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YOU'RE ON YOUR OWN, BABY: REFLECTIONS ON *CAPATO*'S LEGACY

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"[A]t the base of American civilization is the concept of the family and . . . the perpetuation of that concept is highly important."[1]

INTRODUCTION

Robert (Nick) Nicholas Capato and Karen Kuttner met in the mid-1990s, lived together for a few years, and later married.[2] Shortly after their wedding, Mr. Capato was diagnosed with cancer and was told that chemotherapy "might render him sterile."[3] The Capatos, however, desired to have children together, and so, before beginning medication, Nick deposited sperm in a sperm bank to be frozen and stored.[4] Despite Nick undergoing "aggressive treatment," the Capatos were able to conceive through sexual intercourse, and Karen gave birth to a son.[5] Shortly thereafter, Nick's health deteriorated.[6] Still, the Capatos "wanted their

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1. *Hearings Relative to the Social Security Act Amendments of 1939 Before the H. Comm. on Ways and Means*, 76th Cong. 1217 (1939) (statement of Douglas J. Brown, Chair of Advisory Council on Social Security).
2. Astrue v. Capato *ex rel.* B.N.C. (*Capato III*), 132 S. Ct. 2021, 2026 (2012). The Courts referred to Mr. Capato using his formal first name. *Id.* at 2025; *see also* Capato *ex rel.* B.N.C. v. Astrue (*Capato I*), No. 08-5405 (DMC), 2010 WL 1076522, at *1 (D.N.J. Mar. 23, 2010), *aff'd in part*, *vacated in part*, Capato *ex rel.* B.N.C. v. Comm'r of Soc. Sec. (*Capato II*), 631 F.3d 626 (3d Cir. 2011), *rev'd*, *Capato III*, 132 S. Ct. at 2021. I have chosen to use his nickname. *See* Brief for Respondent at *4, *Capato III*, 132 S. Ct. 2021 (2012) (No. 11-159).
3. *Capato III*, 132 S. Ct. at 2026.
4. *Id.*
5. *Id.*
6. *Id.*

son to have a sibling."[7] However, just a few months later, Nick passed away, leaving a will naming Karen, their son, and his children from a prior marriage as his heirs.[8] After Nick's death, Karen underwent fertility treatments, using Nick's frozen sperm.[9] She gave birth to twins, Brian Nicholas and Kayla N. Capato, eighteen months after their father's death.[10] Soon after the twins' birth, Karen applied for surviving child's insurance benefits under the Social Security Act on the twins' behalf, based on Nick's earning record.[11] Her claim was the basis of the U.S. Supreme Court's recent decision in *Astrue v. Capato*,[12] and is the focus of this Article. While the case made headline news,[13] there currently is a paucity of scholarship analyzing the case.[14] This Article explores the *Capato* decision.

Title II of the Social Security Act (the "Act") provides retirement and

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7. *Id*.

8. *Id.*

9. *Id*.

10. *Id*.

11. *Id.*

12. *See id.* at 2027. The case will no doubt catalyze the already growing scholarship on the legal and ethical ramifications of assisted reproductive technology ("ART"). *See, e.g.*, Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*, 46 ARIZ. L. REV. 91 (2004) [hereinafter Knaplund, *Postmortem Conception*]; I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423 (2011); I. Glenn Cohen, *Response: Rethinking Sperm-Donor Anonymity: Of Changed Selves, Nonidentity, and One-Night Stands*, 100 GEO. L.J. 431 (2012); Ruth Zafran, *Dying to Be a Father: Legal Paternity in Cases of Posthumous Conception*, 8 HOUS. J. HEALTH L. & POL'Y 47 (2007). The *Astrue* decision will likely invigorate the never ending debate over administrative discretion under the *Chevron* doctrine. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-45 (1984). The *Astrue* case may also impact scholarship on the significance of blood ties and genetic parenthood in families headed by same-sex parents. *See* Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1191-94 (2010); *see also* NAOMI CAHN, THE NEW KINSHIP: CONSTRUCTING DONOR-CONCEIVED FAMILIES 3-4 (2013). While posthumous conception implicates numerous ethical and legal issues, this Article will focus on the decision's lessons regarding the ideology and legal construction of the family.

13. *E.g.*, Adam Liptak, *Children Not Entitled to Dead Father's Benefits, Justices Rule*, N.Y. TIMES, May 21, 2012, http://www.nytimes.com/2012/05/22/us/children-not-entitled-to-dead-fathers-benefits-justices-rule.html; Associated Press, *Twins Conceived After Dad Died Won't Get Benefits*, FOX NEWS (May 21, 2012), http://www.foxnews.com/us/2012/05/21/twins-conceived-after-dad-died-wont-get-benefits/; Katie Moisse, *Twins Born to Dead Father Ineligible for Benefits*, ABC NEWS (May 22, 2012, 3:10 PM), http://abcnews.go.com/blogs/health/2012/05/22/twins-born-to-dead-father-ineligible-for-benefits/.

14. Recently some commentary has addressed the ramifications of the case, *see* Alycia Kennedy, Note, *Social Security Survivor Benefits: Why Congress Must Create a Uniform Standard of Eligibility for Posthumously Conceived Children*, 54 B.C. L. REV. 821, 843-54 (2013); Benjamin C. Carpenter, *Sex Post Facto, Advising Clients Regarding Posthumous Conception*, AM. C. TR. & EST. COUNS. J. 10-21 (forthcoming 2013), *available at* http://papers.ssrn.com/abstract=2184506.

disability benefits to insured wage earners.[15] In 1939, Congress amended Title II to provide benefits to a deceased wage earner's surviving family members, including minor children, who were dependent on the wage earner.[16] The question at issue in *Capato* was whether posthumously conceived children of a deceased wage earner qualify for survivors' benefits under the Act.[17] After a technical, black-letter examination of the statute at hand, the Court held that the twins, conceived from their dead father's frozen sperm, were not entitled to social security survivors' benefits.[18] Rejecting Karen's argument that the children of a predeceased wage-earning parent should obtain child survivor's insurance, the court deferred to the Social Security Administration's reliance on the state law governing the dead parent's will to determine who are his children for purposes of entitlements to Social Security benefits.[19]

One social implication of the *Capato* decision concerns the ability to create children without sexual intercourse (which traditionally has consummated the nuclear family), and to enable new forms of families to function. On its face, the mere fact that the U.S. Supreme Court, for the first time in history, heard and decided a case considering the status of children born of assisted reproductive technology, involving a non-traditional family and advanced technological developments, is cause for celebration. It demonstrates that the Supreme Court is up-to-date, in keeping with technological advances and social changes, and open to considering new forms of family. However, another social implication concerns the legