicia of reliability.").

[110] *See Crawford*, 541 U.S. 36 at 66-67 (holding that Confrontation Clause violations are subject to harmless error analysis); *see also* United States v. Gillam, 167 F.3d 1273, 1277 (9th Cir. 1999).

[111] 541 U.S. 36 (2004).

[112] *See generally* Melendez Diaz v. Massachusetts, 557 U.S. 305 (2009) (rejecting the government's use of laboratory reports in lieu of government expert witness from the laboratory); Bullcoming v. New Mexico, 564 U.S. 647 (2011) (rejecting the government's theory that government expert witnesses from the laboratory were fungible); Williams v. Illinois, 567 U.S. 50 (2012) (allowing the government's expert witness to read from the laboratory reports created by other government experts). Following *Crawford*, the Court has had to revisit the rule for "testimonial evidence" and interpret variations of out-of-court statements introduced in a criminal case and against the accused, both statements made *to* the government and statements made *by* the government.

policies.[113] The Court focused on a defendant's right to meaningfully cross examine government witnesses who bear testimony against him.[114]

The court's new test under *Crawford* centered on the term "testimonial" and broadened the concept of "'witnesses' against the accused" to include anyone who bears testimony against the defendant.[115] The new test in *Crawford* constitutionally excluded at trial any pretrial statements made to the government that the declarant "would reasonably expect to be used prosecutorially."[116] Further, the Court's guidance did not exempt those statements made *by the government* that it would also expect to be part of its case presentation during the criminal trial.[117] Many of the out-of-court statements that the government planned to be part of its case presentation because the statements were previously deemed admissible under the rules of evidence, were instead found to constitutionally require to be subjected to some form of cross-examination *during the criminal trial* or when the statement was made prior to trial. Statements *by the government*, for these purposes, included statements by government experts, the use of their reports, and their prospective testimony in criminal cases.[118]

Before *Crawford*, prosecutors relied almost exclusively on the rules of evidence to elicit convenient testimony from government experts at trial and admit certified laboratory reports.[119] In some jurisdictions, the government established practices and policies that allowed for the fungibility of its government laboratory experts, those professionals who tested controlled substances or conducted scientific or technical testing. Trial courts in Massachusetts even allowed prosecutors to present scientific, laboratory evidence through a certified document only and thus without a sponsoring witness.[120]

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[113] *See Crawford*, 541 U.S. at 68-69 (rejecting Ohio v. Roberts, 448 U.S. 56 (1980) and creating a new test for whether an out-of-court statement offered by the government and against the accused violated the accused's Sixth Amendment right to confront the witnesses against him). Justice Roberts' failings were on full display in the proceedings below. *See id.* at 65. Sylvia Crawford made her statement while in police custody, herself a potential suspect in the case. *Id.*

[114] *See id.* at 50-51.

[115] *See id.* at 51-52, 67-69.

[116] The Court described that evidence was "testimonial" when the declarant could reasonably expect that it "would be used prosecutorially." *Id.* at 51.

[117] *See generally* cases cited *supra* note 112.

[118] *See Crawford*, 541 U.S. at 40 (finding that the statement at issue from the defendant's wife was admissible via the "statement against penal interest" hearsay exception under Washington Rule of Evidence 804(b)(3)); *see also* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 321-24 (finding that the government's laboratory report was admissible as a business record of the laboratory under Federal Rule of Evidence 803(6)).

[119] *See Melendez-Diaz*, 557 U.S. at 321-24.

[120] *See id.* at 328-29. After *Crawford*, the court had the opportunity to look at Massachusetts practice with respect to lab testing and lab reports during the criminal trial. *See id.* Under the

The *Crawford* Court caused lower courts to re-examine the admissibility of broad categories of out-of-court statements previously admitted against the accused in criminal cases under the rules of evidence.[121] The Court's renewed focus on the defendant's constitutional right to confront witnesses against him thereafter included his right to cross examine out-of-court declarants who the government did not intend to be witnesses at trial. The implications of the new test under the Confrontation Clause fundamentally changed the way that the prosecution presented its case at trial and caused trial courts to weigh constitutional considerations *with* the rules of evidence to determine admissibility.

Prior to 2004, trial courts simply glossed over any meaningful constitutional analysis and routinely admitted the testimony and reports from government laboratory witnesses. The government's presentation of these expert witnesses and their reports was certainly efficient and streamlined the path to conviction by jury verdict. The Court's analysis, however, gave weight to separate considerations under the Confrontation Clause and led to different admissibility outcomes than did applying only the rules of evidence. Reinvigorating Confrontation Clause analysis over the next fifteen years, the Court held that the defendant's constitutional right *during his criminal trial* trumped the government's interest in efficiency and convenience.

iii. Fifth Amendment privilege against self-incrimination

The American criminal justice system favors one method over all others for the accused to advance his theory of the defense before the jury: trial courts prefer that he testify under oath. Trial courts regularly reference the accused's ability and option to testify in his own defense when excluding other evidence potentially favorable to him at trial, including portions of his own pretrial statements. Trial courts also rely upon the accused's option to testify in his own defense when he specifically raises constitutional challenges.

Crawford test, the lab report was certainly testimonial and one that the government expected to use prosecutorially. *See id.* The court rejected Massachusetts' long time, efficient trial practices and required that a live witness be produced to give meaning to the criminal defendants Sixth Amendment right to confront witnesses against him at trial. *Id.* The government in many jurisdictions had processes and evidentiary pathways to admitting out-of-court statements without regard for the defendant's constitutional rights before Crawford. For example, over the course of decades, in Massachusetts state court the government routinely presented the lab reports in narcotics cases without a witness from the lab.

[121] *See Booker*, 543 U.S. at 244-45.

There is little to no legal support for the proposition that the accused must forgo his privilege against self-incrimination *during the criminal trial* to preserve his other, trial related constitutional protections. However, trial courts tend to pit the defendant's privilege against self-incrimination against the other protections discussed in this Article, such as his constitutional right to present a theory of defense, his right to a fair trial, his right to a jury trial, and his right to confront the witnesses against him.[122] The accused, of course, should not have to waive his privilege against self-incrimination and subject himself to cross-examination in order to present at trial his side of the story and to offer the jury a theory of the defense. Nevertheless, trial courts essentially compel the criminal defendant to waive his privilege against self-incrimination, so that he may meaningfully exercise other constitutional rights afforded to him, when he needs those protections the most—*at trial*.

The Framers of the Constitution did not intend for its protections afforded to the accused at trial to work like a game show. Instead the Framers would have wanted the accused, whose liberty is at risk, to enjoy *all* of the constitutional protections afforded to him during his criminal trial. The constitutional safeguards underlying the defendant's right to present his "theory of the defense" and the notions of fundamental fairness work together to benefit the accused *during his criminal trial*. The trial-related protections enumerated in the Bill of Rights similarly were intended to work in concert to protect all citizens when they may need those protections most, during a criminal jury trial in which they are accused of a serious crime.

The Founding Fathers intended the accused's constitutional privilege against self-incrimination to act as a shield for the accused to raise both before and during trial.[123] Under current judicial treatment the defendant may have no choice but to forgo that privilege against self-incrimination, testify under oath at trial, and "subject himself to cross-examination by the government."[124] The constitutional analysis of the

[122] *See supra* Section II.c. With proper judicial treatment of his pretrial statements, the defendant would be better informed in making this decision as to whether to testify in his own defense.

[123] U.S. CONST. amend. V. (enumerating how defendant can invoke his privilege against self-incrimination before or during trial). The defendant maintains his privilege even if he waived it pretrial and provided statements to law enforcement.

[124] *See, e.g.*, United States v. Willis, 759 F.2d 1486, 1501 (11th Cir. 1985) (holding that a defendant cannot attempt to introduce an exculpatory statement made at the time of his arrest without "subjecting [himself] to cross-examination"); United States v. Fernandez*,* 839 F.2d 639, 640 (9th Cir. 1988) (holding that the district court did not abuse its discretion when it limited the accused's ability to elicit his exculpatory hearsay statements on cross-examination); *See Ortega,* 203 F.3d at 683 (citing *Fernandez*, 839 F.2d at 640) (analyzing admissibility of hearsay offered by the defense). The Ninth Circuit in *Ortega* went so far as to hold that the accused should not be

consequences of excluding the non-inculpatory portions of the defendant's pretrial statement called for in this Article should compel different results.

ARGUMENT

The criminally accused have long argued that the non-inculpatory portions of their pretrial statements should be independently admissible at trial. However, most defense arguments have been reduced to evidentiary arguments that the applicable evidence code expressly intended to preclude defendants' desired uses. The absence of decisions undertaking a constitutional analysis of this issue provides a glimmer of hope for criminal defendants. And the timing is right for constitutional consideration of this issue.

The criminal justice system is characterized by a diminishing number of criminal trials. We have learned more about the relative reliability of confessions and the growing body of research on false confessions. The Supreme Court, as discussed in Sections II and III of this Article, has resuscitated trial-related, constitutional protections and (hopefully) the umbrella doctrine of "fundamental fairness" during the criminal trial. These constitutional considerations should be a basis for challenging admissibility determinations that lead to unjust policies and practices—and results—at trial. This appears to be true in part because the perceived risks of allowing the defendant to make use of his non-inculpatory, pretrial statements can be regulated with limitations and a balancing test for determining admissibility.

In the argument sections that follow, this Article will discuss three options for the defendant to make use of the non-inculpatory portions of his pretrial statement *during his criminal trial*.

(1) The defendant could independently offer into evidence the non-inculpatory portions of his pretrial statement (Section IV).
(2) When the government admits only portions of the defendant's pretrial statement as his confession at trial, the defendant could ask the court to admit the other portions of his pretrial statement contemporaneously in the government's case-in-chief (Section V).
(3) The defendant could frame cross-examination questions of government witnesses that reflect those same portions of his pretrial statements. (Section VI).

allowed to use the Confrontation Clause as a means of admitting hearsay testimony through the "back door" without subjecting himself to cross-examination. *See Ortega,* 203 F.3d at 683 (citing *Fernandez*, 839 F.2d at 640).

IV. DEFENDANT'S CONSTITUTIONAL RIGHT TO INDEPENDENT ADMISSION OF HIS NON-INCULPATORY STATEMENTS AT TRIAL

The first of the proposed options would require that trial courts allow a defendant to independently admit portions of his pretrial statement during the defense case-in-chief consistent with his theory of the defense. This is the least probable of the three proposed options, but, because of the order of proof in a criminal trial, it is the fairest of the three. The defendant currently has no ability to have the non-inculpatory portions of his pretrial statement independently admitted; instead, those portions would be categorically excluded under the rules of evidence.

Under the first proposed approach, the lower court's admissibility determination would account for constitutional considerations as well as evidentiary doctrines. This process must be analyzed with a constitutional lens that includes the theory of the defense, the umbrella doctrine of fundamental fairness, and other trial-related constitutional rights. Subject to the limitations and a balancing test set out in Section VII below, trial courts would allow both sides to present the relevant portions of the accused's pretrial statement that advance their respective theories of the case.

a. Constitutional right to advance a "theory of the defense"

The accused enjoys a constitutional right to advance his theory of the defense before the jury, so long as it is properly supported by evidence. His ability to independently admit portions of his pretrial statement turns on how the favorable parts of his pretrial statement relate to, and align with, his theory of the defense. An accused's theory of the defense that is based upon a critique of the government's investigation lends itself to such a connection.

The accused's theory of the defense could converge on a combination of theories such as mistaken identity, failure of proof, or the quality of the investigation. For example, if the defendant offered additional investigative leads and suspects in his pretrial statements to law enforcement *that were not pursued by law enforcement*, then those portions of his statement may support his theory of the defense. The trial court's denial of this evidence supporting his theory of the defense connects directly to the due process right of fundamental fairness during the criminal trial and his Sixth Amendment right to a jury trial on all material issues at trial.

b. Fundamental fairness during the criminal trial

The inherent connection between a defendant's right to present his theory of the defense at trial, and the notions of fundamental fairness in the criminal trial is instructive here. The interplay between an accused's theory of the defense and fundamental fairness comes to bear with the defendant's right to independently admit the non-inculpatory portions of his pretrial statement. The accused must be able to support his theory of the defense, particularly if his theory represents a critique of the government's investigation, with portions of his own pretrial statement.

There is not an issue with a defense theory critical of the government investigation. Because, once the defendant testifies in his own defense under oath, then our criminal justice system readily allows those theories of the defense based on critique of the government's investigation. Our criminal justice system should go further, however, to conclude that it offends the notions of fundamental fairness to not permit the criminal defendant to advance his defense theory in other ways, including a way that permits the defendant to preserve his privilege against self-incrimination. Notions of fundamental fairness must compel lower courts to allow the accused to preserve all his constitutional rights *during the criminal trial*, as opposed to requiring the accused to waive one constitutional protection to advance another.

The defendant's inability to make any use of his non-inculpatory pretrial statements under the rules of evidence rises to the level[125] of a "procedure or policy" that offends the notions of fundamental fairness *during the criminal trial*.[126] The process due to the accused during his criminal trial requires that the notions of fundamental fairness be met during all phases of that trial.

For decades, the government's presentation of the defendant's "confession" has been exclusively governed by the rules of evidence and in favor of an efficient and streamlined government presentation during the criminal trial. Drafters of evidence codes, federal and state,[127] certainly

[125] *See supra* notes 72-78.

[126] *See supra* note 78; *cf.* Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 126 (1987-88) (discussing how the defendant's constitutional rights at trial can actually hinder effective truth-finding). Plainly, the criminal defendant has a set of rights which may interfere with truth-finding and which go beyond immediate fairness considerations. A defendant's right against self-incrimination, the right to unilateral discovery from the prosecution, the right to a jury trial, and the burden of proof beyond a reasonable doubt, for example, are potentially significant barriers to truth-finding. *Id.*

[127] The Federal Rules of Evidence were adopted by order of the Supreme Court on Nov. 20, 1972, transmitted to Congress by the Chief Justice on February 5, 1973, and became effective on

constructed the rules of evidence to disfavor the accused's use of his pretrial statements. Yet, constitutional, as well as evidentiary considerations, should factor into the trial court's admissibility determinations in the criminal case.

As it happened with the Court's holdings as to trial-related, constitutional rights in the early 2000's,[128] trial courts should revisit this procedure and policy that unfairly dices the defendant's pretrial statement. To exclude this information under only the rules of evidence, predominantly rules relating to hearsay, trial courts play a role in orchestrating an unfair proceeding. The prospect of a recurring constitutional violation that offends fundamental fairness during the criminal trial should outweigh considerations of efficiency.

c. Sixth Amendment right to trial before an unbiased jury

In addition to the notions of fundamental fairness grounded in due process, the accused is entitled to his Sixth Amendment right to a "trial before an unbiased jury."[129] The Supreme Court instructed that, even if a case is presented to a jury, that case can still suffer from a Sixth Amendment, jury trial violation. If an issue is material to the outcome of the jury's determination of guilt (or at sentencing),[130] then the defendant is also constitutionally afforded a jury trial *on that narrow issue*. Under the same argument, the accused is entitled to a jury trial on the narrow issue discussed in this Article, the government's unfair apportioning of his pretrial statement.

The accused's pretrial statements to law enforcement are not always the neat and clean confessions that prosecutors are permitted to present at trial.[131] Instead, a defendant's pre-trial statement may equivocate, minimize his culpability, and raise questions about the government's investigation. Yet, the government's redacted confession presentation can be deceptively clean, streamlined and favorable to the state.

July 1, 1973. The federal rules derived from state evidence codes including the California Evidence Code.

[128] *See infra* Section III.b. (describing the Supreme Court's renewed focus on the defendant's Sixth Amendment rights to a jury trial and to confront witnesses against him).

[129] *See* U.S. CONST. amend. VI; *see supra* Section III.a (describing the purpose of the Due Process Clause as promoting fundamental fairness).

[130] *See* Brady v. Maryland, 373 U.S. 83, 87-89 (1963) (setting forth "materiality" as the standard for the government's constitutional discovery obligations); *see also* United States v. Agurs, 427 U.S. 97, 108-10 (1976). The theory underlying the government's constitutional discovery requirement is, the guilty are convicted and the innocent are acquitted. The government must ensure that trials are fair so that the innocent will not be convicted.

[131] *See supra* Section I.b (outlining an illustrative example of the Ponzi scheming promoter as the criminal defendant).

The Supreme Court, in *Booker* and its progeny, provides guidance that there is constitutional infirmity when the prosecutor picks and chooses potentially outcome-determinative information that will *not* be before the jury and therefore will *not* be proved beyond reasonable doubt at trial. The *Booker* Court held that the government violated the accused's Sixth Amendment right to a jury trial when it omitted from trial information not needed to prove the elements of the offense. The Court held that the defendant's constitutional right to a jury trial outweighed the government's interest in an efficient and streamlined presentation at trial. Similar compelling interests are at stake here. The jury deserves to hear and pass on the omitted information here: the defendant's non-inculpatory, pretrial statements.

The defendant is entitled to more than a simplified and stream-lined jury trial. He is constitutionally entitled to more than a mere day in court. It's not just about the accused having his day in court. Trial courts must ensure the quality of all aspects of his day in court. We must review the matters that the government presented to the jury and, more critically, the matters that the prosecution strategically left out.[132]

When part of the evidence that the jury will use to judge guilt at trial includes the accused's confession, then, as a constitutional matter, the defendant is entitled to a jury trial on that narrow, yet material, issue. The jury should hear all relevant portions[133] of the defendant's statement and decide the case understanding the full context in which the incriminating portions of the statement were made. Current judicial treatment permits the government to have a jury trial only on those portions that reinforce the government's theory of guilt. The defendant maintains a constitutional right to a jury trial on all aspects of a single piece of evidence, a confession, wherein even the slightest omissions could lead to a verdict that deprives him of his liberty.

d. Better timing in the defense case-in-chief

Independently admitting portions of the accused's pretrial statement is the most difficult outcome for a trial court to accept, but that outcome is fairest. That is, it is preferable that the defendant first fully appreciates the

[132] *See supra* notes 95-96. The prosecution in *Booker* strategized to present the bare minimum before the jury at trial to save other matters for later judge-alone determinations under a lesser burden of proof. *See Booker*, 543 U.S. at 227. This is not unlike when the government strategically presents the accused's confession at trial without the context of the surrounding statements that do not incriminate him, and may even exculpate him. *See id.*

[133] *See* FED. R. EVID. 401. Under the proposal, relevance is still an important, threshold limitation on the admissibility of evidence.

government's case-in-chief against him and, armed with that information, then decides whether to present witnesses and evidence, testify in his own defense or present independently admissible portions of his pretrial statement.

e. The reliability of the defendant's statement

The Innocence Project and other organizations have unveiled some of the root causes that led to wrongful convictions. Many cases where convicted defendants were later exonerated involved "confession" evidence presented by the government turned out to be false. This has happened frequently enough that the field of false confessions is ripe for expert testimony in criminal trials.

Trial courts, knowing this, readily admit the inculpatory portions of the defendant statements to law enforcement pretrial. The reliability and validity of the defendant's incriminating statements appears to present less of an issue in our criminal justice system. Reliability and whether the statement is "self-serving" becomes a concern when the defendant seeks to admit or make use of his non-inculpatory, pretrial statements at trial.

f. The Ponzi scheme promoter example

Drawing upon the Ponzi scheme example above, if the Ponzi promoter's theory of the defense related to investigatory leads not taken, suspects not pursued and the government's "tunnel vision" in narrowing its focus prematurely to him as the bad actor, then he has an argument to independently admit the non-inculpatory portions of his pretrial statement, in paragraphs 1, 2, 3 and 9. Following the close of the government's case and during his case-in chief, the accused could independently admit these parts of his pretrial statement as evidence in support of his stated theory of the defense. The defendant could then request a specially-crafted jury instruction and better argue his theory of the defense to the jury in summation. Perhaps most importantly, the accused could do so while maintaining his privilege against self-incrimination.

V. DEFENDANT'S NON-INCULPATORY STATEMENTS CONTEMPORANEOUSLY ADMITTED DURING THE GOVERNMENT'S PRESENTATION

This Article's second proposal is, when the government presents the defendant's confession during its case-in chief, the defendant is

constitutionally entitled to contemporaneously admit all or some of the other portions of his statement. When the government offers something less than the entirety of the defendant's pretrial statement during its presentation, this Article argues that the defendant enjoys a constitutional right, or a common-law, evidentiary option, to present the other relevant portions of his own pretrial statement at the same time. At the very least, in fairness, the jury should consider the redacted portions of the defendant's confession to complete the context of the defendant's statement.

a. Fundamental fairness

The fundamental fairness argument in the first proposal above applies equally here. When the government presents only incriminating portions of the defendant's pretrial statement during its trial presentation, the defendant can point to a phase of his criminal trial that is patently unfair. The current treatment of his pretrial statement, and how the government can parse out a confession, offends notions of fundamental fairness and due process for the accused.

Examples of procedures and policies that the Court found violated fundamental fairness are similarly instructive here. By precluding the accused from using the non-inculpatory portions of his pretrial statement at trial to put into proper context the portions of his pretrial statement that were admitted into evidence by the government, the criminal defendant is forced either to accept that misleading presentation by the prosecution or to waive his Fifth Amendment privilege against self-incrimination to support his own theory of the defense of trial. This current treatment of the defendant's pretrial statement is as offensive and damning to notions of fundamental fairness as forcing him to wear his prison clothes at trial or to carry the burden to proof on one of the government's elements of trial.

The doctrine of fundamental fairness further should be triggered when the parties to a civil trial are treated more fairly than the criminal defendant within the adversarial jury trial system. How can lower courts decide that the defendant receives a fair trial, receives the process that is due to him, when the court permits the government to pick and choose the defendant's words that will incriminate him during the trial? It is time to re-examine this practice with a meaningful, constitutional analysis.

b. Common law evidentiary doctrine

When the trial court allows the government to present his confession at trial,[134] the criminal defendant has until now relied on a collection of evidentiary rules to request that the court contemporaneously admit omitted, non-inculpatory portions of his statement. The defendant specifically relies upon rules of evidence based on fairness within the adversarial trial system such as Federal Rules of Evidence 102,[135] 106,[136] 611(a)[137] and 403.[138] The drafters of evidence codes, however, sought to exclude potentially self-serving, pretrial statements made by the defendant and this concern typically trumps the application of these other rules.

Tantamount to a categorical exclusion, courts remain extremely hesitant to recognize any bone fide use of a defendant's pretrial statement other than by the prosecution as a confession. The trial court also has failed to exercise its discretion to admit evidence because otherwise it would unfairly prejudice the accused or potentially mislead to the jury. The trial courts simply do not favor the accused's admission or use of his pretrial statements. Trial courts typically reject these purely evidentiary arguments because, in part, the rules have strayed from the common law doctrine and lost the connection to the underlying premise of "fairness" and "ascertaining the truth" for the parties at trial.[139]

i. The common law "rule of completeness"

The common law, evidentiary doctrine of the "rule of completeness" furnishes an excellent argument for the defendant in addressing the admissibility of clarifying or qualifying portions of his non-inculpatory,

134 *See* FED. R. EVID. 801(d)(2)(A).

135 *See* FED. R. EVID. 102 ("These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.").

136 *See* FED. R. EVID. 106 ("If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that *in fairness* ought to be considered at the same time." (emphasis added)).

137 *See* FED. R. EVID. 611(a) ("The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for *determining the truth*; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment." (emphasis added)).

138 *See* FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

139 *See* FED. R. EVID. 102, 106 & 611(a).

pretrial statements.[140] The rule permits a party to contemporaneously admit the other portions of a recording, writing or oral statement that were left out of the opponent's trial presentation.[141] The rule of completeness, partially-codified under Rule 106,[142] sets out a clear method for the criminal defendant to contemporaneously admit the omitted, non-inculpatory portions of his pretrial statement.[143] The rule operates less as an evidentiary principal and more as a fairness and timing mechanism. While application of Rule106 should itself provide the relief sought in the second proposal, unfortunately, the trial courts seldom agree.

Courts rely upon one of three explanations in rejecting the application of Rule 106 to support denying the defendant's request to admit the favorable portions of his pretrial statement. First, courts hold that Rule 106 only applies to writings and recordings and, therefore, doesn't apply to oral pretrial statements by the accused.[144] Second, courts hold that the rule does not render inadmissible information admissible because it is coupled in the same writing or recording as the information offered by the proponent. Lastly, as discussed above, the defendant can waive his privilege against self-incrimination and testify under oath to offer the non-inculpatory portions of his pretrial statement.[145]

Such judicial reasoning can be countered as follows. First, the "rule of completeness" applies equally under Rule 611(a) for oral statements, as Rule 106 applies to "writings and recordings."[146] Also, many pretrial

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[140] *See* FED. R. EVID. 106; *see also Ortega*, 203 F.3d at 682 (holding that Rule 106 "does not compel admission of otherwise inadmissible hearsay evidence"). Rule 106 applies only to written and recorded statements. FED. R. EVID. 106; *see also* Phoenix Associates III v. Stone, 60 F.3d 95, 103 (2d Cir. 1995). If the government witness' testimony concerned an unrecorded oral confession, the rule of completeness does not apply. Even if the rule of completeness did apply, exclusion of the defendant's exculpatory statements was proper because these statements would still have constituted inadmissible hearsay. *See Ortega*, 203 F.3d at 682; *see also Collicott*, 92 F.3d at 983.

[141] *See* WRIGHT & GRAHAM *supra* note 16.

[142] *See* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 171-72 (1988).

[143] *See* United States v. Velasco, 953 F.2d 1467, 1474–75 (7th Cir. 1992) (citations omitted). Rule 106 requires that the evidence the proponent seeks to admit must be relevant to the issues in the case. Even then, a trial judge need admit only that evidence which qualifies or explains the evidence offered by the opponent. In addition to relevance, the trial court should ask (1) does it explain the admitted evidence, (2) does it place the admitted evidence in context, (3) will admitting it avoid misleading the trier of fact, and (4) will admitting it insure a fair and impartial understanding of all the evidence. *Id.*; *see also* 21A Wright & Graham, Jr., § 5072.

[144] *See* FED. R. EVID. 106 (expressly incorporating "writings and recordings" and omitting oral conversations).

[145] *See supra* Section II.c.

[146] *See* FED. R. EVID. 611(a) ("The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment."); *see also* United States v. Pacquette, 557 Fed. Appx. 933, 936 (11th Cir.

statements are, in fact, written or recorded, including oral statements recounted in an investigatory report or other writing.

Second, the common-law rule of completeness allows the opponent to admit otherwise inadmissible evidence to give proper context to the incomplete writing, recording or statement offered by the proponent.[147] In a circuit split,[148] the majority of the trial courts hold that, although the defendant's pretrial statement is inadmissible hearsay when offered by him,[149] it should be contemporaneously admitted at the accused's request under Rule 106 when the government offers only the incriminating parts of his pretrial statement at trial. It is more logical, for a rule based on fairness and timing, that a party should be able to consider inadmissible evidence at the same time as the admissible evidence for context and to avoid "misleading the jury."[150]

Courts must revisit the evidentiary dead ends for the accused on this issue as well. Wholly distinct from the constitutional arguments in this Article, the rules of evidence are purportedly premised on fairness to the parties in our adversarial system of jury trial. But, as it relates to the defendant's pretrial statements, the drafters of the rules and the trial courts have favored government advantage at every turn.

2015) (extending the fairness standard in Rule 106 to oral statements "in light of Rule 611(a)'s requirements that the district court exercise reasonable control over witness interrogation and the presentation of evidence to make them effective vehicles for the ascertainment of truth") (quoting United States v. Baker, 432 F.3d 1189, 1223 (11th Cir. 2005)); United States v. Verdugo, 617 F.3d 565, 579 (1st Cir. 2010) (noting that the district court "retained substantial discretion under FED. R. EVID. 611(a) to apply the rule of completeness to oral statements"); United States v. Branch, 91 F.3d 699, 727–28 (5th Cir. 1996) (noting, without disagreement, that "[o]ther circuits have held that Rule 611(a) imposes an obligation for conversations similar to what rule 106 does for writings"); *cf.* United States v. Alvarado, 882 F.2d 645, 650 (holding that Rule 106 applies to writings, but Rule 611(a) "renders it substantially applicable to oral testimony as well").

147 *See* 2 Michael H. Graham, HANDBOOK OF FEDERAL EVIDENCE § 106:2 (7th ed. 2012). To the extent however that such evidence, otherwise inadmissible, tends to deny, explain, modify, qualify, counteract, repel, disprove or shed light on the evidence offered by the opponent, the evidence may be admitted provided its explanatory value is not substantially outweighed by the dangers of unfair prejudice, confusion of the issues, misleading the jury, or waste of time, Rule 403. *See id.*

148 *See id.*

149 *See* FED. R. EVID. 801(d)(2)(A) (defining "not hearsay" as a statement by a party offered by the party opponent).

150 *See* 1 Stephen A. Saltzburg et al., FEDERAL RULES OF EVIDENCE MANUAL § 106.02[3] (11th ed. 2015). "It seems that hearsay objections should not block use of a related statement [under Rule 106] . . . when it is needed to provide context for statements already admitted. Thus a statement should be admissible if it is needed to provide context under Rule 106 and to prevent misleading use of related statements even if the statement would otherwise be excludable hearsay." *Id.*

VI. USING PORTIONS OF THE DEFENDANT'S NON INCULPATORY STATEMENTS ON CROSS-EXAMINATION OF GOVERNMENT WITNESSES

The third and final proposal would allow the criminal defendant to advance his theory of the defense by conducting a meaningful cross-examination of government witnesses at trial may require that he be able to use his non-inculpatory statements in formulating questions. The best vehicle for the defendant to advance his theory of the defense, in many criminal cases, rests with cross-examination of government witnesses. Again, when the defendant's theory relates to deficiencies in the government's investigation, then the non-inculpatory portions of pretrial statement can align directly with a proper[151] and effective line of questioning during cross-examination.

Even though the defendant enjoys the constitutional right to argue as his sole defense that the prosecution has not met its burden of proof—and thus *not* present any evidence *nor* testify in his own defense—unfortunately, trial courts foreclose viable avenues of the defendant's cross-examination of government witnesses that would support the defendant's burden-of-proof defense. Similar to those decisions denying the other uses for the defendant's pretrial statements discussed above, trial courts rule against the defendant's use of his non-inculpatory, pretrial statements for cross-examination purposes.[152] This too offends notions of fundamental fairness and due process in the criminal trial.[153]

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[151] The standard for an acceptable question on cross-examination is whether the questioner has a "good faith basis" to ask the question. Here, the accused relies upon his pretrial statement as the "good faith basis" to question government witnesses in accordance with his theory of the defense.

[152] *Cf.* Mark A. Summers, *Taking Confrontation Seriously: Does Crawford Mean That Confessions Must Be Cross-Examined?* 76 ALBANY L. REV. 1805, 1810 (2013). "Yet, reading a defendant's confession to the police out of *Crawford*'s definition of 'testimonial' statements is problematic for several reasons. First, as the analysis above suggests, such an interpretation is contrary to the plain language of *Crawford*. Second, on its face, it leads to an unavoidable contradiction—an accusatory statement made by a third party to the police is 'testimonial,' while a self-accusatory statement made by a defendant under exactly the same circumstances is not. And, finally, it would put *Crawford*'s understanding of the word 'witness' as used in the Confrontation Clause at odds with the Court's interpretation of the same word in the Fifth Amendment." *Id.*

[153] These admissibility determinations during the criminal trial offend notions of fundamental fairness under the Due Process Clause and deprive the accused of his right to a trial before an impartial jury under the Sixth Amendment. *See supra* Section III.a. Unlike the due process umbrella protection of fundamental fairness and the defendant's right to a trial before an impartial jury, discussed above, his Sixth Amendment right to confront the witnesses against him provides only the narrowest relief. The Supreme Court's renewed interest in the Confrontation Clause with a new test under *Crawford* focuses on the out-of-court declarant and the defendant's right to meaningfully confront that person at trial. Like the examples that followed the *Crawford* decision, set out above, with respect to lab reports government expert witnesses who work in laboratories,

Anytime the trial court limits the scope of cross-examination in a criminal case, the accused has a viable Confrontation Clause argument under the Sixth Amendment. It is more egregious here, as trial courts effectively have barred viable defense cross-examination *because* the basis of the questioning touched upon the accused's non-inculpatory, pretrial statements. Merely because a line of cross-examination questioning referred to the defendant's pretrial statement, lower courts have shut down the examination and specifically excluded any reference by the accused to his own pretrial statements.[154]

a. No constitutional right to confront yourself

A few trial courts have considered a defendant's Confrontation Clause challenge to excluding his use of his pretrial statement during cross-examination. They quickly dispose of the issue without significant constitutional analysis because they focus on the fact that the defendant is the out-of-court declarant and conclude that the defendant has no constitutional right to confront himself. Accordingly, this thin analysis under the Confrontation Clause reveals the same result as the rules of evidence.

The Confrontation Clause argument in this Article emphasizes a slightly different constitutional right: the defendant's right to confront *law enforcement witnesses*, not himself. Law enforcement witnesses aggregate the tapestry of the government's case that involves other witnesses and evidence against the accused. For the criminal defendant, no classification of witnesses is more at odds with his theory of the defense and his hope for a not guilty verdict at trial then law enforcement. The Confrontation Clause should provide a meaningful opportunity for the accused to confront the law

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the court ultimately held that the defendant had the constitutional right to conduct a specific type of cross-examination with a specific witness compelled to attend trial.

[154] *See Fernandez,* 839 F.2d at 640 (foreclosing cross-examination that referenced the defendant's pretrial statement); *Willis*, 759 F.2d at 1501. Some scholars believe that the accused has more than enough of an advantage when it comes to confronting the witnesses against him. Summers, *Taking Confrontation Seriously*, at 1815.

> He [the in-court witness] is confronting the very person whose statements he is reporting, he is subject to cross- examination by counsel who has at his elbow the person who knows all the facts and circumstances of the alleged statements and who is therefore in the best possible position to conduct a searching inquiry, and, finally, the declarant may himself go upon the stand and deny, qualify or explain the alleged admissions.

Id. (citing Edmund M. Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 YALE L.J. 355, 355–59 (1921)) (noting Morgan's argument that extra-judicial party admissions were not admitted for their truth).

enforcement witness and, in so doing, the government's evidence lodged against him at trial.[155]

b. Oddly honoring the rules of evidence

Trial courts do not generally limit the defendant's cross-examination of government witnesses for historically-accepted, trial presentation reasons. However, lower courts do oddly honor the rules of evidence as they relate to precluding any use by defendant of his pretrial statements. The constitutional violation of denying the accused's use of certain non-inculpatory statements during the cross-examination of law enforcement witnesses is exacerbated when the government is committed to introduce inculpatory statements from the defendant at trial.

c. Defendant's attempt to "subvert the rules" with "self-serving" statements

Some courts reveal a perverse sense that somehow the defendant would gain an unfair advantage during the criminal trial if he could use the non-inculpatory portions of his pretrial statements at trial. Courts actually refer to the defendant's attempts to subvert the rules of evidence by trying to use his pretrial statements to formulate questions on cross-examination. Non-inculpatory, pretrial statements by the accused are seen as only being self-serving but statements that are potentially misleading to the jury.

Courts have held that to allow the defendant to independently present his own pretrial statements would be "self-serving." However, anytime one party to a litigation admits evidence or elicits testimony, that party does so because that evidence is self-serving, because it favors their side. In contrast, if the defendant's first words during the investigatory stage of his own criminal conduct can support his theory of the defense at trial, then it may be that those early statements may be more persuasive and probative.

[155] It stands to reason that many iterations of the defendants "theory of the defense" run in direct contradiction to the government's presentation in its case in chief. The height of that contradiction and necessary adversarial opposition during the criminal trial is the defense cross-examination of enforcement witnesses. While the court always can control the manner and mode and duration of cross-examination, few of those determinations have actual constitutional implications. Limiting and shutting down information for use when the defendant cross-examines law enforcement may be one of those instances.

d. Preserving the privilege against self-incrimination

Trial courts decide whether the defendant's ability, or in this case inability, to cross-examine government witnesses particularly law enforcement witnesses well before any criminal defendant should have to make the determination to waive or preserve his right not to testify at trial. A criminal defendant when considering whether or not he may take the stand in his own defense should do so in light of all the evidence that was presented to the jury at the time when the government closes its case. The sequence and timing of the criminal trial again supports not pitting the defendant's Confrontation Clause rights against his Fifth Amendment privilege against self-incrimination.

If the defendant is allowed to conduct a meaningful cross-examination of law enforcement witnesses using some portions of his pretrial statements consistent with his theory of the case, then he may not need to testify in his own defense at trial and he can instead rest on a defense that the prosecution has failed to meet its burden of proof. If the defendant is allowed to point out some of the deficiencies in the investigation and investigatory steps not taken and suspects not pursued, then the defendant may make a more informed decision about whether he needs to testify in his own defense once the case proceeds to the defense case in chief.

VII. LIMITATIONS AND A PROPOSED BALANCING TEST

The proposals in this Article come with some distinct limitations and a proposed balancing to guard against the defendant's improper uses of his pretrial statements and any gamesmanship by the defense.

a. Limitations to the proposals

The limitations on the criminal defendant's ability to use the non-inculpatory portions of his pretrial statements should be as follows.

First, to borrow a legal term of art from advocacy, the defendant must have a "good faith basis" for taking advantage of the proposals set forth in this Article. Specifically applicable here, the defense must have a "good faith basis" to pose a question to a government witness on cross-examination. The relief sought here is distinct from hypothetical questions.

Second, this Article does not change the current law as to the "exculpatory no" doctrine and it should not be included as part of the relief sought here. That is, the criminal defendant is entitled to deny the allegations against him upon his first interaction with government investigators without

repercussions. The jury in a criminal case is instructed that the defendant has plead not guilty and maintains his innocence at trial; thus, the accused's "exculpatory no" need not be included in the proposed uses of his non-inculpatory statements argued herein.

Third, if portions of the defendant's pretrial statement lack reliability, then the trial court should not admit those portions and allow them to infect the criminal trial. The government could refute the defendant's theory of the defense that flows naturally from his non-inculpatory pretrial statements. The government could investigate leads and other suspects and, if necessary, request an evidentiary hearing prior to trial.

Lastly, the proposals apply only to pretrial statements provided *before* the defendant meets with an attorney or without the benefit advice of counsel. The proposals urge a new wave of trial court admissibility determinations, not a criminal litigation strategy for defense attorneys and savvy defendants in future criminal cases.

b. A proposed balancing test

This Article urges trial courts to consider the defendant's constitutional protections, as well as evidentiary doctrine, in determining the admissibility and other uses for the defendant's non-inculpatory, pretrial statements. In so doing, the lower court should weigh the competing considerations for the government and the criminal defendant. The government, as discussed above, has an interest in efficiency and a streamlined trial presentation, but this interest must be weighed against preserving the defendant's constitutional protections.

The government should be compelled to file a motion *in limine* to exclude any portion of the defendant's pretrial statement. There is now a presumption of inadmissibility, for the reasons discussed in this Article, for any portion of the defendant's pretrial statement not presented by the government as the accused's confession. The court would more readily engage in the balancing test proposed in this section if the government were required to affirmatively exclude the accused's non-inculpatory pretrial, statements.

Assuming that the trial court conducts a balancing test, some factors will favor admissibility and other factors will favor exclusion. The limitations outlined above certainly will favor exclusion, as well as other indicia of gamesmanship, unreliability and misleading or confusing the jury. That is, the dangers set out in Rule 403 will continue to factor into any

admissibility balancing test.[156] This Article offers three proposals designed to activate the defendant's constitutional rights at trial, not open the door to graymail tactics and gamesmanship.

In addition to the constitutional and evidentiary arguments above, there are also some factual consideration that should be considered in determining admissibility, such as whether: law enforcement officers failed to pursue the investigatory leads or other suspects referred to in the defendant's pretrial statement; the defendant was in a custody during the interrogation and waived his *Miranda* rights including his privilege against self-incrimination; the information within the non-inculpatory portions of the defendants pretrial statement is corroborated by other witnesses or evidence; the government introduces defendant's confession at trial, consistent with the second proposal to contemporaneously admit the defendant's non-inculpatory, pretrial statements.

[156] *See* FED. R. EVID. 403.

ALL FOR ONE AND ONE FOR . . . SOME?: CHALLENGING THE CONSTITUTIONALITY OF MASSACHUSETTS CHARTER SCHOOL LEGISLATION AFTER *DOE NO. 1 V. SECRETARY OF EDUCATION*[1]

"The funds available for public education on the whole have shrunk dramatically over the past decade. Available data suggests that the decline correlates with the expansion of choice and that the overall pot of public education funding, even if charters were included, is shrinking. In other words, states' choice policies are not simply robbing Peter to pay Paul. They are robbing Peter under the auspices of giving it all to Paul, but actually shaving a chunk off of public education funding and leaving Peter and Paul to fight one another. The push for choice makes the ruse possible."[2]

INTRODUCTION:

In 1635, Boston, Massachusetts became the birthplace of the United States' first public school.[3] Fast forward almost four hundred years, and access to a free, public education has become commonplace.[4] Though the Supreme Court of the United States has held that the right to an education is not a fundamental right granted by the United States Constitution, the Court still recognizes public education as one of society's most important institutions, vital for the developmental growth and success of its citizens.[5]

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[1] 95 N.E.3d 241 (Mass. 2018).

[2] *See* Derek W. Black, *Preferencing Educational Choice: The Constitutional Limits*, 103 CORNELL L. REV. 1360, 1391-92 (2018).

[3] *See Apr 23, 1635 CE: First Public School in America*, NAT'L GEOGRAPHIC (Dec. 16, 2013), https://www.nationalgeographic.org/thisday/apr23/first-public-school-america/ (stating first public school was established in Boston, Massachusetts).

[4] *See* Derek W. Black, *The Congressional Failure to Enforce Equal Protection Through the Elementary and Secondary Education Act*, 90 B.U. L. REV. 313, 335 (2010) ("All fifty states have constitutional clauses that guarantee students a public education . . . ."); Emily Parker, *50-State Review: Constitutional Obligations for Public Education*, EDUC. COMM'N OF THE STATES 1, 1 (Mar. 2016), https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf ("Within the constitution of each of the 50 states, there is language that mandates the creation of a public education system.").

[5] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (holding that education is not fundamental right by restating continued importance of education); *see also* Plyler v. Doe,

Inherent in the assertion that education is necessary to cultivate a productive society is the notion that where public education is available, everyone should be afforded equal access to its proffered benefits.[6] But, the public education system in the United States is not without its flaws, and many school districts throughout the country lack sufficient funding to provide students with what is deemed to be an "adequate" education.[7]

In an effort to remedy the inequities in some of these struggling districts, education reformers have turned to charter schools as one possible solution.[8] Still, whether charter schools are the solution to the problematic state of traditional public school systems remains a hotly contested subject

457 U.S. 202, 221 (1982) (stating belief that education plays important and necessary role in society); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and local governments.").

[6] *See Brown*, 347 U.S. at 493 ("[Education], where the state has undertaken to provide it, is a right which must be made available to all on equal terms."); *see also* Black, *supra* note 4, at 316 ("[W]hen a state fails to carry out its state-based educational obligations it not only violates its state constitution, it often also violates federal equal protection.").

[7] *See* William S. Koski, *Beyond Dollars? The Promises and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 COLUM. L. REV. 1897, 1904-07 (2017) (outlining history of case law addressing state requirements that education be "adequate"); *see also* Black, *supra* note 2, at 1365 ("[E]ducation clauses in state constitutions create a state duty to provide adequate and equitable public schools."); Derek W. Black, *Averting Educational Crisis: Funding Cuts, Teacher Shortages, and the Dwindling Commitment to Public Education*, 94 WASH. U. L. REV. 423, 423-26 (2016) (describing severe funding shortages in various public education systems).

[8] *See* 1 JAMES A. RAPP, EDUCATION LAW § 3.11, at 1 (Matthew Bender & Co. 2018) ("Education reform . . . has involved a demand for greater choice among public schools because of a growing concern that existing public schools were not meeting legitimate public expectations."); Nicole Stelle Garnett, *Sector Agnosticism and the Coming Transformation of Education Law*, 70 VAND. L. REV. 1, 4-8 (2017) (summarizing development of school choice programs); Jennifer Reboul Rust, *Investing in Integration: A Case for "Promoting Diversity" in Federal Education Funding Priorities*, 59 LOY. L. REV. 623, 625 (2013) ("Frustration with the tragic state of public education over the past few decades has generated robust experimentation with alternatives to traditional public schooling. . . . Of the school choice concepts in circulation, Americans have become most enchanted by the charter school movement.").

of debate.[9] Consequentially, there are a growing number of challenges to the constitutionality of charter school legislation.[10]

This Note seeks to explore certain constitutional challenges brought by charter school opponents and the viability of future challenges to Massachusetts charter school law.[11] Though the plaintiffs in *Doe No. 1 v. Secretary of Education*, a recent challenge to the constitutionality of certain Massachusetts charter school legislation, were charter school proponents seeking to expand the creation of charter schools in Massachusetts, this case will become the focal point of the following discussion as it may prove to be a vital guide for future plaintiffs who believe they have a case against the Massachusetts charter school system.[12] But, before turning to the case law, it is necessary to discuss some of the legal history surrounding the right to an education under the United States Constitution as compared to state

[9] *See* Robert J. Martin, *Charting the Court Challenges to Charter Schools*, 109 PENN. ST. L. REV. 43, 43-47 (2004) ("One of the most controversial developments in public education during the past decade has been the establishment of charter schools."); *see also* Derek W. Black, *Charter Schools, Vouchers, and the Public Good*, 48 WAKE FOREST L. REV. 445, 445-53 (expounding on areas of focus in national charter school "conversation"); Erin Aubry Kaplan, *School Choice is the Enemy of Justice*, N.Y. TIMES (Aug. 14, 2018), https://www.nytimes.com/2018/08/14/opinion/charter-schools-desegregation-los-angeles.html (opining that charter schools are "resegregating" students); David Leonhardt, *A Plea for a Fact-Based Debate About Charter Schools*, N.Y. TIMES (July 22, 2018), https://www.nytimes.com/2018/07/22/opinion/education-reform-charter-schools-new-orleans.html ("There are two high-profile camps on education reform. Staunch defenders . . [and] [o]n the other side, the harshest critics of reform . . . ."); Valerie Strauss, *Problems With Charter Schools That You Won't Hear Betsy DeVos Talk About*, WASH. POST (June 22, 2017), https://www.washingtonpost.com/news/answer-sheet/wp/2017/06/22/problems-with-charter-schools-that-you-wont-hear-betsy-devos-talk-about/?utm_term=.ffd8ffb9d107 (reporting on certain downfalls of charter schools); Press Release, NAACP, Statement Regarding the NAACP's Resolution on a Moratorium on Charter Schools (Oct. 15, 2016), https://www.naacp.org/latest/statement-regarding-naacps-resolution-moratorium-charter-schools/ (declaring opposition to charter school expansion).

[10] *See* Martin, *supra* note 9, at 45 ("In pursuing their struggle against charter schools, adversaries have utilized both state and federal court systems."); *see, e.g.*, Villanueva v. Carere, 85 F.3d 481 (10th Cir. 1996) (denying request for injunction preventing opening of new charter school); Save Our Sch.-Se. & Ne. v. D.C. Bd. of Educ., No. 04-01500 (HHK), 2006 U.S. Dist. LEXIS 45081, at *4-11 (D.D.C. 2006) (describing D.C. school districts in dire straits); *Doe No. 1*, 95 N.E.3d at 244 (dismissing claim that state's cap on number of charter schools was unconstitutional); League of Women Voters of Wash. v. State, 355 P.3d 1131, 1141 (Wash. 2015) (holding state charter school funding statute unconstitutional); Wilson v. State Bd. of Educ., 89 Cal. Rptr. 2d 745, 747 (Cal. Dist. Ct. App. 1999) (rejecting allegation that California charter schools were unconstitutional).

[11] *See infra* notes 57-166 (summarizing failures and successes of prior charter school litigation).

[12] 95 N.E.3d at 252-59 (outlining requirements for stating claim under certain provisions of Massachusetts Constitution).

constitutions, to describe what makes a charter school a charter school, and to explain how these schools are typically funded.[13]

THE RIGHT TO AN EDUCATION:

In the landmark case, *Brown v. Board of Education*, a unanimous Supreme Court took a strong stance in favor of providing all of the country's children with equal access to an education.[14] The Court opined,

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[15]

The Court implied, however, that the right to an education is only guaranteed in states that have implemented a public education system.[16] The Court later clarified this implication and held that although its "dedication to public education" has remain unchanged since *Brown*, education is not a fundamental right granted by the United States Constitution.[17] But, if a state grants its citizens the right to a public education, all of its citizens must be afforded equal access to the state's education system.[18]

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[13] *See infra* notes 14-35 (briefing constitutional right to education and defining charter schools).

[14] 347 U.S. 483, 493-96 (1954) (detailing importance of obtaining education).

[15] *See id.* at 493.

[16] *See id.* ("Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.").

[17] *See San Antonio Indep. Sch. Dist.*, 411 U.S. at 30 ("[T]he importance of a service performed by the State does not determine whether it must be regarded as fundamental . . . ."); *see also Plyler*, 457 U.S. at 221 (affirming determination that public education is not constitutionally protected right.). *But see San Antonio Indep. Sch. Dist.*, 411 U.S. at 63 (Brennan, J., dissenting) ("[T]here can be no doubt that education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment. This being so, any classification affecting education must be subjected to strict judicial scrutiny . . . .").

[18] *See Plyler*, 457 U.S. at 230 (finding exclusion of undocumented immigrant children from public schools unconstitutional under Fourteenth Amendment). After an in-depth discussion of the Equal Protection Clause of the Fourteenth Amendment, the *Plyler* Court concluded, "If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest." *Id.*; *see also*, Robyn K. Bitner, Note, *Exiled From Education: Plyler v. Doe's Impact on the Constitutionality of Long-Term Suspensions and Expulsions*, 101 VA. L. REV. 763, 778 (2015) ("*Plyler's* reasoning, combined with *Brown*, suggests the possibility of a right of equal access to education under the Equal Protection Clause."). "While there is no absolute right to education, *Plyler* implies that it is constitutionally problematic for states to exclude discrete

Today, all fifty state constitutions include provisions mandating statewide public education systems.[19] Generally, these constitutional provisions have been interpreted to guarantee that the applicable state's public education system will provide its students with an "adequate" level of education.[20] This theory that state constitutions guarantee an adequate level of education emerged in cases addressing disparities between the quality of education provided by different districts as a direct result of the state's school funding scheme.[21] However, unless state courts have defined "adequate" in the context of public education, its meaning can be difficult to discern.[22] This quest for assuring the provision of adequate educational opportunities has helped catalyze the charter school movement, but it is also the foundation for the argument that the creation of charter schools prevents traditional public schools from providing adequate levels of education.[23]

groups of students from public schools once a system of free education is offered to all." *Id.*; *Cf.* Black, *supra* note 9, at 447 ("Public education entails the provision of common experiences under conditions consistent with equal protection, due process, free speech, and religious neutrality.").

[19] *See* Parker, *supra* note 4, at 1 (stating that all fifty states have mandated "the creation of" public education systems); *see also* Black, *supra* note 2, at 1403 ("A right to education and states' duty to deliver it are embedded in all fifty state constitutions.").

[20] *See* Black, *supra* note 2, at 1405 ("[C]ourts have held that state constitutions guarantee students access to a quality or an 'adequate' education."); *see also* Koski, *supra* note 7, at 1904-07 (outlining educational finance reform litigation and use of terms "equal" and "adequate"); Diana Pullin, *Ensuring an Adequate Education: Opportunity to Learn, Law, and Social Science,* 27 B.C. THIRD WORLD L.J. 83, 96 (2007) (stating many courts have interpreted state constitutions to provide "adequate" level of education).

[21] *See* Koski, *supra* note 7, at 1904 (citing Rose v. Council for Better Educ., 790 S.W.2d 186, 205-13) (Ky. 1989)) ("The third wave of educational finance litigation was launched in 1989 when the Kentucky Supreme Court found in the education article of its state constitution not an entitlement to educational equity, but rather an entitlement to a defined level of educational quality."); *see also* Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1175 (1995) ("Adequacy litigation seeks additional educational resources for those school districts failing to provide a constitutionally adequate education.").

[22] *See* Note, *The Misguided Appeal of a Minimally Adequate Education*, 130 HARV. L. REV. 1458, 1458 (2017) ("What constitutes a 'minimally adequate education' and what role courts should play in determining the contours of minimum adequacy continue to be matters of considerable disagreement."). "[A]dequacy suits inevitably require courts to define 'adequacy.' This is no easy task for policymakers and academic experts, much less for judges." *Id.* at 1468.

[23] *Compare* Rapp, *supra* note 8, at [1] (stating reason for charter schools is concern regarding quality of existing education), *and* Kevin S. Huffman, Note, *Charter Schools, Equal Protection Litigation, and the New School Reform Movement*, 73 N.Y.U. L. REV. 1290, 1290 (1998) ("As the quality of public education, particularly in large urban school districts, has declined, activists and politicians from all points on the political spectrum have proposed school reforms."), *with* Black, *supra* note 2, at 1363 ("From the perspective of the local urban district, the effects [of school choice] range from existential threats to serious impediments to equal and adequate education.").

What Is A Charter School?

Charter schools are independently operated schools authorized by statutes that vary from state to state.[24] Despite these variations, charter schools across the board do share characteristics relevant to understanding how they typically differ from "traditional public schools."[25] First, charter schools are independent from public school districts as they are operated by nonprofit organizations, private corporations, teachers, parents, and a number of other groups.[26] They are publicly funded, tuition free schools that are governed by charter agreements, which are contracts between the school and an agency designated to authorize the school.[27] These agreements outline the conditions of operation, renewal, and other rights and responsibilities of the parties including the school's performance expectations.[28] Depending on the state, "authorizers" will take different forms including, but not limited to certain government agencies, educational entities, local school boards, or nonprofit private entities.[29] Additionally, charter schools are not required to comply with many of the state and local regulations imposed on "traditional" public schools, such as those pertaining to curriculum, staffing, and budget, among others.[30]

Students are not "assigned" to attend charter schools, but rather, students choose to attend as an alternative to the available "traditional"

[24] *See* James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2073-74 (2002) (describing differences between charter schools and "traditional" public schools); *see also* Kate Gallen, Comment, *The Role of the Judiciary in Charter Schools' Policies*, 77 MO. L. REV. 1121, 1126 (2012) (characterizing charter schools and how they are operated).

[25] *See* sources cited *supra* note 24 (listing aspects common to most charter schools).

[26] *See* Garnett, *supra* note 8, at 14 (describing "charter authorizers"); Gallen, *supra* note 24, at 1126 (listing entities that operate charter schools).

[27] *See* Ryan & Heise, *supra* note 24, at 2073 (defining charter agreements).

[28] *See* Katherine E. Lehnen, School Inequality: Challenges and Solutions: Allen Chair Issue 2016, *Charting the Course: Charter School Exploration in Virginia*, 50 U. RICH. L. REV. 839, 841 (2016) (quoting Leland Ware & Cara Robinson, *Charters, Choice, and Resegregation*, 11 DEL. L. REV. 1, 3 (2009)) ("Charter agreements typically outline the school's 'mission, program, goals, students served, methods of assessment, and ways to measure success.'"); *see also Charter School FAQ*, NAT'L ALLIANCE FOR PUB. CHARTER SCHS. (2018), https://www.publiccharters.org/about-charter-schools/charter-school-faq (providing information regarding charter agreements); *Charter School Contracts*, NAT'L ASS'N OF CHARTER SCH. AUTHORIZERS (Oct. 2009), https://www.qualitycharters.org/wp-content/uploads/2015/11/PolicyGuide_CharterSchoolContracts_2009.10.pdf (detailing specific aspects of charter school agreements).

[29] *See* sources cited *supra* note 26 (noting examples of agencies which may be deemed charter school "authorizers").

[30] *See* sources cited *supra* note 26 (discussing ways in which charter schools are granted more freedom than public schools).

public schools.[31] Charter schools are technically open to all students and typically do not require applicants to meet eligibility standards such as prior academic performance or test scores.[32] But, enrollment is often limited by statute, and when a charter school reaches capacity, it will begin to admit applicants at random through a lottery, and ultimately many applicants are unable to enroll.[33] Further, a number of states do allow charter schools to give preference to certain applicants, such as siblings of students who already attend the school and children of the school's founders and employees.[34] Charter schools are also granted more freedom than "traditional" public schools when it comes to student discipline and are able to exclude students whose behavior would not otherwise justify expulsion.[35]

Charter Schools in Massachusetts

Massachusetts charter schools "ha[ve] the freedom to organize around a core mission, curriculum, theme, and/or teaching method and [they] control [their] own budget and hire (and fire) teachers and staff."[36] In

[31] *See* Lehnen, *supra* note 28, at 842 ("Charters provide parents and students with educational choice, which is especially meaningful to those students who would otherwise not have such choice.").

[32] *See* Jeanette M. Curtis, *A Fighting Chance: Inequities in Charter School Funding and Strategies for Achieving Equal to Public School Funds*, 55 HOW. L.J. 1057, 1064-65 (2012) ("Charter Schools are not allowed to screen student acceptance or select students based on certain criteria . . . ."); *see also* Gallen, *supra* note 24, at 1142-43 (stating typical charter school admissions processes).

[33] *See* Gallen, *supra* note 24, at 1126 ("If more students apply than a charter school has space for, the school must institute a lottery system . . . ."); *Charter School FAQ*, *supra* note 28 (claiming charter school lotteries are completely random). *But see* Garnett, *supra* note 8, at 13 ("[S]ome [charter schools] are permitted to prefer neighborhood students and/or to test applicants for admission."); Valerie Strauss, *How Charter Schools Choose Desirable Students*, WASH. POST (Feb. 16, 2013), https://www.washingtonpost.com/news/answer-sheet/wp/2013/02/16/how-charter-schools-choose-desirable-students/?utm_term=.9cfe2278a781 (bringing attention to charter schools' use of selective enrollment procedures).

[34] *See Clear Student Enrollment and Lottery Procedures*, NAT'L ALLIANCE FOR PUB. CHARTER SCHS. (2018), https://www.publiccharters.org/our-work/charter-law-database/components/12 (providing synopsis of admissions processes for every state).

[35] *See* Black, *supra* note 2, at 1383 ("[C]harters have far more leeway to exclude students once they are enrolled.").

[36] *See Questions and Answers About Charter Schools*, MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC., 1, 1, http://www.doe.mass.edu/charter/about.html (follow "Questions and Answers about Charter Schools in Massachusetts hyperlink under "Additional resources") (last updated May 2018) (simplifying Massachusetts' charter school statute).

> The purposes of establishing charter schools are: (i) to stimulate the development of innovative programs within public education; (ii) to provide opportunities for innovative learning and assessments; (iii) to provide parents and students with greater options in

Massachusetts, there are two categories of charter schools: Commonwealth charter schools and Horace Mann charter schools.[37] Both Commonwealth and Horace Mann charter schools are governed by a board of trustees, they operate independently of any school committee, and their charter agreements must be approved by the Massachusetts Board of Elementary and Secondary Education (the "Board").[38] If approved, the charter agreements remain in place for five years.[39] At the end of the five year term, a school's agreement may be renewed if it has attracted students and produced "positive results" during the initial five year term.[40] The main difference between Horace Mann charter schools and Commonwealth charter schools is that, in addition to approval by the Board, Horace Mann charter schools must also be approved by the local school committee and, in certain cases, the local teacher's union.[41]

For each student who attends a Commonwealth charter school, the school receives a "tuition payment" from the state equal to the amount that

> selecting schools within and outside their school districts; (iv) to provide teachers with a vehicle for establishing schools with alternative, innovative methods of educational instruction and school structure and management; (v) to encourage performance-based educational programs; (vi) to hold teachers and school administrators accountable for students' educational outcomes; and (vii) to provide models for replication in other public schools.

MASS. ANN. LAWS ch. 71 § 89(c) (LexisNexis 2018).

[37] *See Questions and Answers About Charter Schools*, *supra* note 36, at 1 (responding to frequently asked questions regarding Massachusetts charter schools).

[38] *See id.* (defining basic tenets of Massachusetts charter schools).

[39] *See id.* (stating term length of charter agreements in Massachusetts).

[40] *See id.* (listing Massachusetts' charter school renewal conditions).

[41] *See id.* (noting difference between two types of Massachusetts charter schools); *see also* MASS. ANN. LAWS ch. 71 § 89(c) (LexisNexis 2018) (classifying Massachusetts charter schools into two broad categories); 603 MASS. CODE REGS. 1.04 (2015) (providing procedures for creating new charter schools). There are three types of Horace Mann charter schools: Horace Mann I, Horace Mann II, and Horace Mann III. *Questions and Answers About Charter Schools*, *supra* note 36, at 2. Horace Mann I and Horace Mann III charter schools are both newly created schools, while Horace Mann II charter schools are existing schools that are converted into charter schools. *Id.* A Horace Mann I charter school must be approved by the Board, the local teacher's union, and the school committee in its respective school district. *Id.* Any modifications to a collective bargaining agreement must be submitted with the school's initial application and "must be approved by the school committee and collective bargaining unit." *Id.* Horace Mann II charter schools must also be approved by the Board and the local school committee, and any modifications to "a collective bargaining agreement must be approved by a majority of faculty at the school, with the vote to be held within [thirty] days of submission of the application." *Id.* Likewise, Horace Mann III charter schools must be approved by the Board and the local school committee, but "an agreement with the local collective bargaining unit is not required prior to Board approval, however, the charter school's board of trustees must negotiate with the collective bargaining unit and the school committee in good faith regarding any modifications to collective bargaining agreements following the award of a charter." *Id.* Additionally, at least four Horace Mann III schools must be located in Boston. *Id.*

the Massachusetts Department of Elementary and Secondary Education ("DESE") deems to be the cost of educating one student; this is referred to as the "per-pupil amount."[42] The state then deducts this per-pupil amount from the aid received by the school district (the "sending district) where the student would have otherwise attended.[43] Simply put, the state reallocates funding from the sending district to the Commonwealth charter school(s) in an amount equal to the per-pupil expense multiplied by the number of students in the sending district that have chosen instead to attend a charter school.[44] Commonwealth charter schools are also eligible to receive funding through federal and state grants, and they may also apply for private grants and receive contributions.[45]

Horace Mann charter school funding "comes directly from the school district in which the school is located, through a memorandum of understanding with the district."[46] During the first year of operation, Horace Mann applications "may specify a total budget allocation" that has been approved by the local school committee, and "each year thereafter, the board of trustees . . . will submit a budget request for the following year to the superintendent and school committee under the district."[47] These schools may also apply for private grants and receive individual contributions.[48]

Massachusetts also imposes a limitation on the number of charter schools that are permitted to operate at one time.[49] This limitation is commonly referred to as the "cap" on charter schools and restricts the total number of charter schools to 120 (48 Horace Mann charter schools and 72

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[42] *See Questions and Answers About Charter Schools*, *supra* note 36, at 9 (providing description of Commonwealth Charter School funding method).

[43] *See id.* (explaining per-pupil funding reallocation).

[44] *See id.* (summarizing funding formula for Commonwealth charter schools).

[45] *See id.* (detailing Commonwealth charter schools' ability to receive certain grants).

[46] *See id.* (explaining funding method for Horace Mann charter schools).

[47] *See Questions and Answers About Charter Schools*, *supra* note 36, at 9 (summarizing budget requests at Horace Mann charter schools).

> Under the law, a Horace Mann charter school cannot receive less than it would have under the district's standard budgetary allocation rules. A school may appeal a disproportionately lower budget allocation to the Commissioner [of Elementary and Secondary Education]. Depending upon the terms of its charter and the memorandum of understanding, a Horace Mann charter school may receive its share of federal and state grant funds from the district or receive funds directly.

Id.

[48] *See id.* (detailing Massachusetts charter Horace Mann charter schools' ability to receive certain grants).

[49] *See id.* at 5 (stating that there is limitation on number of charter schools permitted in Massachusetts).

Commonwealth charter schools).[50] Further, "no public school district's total charter school tuition payment to [C]ommonwealth charter schools shall exceed [nine] per cent of the district's net school spending."[51]

If all of the seats at a charter school are filled, applicants to that school will be placed on a waiting list, and the school will hold an admissions lottery to fill any open spaces that become available.[52] However, Commonwealth charter schools do give preference to siblings of students who already attend the school and to applicants who live in the city or town in which the charter school is located.[53] In an initial lottery, Horace Mann charter schools give first priority to "students attending said school, or attending school in the school building previously occupied by said school, on the date that the final [charter school] application is filed with the

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[50] *See id.* (specifying Massachusetts' "cap" on number of permitted charter schools); *see also Doe No. 1*, 95 N.E.3d at 244 (using the term "cap" in reference to limitation on Massachusetts charter schools). There is one exception to the cap, which is as follows:

> In any fiscal year, if the board determines based on student performance data collected pursuant to section 1I, said district is in the lowest 10 per cent of all statewide student performance scores released in the 2 consecutive school years before the date the charter school application is submitted, the school district's total charter school tuition payment to commonwealth charter schools may exceed 9 per cent of the district's net school spending but shall not exceed 18 per cent. For a district qualifying under this paragraph whose charter school tuition payments exceed 9 per cent of the school district's net school spending, the board shall only approve an application for the establishment of a commonwealth charter school if an applicant, or a provider with which an applicant proposes to contract, has a record of operating at least 1 school or similar program that demonstrates academic success and organizational viability and serves student populations similar to those the proposed school seeks to serve, from the following categories of students, those: (i) eligible for free lunch; (ii) eligible for reduced price lunch; (iii) that require special education; (iv) English learners or of similar language proficiency level as measured by a standardized English proficiency assessment chosen by the department; (v) sub-proficient, which shall mean students who have scored in the "needs improvement", "warning" or "failing" categories on the mathematics or English language arts exams of the Massachusetts Comprehensive Assessment System for 2 of the past 3 years or as defined by the department using a similar measurement; (vi) who are designated as at risk of dropping out of school based on predictors determined by the department; (vii) who have dropped out of school; or (viii) other at-risk students who should be targeted to eliminate achievement gaps among different groups of students. For a district approaching its net school spending cap, the board shall give preference to applications from providers building networks of schools in more than 1 municipality.

MASS. ANN. LAWS, ch. 71 § 89(i)(3) (LexisNexis 2018).

[51] *See Questions and Answers About Charter Schools*, *supra* note 36, at 5 (stating Massachusetts' charter school spending cap). The nine per cent tuition payment cap may increase to 18 percent. MASS. ANN. LAWS, ch. 71, § 89(i)(3) (LexisNexis 2018).

[52] *See* MASS. ANN LAWS ch. 71, § 89(n) (LexisNexis 2018) (listing permissible, and sometimes mandated, Massachusetts charter school admissions preferences).

[53] *See* 603 MASS. CODE REGS. 1.05(6) (2015) (summarizing Commonwealth charter schools' enrollment and application processes).

Board."[54] Then, priority is given to "siblings attending said school, or attending school in the school building previously occupied by said school, on the date that the final [charter school] application is filed with the Board."[55] In subsequent lotteries, Horace Mann charter schools prioritize siblings of students who already attend the charter school, students who are enrolled in the public schools in the district where the Horace Mann school is located, and students who live in the city or town where the charter school is located.[56] Thus, despite an ultimately "random" lottery, some applicants will have an increased chance of enrollment as compared to those who are not given preference.[57]

An Overview of Past Challenges to the Constitutionality of Charter Schools

Charter schools' growing presence in the United States' public education system is no doubt controversial, polarizing those in favor of school choice and those who contest its efficacy.[58] Unsurprisingly, this debate has made its way to the courtroom.[59] Much of the litigation in this area has been initiated by charter school opponents claiming that the creation of charter schools will ultimately deprive students of equal access to an adequate level of education in contravention of certain state constitutional rights.[60] Because education is not a fundamental right granted by the United States Constitution, most of these claims have been litigated in state courts.[61]

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[54] *See* 603 MASS. CODE REGS. 1.05(7) (2015) (specifying admissions preferences to be used by Horace Mann charter schools).

[55] *See id.* (detailing admissions preferences used by Horace Mann charter schools).

[56] *See id.* (expanding on Horace Mann charter school admissions processes).

[57] *See id.* (providing list of all admissions preferences used by Massachusetts charter schools).

[58] *See* sources cited *supra* note 9 (asserting charter school debate has become increasingly controversial).

[59] *See, e.g.*, Villanueva v. Carere, 85 F.3d 481, 483 (10th Cir. 1996) (determining whether schools were closed with discriminatory intent); Smith v. Henderson, 54 F. Supp. 3d 58, 61 (D.D.C. 2014) (finding no merit in claim that school closure plan was discriminatory); *Doe No. 1*, 95 N.E.3d at 244-45 (dismissing claims asserting Massachusetts charter school cap was unconstitutional).

[60] *See, e.g.*, *Smith*, 54 F. Supp. 3d at 61 (dismissing claim that charter school expansion is discriminatory); *Villanueva,* 85 F.3d at 484 (holding no equal protection violation after public school closures and subsequent charter school expansion); Council of Orgs. & Others for Educ. About Parochiaid v. Governor, 566 N.W.2d 208, 216-22 (Mich. 1997) (addressing allegation that Michigan's charter school act was unconstitutional); *In re* Grant of Charter Sch. Application of Englewood Palisades Charter Sch., 727 A.2d 15, 20-22 (N.J. Super. Ct. App. Div. 1999) (describing three public school districts' challenges to New Jersey's charter school act).

[61] *See generally San Antonio Indep. Sch. Dist.*, 411 U.S. at 35 ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution.").

There are, however, a handful of federal cases that have addressed this issue in the context of equal protection.[62]

At the federal level, equal protection claims have continuously failed, as plaintiffs have been unable to present strong evidence that the charter schools at issue were created with a discriminatory intent.[63] Challenges to the constitutionality of charter school laws brought at the state level have also been largely unsuccessful, and though they do differ from the federal claims, they are often dismissed for similar reasons.[64] Furthermore, to succeed on such claims in the future, these past failures cannot be ignored.[65] The following summarizes two federal cases in which plaintiffs contested the expansion of local charter schools on the basis of equal protection.[66] Each case highlights the need for specific evidence of discrimination and confirms that conclusory arguments are unlikely to hold up in a court of law.[67]

In *Villanueva v. Carere*, a Colorado school board elected to close two public schools just three months after approving the opening of a new charter school.[68] Parents of students who attended those public schools sought to enjoin the school closings, claiming that the school board violated

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[62] *See Smith*, 54 F. Supp. 3d at 61 (finding no evidence of discrimination); Save Our Sch.-Se. & Ne. v. D.C. Bd. of Educ., No. 04-01500 (HHK), 2006 U.S. Dist. LEXIS 45081, at *1 (D.D.C. July 3, 2006) (analyzing equal protection claims alleging charter schools in D.C. were discriminatory), *aff'd*, 564 F. Supp. 2d 1 (D.D.C. 2008); *Villanueva,* 85 F.3d at 486 (holding that no equal protection violation occurred).

[63] *See* cases cited *supra* note 62 (failing to succeed on claims of equal protection); *see also* Martin, *supra* note 9, at 100 ("In these federal cases plaintiffs have consistently failed in their attempts to establish that state charter school programs have violated constitutional provisions or other federal law.").

[64] *See, e.g.*, State *ex rel.* Ohio Cong. of Parents & Teachers v. State Bd. of Educ., 857 N.E.2d 1148, 1166 (Ohio 2006) (rejecting allegations that Ohio charter schools were unconstitutional); *In re Grant of Charter Sch. Application of Englewood Palisades Charter Sch.*, 727 A.2d at 20 (finding "none of the challenges advanced by appellant districts persuasive"); *Council of Orgs. & Others for Educ. About Parochiaid*, 566 N.W.2d at 222 (upholding constitutionality of Michigan's charter school act); *see also* Black, *supra* note 2, at 1409 ("With the exception of the Washington Supreme Court, high courts have rejected these [constitutional] challenges [to charter school programs] . . . ."); Martin, *supra* note 9, at 102 ("The state and federal courts have shown almost unwavering constancy in rejecting the challenges brought by school boards and other adversaries against the opening or continued operation of charter schools.").

[65] *See* Black, *supra* note 2, at 1408-11 (analyzing why past charter school cases have failed and proposing ways to improve future outcomes).

[66] *See Smith*, 54 F. Supp. 3d at 61 (dismissing equal protection claims); *Villanueva,* 85 F.3d at 484 (finding no equal protection violations).

[67] *See* cases cited *supra* note 62 (holding evidence insufficient to establish valid equal protection claims). "[C]laims must become far more factually granular. Plaintiffs cannot assume that choice programs inherently harm public education." Black, *supra* note 2, at 1416.

[68] *See* 85 F.3d at 483-86 (analyzing equal protection claims brought by parents whose children's schools were closed).

their Fourteenth Amendment right to equal protection of the laws.[69] This equal protection claim was based on the plaintiffs' assertion that the closings were motivated by the intent to discriminate against Hispanic students, as the student population at the schools elected to close was predominantly Hispanic.[70]

For the claim to succeed, the plaintiffs in *Villanueva* not only had to show that the schools were closed in furtherance of a "racially discriminatory intent or purpose," but also that the discriminatory purpose was the "motivating factor in the decision."[71] The plaintiffs presented no direct evidence of discriminatory intent, though the court acknowledged that equal protection claims require a "sensitive inquiry" into both direct and circumstantial evidence of discriminatory intent.[72] In light of the lower court's finding that the school board's decisions were made in a "sincere" effort to improve the overall quality of education, and this court's own finding that the members of the school board and the school superintendent were Hispanic and had a history of commitment to the Hispanic and minority communities in the district, the court held that there was insufficient evidence of a discriminatory intent.[73] The court also found that the plaintiffs failed to demonstrate that the closures had a discriminatory impact on the Hispanic students, noting that approximately fifty percent of the students projected to attend the charter schools were Hispanic, a proportion nearly identical to the percentage of Hispanic students within the entire district.[74]

Last, the court rejected the plaintiffs' argument that Colorado's Charter Schools Act's use of the phrase "cultural factors" in its definition of "at-risk pupils" was code for "ethnic minority" and therefore created a suspect classification.[75] The court was sensitive to the parents' concerns, but found that after a reading of the entire statute, it did not seem to create any classification of students, and even included an express mandate that charter schools' enrollment decisions "be made in a nondiscriminatory manner."[76]

In *Smith v. Henderson*, several schools in Washington D.C.'s public school system were under-enrolled, and in an effort to use resources more

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[69] *See id.* at 483-84 (stating constitutional claims to be reviewed).

[70] *See id.* at 485 (summarizing school closure plan).

[71] *See id.* (asserting requirements for proving racially discriminatory intent and purpose).

[72] *See id.* at 486 (finding no direct evidence of discriminatory intent).

[73] *See id.* (justifying determination that there was no evidence of discriminatory intent).

[74] *See Villanueva*, 85 F.3d at 487 (opining that population data revealed lack of discriminatory impact).

[75] *See id.* at 488 (summarizing plaintiffs' reasons for asserting statute created suspect classification).

[76] *See id.* (disagreeing with plaintiffs' characterization of suspect classification).

efficiently, the district began to create and implement a school closure plan.[77] Parents of students who attended public schools closed under the plan filed a complaint alleging that the closings were discriminatory and violated the Fifth Amendment's Equal Protection clause.[78] They set forth a few reasons for why the closure plan was discriminatory, one being that its purpose was "to make room for charters."[79] They posited that "making room" for charters was discriminatory because "reforms like charter schools . . . will ultimately harm black students in the District."[80] The court made note of aspects of the plaintiffs' brief that revealed their evident distaste for charter schools, and explained that questions of policy are political issues, and not legal issues to be resolved by a judge.[81] It then pointed to the fact that the plaintiffs offered no explanation for why charter school expansion was discriminatory beyond their allegation that it would "ultimately harm black students," nor did they "offer[] [any] real evidence that their schools were actually closed to make way for charters."[82] As a result of the plaintiffs' generalized and opinionated assertions about charter school policy, and the absence of any actual evidence of discrimination, the court concluded that no reasonable jury would find an equal protection violation, and dismissed the claim.[83]

At the state level, plaintiffs challenging the constitutionality of charter school statutes frequently focused on charter school funding.[84] Specifically, they argued that it is unconstitutional for a state to reallocate traditional public school funds for charter school use.[85] Despite the

[77] *See* 54 F. Supp. at 61 (providing background regarding plaintiffs' complaint).

[78] *See id.* at 68-69 (addressing equal protection claims).

[79] *See id.* at 72 (discussing claim that charter school expansion was discriminatory).

[80] *See id.* at 61 (pointing to plaintiffs' only justification for discrimination claim).

[81] *See id.* at 67 (criticizing aspects of plaintiffs' argument that relied on policy opinions).

[82] *See Smith*, 54 F. Supp. 3d at 72 (finding no evidence of discrimination caused by charter school expansion).

[83] *See id.* at 73 ("[N]o reasonable jury could find an Equal Protection . . . violation here.")

[84] *See, e.g.*, Iberville Parish Sch. Bd. v. La. State Bd. of Elementary & Secondary Educ., 248 So.3d 299, 301 (La. 2018) (reversing holding that charter school funding was unconstitutional); *State ex rel. Ohio Cong. of Parents & Teachers*, 857 N.E.2d at 1160 (rejecting allegations that charter school funding was unconstitutional); *In re Grant of Charter Sch. Application of Englewood Palisades Charter Sch.*, 727 A.2d at 39 (disagreeing that funding scheme was unconstitutional on its face); *Council of Orgs. & Others for Educ. About Parochiaid*, 566 N.W.2d at 211 (upholding constitutionality of Michigan's charter school act). These suits have been filed by public school systems, charter schools, public and charter school attendees, and various other groups. *See, e.g.*, cases cited *supra* notes 60, 60, 62. Though such cases have been brought by plaintiffs with varying and often opposing opinions regarding the "charter school debate," most, if not all, are centered on the same underlying issue: one group believes it is not receiving the same level of education as the other as a result of funding disparities between the traditional public schools and the state's charter schools. *See* cases cited *supra* notes 60, 60, 62.

[85] *See* cases cited *supra* note 84 and accompanying text (claiming that diverting funds from public schools to charter schools decreases quality of public education).

abundance of such claims, the vast majority have been dismissed.[86] In 2015, the Washington Supreme Court became the first to deem charter schools unconstitutional.[87] Following this ruling, the Washington legislature modified the state's charter school act, and in 2018, the Washington Supreme Court found that the new law was, indeed, "constitutional on its face."[88] Only one other court, The Court of Appeal of the First Circuit of Louisiana, has since declared that its state charter school statute was unconstitutional; however, this court's ruling was recently reversed on appeal.[89]

The Washington Supreme Court, in 2015, concluded that the state's proposed "Charter School Act" was unconstitutional because its treatment of charter schools as "common schools" violated the language in the Washington State Constitution.[90] The court found that the proposed charter schools did not fall under the definition of a common school because they were to be run by "an appointed board or nonprofit organization" and would not be under the control of "voters of the school district."[91] The court stressed that "common school" funds must be protected from what it deemed an "invasion" by anything falling outside the definition of a common school.[92] It went on to specify that the Charter School Act's reallocation of funds from common schools to the proposed charter schools was precisely the sort of "invasion" that the constitution sought to proscribe.[93] In sum, the court's holding was rooted in its interpretation of the Washington Constitution's definition of "common schools" and its belief that the proposed charter schools were not embodied by that definition.[94]

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[86] *See* sources cited *supra* note 64 (confirming consistent failures to challenge constitutionality of charter school laws).

[87] *See League of Women Voters of Wash.*, 355 P.3d at 1133-34 (holding state charter school funding statute unconstitutional); *see also* Laura Habein, Note, *League of Women Voters v. State: The Rejection of Public and Private Hybridity Within Washington State Public Schools*, 31 NOTRE DAME J.L. ETHICS & PUB. POL'Y 201, 201 ("On September 4, 2015, Washington's Supreme Court became the first in the country to find the taxpayer-funded charter schools unconstitutional.").

[88] *See* El Centro de la Raza v. State, 428 P.3d 1143, 1146 (Wash. 2018) (reviewing constitutionality of Washington state's modified charter school act.)

[89] *See* Iberville Parish Sch. Bd. v. La. State Bd. of Elementary & Secondary Educ., No. 2015 CA 1417, 2017 La. App. Unpub. LEXIS 4, at *13 (2017), *rev'd*, 248 So. 3d 299, 301 (La. 2018) (reversing lower court determination that charter school funding was unconstitutional).

[90] *See League of Women Voters*, 355 P.3d at 1135-37 (interpreting constitutional definition of common schools).

[91] *See id.* at 1137 (using definition of common schools to explain why charter schools cannot be classified as such).

[92] *See id.* (concluding that funds for common schools must only be used for common schools).

[93] *See id.* at 1137-41 (disapproving charter school use of common school funds).

[94] *See id.* (looking only to constitution to determine charter school statute was unconstitutional).

In accordance with this ruling, the Washington state legislature amended the Charter School Act in 2016.[95] In an attempt to eliminate the funding issue central to the Washington Supreme Court's 2015 holding, the new law no longer designates charter schools as common schools.[96] In 2018, upon reviewing the legislature's alterations, the Washington Supreme Court found that under the new law, charter schools would be funded by the state's lottery revenue, and no longer "divert[s] restricted common school funds to support charter schools."[97] Thus, the court held that the funding method described in the modified Charter School Act was constitutional.[98]

Courts that have dismissed similar claims have routinely stated that charter school policy determinations are questions for the legislature, never questioning whether the legislature's classification of charter schools as "public" schools is actually consistent with the applicable state constitution .[99] Many of these courts have also found that plaintiffs failed to present facts establishing that the impact of charter school funding on the provision of education at "traditional" public schools was sufficiently detrimental to be considered unconstitutional.[100] The Washington Supreme Court, on the other hand, never "deferred to the legislature" in its 2015 opinion, nor did it

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[95] *See* El Centro de la Raza v. State, 428 P.3d 1143, 1146 (Wash. 2018) (summarizing timeline of legislature's modification of Washington's charter school act).

[96] *See id.* at 1146, 1148-49, 1154 (outlining the legislature's alterations).

[97] *See id.* at 1154 (describing modified charter school funding source).

[98] *See id.* at 1154-56 ("[C]harter schools . . . receive no money from the general fund. . . . therefore, we hold that the Act does not on its face violate [Washington's constitution] by diverting restricted common school money to charter schools.").

[99] *See, e.g.*, *State ex rel. Ohio Cong. of Parents & Teachers*, 857 N.E.2d at 1156 ("[I]n reviewing these constitutional claims, we must give due deference to the General Assembly."); *In re Grant of Charter Sch. Application of Englewood Palisades Charter Sch.*, 727 A.2d at 27 ("[I]n interpreting a new statute, a reviewing court must accord substantial deference to the interpretation by the agency charged with implementing it."); *Council of Orgs. & Others for Educ. About Parochiaid*, 566 N.W.2d at 215 ("This Court gives deference to a deliberate act of the Legislature, and does not inquire into the wisdom of its legislation."). Even the Washington Supreme Court, which seemed to depart from this line of reasoning in *League of Women Voters*, distinguished its role from that of the legislature in *El Centro de la Raza*, stating, "[I]t is not the province of the court to express favor or disfavor of the legislature's policy decision to create charter schools. Rather, our *limited role* is to determine whether the enacted legislation complies with the requirements of our state constitution." *El Centro de la Raza*, 428 P.3d at 1146 (emphasis added).

[100] *See, e.g.*, *Ohio Cong. of Parents & Teachers*, 857 N.E.2d at 1160 ("The appellants have not presented clear and convincing evidence that community schools are raiding local funds that school districts are otherwise entitled to receive."); *In re Grant of Charter Sch. Application of Englewood Palisades Charter Sch.*, 727 A.2d at 27 ("The school district's claim . . . is too abstract."); *Wilson*, 89 Cal. Rptr. at 757 (dismissing claim that California charter schools were unconstitutional). "Plaintiffs must demonstrate that choice programs are actually causing or connected to inadequate or inequitable educational opportunities in particular schools." Black, *supra* note 2, at 1416.

evaluate facts evidencing the actual effects of the funding formula.[101] Its holding was based solely on the court's own interpretation of the state constitution.[102]

Many attempts to persuade state courts that charter school funding is unconstitutional either allege that charter schools are not truly public and thus should not be granted funds designated for use by the state's public school system, or they contend that directing funding away from public schools for use by charter schools will prevent the affected public schools from providing students with a constitutionally adequate level of education.[103] The following provides just three examples of such cases: the first illustrates courts' reluctance to contradict the rule of the legislature, while the second two demonstrate that plaintiffs who allege charter school funding adversely effects the overall adequacy of the education provided by "traditional" public schools must present specific evidence of such injury.[104]

In *Council of Organizations & Others for Education About Parochiaid, Inc. v. Governor*, plaintiffs sought to enjoin the distribution of public funds to charter schools authorized by the Michigan Charter School Act.[105] They argued that the charter schools were not public schools because they were not under the "immediate and exclusive control of the state," and therefore the funding scheme was unconstitutional under the education provisions of the Michigan Constitution.[106] The Michigan Supreme Court held that the Charter School Act was constitutional, noting that the Michigan Constitution does not define the term "public schools," but it does grant the legislature the responsibility of "maintaining and supporting a system of free public education," and the legislature had classified the charter schools as

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[101] *See League of Women Voters of Wash.*, 355 P.3d at 1135 ("This case turns on the language of article IX, section 2 of our state constitution and this court's case law addressing that provision."). *But see* El Centro de la Raza v. State, 428 P.3d 1143, 1146 (Wash. 2018) (stating that courts do not play role of legislature critic).

[102] *See League of Women Voters*, 355 P.3d at 1135 (citing specific constitutional language).

[103] *See* cases cited *supra* note 100 (alleging either charter schools are not public or are detrimental to public education system).

[104] *See, e.g.*, *Ohio Cong. of Parents & Teachers*, 857 N.E.2d at 1159 ("[Appellants] allege that the funding method used to support community schools diverts funds from city school districts, depriving them of the ability to provide a thorough and efficient system of common schools."); *Council of Orgs. & Others for Educ. About Parochiaid*, 566 N.W.2d at 216 ("[T]he plaintiffs reason that [charter schools] are not public schools because they were not under the immediate and exclusive control of the state."); *In re Grant of Charter Sch. Application of Englewood Palisades Charter Sch.*, 727 A.2d at 39 ("Franklin Township argues that the Act is unconstitutional on its face because its funding scheme—diverting funds away from an existing district in order to pay for a charter school—will prevent existing districts from meeting their obligation under the State Constitution to provide a 'thorough and efficient' education.").

[105] 566 N.W.2d at 211 (stating plaintiffs' claim and request for injunction).

[106] *See id.* at 216 (expanding on Michigan Constitution's "immediate and exclusive control" requirement).

public schools.[107] The court went on to say that the Michigan Constitution "does not mandate exclusive control," but rather only requires that the legislature "'maintain and support' a system of public schools" and "[t]his Court gives deference to a deliberate act of the Legislature, and does not inquire into the wisdom of its legislation."[108] The court did acknowledge that the constitution required the state to have "general supervision over all public education," but found that because the state had the power to authorize and revoke the charters, and could control the allocation of funds to the schools, the supervision requirement was satisfied.[109]

In 1999, three public school districts in New Jersey challenged various aspects of the New Jersey Charter School Program Act of 1995.[110] One district argued that the charter school act was "unconstitutional on its face" because it permitted the "diver[sion of] funds away from" public school districts "to pay for . . . charter school[s]," which would "inevitably" prevent the public districts "from meeting their obligation under the State Constitution to provide a 'thorough and efficient' education."[111] The court responded saying that this claim was abstract, and provisions in the act providing for funding adjustments to the public schools may very well alleviate the hypothetical financial problem.[112] The court concluded, "[n]ot until the school has operated for at least a year, or perhaps more, will it be possible to gauge whether its presence is subverting the district's ability to provide a constitutionally adequate education for its regular students."[113]

Similarly, in a 2006 challenge to the constitutionality of Ohio's charter school statute, the plaintiffs alleged that the diversion of funds from public school districts to charter schools deprived the public schools "of the ability to provide a thorough and efficient system of common schools."[114] The Supreme Court of Ohio disagreed, stating, "[t]he mere increase or decrease in the local share percentage does not violate the Thorough and Efficient Clause [of the Ohio Constitution], because the district still receives state funding for the children actually attending the district traditional

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[107] *See id*. at 219, 222 (confirming constitutionality of statute).

[108] *See id.* at 215-16 (detailing Michigan's constitutional requirements for statewide public education system).

[109] *See id.* at 212-14, 221 (quoting MICH. CONST. of 1963, art. VIII, § 3) (opining that state had sufficient control over charter schools to satisfy constitutional requirements).

[110] *See In re Grant of Charter Sch. Application of Englewood Palisades Charter Sch.*, 727 A.2d at 20-22 (addressing three public school districts' challenges to New Jersey's charter school act).

[111] *See id.* at 39 (rejecting claim as "speculative").

[112] *See id.* at 40-41 (finding no merit in future "fiscal doom" hypothesis).

[113] *See id.* (taking issue with speculative aspects of funding claim).

[114] *See State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ.*, 857 N.E.2d at 1159 (arguing that per-pupil funding overcomes plaintiffs' funding concerns).

schools."[115] It emphasized that the charter schools were funded on a per-pupil basis, and implied that state funds effectively attach to the students, and not to the school.[116] This implication seemed to assume that the "traditional" public schools were unlikely to suffer from a loss of funds that would have hypothetically been used to educate that single student because when that student leaves to attend a charter school, the public school is no longer responsible for educating that student.[117] The Supreme Court of Ohio, unpersuaded by the plaintiffs' general assertions that their schools would lose funding, held that plaintiffs did not "present clear and convincing evidence" that the charter school statute was unconstitutional.[118]

MASSACHUSETTS LAW: ADEQUACY AND *DOE NO. 1 V. SECRETARY OF EDUCATION*

In April of 2018, the Supreme Judicial Court of Massachusetts (the "SJC"), made its first ever ruling as to the constitutionality of the state's charter school statute.[119] The plaintiffs, five students who attended Boston Public Schools, filed a complaint alleging that the Massachusetts charter school cap prevented them from accessing an "adequate" education, and therefore violated the education clause and equal protection provisions of the Massachusetts Constitution.[120] Each student applied to attend at least one charter school, but none were admitted through the school admissions lotteries and so had to attend "constitutionally inadequate schools in Boston."[121] The defendants, Massachusetts' Secretary of Education and

[115] *See id*. at 1160 (claiming per-pupil funding prevents public school from losing funds it was otherwise entitled to).

[116] *See id.* ("[T]he state still fulfills its obligation to fund each student at a specific level according to the statutory formula.").

[117] *See id.* ("When a student leaves a traditional school to attend a [charter] school, the state funds follow the student.").

[118] *See id.* ("The appellants have not presented clear and convincing evidence that community schools are raiding local funds that school districts are otherwise entitled to receive.").

[119] *See Doe No. 1*, 95 N.E.3d at 244-45 (summarizing claims alleging Massachusetts charter school cap was unconstitutional).

[120] *See id.* at 250 (providing legislative history of plaintiffs' claims). The plaintiffs in *Doe No. 1* sought a "declaratory judgment," which "declares conclusively the rights and duties, or the status, of the parties but involves no executory or coercive relief following as of course." *Declaratory Judgment*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969).

[121] *See Doe No. 1*, 95 N.E.3d at 250 ("In their complaint, the plaintiffs sought to represent a class including themselves and all other children attending or assigned to attend constitutionally inadequate schools in Boston who have applied to public charter schools, but have failed to gain entry via the lottery.").

other members of the Massachusetts Board of Elementary and Secondary Education, filed a motion to dismiss.[122]

Prior to plaintiffs' appeal to the SJC, the Suffolk County Superior Court granted defendants' motion for dismissal as to both of the plaintiffs' claims.[123] The lower court held that the charter school cap did not violate Massachusetts' education clause, finding that although the state is obligated to educate all of its children, there is no "constitutional right to choose a particular flavor of education" and thus, "denial of access to a particular type of school providing a particular type of education" did not constitute "the sort of Statewide abandonment of duty" required for a finding of an education clause violation.[124] The lower court also held there was no equal protection violation, finding that the plaintiffs had not established that the charter school cap was not "rationally related to the furtherance of a legitimate State interest in providing public education to every child of this Commonwealth."[125] The SJC affirmed.[126]

As this case was initiated by charter school proponents who sought to expand access to charter schools, it may appear distinct from the discussion regarding claims brought by charter school opponents.[127] But, this is the first, and thus far the only Massachusetts case to address a constitutional challenge relating to charter school legislation, and the SJC's opinion describes, in detail, the requirements for establishing education clause and equal protection violations within the charter school context.[128] Accordingly, it will be necessary for future litigants seeking to challenge any aspect of the Massachusetts charter school statute to understand the court's holding.[129]

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[122] *See id.* (reviewing lower court's allowance of defendant's motion to dismiss *de novo*).

[123] *See id.* ("The motion judge granted the motion, concluding that, although an actual controversy between the parties existed and the plaintiffs had standing to bring their claims against the defendants, the plaintiffs had failed to state a claim under either the education clause or the equal protection provisions of the Massachusetts Declaration of Rights."); *see also* Does v. Peyser, No. 2015-2788, 2016 WL 9738404, at *1 (Mass. Super. Oct. 4, 2016) (granting defendants' motion to dismiss).

[124] *See Does*, 2016 WL 9738404, at *9 (rejecting plaintiffs' education clause claim).

[125] *See id.* at *9-10 (rejecting plaintiffs' equal protection claim).

[126] *See Doe No. 1*, 95 N.E.3d at 244-45 ("We affirm the judgment of dismissal and conclude, as did the motion judge, that the plaintiffs have failed to state a claim for relief under either provision.").

[127] *See id.* at 244 ("[Plaintiffs] alleg[ed] that the charter school cap under G.L. c. 71 § 89 (i) violates the education clause and the equal protection provisions of the Massachusetts Constitution because the students were not able to attend public charter schools of their choosing.").

[128] *See id.* at 250-59 (detailing elements necessary to successfully state constitutional claims challenging Massachusetts' charter school statute).

[129] *See id.* (addressing each claim and its elements to highlight requirements for stating valid claims).

In *Doe No. 1*, the SJC first determined whether it had jurisdiction to adjudicate the plaintiffs' claims.[130] In Massachusetts, when a plaintiff seeks declaratory relief, a court has jurisdiction if the plaintiff can demonstrate "the existence of an actual controversy" and "the requisite legal standing to secure its resolution."[131] Actual controversy exists when a plaintiff has set forth a "real dispute caused by" one party's assertion of "of a legal relation, status or right in which he has a definite interest, and the denial of such assertion by another party also having a definite interest in the subject matter . . . ."[132] Additionally, the circumstances must indicate that "unless the matter is adjusted," litigation is almost inevitable.[133] The SJC found that an actual controversy existed, explaining that the plaintiffs had an "identifiable interest in the opportunity to attend a commonwealth charter school" and that interest was "actually limited" by the charter school cap.[134]

The court also found that the plaintiffs demonstrated standing as to both constitutional claims.[135] "A party has standing when it can allege an injury within the area of concern of the statute, regulatory scheme, or constitutional guarantee under which the injurious action has occurred."[136] A plaintiff will have suffered an injury if the defendant "violated some duty owed to the plaintiff."[137] Importantly, the defendant's mere "act or omission" will not be enough to constitute an injury that justifies standing.[138] The plaintiffs demonstrated standing as to their alleged injury pursuant to the education clause of the Massachusetts Constitution—denial of an adequate public education—because the education clause "imposes a duty on the Commonwealth to provide an adequate public education to its

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[130] *See id.* at 250-51 (asserting that plaintiffs must demonstrate existence of actual controversy and requisite legal standing).

[131] *See Doe No. 1*, 95 N.E.3d at 251 ("In declaratory judgment actions, both requirements are liberally construed.").

[132] *See* S. Shore Nat'l Bank v. Bd. of Bank Inc., 220 N.E.2d 899, 902 (Mass. 1966) (quoting Sch. Comm. of Cambridge v. Superintendent of Schs. 70 N.E.2d 298, 300 (Mass. 1946)) (defining actual controversy); *see also Doe No. 1*, 95 N.E.3d at 251 (referencing *S. Shore Nat'l Bank,* 220 N.E.2d at 902).

[133] *See S. Shore Nat'l Bank*, 220 N.E.2d at 902 (quoting *Sch. Comm. of Cambridge*, 70 N.E.2d at 300) (defining actual controversy); *see also Doe No. 1*, 95 N.E.3d at 251 (holding plaintiffs "adequately demonstrated" existence of actual controversy).

[134] *See Doe No. 1*, 95 N.E.3d at 252 (reasoning that because cap inhibited plaintiffs' interest in attending charter school actual controversy existed).

[135] *See id.* ("The plaintiffs have set forth sufficient facts to demonstrate standing as to both counts in their complaint.").

[136] *See id.* (defining requirement for demonstrating standing).

[137] *See id.* (quoting Penal Insts. Comm'r v. Comm'r of Corr., 416 N.E.2d 958, 962) (articulating when plaintiff's alleged injury will demonstrate standing).

[138] *See id.* (quoting Penal Insts. Comm'r v. Comm'r of Corr., 416 N.E.2d 958, 962) (further defining injury).

schoolchildren."[139] Regarding the plaintiffs' equal protection claim, pursuant to which the alleged injury was "discrimination in the provision of public education without adequate justification," lawmakers are prohibited from "treating similarly situated citizens differently without adequate justification" and therefore plaintiffs had standing.[140]

After concluding that the plaintiffs demonstrated both the existence of an actual controversy and the requisite legal standing, the court proceeded to determine whether the plaintiffs' claims would survive the motion to dismiss.[141] It addressed the education clause claim first.[142] To state a claim under the education clause, it is not enough for the plaintiffs to "plead facts suggesting [that they were] deprived of an adequate education," but the facts must also suggest "that the defendants have failed to fulfil their constitutionally prescribed duty to educate."[143] To allege that the defendants have not fulfilled their duty to educate, the facts must "demonstrate that the Commonwealth's extant public education plan does not provide reasonable assurance of an opportunity for an education to '*all* of its children . . .' over a reasonable period of time, or is otherwise 'arbitrary, nonresponsive, or irrational.'"[144] The court conceded that the plaintiffs were attending schools where the education provided was, "at the moment, inadequate," but to meet the requirements for stating a claim under the education clause, they also needed to show that there was no "reasonable assurance" that their schools would improve "over a reasonable period of time."[145]

Rather than claiming that the Commonwealth's "framework for ensuring" educational adequacy failed to provide assurance that their schools would improve over a reasonable period of time, the plaintiffs' sole focus

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[139] *See Doe No. 1*, 95 N.E.3d at 252 (confirming plaintiffs demonstrated standing as to education clause claim because state had duty to educate).

[140] *See id.* (confirming plaintiffs' standing as to equal protection because state cannot discriminate).

[141] *See id.* (setting forth conditions for surviving motion to dismiss). "To survive a motion to dismiss, the facts alleged must 'plausibly suggest[ ] (not merely be consistent with) an entitlement to relief.'" *Id.* (alterations in original) (quoting Edwards v. Commonwealth, 76 N.E.3d 248, 254 (Mass. 2017)). "Factual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* (alterations in original) (quoting Iannacchino v. Ford Motor Co., 888 N.E.2d 879, 890 (Mass. 2008)).

[142] *See Doe No. 1*, 95 N.E.3d at 253 (beginning discussion of education clause claim).

[143] *See id.* (concluding plaintiffs did not plead facts suggesting defendants breached duty to educate).

[144] *See id.* (quoting Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1140 (Mass. 2005); McDuffy v. Sec'y of Exec. Office of Educ., 615 N.E.2d 516, 554 (Mass. 1993)) (characterizing elements necessary to show Commonwealth's failure to fulfill duty to educate).

[145] *See Doe No. 1*, 95 N.E.2d at 254 ("[T]here may be moments in time where particular public schools are not providing an adequate education to their students. . . . This alone is insufficient to support a claim that the Commonwealth has failed to fulfil its constitutional obligation.").

was on the charter school cap and their inability to leave the public school system.[146] The court emphasized that "there is no constitutional entitlement to attend charter schools, and the plaintiffs' complaint [did] not suggest that charter schools are the Commonwealth's only plan for ensuring that the education in the plaintiffs' schools will be adequate."[147] Thus, the court found that the plaintiffs failed to state a claim under the education clause.[148]

The court proceeded to discuss the plaintiffs' equal protection claim.[149] The plaintiffs claimed that the charter school cap "create[d] two classes of children: those who [were] guaranteed to receive an opportunity for an adequate education because all traditional public schools in their districts provide[d] one, and those in districts with many failing schools whose educational prospects [were] determined by a lottery."[150] The court did not decide whether the charter school statute was discriminatory for the purposes of an equal protection analysis, but found that even assuming that it was discriminatory, the plaintiffs' claim would not survive the motion to dismiss.[151]

Before it could evaluate whether the plaintiffs alleged facts that "plausibly suggested" an equal protection violation, the court had to consider the applicable standard of review.[152] If a statute "burdens a fundamental right or targets a suspect class," the court will review the statute with "strict scrutiny."[153] Otherwise, the statute will be subject to "rational basis

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[146] *See id.* at 255 (acknowledging inadequacy of education provided by plaintiffs' schools).

[147] *See id.* (affirming lower court's dismissal of education clause claim.). "The education clause provides a right for all the Commonwealth's children to receive an adequate education, not a right to attend charter schools. . . . [T]he clause does not permit courts to order 'fundamentally political' remedies or 'policy choices that are properly the Legislature's domain.'" *Id.* (quoting *Hancock*, 822 N.E.2d at 1156-57). "There may be any number of equally effective options that also could address the plaintiffs' concerns; however, each would involve policy considerations that must be left to the Legislature." *Id.*

[148] *See Doe No. 1*, 95 N.E.3d at 255 ("Whether to divert an increased amount of school district funds from traditional public schools to charter schools to comply with the education clause mandate is a choice for the Legislature, not for the courts.").

[149] *See id.* (addressing equal protection claim).

[150] *See id.* (describing plaintiffs' assertion that charter school cap created two classes of children).

[151] *See id.* (concluding plaintiffs did not state plausible claim for purposes of equal protection). On its face, the net school spending cap operates in a way to encourage more commonwealth charter schools in the plaintiffs' school district than in higher performing districts. . . . Under the plaintiffs' theory of discriminatory injury, they are part of the advantaged class associated with the statute's facial discrimination, and likely would not have standing to challenge it.
Id. at 255, n.28.

[152] *See id.* at 256 (explaining differences in application of strict scrutiny compared to rational basis review).

[153] *See Doe No. 1*, 95 N.E.3d at 256 (providing circumstances when strict scrutiny is appropriate standard of review).

review."[154] The charter school statute did not target a suspect class, but the plaintiffs argued that strict scrutiny should still apply because the statute did burden the "fundamental right to education protected by the Massachusetts Constitution."[155] However, the SJC has yet to decide whether the education clause imparts a fundamental right under the circumstances presented in this case.[156] The court declined to resolve this question, finding that even if education was a fundamental right, the charter school cap did not warrant heightened scrutiny.[157]

A statute burdens a fundamental right only if it "significantly interferes" with that right.[158] Here, the court did not believe that the charter school cap significantly interfered with the right to education.[159] It reiterated that there is not a constitutional right to attend charter schools, adding that "the charter school cap [did] not interfere with the students' ability to attend traditional public schools."[160] In sum, even where there is a right to obtain an education, and even if that right is fundamental, there is no right to attend a charter school, and therefore, under this set of facts it would have been impossible for the court to find that the charter school cap interfered with the plaintiffs' right to an education as they were still able to attend public schools.[161] Like their education clause claim, the plaintiffs' focus on the constitutionality of the cap, and not on the inadequacy of the education at their public schools, resulted in their failure to state a claim.[162]

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[154] *See id.* at 257 (indicating where strict scrutiny is inapplicable, the court turns to rational basis review).

[155] *See id.* at 256 (declining to determine whether education is fundamental right in Massachusetts).

[156] *See id.* (stating that it has not held whether and when education is fundamental right).

> We have had occasion to hold that the Massachusetts Constitution does not guarantee each individual student the fundamental right to an education in circumstances in which a student's behavior leads to expulsion. . . . Although heightened scrutiny does not apply in the individual student misconduct context, whether the education clause implies heightened scrutiny of education-related discriminatory classifications in other circumstances is an open question. We need not determine whether such circumstances exist and, if so, what they might be, in order to conclude that heightened scrutiny does not apply to the charter school cap statute.

Id.

[157] *See id.* (opining that state had not interfered with plaintiffs' right to education).

[158] *See Doe No. 1*, 95 N.E.3d at 256 (citing Zablocki v. Redhail, 434 U.S. 374, 386 (1978)) (specifying extent of burden on fundamental right required for strict scrutiny).

[159] *See id.* at 257 (agreeing with lower court's assertion that there is no constitutional right to attend charter schools).

[160] *See id.* (confirming that strict scrutiny would not apply to plaintiffs).

[161] *See id.* (reiterating charter school cap has no impact on general ability to obtain public education).

[162] *See id.* at 256-57 (addressing application of rational basis review in this case).

A law will be upheld under rational basis review "as long as it is rationally related to the furtherance of a legitimate state interest."[163] Additionally, an equal protection analysis under the Massachusetts Constitution "requires the court to look carefully at the purpose to be served by the statute in question and at the degree of harm to the affected class."[164] Further, the court must evaluate whether "an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class."[165] In applying this standard of review, the court acknowledged that although the charter school cap did not burden any fundamental right, the cap may still "impose a serious degree of harm on the plaintiffs . . . given the nature of the educational interest at stake."[166] Despite this potential harm, the court opined that "the purposes of the charter school cap reflect[ed] a legislative attempt to balance the plaintiffs' strong educational interest" with the education interests of those students who do not attend charter schools.[167] Accordingly, the court believed that the purpose of the cap transcended any harm it may have caused the plaintiffs, concluding "that no plausible set of facts exist to overcome the statute's presumption of rationality."[168]

To conclude, this opinion not only explained why the plaintiffs failed to establish that the charter school cap violated the education clause or the equal protection rights within the Massachusetts Constitution, but it also illustrated what would be necessary for such claims to succeed.[169] The SJC outlined the requirements for each claim and even characterized the

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[163] *See Doe No. 1*, 95 N.E.3d at 257 (quoting English v. New England Med. Ctr., 541 N.E.2d 329, 332 (Mass. 1989)) (defining application of rational basis review).

[164] *See id.* at 257 (quoting *English*, 541 N.E.2d at 333) (highlighting need to balance purpose of statute with harm it causes).

[165] *See id.* at 257 (quoting *English*, 541 N.E.2d at 333) (expanding on application of rational basis review).

[166] *See id.* at 257 (returning to issue of statute's degree of harm to affected class).

[167] *See id.* at 258 (listing various reasons that provide rational basis for charter school statute). As the Superior Court judge noted in this case, funding for charter schools necessarily affects the funding for traditional public schools. The cap is an effort to allocate education funding among all the Commonwealth's students attending these two types of publicly funded schools. Because of the statutory funding mechanism that mandates payment of charter school tuition from resources that would otherwise go to traditional public schools, the expansion of charter schools has detrimental effects on traditional public schools and the students who rely on those schools and their services. . . . This attempt to allocate resources among all the Commonwealth's students represents the rational basis for the statutory cap.
Id.

[168] *See Doe No. 1*, 95 N.E.3d. at 258 (determining plaintiffs' claims did not survive rational basis review).

[169] *See id.* at 250-59 (describing how to state valid claim under applicable constitutional provisions).

legislative interests at stake.[170] Furthermore, it is not impossible to overcome such interests, but the standard is high, and a plaintiff must plead facts plausibly suggesting that an actual constitutional right has been violated, that the violation is unlikely to be cured within a reasonable period of time, and the resulting harm must be such that it cannot be justified or overcome by the legislative interests at play.[171]

Future Challenges to the Constitutionality of Massachusetts Charter School Laws

Despite the evidently widespread concern that charter school funding disrupts the quality, and equality, of education provided by state public education systems, the majority of claims addressing such concerns have been unsuccessful.[172] But, courts' consistent refusals to deem charter school statutes unconstitutional seems to be the product of advocates who assert broad claims rarely supported by specific evidence.[173]

At the federal level, Equal Protection claims fail because evidence of discriminatory intent is lacking.[174] Arguments that public schools are treated differently from charter schools, or that certain schools have a seemingly disproportionate number of minority students compared to others, will not survive the high standard that must be met for an equal protection claim to hold any merit.[175] It may be that in the context of challenges to the constitutionality of charter school laws, federal equal protection claims will rarely, if ever, succeed, as there is no fundamental right to education, and in the absence of true discrimination, the standard of review is unlikely to rise

[170] *See id.* (illustrating elements of each claim).

[171] *See id.* at 259 ("Where a statute does not use a suspect classification or burden a fundamental right, is supported by a rational basis, and does not otherwise violate the Constitution, advocates may not turn to the courts merely because they are unsatisfied with the results of the political process.").

[172] *See* Black, *supra* note 2, at 1414 ("Prior litigation, on the whole, has been a failure. Even the rare victories have been cut short by legislative work-arounds. The flaw of the litigation may be that it simply claims too much—that state constitutions prohibit charters . . . entirely."); Martin, *supra* note 9, at 102 ("It seems clear that the outcome of charter school cases decided in state and federal courts have not served as a significant derailment to the growth of the charter school movement.").

[173] *See* cases cited *supra* note 62, 64 (providing examples of plaintiffs unable to persuade courts due to vague evidence); *see also* Black *supra* note 2, at 1415-17 (theorizing that plaintiffs must make precise showing of charter schools' harm to public education).

[174] *See* cases cited *supra* note 62 (listing cases where courts rejected federal equal protections claims).

[175] *See* sources cited *supra* note 62 (exemplifying that broad assertions cannot support equal protection claims).

to the level of "strict scrutiny."[176] Thus, under the assumption that these challenges will almost always be subject to rational basis review, it also seems likely that federal courts will tend to find that the law in question is rationally related to the governmental interest in furthering educational opportunities.[177]

At the state level, however, there may be more hope.[178] Though the majority of charter school claims to date have failed in state courts, it seems that these cases, more so even than those heard in federal courts, were unsuccessful because of the broad, sometimes hypothetical, and often polemical assertions of plaintiffs.[179] Further, the SJC's opinion in *Doe No. 1* delineated, in rather precise terms, how to establish constitutional violations under the education clause and equal protection provisions of the Massachusetts Constitution.[180] Thus, this case may not only be used as precedent, but it can help guide future plaintiffs who may wish to challenge the constitutionality of Massachusetts' charter school statutes.[181]

Below, the description of a hypothetical claim will exemplify how *Doe No. 1* may help guide future challenges to the constitutionality of Massachusetts charter school laws.[182] But first, recent changes to the Massachusetts Department of Elementary and Secondary Education ("DESE") school "accountability system" must be noted.[183] When the plaintiffs in *Doe No. 1* filed their claim, DESE classified schools by level.[184]

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[176] *See* sources cited *supra* note 62 (requiring strong evidence of discriminatory intent, and actual discriminatory impact).

[177] *See* sources cited *supra* note 62 (revealing federal courts tend to find legitimate governmental purpose for charter school statutes).

[178] *See Doe No. 1*, 95 N.E.3d at 250-59 (providing in-depth clarification of elements required to challenge education laws); *see also League of Women Voters of Wash.*, 355 P.3d at 1141 (striking down charter school act due to unconstitutional funding); Black, *supra* note 2, at 1416 ("The state's motivations and rationale for its policies are irrelevant if the net result is a failure to provide appropriate educational opportunities. A court might strike down the implementation of a charter system and demand reform in the same way that it has struck down state funding formulas and demanded that they be rewritten. In doing so, courts do not preclude any particular form of school funding or school choice; courts simply demand that the state's chosen policies produce outcomes consistent with the constitution.").

[179] *See* cases cited *supra* note 94 (listing state level charter school claims attempting to persuade courts with little evidentiary support).

[180] *See* 95 N.E.3d at 250-59 (taking reader through each claim step by step).

[181] *See id.* (outlining required elements of education clause and equal protection claims).

[182] *See id.* (providing "guide" for similar claims).

[183] *See Summary of the Next-Generation District and School Accountability System*, MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC. 1, 1-9, http://www.doe.mass.edu/accountability/lists-tools.html (follow "Summary of the Next-Generation District and School Accountability System" hyperlink under "General Information") (last updated June 2018).

[184] *See Doe No. 1*, 95 N.E.3d at 249, n.17 (describing Massachusetts' classification of schools based on performance); *see also Summary of the Next-Generation District and School*

At that time, schools that were ranked level four and five were among the worst performing schools in the state, and therefore were generally considered to provide inadequate levels of education.[185] Since the publication of the *Doe No. 1* opinion, however, DESE updated its "accountability system."[186] Instead of assigning a numeric level to each Massachusetts school, DESE will now place each school into one of two general categories: "schools requiring assistance or intervention," and "schools not requiring assistance or intervention."[187] Within each of these two broad categories, a school will also be placed into an "accountability category" depending on its academic performance as evaluated by DESE.[188] There are two accountability categories for schools that "require assistance or intervention": (1) schools "in need of broad/comprehensive support" and (2) schools "in need of focused/targeted support."[189] The "broad/comprehensive support" category falls at the lowest end of the performance spectrum under DESE guidelines, while the "focused/targeted support" category, though still low on the spectrum, requires evidence of stronger academic performance.[190] Of the schools that do not "require assistance or intervention," DESE will place those deemed to have exhibited the highest level of performance in the "schools of recognition" accountability category.[191] The remaining "schools that do not require

Accountability System, *supra* note 183, at 1 (providing background on Massachusetts' formerly used assessment system).

185 *See id.* (briefing school ranking system).

186 *See Summary of the Next-Generation District and School Accountability System*, *supra* note 183, at 1 (explaining Massachusetts' newly implemented school assessment system). This Note does not detail the specific factors that DESE analyzes when assessing school performance, as it is not particularly relevant to this discussion. The summary of Massachusetts' new school classification system is included in the text to provide the reader with the current language associated with Massachusetts school performance. Furthermore, the Note's description of a hypothetical challenge to the constitutionality of Massachusetts charter school laws must use language that is accurate and up-to-date if it is to be realistic and convincing. Thus, an in-depth discussion of the particulars of the Massachusetts' assessment system is not necessary, and the brief overview provided is sufficient for the purpose of this Note.

187 *See Summary of the Next-Generation District and School Accountability System*, *supra* note 183, at 7-8 (defining classifications used for Massachusetts' school assessments).

188 *See id.* at 8 (detailing additional categories used to indicate school's performance).

189 *See id.* at 7-8 (listing "accountability" categories for "schools requiring assistance or intervention")

190 *See id.* at 8 (providing chart summarizing differences between each accountability category); *see also Massachusetts' New School and District Accountability System*, MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC. (2018), http://www.doe.mass.edu/accountability/lists-tools.html (follow "One-Page Summary of Massachusetts' Accountability System – For Parents" hyperlink under "General Information") (showing image of school performance spectrum according to accountability categories).

191 *See School Leader's Guide to the 2018 Accountability Determinations*, MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC., http://www.doe.mass.edu/accountability/lists-tools.html

assistance" will be categorized as either "meeting targets" or "partially meeting targets."[192]

Though DESE has not analogized these accountability categories to the formerly used numeric levels, for the purposes of the following hypothetical, it seems fair to say that schools deemed to "require assistance or intervention" would likely have been classified as level four or five schools.[193] Thus, assume the hypothetical plaintiff attends a public school in Massachusetts that "requires assistance or intervention," and thus performs at a level equivalent to the level four and five schools described in *Doe No. 1*.[194] She would like to challenge the constitutionality of Massachusetts charter school funding, asserting that she is not only receiving an inadequate education, but funding initially designated for use by her public school was diverted to charter schools and has inhibited her school's ability to obtain resources necessary for improvement.[195] Assuming the plaintiff has statistical evidence that the charter school funding has actually contributed to the inadequacy of her school, she may succeed if she follows the path laid by the SJC in *Doe No. 1*.[196]

First, *Doe No. 1* established that the standard for establishing jurisdiction is fairly low.[197] Plaintiff would likely be able to show that an actual controversy existed, as she attends an underperforming school and is claiming that charter school funding impeded her access to an adequate education because it prevented her school from improving academically.[198] Thus, her identifiable interest in obtaining an adequate education is impeded by Massachusetts' charter school funding scheme.[199] She would likely have

(follow "School Leader's Guide to the 2018 Accountability Determinations hyperlink under "Supporting Materials") (last updated Sept. 26, 2018) (expanding on criterion used to assess "schools of recognition); *see also Summary of the Next-Generation District and School Accountability System*, *supra* note 183, at 8 (summarizing "schools of recognition" accountability category).

192 *See Summary of the Next-Generation District and School Accountability System*, *supra* note 183, at 8 (listing "accountability" categories for "schools not requiring assistance or intervention")

193 *Compare Summary of the Next-Generation District and School Accountability System*, *supra* note 183, at 7-8 (outlining when schools will "require assistance or intervention" "schools of recognition" accountability category), *with Doe No. 1*, 95 N.E.3d at 249, n.17 (explaining when school performance would warrant level four or five designation).

194 *See* sources cited, *supra* note 193 and accompanying text (comparing updated school assessment system with the previous classification system).

195 *See* Black *supra* note 2, at 1363 (asserting that charter school funding actually threatens quality of public school education).

196 *See Doe No. 1*, 95 N.E.3d at 250-59 (delineating elements of successful claims).

197 *See id.* at 251 (confirming both actual controversy and standing are liberally construed).

198 *See id.* (finding actual controversy existed where access to adequate education was inhibited by statute).

199 *See id.* at 252 (stating identifiable interest was opportunity to attend Commonwealth charter school).

standing under both the education clause and equal protection provisions of the Massachusetts Constitution.[200] Under the education clause, her injury, an inadequate public education, is within the constitution's area of concern as it imposes a duty on the state to provide an adequate public education to all children.[201] Under the equal protection principles of the constitution, her injury, like that in *Doe No. 1*, would be "discrimination in the provision of public education without adequate justification."[202]

Next, under the education clause, this plaintiff would allege that her assignment to an inadequate school is caused by charter school funding.[203] As explained above, she would likely succeed in proving that she has been deprived of an adequate education, but whether defendants have failed to fulfill their constitutionally prescribed duty to educate is a bit trickier.[204] This plaintiff's situation is different from that of the plaintiffs in *Doe No. 1*, as they had no constitutional right to attend a charter school, whereas this plaintiff has a right to attend a constitutionally adequate public school.[205] But, this plaintiff would still have to establish that the Commonwealth's "extant public education plan does not provide reasonable assurance of an opportunity for an adequate education . . . over a reasonable period of time."[206] Under the assumption that she has data to support the contention that charter school funding is actually preventing her school from improving and causing it to remain inadequate, she could argue that as long as the state continues to fund charter schools by reallocating funds from public schools, her school will continue to provide an inadequate education. Thus, it is possible the court could find that under the current funding scheme, there is no reasonable assurance of an opportunity for her to receive an adequate education over a reasonable period of time.[207]

As for the equal protection claim, the plaintiff may argue that the charter school funding method creates two classes of children: those who attend schools with funding sufficient for providing an adequate education,

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[200] *See id.* ("A party has standing when it can allege an injury within the area of concern of the statute, regulatory scheme, or constitutional guarantee under which the injurious action has occurred.").

[201] *See Doe No. 1*, 95 N.E.3d at 252 (concluding plaintiffs' alleged injury fell within area of concern of education clause).

[202] *See id.* (defining plaintiffs' equal protection injury).

[203] *See id.* at 253 (finding charter school cap caused assignment to inadequate school).

[204] *See id.* (requiring that plaintiff plead facts suggesting deprivation of adequate education and state's failure to educate).

[205] *See id.* at 255 (stating that there is no right to attend charter schools).

[206] *See Doe No. 1*, 95 N.E.3d at 254 (demonstrating reasonable assurance requirement).

[207] *See id.* (asserting education clause claims cannot succeed if reasonable assurance of adequate education over reasonable time). "[T]here may be moments in time where particular public schools are not providing an adequate education to their students." *Id.*

and those who attend failing schools that are unable to improve as a result of charter school funding.[208] A court would be unlikely to apply strict scrutiny, as education has not been deemed a fundamental right in Massachusetts, and in this case, the charter school funding does not target a suspect class.[209] However, the plaintiff's claim may survive rational basis review.[210] A court would likely find that the governmental purpose for enacting the charter school statute was to create innovative alternatives to the state's traditional public school system with the hopes of improving the overall quality of public education.[211] But, this plaintiff's specific, statistical evidence that charter school funding detrimentally impacts the quality of education that her school can provide, may persuade the court that the degree of harm to the provision of adequate public education outweighs the governmental purpose to be served by the charter school statute.[212] If the court is persuaded that the plaintiff's school cannot improve so long as charter schools are allocated funds from public districts, then it would be unlikely to conclude that the governmental purpose transcends the harm it is causing.[213]

It may not be impossible to successfully challenge charter school legislation, but claims have to be strategic, and evidence has to be grounded in specific facts that leave little to no room for dispute.[214] Of course, the hypothetical plaintiff may not find the success described in the preceding paragraphs, but she does make a pretty convincing argument.

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[208] *See id.* at 255 (setting forth plaintiffs' claim that charter school cap creates two classes of children).

[209] *See id.* at 256 (stating strict scrutiny is only appropriate if statute burdens fundamental right or targets suspect class).

[210] *See id.* at 257 (conveying that court considers degree of harm caused by statute in addition to state interest).

[211] *See Doe No. 1*, 95 N.E.3d at 257 (providing governmental purpose for charter school creation). "The Legislature first created charter schools as laboratories only twenty-five years ago to accomplish purposes such as 'simulat[ing] the development of innovative programs within public education' and 'provid[ing] models for replication in other public schools.'" *Id.* (alterations in original) (quoting ALM GL c. 71 § 89 (b)).

[212] *See id.* (discussing evidence necessary to show significant harm).

[213] *See id.* at 257-58 (highlighting consideration of whether statute's legitimate public purpose transcends harm).

[214] *See* Black, *supra* note 2, at 1425 ("The conceptually and factually more direct challenge to choice programs is that they impede the delivery of constitutionally required public education opportunities. Again, the claim is not that charters or vouchers are per se barred, but that as a practical matter, the state's statutory structure for choice programs is undermining public education. This claim requires evidence of the precise effects of choice on public education in particular locations.").

CONCLUSION

Proving to a court that charter school laws are unconstitutional will never be an easy task, but it may be possible. This is a developing area of legislation that inevitably needs some fine tuning, but legal precedent has already revealed some of the adjustments that need to be made. Broad allegations that lack specific evidence will not prevail. However, specific data, actual statistics, and evidence of the impact of specific charter schools on specific public schools all have the potential to change the course of these constitutional challenges. Furthermore, hostile arguments conveying an anti-charter school attitude will not help the cause. Attacking charter schools as an institution may be tempting for those who oppose school choice reform, but for change to occur, more strategic and focused methods must be sought.

Perry Gans

AUDIBLE: CONTRACTUAL RELATIONS BETWEEN SCHOOLS AND THEIR STUDENT-ATHLETES ARE DUE FOR A REROUTE

Every year, thousands of high school students commit to their college of choice to further their education and begin their collegiate athletic career.[1] Prior to making this decision, student-athletes have been recruited by that school, during a process that sometimes begins as early as their sophomore year and culminates on National Signing Day.[2] During the recruiting process, coaches from NCAA member colleges are allowed to contact and engage in conversations with prospective student-athletes to attend their school.[3] These communications are only allowed to occur during a "contact period" and are not allowed to happen during a "dead period."[4] The primary purpose of these communications is to establish a trusting relationship with prospective student-athletes and ultimately obtain a commitment from them to attend the institution represented by that coach.[5] The recruiting conversations consist of a variety of promises, including those that they may not be capable of fulfilling.[6] Recruits often communicate exclusively with the same coach or group of coaches throughout the recruiting process, and rely on their promises and established trust when

[1] *See* National Collegiate Athletic Association, *NCAA Recruiting Facts,* https://www.ncaa.org/sites/default/files/Recruiting%20Fact%20Sheet%20WEB.pdf (noting there are 179,200 Division I athletes and 59 percent receive scholarships). The facts sheet provided by the NCAA notes that throughout the three major divisions, there are 480,000 student-athletes. *See id.* Additionally, 59 percent of Division I student-athletes and 62 percent of Division II student-athletes receive some level of "athletic aid" or scholarship. *Id.*

[2] *See* NCAA RECRUITING FACTS, http://www.ncaa.org/student-athletes/future/recruiting (last visited Mar. 3, 2018) (defining key terms and dates for recruiting cycles). This information sheet provides guidelines to students and coaches on what contacts or recruiting is allowed to avoid any violations. *Id.*; *see also* NATIONAL LETTER OF INTENT, NLI SIGNING DATES FOR PROSPECTIVE STUDENT-ATHLETES SIGNING 2018-19 AND ENROLLING 2019-20, http://www.nationalletter.org/signingDates/index.html (last visited Feb. 15, 2018) (outlining dates where recruits may sign National Letter of Intent and choose their college).

[3] *See* NCAA Recruiting, *supra* note 2 (outlining communication periods for recruiting).

[4] *See* NCAA Recruiting, *supra* note 2 (defining "contact period" as a time when "a college coach may have face-to-face contact with college-bound student-athletes . . . and write or telephone student-athletes or their parents.").

[5] *See* Jamie Y. Nomura, Note, *Refereeing the Recruiting Game: Applying Contract Law to Make the Intercollegiate Recruitment Process Fair,* 32 HAWAII L. REV. 275, 275-78 (2009) (describing recruiting process and mindset of recruiters).

[6] *See id.* at 276 (noting that college coaches make false promises because they are not held responsible for them).

choosing which school to attend.[7] It has been stated that "[a] coach is often the most influential reason for a recruit choosing a school."[8] After a recruit has developed a sufficient relationship to commit to a college, they will sign a National Letter of Intent ("NLI") and deliver the NLI to that college.[9] Once a recruit accepts the University's scholarship offer by signing the NLI, a contract has been formed between the student-athlete and the college, and both parties are now bound to the standardized terms of the contract.[10]

Every time a college athlete takes the field to represent their school, they do so without any form of compensation beyond what is included in their scholarship package.[11] Perhaps worse than being without compensation for the inherent risk in athletic participation, they are without any guarantee of what has been verbally promised to them during the recruiting process, as these promises are not recorded in a single document.[12] This leads to the unfortunate and increasingly common scenario in which the coach that recruited the student-athlete and encouraged them to commit to that particular institution may leave at any point to further their own career, all the while the student-athlete who committed to play for them remains contractually bound to stay at that school.[13] For the student-athletes whom find themselves in this situation, they are left with an uncertain future and

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[7] *See id.* (describing typical communication practices during recruiting cycle).

[8] *See* Art Thiel, *If Coach Bolts, Let the Players Go Too,* SEATTLE POST-INTELLIGENCER (Dec. 18, 2007), https://www.settlepi.com/sports/article/If-coach-bolts-let-players-go-to-1259243.php (describing unique relationship between coach and recruit). "The letter of intent is a pledge to the university. But what of a coach's pledge to the university? Apparently, it is worthless. Yet a coach is often the most influential reason for a recruit choosing a school." *Id.*

[9] *See* Nomura, *supra* note 5, at 275 (noting recruiting process ends when recruit signs NLI). The process of accepting the University's scholarship offer and finalizing the contract is completed by the signing of the NLI. *Id.*

[10] *See* Stephen F. Ross & Lindsay Berkstresser, Abstract, *Using Contract Law to Tackle the Coaching Carousel*, 47 U.S.F. L. REV. 709, 725-26 (2013) (describing one-sided nature of NLI). Once signed, the NLI binds the student-athlete to the school that corresponds with the NLI, however, it does not bind the coach to that school or student-athlete. *Id.* at 725, 727.

[11] *See NCAA 2018-2019 Div. I Manual*, NCAA (2018) AT BYLAW 12.1.2, http://www.ncaapublications.com/productdownloads/D117.pdf (noting college athlete loses eligibility if one "uses his or her athletics skill (directly or indirectly) for pay in any form in that sport.").

[12] *See* Katherine Sulentic, Note, *Running Backs, Recruiting, and Remedies: College Football Coaches, Recruits, and the Torts of Negligent and Fraudulent Misrepresentation*, 14 ROGER WILLIAMS U. L. REV. 127, 130-31 (2009) (explaining one-sided nature of NLI). The only document that identifies what the student will receive from the University is the financial aid agreement. *Id.* at 147. "If a plaintiff attempts to sue under a contract based on promises that the coach will not leave the university, the coach will change the playbook, or the student-athlete will receive playing time, it will be impossible to find this documented in either the NLI or the financial aid agreement." *Id.* at 147-48.

[13] *See* Mark Woods, *Athletes on a One-Way Road After Signing*, PALM BEACH POST, June 10, 2000, at 1C (asserting players are bound to stay at school for one-year while coaches are not).

remain fully bound by the terms of the NLI.[14] In the event that this occurs, players may request a release from the NLI and transfer, however, this is subject to the University's athletic officials' approval.[15] In the event that the request for release is denied, the athlete is now facing a situation that is materially different from what they originally committed to and are left without an alternative.[16] Per the NCAA, once a prospective student-athlete has signed the NLI, they have agreed to attend that institution for one academic year.[17] Even when the student-athlete has completed the mandated academic year at the original institution in its entirety, transferring to another institution may not be done without penalty.[18] After transferring to a different institution, the athlete must "complete one full academic year of residence" before being allowed to compete in athletics, further, they are also unable to receive an athletic scholarship from the new school until a release from the original school has been signed.[19] This issue is magnified in college football because of the National Football League's ("NFL") "three-year rule," which requires NFL prospects be enrolled as a college athlete for three years before they are eligible to declare for the draft.[20]

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[14] *See* Michael J. Riella, *Leveling the Playing Field: Applying the Doctrines of Unconscionability and Condition Precedent to Effectuate Student-Athlete Intent Under the National Letter of Intent*, 43 WM. & MARY L. REV. 2181, 2186 (2002) (articulating legal ramifications of NLI).

[15] *See* NLI*, Release Request and Appeal Process*, NATIONAL LETTER OF INTENT, http://www.nationalletter.org/releaseAndAppeals/releaseinstructions.pdf (providing NLI release request instructions). Per the NLI website, upon the filing of a request for release, the signing institution has a thirty-day deadline to render a decision on the request. *Id.* (outlining timeline by which request for release process operates).

[16] *See* Fortay v. Univ. of Miami, No. Civ. 93-3443, 1994 LEXIS 1865, *14 (D.N.J. Feb. 17, 1994) (outlining case of rejection of request for release).

[17] *See* NCAA, TRANSFER TERMS, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, http://www.ncaa.org/student-athletes/current/transfer-terms (last visited Jan. 15, 2018) ("NCAA schools that are part of the program may send a National Letter of Intent to a prospective student-athlete they have recruited. The letter is a legally-binding contract. It explains what athletics financial aid the school agrees to provide the student-athlete for one full academic year, only if the student is admitted to the school and is eligible for financial aid under NCAA rules. If you sign a National Letter of Intent, you agree to attend that school for one academic year and other schools that are part of the National Letter of Intent program can no longer recruit you.").

[18] *See* NCAA Div. I Manual, *supra* note 11, at 168, Art. 14.5.5.1 ("A transfer student from a four-year institution shall not be eligible for intercollegiate competition at a member institution until the student has fulfilled a residence requirement of one full academic year (two full semesters or three full quarters) at the certifying institution.").

[19] *See* Sean M. Hanlon, *Athletic Scholarships as Unconscionable Contracts of Adhesion: Has the NCAA Fouled Out?*, 13 SPORTS LAW. J. 41, 72 (2006) (noting effects of penalties imposed on student-athletes when transferring from one school to another).

[20] *See* Sulentic, *supra* note 12, at 131 (describing elevated impact on college football players in comparison to other sports). Several other sports including baseball, basketball, and hockey all have a shorter wait time for draft eligibility. *Id.* at 132 (noting how eligibility varies for other collegiate sports).

Another common issue is that an athlete could sign their NLI only to later find out that the school has accepted more NLI's than available scholarships, and is then left with no option other than to join the team as a "walk-on."[21] When this occurs, the student-athlete who thought they would be receiving financial aid in the form of an athletic scholarship, does not receive any, and is left with the problem of being bound to attend that institution for one academic year following the signing of their NLI.[22]

The National College Players Association ("NCPA") is a nonprofit organization created to provide information and protections to current and future college athletes.[23] The NCPA has created a document entitled the College Athlete Protection Guarantee ("CAP").[24] The CAP allows recruits to rely on a negotiable contract with legal protections as opposed to relying on potentially empty verbal promises received from college coaches.[25]

Several courts have held that under the current NLI model, in order for an athlete to make a contractual claim against a university, the athlete "must point to an identifiable contractual promise that [the university] failed to honor."[26] This holding would implicitly require student- athletes to negotiate for specific contractual terms, which the NLI does not allow.[27]

This Note argues that a widespread adoption and implementation of the CAP guarantee would provide student-athletes with legal protections and a basis for breach of contract claims currently unavailable under the current NLI system.[28] While there are several ways that a student-athlete may be taken advantage of or misled during the recruiting process, this Note focuses on coaching changes and the potential effects on student-athletes after they

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[21] *See* Ross & Berkstresser, *supra* note 10, at 713-14 (describing problems related to school accepting too many NLI's in given year); *see also* NCAA, Transfer Terms, *supra* note 17 (defining walk-on as: "[s]omeone who is not typically recruited by a school to participate in sports and does not receive a scholarship from the school, but who becomes a member of one of the school's athletic teams.").

[22] *See* Andy Staples, *Coming to an Understanding: The Issue With Recruiting Commitments and How We Can Fix It; Punt, Pass & Pork*, SPORTS ILLUSTRATED, Feb. 1, 2016 (noting several major issues with recruiting including accepting too many NLI's).

[23] *See* NCPA, ABOUT US, NATIONAL COLLEGIATE PLAYERS ASSOCIATION, https://ncpanow.org/mission-and-goals (last visited Dec. 14, 2017) (describing purpose behind creation of NCPA).

[24] *See id.* at CAP guarantee (noting creation of CAP guarantee).

[25] *See id.* (describing CAP guarantee and its features).

[26] *See* Ross v. Creighton Univ., 957 F.2d 410, 417 (7th Cir. 1992) (determining standard for breach of contract claim against university from athlete).

[27] *See id.* at 417 (holding created unrealistic narrow window for breach of contract claims to be brought by student-athletes).

[28] *See infra* Part V.

sign the NLI.[29] This Note begins with a background on the history of the NLI as well as the creation of the NCPA and the CAP.[30] It reviews several cases which have analyzed issues centered around contractual disputes between student-athletes and their universities, and the precedent created for future contractual claims of the same nature.[31] Further, this Note provides an analysis of how student-athletes could benefit from the implementation of the CAP, and why the NCAA will oppose a change from the current NLI system.[32] Finally, this Note concludes that the CAP guarantee will effectively provide legal protections to student-athletes that are not currently available and suggest remedies in areas that the NLI is lacking.[33]

PART I: HISTORY AND DEVELOPMENT OF NLI AND CREATION OF CAP

The NLI is a document signed by prospective student-athletes that provides an athletic financial aid award to a recruit for one academic year provided the student-athlete is admitted to the university, and qualifies for aid under the NCAA and institution guidelines.[34] The NLI is drafted and governed by the Collegiate Commissioners Association ("CCA"), however the NCAA manages the daily operations of the NLI program.[35] The NLI was created in 1964 with the same goals in mind as it has today, "to reduce and limit recruiting pressure on student-athletes and to promote and preserve the amateur nature of collegiate athletics."[36] In 1991, the CCA expanded the NLI into its current form, a four-page document that includes all the rules and interpretations of men's and women's collegiate sports.[37]

The University begins the recruiting process by initiating communications with a prospective student-athlete and then ultimately makes an offer to them in the form of an athletic scholarship.[38] The athletic scholarship is required along with the NLI in order to create a binding

[29] *See* Sulentic, *supra* note 12, at 136-43 (noting and describing several ways that coach may mislead recruit).

[30] *See infra* Part I.

[31] *See infra* Part II-III.

[32] *See infra* Part IV.

[33] *See infra* Part V.

[34] *See* NLI, *supra* note 15 (explaining NLI's primary function).

[35] *See* NLI, *supra* note 15 (outlining governing authority over administration of NLI).

[36] *See* Stacey Meyer, *Unequal Bargaining Power: Making the National Letter of Intent More Equitable*, 15 MARQ. SPORTS LAW. J. 227, 227-28 (2004) (noting core principles behind creation of NLI still emphasized today).

[37] *See id.* at 228 (describing current NLI format).

[38] *See id.* (noting university initiates recruiting process).

contract, as each item separately does not do so.[39] The contract is binding for one year, at which point the scholarship must be renewed on an annual basis.[40] After the completion of the athlete's mandated academic year at the institution the renewal of their financial aid package is reviewed.[41] This is done annually because the NLI document itself only covers the first academic year at the chosen institution.[42] The renewal process is discretionary on the part of the athletic department, as neither the institution nor the athlete carries any obligations under the NLI after the completion of the first academic year.[43] The NLI has a provision entitled "Coaching Changes" in which the student-athlete will sign to acknowledge that they understand the commonality of coaching changes and that they are bound by the NLI in the event that a coaching change does happen.[44]

The NCPA and the Creation of the CAP

The NCPA is a nonprofit organization created by Ramogi Huga, and is comprised of over 17,000 Division I college athletes as well as administrative personnel to protect former, current, and future college athletes.[45] Since its inception, Huga and the NCPA have testified in U.S. congressional hearings and briefings, state legislatures, and in legal matters in support of better protections for college athletes.[46] The NCPA has also

[39] *See id.* at 229 (emphasizing NLI alone does not create contract). "The NLI is not a scholarship offer, but the athlete is told that 'at the time I sign this NLI, I must receive a written offer of athletics financial aid . . . . The offer shall list the terms and conditions of the award, including the amount and duration of the financial aid.' Thus, without the financial aid award, the contract is not complete." *Id.*

[40] *See* Riella, *supra* note 14, at 2187 (noting NLI itself does not guarantee student-athletes anything that may have been promised).

[41] *See* Riella, *supra* note 14, at 2187 (emphasizing financial aid award and NLI only binding for one-year).

[42] *See* Riella, *supra* note 14, at 2187-88 (noting annual review process).

[43] *See* Riella, *supra* note 14, at 2188-89 (describing discretionary renewal process of financial aid package). "At the end of the academic year covered by the agreement, the coach and athletic director will advise the financial aid department whether to renew the athletic aid." *Id.*

[44] *See* COLLEGIATE COMMISSIONERS ASSOCIATION, COACHING CHANGES, http://www.nationalletter.org/nliProvisions/coachingChange.html (last visited Sept. 6, 2018) (stating coaching changes provision language). "I understand I have signed this NLI with the institution and not for a particular sport or coach. If a coach leaves the institution or the sports program (e.g., not retained, resigns), I remain bound by the provisions of this NLI. I understand it is not uncommon for a coach to leave his or her coaching position." *Id.*

[45] *See* NCPA, MISSION AND GOALS, https://ncpanow.org/mission-and-goals (last visited Dec. 18, 2017) (noting organization's purpose and intent).

[46] *See* COLLEGE ATHLETES PLAYERS ASSOCIATION, WHO WE ARE, http://www.collegeathletespa.org/about (last visited Feb. 17, 2018) (detailing NCPA's accomplishments).

sponsored a Student-Athletes Bill of Rights in California which provides several protections including prohibiting a school from taking scholarships away from athletes that have been permanently injured while playing their sport.[47]

More recently, the NCPA has taken its advocacy a step further and they have developed an editable contract called the CAP.[48] The CAP was created around the idea that colleges have the ability to provide various protections and safeguards for their student-athletes, and the students can receive them "if [they] know what to ask for."[49] The NCPA claims that the CAP can save the student-athletes money and protect them from broken promises by the school.[50] The CAP also states that it can offer the same protection to "walk-ons."[51] There are also athletes that are told that if they attend the school as a walk-on, their play may earn them a scholarship.[52] Per NCAA rules, student-athletes are not obligated to sign NLI agreements to commit to a college and receive an athletic scholarship.[53] Using both an NLI and a CAP may create issues in terms of what protections are actually received.[54] While the CAP does offer "transfer freedoms", NCAA and Conference rules still apply and may require the athlete to sit out a year.[55]

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[47] *See id.* (outlining NCPA's legislative progress).

[48] *See* NCPA, CAP GUARANTEE, www.ncpanow.org/capa (last visited Oct. 28, 2018) (providing CAP guarantee overview).

[49] *See id.* (noting CAP guarantee's purpose).

[50] *See id.* ("A written guarantee can save you tens of thousands of dollars and prevent the agony of being betrayed by an athletic program. Get informed, get protected with the CAP Guarantee."). The CAP also states, "With the [CAP], you can request and secure legally binding protections/benefits worth over $100,000 dollars beyond a minimum scholarship without breaking NCAA rules." *Id.*

[51] *See id.* ("Walk-Ons: Any promises of future financial aid, medical expenses, transfer releases, and the freedom to participate in various employment/activities can be secured using this document.").

[52] *See* NCPA UNVEILS CAP, ATHLETIC MANAGEMENT, http://www.athletic management.com/content/ncpa-unveils-cap (last visited Oct. 26, 2018) ("We often hear from players who were told that if they came in as a walk-on and did well, they would get a scholarship . . . The next thing they know, it's year two or year three and there's still no scholarship, and there's nothing in writing for them to fall back on. With the CAP, those terms and conditions could all be spelled out and agreed to beforehand.").

[53] *See* NCPA, *supra* note 48 (providing CAP replacement option). The CAP also states that if a college insists that the student-athlete does sign an NLI, to use the CAP in conjunction with the NLI to receive protections they would not have otherwise. *Id.*

[54] *See id.* (noting signed and dated CAP must be submitted before NLI, or ". . . no CAP Guarantee protections"). This problem would occur because a submission of the NLI prior to the CAP would override the CAP protections. *Id.*

[55] *See id.* (recognizing conflict between NCAA rules). While the CAP is an agreement between the school and student-athlete, certain NCAA and Conference rules apply. For instance, in a transfer scenario, even if the school and student agree to terms in the CAP, for the student to transfer without penalty they would need the approval of both the NCAA and the relevant conference. *Id.*

Since 2012, the NCAA has allowed schools to provide multiyear scholarships.[56] Yet, the issue is that student-athletes are still not guaranteed and the CAP seeks to fix that by providing the ability to negotiate a four-year guaranteed scholarship for the student-athlete before they step on campus.[57] There are several conferences today that "guarantee" four-year scholarships, the NCAA does not enforce any penalty if the guaranteed scholarship within the NLI is not honored.[58]

One of the most important, if not the primary benefit, that student-athletes receive from the CAP guarantee is a form of legal recourse in the event that the benefits agreed upon are violated, which is not available if solely using the NLI.[59] If a verbal promise is broken, and only an NLI has been executed, there is essentially no form of recourse for the athlete, as the school is not penalized for not honoring verbal promises.[60] However, if any terms of the CAP agreement are violated, the student-athlete will then have several remedies under contract law.[61]

NCAA's Opposition to the CAP

Recently, the NCAA publicly opposed the CAP via memorandum.[62] Primarily, the NCAA believes that several provisions within the CAP are not compliant with current NCAA or conference rules.[63] The NCAA also claims

[56] *See* Michelle Brutlag Hosick, *Multiyear Scholarship Rule Narrowly Upheld,* NCAA (Feb.17, 2012), http://www.ncaa.org/about/resourcs/mediacenter/news/multiyear-scholarship-rule-narrowly-upheld (noting decision allows multi-year scholarships). While there was a vote to approve the legislation allowing multi-year scholarships to be administered, there was a significant portion of those who voted who have concerns. *Id.*

[57] *See* NCPA, *supra* note 48 (listing negotiable financial-aid terms).

[58] *See* Dennis Dodd, *Inside the First Legally Binding Contract between a College Athlete and a School*, CBS SPORTS (June 14, 2017), https://www.cbssports.com/college-football/news/inside-the-first-legally-binding-contract-between-a-college-athlete-and-a-school/ (noting schools may offer multi-year scholarships but rarely do).

[59] *See* Jason Scott, *Could the CAP Agreement Shake up College Athletics?*, ATHLETIC BUSINESS (June 2017), https://www.athleticbusiness.com/contract-law/could-the-cap-agreement-shake-up-college-athletics.html (asserting basis for claim present with CAP that is not currently available with NLI).

[60] *See Fortay*, 1994 U.S. Dist. LEXIS 1865, at *45 (holding contract not breached because promises not included in NLI and financial-aid award).

[61] *See* Nomura, *supra* note 5, at 288 (explaining remedies for breach of contract between school and student-athlete). This Note argues that the crux of an argument between a student and the college for a contractual breach if a breach of the duty of good faith, and fair dealing. *Id.*

[62] *See* NCAA, *College Athlete Protection (CAP) Guarantee Agreement – Compliance - Related Concerns*, http://fs.ncaa.org/Docs/AMA/cap-compliance-related-concerns-20170717.pdf (providing reasons why NCAA believes CAP not NCAA compliant).

[63] *See id.* at 1 (asserting conflicting concerns CAP raises). "Although the proposed CAP agreement includes a statement that the student-athlete shall relinquish any benefit provided

that they are not in a position to comment on the CAP guarantee prior to deciding the governing law for a dispute under a CAP violation.[64] Further, the NCAA contends that the CAP will not benefit students as much as the NCPA claims.[65]

PART II: ESTABLISHING A CONTRACTUAL RELATIONSHIP BETWEEN STUDENT-ATHLETE AND INSTITUTION

Courts have repeatedly recognized the contractual nature of the NLI.[66] Courts have also held that the basic legal relationship between a student and the university they attend is contractual in nature; the catalogues, bulletins, circulars, and regulations of the institution made available to the students become a part of the contract.[67] Courts have also specifically held that, when an agreement between the school and the student-athlete is accompanied by a financial aid award, the standard form NLI is a contract.[68] The NLI agreement between student-athletes and their schools contain all of the necessary elements of a contract: offer, acceptance, and consideration.[69] It is an offer by the school, accepted by the student-athlete when he signs the Letter, to provide scholarship money in exchange for his commitment to attend the institution.[70] However, the courts that have recognized the NLI as a contract, still find, student-athletes have no legal remedies for breach of contract and defer to the schools' "reasonable" interpretation of the implied terms to validate a breach.[71]

One of the paramount cases in establishing a contractual relationship between a student-athlete and their school is *Taylor v. Wake Forest Univ.*, a case in which a football player alleged that the university wrongfully

pursuant to this agreement found to violate applicable NCAA or conference rules, the proposed agreement as constructed raises a number of NCAA compliance-related concerns."

[64] *See id.* (noting that NCAA is unable to comment on accuracy of CAP governing law provision).

[65] *See id.* ("[I]t is clear that the CAP Agreement was developed primarily for elite level Division I football/basketball student-athletes, many of whom will already receive these expenses/benefits as part of their college experience.").

[66] *See* Riella, *supra* note 14, at 2195 (noting courts have held that NLI is contract).

[67] *See id.* at 2189; *see also* Zumbrun v. Univ. of S. Cal., 101 Cal. Rptr. 499, 504 (Cal. Ct. App. 1972) (noting NLIs, scholarship agreements, and student codes of conduct create contractual relationship).

[68] *See* Harold B. Hillborn, *Student-Athletes and Judicial Inconsistency: Establishing a Duty to Educate as a Means of Fostering Meaningful Reform of Intercollegiate Athletics*, 89 NW. U.L. REV. 741, 750-51 (noting that courts find NLI and financial aid agreement are contracts).

[69] *See id.* at 751(discussing contractual elements of NLI agreements between student-athlete and school).

[70] *See id.* (specifying contractual structure of NLI).

[71] *See id.* at 751-52 (analyzing the courts' decision making in various cases).

terminated his scholarship and attempted to recover the educational expenses that resulted from the loss of scholarship.[72] Taylor's freshman grade point average fell to a 1.0, which was below the University's minimum requirement of a 1.35.[73] After Taylor's grades did not meet the team's academic requirements, Taylor refused to attend practice and participate in football related activities.[74] The scholarship agreement however, stated that the University could terminate the financial aid of a student-athlete if the student-athlete refused to attend practices or in any way disrupted them.[75] The court held that Taylor's refusal to attend practice despite meeting the academic requirements of the scholarship agreement, was a direct breach of contractual obligations.[76]

While courts recognize this contractual relationship between a student-athlete and an institution and therefore the ability to bring a breach of contract claim against the institution, they are hesitant to, and rarely find in favor of the plaintiff student.[77] In arguably one of the most famous cases for establishing this contractual relationship, *Ross v. Creighton*, a men's basketball player brought suit against Creighton University, alleging that the school never tendered academic benefits that were promised to him during

[72] *See* 191 S.E.2d 379, 380 (N.C. Ct. App. 1972) (describing Taylor's claim against Wake Forest University).

[73] *See id.* at 381 (explaining Taylor's academic history). Wake Forest had a policy requiring a 1.35 GPA freshman year, a 1.65 GPA sophomore year, and a 1.85 GPA junior year. *Id.* In Taylor's second semester, he improved his GPA to a 1.9, which satisfied the policy, however, Taylor still refused to participate. *Id.*

[74] *See id.* (showing Taylor refused to practice through fall of his senior year).

[75] *See id.* at 381-82 (noting Taylor violated terms of scholarship agreement by failing to participate in football program).

[76] *See id.* (acknowledging contractual relationship between student and university).

[77] *See* Riella, *supra* note 14, at 2196:

> The enforceability of the NLI has long been a contentious point for athletes seemingly trapped in programs that are no longer desirable. There are no reported cases, however, where players have challenged paragraph 19 of the NLI in court. This is directly attributable to athletes' compliance with the appeals provisions of the agreement. Scared away from the judicial system by courts' reluctance to hold against university interests, the players languish in an appeals system directed by university administrators. Such a commingling of interests certainly invites further inquiry into the fairness of the current system, especially when athletes are almost invariably denied full releases from NLIs when coaches leave the program. A brief survey of the case law determining the nature of, and duties that arise from, the athlete-university relationship will illustrate why athletes do not regularly challenge the enforceability of the NLI in court.

Id.; See also Ross, 957 F.2d at 417 (explaining that students typically avoid pursuing actions against Universities due to lack of success).

the recruiting process.[78] The court held that in order to state a claim for breach of contract, the athlete "must point to an identifiable contractual promise that the defendant failed to honor."[79]

Other plaintiffs have brought the breach of contract claim further in an attempt to hold institutions responsible for the oral promises made to them during the recruiting process.[80] In *Fortay v. Miami,*[81] the plaintiff was allegedly made promises during his recruitment that he would be named the starting quarterback for Miami's football team.[82] Fortay claimed that the representations made to him during his recruitment were the main reason that he chose to attend the University of Miami.[83] While Fortay's argument was unsuccessful, the court did redefine what constituted a contract by including in this line of cases and included recruiting letters and correspondence as a part of the contract.[84]

PART III: CASE ANALYSIS

The NCAA's mission statement states, "The Association – through its member institutions, conferences and national office staff – shares a belief and commitment to: . . . The highest levels of integrity and

[78] *See Ross,* 957 F.2d at 416 (noting basis for Ross' claim). Prior to signing the requisite paperwork to attend Creighton, Ross was allegedly told he would be provided with educational assistance because he came from an "academically disadvantaged background." *Id.* at 411.

[79] *See id.* at 415 (holding that Ross did not meet standard for contractual claim). The court found that a contractual relationship did exist between Ross and Creighton University, however, the narrow standard created in the holding is immensely limited. *Id.*; *see also* Sulentic, *supra* note 12 (noting recruiting rules).

[80] *See Fortay*, 1994 U.S. Dist. Lexis 1865, at *1 (describing Fortay's claim to hold school liable for oral promises).

[81] 1994 LEXIS 1865, at *21.

[82] *See id.* at 12 (describing alleged promises made to Fortay during recruitment).

[83] *See id.* (noting Fortay relied on alleged promises made to him by Miami coaches). Fortay was one of the most talented and highly recruited quarterbacks in the nation during his senior year of high school. *Id.* at 9-13. After a busy recruiting process, he ultimately decided to attend the University of Miami. *Id.* After Fortay signed his NLI, the head coach had left Miami to pursue a coaching position in the National Football League. *Id.* at 13-14. Fortay then requested a release from the school however the university officials denied the request. *Id.* at 14. Fortay's career fell short of expectations because he never became starting quarterback or received valuable playing time as was allegedly promised by the coaching staff. *Id.* at 14-15.

[84] *See id.* at 19-21 (expanding contractual items to include recruiting letters). The significance of this expansion is that the court stays true to the standard of requiring the student-athlete be able to point to an identifiable contractual promise that was broken by the university. *Id.* The issue with the failure to recognize verbal promises, is that a majority of the conversations during the recruiting process occur over the phone or in person without any textual records of the dialogue. *Id.* Therefore, student-athletes may be openly lied to without any recourse if those promises are not kept. *Id.*

sportsmanship. . . ."[85]..However, with the current NLI system being so fundamentally unfair and one-sided in the event of a contractual breach by the institution, one can argue that the NCAA does not operate with the self-proclaimed highest level of integrity.[86] The CAP guarantee conversely, the CAP guarantee was designed with the student-athlete in mind and offers numerous protections for them against the institutions that recruit them.[87]

As previously discussed, one major issue for the current NLI system is that once a student-athlete has signed, they are legally bound to that institution for at least one academic year, regardless of any material changes that occur that may affect the circumstances that caused the student-athlete to choose their respective school.[88] For instance, if there is a coaching change, the NLI requires that the student-athlete have signed and acknowledge that they are still bound by the document.[89] Such an event can materially alter an athlete's career trajectory, and yet, the very association that has pledged to protect and service their student-athletes fails to do so by

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[85] *See* NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NCAA CORE VALUES, https://www.ncaa.org/about/ncaa-core-values (last visited Oct. 21, 2018) (outlining core values of NCAA).

[86] *See* Riella, *supra* note 14, at 2182-83 (stating that NLI is heavily criticized for lack of protection of student-athletes). When speaking of situations where coaches leave after a student has signed their NLI, the article states,

> The National Collegiate Athletic Association, the Collegiate Commissioner's Association, and proponents of the NLI see no injustice in such a situation. They stridently assert that the athlete agrees to toil in a program. . .not because of an affinity for a particular coach's personality, style of play, or reputation for molding professional athletes, but for the school itself

Id. at 2182. It is not difficult to see that this view unequivocally disregards the relationships that have been built between recruiters and prospective student-athletes during their recruitment, and therefore emphasizes how the entire process favors the institution from beginning to end. *Id.* at 2182-84.

[87] *See* National College Players Association, *supra* note 23 ("The CAP Guarantee is a free, editable contract that allows D-I recruits and current college athletes to learn about and secure legal protections rather than rely on verbal promises from a coach who may or may not intend on honoring commitments and may or may not be there the next year.").

[88] *See* Riella, *supra* note 14, at 2193-99 (stating that there is no course of action under NLI system regardless of material changes). This issue is widely criticized by even the most well-revered members of the NCAA, including coaches. *Id.* at 2182. Louisiana State University basketball coach Dale Brown compared this situation to that of a bride who has arrived at the chapel and the groom did not show. *Id.* at 2182-83. Several other prominent coaches have stated that they believe student-athletes should have the ability to transfer when the coach who recruited them left for another job. *Id.* at 2183.

[89] *See* Collegiate Commissioner's Association, *supra* note 44, at Coaching Changes (noting coaching change provision). The NCAA has taken note of this issue, and instead of providing a protection for the student-athletes left in this situation, they added a binding provision to the NLI which makes them acknowledge the possibility of this occurrence. *Id.*

refusing to allow student-athletes to transfer without penalty.[90] This is further illustrated in scenarios where that particular institution "over signs" or accepts more NLI's than the school has allotted scholarships for that year.[91] While these issues have been brought to the NCAA's attention in various settings, instead of adjusting the current system to protect their student-athletes, the NCAA has enforced NLI provisions that place the responsibility entirely on the student-athlete.[92]

Now, the NCPA through the CAP guarantee has aimed to benefit student-athletes and protect them in situations where they currently do not have a voice.[93] The NCPA focuses on providing benefits to student-athletes that are already available, but are not regularly provided without any repercussions for the institution.[94] Pertaining to the issue of coaching changes, the NCPA through the CAP guarantee has aimed to created a solution.[95] The agreement has a negotiable transfer clause that would ultimately prevent the institution from blocking a transfer in the event that a coaching change occurs after the CAP guarantee is signed.[96] This not only gives student-athletes an option to leave a situation that has been materially

[90] *See* NCAA 2018-2019 Div. I Manual, Bylaw 12.1.2 (2018) (explaining amateur status). It should also be noted that the term penalty encompasses the requirement of not being able to participate in their chosen sport for a year, or generally lost time which may affect their career. *See* Sulentic, *supra* note 12, at 146 ("A student-athlete might not recognize that he has made a bad choice until well after that first year is over. To rely on the NLI as the basis for a cause of action under contract provides too narrow a window under which to bring suit."). This significantly effects athletes with aspirations to play professionally significantly because of how valuable their time in college is to their athletic development. *Id.* at 146-48.

[91] *See* Ross & Berkstresser, *supra* note 10, at 726-27 (detailing options for student athletes who are not given scholarships due to over-signing).

[92] *See* Ross & Berkstresser, *supra* note 10, at 725-26 (describing NLI as adhesion contract).

[93] *See* National College Players Association, *supra* note 23 ("A letter of intent provides no protection for a player – it only protects the school. Coaches too often use this to their advantage by breaking verbal promises made to recruits after they have gained their trust during the recruiting process.").

[94] *See* College Athlete Protection Guarantee, *CAP Guarantee vs. Letter of Intent*, https://sports.cbsimg.net/images/collegefootball/College-Athlete-Guarantee-CBS-Sports.pdf (emphasizing pitfalls of NLI compared to CAP guarantee). "The CAP agreement is NOT the same as a Letter of Intent . . . the CAP Guarantee is much better. A Letter of Intent does NOT require a college to provide you a scholarship or any protections/benefits, but it does bind your athletic participation . . . under threat of penalty. This is unfair." *Id.* In contrast, it should be noted that the CAP aims to rectify these pitfalls and provide more protections for the student-athlete. *Id.* at 1 (outlining possible benefits and protections).

[95] *See* National College Players Association, *supra* note 45, at NCPA Goals (creating opportunity to negotiate transfer release in event of coaching change). As noted previously, there is not ability to negotiate within the NLI system, however, the CAP guarantee seeks to provide an opportunity for the student-athlete to have a backup plan in the event of a coaching change. *See* National College Players Association, *supra* note 45, at NCPA goals.

[96] *See* National College Players Association, *supra* note 45, at NCPA Goals (contrasting with NLI where current provision does exact opposite and leaves athletes with uncertain future).

changed by the departure of a coach, but it then requires institutions to be more honest and forthcoming about what coaches' futures may be during the recruiting process.[97]

PART IV: BRINGING A BREACH OF CONTRACT CLAIM AGAINST A UNIVERSITY UNDER THE CAP GUARANTEE OPPOSED TO THE NLI

Perhaps the most important part of the CAP guarantee, is what its implementation potentially means for student-athletes in the courtroom, and that is why the NCAA might strongly oppose its widespread implementation.[98] As it stands, courts routinely recognize that there is a contractual relationship between the student-athlete and their university, yet almost never side with the plaintiff-student in breach of contract claims.[99] Specifically, narrow holdings such as in *Ross,* have said that a student-athlete "must point to an identifiable contractual promise that the defendant failed to honor."[100] The CAP guarantee, as it is laid out, will specifically address this issue and make it much more favorable for the student when pursuing such claims.[101] Now, instead of having to attempt to add hearsay oral promises to the makeup of the student-school contract, those promises are recorded as negotiated terms of the CAP guarantee.[102] When applying the CAP guarantee, athletes in potential future litigation will be able to point to an identifiable breach of contract.[103] Ultimately, the goal of the NCPA and

[97] *See* National College Players Association, *supra* note 23, at About Us (providing reasons why CAP is more favorable than NLI).

[98] *See* National College Players Association, *supra* note 23, at About Us (noting CAP provides clear legal protections).

[99] *See Taylor*, 191 S.E.2d at 382 (holding player breached contract by not participating in practice); *Ross*, 957 F.2d at 415 (dismissing plaintiff's claim due to compelling policy considerations); *Fortay*,1994 LEXIS 1865, at *19-21(showing that while contractual relationship existed, court still found for school).

[100] *See Ross*, 957 F.2d at 417 (describing narrow holding).

[101] *See* National College Players Association, www.ncpanow.org/capa (last visited Sept. 28, 2018) (noting negotiable and editable nature of CAP); *see also Ross*, 957 F.2d at 417 (demonstrating Ross struggled by not being able to show court where he was promised extra academic services). The CAP guarantee offers a direct solution to this problem by allowing the recruits to record promises made to them, and having them documented to present to courts when asked to point to a specific promise. *See* National College Players Association, www.ncpanow.org/capa (last visited Sept. 28, 2018) (addressing areas in which CAP guarantee seeks to remedy issues).

[102] *See* National College Players Association, www.ncpanow.org/capa (last visited Sept. 28, 2018) (providing negotiable terms for student-athlete to secure protection).

[103] *See id.* (emphasizing negotiable nature of contract).

CAP is to avoid litigation altogether and provide student-athletes with the benefits that have been promised to them.[104]

In *Fortay*, the plaintiff's unsuccessful claim was grounded in the same reasoning as the claim made in *Ross*, which was that the school had made an oral promise to him, and it was not upheld.[105] Once Fortay arrived at Miami, the Miami head coach left his current job for one in the NFL.[106] Fortay had unsuccessfully attempted to transfer, and was now stuck in a situation that was materially different from what he had signed up for.[107] Fortay's main issue, was that he did not have any documentation of the promise allegedly made to him regarding being the next starting quarterback which ultimately led him to sign with Miami.[108] If he had access to the CAP guarantee, and was given the ability to negotiate a written contract rather than rely on a verbal promise, his claim would have likely been successful.[109]

PART V: CONCLUSION

Since the NLI's inception in 1964, it has served as a means for prospective student-athletes to choose which school they will attend. The stated purpose of the NLI is to relieve pressure on student-athletes as they make life-changing decisions on where to attend college and further their athletic career. However, while this purpose may be served, the NLI primarily serves the interests of universities, and has unknowingly bound student-athletes to situations that are materially different from what they originally thought, such as the situations shown in *Taylor, Ross,* and *Fortay.* When a situation changes, student-athletes are left with no way out and are bound by the NLI. This is why the adoption and implementation of the College Athlete Protection Guarantee will better serve student-athletes, as it gives them a cause of action and a chance at receiving the college experience, they were promised by the coaches recruiting them. Since the CAP guarantee gives student-athletes a cause of action and a chance of receiving the college experience promised by the coaches that recruited them, the

104 *See id.* (explaining documentation of promises to secure clear legal protection).

105 *See Fortay*, 1994 LEXIS 1865, at *19-21 (describing Fortay's claims against University of Miami).

106 *See id.* at 13-14 (noting coaching change that played major role in derailing Fortay's career). After the head coach left, Fortay requested a release from his NLI to transfer to a more favorable situation. *Id.*

107 *See id.* at 16-18 (noting how different reality of situations at, before, and after NLI was signed).

108 *See id.* at 10-12 (discussing Fortay's decision to choose Miami).

109 *See* NCPA AT CAP GUARANTEE, www.ncpanow.org/capa (last visited Sept. 28, 2018) (allowing for negotiation of terms by coaches).

adoption and implementation of the CAP guarantee will even the playing field for student-athletes. A widespread adoption of the CAP guarantee would change the way recruiting works, ultimately for the betterment of the experience for student-athletes as they begin the next step of their academic and athletic careers.

Tyler Jordan

LAND OF THE FREE MARKET: U.S. COMPANIES CONTINUE TO ENJOY GREATER LEGAL PROTECTION THAN CONSUMERS

"The value of all things contracted for, is measured by the Appetite of the Contractors: and therefore the just value, is that which they be contented to give." –Thomas Hobbes

I. INTRODUCTION

The proliferation of internet-based companies, and the increasingly one-sided terms of service to which users must "consent" before using services or making online purchases, have led to a clash between U.S.-based corporations and European Union ("E.U.") governing bodies, like the European Commission ("E.C.").[1] As the internet further blurs the borders between two of the world's largest economic powers, web-based heavy hitters like Facebook, Google, Apple, and Amazon have run afoul of E.U. consumer protection regulations in recent years and cast light on the disparate approaches to consumer protection in business-to-consumer ("B2C") contracts between the U.S. and the E.U.[2]

Although the E.U.'s Directive on Unfair Contract Terms—colloquially referred to as the "Unfair Contract Terms Directive" ("UCTD")—and other jurisdiction-specific consumer protection statutes represent continued progress in the interest of economic justice and fairness for European consumers, the U.S. remains a recalcitrant holdout in the West, doubling down on a conservative tradition of contract jurisprudence.[3]

Through an empirical look at the terms of service of five of the largest U.S.-based internet-based companies, this Note highlights the disparity between the E.U.'s explicit prohibition on unfairness in offending

[1] *See* European Commission Press Release IP/17/631, The European Commission and Member States consumer authorities ask social media companies to comply with E.U. consumer rules (Mar. 17, 2017) (demanding changes to violative terms of use).

[2] *See id.* (explaining "unfair terms and conditions" contravene E.U. B2C contract directives); *see also* Sam Schechner, *Europe Targets U.S. Web Firms,* THE WALL STREET JOURNAL, Nov. 27, 2014 (showing E.U. member states' desire for more regulation of U.S. tech superpowers).

[3] *See infra* Section IV: Analysis (dissecting U.S. companies' enjoyment of comparatively lax consumer protection jurisprudence).

terms of service clauses, while distinguishing those practices from withering domestic consumer protection doctrine.[4]

American and European consumer protection directives are primarily outgrowths of the doctrines of good faith and unconscionability, and formalize the notion that fundamentally "unfair" agreements should not be binding.[5] Given the philosophical nature of "unfairness" at the core of the doctrine, and the relative lack of statutory or judicial guidance, the U.S. iteration of unconscionability has historically been notoriously difficult to define.[6] The broad, indefinite nature of the concept has unfortunately led to judicial caution domestically, giving way to fact-intensive, ad hoc determinations of "unconscionability."[7] However, to adequately track the origins of the concept, a clear and unambiguous definition, although broad, is necessary.[8]

For purposes of this Note, I follow the definitional guidance of the Restatement (Second) of Contracts § 208, which defines an unconscionable contract as one in which there exists "gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party."[9] There

[4] *See* Jennifer S. Martin, *An Emerging Worldwide Standard for Protections of Consumers in the Sale of Goods: Did We Miss an Opportunity with Revised UCC Article 2?*, 41 TEX. INT'L L.J. 223, 273 (2006) (explaining 1999 Article 2's revision does not sufficiently protect consumers); *see also* Robert L. Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 HOUS. L. REV. 1041, 1071-73 (2005) (highlighting fundamental distinctions in E.U. and U.S. approaches to consumer protection and internet contracts).

[5] *See* Martin, *supra* note 4, at 239-46 (contrasting domestic use of unconscionability and good faith with European consumer protection legislation).

[6] *See, e.g.*, Per Gustafsson, *The Unconscionability Doctrine in U.S. Contract Law*, FACULTY OF LAW LUND UNIV. 3.6 (Fall 2010) (stating unconscionability lacks "clear definition"); Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1071-72 (2006) (citing descriptions of unconscionability in U.C.C. § 2-302 as "overly vague and indeterminate"); A.H. Angelo & E.P. Ellinger, *Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States*, 14 LOY. L.A. INT'L & COMP. L. REV. 455, 497 (1992) (explaining that U.C.C. § 2-302 provides little guidance in defining "unconscionability"); Arthur Allen Leff, *Unconscionability and the Code: The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967) (stating U.C.C. § 2-302 "makes nothing clear about the meaning of 'unconscionable'"); Court decisions regarding unconscionability provide little direction. *See* Larry Bates, *Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection*, 16 EMORY INT'L L. REV. 1, 14 (2002) (arguing unconscionability precedent is "full of inconsistencies, contradictions, and lacks any sort of unifying theme").

[7] *See* Leff, *supra* note 6, at 496 (explaining lack of definition causes "ad hoc judicial determination" of unconscionability); *see also* Angelo & Ellinger, *supra* note 6, at 498 (highlighting historic "undercurrent of caution" in U.S. courts in cases involving unconscionability).

[8] *See* Gustafsson, *supra* note 6, at 6 (outlining need for clear definition of unconscionability).

[9] *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d [hereinafter § 208] (Am. Law Inst. 1981) (defining unconscionability in domestic context).

must also be a showing "that the weaker party had no meaningful choice, no real alternative, or no assent or appear to assent to the unfair terms."[10]

In the foregoing sections, this Note outlines the substantive history of the concept of unconscionability from its origins in Europe to its incorporation into U.S. common law and its outgrowth and codification in E.U. consumer protection statutes.[11] Further, by applying prevailing E.U. consumer protection directives to the terms of service of five of the top U.S.-based internet companies, this Note highlights the growing disparity between U.S. and E.U. internet B2C contract practices.[12] In the interest of navigating jurisdictional nuances regarding consumer protection, the ensuing analysis provides an illustrative, non-exhaustive list of the types of terms in B2C service contracts which, although standard practice domestically, would lead to sanction and litigation abroad.[13] Finally, this Note examines whether the U.S. "market-driven" consumer protection regulatory model is sufficiently responsive to meet the changing needs of domestic consumers in a global economy.[14]

II. HISTORY

The earliest origins of consumer protection doctrine were rooted primarily in the "freedom to contract."[15] A seventeenth century principle that parties to an agreement are free to agree to, alter, or decline any legal terms, "freedom to contract" is rooted in the most fundamental tenet of contract and treaty law—"pacta sunt servanda": agreements must be kept.[16]

A. Tracking Unconscionability and Consumer Protection: The European Union

As the pan-European economy strengthened thanks in part to the "laissez faire" spirit of the era, the emerging middle class likely looked

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[10] *See id.* (defining unconscionability in U.S.).

[11] *See infra* Section II, Part A: *Tracking Unconscionability and Consumer Protection: The European Union* (tracking unconscionability doctrinal history).

[12] *See infra* Section IV, Analysis (examining distinctions between E.U. and domestic consumer protection practices).

[13] *See infra* Section IV, Analysis (analyzing potentially violative terms of U.S. standard form consumer contracts).

[14] *See infra* Section V, Conclusion (discussing whether U.S. regulatory model has responded to external pressures).

[15] *See* Angelo & Ellinger, *supra* note 6, at 455 (describing origin of consumer protection).

[16] *See id.* (examining history of contract).

favorably upon principles of economic freedom.[17] With an emphasis on the "freedom" aspect of "freedom to contract," European nations began to codify the first seeds of consumer protection doctrine.[18]

i. The United Kingdom Approach

By the time it found favor elsewhere in the continent, the "sanctity of contract" was already well established by English common law.[19] Contemporary English cases showing deference to the principle that parties to an agreement should have equal freedom to agree or to alter the terms of an agreement also served as the first iterations of unconscionability doctrine.[20]

First applied to instances in which young noblemen received "inadequate" consideration in sales of their birthrights, late seventeeth century English case law developed the principle that the court would not intervene in a contract freely entered into unless it involved "trading on a weakness of the expectant heir."[21] Likely an attempt to protect English nobility from the ill-advised actions of young heirs, by the early eighteenth century English courts showed increasing deference to principles of unconscionability in these contracts, eventually going so far as to establish that inadequacy of consideration alone was enough for a court to intervene.[22]

Unfortunately, this broad use of unconscionability in equity, slanted heavily in favor of the landed class, led to a tepid judicial approach to expanding the doctrine to other areas of contract law.[23] In response to this judicial reticence, and in an effort to clarify unconscionability standards, Parliament enshrined its principles in the Money-Lenders Act of 1900 ("Money-Lenders Act") and later in the Consumer Credit Act of 1974

[17] *See id.* (tracking history of consumer protection).

[18] *See id.* at 456.

[19] *See id*. at 460.

[20] *See* Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82, 86 (1750); *see also* Batty v. Lloyd, 23 Eng. Rep. 375 (1682) (focusing on freedom of contract). Unconscionability "may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under a delusion would make on the one hand, and as no honest man would accept on the other; which are unequitable and unconscientious bargains."

[21] *See* Angelo & Ellinger, *supra* note 6, at 461-63 (describing history of English unconscionability doctrine).

[22] *See id.* at 461 (Holding unconscionability was factor in "slanting of the doctrine in favor of the expectant heir.").

[23] *See id.* at 463-64 *(*explaining cases revealing "the courts' reticence to the development of generally applicable unconscionability rules").

("Consumer Credit Act").[24] However, the narrow judicial approach to application of unconscionability in diverse areas of contract law persisted despite the courts' inclination to develop a concrete general doctrine.[25]

Late into the twentieth century, courts continued to show reticence to expanding implementation of unconscionability beyond its statutory remit, as the English legislature cobbled together a disjointed unconscionability doctrine through various consumer protection statutes.[26]

ii. The German Approach

As courts in the United Kingdom were on the way to establishing the groundwork for consumer protection doctrine in the eighteenth century, their Prussian counterparts had already made substantial inroads in laying a solid foundation for those same doctrines.[27] Unlike their British counterparts, the German legislature was among the first in Europe to codify those bases while paying careful attention to the concept of "freedom" as it relates to the bargaining process.[28]

Given that the German legislature was relatively early to the statutory consumer protection party, a galvanized general statutory framework of unconscionability spawned a collection of case law that coherently articulates the status of unconscionability and consumer protection doctrine from its origin to memorialization in modern consumer protection statutes.[29]

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[24] *See id.* (tracking history of unconscionability in England); *see also* An Act to Amend the Law with Respect to Persons Carrying on Business as Money-Lenders, 1900, 63-64 Vict. 155, ch. 51 (Eng.) (outlining circumstances wherein courts may reopen lending contracts with "harsh or unconscionable" impact on borrowers); Consumer Credit Act, 1974, §§ 137-40 (articulating specific standards for fairness in lending contracts and defining ban on "extortionate" lending agreements).

[25] *See* Angelo & Ellinger, *supra* note 6, at 466 ("Indeed, a number of modem cases suggest that the English courts were favorably inclined to the notion of developing a general doctrine of setting aside unconscionable bargains."); *see also* Lloyds Bank Ltd. v. Bundy [1975] Q.B. 326 (Eng.) (seeking general unconscionability doctrine).

[26] *See* Angelo & Ellinger, *supra* note 6, at 470 (citing English courts' reticence to "rely on the concept of unconscionability"); *see also* Unfair Contract Terms Act, 1977, ch. 50 (U.K.) §§ 3, 4, 6(2), 7(2) (1977)(Eng.) [hereinafter Unfair Terms Act] (delineating consumer protections regarding unfair waiver provisions in business to consumer contracts); Landlord and Tenant Act 1987 (c. 31) (delineating tenants' rights against landlords); Employment Rights Act 1996 (c. 18) (codifying rights of employees in U.K.).

[27] *See* Angelo & Ellinger, *supra* note 6, at 455 (codifying freedom of contract in Prussian Code of 1794).

[28] *See id.* "Undertakings can give rise to [enforceable] rights only insofar as these undertakings are freely given." *Id.* (quoting Paragraph I 3.1 of the Prussian Code).

[29] *See generally* Angelo & Ellinger, *supra* note 6, at 482-94 (explaining implementation of Articles 138 and 242 of BGB from inception in 1896 to late 1970's).

The German statutory bases for the concept of unconscionability in contracts were first codified in 1896, principally in Articles 138 and 242 of the *Burgerliches Gesetzbuch* (BGB), the German civil code,.[30] Essentially, Article 242 established the "good faith" requirement, while Article 138 established the circumstances under which unconscionability issues occur, along with elements limiting the scope of the statute.[31] Article 138(2) further mandates:

> A legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgement or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance.[32]

Although Article 138(2) establishes a strong, clear foundation for unconscionability doctrine, it is limited, applying only to exploitative behavior in situations wherein the benefit drawn from the agreement is "clearly disproportionate."[33] However, this pared down statutory construction lends itself to clear, efficient judicial analysis and implementation of the now codified doctrine of unconscionability.[34]

Given their inherent lack of substantive negotiation, contracts utilizing "unfair standardized terms" drew significant criticism rom German courts following the implementation of Articles 183 and 242.[35] The expansive case law that resulted was subsequently codified by the Standard Terms Act of 1976.[36]

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[30] *See id.* at 482-83 (outlining early consumer protection and unconscionability statutes).

[31] *See id.* at 483 (providing detailed analysis of Article 138 revision). The revision of Article 138 establishes that contracts contravening public policy or exploiting the "distressed situation," "carelessness," or "inexperience" of another party will not be enforced. *Id.*

[32] *See* BURGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, BGBL.1 at 138 (Ger.) *available at* https://www.gesetze-im-internet.de. (outlawing exploitative terms in B2C contracts).

[33] *See id.*; *see also* Angelo & Ellinger, *supra* note 6, at 484 (stating that Article 138 "goes far" in establishing general concept of unconscionability).

[34] *See generally* Angelo & Ellinger, *supra* note 6, at 484-89. Angelo and Ellinger parse substantive verbiage of Article 138(2), primarily leaning on the *Bundesgerichtshof*, Germany's highest civil appellate court, and legislative notes clarifying broader language of the statute, including the meanings of "need," "carelessness," "exploitation," and "inexperience." *Id.* While these definitions are superfluous in this analysis, their inclusion highlights the meticulous nature of the drafters and jurists who developed Germany's statutory version of unconscionability over the course of roughly one hundred and twenty years. *Id.*

[35] *See id*. at 493 (noting disfavor of standard form contracts in Germany).

[36] *See id.* (describing origins of Standard Terms Act of 1976).

B. Tracking Unconscionability and Consumer Protection: The United States

Although the doctrine of unconscionability, and the consumer protection statutes that spring from it, have received disparate legislative and judicial treatment in the U.S. than in England, the concepts share a common origin.[37] In one of the most oft-cited early U.S. cases regarding the doctrine of unconscionability, the Supreme Court quoted the then 1750 English decision, *Earl of Chesterfield v. Janssen*, in an attempt to define the concept of unconscionability and establish precedent upon which subsequent unconscionability analyses would rely.[38]

Unfortunately, the hazy articulation set forth in *Earl of Chesterfield* is arguably the only substantive piece of the unconscionability puzzle that American jurists borrowed from their English counterparts.[39] In subsequent cases examining unconscionability, American jurists attempted to develop a more satisfactory definition, adding concepts of "superior knowledge," "unjust advantage," "undue influence," and unfairness that "shocks the conscience."[40] Unfortunately, the nebulous definition of unconscionability developed by these early cases persisted in spite of piecemeal attempts at clarification.[41] Further, the doctrine lacked adequate definition even after it was articulated by Karl Llewelyn in the first and subsequent iterations of the Uniform Commercial Code ("U.C.C") 2-302.[42]

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[37] *See* Hume v. United States, 132 U.S. 406, 411 (1889) (citing Earl of Chesterfield v. Janssen, 2 Ves. Sr. 125, 155 (1750)) (establishing foundation of English unconscionability doctrine).

[38] *See Hume*, 132 U.S. at 411 (quoting Chesterfield), "[An unconscionable contract is one] such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other; which are inequitable and unconscientious bargains; and of such even the common law has taken notice . . . . "*); see also* Martin, *supra* note 4, at 228 (recognizing courts "frequently return to the definition cited in *Hume* [emphasis original]").

[39] *See* Matthew S. Winings, *The Old, the Ignorant and the Downright Shameful* (Jan. 19, 2005) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=650822 (noting early American unconscionability decisions do little to develop adequate definition).

[40] *See* Sheehan v. Erbe, 77 A.D. 176, 180 (N.Y. App. Div. 1902) (articulating "superior knowledge" concept); *see also*, Gadsby v. Gadsby, 175 N.E. 495, 497 (Mass. 1931) (introducing "unjust advantage"); *see also* Turner v. Pabst Brewing Co., 74 A.D. 106, 109 (N.Y. App. Div. 1902) (describing "undue influence" and unfairness that "shock[s] the conscience").

[41] *See* Paul Thomas, Note, *Conscionable Judging: A Case Study of California Courts' Grapple with Challenges to Mandatory Arbitration Agreements,* 62 HASTINGS L.J. 1065, 1069-70 (2011) (acknowledging "hazy conception" defining early U.S. unconscionability doctrine).

[42] *See* U.C.C. § 2-302(1) (1952 Official Draft) ("If the court finds the contract or any clause of the contract to be unconscionable, it may refuse to enforce the contract or may strike any unconscionable clauses and enforce the contract as if the stricken clause had never existed."). The subsequent draft of § 2-302 did little to alter the definition, save for the addition of remedies limiting the effect of offending terms. *See* U.C.C. 2-302(1) (2005); *see also* Thomas, *supra* note 41 (focusing on nebulous articulations of unconscionability).

Even today, neither domestic statutes nor case law have developed satisfactory definitions of the concept of unconscionability.[43] As mentioned previously, this note will adhere loosely to the non-binding restatement definition when referencing American approaches to unconscionability.[44]

III. FACTS

Until the 1980's, the jurisprudential distinction between U.S. and E.U. consumer protection doctrine was relatively shallow.[45] Compared to the modern view, U.S. courts and legislatures maintained a consumer-centric stance, while E.U. consumer protection doctrine, still relying on codified unconscionability doctrine, was somewhat stagnant.[46]

However, at roughly the same time as E.U. consumer protection doctrine was roused from dormancy, contemporary U.S. doctrine experienced a radical philosophical shift away from a statutory "social regulation" approach, toward a "market-oriented" economic regulation model.[47] This philosophical shift coincided with a U.S. focus on litigation which relied on unclear, and often contradictory, precedent regarding the enforceability of contract terms disputed as "unfair."[48] Subsequently, courts have consistently ruled that, absent a showing of bad faith or unconscionability, contracts are presumed to be enforceable despite their onerous effect on consumers.[49] The lack of statutory guidance, in conjunction with the reliance on the already murky U.S. unconscionability doctrine, has led to a relatively low rate of consumer success in contesting the validity of seemingly unfair B2C contract terms.[50]

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[43] *See* Thomas, *supra* note 41 (explaining persistence of unconscionability ambiguity).

[44] *See* RESTATEMENT SECOND OF CONTRACTS § 208 cmt. d (defining "unconscionability").

[45] *See* Jane K. Winn & Mark Webber, *The Impact of EU Unfair Contract Terms Law on U.S. Business-to-Consumer Internet Merchants,* 62 BUS. LAW 209, 211 (2006) (describing trends in consumer protection jurisprudence in U.S. and E.U.).

[46] *See id.* (comparing consumer protection doctrine in late twentieth century).

[47] *See id.* (describing philosophical shift allocating more risk for consumers in business-to-consumer ("B2C") contracts).

[48] *See id.* (calling judicial guidance for most contract provisions "fragmentary or contradictory").

[49] *See generally* MICHAEL L. RUSTAD, GLOBAL INTERNET LAW, 415-19 (Jesse H. Choper et al. eds., 2nd ed. 2016) (outlining enforceable U.S. standard for B2C terms that would be unenforceable in E.U.).

[50] *See* Leff, *supra* note 6, at 496 (explaining inadequacy of ad hoc judicial determinations regarding unconscionability).

A. *Current Binding European Consumer Protection Directives*

As U.S. jurisprudence eschewed away from a social regulatory model, the shift in E.U. policy was markedly different, reaching a watershed moment in consumer protection with the passage of the UCTD in 1993, and its subsequent revision in 1999.[51] Born out of a desire to prevent "significant imbalance in the parties' rights and obligations" arising under B2C contracts, the UCTD lays out a non-exhaustive blacklist of contract terms that are considered unfair, and thus non-binding, for consumers.[52] Among the terms that are ubiquitous in U.S. B2C internet contracts, but banned by the UCTD and subsequent consumer protection regulations are: choice of forum clauses, choice of law provisions, waiver of all seller warranties, browsewrap provisions, rolling contract provisions, mandatory arbitration clauses, anti-class action clauses, and limitations on remedies.[53]

IV. ANALYSIS

The following subsections explore the language of the terms of use for five of the top U.S.-based internet companies, this includes: Amazon, Google, Facebook, Priceline Group, and Netflix.[54] The edicts from cogent E.U. statutes mentioned above will be applied to the terms of use to discern whether these titans of technology, and their respective counsel, should be concerned about the enforceability of these B2C contracts in the European marketplace.[55] Organized according to type of offending clause, this note

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[51] *See* Rustad, *supra* note 49, at 414 ("The U.S. market-based approach to terms of use is antithetical to the European consumer law, which provides consumers with minimum procedural and substantive protection.").

[52] *See* Council Directive 93/13, art. 3, 1993 O.J. (L 95) 29 (EC) [hereinafter "UCTD"] (outlining unfair terms in consumer contracts). The 1993 version of the UCTD was amended in 1999, which remains the binding precedent. *Id.* There was no substantive change between the 1993 and 1999 versions for our purposes. *See* Commission Regulation 2083/99, The Unfair Terms in Consumer Contracts Regulations, 1999 0.3. References to the UCTD in this note should be considered references to the revised 1999 version. *Id.*

[53] *See* Council Regulation 1215/2012, 2012 O.J. (L 351) 1 (EU) [hereinafter *Brussels Regulation*] (banning compulsory forum clauses); *see also* Council Regulation 593/2008, 2008 O.J. (L 177) 6, 10 (EU) [hereinafter *Rome I Regulation*] (prohibiting one-sided choice of law provisions).

[54] *See Leading Online Companies Ranked by Revenue in 2017,* STATISTA (last visited Oct. 27, 2018), https://www.statista.com/statistics/277123/internet-companies-revenue/ (outlining top internet companies by revenue). These five companies were chosen based on market share in their respective industries, name recognition, and anecdotal frequency of use. References to other large internet corporations are included for illustrative or comparative purposes.

[55] *See* sources cited *supra* notes 52-54 (laying out expectations for corporations conducting business in E.U.). These comparisons are also meant to serve as a warning to attorneys representing businesses expanding their footprint in the E.U.

will examine the language of each of the companies' terms of service, and using language pulled directly from those terms of service, it seeks to determine which clauses would likely to lead to unenforceability of specific terms or of the contract as a whole in the European market.[56]

A. "Browsewrap" Agreements

So-called "browsewrap" agreements are a somewhat recently created class of Terms of Use ("TOU") that base user "consent" to be bound by those terms on the mere fact that the user visits and "browses" the site.[57] Usually, these terms of service are not posted on a site's main page, requiring users to click a hyperlink to get to the terms to which they are purportedly bound.[58] Following suit with the Seventh Circuit Court's decision to uphold "shrinkwrap" contracts in *ProCD, Inc. v. Zeidenberg*, "browsewrap" contracts are generally held to be enforceable in the U.S.[59] Court determinations often turn on whether consumers have notice of the TOU.[60]

Conversely, there is an outright prohibition on "browsewrap" terms in the E.U. following passage of the UCTD, which states that terms "irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract" are unenforceable.[61]

Priceline's TOU are illustrative of a common U.S. company browsewrap provision, stating in relevant part, "By accessing *any areas of this site*, users . . . agree to be legally bound without limitation, qualification, or change and to abide by these terms and conditions, which will constitute

[56] *See generally* Analysis *infra*; *see also* UCTD*, supra* note 52, at 8 ("Terms that are found unfair under the Directive are not binding for consumers.").

[57] *See* Rustad, *supra* note 49, at 227 (defining "browsewrap" agreements).

[58] *See id.* (examining enforceability of browsewrap agreements in U.S. caselaw).

[59] *See id.* (explaining precedential bases for browsewrap agreements); *see also* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449 (7th Cir. 1996) (holding shrinkwrap licenses found inside packaging enforceable provided they are not unconscionable).

[60] *See* Rustad, *supra* note 49, at 228 (requiring providers to "prove that the user has actual or constructive notice of the terms of use"); *see also, e.g.*, Van Tassell v. United Mktg. Grp., LLC, 795 F. Supp. 2d 770, 792-93 (N.D. Ill. 2011) (finding arbitration clause unenforceable in browsewrap agreements due to protracted process to access terms); Hines v. Overstock.com, Inc., 668 F. Supp. 2d 362, 367 (E.D.N.Y. 2009) (finding browsewrap agreement non-binding because consumer had no "actual or constructive" notice of terms); Pollstar v. Gimania, Ltd., 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000) (ruling "browsewrap" agreement unenforceable because of inconspicuous placement of hyperlink to terms).

[61] *See UCTD supra* note 49, at Schedule 2(1)(i) (making browsewrap agreements unenforceable). The logic behind deeming "browsewrap" terms unenforceable is that users cursorily visiting websites likely do not have adequate time to acquaint themselves of the terms to which they are bound, even if there is notice of the terms of use on the home page. *Id.*

our Agreement ('agreement')" (emphasis added).[62] Given the placement of the TOU hyperlink on Priceline's main page, as well as the fact that customers must "consent" to the terms before a purchase can be made, this clause would likely hold up in American courts.[63] Priceline is by no means alone in its use of these terms of dubious fairness, all five of the companies studied contained some iteration of a "browsewrap" agreement.[64] However, if consumers brought cases against any of these companies in the E.U., these provisions would likely be held unenforceable.[65]

B. Pre-Dispute Mandatory Arbitration

Pre-dispute mandatory arbitration provisions ("arbitration provisions") require consumers to "consent" to have any future dispute arbitrated by a neutral third-party arbiter, waiving their rights to jury trial.[66] Arbitration provisions are popular among online social media companies as cost-saving measures.[67]

Following the enactment of the Federal Arbitration Act ("FAA")—which preempts all state laws outlawing mandatory arbitration provisions—courts presume arbitration provisions to be enforceable as long as consumers have notice of the provision, have an opportunity to understand its contents, and "manifest assent" to the terms.[68] However, the enforceability of mandatory arbitration provisions is another significant point at which E.U.

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[62] *See Priceline.com LLC Web Site Terms & Conditions*, PRICELINE, https://www.priceline.com/static-pages/terms_en.html last visited (Oct. 1, 2018) (describing browsewrap terms)[hereinafter Priceline].

[63] *See* Rustad, *supra* note 49, at 228 (describing leniency of U.S. courts regarding browsewrap provisions, provided there is adequate notice).

[64] *See, e.g.*, *Conditions of Use,* AMAZON, https://www.amazon.com/gp/help/customer/display.html?nodeId=201909000 (last visited Oct. 3, 2017) ("By using Amazon Services, you agree to these conditions.") [hereinafter "Amazon"]; *Google Terms of Service*, GOOGLE, https://www.google.com/policies/terms/ (last visited Oct. 25, 2017), ("By using our Services, you are agreeing to these terms.") [hereinafter "*Google"*]; *Netflix Terms of Use*, NETFLIX, https://help.netflix.com/legal/termsofuse (last visited Aug. 1, 2017) ("By using, visiting, or browsing the Netflix service, you accept and agree to these Terms of Use. If you do not agree to these Terms of Use, do not use the Netflix service.") [hereinafter "*Netflix"*]; *Statement of Rights and Responsibilities*, FACEBOOK, https://www.facebook.com/terms.php (last visited Jan. 30, 2015) ("By using or accessing the Facebook Services, you agree to this Statement, as updated from time to time in accordance with Section 13 below.") [hereinafter "Facebook"].

[65] *See* UCTD, *supra* note 49, at Schedule 2(1)(i) (outlawing browsewrap agreements).

[66] *See* Rustad, *supra* note 49, at 401 (defining arbitration provisions).

[67] *See id.* (describing corporate belief that arbitration is less expensive than litigation).

[68] *See id.* at 400 (explaining that "U.S. federal courts are inclined to enforce predispute mandatory arbitration clauses in consumer cases"); *see also* PaineWebber, Inc. v. Bybyk, 81 F.3d 1193, 1198 (2d Cir. 1996) (describing circumstances under which FAA will enforce arbitration provisions).

and U.S. consumer protection laws diverge, as these provisions are explicitly unenforceable under E.U. law.[69] Term (q) of the UCTD's Schedule 2 provides, in relevant part, that the a seller in a B2C contract cannot hinder consumers' right to "take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration . . . ."[70]

Again, Priceline provides an example of a mandatory arbitration term that would be barred under the UCTD, stating in the "Mandatory Arbitration" section of its TOU that consumers "agree" that any dispute arising out of use of its services will be under exclusive jurisdiction of "final and binding arbitration administered by the American Arbitration Association."[71] While this term clearly violates the UCTD, the remaining four companies' terms may well pass arbitration muster as their terms either include other options for dispute resolution in addition to "mandatory arbitration," or make no mention to arbitration at all.[72]

C. Mandatory Class Action Waivers

As with pre-dispute arbitration, internet-based companies commonly incorporate mandatory class action waivers in their TOU's to protect against hefty damages that could be awarded to groups of consumers by sympathetic judges and jurors.[73] Also, as with arbitration provisions, mandatory class action waivers are broadly enforced in the U.S.[74] Similarly, these waivers are also likely prohibited in the E.U. by the UCTD.[75] Although less clear than with arbitration clauses, class action waivers also contravene the spirit of the UCTD's Regulation 5, which holds that clauses causing a "significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer" are considered *per se* unfair.[76] Given that class action waivers eliminate an avenue through which consumers are better able to combat sophisticated legal teams of large

[69] *See* UCTD *supra* note 52, at Schedule 2(1)(q) (outlawing mandatory arbitration provisions).

[70] *See* UCTD *supra* note 52, at Schedule 2(1)(q) (outlining E.U.'s prohibition on arbitration provisions).

[71] *See* Priceline, *supra* note 62 (establishing Priceline's arbitration provision).

[72] *See* sources cited, *supra* note 64 (describing various dispute resolution mechanisms). Amazon and Netflix both include "small claims court" provisions in their dispute resolution sections, while Google and Facebook buck the trend, making no mention of arbitration. *Id.*

[73] *See* Rustad, *supra* note 49, at 246 (describing types of clauses businesses employ to protect economic interests).

[74] *See id.* at 417 (explaining broad enforcement of class action waivers in U.S. courts).

[75] *See* UCTD, *supra* note 52, at Regulation 5 (disallowing clauses creating "significant imbalance" in parties' rights and obligations in agreement).

[76] *See id.* (imputing prohibition on mandatory class action waivers).

corporations, to the obvious disadvantage of consumers, it is probable that these types of provisions would not be enforceable in the E.U.[77]

Amazon's TOU takes center stage in illustrating class action waivers, stating that the parties to the contract "agree that any dispute resolution proceedings will be conducted only on an individual basis and not in a class, consolidated or representative action."[78] Although Regulation 5 does not establish a "bright line" rule as effectively as other provisions of the UCTD, it is likely that the E.C. would find Amazon's clause creates a "significant imbalance" in the rights of the parties to the detriment of the consumer.[79]

Netflix and Priceline also followed Amazon's lead by enacting similar provisions barring class actions.[80] However, in keeping with their trend of relative consumer-centrism, Google and Facebook again make no mention at all of class actions or waivers thereof.[81]

D. Rolling Contracts and Unilateral Changes to Terms

"Rolling" contracts are standard form instruments that allow businesses to unilaterally change contract terms after the initial formation of the agreement.[82] Rolling contracts often include layered provisions making substantive changes binding either at the time the changes are published, or upon continued use of the website, service, or software.[83] In the U.S., courts have been increasingly willing to enforce "rolling" contract terms, provided that consumers receive "reasonable notice" and the opportunity to refuse the new terms and back out of the contract.[84]

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[77] *See id* (outlining prohibitions on imbalanced terms).

[78] *See* Amazon, *supra* note 64 (establishing Amazon's class action waiver policy).

[79] *See* Rustad, *supra* note 49, at 417 (describing class action waivers as unfair to consumers).

[80] *See* Priceline, *supra* note 62 ("[N]o proceeding against Priceline, its affiliates, or any travel service providers or companies offering products or services through the site . . . may proceed as a class action."); *see also* Netflix, *supra* note 64 ("YOU . . . MAY BRING CLAIMS AGAINST [Netflix] ONLY IN YOUR . . . INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING") (emphasis in original).

[81] *See* Google, *supra* note 64 (omitting class action waivers); *see also* Facebook, *supra* note 64 (abstaining from including class action waivers).

[82] *See* Rustad, *supra* note 49, at 240 (defining "rolling" contract terms).

[83] *See id.* at 240-41 (describing "rolling" provision in Travelocity's terms of service).

[84] *See id.* (citing "recent trend in judicial decisions" upholding rolling contract terms); Maria Vittoria Onufrio and Michael L. Rustad, *Reconceptualizing Consumer Terms of Use for a Globalized Knowledge Economy*, 14 U. PA. J. BUS. L. 1085, 1129-30 (2012) (explaining reversal in trend of judgments striking down "shrinkwrap" and "rolling" contracts following *ProCD* decision); *see also* Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1149 (7th Cir. 1998); *ProCD*, *Inc*.,

However, contracts incorporating "rolling" terms likely violate several prohibitions laid out in Schedule 2—formerly the "Annex"—of the UCTD, including Terms (c), (i), (j), and (k).[85] Term (c) prohibits making contract terms "binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his will alone."[86] Meanwhile, Term (i) precludes terms "irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract."[87] Term (j), meanwhile, embargoes terms "enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract."[88] Finally, Term (k) bans provisions "enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided."[89]

Here again, we turn to Priceline as the standard-bearer for U.S.-style terms that would—or perhaps will—be problematic in much of the European market.[90] The preamble of Priceline's terms of service states, "Priceline.com reserves the right, in its sole discretion, to amend, modify, or alter this Agreement at any time by posting the amended terms on this Site."[91] This term appears to have the effect of binding consumers based on unilateral action, listing no "valid reasons" for the change of the contract terms, and granting the consumer the opportunity to acquaint herself to those changes, likely violating Terms (c), (i), and (j) on its face.[92] Given its fact-specific nature, a determination regarding whether Term (k) is violated would rest primarily on whether a "characteristic" of the service is altered in the event that Priceline changed its terms.[93] Given that this provision likely violates

86 F.3d at 1452; Brower v. Gateway 2000, 676 N.Y.S.2d 569, 575 (N.Y. App. Div. 1998) (upholding "rolling" adhesion contracts based on notice and manifestation of consent).

[85] *See* UCTD, *supra* note 52, at Schedule 2, Term (c), (i), (j), and (k) (prohibiting litany of provisions effectuating purposes of "rolling contracts").

[86] *See id.* (prohibiting contracts in which stronger party has unilateral ability to cancel or perform).

[87] *See id.* (disallowing contracts immediately binding on consumers).

[88] *See id.* (outlawing seller ability to unilaterally change terms).

[89] *See id.* (banning seller ability to unilaterally alter service or product supplied).

[90] *See* PRICELINE, *supra* note 62, at Pmbl. (examining Priceline's rolling contract provision).

[91] *See id.* (laying out problematic Priceline rolling contracts clause).

[92] *See id.*(examining problematic Priceline TOU); *see also* UCTD, *supra* note 52, at Schedule 2, Terms (c), (i), and (j) (laying out prohibited clauses present in Priceline's TOU).

[93] *See id.* at Term (k). The inclusion of the qualifier "as to any of the *characteristics* of the product or service to be provided" links Term (k) to a determination as to whether a specific change to the terms would qualify as a change to a "characteristic" of the good or service in question. *Id.* (emphasis added). While the UCTD provides little guidance as to what constitutes a "characteristic," the preceding use of the word "any" suggests that E.U. lawmakers wanted the provision to broadly apply to substantive changes to the terms. *Id.*

several of the UCTD's prohibitions against rolling contracts, the clauses likely would not stand up to E.C. scrutiny if challenged by an E.U. consumer.[94]

Although Priceline's "rolling" terms align with its penchant for developing distinctly U.S.-flavored terms of use, Amazon and Google's terms use similar language, and are thus likely on equally unsteady footing in the E.U.[95] While this majority U.S. centrism is unsurprising, there seems to be a developing trend among the companies that have had prior run-ins with the E.C. to draft jurisdictionally-distinct terms of use, while also softening terms which would otherwise be binding in the U.S.[96] Facebook and Twitter have also inserted qualifiers into their "rolling" provisions, giving notice and allowing consumers time to apprise themselves of changes before new terms become binding.[97]

E. Compulsory Choice-of-Law and Forum Selection

Among the most clearly violative common U.S.-style terms of service are choice-of-law and choice-of-forum provisions, which contravene explicit prohibitions laid out in E.U. statute.[98] As the monikers suggest, law and forum selection clauses are contract terms that determine which jurisdiction will exclusively hear any disputes arising from a contract, as well

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[94] *See* Rustad, *supra* note 49, at 416 ("European Rolling Contracts in Consumer Licensing or Terms of use Violates the UCTD and Several Terms in [Schedule 2].").

[95] *See* Amazon, *supra* note 64 ("We reserve the right to make changes to our site, policies, Service Terms, and these Conditions of Use at any time"); *see also* Google, *supra* note 64 ("Google may also stop providing Services to you, or add or create new limits to our Services at any time . . . changes addressing new functions for a Service or changes made for legal reasons will be effective immediately. If you do not agree to the modified terms for a Service, you should discontinue your use of that Service.").

[96] *See* Facebook, *supra* note 64 (demonstrating trend); *see also Twitter Terms of Service*, TWITTER (hereinafter "Twitter") (Feb. 21, 2018), https://twitter.com/en/tos. Following E.C. warnings, Facebook developed bespoke terms of service for German users, while Twitter crafted more broad terms for E.U. users or users "otherwise outside the United States." *See* Facebook, *supra* note 64. Facebook, Twitter, and Netflix—which have had significant contact with the E.C. regarding tax rates and geofencing practices—have each also softened the language of some of their terms for domestic users. *Id.*

[97] *See* Facebook, *supra* note 64, at Section 13(1) ("We'll notify you before we make changes to these terms and give you the opportunity to review and comment on the revised terms before continuing to use our Services."); *see also* Twitter, *supra* note 96, at Section 6 ("We will notify you 30 days in advance of making effective changes to these Terms that impact the rights or obligations of any party. . . .").

[98] *See* Brussels, *supra* note 53, at Art. 15-17 (describing consumers' non-waivable right to home-court advantage in B2C litigation); *see also* Rome I, *supra* note 53, at Art. 6 (prohibiting one-sided choice of law provisions in B2C contracts); Rustad, *supra* note 49, at 415 (describing E.U. prohibition on choice of forum and choice of law provisions).

as the body of law that will bind the parties to those disputes.[99] Absent fraud, duress, unconscionability, lack of logical connection between the forum and the dispute, or violation of statute in the applicable jurisdictions, U.S. courts generally uphold choice-of-law and forum selection provisions in B2C contracts.[100]

While it is well-established that choice-of-law and forum selection provisions are broadly enforceable in U.S. contracts, these clauses are clear violations of both the Brussels Regulation and the Rome I Regulation in the E.U.[101] Given that stronger parties to contracts are likely better able to afford travel expenses to distant fora, Articles 15-17 of the Brussels Regulation grant non-waivable home venue rights to E.U. citizens in B2C contracts.[102] Article 6 of the Rome I Regulation, meanwhile, prohibits one-sided choice-of-law provisions for E.U. citizens in B2C agreements.[103]

Google's terms of service provide a prototypical example of choice-of-law and forum selection clauses in the U.S. context, providing in relevant part that:

> All claims arising out of or relating to these terms or the Services will be litigated exclusively in the federal or state courts of Santa Clara County, California, U.S.A., and you and Google consent to personal jurisdiction in those courts . . . The laws of California, U.S.A., excluding California's conflict of laws rules, will apply to any disputes arising out of or relating to these terms or the Services.[104]

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[99] *See* Governing Law and Choice of Forum Clauses Explained, LEXISNEXIS, https://www.lexisnexis.ca/en-ca/ihc/2017-03/governing-law-and-choice-of-forum-clauses-explained.page (last visited Feb. 24, 2018) (defining choice of law and forum selection clauses).

[100] *See, e.g.*, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 586 (1991) (finding forum selection clauses not facially unfair simply due to lack of negotiation); Hall v. Sprint Spectrum, L.P., 876 N.E.2d 1036, 1037 (2007) (upholding choice-of-law clause unless no relationship to parties or transaction in violation of public policy); Caspi v. Microsoft Network, LLC, 732 A.2d 528, 529 (1999) (holding forum selection enforceable absent fraud, "overweening bargaining power, or violation of public policy"). *See also* Onufrio, *supra* note 84, at 1167 ("Courts will only refuse to enforce choice-of-law agreements to the extent it would vary a rule that may not be varied by agreement under the law of the jurisdiction whose law would apply.") "The vast majority of U.S. courts enforce forum selection clauses even though in the real world few consumers appreciate that they are agreeing before the fact to litigate in a distant forum." Onufrio, *supra* note 84, at 1178.

[101] *See* Rustad, *supra* note 49, at 416 (outlining E.U. prohibition on choice-of-law and forum selection provisions); *see also* Onufrio, *supra* note 84, at 1179 ("U.S. companies can assume that their choice-of-law and forum clauses are unenforceable in the Eurozone.").

[102] *See* Brussels, *supra* note 53, at Art. 15-17 (granting non-waivable home-court advantage to E.U. citizens in B2C contract litigation).

[103] *See* Rome I, *supra* note 53, at Art. 6 (prohibiting one-sided choice-of-law provisions).

[104] *See* Google, *supra* note 64 (quoting Google's TOU).

These terms, while perfectly enforceable in the U.S., would clearly violate Articles 15-16 of the Brussels Regulation, as well as Article 6 of the Rome I Regulation.[105] Although in this instance Google adheres to the U.S. tradition of enforcement of these clauses, the companies' choice-of-law and forum selection provisions depart more from the current jurisdictional status quo than in any of the previously mentioned terms.[106] Netflix, for example, neglects to mention forum selection, while including a provision invalidating its own choice-of-law provisions if they contravene consumer protection laws in users' states of residence.[107]

IV. CONCLUSION

In sum, modern E.U. consumer protection mandates are focused primarily on correcting the imbalance in bargaining power between businesses and consumers. Philosophically, and perhaps counterintuitively, these regulations do more to preserve the freedom to contract for all. Conversely, the U.S. market-driven approach to consumer protection fosters that imbalance, preserving and bolstering the freedom to contract of corporations, while eroding the same rights of consumers. This is not to say that consumers are less capable of entering into contracts with businesses by nature of an imbalance in bargaining power. Rather, given that a "bargained for exchange" is the lynchpin of contract formation, demeaning one party's voice in a bargain by allowing companies to unilaterally dictate terms to consumers demeans the bargain—and thus the contract—itself.

From a governmental standpoint, the world's two largest economies continue to diverge as the U.S. doubles-down on its market-driven regulatory approach, while the E.U. continues its tradition of statutory activism in the consumer protection arena, propping up consumers wherever possible. However, as a practical matter, U.S. businesses seem to be reacting to a European Commission flexing its relatively newfound authority on the world's economic stage. Placing pressure on e-titans like Google, Facebook,

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[105] *See* sources cited, *supra* note 53 (outlining E.U. prohibition on choice-of-law and forum selection provisions); *see also* Rustad, *supra* note 49, at 415 (describing U.S.-style choice-of-law and forum selection provisions as unenforceable).

[106] *See, e.g.*, Amazon, *supra* note 64 (allowing arbitration in home county of consumers); Facebook, *supra* note 64 (citing German law as binding for German consumers); Priceline, *supra* note 64 (setting county of consumers' "billing address" as small claims venue); Netflix, *supra* note 64, at Section 11 (including provision recognizing consumer protection laws in consumer states of residence).

[107] *See* Netflix, *supra* note 61, at Section 11 (including clause deferring to consumer protection statutes of users' home jurisdictions).

Twitter, and Amazon in the Eurozone has resulted in subtle changes to the way these companies interact with their customers domestically.

It remains unlikely that there are seismic changes to U.S. consumer protection law on the horizon. However, there may still be hope for U.S. consumers grappling with the American market-driven consumer protection tradition. As legal expenses make dozens of jurisdictionally bespoke terms of use untenable, more internet companies may slowly succumb to market pressures, gradually shifting the stream of domestic consumer protection doctrine back to its philosophical headwater.

Christopher LeBlanc

TRUANCY, SECURE DETENTION, AND THE RIGHT TO LIBERTY

A State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests. . .[1]

-Chief Justice Burger

I. INTRODUCTION

Francisco De Luna was thirteen when his father died, his mother worked long hours to compensate for the loss and support their family, and as a result, Francisco was unable to keep up with his school attendance.[2] Francisco was cited for truancy and compelled to appear in court.[3] He failed to appear in court and to pay the fine, and Francisco was sent to a secured detention facility for eighteen days.[4]

Compulsory education laws have faced contention since their inception.[5] However, despite constitutional challenges and carving out exceptions for very specific instances, these statutes are still commonplace in the United States today.[6] Although on their face the statutes appear as though they progress well-intentioned state interests, the punishment for violation of these statutes pose great risk for the mental health of the youth and improperly infringe upon their liberty interests.[7]

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[1] *See* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (discussing challenge to compulsory education statute based on freedom of religion argument).

[2] *See* Dean Hill Rivkin, *TRUANCY PROSECUTIONS OF STUDENTS AND THE RIGHT [TO] EDUCATION,* DUKE FORUM FOR LAW & SOCIAL CHANGE, 139, 147 (2011), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1020&context=dftsc (describing nontransparent legal contours of truancy).

[3] *See id.* (discussing Francisco's lack of attendance to warrant citation).

[4] *See id.* (illustrating severity of punishment for children not attending school).

[5] *See Yoder*, 406 U.S. at 239 (1972) (reviewing challenge to compulsory education statute based upon infringement on religious freedom).

[6] *See Compulsory Education Laws: Background*, FINDLAW, https://education.findlaw.com/education-options/compulsory-education-laws-background.html (last visited Nov. 19, 2017) (examining history and current state of compulsory education laws).

[7] *See* Barry Holman & Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* JUSTICE POLICY INSTITUTE, http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf (last visited Nov. 19, 2017) (studying effects of incarceration on mental health of youths).

When examining the data regarding the detrimental effects on the mental health of youths placed in secure detention, it is hard to imagine a state interest compelling enough to make this repercussion a viable option for truancy. This Note will examine the history of the compulsory education laws and the role of the justice system in relation to truancy. It will then turn to the data on mental health implications of secure detention and a strict scrutiny analysis of the states' interest weighted against the means by which these interests are being achieved.[8] Finally, this Note will survey the states currently implementing secure detention for violating a court order in relation to truancy, and propose a more mentally beneficial and legally constitutional means of achieving the state interest of reducing truancy rates.

II. HISTORY

A. Compulsory Attendance and Truancy in the Justice System

Implementing compulsory education dates back to ancient times.[9] Even before the Plato era of blooming ancient philosophy, Jewish custom required parents to provide their children with an education.[10] In the United States, Massachusetts was the first state to enact a compulsory education law in the year 1852.[11] The statute specified:

> [e]very person who shall have any child under his control between the ages of eight and fourteen [sic] years, shall send such child to some public school within the town or city in which he resides, during at least twelve weeks, if the public schools within such town or city shall be so long kept, in each and every year during which such child shall be under his control, six weeks of which shall be consecutive. . . .[12]

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[8] *See id.*

[9] *See Compulsory Education Laws: Background*, FINDLAW, https://education.findlaw.com/education-options/compulsory-education-laws-background.html (last visited Nov. 19, 2017) (surveying history of compulsory education).

[10] *See id.* (exemplifying origins of compulsory education through time).

[11] *See* Nicky Hardenberg, *Massachusetts Compulsory Attendance Statutes from 1852-1913*, MHLA (2003) http://www.mhla.org/information/massdocuments/mglhistory.htm (establishing Massachusetts as first state to recognize need for compulsory child education).

[12] *See id.*

The implementation of compulsory education has not been without objection.[13] In *Pierce v. Society of Sisters,*[14] the plaintiffs challenged a proposed Oregon statute which required "every parent, guardian or other person having control or charge or custody of a child between eight and sixteen years to send him 'to a public school for the period of time a public school shall be held during the current year."[15] The plaintiffs were two alternative education corporations including a parochial school and a military academy.[16] The Court held that the statute improperly interfered with the business interest of both of the corporations and, therefore, was invalid.[17] Similarly, in *Yoder*, the respondents, members of the Amish religion, were convicted of violating a Wisconsin compulsory-attendance statute.[18] The Court held the impact the statute had on the respondent's ability to practice their religion outweighed the state interest in compulsory education.[19] However, this finding was an exception for a limited group of people for whom the statute would severely infringe upon their religious freedom.[20] For as long as compulsory education laws have existed, there have been repercussions for violating them by way of truancy.[21] "Truancy is a child's failure to attend school without a justification or excuse for the absence being communicated to school authorities."[22] In most states, truancy is an offense punishable only to minors- or a status offense.[23] In fact, up until the 1960s and the 1970s, juveniles who were habitually truant were

[13] *See* Wisconsin v. Yoder, 406 U.S. 205, 205 (1972) (holding state interests did not outweigh right to religious freedom).

[14] 268 U.S. 510 (1925).

[15] *See id.* at 530 (1925) (holding statute invalid based upon possible interference with business interests of two corporations).

[16] *See* Philip B. Kurland, *The Supreme Court, Compulsory Education, and the First Amendment' s Religion Clauses*, 75 W. VA. LAW REV. 213, 218 (1972) (discussing common law history of compulsory education and its statutory challenges).

[17] *See Yoder*, 406 U.S. at 207 (reviewing decision of Wisconsin Supreme Court convicting respondents of violating statute).

[18] *See id.* (explaining respondent, age fourteen and fifteen, did not attend school as required).

[19] *See id.* at 218 (finding law's effect on religion was severe and inescapable).

[20] *See* Hardenberg, Massachusetts Compulsory Attendance Statutes from 1852-1913, MHLA (2003) http://www.mhla.org/information/massdocuments/mglhistory.htm (discussing past and current state of compulsory education).

[21] *See supra* note 2, at 140 ("Since the inception of universal compulsory education, the issue of truancy has defied easy solution.").

[22] *See* BOUVIER LAW DICTIONARY (Wolters Kluwer Desk ed. 2012), *available at LexisNexis* (defining truancy).

[23] *See* Farah Z. Ahmad & Tiffany Miller, *The High Cost of Truancy*, CENTER FOR AMERICAN PROGRESS (Aug. 2015), https://cdn.americanprogress.org/wp-content/uploads/2015/07/29113012/Truancy-report4.pdf (detailing history of truancy legislation and judicial involvement in United States).

formally processed through the judicial system.[24] At that time, both the decision *In re Gault* and the Juvenile Justice and Delinquency Prevention Act of 1974, perpetuated a general shift away from formal processing and institutional confinement for truancy.[25] In *In re Gault,* the Court held that, in judicial proceedings, juveniles must be afforded the same rights as adults, and the Juvenile Justice and Delinquency Prevention Act of 1974 established core protections for juveniles within the justice system.[26] In 2002, the Juvenile Justice and Delinquency Prevention Act was amended "particularly for the purpose of permitting nonviolent juvenile offenders (including status offenders) to remain at home with their families as an alternative to incarceration or institutionalization."[27] However, in roughly thirty states, judges may invoke a court order exception to the Deinstitutionalization of Status Offenders core requirement of the act.[28] "This exception allows judges to place a juvenile in a secure detention facility if the youth [. . .]violated a valid court order."[29] Essentially, this exception allows states to circumvent the provision of the act and commit youth to secure facilities as a result of truancy.[30] The states which have done away with secure detention as a repercussion for truancy have determined largely that there are less restrictive alternatives available, and that overall a child who violates a truancy order is not a delinquent and therefore should not be treated as such.[31]

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[24] *See id.* at 1 (highlighting process associated with habitual truancy).

[25] *See id.*

[26] *See* Juvenile Justice and Delinquency Prevention Act of 1974, 93 Pub. L. No. 415, 88 Stat. 1109 (1974) (providing comprehensive coordinated approach to problem of juvenile delinquency, and for other purposes); *see also* In re Gault, 387 U.S. 1, 62 (1967) (finding person should be tried in accordance with all guarantees of Constitution).

[27] *See* Juvenile Justice and Delinquency Prevention Act § 233 (stating requirement of state plans).

[28] *See Truancy and the Use of Detentio*n, COLORADO DIVISION OF CRIMINAL JUSTICE, https://www.colorado.gov/pacific/dcj/truancy-and-use-detention (last visited Nov. 19, 2017) (discussing Colorado study which examined truancy and use of detention).

[29] *See id.* (explaining routes around statutory provisions for truancy).

[30] *See id.*

[31] *See* S.G. v. Vurro, 77 So. 3d 897, 898 (Fla. Dist. Ct. App. 2012) (citing FLA. STAT. ANN.) ("A child who violates a truancy order, however, is not a delinquent child . . . [a] delinquent contemnor may be punished by placement in secure detention, a child in need of services who commits a contempt of court may be placed in 'a staff-secure shelter or a staff-secure residential facility solely for children in need of services,' or if no such placement is available, in 'an appropriate mental health facility or substance abuse facility for assessment'"); In re In Interest of D., 110 Wis. 2d 168, (1983) (finding secure detention for violation of court invalid order because less restrictive means existed).

III. FACTS

A. Impact of Incarceration on Mental Health

The impact of secure detention is detrimental to the mental health of the youth subjected to it.[32] According to studies, those incarcerated in their youth experience a two to four times higher suicide rate of the youth in the community.[33] The Office of Juvenile Justice and Delinquency Prevention reports that 11,000 youths engage in more than 17,000 acts of suicidal behavior in the juvenile justice system annually.[34] One study examined the prevalence of depression among incarcerated and non-incarcerated delinquents.[35] The prevalence of depressive disorders, according to diagnostic criteria of the DSM-III, was eighteen percent prevalence for incarcerated delinquents compared to only four percent for non-incarcerated adolescents.[36] Further, not only the prevalence but also the actual development of depression was studied.[37]

> Of the 100 delinquents admitted consecutively to a detention center, 11 showed evidence of depression both during and before incarceration, while seven developed a depressive disorder in the center. With regard to specific symptoms, 100% of the depressed incarcerated adolescents were found to suffer from sleep difficulties, and 94% experienced disturbances of appetite.[38]

This study indicated that seven individual youths developed depression because they were subjected to incarceration.[39]

Another study conducted between 1992 and 1995 at a juvenile detention center found:

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[32] *See* Holman & Ziedenberg, *supra* note 7, at 4 (surveying impacts of detention on youth and mental health).

[33] *See* Dale G. Parent et al., *Conditions of Confinement: Juvenile Detention and Corrections Facilities*, (1994), https://www.ncjrs.gov/pdffiles1/ojjdp/1FrontMat.pdf (studying data about incarceration youth in juvenile detention facilities).

[34] *See id.* (analyzing results of study).

[35] *See* JH Kashani et al., *Depression among incarcerated delinquents.*, 3 PSYCHIATRY RESEARCH 185–91 (1980), http://www.ncbi.nlm.nih.gov/pubmed/6947311 (utilizing DSM-III criteria to analyze depressive disorders among incarcerated and non-incarcerated delinquents).

[36] *See id.*

[37] *See id.*

[38] *See id.*

[39] *See id.* (summarizing results of study).

> [w]hen the percentages of lifetime suicidal ideations of 31.6 percent for males and 51.1 percent for females is reviewed with the previous history of suicide attempts of 15.1 percent for males and 39.8 percent for females, it is clear that adolescents in a juvenile detention facility are at high risk for self-destructive behavior.[40]

Given all the detrimental effects that have been empirically proven, it has not been shown that the rate of criminal conduct is significantly reduced by subjecting these youths to such conditions.[41] In fact, it is likely that the incarceration for such a minor offense as violating a court order regarding compulsory attendance may actually be increasing rates of recidivism.[42] In a two year study of 414 adolescents, it was found that between poor parenting, gang membership, gun ownership and prior detention, prior detention is thirteen times more likely to lead to recidivism.[43]

A recent evaluation of secure detention in Wisconsin, conducted by the state's Joint Legislative Audit Committee reported that, in the four counties studied, seventy percent of youth held in secure detention were arrested or returned to secure detention within one year of release.[44] The researchers found that "placement in secure detention may deter a small proportion of juveniles from future criminal activity, although they do not deter most juveniles."[45] A strong factor that contributes to this increased rate of recidivism is the opportunity to make connections with and be influenced by other delinquents while the juveniles are in the secure facilities.[46]

> Researchers at the Oregon Social Learning Center found that "congregating youth together for treatment in a group setting causes them to have a higher recidivism rate and poorer outcomes than youth who are not grouped together

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[40] *See* D E Mac et al., *Psychological Patterns of Depression and Suicidal Behavior of Adolescents in a Juvenile Detention Facility*, 12 JOURNAL FOR JUVENILE JUSTICE AND DETENTION SERVICES J. FOR JUV. JUST. AND DETENTION SERVICES (1997), https://www.ncjrs.gov/App/abstractdb/AbstractDBDetails.aspx?id=167146 (evaluating rate of suicide before and after being incarcerated at specific detention center).

[41] *See* Brent B. Benda et al., *Recidivism Among Adolescent Serious Offenders*, 28 CRIMINAL JUSTICE AND BEHAVIOR, SAGE J 588-613 (2001), http://journals.sagepub.com/doi/10.1177/009385480102800503 *available at* "download full pdf" (examining predictors of recidivism in youthful offenders).

[42] *See id.* (discussing likelihood of recidivism in youths).

[43] *See id.* at 593-610 (describing method and results of study).

[44] *See* Holman & Ziedenberg, *supra* note 7, at 4 (examining risk associated with incarcerating juveniles).

[45] *See id.* at 4 (discussing research evaluation of counties).

[46] See *id.* at 5 (analyzing congregation of youth increase chances of re-offending).

> for treatment. The researchers call this process 'peer deviancy training,' and reported statistically significant higher levels of substance abuse, school difficulties, delinquency, violence, and adjustment difficulties in adulthood for those youth treated in a peer group setting. The researchers found that 'unintended consequences of grouping children at-risk for externalizing disorders may include negative changes in attitudes toward antisocial behavior, affiliation with antisocial peers, and identification with deviancy.'"[47]

Studies are continually showing that the effects of incarcerating juveniles are detrimental, and to subject them to this type of psychological hazard as a result of truancy is certainly not a narrowly tailored, least restrictive solution.[48]

B. The Strict Scrutiny Standard

In order for a statute to impede upon a fundamental right, it must first pass the strict scrutiny standard.[49] The Fifth Amendment establishes the right to liberty, stating that no person shall "be deprived of life, liberty, or property, without due process of law."[50] This right, established in the Bill of Rights, has been extended to the states through the Due Process Clause of the Fourteenth Amendment.[51]

In regards to truancy, it is important to recognize that the state does have legitimate interests in enacting compulsory education laws, and ensuring their enforcement by enforcing the repercussions for violations of

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[47] *See id.* at 5 (examining peer deviancy training with negative behavior of adolescents).

[48] *See id.* at 5 (discussing studies in California and Florida).

[49] *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (utilizing strict scrutiny standard for interference with fundamental rights). In *Skinner,* the Court examined a law centered on mandatory sterilization of what the Court referred to as habitual criminals, with an exception for white collar crimes. *Id*. The Court unanimously held that the act violated Equal Protection, and established the standard of strict scrutiny for a law which infringes upon a fundamental right- which here was the right to liberty. *Id.*

[50] U.S. CONST. Amend. V. (establishing fundamental right to liberty).

[51] *See* Saenz v. Roe, 526 U.S. 489, 525 (1999) (holding fundamental rights are incorporated by Fourteenth Amendment and apply to states). When dealing with civil rights and individual fundamental rights, the court will use strict scrutiny, and the state must demonstrate narrowly tailored means to pursue a compelling state interest. *Id*. As this case dealt with the right to travel, the state's interest in the state saving money was not narrowly tailored with the durational residency requirement that was at issue. *Id.* The requirement interfered with the right to travel, which is a fundamental right because people need to travel to petition the courts, and that right was not outweighed by the state's economic interest. *Id.*

these education laws. These interests include "preserving basic political and economic institutions as well as assuring that children are intellectually and socially prepared to become self-reliant members of society. . . [a] State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate."[52] However, when applying the strict scrutiny standard courts must also question whether the means implemented are the least restrictive to achieve the goal of furthering the state's interest.[53] In national studies analyzing the efficacy of programs designed to reduce truancy, there has been no overall consensus on an effective method.[54]

Further, as noted in the case of Francisco De Luna, there are often other underlying causes of the child's truancy which would likely be better addressed by tutoring services, mental health counseling, and establishing a core support group. [55] Any of these alternatives would provide less restrictive means than secure detention to address truancy issues, and would likely avoid the negative mental health implications associated with juvenile incarceration as noted above.

IV. ANALYSIS

A. Colorado's Truancy Protocol

In Colorado, the truancy protocol dictates that judicial truancy proceedings have two stages.[56] In the first stage, the court may seek an order to compel the child to attend school.[57] However, if the child fails to comply with the order, they then enter the second stage of proceedings.[58] In the second stage there is a contempt proceeding either to secure compliance with

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[52] *See id.* (discussing compulsory education statute).

[53] *See* People v. McKee, 207 Cal. App. 4th 1325, 1335 (2012) ("Because petitioner's personal liberty is at stake . . . the applicable standard for measuring the validity of the statutory scheme requires application of the strict scrutiny standard of equal protection analysis.").

[54] *See* Myriam Baker et al., *Process and Implementation Outcomes,* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (2001), https://www.ncjrs.gov/pdffiles1/ojjdp/188947.pdf (reviewing progress of truancy reduction programs).

[55] *See* Class Action Complaint at 16, De Luna v. Hidalgo County, (No. 7:10-cv-00268) (discussing challenge to Texas statute resulting in incarceration for some circumstances in truancy petitions).

[56] *See* Pattie P. Swift *2016 Truancy Protocol- 12th Judicial District,* (2016) [hereinafter: "2016 Truancy protocol"], *available at* https://www.courts.state.co.us/userfiles/file/court_probation/12th_judicial_district/truancy%20Protocol%20%26%20Forms/Truancy%20Protocol%2006_07_16.pdf (detailing truancy protocol for Colorado).

[57] *See id.*

[58] *See id.*

the order or to punish the violation-these are called "remedial and punitive contempt proceedings."[59] The juvenile may be sentenced for indirect, punitive contempt if they "knowingly and willfully" violate the court order mandating attendance.[60] The sanctions may include jail for the parent, or juvenile detention for the student.[61]

B. Massachusetts' Truancy Protocol

In Massachusetts, an application for a child requiring assistance will be filed for a truant child, usually by a representative of the school or a parent.[62] After the application is filed, a preliminary hearing is held with the child, the child's parents, a representative from the Department of Children and Families, and a representative from the Department of Youth Services present.[63] At the hearing, the case is either dismissed for lack of probable cause, the child is referred to informal assistance with a probation officer, or a fact-finding is scheduled.[64] Informal assistance is done under the supervision of a probation officer and may include psychological, educational, medical services. [65] If the case does not result in informal assistance and instead a fact finding hearing is scheduled, the person who filed the application for a child requiring assistance has the burden to present enough evidence for the judge to find, beyond a reasonable doubt, that the child does in fact require assistance.[66] The matter then moves to a disposition hearing, at which the judge takes into consideration the probation officer's report from a conference held with the individuals involved in the application.[67] The judge will then decide whether to permit the child to remain in the home, place the child in the care of a relative, or place the child with the Department of Children and Families.[68] After 120 days, the court holds a disposition review hearing to determine the child's progress in the current treatment program.[69]

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[59] *See id.*

[60] *See id.* at 8.

[61] *See* Swift, *supra* note 58, at 5 (detailing sanctions).

[62] *See* MASS. TRIAL. CT. ADMIN. OFF. HANDBOOK FOR PARENTS, LEGAL GUARDIANS AND CUSTODIANS IN CHILD REQUIRING ASSISTANCE CASES 2 (2012) [hereinafter "Handbook"] (discussing process of truancy court proceedings).

[63] *See id.* at 3 (describing preliminary hearing stage).

[64] *See id.* at 4.

[65] *See id.*

[66] *See id.* at 5 (discussing burden of proof in such proceedings).

[67] *See* Handbook, *supra* note 62, at 6-7 (detailing disposition hearing).

[68] *See id.* (discussing possible results of disposition hearing).

[69] *See id.* (detailing disposition review hearing).

C. Future Movement for Mental Health Preservation

Given the various mental health implications of secure detention, it would be the most beneficial for the courts in every state to adopt a truancy system similar to the one employed in Massachusetts.[70] This type of multi-faceted intervention seems to be more effective to determine the root of the problem that is causing the truancy, and is more likely to have a positive effect on the child's mental health, rather than subjecting them to detention.[71] Traditionally, choices regarding a child's schooling have been left to the parents and the state, however, it is imperative that a child's mental health also be a determining factor in such choices, and recognized as having a significant impact as to the reasons behind a child's truancy.[72]

D. Constitutional Challenge

In addition to potential mental health implications, the use of secure detention as a consequence for truancy may also violate the child's constitutional right of due process.[73] For a statute to survive a constitutional challenge based upon a fundamental right, it must pass a strict scrutiny test.[74] Therefore, the means by which the state is achieving their interest must be narrowly tailored, and the interest must be compelling.[75] By sentencing juveniles to secure detention, the state is interfering with their fundamental right of freedom.[76] Although a state's interest in education is certainly profound, as the education of youths perpetuates a more capable society, and therefore stimulates the economy, this interest is not found to be insurmountable when weighted against the fundamental right to freedom of religion.[77] The narrowly tailored standard has also been defined as the "least

[70] *See* Kashani et. al., *supra* note 34, at 185 (highlighting mental health implications of truancy protocols).

[71] *See* Swift, s*upra* note 58 (discussing process of truancy proceedings)

[72] *See* Kashani et. al., *supra* note 34, at 185 (highlighting mental health implications of truancy protocols).

[73] *See Saenz*, 526 U.S. at 507-08 (holding fundamental rights are incorporated by Fourteenth Amendment and apply to states).

[74] *See id.* at 499 (establishing strict scrutiny test).

[75] *See id.*

[76] *See* Dean Hill Rivkin, *Truancy Prosecutions of Students and the Right [to] Education*. 3 Duke F.L. & SOC. CHANGE 139, 139-61 (2011) (discussing how states perpetuate their own educational interest and infringe juveniles' fundamental right to freedom).

[77] *See Yoder*, 406 U.S. at 214 (discussing challenge to compulsory education statute based on freedom of religion argument).

restrictive" alternative to achieve the state's interest. [78] In truancy prosecutions, there are a number of alternative means to achieving compulsory attendance that would benefit the mental health of juveniles. Not only are there alternative options, but it has been shown that secure detention does not reduce recidivism of truancy issues, but rather increases the likelihood of youths committing more serious offenses. [79] Additionally, it is often not a case of defiance that leads to a child's habitual truancy, but rather a mitigating factor such as family dynamics or an existing mental health issue.[80] Perhaps the most compelling and most obvious reason that this type of action fails the strict scrutiny test is that sending youths to secure detention does not resolve the truancy issue as they cannot attend their regularly required school while in secure detention.[81] Youths who have been in secure detention as a result of truancy have been shown to be over fourteen times less likely to graduate than those who have not been in secure detention for truancy.[82] Therefore, given that it does not directly deter truancy, decreases a youth's likelihood of graduating, and often times punishes the youth for circumstances beyond their own control, secure detention as a punishment for habitual truancy is likely a violation of the constitutional right to liberty as it does not meet the standards of a strict scrutiny analysis.[83] Not only is the use of secure detention not the least restrictive alternative in achieving the state's interest in children's educations, it actually hinders the

[78] *See Skinner*, 316 U.S. at 541 (discussing constitutionality of compulsory sterilization statute using strict scrutiny test).

[79] *See* Benda, *supra* note 40 (examining predictors of recidivism in youthful offenders).

[80] *See* Class Action Complaint at 16, De Luna v. Hidalgo County, No. 7:10-cv-00268 (S.D. Tex. Jul. 26, 2010). (discussing challenge to Texas Statute resulting in incarceration for some circumstances in truancy petitions)

[81] *See* Rivkin, *supra* note 2, at 139-61 (discussing implications of truancy prosecutions).

[82] *See SECURE DETENTION FOR TRUANCY: IMPACTS ON COLORADO YOUTH ACADEMIC AND SOCIAL SUCCESS* NAT'L JUV. JUST. NETWORK (2016) *available at* http://www.njjn.org/uploads/digital-library/CO_Truancy_Detention_FactSheet_Final_2016.pdf (discussing various factors contributing to and resulting from truancy detention). A publication by the Colorado division of Criminal Justice indicates that compared to the national averages, youths who are found to be truant and sentenced to secure detention are more likely to be youths of color, qualify for free or reduced lunches, and be non-native English speakers. *Id.*

This study integrated five-year datasets from education, child welfare, judicial, and juvenile justice. A total of 2,070 youths were identified as receiving court oversight for truancy in the 2010-2011 fiscal year. Cross system analyses examined this cohort over a five-year period to investigate predictors of secure detention and outcomes for youth with or without a secure detention for truancy. . . . Graduation was influenced by many factors, but detention was the strongest predictor. Youth who went to detention for truancy were 14.5 times less likely to graduate from high school than other Colorado youth found truant.

Id.

[83] *See In re In Interest of D.*, 327 N.W. at 691 (finding secure detention for violation of court order was invalid because less restrictive means existed); *see also Vurro*, 77 So. 3d at 898 (suggesting child who is habitually truant be given access to services).

facilitation of that interest.[84] It is because of these reasons that the states should focus their resources not on detaining juveniles in secure detention, but rather on providing services to the juveniles to help them cope with the factors that contribute to their inability to attend school.

V. CONCLUSION

In conclusion, evidence shows that the use of divertive alternatives besides the use of secure detention are more beneficial to the mental health of juveniles, and imperative to reduce rates of recidivism. Additionally, abstaining from the use of secure detention and instead using treatment programs and services does not pose the same threat to the juveniles' fundamental right to liberty. In order to foster a more productive system for truancy, it is important to recognize the severe ramifications that secure detention has on the mental health of juveniles in the criminal justice system. The use of treatment and services would avoid these ramifications and likely result in a decreased level of truancy and overall reduction in the juvenile's interaction with the criminal justice system, which in turn would have an overall result of a decreased burden on the state.

Amanda McNelly

[84] *See Vurro*, 77 So. 3d at 898 (discussing effects of treatments of truant youths).

SENTENCING STATUTES: THE DEVIATION FROM FEDERAL SENTENCING GUIDELINES AND VARIATION AMONG STATES' SENTENCING LAWS

Only the man who has enough good in him to feel the justice of the penalty can be punished ~William Ernest Hocking

INTRODUCTION

Over the years, many cases have been brought before the United States Supreme Court to decide whether a state law is unconstitutional or whether the matter has federal standing.[1] Under Amendment X of the United States Constitution, states possess reserved powers separate from the federal government's powers.[2] These reserved powers grant each individual state the ability to create and abide by their own constitutions, statutes, and amendments, as long as there is no conflict with the United States Constitution.[3] Therefore, a state's power to create its own legislation allows it to utilize all, some, or none of the federal legislation or suggested materials as a model.[4]

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[1] *See* Ewing v. California, 538 U.S. 11, 29-30 (2003) (holding state's sentence not grossly disproportionate and not in violation of Eighth Amendment); *see also* Lockyer v. Andrade, 538 U.S. 63, 77 (2003) (upholding defendant's state sentence). "[I]t was not an unreasonable application of our clearly established law for the California Court of Appeal to affirm Andrade's sentence of two consecutive terms of twenty-five years to life in prison." *Id.* at 77.

[2] *See* U.S. CONST. amend. X (stating powers reserved to states). "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*; *see also* Alden v. Maine, 527 U.S. 706, 714 (1999) (reiterating states as sovereign entities); United States v. Darby, 312 U.S. 100, 124 (1941) ("There is nothing in the history . . . to suggest . . . its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.").

[3] *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding."); *see also* Darr v. Burford, 339 U.S. 200, 217 (1950) ("[S]tates have the major responsibility for the maintenance of law and order within their borders . . . .").

[4] *See* STANDARDS FOR CRIMINAL JUSTICE: SENTENCING pt. II, 18-2.1 (AM. BAR ASS'N 1994) (providing model for state legislature to view when designing sentencing system).

Standard 18-2.1 Multiple Purposes; Consequential and Retributive Approaches
A. Societal Purposes

Although states have some prohibitions of powers, they do possess the power to create their own sentencing statutes.[5] The ability to create state sentencing laws arises from Amendment X of the United States Constitution.[6] While keeping in mind that the interpretation cannot conflict with supreme laws, neighboring states can interpret sentencing models or create new sentencing laws however the state deems appropriate for its jurisdiction.[7] The existence of multiple state sentencing laws and one uniform federal sentencing guideline creates a question of whether or not this is the most effective method of dealing with criminal offenders.[8] Due to the increasing number of state sentencing guidelines and its supporters, state sentencing guideline developments are prospering.[9]

> (a) The legislature should consider at least five different societal purposes in designing a sentencing system:
>
> > i. To foster respect for the law and to deter criminal conduct.
> > ii . To incapacitate offenders.
> > iii. To punish offenders.
> > iv. To provide restitution or reparation to victims of crime.
> > v. To rehabilitate offenders.
>
> (b) Determination of the societal purposes for sentencing is a primary element of the legislative function. The legislature may be aided by the agency performing the intermediate function.

Id.; *see also* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM'N 2016) (providing federal sentencing guidelines). When a federal court in any district sentences a defendant, it looks to the U.S. Guidelines Manual provided by the United States Sentencing Commission. *Id.*

[5] *See infra* Part I, II, and III.

[6] *See* U.S. CONST. amend. X (expressing state powers).

[7] *See* Harmelin v. Michigan, 501 U.S. 957, 989 (1991) (recognizing varying levels of punishment for specific acts among states). One state may criminalize an act that another state does not criminalize, or assign a less severe punishment. *Id*. "What greater disproportion could there be than that?" *Id*. at 989-90; *see also* NORA V. DEMLEITNER, DOUGLAS A. BERMAN, MARC L. MILLER & RONALD F. WRIGHT, SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 7 (Wolters Kluwer, 2nd ed. 2007) (discussing historical trends in theory of punishment); NICHOLAS N. KITTRIE, ELYCE H. ZENOFF & VINCENT A. ENG, SENTENCING, SANCTIONS, AND CORRECTIONS: FEDERAL AND STATE LAW, POLICY, AND PRACTICE 222 (Found. Press, 2nd ed. 2002) (explaining diversity of state guidelines). "One continuing concern is the ability to individualize sentencing and consider a wide range of sentencing purposes while maintaining an equitable sentencing system." *Id.* at 215.

[8] *See* NICHOLAS N. KITTRIE, ELYCE H. ZENOFF & VINCENT A. ENG, SENTENCING, SANCTIONS, AND CORRECTIONS: FEDERAL AND STATE LAW, POLICY, AND PRACTICE 222 (Found. Press, 2nd ed. 2002) (reasoning greater state guidelines success due to lack of federal features included in them).

[9] *See id.* (analyzing why state sentencing guidelines are more popular than federal guidelines). State sentencing guidelines have the capability of "bringing greater fairness and rationality to sentencing, retaining more judicial discretion than federal version . . . permitting consideration of a wider range of sentencing purposes and offender characteristics," and "emphasizing the goal of predicting and avoiding prison overcrowding." *Id.* A more effective balance of "resource matching,

HISTORY

Although each state may create its own sentencing laws, the states tend to follow similar traditional social purposes behind sentencing.[10] Deterrence, incapacitation, rehabilitation, and retribution, or just punishments, typically fall under one of the main categories of sentencing.[11] The purpose of deterrence is to increase the number of law-abiding citizens by deterring the public with serious consequences for criminal behavior.[12] Because some form of incapacitation generally follows an offense, whether it be incarceration or non-prison sanctions, jurisdictions can decide on the degree of incapacitation for the offender.[13] While the punishing of offenders lost popularity around the 1950s, many states remain to keep punishment as the central objective of state sentencing laws.[14] When appropriate and achievable, reparation or restitution is sought to replenish victims of crimes for their losses suffered.[15] Rehabilitating offenders, whether incarcerated or not, has two intertwining goals: reform the offender while simultaneously accomplishing other societal objectives.[16]

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sanction severity and type, allowable sentencing factors, and the degree of case-level discretion" contribute to the state sentencing guidelines meeting more success than federal guidelines. *Id.* at 226.

[10] *See* NORA V. DEMLEITNER, DOUGLAS A. BERMAN, MARC L. MILLER & RONALD F. WRIGHT, SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 2 (Wolters Kluwer, 2nd ed. 2007) (addressing two categories of sentencing philosophers: consequentialist or deontological). Consequentialist philosophers "justify state punishment as a means of reducing the overall harms created by criminal behavior," while deontological philosophers "justify state punishment as a means of righting the moral wrongs of criminal behavior." *Id.*

[11] *See id.* (describing what is within each category); *see also Punishment – Theories of Punishment*, http://law.jrank.org/pages/9576/Punishment-THEORIES-PUNISHMENT.html (last visited Oct. 21, 2018) (claiming "[t]heories of punishment can be divided into two general philosophies: utilitarian and retributive."). Under the utilitarian theory, punishment is a form of discouraging or deterring future wrongdoing. *Id.* The retributive theory suggests criminals deserve punishment for their criminal behavior, focusing "on the crime itself as the reason for imposing punishment." *Id.*

[12] *See* Demleitner et. al., *supra* note 7, at 5 (summarizing theory behind deterrence). Deterrence can be a general punishment that "should prevent other people from committing criminal acts," or specific punishment that "should prevent the same person from committing crimes." *See also Punishment – Theories of Punishment*, http://law.jrank.org/pages/9576/Punishment-THEORIES-PUNISHMENT.html (last visited Oct. 21, 2018) (explaining types of deterrence).

[13] *See* Demleitner et. al., *supra* note 7, at 5 (reasoning behind incapacitating offenders).

[14] *See id.* (announcing return of punishing offenders).

[15] *See id.* (explaining concept of victim restoration).

[16] *See id.* at 5-6 (explaining purpose of rehabilitating offenders). The main goal of rehabilitating offenders is to reform them. *Id.* Rehabilitation also serves to deter criminal conduct and punish offenders. *Id.* at 6.; *see also Punishment – Theories of Punishment*, http://law.jrank.org/pages/9576/Punishment-THEORIES-PUNISHMENT.html (last visited Oct. 21, 2018) (stating rehabilitation typically includes treatment for afflictions and educational programs for competing in job market).

When a legislature is determining how to design and implement sentencing guidelines or laws, it must decide how much discretion is given to a judge or administrative agency.[17] For example, a legislature can determine that a certain crime be punishable by a set term of imprisonment with no judicial or administrative discretion, by a general range of imprisonment from which the judge will decide the sentence, or by an extremely wide range of imprisonment imposed by a judge with the duration of the sentence decided by an administrative agency.[18] Contemporary sentencing models stem from the previously mentioned statutory sentencing models and consist of determinate, indeterminate, mandatory minimums, presumptive sentencing guidelines, and voluntary and advisory sentencing guidelines.[19] Over the years, the popularity of some models have fluctuated.[20] Recently, some states have replaced indeterminate sentencing with a more structured sentencing model, involving determinate sentencing, mandatory minimum penalties, and sentencing guidelines.[21]

Should concern arise regarding the constitutionality of a state's sentence under the United States Constitution, after exhausting all appeals, motions, and habeas corpus petitions in the state court, the federal government may receive a petition for a writ of habeas corpus to hear the case, and render a decision.[22] A state prisoner can claim cruel and unusual

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[17] *See* Kittrie et. al., *supra* note 8, at 209-12 (discussing statutory sentencing models).

[18] *See id.* at 209-10 (citing state legislature's variety of statutory sentencing models). Utilization of these statutory sentencing models is not required, nor is there a rule against using a combination of the models, if applicable. *Id.* at 209.

[19] *See id.* at 211-12 (listing contemporary sentencing models). A determinate sentence involves a "sentence of incarceration in which an offender is given a fixed term that may be reduced by good time or earned time." *Id.* An indeterminate sentence gives "an administrative agency authority to release an offender and determine whether an offender's parole will be revoked for violations of the conditions of release." *Id.* The mandatory minimum is a sentence "that is specified by statute and that may be applied for all convictions of a particular crime or a particular crime in which special circumstances." *Id.* Presumptive sentencing guidelines can occur if:

> (1) the appropriate sentence for an offender in a specific case is presumed to fall within a range of sentences authorized by sentencing guidelines that are adopted by a legislatively created sentencing body, usually a sentencing commission; (2) sentencing judges are expected to sentence within the range or provide written justification for departure; (3) the guidelines provide for some review, usually appellate, of the departure.

Id. Recommended sentencing policies that are not required by law are voluntary and advisory sentencing guidelines. *Id.*

[20] *See* Kittrie et al*., supra* note 8, at 212 (describing transformation of sentencing from past to present).

[21] *See id.* (explaining recent changes in sentencing).

[22] *See* Duncan v. Henry, 513 U.S. 364, 365-66 (1995) (asserting state prisoners must alert state of federal claims under United States Constitution); *see also* Picard v. Connor, 404 U.S. 270, 275 (1971) (stating policy of federal-state comity in exhaustion doctrine); Darr v. Burford, 339 U.S. 200, 217 (1950) (explaining state court entitled to review its acts before state prisoner seeks federal

punishment under the Eighth Amendment if he or she is subjected to excessive sanctions.[23] The application of this doctrine, codified in 28 U.S.C. § 2254(b)-(c), requires that the state prisoner notify the state courts of the claim being challenged before a federal court can hear the prisoner's assertion regarding the legality of the current sentence.[24] This requirement ensures the state has an opportunity to correct any constitutional violations in the prisoner's claim first.[25]

PART I – MASSACHUSETTS SENTENCING LAWS

In Massachusetts, the theories surrounding punishment of criminal offenders consists of protection of the public, reformation of the criminal, retribution, and deterrence.[26] A first degree murder conviction is punishable by state imprisonment for life without parole.[27] A conviction of second degree murder is punishable by state imprisonment for life with eligibility of parole after the term of years fixed by the court pursuant to Chapter 279,

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relief); *see also* 28 U.S.C. § 2254(a), (d)(1)-(2) (2012) (citing federal remedies for state conviction and sentencing).

> The Supreme Court, . . . a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a). "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that – the applicant has exhausted the remedies available in the courts of the State . . . ." 28 U.S.C § 2254(b)(1)(A).

[23] *See Harmelin*, 501 U.S. at 993 (citing Page v. United States, 462 F.2d 932, 935 (1972)) (asserting it is not cruel and unusual punishment when sentence is within statutory limits proscribed).

[24] *See* 28 U.S.C. § 2254(b)(1)(A) (2012) (asserting state prisoner applicant must exhaust all remedies available in state courts). A state prisoner "shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). *See Picard*, 404 U.S. at 275-76 (discussing exhaustion doctrine application).

[25] *See* O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999) (requiring state prisoners allow state courts "full and fair opportunity to resolve federal constitutional issues . . . ."); *see also Duncan*, 513 U.S. at 365 (explaining how state prisoner can exhaust all state remedies).

[26] *See* 32 Mass. Prac., Crim. L. § 7 (explaining theories of criminal punishment).

[27] *See* MASS. ANN. LAWS ch. 265, § 2(a) (LexisNexis 2017) (providing sentence for first degree murder). "Murder committed with deliberately premediated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree." MASS. ANN. LAWS ch. 265, § 1 (LexisNexis 2017) (defining first degree murder). Murder that does not meet the first degree murder definition is murder in the second degree, which is a decision the jury finds. *Id.* (explaining who determines degree of murder and how); *see also* Commonwealth v. Angiulo, 615 N.E.2d 155, 161 (Mass. 1993) ("One convicted of murder in the first degree is subject to life imprisonment without the possibility of parole.").

Section 24 of the Annotated Laws of Massachusetts.[28] The court utilizes indeterminate sentencing and may fix a term of imprisonment with a minimum term not less than fifteen years and not exceeding twenty-five years, and a maximum term not exceeding the longest term of punishment for second degree murder fixed by the law.[29] Manslaughter is punishable by state imprisonment not exceeding twenty years or by imprisonment in jail or a house of correction not exceeding two and one half years, and a fine not exceeding one thousand dollars.[30] If the court sentences the defendant to state prison on a manslaughter conviction, the court fixes a maximum term not exceeding the longest term of punishment for manslaughter fixed by the law, twenty years in this case, and at least a one year minimum term.[31]

PART II – NEW HAMPSHIRE SENTENCING LAWS

In New Hampshire, a felony conviction can result in a defendant going to prison for more than one year.[32] New Hampshire separates felonious crimes into two classes, "A" and "B," however, although murder is a felony, it does not fall under either of these classes.[33] First degree murder, second degree murder, and manslaughter have their own sentencing

[28] *See* MASS. ANN. LAWS ch. 265, § 2(c) (LexisNexis 2017) (detailing sentencing for second degree murder); *see also* Commonwealth v. Mangum, 256 N.E.2d 297, 298 (Mass. 1970) (reinforcing state mandatory punishment of life imprisonment for second degree murder conviction). A significant difference between a sentence of life imprisonment for first degree murder and second degree murder is that a person convicted of first degree murder is not eligible for parole. Commonwealth v. Glass, 519 N.E.2d 1311, 1316 (Mass. 1988) (contrasting parole eligibility for two different crime convictions with similar sentences).

[29] *See* MASS. ANN. LAWS ch. 279, § 24 (LexisNexis 2017) (stating indeterminate sentencing for second degree murder); s*ee also* Commonwealth v. Perry, 450 N.E.2d 615, 619 (Mass. 1983) (explaining parole eligibility for second degree murder conviction after serving fifteen years in prison).

[30] *See* MASS. ANN. LAWS ch. 265, § 13 (LexisNexis 2017) (reviewing sentences for manslaughter); *see also* Commonwealth v. Catalina, 556 N.E.2d 973, 976 (Mass. 1990) (citing Commonwealth v. Godin, 371 N.E.2d 438, 442 (Mass. 1977)) (explaining common law is sole basis for manslaughter elements as there is no statutory definition); Commonwealth v. Knight, 637 N.E.2d 240, 247 (1994) ("[A]n unlawful killing that is not murder is manslaughter."); Commonwealth v. Skinner, 556 N.E.2d 1014, 1017 (Mass. 1990) (citing Lannon v. Commonwealth, 400 N.E.2d 862, 865 (Mass. 1980)) (emphasizing malice distinguishes murder and manslaughter). "Malice is an essential element of murder." *Lannon*, 400 N.E.2d at 865.

[31] *See* MASS. ANN. LAWS ch. 279, § 24 (LexisNexis 2018) (outlining indeterminate sentence for manslaughter). "[T]he minimum term shall be a term set by the court, except that, where an alternative sentence to a house or correction is permitted for the offense, a minimum state prison term may not be less than one year." *Id.*

[32] *See* N.H. REV. STAT. ANN. § 625:9(III) (LexisNexis 2018) (defining felony).

[33] *See id.* (categorizing murder felonies from A and B felonies).

laws.[34] A conviction of first degree murder holds a sentence of life imprisonment without parole.[35] A second degree murder conviction is punishable by a maximum term of imprisonment for life or the court may order its own term.[36] However, when a court orders a life sentence for second degree murder, both the minimum and maximum terms are within the court's discretion.[37] When a court orders a maximum term other than a life sentence for second degree murder, the minimum cannot exceed half of the maximum term.[38] If evidence supports the presence of an extreme indifference to the value of human life, then the jury may convict with murder in the second degree; if an extreme indifference does not exist, the jury may convict by manslaughter.[39] Manslaughter is punishable by imprisonment not exceeding thirty years.[40] In addition to a sentence of imprisonment, a fine may be imposed not exceeding $4,000 for a felony.[41]

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[34] *See id.* § 651:2(II) (showing first and second degree murder and manslaughter not under felony class).

[35] *See id.* § 630:1-a(III) (stating sentence for first degree murder).

> A person is guilty of murder in the first degree if he: (a) Purposely causes the death of another; or (b) Knowingly causes the death of: . . . . ['P]urposely' shall mean that the actor's conscious object is the death of another, and that his act or acts in furtherance of that object were deliberate and premeditated.

Id. §§ 630:1-a(I)-(II); *see also* State v. Greenleaf, 54 A. 38, 43 (N.H. 1902) (asserting state must show malice, deliberation, and premeditation for first degree murder conviction). Although premeditation and deliberation must occur before the actual killing by some amount of time, the time does not have to be long nor is there a particular amount of time required. State v. Shackford, 506 A.2d 315, 317 (N.H. 1986) (citing State v. Place, 495 A.2d 1253, 1255 (N.H. 1985)) (discussing elements of first degree murder).

[36] *See* N.H. REV. STAT. ANN. § 630:1-b(II) (LexisNexis 2018) (stating sentence for second degree murder). "A person is guilty of murder in the second degree if: (a) He knowingly causes the death of another; or (b) He causes such death recklessly under circumstances manifesting an extreme indifference to the value of human life." *Id.* § 630:1-b(I).

[37] *See id.* § 651:2(II)(d) (explaining indeterminate sentence for second degree murder conviction).

[38] *See id.* (outlining maximum and minimum terms for second degree murder conviction).

[39] *See* State v. Schultz, 677 A.2d 675, 678 (N.H. 1996) (reiterating critical factor of "extreme indifference" is degree of disregarding risks of death to another); *see also* State v. Dow, 489 A.2d 650, 652 (N.H. 1985) (quoting State v. Howland, 402 A.2d 188, 191 (N.H. 1979)) (explaining juries make factual determinations whether to convict defendant of second degree murder or manslaughter).

[40] *See* N.H. REV. STAT. ANN. § 630:2(II) (LexisNexis 2018) (stating sentence for manslaughter). "A person is guilty of manslaughter when he causes the death of another: (a) Under the influence of extreme mental or emotional disturbance caused by extreme provocation but which would otherwise constitute murder; or (b) Recklessly." *Id.* § 630:2(I).

[41] *See* N.H. REV. STAT. ANN. § 651:2(IV) (LexisNexis 2018) (describing potential additional punishment on top of imprisonment sentence).

PART III – NEW YORK SENTENCING LAWS

In New York, a felony means an offense for which imprisonment can exceed one year.[42] New York has classifications ranging from Class A to Class E for felonies, with Class A consisting of two subcategories, A-1 and A-II.[43] Within the individual section for a particular felony is the appropriate classification.[44] Murder in the first and second degree are class A-I felonies, manslaughter in the first degree is a class B felony, and manslaughter in the second degree is a class C felony.[45] The state abides by determinative sentences that run for a specific period and indeterminate sentences that state a minimum and maximum range.[46]

With some exceptions, if a court orders a sentence of imprisonment for a felony, it is an indeterminate sentence.[47] The term of an indeterminate sentence is to be not less than three years and depending on the felony class, the maximum term fixed by the court varies.[48] A class A felony maximum sentence term is life imprisonment, a class B felony sentence term cannot exceed twenty-five years, and a class C felony sentence term cannot exceed

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[42] *See* N.Y. PENAL LAW § 10.00(5) (Consol. 2018) (defining felony).

[43] *See id.* § 55.05(1) (stating felonies classified "for purpose of sentence"). This type of classification system seeks to avoid "the need for separate authorized sentences for each offense. Under this system the specific offenses are merely labeled as to category and all aspects of the sentence are dealt with in one title of the law." N.Y. PENAL LAW § 55.05 note (Consol. 2017) (Commission Staff Notes).

[44] *See id.* § 55.10(1) (explaining location of classification of felony).

[45] *See id.* §§ 125.15, .20, .25, .27 (classifying specific felonies).

> A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or (2) With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance . . . .

Id. § 125.20 (defining first degree manslaughter). "A person is guilty of manslaughter in the second degree when: (1) He recklessly causes the death of another person; or . . . (3) He intentionally causes or aids another person to commit suicide." *Id.* § 125.15 (defining second degree manslaughter).

[46] *See* People v. Hassin, 48 A.D. 2d 705, 705 (App. Div. 1975) (articulating if statute provides indeterminate sentence for certain criminal conviction, court cannot impose definite sentence); *see also* Robert Reuland, *New York Sentencing Chart: Criminal Sentences in New York*, LAW OFFICES OF ROBERT C. REULAND, P.C., http://www.reulandlaw.com/useful-info/new-york-sentencing-chart/ (last visited Sept. 23, 2018) (describing New York's felony classifications in statutes).

[47] *See* N.Y. PENAL LAW § 70.00 (Consol. 2018) (explaining type of imprisonment sentence for felony); People v. Kerrigan, 37 A.D.2d 770, 770 (App. Div. 1971) (reiterating imprisonment sentence for felony is indeterminate sentence with maximum of at least three years).

[48] *See* N.Y. PENAL LAW § 70.00(2) (Consol. 2018) (discussing indeterminate sentences broadly).

fifteen years.[49] Under an indeterminate sentence, the minimum period of imprisonment is to be not less than one year and similar to the maximum term, the court fixes the minimum period depending on the class of the felony.[50] With the exception of murder in the first degree, class A-I felony imprisonment periods are to be between fifteen years and twenty-five years.[51] Murder in the first degree, that does not obtain a sentence of death or life imprisonment without parole, requires a minimum imprisonment period between twenty and twenty-five years.[52] A defendant convicted of murder in the first degree and sentenced to life imprisonment without parole cannot become eligible for parole or conditional release and the sentence is an indeterminate sentence.[53] The minimum period fixed by a court for all other felonies is between one year and not more than one-third of the maximum term.[54]

ANALYSIS

Having uniform state sentencing guidelines or laws could create less confusion and more equality for the legal system across the nation, however, this uniform system would simultaneously take away from each state's independence.[55] Each state is aware of the most common and frequent crimes that occur within that state's borders, and overall, each legislature has a better understanding of what would benefit the state compared to other states.[56] In order to alleviate a strict and uniform sentencing standard that all states abide by, there is the option of having uniform sentence ranges for a

[49] *See id.* § 70.00(2)(a)-(c) (comparing felony classes' maximum term of sentence).

[50] *See id.* § 70.00(3) (describing minimum period of imprisonment under indeterminate sentences). This minimum period controls the length of time the prisoner must serve before becoming eligible for parole consideration. *Id.*

[51] *See id.* § 70.00(3)(a)(i) (pointing to A-I felony imprisonment minimum periods).

[52] *See id.* (highlighting A-I felony first degree murder minimum period of imprisonment); *see also* N.Y. PENAL LAW § 60.06 (Consol. 2018) (listing options that court can sentence defendant convicted of first degree murder).

[53] *See* N.Y. PENAL LAW § 70.00(5) (Consol. 2018) (stating life imprisonment without parole as indeterminate sentence).

[54] *See id.* § 70.00(3)(b) (defining minimum period fixed by court for all other felonies).

[55] *See* U.S. CONST. amend. X (asserting state powers).

[56] *See Harmelin*, 501 U.S. at 989-90 (contrasting punishment for particular crimes based on individual states desires); *see also* Alison Lawrence, *Making Sense of Sentencing: State Systems and Polices*, NAT'L CONF. OF ST. LEGISLATURES 32 (2015) (discussing states creating own unique sentencing system); Alison Lawrence, *Trends in Sentencing and Corrections: State Legislatures*, NAT'L CONF. OF ST. LEGISLATURES (2013) (declaring states involvement in collecting data to find effective sentencing guidelines and correction polices).

particular crime that it must be within and formulate a similar structure of communicating the sentences to readers.[57]

Although each state creates sentencing structures favoring their own respective desires, it is an interesting realization how bordering states sentencing structures and laws are different.[58] For instance, New York and New Hampshire classify felony crimes into different classes, each with their own individual particularized sentence, as opposed to Massachusetts where each criminal statute provides the penalties for particular felonies.[59] New York differentiates manslaughter from Massachusetts and New Hampshire by splitting it into first degree and second degree manslaughter, each categorized under a different felony class.[60] How states communicate penalties for felonies to the public is also unique.[61]

Massachusetts defines what constitutes first and second degree murder in the same statute.[62] The punishments for first and second degree murder appear in a separate statute.[63] Massachusetts does not have a statutory definition for manslaughter, however, there is a statute that solely addresses the punishment for an individual convicted of manslaughter.[64] Along with the aforementioned penalties in other statutes, Massachusetts

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[57] *See* Alison Lawrence, *Making Sense of Sentencing: State Systems and Polices*, NAT'L CONF. OF ST. LEGISLATURES 3 (2015) (defining sentencing systems); *see also* NICHOLAS N. KITTRIE, ELYCE H. ZENOFF & VINCENT A. ENG, SENTENCING, SANCTIONS, AND CORRECTIONS: FEDERAL AND STATE LAW, POLICY, AND PRACTICE 211-12 (Foundation Press, 2nd ed. 2002) (discussing sentencing options).

[58] *See* Brian J. Ostrom, Charles W. Ostrom, Roger A. Hanson & Matthew Kleiman, *Assessing Consistency and Fairness in Sentencing: A Comparative Study in Three States*, NAT'L CTR. FOR ST. CTS. (2008), http://www.ncsc.org/~/media/microsites/files/csi/assessing%20consistency.ashx (reporting considerable variation among state sentencing guidelines).

[59] *See* N.Y. PENAL LAW § 70.00 (Consol. 2018) (demonstrating usage of felony classes); N.H. REV. STAT. ANN. § 651:2(II)(a)-(b), (d) (LexisNexis 2018) (showing felony classes); MASS. ANN. LAWS ch. 265, §§ 1, 2, 13, 24 (LexisNexis 2018) (highlighting no usage of classes for felonies).

[60] *See* N.Y. PENAL LAW §§ 125.15, .20 (Consol. 2018) (exhibiting two degrees of manslaughter in New York); N.H. REV. STAT. ANN. § 630:2 (LexisNexis 2018) (defining manslaughter without degrees); MASS. ANN. LAWS ch. 265, § 13 (LexisNexis 2018) (defining manslaughter without degrees).

[61] *See* Alison Lawrence, *Making Sense of Sentencing: State Systems and Polices*, NAT'L CONF. OF ST. LEGISLATURES (2015) (describing each state's system as unique).

[62] *See* MASS. ANN. LAWS ch. 265, § 1 (LexisNexis 2018) (exhibiting two definitions in one statute).

[63] *See id.* § 2 (demonstrating usage of one statute to explain two different crimes' punishments).

[64] *See id.* § 13 (providing one statute solely for asserting manslaughter punishment); *Catalina*, 556 N.E.2d at 976 (citing Commonwealth v. Godin, 371 N.E.2d 438, 442 (Mass. 1977)) (stating no statutory definition for manslaughter).

provides a statute disclosing indeterminate sentences for an individual sentenced to state prison.[65]

New Hampshire divides first degree murder, second degree murder, and manslaughter into separate statutes; each respective statute defines the elements of the crime and the punishment for a conviction.[66] New Hampshire does provide a separate statute for sentences and limitations, however for first degree murder and manslaughter, the statute directs the reader to the statute pertaining to that particular crime, as that particular statute provides the sentence.[67] The sentencing and limitations statute addresses second degree murder by explaining the minimum term application based on the maximum term.[68]

New York has a separate statute for each crime and first degree murder, second degree murder, first degree manslaughter, and second degree manslaughter each also have their own statute describing the elements and classes of the felonies.[69] New York provides the sentence of imprisonment for each felony class in a separate statute.[70] This statute directs and unveils New York's usage of indeterminate sentences, alternative definite sentences, and determinate sentences.[71]

A structure that allows the court to fix the maximum within a statutory range is more beneficial to offenders because two separate convictions of the same crime may have unique fact patterns which could call for application of different terms.[72] Although there is no requirement that two separate defendants convicted of the same crime with similar facts receive equal punishments, a judge's discretion must remain in the particular statute's boundaries and not change the type of sentence from an indeterminate sentence to a determinate sentence.[73] The primary purpose of

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[65] *See* MASS. ANN. LAWS ch. 265, § 24 (LexisNexis 2017) (asserting indeterminate sentencing usage in Massachusetts).

[66] *See* N.H. REV. STAT. ANN. §§ 630:1-a, :1-b, :2 (LexisNexis 2017) (showing one statute containing definition and sentence of only one particular crime).

[67] *See id.* § 651:2 (providing sentencing for crimes).

[68] *See id.* § 651:2(II)(d) (explaining minimum sentence term for second degree murder).

[69] *See* N.Y. PENAL LAW §§ 125.15, .20, .25, .27 (Consol. 2017) (showing one statute describing only one crime and corresponding felony class).

[70] *See id.* § 70.00 (asserting sentence of imprisonment for felonies in one statute).

[71] *See id.* (highlighting usage of different types of sentences).

[72] *See* N.Y. PENAL LAW § 70.00 note (Consol. 2017) (Commission Staff Notes) (noting ability of court to fix maximum term of sentence according to each individual case); *see also* Alison Lawrence, *Making Sense of Sentencing: State Systems and Polices*, NAT'L CONF. OF ST. LEGISLATURES 4 (2015) (describing indeterminate sentencing as highly individualized penalty).

[73] *See* People v. Givens, 181 A.D.2d 1031 (App. Div. 1992) (citing People v. Brown, 136 A.D.2d 1, 16 (App. Div. 1988)) (discussing sentences for defendants in similar situations); People v. Hassin, 48 A.D. 2d 705, 705 (App. Div. 1975) (asserting court has no authority to impose determinate sentence when statute provides for indeterminate sentence).

requiring a maximum term of an indeterminate sentence to be at least three years is to assure that the parole board supervises the prisoner's return to society.[74] The minimum period a prisoner must serve before becoming eligible for parole gives the court, in some instances, more discretion to ensure the prisoner serves time for the crime committed. [75]

A determinate sentencing structure leaves no room for courts' discretion in deciding the length of a sentence, nor do parole boards play a role.[76] This type of sentencing system could be a strong deterrence for committing crimes because there is no option of pleading to or hoping for a lesser sentence.[77] Additionally, this could help long-term cost savings because repeat offenders will be in prison instead of society.[78] However, disadvantages of this system include overcrowding in prisons and increased costs of imprisonment.[79]

CONCLUSION

Each state may have its own sentencing structure based on the power granted to it by the United States Constitution. Because of this power, states currently vary in the structure of sentencing laws. As the past demonstrates, the types of sentencing laws change in order to accommodate the needs of states and to protect an ever-changing society. Although nationwide uniform sentencing laws may not be the appropriate solution, there should be some uniformity among the states. Regardless of what the sentencing structure and laws are in a state, the ultimate objective should be to protect the public by holding offenders accountable for their actions.

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[74] *See* N.Y. PENAL LAW § 70.00 note (Consol. 2017) (Commission Staff Notes) (noting ability of court to fix maximum term of sentence according to each individual case).

[75] *See* N.Y. PENAL LAW § 70.00 (Consol. 2017) (discussing imprisonment length and parole eligibility).

[76] *See* Alison Lawrence, *Making Sense of Sentencing: State Systems and Polices*, NAT'L CONF. OF ST. LEGISLATURES 4 (2015) (explaining determinate sentencing).

[77] *See id.* (noting lack of court's discretion in determinate sentences). The foundation for determinate sentencing is "to increase certainty in the amount of time served, improve proportionality of the sentence to the gravity of the offense, and reduce disparities that might exist when sentences are more indeterminate." *Id.*

[78] *See Sentencing – Sentencing Guidelines: Fair or Unfair, Further Readings*, http://law.jrank.org/pages/10153/Sentencing.html (last visited Sept. 30, 2018) (explaining advantages of determinate sentencing). States would save money on "property loss, losses from pain and suffering, lost wages, police security, and medical insurance costs resulting from the crimes of these offenders." *Id.*

[79] *See id.* (stating disadvantages of determinate sentencing structures).

FINANCIAL REGULATION – REGULATING A NEW SECTOR: HOW SHOULD REGULATORY AGENCIES CLASSIFY AND REGULATE VIRTUAL CURRENCIES? – *COMMODITY FUTURES TRADING COMM'N ("CFTC") V. MCDONNELL ET AL.*, 287 F. SUPP. 3D 213 (E.D.N.Y. 2018).

With the growing usage and awareness of virtual currencies, regulators are left to determine how to properly classify and regulate this undeveloped sector.[1] Classifying these digital assets as currencies, commodities, or securities will not only help embrace regulation, and thus support the legitimization of the new sector, but will also guide present and future agencies in their regulatory efforts.[2] In *CFTC v. McDonnell*,[3] the United States District Court for the Eastern District of New York issued its first published decision that considered whether virtual currencies are properly characterized as commodities.[4] While the court held that virtual currencies are "goods exchanged in a market for a uniform quality and value . . . falling within the common definition of [a] 'commodity,'" the question of whether a cryptocurrency is considered a commodity, security, or some other traditional form of investment, is highly dependent on the specific underlying facts and circumstances.[5]

Since 2015, the United States Commodity Futures Trading Commission ("CFTC") has held that virtual currencies, such as Bitcoin, should be defined and regulated as commodities.[6] While this was an

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[1] *See* CFTC v. McDonnell et al., 287 F. Supp. 3d 213, 260 (E.D.N.Y. 2018) (announcing issue faced by regulators); *see also* CFTC v. McDonnell, 321 F. Supp. 3d 366, 368 (E.D.N.Y 2018) (presenting premise of case); *see also* Daniel McAvoy, et. al., *Court Confirms CFTC Jurisdiction Over Cryptocurrency Fraud and That Virtual Currencies Are Commodities,* NIXON PEABODY (Mar. 8, 2018), https://www.nixonpeabody.com/-/media/Files/Alerts/2018-March/Court-confirms-CFTC-jurisdiction-over-cryptocurrency-fraud.ashx (comparing *CFTC v. McDonnell* to new sector of virtual currencies).

[2] *See McDonnell*, 287 F. Supp. 3d at 260 (discussing necessary regulatory oversight to increase economic prosperity).

[3] *See McDonnell,* 287 F. Supp. 3d, 218-19 (E.D.N.Y. 2018) (introducing facts of case in chief).

[4] *See id.* at 217 (articulating standing of Commodity Futures Trading Commission).

[5] *See id.* at 227-29 (treating virtual currencies as commodities). The court relied on CFTC v. Gelfman Blueprint Inc., No. 17-7181, 2017 WL 4228737 (S.D.N.Y. Sept. 21, 2017) to establish the CFTC's authority over fraud or manipulation involving traded virtual currencies. CFTC v. Gelfman Blueprint, Inc., No. 17-7181, 2017 WL 4228737 (S.D.N.Y. filed Sept. 21, 2017).

[6] *See* CFTC v. McDonnell, *supra* note 3 (discussing regulatory viewpoint of the CFTC); *see also* Mitchell Prentis*, Digital Metal: Regulating Bitcoin as A Commodity*, 66 CASE W. RES. L. REV.

accepted decision among regulators, it has not been adopted by any court until the U.S. District Court of the Eastern District of New York issued its decision in March 2018 establishing that virtual currencies should be properly characterized as commodities.[7] In *CFTC v. McDonnell*, the issue arose out of alleged fraud in connection with the solicitation of cryptocurrency and "fiat" currency from customers in exchange for advice and services associated with trading virtual currencies.[8] The court in *McDonnell* addressed two primary issues: "(1) whether virtual currency may be regulated by the CFTC as a commodity; and (2) whether the amendments to the Commodity Exchange Act ("CEA") under the Dodd-Frank Act permit the CFTC to exercise its jurisdiction over fraud that does not directly involve the sale of futures or derivative contracts."[9]

Judge Weinstein, of the presiding court, stated that "virtual currencies are goods that can be exchanged in a market place for a uniform quality and value and thus should be treated as a commodity."[10] The court

609, 626 (2015) (stating virtual currencies can be regulated by CFTC as commodities). Both virtual currencies and commodities can be defined as "goods" exchanged in a market for a uniform quality and value. *Id.* Due to their overlapping characteristics, virtual currencies can be defined as "commodities," thus granting regulatory power to the CFTC. *Id*.

[7] *See McDonnell*, 287 F. Supp. 3d at 218 (discussing background of Bitcoin and virtual currencies).

[8] *See id.* (presenting claim asserted against defendants). The name of the defendant's company was CabbageTech D/B/A Coin Drop Markets. *Id.; see also Fiat Money,* INVESTOPEDIA, https://www.investopedia.com/terms/f/fiatmoney.asp (last visited Oct. 7, 2018) (defining "Fiat Money").

> Fiat money is currency that a government has declared to be legal tender, but it is not backed by a physical commodity. The value of fiat money is derived from the relationship between supply and demand rather than the value of the material from which the money is made. Fiat money only has value because the government maintains that value, or because two parties agree on said value.

Fiat Money, INVESTOPEDIA, https://www.investopedia.com/terms/f/fiatmoney.asp (last visited Oct. 7, 2018).

[9] *See McDonnell*, 287 F. Supp. 3d at 217 (discussing how court viewed and dissected issues); *see also* McAvoy, *supra* note 1 (highlighting issues addressed in *McDonnell*).

> First, the [c]ourt found that the Commodity Exchange Act, or CEA, should be construed liberally, and that cryptocurrencies have many of the same qualities as traditional commodities such as gold. Second, it found that Section 2(c)(2)(C)(i)(II)(bb)(AA) of the CEA grants the CFTC jurisdiction over cryptocurrency spot markets involving the scienter-based crimes of fraud or manipulation, even though the CFTC does not have jurisdiction over these markets in the absence of manipulation or fraud. Third, the [c]ourt found that the CFTC has concurrent jurisdiction over these types of crimes with other regulatory agencies.

McAvoy, *supra* note 1.

[10] *See CFTC*, 287 F. Supp. 3d at 229 (discussing Judge Weinstein's holding); s*ee also* 7 U.S.C. § 1(a)(9) (2018) (defining commodity). The CEA defines commodities as:

in *McDonnell* listed a wide range of options for the potential regulation of virtual currencies by utilizing the current regulatory landscape and outlined not only options for individual regulatory agencies, but also presented the idea of interagency cooperation – a teamwork approach.[11] The court's opinion acknowledged and emphasized the difficulties of trying to regulate a new digital asset that can be classified as a commodity, but can also behave like a security or other forms of investments.[12] Although the world of virtual currencies lacks depth in regards to legal precedent, the court here was able to rely on a holding issued by the Southern District of New York.[13]

The *McDonnell* court recognized the power of the commission to bring forth actions stemming from any person using deceptive or manipulative tactics related to any sale of any commodity in interstate commerce, as previously established in *CFTC v. Gelfman Blueprint, Inc.*[14] The CFTC expanded its enforcement powers and established jurisdiction over virtual currencies traded in interstate commerce.[15] Although Judge Weinstein's opinion does not bind any other court, its value as the first published court decision regarding this topic is certain to be influential in future cases as a strong and reliable precedent.[16]

> . . .wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, Solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles . . . and all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in.

7 U.S.C. § 1(a)(9) (2018).

[11] *See McDonnell*, 287 F. Supp. 3d at 221 (describing potential options for regulating virtual currencies).

[12] *See id.* at 225 (recognizing difficulties in regulating currencies that behave similarly to commodities or other forms of investments); s*ee also Types of Investments*, FINRA, http://www.finra.org/investors/types-investments (last visited Oct. 7, 2018) (listing various investments). 'Traditional' forms of investments include stocks, bonds, mutual funds, bank products, options, annuities, alternative investments, futures, and insurance. *Id.*

[13] *See McDonnell*, 287 F. Supp. 3d at 227 (examining court's analysis in *CFTC v. Gelfman Blueprint, Inc.*). In *CFTC v. Gelfman*, the CFTC relied on the broad statutory authority of Section 9(1) of the CEA which focuses on fraud and manipulation involving commodities in interstate commerce. *See Gelfman Blueprint, Inc.*, 2017 WL 4228737.

[14] *See id.* (noting *McDonnell* court's recognition of what was established in *CFTC v. Gelfman Blueprint, Inc.*).

[15] *See id*. (describing expansion of regulatory powers of CFTC).

[16] *See* CFTC, *A CFTC Primer on Virtual Currencies*, LAB CFTC, (Oct. 17, 2017), http://www.cftc.gov/idc/groups/public/documents/file/labcftc_primercurrencies100417.pdf (stating CFTC's jurisdiction is implicated "if there is fraud or manipulation involving a virtual currency traded in interstate commerce."). This case answered two issues: (1) can virtual currency be regulated by the CFTC as a commodity and (2) do the amendments to CEA under the Dodd-

7 U.S.C. Ch. 1 helps to govern the commodities markets.[17] Under §13a-1(a), the CFTC may, "seek injunctive relief when it believes that an entity or person is in violation of the Commodities Exchange Act & Regulations (CEA)."[18] The statutes within the CEA are intended to be liberally interpreted and thus grant the CFTC more regulatory reach to ensure broad market protection for investors.[19] The CFTC may use this liberal interpretation of the CEA to employ its regulatory powers by pursuing civil actions or issuing administrative orders that help to create new precedent and interpretation of the CEA.[20] By charging civil actions and establishing its own administrative law, the CFTC is able to explore and determine the scope of its regulatory reach.[21]

The regulatory capacity of the CFTC has been established by broadly defining what is and what is not a "commodity" under the CEA.[22] The CEA defines commodities as "crops and goods" but also states that commodities include "all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in."[23] This interpretation has been further expanded upon by the court in *Barclays PLC,*[24] which established that the CEA covers both tangible and intangible

Frank Act permit the CFTC to exercise jurisdiction over fraud or manipulation that does not involved the sale of futures or derivative contracts. *Id.* Both answers are in the affirmative. *Id.*

[17] *See* 7 USC § 1 2018 (discussing statute governing activity in commodity exchange markets).

[18] *See* 7 U.S.C. § 13a-1(a) 2018 (noting circumstances under which CFTC may seek injunctive relief); *see also* CFTC v. Parnon Energy Inc., 875 F. Supp. 2d 233, 241 (S.D.N.Y. 2012) ("The Commission may only bring claims alleging violations of the CEA.").

[19] *See* CFTC v. Am. Precious Metals, LLC, 845 F. Supp. 2d 1279, 1282-83 (S.D. Fla. 2011) ("Chevron applies to the instant case because the CFTC is construing a jurisdictional provision of the CEA—a statute it is responsible for administering."); *see also* R&W Technical Servs. Ltd. v. CFTC, 205 F.3d 165, 173 (5th Cir. 2000) (stating court defers to agency's interpretation of statute "that the agency is responsible for administering."). When determining its own administrative law, the CFTC will seek to place a loose interpretation of its rules into writing as to not hamstring its own future regulatory efforts. *McDonnell,* 845 F. Supp. 2d at 1282-83.

[20] *See McDonnell*, 287 F. Supp. 3d at 223 (filing and simultaneously settling charges against Coinflip, Inc. (Coinflip) and its Chief Executive Officer). In the Coinflip Order, the CFTC took the view for the first time that bitcoin and other virtual currencies are commodities subject to CEA and CFTC regulations. *Id.*

[21] *See Gelfman Blueprint Inc.*, 2017 WL 4228737, at *12 (providing example of CFTC's expansion of regulatory reach).

[22] *See* 7 U.S.C. § 1(a)(9) (2018) (defining commodity), s*ee also Black's Law Dictionary*(10th ed. 2014) (defining commodity as "an article of trade or commerce"); *see also Merriam Webster*, https://www.merriamwebster.com/dictionary/commodity (last visited Feb. 5, 2018) (defining commodity as "an economic good such as. . . an article of commerce.").

[23] *See* 7 U.S.C. § 1(a)(9) (2018) (defining commodity).

[24] *See* In re Barclays PLC, CFTC, No. 15-25, 2015 WL 2445060, at *14 (CFTC May 20, 2015) (discussing regulation of tangible and intangible commodities). Examples of 'Intangible Commodities' include fixed interest rate benchmarks whereas 'Tangible Commodities' refer to more traditional forms of commodities such as corn, gold, etc. *Id.*

commodities when it ruled that the CFTC should regulate fixed interest rate benchmarks.[25] Due to the fluid and intangible nature of virtual currencies, they possess overlapping characteristics with commodities.[26]

In *Digital Metal: Regulating Bitcoin as a Commodity*, Mitchell Prentis explores the cross-over between the CEA's definition of a commodity and the characteristics of virtual currencies.[27] Prentis defines virtual currencies as "goods exchanged in a market for uniform quality and value," which falls well within both the general definition of "commodity" as well as the definition established by the CEA within 7 U.S.C. § 1a(9).[28] While this definition of "commodity" grants authority to the CFTC, it "does not preclude other agencies from exercising regulatory power when virtual currencies [function] differently than derivative commodities."[29] For example, if the virtual currency being offered or traded possesses traits characterizing it as a "security," the Securities and Exchange Commission ("SEC") would exercise their regulatory power rather than the CFTC.[30]

In its case versus McDonnell, the CFTC asserted that, due to their characteristics, virtual currencies have the ability to be regulated as a commodity.[31] The court categorized the virtual currencies as "goods exchanged in a market for a uniform quality and value," falling well within

[25] *See id.* (regulating fixed interest rate benchmarks as commodities as intangible commodities); *see also* Press Release, U.S. CFTC, Barclays to Pay $400 Million Penalty to Settle CFTC Charges of Attempted Manipulation and False Reporting of Foreign Exchange Benchmark Rates, U.S. CFTC (May 20, 2015), https://www.cftc.gov/PressRoom/PressReleases/7181-15 (discussing sanctions imposed on Barclays by CFTC). The CEA covers intangible commodities. *Id*. Barclays was charged with "attempted manipulation, false reporting, and aiding and abetting other banks' attempts to manipulate, global foreign exchange (FX) benchmark rates to benefit the positions of certain traders." *Id.*; see also Benchmark Interest Rate, NASDAQ, https://www.nasdaq.com/investing/glossary/b/benchmark-interest-rate (last visited October 27, 2018) (defining benchmark interest rate).

[26] *See* 7 U.S.C. § 1(a)(9) (2018) (describing characteristics of commodities under CEA).

[27] *See* Mitchell Prentis*, Digital Metal: Regulating Bitcoin as a Commodity*, 66 CASE W. RES. L. REV. 609, 626-32 (2015) (exploring similarities between traditional definition of commodities and characteristics of virtual currencies); *see also* Li Yusen, *Virtual Currency: Analysis and Expectation*, AM. J. ECON. (2015), available at http://article.sapub.org/10.5923.c.economics.201501.07.html (exploring characteristics and expectations of virtual currencies).

[28] *See* Prentis, *supra* note 27, at 630 (defining virtual currencies); *see also* Yusen, *supra* note 27 (acknowledging characteristics and expectations of virtual currencies).

[29] *See McDonnell*, 287 F. Supp. 3d at 228 (focusing on regulatory power given to CFTC through definition of "commodity").

[30] *See* Jay Clayton, *Statement on Cryptocurrencies and Initial Coin Offerings*, U.S. SEC & EXCH. COMM'N (Dec. 11, 2017), https://www.sec.gov/news/public-statement/statement-clayton-2017-12-11 (emphasizing SEC's intention to exercise power over virtual currencies deemed to be securities).

[31] *See McDonnell*, 287 F. Supp. 3d at 217 (summarizing the court's holding in favor of CFTC).

the common definition of "commodity" as established within the CEA.[32] This categorization by the court bolstered the CFTC's holding that not only can virtual currencies be regulated via the CEA as commodities, but the CFTC also possesses anti-fraud and manipulation jurisdiction over them.[33] While the CFTC categorizes virtual currencies as commodities and establishes its authority over virtual currency spot markets, they also recognize potential concurrent jurisdiction amongst other federal agencies.[34]

Although the CFTC has successfully identified traits that allow virtual currencies to be classified commodities, this new sector will be well molded and properly regulated through interagency cooperation.[35] Due to the fact-intensive nature of the cases concerning virtual currencies, details such as the manner in which a virtual currency is distributed, traded, used, or relied upon by an investor may have an effect on its classification as a commodity.[36] The court properly acknowledged the ever-changing

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[32] *See id.* at 228; *see also* 7 U.S.C. § 1(a)(9) (defining "commodity").

[33] *See Gelfman Blueprint Inc.*, 2017 WL 4228737, at *3 (discussing CFTC's authority over fraud and manipulation); s*ee also* Gregory S. Kaufman, et. al., *US District Court rules virtual currencies are commodities*, EVERSHEDS SUTHERLAND (US) LLP, (Mar. 13, 2018), https://us.eversheds-sutherland.com/NewsCommentary/Legal-Alerts/209561/Legal-Alert-US-District-Court-rules-virtual-currencies-are-commodities (last visited Oct. 7, 2018) (analyzing court's ruling that virtual currencies are commodities).

[34] *See McDonnell*, 287 F. Supp. 3d at 220 (discussing concurrent jurisdiction between federal agencies); *see also Spot Market,* INVESTOPEDIA, https://www.investopedia.com/terms/s/spotmarket.asp (defining "Spot Market" as market where financial instruments are traded for immediate delivery)."This varies from a futures market, since a futures contract is based on delivery of the underlying asset at a future date." *Id*.

> . . .other regulatory agencies that the Court believes may have jurisdiction over virtual assets, including: — The SEC, to the extent a token or cryptocurrency is a security under the Howey Test (test created by the Supreme Court for determining whether an arrangement qualifies as 'investment contract' that is deemed to be a security). — The Department of Justice and state criminal authorities where fraud or other crimes are involved. — The Treasury Department's Financial Enforcement Network, or FinCEN, in connection with violations of money laundering laws. — The Internal Revenue Service, or IRS, on gains and losses pertaining to virtual currencies and failures to properly report that income. — Self-regulatory organizations, or SROs, such as stock exchanges, that can help self-police virtual currency markets. — State regulators, including under money transmitter laws, where spot transaction exchanges may be required to register with agencies such as the New York Department of Financial Services. — Any combination of the above.

See Nixon Peabody, *supra* note 1.

[35] *See McDonnell*, 287 F. Supp. 3d at 220-21 (recognizing need for interagency cooperation in regulating virtual currencies).

[36] *See* Michael Larkin, *SEC Looks at This When Deciding If A Cryptocurrency Will Be Regulated*, INVESTOR'S BUSINESS DAILY, June 14, 2018, https://www.investors.com/news/sec-explains-cryptocurrency-security-asset-ico-regulation/ (identifying regulations used by SEC to determine whether cryptocurrency will be regulated).

regulatory environment within its exploration of the multiple avenues of regulation through their discussion of cooperation between the regulatory agencies.[37]

The emergence of a new sector, such as virtual currencies, creates a responsibility for the regulatory agencies, including the CFTC, to ensure responsible innovation and enhance current financial markets.[38] Regulators are tasked with harmonizing investor protection and systematic regulation while simultaneously possessing a duty to encourage innovation and not stifle it.[39] It is possible that the best way to encourage cooperation between regulatory agencies is for courts to issue opinions structured similarly to the court in *CFTC v. McDonnell*.[40] By analyzing not only virtual currencies on a generalized basis, but also looking at the facts specific to the case, the court establishes sound precedent which future regulators and market participants can rely on.[41]

> "[When] purchasers no longer have expectation of managerial stewardship from a third party, a coin is not a security," said William Hinman, the head of the SEC's division of corporate finance, at the Yahoo Finance All Markets Summit: Crypto. [I]nvestors could be buying coins in the belief they can profit when they [the company] go[es] public and [the currency] increase[s] in value.

Id.

[37] *See McDonnell*, 287 F. Supp. 3d at 220 (addressing overlapping and concurrent jurisdiction between regulatory agencies in oversight of virtual currencies).

[38] *See id.* at 241 (acknowledging necessity of utilizing regulation to foster open, transparent, competitive, and financially sound markets).

[39] *See* Desné Masie, *Why it would be in everybody's interests to regulate cryptocurrencies,* THE CONVERSATION, Feb. 11, 2018, http://theconversation.com/why-it-would-be-in-everybodys-interests-to-regulate-cryptocurrencies-91168 (discussing benefits of increased regulatory oversight); s*ee also* Joseph E. Stiglitz, *Principles of Financial Regulation: A Dynamic Portfolio Approach*, WORLD BANK RESEARCH OBSERVER, Spring 2001, https://openknowledge.worldbank.org/bitstream/handle/10986/17126/766530JRN0WBRO00Box374385B00PUBLIC0.pdf?;sequence=1&isAllowed=y (breaking down international analysis of threat posed by regulation to innovation). ". . .[O]verregulated financial system[s] . . . stifle innovation and the flow of credit to new entrepreneurs. . . ." *See* Stiglitz, *Principles of Financial Regulation: A Dynamic Portfolio Approach*, at 1.

[40] *See* 287 F. Supp. 3d at 213 (discussing strategies to encourage regulatory cooperation); *see also* Nixon Peabody, *supra* note 1 (specifying court's holdings within *CFTC v. McDonnell*).

[41] *See McDonnell*, 287 F. Supp. 3d at 241 (discussing mission of CFTC).

> "The mission of the CFTC is to foster open, transparent, competitive, and financially sound markets. By working to avoid systemic risk, the Commission aims to protect market users and their funds, consumers, and the public from fraud, manipulation, and abusive practices related to derivatives and other products that are subject to the Commodity Exchange Act (CEA)."

Id.

Although virtual currencies create obstacles such as regulation, oversight, and legitimization, there are major advantages to the utilization of decentralized financial systems.[42] A decentralized financial system has the profound ability to increase the accuracy and efficiency of transaction processing, increase the availability of financial freedom from centralized risks such as failed currencies and governments, and increase the efficiency of payment clearance, and support improved security through anonymity.[43] By addressing the challenge of interagency cooperation, federal courts and agencies have the ability to foster this new innovation, streamline the financial services industry and open the doors to further disruptive innovation and technology.[44]

In determining whether virtual currencies may be treated as commodities, the court in *CFTC v. McDonnell* correctly concluded that the nature of these currencies caused them to fall within the scope of the CFTC's regulatory powers. While this regulatory reach is well within the bounds prescribed to the CFTC, regulating a new currency with traits that have not yet been regulated necessitates open lines of communication between federal agencies sharing potential concurrent jurisdiction. With proper interagency cooperation, a wave of progressive regulation can be welcomed, and in the process, disruptive innovation can be fostered which has the power to change and improve the world as we know it today.

Nicholas Fusco

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[42] *See* Joseph Young, *Cryptocurrencies vs. Banks: Advantage of Decentralized Financial Systems*, COINTELEGRAPH, March 10, 2018, https://cointelegraph.com/news/cryptocurrencies-vs-banks-advantage-of-decentralized-financial-systems (discussing benefit of decentralized cryptocurrencies' ability to operate without single point of failure).

[43] *See id. (*listing advantages of decentralized financial system); *see also* Yingjie Zhao, *Cryptocurrency Brings New Battles into the Currency Market*, SEMINAR FUTURE INTERNET WS2014, March 2015, https://pdfs.semanticscholar.org/bc7b/8a0254abc94231c020cb11f66b4aead486b6.pdf (exploring benefits of virtual currencies and their effect on financial market); s*ee also* Kirk Semple & Nathaniel Popper, *Venezuela Launches Virtual Currency, Hoping to Resuscitate Economy*, THE NEW YORK TIMES, Feb. 20, 2018, https://www.nytimes.com/2018/02/20/world/americas/venezuela-petro-currency.html (detailing launch of Venezuelan virtual currency as response to financial crisis). In the midst of a financial collapse, Venezuela seeks to launch its own virtual and decentralized currency with aims to financially revive its economy. *Id*. It is with virtual currency that Venezuela looks to help their treasury pay off debt and increase imports of essential goods with the proceeds from their sale of oil. *Id.*

[44] *See* Stiglitz, *supra* note 39 (discussing regulation of virtual currencies and its relation to innovation).

CIVIL RIGHTS—SLAMMING SHUT THE COURTHOUSE DOORS: THE SUPREME COURT'S EXPANSIVE VIEW OF QUALIFIED IMMUNITY KILLS SECTION 1983 SUITS FOR EXCESSIVE FORCE AT SUMMARY JUDGMENT—*KISELA V. HUGHES*, 138 S. CT. 1148 (2018).

In recent years, numerous highly publicized police shootings have ignited a vigorous national debate over police use of deadly force.[1] The Fourth Amendment's prohibition against unreasonable seizures bars the police from using deadly force unless officers have probable cause to believe that a suspect poses an imminent threat of serious physical harm to the police or third parties.[2] Section 1983 of the Civil Rights of Act of 1871 allows

[1] *See* Scott Gleeson, *Colin Kaepernick decries police killings as 'lawful lynchings,'* USA TODAY (Apr. 21, 2018, 3:00 PM), https://www.usatoday.com/story/sports/nfl/2018/04/21/colin-kaepernick-police-killings-protest/539240002/ (describing ex-NFL player's campaign against police "use . . . of oppressive and excessive force"); Editorial Board, *Black man down — again*, WASH. POST (Mar. 26, 2018), https://www.washingtonpost.com/opinions/black-man-down—again/2018/03/26/e2dc5516-312d-11e8-94fa-32d48460b955_story.html?utm_term=.d1bfd1336350 (arguing police officers often fail to sufficiently evaluate situations before resorting to deadly force); Meridith Edwards & Dakin Andone, *Ex-South Carolina cop Michael Slager gets 20 years for Walter Scott killing*, CNN (Dec. 17, 2017), https://www.cnn.com/2017/12/07/us/michael-slager-sentencing/index.html (detailing sentencing of officer caught on video shooting unarmed African American man in back); *Trump: NFL kneelers 'maybe shouldn't be in country,'* BBC NEWS (May 24, 2015), https://www.bbc.com/news/world-us-canada-44232979 (reporting President Trump's criticism of NFL players for protesting police brutality against minorities); Erik Eckholm & Matt Apuzzo, *Darren Wilson Is Cleared of Rights Violations in Ferguson Shooting*, N.Y. TIMES (Mar. 5, 2015), https://www.nytimes.com/2015/03/05/us/darren-wilson-is-cleared-of-rights-violations-in-ferguson-shooting.html (chronicling federal civil rights investigation into 2014 shooting of Michael Brown).

[2] *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated."); Mapp v. Ohio, 367 U.S. 643, 654-55 (1961) (applying Fourth Amendment to state officials through Fourteenth Amendment Due Process Clause); *see also* Tennessee v. Garner, 471 U.S. 1, 11 (1985) (holding police may not use deadly force on fleeing suspect without probable cause suspect posed threat of serious physical harm to police or others). In *Garner*, when assessing the reasonableness of a "seizure" effectuated by the use of deadly force, the Supreme Court weighed the nature of the intrusion into the suspect's Fourth Amendment rights against the importance of the

citizens to sue police officers in federal court for Fourth Amendment violations stemming from unreasonable use of deadly force.[3] However, under the doctrine of qualified immunity, a police officer who unreasonably utilizes deadly force in violation of the Fourth Amendment is immune from § 1983 suit so long as the officer's conduct did not violate the plaintiff's "clearly established" constitutional rights of which a reasonable officer should have known.[4] In *Kisela. v. Hughes*,[5] the Supreme Court was tasked with determining whether an officer who responded to a call about a woman hacking a tree with a kitchen knife and found her standing near her roommate wielding a large knife violated her "clearly established" Fourth Amendment

government interests involved. *See Garner*, 471 U.S. at 7-8. The Court focused on the gravity of the intrusion into a citizen's personal liberty that deadly force necessarily entails. *Id.* at 9 ("The intrusiveness of a seizure by means of deadly force is unmatched . . . [t]he suspect's fundamental interest in his own life need not be elaborated upon.").

[3] *See* 42 U.S.C. § 1983. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding . . . .

Id. When Section 1983 was enacted in 1871 during Reconstruction, Congress was primarily concerned with providing judicial redress against a different variety of deadly force—the brutal tactics the Klu Klux Klan employed against newly freed slaves. *See* Monroe v. Pape, 365 U.S. 167, 175-80 (1961) (chronicling statements lawmakers made during debates on § 1983); *see also* McDonald v. City of Chicago, 561 U.S. 742, 857 (2010) (documenting racially motivated lynchings and other atrocities committed by Klan in aftermath of Civil War). Section 1983 was enacted for three primary purposes: to redress unconstitutional state laws, to provide a federal forum for constitutional violations committed by state officials when there was no remedy available under state law, and to supply a federal remedy for constitutional violations committed by state officials when a state court remedy was available in theory but not in actuality. *See Pape*, 365 U.S. at 173-74.

[4] *See* Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (recognizing government officials are immune from § 1983 liability unless official's conduct "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known."). While there does not need to be a case "directly on point" in order for a constitutional right to be "clearly established," existing precedent must define the constitutional right such that qualified immunity shields all officials from § 1983 liability except those that are "plainly incompetent or. . . knowingly violate the law." *See* Malley v. Briggs, 475 U.S. 335, 341(1986) (holding officers are immune from liability for defective warrants if "reasonably competent officer[s] would have concluded that a warrant should issue.").

[5] 138 S. Ct. 1148 (2018).

rights by shooting her four times.[6] Over a scathing dissent penned by Justice Sotomayor, seven justices concluded that Officer Kisela was entitled to qualified immunity because there was no binding Ninth Circuit precedent that clearly established shooting the plaintiff under those circumstances violated her right to be free from excessive force.[7]

On May 21, 2010, University of Arizona Police Department Corporal Andrew Kisela and officer-in-training Alex Garcia received a dispatch reporting that a woman was hacking a tree with a knife.[8] Upon arriving on the street where the woman was reportedly attacking the tree, officers were flagged down by the person who called the police to report the incident.[9] The caller provided officers with a description of a woman that was "screaming and acting erratically" while hacking a tree with a knife.[10] Moments later, a third officer arrived on the scene, and the officers "almost immediately" noticed a woman, later identified as Shannon Chadwick ("Chadwick"), standing behind a five-foot chain link fence with a locked gate in a nearby front yard .[11]

Both parties vigorously contested what exactly occurred over the next minute or so.[12] Shortly after officers noticed Chadwick, the police saw a woman who matched the description of the alleged tree hacker, later identified as the plaintiff Amy Hughes ("the plaintiff"), exit the house with a twelve-inch kitchen knife in hand and walk down the driveway towards Chadwick.[13] There was conflicting testimony regarding the plaintiff's

[6] *See id.* at 1153 (analyzing whether reasonable officer in defendant's position would have known shooting plaintiff violated her constitutional rights).

[7] *See id.* (holding defendant was entitled to qualified immunity because no precedent clearly established shooting plaintiff was illegal).

[8] *See* Hughes v. Kisela, No. 11-366, 2013 U.S. Dist. LEXIS 202101, at *2-3 (D. Ariz. Dec. 20, 2013) (describing how officers were notified of plaintiff's bizarre behavior). The dissent made much of the fact that the dispatch was classified as a "check welfare" call and did not report any criminal activity. *See Kisela,* 138 S. Ct. at 1157 (Sotomayor, J., dissenting) (arguing plaintiff holding kitchen knife did not justify use of deadly force).

[9] *See Kisela*, 2013 U.S. Dist. LEXIS 202101, at *2-3 (chronicling seqence of events officers encountered).

[10] *See id.* at 3 (relaying witness's communications with officers).

[11] *See id.* (recreating scene that confronted officers upon arrival).

[12] *See* Brief in Opposition to Petition for a Writ of Certiorari, at 7-14, Kisela v. Hughes, 138 S. Ct. 1148 (2018) (No. 17-467) (pointing out inconsistencies in Defendant's version of events). *But see* Reply in Support of Petition for Writ of Certiorari, 2-7, 138 S. Ct. 1148 (2018) (No. 17-467) (rebutting plaintiff's characterization of factual sequence leading up to shooting).

[13] *See Kisela*, 2013 U.S. Dist. LEXIS 202101, at *4 (chronicling Hughes conduct after leaving house); *see also* Reply in Support of Petition for Writ of Certiorari, at 3, Kisela v. Hughes, 138 S. Ct. 1148 (2018) (No. 17-467) (noting plaintiff moved towards Chadwick after exiting house).

demeanor after exiting the house: Chadwick claimed the plaintiff was "calm and. content," while the third officer asserted that she appeared "agitated" and repeatedly told Chadwick to "give it to me."[14] Regardless, the plaintiff moved towards Chadwick and came within five to six feet of her.[15] All three officers drew their guns and ordered the plaintiff to drop the knife at least twice.[16] Chadwick said something to the effect of "Take it easy," but the plaintiff continued to ignore the both Chadwick and the officers.[17] The chain link fence in the front yard blocked Kisela's line of fire, so he dropped to the ground, aimed his service weapon, and shot the plaintiff four times through the fence, non-fatally wounding her.[18]

In 2011, the plaintiff filed a § 1983 suit against Corporal Kisela in his individual and official capacity in federal district court in Arizona, alleging that Kisela used excessive force in violation of the Fourth Amendment.[19] The district court judge granted Kisela's renewed motion for

[14] *See* Hughes v. Kisela, 841 F.3d 1081, 1084 (9th. Cir. 2017) (emphasizing that Chadwick was never in fear of Hughes); *Kisela*, 2013 U.S. Dist. LEXIS 202101, at *3-4 (outlining Officer Kunz's observations); *see also* Brief for Petitioner, Kisela v. Hughes, 138 S. Ct. 1148 (2018) (No. 1 7-467) ("A witness later described [Hughes] as having been in the middle of the street 'screaming and crying very loud, holding a long knife that was like a butcher's knife . . . maybe a foot long,' and looking like "she was about to stab herself with the knife or do something crazy.").

[15] *See Kisela*, 138 S. Ct. at 1151 (recounting plaintiff approaching Chadwick). Kisela focused on the fact that the length of the kitchen knife paired with the plaintiff's distance from Chadwick placed Chadwick squarely within the "'kill zone'. . ...where she could have attacked Chadwick in less than half a second." *See* Reply in Support of Petition for Writ of Certiorari, at 5, Kisela v. Hughes, 138 S. Ct. 1148 (2018) (No. 17-467) (focusing on potentially deadly threat Hughes posed to Kisela).

[16] *See Kisela*, 138 S. Ct. at 1151 (explaining reason for shooting plaintiff). Kisela claimed that he saw the plaintiff raise the knife as though she were going to stab Chadwick. *See* Hughes v. Kisela, 841 F.3d. 1081, 1084 (9th Cir. 2016) (describing conflicting testimony regarding knife in plaintiff's hand). The two other responding officers did not corroborate this claim. *Id.* While Kisela asserted that officers instructed the plaintiff to drop the weapon mutliple times, Chadwick only recalled hearing "two commands in quick succession." *Id.*

[17] *See Kisela*, 138 S. Ct. at 1151 (applying summary judgment standard and concluding Chadwick's comment was directed at both officers and the plaintiff).

[18] *See id*. (detailing shooting). After the incident, officers learned that the plaintiff and Kisela were roommates, and that at the time of the shooting, the plaintiff was upset over a twenty dollar debt Chadwick owed her. *Id.* at 1151-52. At the time of the incident, the plaintiff was taking medication for bipolar disorder, and Chadwick did not believe that the plaintiff understood the police officers' commands. *See Kisela*, 841 F.3d at 1084. This information had little bearing on the legality of Kisela's decision to shoot the plaintiff because a reasonable officer in his position would not have been privy to that information when initially arriving on the scene. *Id.*

[19] *See* Hughes v. Kisela, No. 11-00366, 2012 U.S. Dist. LEXIS 64230, at *2-3 (D. Ariz. May 12, 2012) (granting motion for summary judgement as to negligence

summary judgment after concluding that his use of force was objectively reasonable.[20] The judge also opined that even if shooting the plaintiff was unreasonable, Kisela would have been entitled to qualified immunity from suit because his actions did not violate a clearly established constitutional right that a reasonable officer would have known.[21] On appeal, a Ninth Circuit panel reversed the district court's grant of summary judgment, holding that there were legitimate factual disputes regarding both whether Kisela's conduct complied with the Fourth Amendment, and whether he was entitled to qualified immunity.[22] Over a vigorous dissent joined by seven circuit judges, a splintered Ninth Circuit denied Kisela's petition for a

claim and denying motion as to § 1983 claim). The plaintiff's complaint asserted a state law negligence claim and a federal civil rights claim under 42 U.S.C. § 1983. *Id.* at *2-3. When Kisela moved to dismiss both claims, his motion were converted into a motion for summary judgement pursuant to Rule 56 "because the parties ha[d] submitted affidavits and other materials outside the pleadings." *Id.* at *1; *see also* Fed. R. Civ. P. 56. Kisela argued that he was entitled to summary judgment because shooting the plaintiff under the circumstances was reasonable and did not run afoul of the Fourth Amendment, and alternatively, that he was entitled to qualified immunity. *See Kisela*, No. 11-366, 2012 U.S. Dist. LEXIS 64230, at *7. The court denied the defendant's motion without prejudice, noting that the facts alleged in the complaint, if true, would not have entitled Kisela to qualified immunity because his act of shooting the plaintiff would have violated her "clearly established" Fourth Amendment right to be free from unreasonable seizures. *See id.* at *9-10 ("[I]t should have been clear to any reasonable officer that, under circumstances alleged in the complaint, firing at [the plaintiff] was objectively unreasonable.")

[20] *See Kisela*, 2013 U.S. Dist. LEXIS 202101, at *17-18 (concluding "the evidence presented does not raise a genuine issue of material fact or support a finding of excessive force"). Applying the objective reasonableness Fourth Amendment standard espoused by the Supreme Court in *Graham* and *Harris*, the district court judge concluded that "even considering Plaintiff's emotional state, it does not appear that the force used by Defendant was objectively unreasonable." *Id.* at 17; *see also* Scott v. Harris, 550 U.S. 372, 383 (2007) ("[I]n determining the reasonableness of . . . which a seizure is affected, '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'") (internal citations omitted). The judge pointed out that when assessing the reasonableness of a police seizure, courts must take into account the fact that officers often act in rapidly devolving and unpredictable situations. *See Kisela*, 2013 U.S. Dist. LEXIS 202101, at *15-16.

[21] *See Kisela*, 2013 U.S. Dist. LEXIS 202101, at *17-18 (concluding Kisela would have been entitled to qualified immunity from suit). Despite the fact the district court judge did not have to reach the qualified immunity issue because of his conclusion regarding the objective reasonableness of Kisela's conduct, he noted that Kisela would have been entitled to qualified immunity because under "the standard of 'whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted,' it appears that Defendant's conduct was reasonable." *See Kisela*, 2013 U.S. Dist. LEXIS 202101, at *18.

[22] *See Hughes*, 841 F.3d. at 1081 (determining Kisela was not entitled to summary judgment when viewing facts in light most favorable to non-moving plaintiff).

rehearing *en banc*, and Kisela appealed to the Supreme Court.[23] In a sharp rebuke of the Ninth Circuit, the Court issued a *per curiam* opinion summarily reversing the Court of Appeals' decision because "even assuming a Fourth Amendment violation occurred—a proposition that is not at all evident—on these facts Kisela was at least entitled to qualified immunity."[24]

In the aftermath of the Civil War, Congress enacted the Civil Rights of Act of 1871 to provide a mechanism for enforcing the Fourteenth Amendment against state and local government officials.[25] Section 1 of the

[23] *See* Hughes v. Kisela, 862 F.3d. 775 (9th Cir. 2017) (denying defendant's petition for rehearing *en banc*).

[24] *See Kisela*, 138 S. Ct. 1148, 1152-54 (2018) (admonishing Ninth Circuit for failing to adhere to binding precedent when engaging in qualified immunity analysis). The Court noted that this was not the first time it had warned the Ninth Circuit not define "clearly established rights" too broadly when applying the doctrine of qualified immunity. *Id*. at 1152 ("This Court has 'repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.'") (quoting San Francisco v. Sheehan, 135 S. Ct. 1765, 1775–76 (2015)).

[25] *See Pape*, 365 U.S. at 175-80 (exploring history of Civil Rights Act of 1871). Section
1983 was enacted as part of a large statute popularly known as the Ku Klux Act. *Id.* The act was a federal response to Southern government officials and the Ku Klux Klan's trenchant resistance to the implementation of Reconstruction, as well as a rash of unpunished criminal offenses committed against former slaves in the South. *Id.* at 171. President Grant implored Congress to enact measures designed to neutralize the Klan's reign of lawless terror in the South, declaring:

> A condition of affairs now exists in some States . . . rendering life and property insecure . . . The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States. . . .

Id. at 172-73. When analyzing the legislative of history of § 1983 in *Monroe v. Pape,* the Supreme Court identified three overarching goals of the statute: overriding state laws that violated the constitutional rights of individuals, providing a federal remedy where state law protections were inadequate, and providing a federal remedy where the state remedy, though adequate in theory, was not available in practice. *Id.* at 173-74. The third justification stemmed from the fact that in many instances, Southern states' criminal laws were not enforced against those who committed violent offenses against freed African Americans and their supporters. *Id.* Congressman Eli Perry succinctly summarized this lack of even-handed enforcement in the 1871 debates on the Act, observing:

> Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices. In the presence of these gangs all the apparatus and

Act, now codified as 42 U.S.C. § 1983, gave citizens a direct federal cause of action against "persons" who violate constitutional rights while acting under the color of state law.[26] Despite the statute's broad language, from 1871 to 1920, there were only twenty-one § 1983 actions filed, and until the 1960s, §1983 actions continued to constitute a small fraction of the federal docket.[27] As the number of constitutional rights applicable to state actors through the Fourteenth Amendment expanded, and the Supreme Court's interpretation of § 1983 liberalized, the number of § 1983 suits skyrocketed.[28] Today there are thousands of § 1983 suits filed annually,

> machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice. Of the uncounted scores and hundreds of atrocious mutilations and murders it is credibly stated that not one has been punished.

CONG. GLOBE, 42d Cong., 1st Sess., pt. 2, app. at 78 (1871).

[26] *See* 42 U.S.C. § 1983. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding . . . .

Id. State courts have concurrent jurisdiction over § 1983 suits. *See* Haywood v. Drown, 556 U.S. 729, 731 (2009).

[27] *See* Richard Briffault, *Developments in the Law: Section 1983 and Federalism*, 90 HAR. L. REV. 1133, 1161 n.139 (1977) (noting low number of 1983 suits filed from 1871 to 1920).

[28] *See Pape*, 365 U.S. at 183, 187-88 (holding that § 1983 applied to unlawful activities committed by officials vested with state authority even if their conduct violates state law); *see also* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690-91 (1977) (holding municipalities are "persons" that can incur liability under § 1983). In 1961, the Supreme Court's decision in *Monroe v. Pape* commenced a sharp uptick in the number of § 1983 actions by clarifying that the statute provided an independent federal cause of action supplemental to any available state remedies. *See Pape*, 365 U.S. at 183. Additionally, the *Monroe* Court clarified that the "under color of state law" language citizens to sue successfully state officials for conduct that violated state law as long as the official was acting with the apparent authority of the state at the time of the incident in question. *Id.* at 187-88. Only seventeen years later, the Court accelerated this trend by determining that municipalities can be subject to § 1983 liability. *See Monell*, 436 U.S. at 690-91. Municipal coffers provided an added incentive for potential plaintiffs to file § 1983 suits against municipal employees like police officers. *Id*.; *see also* Thurman v. Rose, 575 F. Supp. 1488, 1491 (N.D. Ind. 1983) ("Today, the swelling tide of § 1983 actions threatens to engulf the federal courts, and has no doubt forced the federal judiciary to rethink some of the premises underlying the arguments in support of turning § 1983 into a uniform "font" of federal tort law.").

forming ten percent of the federal civil docket, and the statute serves as an important vehicle for redressing constitutional injuries and holding government actors, like police officers, accountable for illegal conduct.[29]

As the number of federal civil rights lawsuits increased, the Supreme Court applied the doctrine of qualified immunity to shield government officials from §1983 liability.[30] Qualified immunity seeks to strike a balance between the public interest in deterring illegal acts committed by government actors and compensating the victims of such conduct, with the competing public interest in ensuring that meritless lawsuits are not allowed to unduly burden government officials by subjecting them to costly, time-consuming litigation.[31] In order to achieve these objectives, the Supreme Court refined qualified immunity analysis in *Harlow v. Fitzgerald* by refusing to conduct an inquiry into the government actor's subjective good faith and holding that qualified immunity shields government officials performing discretionary functions from suit as long as the official's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[32] After *Harlow*, courts

[29] *See* U.S. DISTRICT COURTS - JUDICIAL BUSINESS 2017 *available at* https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2017 (last visited Jan. 19, 2019) (noting there were 38,925 civil rights lawsuits filed in federal courts in 2017); *see also* U.S. Dep't of Justice, 92-BJ-CX-K026, *Challenging the Conditions of Prisons and Jails; A Report on Section 1983 Litigation* (1994) (detailing 25,030 § 1983 lawsuits sued against state prison systems in 1994).

[30] *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (articulating contemporary qualified immunity standard). Although the *Harlow* Court articulated the qualified immunity test that was ultimately applied in § 1983 suits, the *Harlow* decision only applied qualified immunity to a *Bivens* claim against Nixon administration officials for allegedly violating the plaintiffs' of First Amendment and statutory rights. *Id.* at 806; *see also* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 391 (1971) (recognizing cause of action against federal officials for violation of Fourth Amendment). *Bivens* actions are the functional equivalent of § 1983 suits, except the suits are filed against federal government actors for constitutional violations. *Id.* Qualified immunity was expressly applied to § 1983 suits two years after *Harlow*. *See* Davis v. Scherer, 468 U.S. 183, 193-94 (1984) (applying qualified immunity in § 1983 suit).

[31] *See Harlow*, 457 U.S. at 814-17 (discussing competing public policies underlying scope of qualified immunity).

[32] *See Harlow*, 457 U.S. at 818 (refining qualified immunity standard). The *Harlow* Court rejected the prior qualified immunity test, which required engaging in a subjective inquiry into official's good faith, because many courts treated an official's subjective intent as a factual question that must be resolved at trial. *Id.* at 816 ("[A]n official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury."). Allowing cases to proceed to trial solely to resolve questions regarding an official's subjective intent largely defeated the entire purpose of qualified immunity because even if the official was ultimately found not liable by a jury, the protracted and

assessing whether an official was entitled to qualified immunity at the summary judgement stage had to conduct a threshold inquiry to determine whether the right that was allegedly violated was "clearly established" by existing law: if the right was not clearly established, the case would be dismissed, because then a reasonable official would not have had reason to know his actions were unlawful.[33] The qualified immunity test requires determining whether a reasonable official would have known his conduct clearly violated the plaintiff's constitutional rights—the doctrine is intended to immunize "all but the plainly incompetent or those who knowingly violate the law" from § 1983 suits.[34]

Police use of deadly force is constrained by the reasonableness requirement of the Fourth Amendment.[35] In order to avoid summary judgment, plaintiffs suing police officers for excessive force under § 1983 must show both that the officer's actions violated the plaintiff's Fourth Amendment rights and that the right was "clearly established."[36] In determining whether a Fourth Amendment violation occurred, courts must

expensive litigation process would still distract officials from their governmental duties, inhibit discretionary action, and deter capable people from seeking government positions. *Id.* at 816-17. For qualified immunity to serve its purpose, the affirmative defense must be capable of terminating "insubstantial claims" prior to discovery. *Id.* at 816-18; *see also* Pearson v. Callahan, 555 U.S. 223, 231 (2009) ("Because qualified immunity is 'an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial.'") (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)).

[33] *See Harlow*, 457 U.S. at 818-19 ("If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.").

[34] *See Malley*, 475 U.S. at 344-45 (discussing intention of doctrine). Here, the court held that police officers applying for warrants are entitled to qualified immunity if reasonable officer could have believed that there was probable cause to support warrant. *Id.*

[35] *See* Tennessee v. Garner, 471 U.S. 1, 7 (1985) ("While it is not always clear just when minimal police interference becomes a seizure . . . there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."). Police officers are only permitted to employ deadly force if they have probable cause to believe that the suspect poses a threat of serious physical harm, either to the officers or to others. *Id.* at 11.

[36] *See* Pearson v. Callahan, 555 U.S. 223, 236-37 (2009) (reversing *Saucier* inquiry and allowing lower courts to decide which qualified immunity prong should be addressed first). In *Saucier*, the Court mandated that district court judges must first determine whether the plaintiff facially alleged a violation of any constitutional right at all before analyzing whether the constitutional right was clearly established. *See* Saucier v. Katz, 533 U.S. 194, 200-201 (2001). Eight years later, the Court shifted course and overturned the *Saucier* mandated sequence, concluding the lower courts should be allowed to decide which inquiry to conduct first in specific cases. *See Pearson*, 555 U.S. 223, 236-37.

assess the reasonableness of the use of force from the perspective of a reasonable officer on the street, and weigh the gravity of the intrusion into the individual's constitutionally protected interests against the "countervailing government interests" at stake.[37] For an officer's conduct to violate a "clearly established" Fourth Amendment right, the conduct must violate a right that is specifically defined by existing precedent to the extent that a "reasonable offi[cer] in the defendant's shoes would have understood that he was violating" the right.[38] While the Ninth Circuit Court of Appeals has evaluated police use of deadly force in a variety of contexts, the Supreme Court has explicitly warned "the Ninth Circuit in particular not to define clearly established [Fourth Amendment] law at a high level of generality" because doing so can result in officers being improperly denied the protections of qualified immunity.[39] Thus, determining whether an officer may invoke the shield of qualified immunity is an inherently fact-specific inquiry that requires comparing the facts of the case to existing precedent and ascertaining whether the caselaw would have made an objectively reasonable officer in the defendant's position aware that his conduct violated

[37] *See* Graham v. Connor, 490 U.S. 386, 396-97 (1989) (assessing Fourth Amendment reasonableness of police use of force when effecting arrest). Whether an officer utilized excessive force in violation of the Fourth Amendment requires that a court pay close attention to the facts of each case, by weighing factors including the seriousness of the crime under investigation, whether the suspect poses and imminent threat to the safety of officers or third parties, and whether the suspect is actively resisting arrest or fleeing. *Id.* at 396-97("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."). *See also* Scott v. Harris, 550 U.S. 372, 379-81 (2007) (concluding it was "quite clear" police did not violate Fourth Amendment when shooting suspect fleeing in high speed car chase that endangered lives of bystanders).

[38] *See* Plumhoff v. Rickard, 134 S. Ct. 2012, 2023 (2014) (stressing that officer must violate right that is clearly and specifically defined to forfeit qualified immunity).

[39] *See* Ashcroft v. al-Kidd, 563 U.S. 731, 742(2011) ("We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.") (internal citations omitted); *see also* Blanford v. Sacramento Cty., 406 F.3d 1110. 1117-19 (9th Cir. 2005) (holding officers who shot man that was wielding sword, behaving erratically, and seeking to enter residence were entitled to qualified immunity). *But see* Deorle v. Rutherford, 272 F.3d 1272, 1286 (9th Cir. 2001) ("Officer not entitled to qualified immunity because no reasonable officer could have believed shooting unarmed suspect in face with lead-filled beanbag was reasonable."); Harris v. Roderick, 126 F.3d 1189 (9th Cir. 1997) (holding FBI sniper shooting armed individual in back from a significant distance as he walked away constituted Fourth Amendment violation).

the plaintiff's Fourth Amendment rights.[40] The rational underlying the "clearly defined" requirement is that individual officers and police departments should not be subjected to costly litigation and liability for conduct without fair notice that the conduct is illegal.[41]

In *Kisela v. Hughes,* the Supreme Court declined to explore whether Corporal Kisela shooting the plaintiff constituted excessive force in violation of the Fourth Amendment and immediately commenced qualified immunity analysis.[42] The Court stressed that Kisela could only lose the protections of qualified immunity if existing precedent specifically defined the plaintiff's right to be free from unreasonable and excessive force to the extent that a

[40] *See* Anderson v. Creighton, 483 U.S. 635, 640 (1987) (internal citations omitted) (articulating how specifically precedent must define right for it to be deemed "clearly established"). In *Anderson*, Justice Scalia noted:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. But see id. at 648 (Stevens J., dissenting) (arguing Court improperly endorsed "a double standard of reasonableness . . . the constitutional standard already embodied in the Fourth Amendment and an even more generous standard that protects any officer who reasonably could have believed that his conduct was constitutionally reasonable."). Officers are not required to use the least intrusive or violent level of force as long as the force deployed is reasonable under the circumstances. *See* Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994) ("Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment . . . [i]n the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission.").

[41] *See H*ope v. Pelzer, 536 U.S. 730, 733-34 (2002) (recognizing importance of providing fair notice of illegality to police officers before imposing § 1983 liability); *Malley*, 475 U.S. at 341 ("[I]f officers of reasonable competence could disagree on this issue, immunity should be recognized."); Moore v. Pederson, 806 F.3d 1036, 1052 (11th Cir. 2015) (emphasizing that "fair and clear notice to government officials is the cornerstone of qualified immunity"); Soto v. Bzdel, 214 F. Supp. 2d 69, 73 (D. Mass. 2002) (reiterating government officials are immune from suit unless they have fair notice certain conduct is illegal).

[42] *See Kisela*, 138 S. Ct. at 1152 ("Here, the Court need not, and does not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes."). Prior to *Pearson*, the *Saucier* inquiry would have forced the Court to determine whether a Fourth Amendment violation occurred before addressing whether the right was clearly established. *See Pearson*, 555 U.S. at 231 (overturning *Saucier* and allowing lower courts to choose prong of analysis to perform first); *Saucier*, 533 U.S. at 200-01 (directing lower courts to determine whether facts alleged amounted to constitutional violation before determining whether right was clearly established); *see also* DONALD L. DOERNBERG & EVAN TSEN LEE, FEDERAL COURTS: A CONTEMPORARY APPROACH 636-637 (5th Ed. 2013) (observing *Saucier* sequence led courts to rule on constitutional questions that could have been avoided).

reasonable officer in Kisela's position would have understood that shooting the plaintiff violated the right.[43] The Court seemed to tilt disputed facts regarding the situation Corporal Kisela faced when arriving on scene in favor of the police, emphasizing the plaintiff's erratic behavior, failure to comply with officers' commands, and the seriousness of the threat she posed to Chadwick.[44] Moreover, the Court viewed the excessive force cases the Ninth Circuit relied on to support its conclusion that Kisela was not entitled to qualified immunity as supporting the opposite conclusion, that a reasonable officer in Kisela's position would not have known that shooting the plaintiff was unreasonable and excessive.[45] Finally, the Court criticized the Ninth Circuit for relying on *Glenn v. Washington County*,[46] because the case was decided a year after Corporal Kisela shot the plaintiff and thus could not have given Kisela notice that using deadly force in the circumstances he was confronted with was illegal.[47] Thus, because existing precedent did not establish that shooting the plaintiff in an attempt to protect Chadwick constituted excessive force, the Court concluded that Corporal Kisela was entitled to qualified immunity from the § 1983 suit and overturned the Ninth Circuit's reversal of summary judgment.[48]

Justices Sotomayor and Ginsberg viewed the record in a starkly different light than the seven justice *per curiam* majority.[49] The dissenting

[43] *See Kisela*, 138 S. Ct. at 1152-53 (emphasizing Fourth Amendment right to be free from excessive force must be specifically defined by existing caselaw).

[44] *See id.* at 1153 ("This is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment."). *But see* Mattos v. Agarano, 661 F.3d 433, 439 (9th Cir. 2011) (noting at summary judgment, courts must draw all reasonable factual inferences in favor of non-moving party).

[45] *See Kisela*, 138 S. Ct. at 1153-54 (explainging why cases cited by Court of Appeals support finding that Kisela was entitled to qualified immunity).

[46] 673 F.3d 864, 874-80 (reversing summary judgement for officers where officers shot intoxicated teenager armed with pocket knife with "beanbag" rounds fired from shotgun).

[47] *See Kisela*, 138 S. Ct. at 1154 (noting that *Glen* could not "have given fair notice to [Kisela] because a reasonable officer is not required to foresee judicial decisions that do not yet exist in instances where the requirements of the Fourth Amendment are far from obvious.").

[48] *See Kisela*, 138 S. Ct. at 1152 (holding that Kisela was entitled to qualified immunity).

[49] *See id.* at 138 S. Ct. at 1154-56 (Sotomayor, J., dissenting). Justice Sotomayor contended:

> The record, properly construed at this stage, shows that at the time of the shooting: Hughes stood stationary about six feet away from Chadwick, appeared "composed and content," . . . held a kitchen knife down at her side with the blade facing away from Chadwick. Hughes was nowhere near the officers, had committed no illegal act, was suspected of no crime, and

justices took particular issue with what they perceived as the Court's failure to properly view disputed facts in a "light most favorable" to the Plaintiff, the non-moving party, as is generally required at the summary judgement phase.[50] Viewing the facts in a light most favorable to the Plaintiff, Justice Sotomayor contended that shooting the plaintiff was unreasonable because officers were not investigating a crime, did not witness the plaintiff commit any crimes, she "never acted in a threatening manner," and she seemed to not to notice the officers' presence.[51] The dissent also pointed out that Kisela could have attempted to employ less lethal measures to subdue the plaintiff and protect Chadwick before resorting to deadly force.[52] Shifting focus to whether Kisela violated the plaintiff's "clearly established" Fourth Amendment rights, the dissent accused the Court of applying a higher standard that was tantamount to improperly requiring that the exact conduct at issue have been previously deemed illegal.[53] When addressing Ninth Circuit cases regarding police use of deadly force, the dissent relied heavily

> did not raise the knife in the direction of Chadwick or anyone else. Faced with these facts, the two other responding officers held their fire, and one testified that he "wanted to continue trying verbal command[s] and see if that would work.". . . But not Kisela. He thought it necessary to use deadly force, and so, without giving a warning that he would open fire, he shot Hughes four times, leaving her seriously injured . . . If this account of Kisela's conduct sounds unreasonable, that is because it was.

See Kisela, 138 S. Ct. at 1155 (internal citations omitted).

[50] *See Kisela*, 138 S. Ct. at 1154-56 (Sotomayor, J., dissenting) (contending facts sufficient to provide reasonable jury with basis for finding Kisela "needlessly resort[ed] to lethal force"). *See also* Tolan v. Cotton, 134 S. Ct. 1861, 1863 (2014) (holding at summary judgement "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor") (quoting Anderson v. Liberty Lobby, Inc., 477 U. S. 242, 255 (1986)).

[51] *See Kisela*, 138 S. Ct. at 1158 (characterizing disputed facts in light most favorable to Hughes).

[52] *See id.* at 11157 (highlighting expert testimony that asserted Kisela could have used Taser). *See* Headwaters Forest Def. v. Cty. of Humboldt, 240 F.3d 1185, 1204 (9th Cir. 2000) (holding that when suspect does not pose threat of immediate danger to others police must "consider 'what other [less intrusive] tactics if any were available' to effect their arrest") (quoting Chew v. Gates, 27 F.3d 1432, 1443 (9th Cir. 1994)). *But see* Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994) (recognizing officers do not have to choose least intrusive means available when attempting to subue dangerous suspects).

[53] *See Kisela*, 138 S. Ct. at 11158 (noting that precedent must only provide officers with "fair notice" that conduct was unlawful); *see also* Hope v. Pelzer, 536 U.S. 730, 741 (2002) (declaring that "officials can still be on notice that their conduct violates established law even in novel factual circumstances"). In *Hope v. Pelzer*, the Court determined that reasonable corrections officers should have known that punishing a prisoner by shackling him to a "hitching post" in the blazing Alabama sun for hours violated the Eighth Amendment despite the fact that there was not a previous case directly on point. *Id.* at 743-47.

on *Deorle v. Rutherford*[54] in support of its conclusion that a reasonable officer in Kisela's position would have known that shooting the plaintiff was unreasonable because she had not committed a serious crime, was not warned that she would be shot if she did not comply, was not a flight risk, and "presented no objectively reasonable threat to the safety of officers or others."[55] After citing several decisions that purportedly established that the "Fourth Amendment clearly forbids the use of deadly force against a person who is merely holding a knife and not threatening anybody with it," Justice Sotomayor criticized the Court's reliance on *Blanford v. Sacramento County*,[56] and sought to distinguish the *Blanford* plaintiff and the Civil War era cavalry sabre he wielded from the plaintiff and her knife.[57] Finally, the dissent pointedly accused the majority of exacerbating a "disturbing trend" in which the Court has almost exclusively used the drastic measure of summary reversal to grant officers qualified immunity, "transforming the doctrine into an absolute shield" from liability for police officers and eviscerating constitutional protections. [58]

Rather than needlessly deciding a constitutional issue and determining whether Kisela shooting the plaintiff violated the Fourth

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[54] 272 F.3d. 1272, 1282 (9th Cir. 2001) (holding shooting unarmed man in face with lead-filled "bean bag" shot was objectively unreasonable and violated Fourth Amendment). In *Deorle*, at least twelve police officers responded to the house of a distraught man was behaving erratically and screaming at officers. *Id.* at 1276. Although the man brandished several items that could have been used as weapons including a hatchet, unloaded crossbow, and wooden board, he dropped all the items when commanded to do so by officers. *Id.* With no warning, the defendant officer shot the man in the face with a lead filled beanbag shoot from a twelve gauge shotgun because the man was advancing towards the officer at a "steady gait." *Id.* at 1277. The force of the beanbag shot fractured the man's skull, put out his left eye, and left lead shot embedded in his skull. *Id*. at 1278.

[55] *See Kisela*, 138 S. Ct. at 1158 (Sotomayor J., dissenting) (contending *Deorle* gave Kisela fair warning shooting Hughes was unlawful). Glossing over the fact that the plaintiff was "armed with a large knife" and appeared ready to use it as a weapon when she was shot, Justice Sotomayor noted that kitchen knives can be used for "safe, benign purposes." *Id.* at 1159.

[56] 406 F.3d. 1110 (9th Cir. 2005).

[57] *See Kisela*, 138 S. Ct. at 1161 (arguing man armed with sword in *Blanford* posed more serious threat of harm than plaintiff).

[58] *See Kisela*, 138 S. Ct. at 1160-62 (Sotomayor J., dissenting). Justice Sotomayor declared:

> The majority today exacerbates that troubling asymmetry. Its decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.

See id. at 1162.

Amendment, the Court focused its inquiry on the other prong of qualified immunity analysis—whether Kisela violated a clearly established Fourth Amendment right of which a reasonable officer would have known.[59] In light of the *Pearson* Court's rejection of the rigid two-pronged *Saucier* sequence, the Court conformed to precedent and the doctrine of constitutional avoidance by determining whether it was clearly established that shooting the plaintiff under the circumstances constituted excessive force before deciding whether the plaintiff's constitutional rights were violated.[60] The crux of the disagreement between the majority and the dissenting justices hinged on the question of whether existing precedent clearly established that Kisela shooting the plaintiff constituted excessive force.[61] The dissenting justices contention that *Deorle* clearly established shooting Hughes violated the Fourth Amendment was misguided because of the fundamental factual difference between the two cases: the plaintiff was standing six feet away from a defenseless woman while carrying a "large kitchen knife" she had reportedly just been hacking a tree with, whereas in *Deorle*, an officer shot an unarmed and erratically behaving man in the face with a lead filled bean bag shot as he approached the officer.[62] The

[59] *See Kisela*, 138 S. Ct. at 1152 ("Here the Court need not, and does not, decide whether Kisela violated the Fourth Amendment.").

[60] *See* Pearson v. Callahan, 555 U.S. 223, 236-37 (2009) (rejecting *Saucier* inquiry and allowing lower courts to decide which qualified immunity prong should be addressed first); *see also* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."). *But see Kisela*, 138 S. Ct. at 1157-58 (Sotomayor J., dissenting) (analyzing whether Kisela's conduct violated Fourth Amendment and noting majority "sidestep[ed] the [constitutional] inquiry altogether").

[61] *See Kisela*, 138 S. Ct. at 1152 ("[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.") (quoting Mullenix v. Luna, 136 S. Ct. 305, 308 (2015)).

[62] *See Kisela* 138 S. Ct. at 1158-59 (Sotomayor J., dissenting) (arguing "[t]he majority struggles to distinguish *Deorle*, to no avail"). Justice Sotomayor's focus on the fact that a twelve-inch kitchen knife may be used for innocuous purposes ignores the fact that a civilian witness informed police that the plaintiff was hacking a tree with the knife, screaming, and acting erratically. *Id; see also Kisela*, 2013 U.S. Dist. LEXIS 202101, at *2-3. This reported behavior paired with the plaintiff's failure to comply with officers' orders, or even acknowledge their presence, was sufficient to make a reasonable officer believe that the plaintiff posed an imminent threat of serious injury or death to Chadwick. Moreover, Justice Sotomayor was incorrect in for asserting that the Court improperly inferred that Hughes was "within striking distance" of Chadwick: standing six feet from a person while wielding a foot-long knife makes it possible for the knife wielder to take a single step and stab the person, unquestionably placing the other individual within "striking distance." *See Kisela*,

difference between the gravity of the potential threat the knife-wielding plaintiff posed to Chadwick and the unarmed *Deorle* plaintiff posed to the officer is so readily apparent that a reasonable officer in Kisela's position could not have understood *Deorle* as proscribing using deadly force to protect Chadwick from the plaintiff's knife.[63] The dissent's expansive reading of *Deorle* contravened prior warnings from the Supreme Court to the Ninth Circuit regarding construing the *Deorle* decision too broadly when determining whether law is clearly established and would have subjected officers to liability for conduct that they would not necessarily have known was illegal.[64] The Court also recognized significant differences between the facts in the instant case and several other cases cited as support for denying Kisela qualified immunity, and criticized the Ninth Circuit for its dubious reliance on a case decided after the incident as support of the proposition that Kisela had fair notice that shooting the plaintiff was illegal.[65] As

138 S. Ct. at 1160. While Hughes had not committed a serious crime, a factor that weighs against deploying lethal force, this factor was subsumed by the fact that officers had reason to believe the plaintiff posed an imminent threat to Chadwick and was seconds away from assaulting her with a deadly weapon. *See Kisela*, 138 S. Ct. at 1158-59.

[63] *See Kisela*, 138 S. Ct. at 1154 (pointing out obvious factual differences between *Deorle* and instant case. *Compare Kisela* 138 S. Ct. at 1158-59 (Sotomayor J., dissenting) (arguing *Deorle* placed illegality of Kisela's conduct "beyond debate").

[64] *See* San Francisco v. Sheehan, 135 S. Ct. 1765, 1775-76 (2015) (instructing Ninth Circuit to define clearly established excessive force law specifically).

[65] *See Kisela*, 138 S. Ct. at 1154-55 ("*Glenn* 'could not have given fair notice to [Kisela]' because a reasonable officer is not required to foresee judicial decisions that do not yet exist in instances where the requirements of the Fourth Amendment are far from obvious.") (quoting Brosseau v. Haugen, 543 U.S. 194, 200, n.4 (2004)); *see also* Hughes v. Kisela, 862 F.3d 775, 794-95, n.2 (9th Cir. 2017) (Ikuta J., dissenting from denial of rehearing en banc) (criticizing majority's reliance on *Glen* because it was decided over a year after Kisela shot plaintiff). By relying on *Harris v. Roderick*, the dissenting justices and Ninth Circuit flouted Fourth Amendment deadly force jurisprudence by defining clearly established law extremely broadly. *See Kisela*, 138 S. Ct. at 1160 (Sotomayor J., dissenting) (arguing *Harris* established officers cannot use deadly force when person with weapons poses no "objective and immediate threat to officers or third parties"). In *Harris*, the Ninth Circuit denied qualified immunity to an FBI sniper that shot an armed man in the back at the Ruby Ridge standoff pursuant to modified rules of engagement that purportedly authorized agents to kill "any armed adult male observed in the vicinity of the Weaver cabin." *See* 126 F.3d 1189, 1193, 1202 (9th Cir. 1997). Shooting a person armed with a gun in the back from a long distance when the person is not an immediate threat to anybody is markedly different from shooting an erratically behaving woman armed with a knife as she advanced towards another person and repeatedly ignored officers' commands to drop the knife. *See Kisela*, 138 S. Ct. at 1154 ("Suffice it to say, a reasonable police officer could miss the connection between the situation confronting the sniper at Ruby Ridge and the situation confronting Kisela in Hughes' front yard.").

acknowledged by the Court*, Blanford v. Sacramento County* was the most factually similar Ninth Circuit excessive force case because the *Blanford* plaintiff was also armed with a knife-like weapon, ignored officers commands to drop the weapon, and officers reasonably believed, albeit mistakenly, that the *Blanford* plaintiff posed as an imminent threat to a third party.[66]

Determining whether precedent clearly established that Kisela's use of deadly force was illegal decided whether he was entitled to qualified immunity and a quick summary judgement, or subject to protracted litigation in which his conduct would ultimately be evaluated by a jury.[67] Justice Sotomayor's dissent raises the concern that the Court's qualified immunity analysis in excessive force cases imposes too heavy of a burden on § 1983 plaintiffs by requiring that there have been a "factually identical case to satisfy the 'clearly established' standard."[68] However, while the Court has unquestionably stressed the need for specifically defining excessive force jurisprudence in order for the right to qualify as "clearly established," this requirement of specificity is integral to ensuring qualified immunity functions to ensure that officers are only subjected to § 1983 suits if they have fair notice that the conduct in question is illegal.[69] Subjecting police officers to § 1983 liability for using deadly force they reasonably believed was lawful in an attempt to protect themselves or other others from imminent

[66] *See Kisela*, 138 S. Ct. at 1153-54 (observing similarities between situations officers confronted in *Blanford* and *Kisela*). Indeed, the instant case arguably presented officers with a more compelling reason for utilizing deadly force than in *Blanford*, because in that case, officers did not know whether the house the plaintiff attempted to enter while wielding a Civil War era sabre was occupied. *See* Blanford v. Sacramento County., 406 F.3d 1110, 1116 (9th Cir. 2005). By contrast, in the instant case, Corporal Kisela knew the plaintiff was within a few feet of her potential victim and reasonably believed she posed a threat to Chadwick. *See Kisela*, 138 S. Ct. at 1153.

[67] *See Kisela*, 138 S. Ct. at 1152 (acknowledging qualified immunity protects officers whose conduct does not violate "clearly established" constitutional rights reasonable officers would have known).

[68] *See id*. at 1161 (Sotomayor J., dissenting) (arguing Court has erected more stringent standard for the "clearly established" qualified immunity prong by requiring precedent where nearly identical conduct was unlawful).

[69] *See Kisela*, 138 S. Ct. at 1153 ("Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness."); *see also Malley*, 475 U.S. at 341 (emphasizing requirement of fair notice conduct is unlawful and declaring qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"); *Davis*, 468 U.S. at 183 ("[O]fficials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated.").

and serious physical harm would effectually punish officers for conduct they had no reason to believe was illegal, and potentially dissuade the police from quickly and decisively using deadly force in situations when just a seconds hesitation can prove fatal.[70] Moreover, while Justice Sotomayor's preference for allowing a jury to assess the reasonableness of police use of deadly force is in sync with caselaw that cautions against prematurely encroaching on the province of the jury, Sotomayor's broad conception of "clearly established law" would severely undercut qualified immunity because in order for the doctrine to serve its purpose, qualified immunity must be capable of terminating unjustified suits in their infancy.[71]

In defining the contours of qualified immunity as applied to deadly force suits brought under § 1983, the Court necessarily has to strike a balance between compensating grievously injured victims of police violence and deterring unlawful police conduct, with protecting officers from costly litigation and ensuring that officers will not hesitate to quickly and forcefully react in situations where individuals pose immediate risks of serious harm to the police or others.[72] While some have criticized the Court's recent qualified immunity jurisprudence as providing the police with nearly blanket

[70] *See Kisela*, 138 S. Ct. at 1152 (reiterating officers must have notice use of force was illegal); *see also* Dan Boylan, *Number of police officers killed in line of duty up sharply*, WASHINGTON TIMES (Dec. 27, 2018) https://www.washingtontimes.com/news/2018/dec/27/144-police-officers-died-in-line-of-duty-this-year/ (documenting nearly twelve percent increase in law enforcement officers killed on duty in 2018); Aamer Madhani, *Ferguson effect: 72% of U.S. cops reluctant to make* stops, USA TODAY (Jan. 11, 2017) available at https://www.usatoday.com/story/news/2017/01/11/ferguson-effect-study-72-us-cops-reluctant-make-stops/96446504/ ("More than three-quarters of U.S. law enforcement officers say they are reluctant to use force when necessary.").

[71] *See Kisela*, 138 S. Ct. at 1162 (Sotomayor J., dissenting) ("Rather than letting this case go to a jury, the Court decides to intervene prematurely, purporting to correct an error that is not at all clear."); *see also*
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56 (1986) (cautioning district courts against improperly granting summary judgment and "denigrat[ing] the role of the jury"). If qualified immunity cannot end insubstantial suits quickly, then officers are subjected to costly and time-consuming litigation, and the benefits of the doctrine are lost. *See also* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) ("[Qualified immunity] is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial."); *Harlow*, 457 U.S. at 818 (requiring that district courts make threshold determination of currently applicable law and whether it was clearly established before allowing discovery).

[72] *See Harlow*, 457 U.S. at 813-14 (recognizing "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees"); Scheuer v. Rhodes, 416 U.S. 232, 241-42 (1974), abrogated by Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (emphasizing "public interest" in rapid and decisive official action).

immunity for shooting civilians,[73] the Court has protected officers from incurring civil liability for conduct that is not obviously illegal and reduced the possibility that officers will fail to quickly employ force when presented with potentially lethal situations. It is a tragedy any time officers shoot and kill or injure a person that they reasonably, but mistakenly, believe poses an imminent threat of deadly harm.[74] However, by the same token, when officers have probable cause to believe a suspect poses a imminent threat of serious physical danger to others, just a moment of hesitation can prove equally as tragic.[75] In *Kisela v. Hughes*, the Supreme Court signaled that officers who use deadly force in reasonable conformity with existing Fourth Amendment jurisprudence do not have to fear costly § 1983 suits and continued a trend whereby § 1983 excessive force suits are increasingly disposed of at summary judgement when the officer's conduct does not violate clearly and specifically established law.[76] This trend will likely

[73] *See* Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 124 (2009) ("Qualified immunity has moved closer to a system of absolute immunity for most defendants, resulting in a finding of liability for only the most extreme and most shocking misuses of police power."); Alan K. Chen, *The Facts About Qualified Immunity**, 55 EMORY L.J. 229, 230-33 (2006). The Court's recent increasing willingness to dispose of cases at summary judgment appears aimed at providing officers with something closer to absolute immunity. *Id.*

[74] *See, e,g.*, Pollard v. City of Columbus, 780 F.3d 395, 403 (6th Cir. 2015) (holding officers entitled to qualified immunity for killing man they mistakenly believed was armed); *Blanford*, 406 F.3d 1110, 1114 (shooting sword-wielding man as he entered house officers did not know belonged to his parents and paralyzing him); Slattery v. Rizzo, 939 F.2d 213, 216-17 (4th Cir. 1991)(Powell, J., sitting by designation)(concluding officer was entitled to qualified immunity when he mistakenly believed that beer bottle in suspect's hand was gun).

[75] *See, e.g.*, Nicole Darrah, *Milwaukee cop killed serving warrant ID'd, leaves behind wife, child* FOX NEWS (Feb. 7, 2019) https://www.foxnews.com/us/milwaukee-police-officer-shot-killed-while-serving-warrant-medical-examiner-says (reporting shooting of Milwaukee police officer); *Two rookie police officers shot and killed in two days*, ABC 7 NEWS (Jan. 11, 2019), https://abc7news.com/two-rookie-police-officers-shot-and-killed-in-two-days/5056778/ (describing murders of female officers in Louisiana and California); Bill Chappell, *More Police Officers Died From Gunfire Than Traffic Incidents In 2018, Report Says*, NPR (Dec. 27, 2018) https://www.npr.org/2018/12/27/680410169/more-police-officers-died-from-gunfire-than-traffic-incidents-in-2018-report-say (noting fifty-two officers were shot and killed in 2018);
Laurel J. Sweet, *Police officer slain, woman killed in Weymouth*, BOSTON HERALD (July 15, 2018) https://www.bostonherald.com/2018/07/15/police-officer-slain-woman-killed-in-weymouth/ (chronicling murder of officer and elderly woman in Boston suburb).

[76] *See Kisela*, 138 S. Ct. at 1153.

continue unabated because recently confirmed Justice Brett Kavanaugh's view on qualified immunity appears to align with the Supreme Court's recent qualified immunity cases.[77]

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[77] *See* City of Escondido v. Emmons, 202 L.Ed.2d 455, 460 (U.S. 2019) (per curiam) (remanding because Court of Appeals defined "clearly established right" too generally); Hedgpeth v. Rahim, 893 F.3d 802, 809 (D.C. Cir. 2018) (concluding officer was entitled to qualified immunity for forcible arrest); Flythe v. District of Columbia, 791 F.3d 13, 21-22 (D.C. Cir. 2015). The court reversed summary judgment for officer because "[it] believe[d] that a reasonable jury could conclude that [the decedent] never threatened Officer Eagan with a knife" and the shooting was thus unreasonable. *Id.*; Hundley v. District of Columbia, 494 F.3d 1097, 1102 (D.C. Cir. 2007) (reversing due to inconsistent verdicts with respect to excessive force claim).

DIGITAL PRIVACY – IT AIN'T OVER TIL THE DEAD PERSON TWEETS – *AJEMIAN V. YAHOO!, INC., 84 N.E.3D 766 (MASS. 2017)*.

Planning your "digital afterlife" has become a common practice amongst tech-savvy consumers of the internet's top social media providers.[1] Companies not only implore you to think ahead about your digital footprint, but they have also started implementing afterlife-centric practices.[2] People wanting access to a deceased friends or family member's photos, memories, and statuses has become common, but determining who has the right to access information after death has invoked privacy concerns.[3] In *Ajemian v. Yahoo!, Inc.*,[4] the Supreme Judicial Court of Massachusetts ("SJC")

[1] *See* Jack Linshi, *Here's What Happens to Your Facebook Account After You Die*, TIME MAGAZINE (Feb. 12, 2015) (questioning legacy left by dead friends and family members). Facebook even allows you to write a message from the afterlife to friends or family you designate as a "legacy contact." *Id.* Google has an entire blog post dedicated to planning your digital afterlife. *See* Andreas Tuerk, *Plan Your Digital Afterlife with Inactive Account Manager*, GOOGLE: PUB. POLICY BLOG (Apr. 11, 2013), https://publicpolicy.googleblog.com/2013/04/plan-your-digital-afterlife-with.html (detailing blog-post dedicated to planning one's digital afterlife).

[2] *See* Linshi, *supra* note 1 (highlighting article aptly titled "Here's What Happens To Your Facebook Account After You Die").

[3] *See id*. (explaining Facebook not just for those still alive). In recent years, Facebook has changed the way it views afterlife privacy:

> Facebook announced Thursday a policy that allows you to designate a "legacy contact," who'll be allowed to "pin a post on your Timeline" after your death, such as a funeral announcement. The contact won't be able to log in as you or read your private messages, but will be allowed to respond to new friend requests, update your cover and profile photos, archive your Facebook posts and photos.
>
> Before, the Facebook profiles of the deceased could only be "memorialized," deleted or left unchanged after friends or family reported the deaths. Memorializing the profile involves freezing the account, which then no longer appears in searches or public notifications like birthdays, and can be viewed only by the user's friends.

Id.

[4] 84 N.E.3d 766, 768 (Mass. 2017) (discussing merits of stored communication and privacy).

> A federal law enacted as part of the Electronic Communications Privacy Act of 1986 (*18 U.S.C. §§ 2701 to 2712*). The SCA protects the privacy of: Wire and electronic communications while in electronic storage (for example, e-mails stored on a server). Electronic information about subscribers and customers to remote computing and electronic communication services (for example, e-mail service subscriber names).

addressed the Stored Communications Act, 18 U.S.C. § 2702(b)'s ("SCA") bar against disclosing stored communications.[5] The SJC vacated a ruling of summary judgment in favor of Yahoo! citing the Fiduciary Access to Digital Assets Act of 2015.[6]

In August 2006, John Ajemian ("Ajemian") died unexpectedly.[7] Four years before his death, Ajemian and his brother, Robert, set up a Yahoo! email account together.[8] Upon Ajemian's death, Robert wanted access to the Yahoo! account.[9] After requesting permission from Yahoo! to access the joint account, Robert was denied.[10]

In their contract, Yahoo! stated when opening email accounts they have the "discretion to reject the personal representatives' request" upon the death of a user.[11] Ajemian did not leave a will or instructions for what to do

> The SCA, among other things, covers: Requirements for federal and state law enforcement to compel the disclosure of stored communications. Circumstances under which service providers may voluntarily disclose customer communications and records.

Id.

[5] *See* 18 U.S.C. § 2702(b) (stating stored communications including email and servers which contain digital information).

[6] *See Fiduciary Access to Digital Assets Act*, Revised (2015), UNIFORM LAW COMMISSION, http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20(2015) (explaining purpose of 2015 Fiduciary Act).

> A fiduciary is a person appointed to manage the property of another person, subject to strict duties to act in the other person's best interest. Common types of fiduciaries include executors of a decedent's estate, trustees, conservators, and agents under a power of attorney. This act extends the traditional power of a fiduciary to manage tangible property to include management of a person's digital assets. The act allows fiduciaries to manage digital property like computer files, web domains, and virtual currency, but restricts a fiduciary's access to electronic communications such as email, text messages, and social media accounts unless the original user consented in a will, trust, power of attorney, or other record.

Id.

[7] *See Ajemian*, 84 N.E.3d at 768 (postulating premise of case). Ajemian succumbed to unexpected injuries after a bicycle accident. However, Ajemian had not prepared or organized any of his social media sites or posts should an accidental death take place. *Id.*

[8] *See id.* at 769 (detailing formation of Yahoo! account). The account was equally shared between the brothers, Robert merely wanted access to what was partially his. *Id*. at 769-70.

[9] *See Ajemian*, 84 N.E.3d at 768 (highlighting premise of case). Ajemian's sister, Marianne, also wanted access to the account and was part of the suit with Robert. *Id.*

[10] *See id.* (expanding on denial of email access by Yahoo!). Yahoo! stated that their denial was based on the Stored Communications Act (SCA), 18 U.S.C. § 2701 citing concerns for customer privacy and customer protection. *Id.*

[11] *See id.* (explaining Yahoo!'s basis for denial). Since Robert was merely the personal representative of Ajemian's estate, the case would have vastly differed had a will or legal instrument been created by Ajemian prior to his death. *Id*.

with his online accounts pursuant to his death.[12] Upon Yahoo!'s denial, Robert and Mariane brought suit in Probate and Family Court for the family to gain access to Ajemian's email account.[13] The judge in the Probate and Family Court ordered summary judgment for Yahoo!.[14] The SJC heard the appeal, vacated the judgment, and remanded the case to Probate and Family Court for further proceedings.[15] The SJC transferred the case on its own motion.[16] In March 2018, the United States Supreme Court ("Supreme Court") denied Yahoo!'s petition for writ of certiorari. [17]

Access to stored communications is strictly limited to those with permitted access.[18] Preparing for digital afterlife may be daunting, but it provides guidance to personal representatives on what to do with active online accounts.[19] If no will or instructions are left, states vary on who may be granted access pursuant to a decedent's death because no court at a higher level has declared a legal standard that should be applied.[20] The SCA has a three-prong analysis for electronic communications.[21] The SCA "prohibits

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[12] *See Ajemian*, 84 N.E. at 768 (examining Ajemian wishes which were scarce as his death was unexpected and young).

[13] *See id*. at 769-70 (highlighting travel of case from family court).

[14] *See* Ajemian v. Yahoo!, Inc., 987 N.E.2d 604, 606 (2013) (showing prior history of case). After summary judgment was granted for Yahoo!, the appeal in the present case was commenced by the Ajemian siblings. *Id.* at 768.

[15] *See Ajemian*, 84 N.E.3d at 770 (explaining procedural history of prior history of case).

[16] *See id*. (explaining where case originated).

[17] *See id*. at 766 (highlighting travel of case). The Supreme Court of the United States has since cited to Ajemian quoting e-mail accounts are a "form of property often referred to as a 'digital asset.'"; *see also* Carpenter v. United States, 138 S. Ct. 2206, 2270 (2018) (detailing unlawful access to stored communications).

[18] *See* 18 U.S.C. § § 2701-02 (2018) (providing broad overview of Stored Communications Act).

[19] *See* Joe Zadeh, *How to Prepare for Your Digital Afterlife*, VICE NEWS (Sept. 4, 2014), https://www.vice.com/en_us/article/9bzgyv/how-to-prepare-for-your-digital-afterlife-joe-zadeh-212 (discussing how to handle online accounts after death).

> Google was the first multinational internet corporation to actually try to tackle the wider problem of ghosts in the machine. Their 'Inactive Account Manager,' a typically prudish and death-denying Western name, is an ambiguous service that focuses on granting your Google account and all its contents to a named inheritor, but doesn't really cater for the way in which most of our lives have supernova'd across at least 20 accounts in the last decade or so. It comes as no surprise that a more direct and focused attempt to service the digital afterlife should come from the death-accepting cultures of the Far East, where cremation simulators are regarded a little like theme park attractions.

Id.

[20] *See id*. (examining how different cultures deal with death on the internet).

[21] *See Ajemian*, 84 N.E.3d at 771 (explaining SCA's three-prong test).

> To achieve this purpose, the SCA provides a tripartite framework for protecting stored communications managed by electronic service providers. First, subject to certain

entities that provide services to the public from voluntarily disclosing the contents of stored communications unless certain statutory exceptions apply."[22]

Society has increasingly changed with the advent of the digital space.[23] In Japan, Yahoo! has attempted to counter the issue of death and social media by creating Yahoo!Ending.[24] Society also has to worry about what the effect of granting email access to families without explicit consent from decedent's might mean for other online institutions such as mobile banking, health care records or online diaries.[25]

Courts have also looked at statutory interpretation as a guiding force for delineating technicalities in the SCA.[26] While a court presumes that Congress's intentions are stated within the statute, courts will not read a statute to be incongruent with state law.[27] However, an ability to opt out of

> exceptions, it prohibits unauthorized third parties from accessing communications stored by service providers. *See* 18 U.S.C. § 2701. Second, it regulates when service providers voluntarily may disclose stored electronic communications. *See* 18 U.S.C. § 2702. Third, the statute prescribes when and how a government entity may compel a service provider to release stored communications to it. *See* 18 U.S.C. § 2703.

Id.

[22] *See id.* (explaining voluntary disclosure of digitally stored communications).

[23] *See* D. Casey Flaherty, *The End of Lawyers, Period.*, AMERICAN BAR JOURNAL (Mar. 3, 2016) *http://www.abajournal.com/legalrebels/article/the_end_of_lawyers_period/* (highlighting statistics on impact of internet on legal profession). A survey of American attorney's in 2015 found only 20% believed that "computers will never replace human practitioners" down 46% when the same survey was conducted in 2011. *Id.*

[24] *See* Anna Fifield, *New 'Yahoo Ending' Service lets users in Japan prepare for the inevitable,* THE WASHINGTON POST (July 21, 2014) https://www.washingtonpost.com/world/asia_pacific/a-new-yahoo-ending-service-lets-users-in-japan-prepare-for-the-inevitable/2014/07/20/d5751480-0866-4760-b41b-79aee25ad412_story.html?noredirect=on&utm_term=.78bcfc15f4e6 (expanding on how Yahoo!Ending works). Yahoo!Ending allows for deactivation of users accounts after their death as well as deleting stored content such as photos, videos and information in Yahoo Wallet. *Id.*

> While Google lets users anywhere plan for their afterlives or other periods of dormancy through its "Inactive Account Manager" function, Yahoo Japan goes a step further. In conjunction with Kamakura Shinsho, a funeral services company, it offers advice on how to write a will, plan a funeral and even find a grave.
> A basic package offered through Yahoo Japan costs about $4,500, including the funeral, embalming and cremation, plus a wake for 30 people. Feeding guests at the wake costs an extra $30 per person, and for an additional $1,500 you can get a monk to perform the funeral.

Id.

[25] *See id.* (discussing technological advances of social media).

[26] *See* BedRoc Ltd., LLC v. United States, 541 U.S. 176, 191-92 (2004) (showcasing how Congress could not have foreseen expansion of internet when creating SCA).

[27] *See id.* (detailing courts understanding of preemption right under State law).

state law does not save a state law from being preempted.[28] New rules and navigation with the advent of the internet has forced Congress to endure an introspective into what is protected and what is not by the SCA.[29]

The court in *Ajemian v. Yahoo!, Inc.* determined how parties must maintain and store digital communications into the afterlife.[30] The *Ajemian* court agreed with the concept that the world changed with the advent of the internet and the courts must do so as well.[31] The privacy and privilege that corresponds with an email address cannot be whittled down to the discretion of a service contract when the contract is disfavored as a matter of public policy.[32]

The Court undertook a statutory analysis to determine whether the SCA prohibited Yahoo! from disclosing the contents of the decedent's email account.[33] Yahoo! adopted a broad concept and attempted to create a vague rule that protected their interests over the wishes of a decedent's family and friends.[34] While wills and trusts are common nomenclature in American culture, the privacy of creating a document expressing one's wishes upon death is often lost in the minutia.[35] Examining the court's reasoning for disallowing summary judgment:

Yahoo! contends that 18 U.S.C. § 2702(a) prohibits it from disclosing the contents of the e-mail account, while the personal representatives argue that they fall within two of the enumerated exceptions. The first of these, the so-called "agency exception," allows a service provider

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[28] *See* Egelhoff v. Egelhoff, 532 U.S. 141, 151 (2001) (discussing how state law presumption works in regards to SCA).

[29] *See id.* at 143-52 (examining preemptive steps taken to thwart issues presented in SCA).

[30] *See Ajemian*, 84 N.E.3d at 771 (re-examining *Ajemian* as compared with privacy and stored digital communication).

[31] *See id.* at 772-74 (explaining court's reasoning).

[32] *See id.* at 771 (narrowing down terms of service between Yahoo! and decedent).

[33] *See id.* (detailing court's analysis of case in chief).

[34] *See id.* at 772 (discussing Yahoo!'s view of SCA and how it should be applied).

[35] *See* Barbranda Lumpkins Walls, *Haven't Done a Will Yet?,* AARP (2017) https://www.aarp.org/money/investing/info-2017/half-of-adults-do-not-have-wills.html, (featuring wills and trusts in American society). "[A] whopping 78 percent of millennials (ages 18-36) and 64 percent of Generation Xers (ages 37-52) do not have a will." *Id.*

> Preparing for the end of life is one of those things you know you *should* do — but have you actually sat down and done it? Probably not, according to a new survey from Caring.com, which found that only 4 in 10 American adults have a will or living trust. Happily, older adults appear to lead the pack in readying these important documents. While most U.S. adults age 18 and over have not done the needful, 81 percent of those age 72 or older and 58 percent of boomers (ages 53-71) do, in fact, have estate-planning documents. The study, conducted in January, asked more than 1,000 respondents whether they had estate-planning documents in case of their death.

Id. (emphasis in original).

to disclose the contents of stored communications "to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient." 18 U.S.C. § 2702(b)(1). The second, the "lawful consent" exception, allows disclosure "with the lawful consent of the originator or an addressee or intended recipient of such communication, or the [originator] in the case of remote computing service." 18 U.S.C. § 2702(b)(3).[36]

Yahoo! heavily relied on the service contract between themselves and the decedent but failed to introspectively understand how many people sign away everyday rights without completing a "meeting of the minds."[37] The *Ajemian* court correctly vacated the trial court's ruling of summary judgment for Yahoo! in that today's society "by recognizing that in today's society, an internet provider or user of services cannot unequivocally have unilateral rights over the contents of the e-mail account."[38] Society uses the internet and social media as an additional limb, creating a healthy flow between reality and fantasy.[39] The privacy implications of refusing those closest to a decedent access to their innermost information attempts to circumvent an entire sector of the legal field.[40]

Unfortunately, courts have not kept up with the intersection of privacy and technology and have failed families and decedents in protecting both those living and passed.[41] To rectify the system and to become more aligned with the *Ajemian* ruling, other courts should follow suit and examine how best to protect privacy while still allowing family intimacy.[42] No

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[36] *See Ajemian*, 84 N.E.3d at 772 (focusing on Court's reasoning for disallowing Summary Judgment).

[37] *See id.* (indicating Yahoo!'s contention that it is prohibited from disclosing email contents); *see also* 17 Am Jur.2d *Contracts* § 18 (1964) (defining meeting of the minds).

[38] *See Ajemian*, 84 N.E.3d at 769 (stating Court's basis for vacating judgment, remanding to Family and Probate Court).

[39] *See* Thomas Brewster, *Facebook is Playing Games With Your Privacy and There's Nothing You Can Do About It*, FORBES, (June 29, 2016) https://www.forbes.com/sites/thomasbrewster/2016/06/29/facebook-location-tracking-friend-games/ (investigating Facebook's effect in today's privacy and social media).

[40] *See id.* (highlighting minimal ability to protect yourself from privacy intrusion on World Wide Web).

[41] *See* Walls, *supra* note 35 (featuring statistics about adults who do or do not have wills and trusts).

[42] *See* Mark Scott & Natasha Singer, *How Europe Protects Your Online Data Differently Than the U.S.*, N.Y. TIMES (Jan. 31, 2016) *https://www.nytimes.com/interactive/2016/01/29/technology/data-privacy-policy-us-europe.html* (examining how other countries and entities protect privacy rights better than United States).

> In the United States, a variety of laws apply to specific sectors, like health and credit. In the European Union, data protection is considered a fundamental right, which can have far-reaching consequences in all 28 member states. All the talk about data privacy can

solution will come until a uniform consensus across states has been decided and resolved in favor of families and privacy.[43]

The court in *Ajemian* faced a difficult decision in weighing privacy and family rights, but ultimately decided the issue was best left to be resolved at a later date. While there are many opinions to this debate, it is advisable to protect oneself prior to death via a will or trust, in order to allow family members peace of mind and no fear of a tweet from the dead.

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get caught up in political wrangling. But the different approaches have practical consequences for people, too.

Id.

[43] *See id.* (showcasing more effective ways to manage online privacy).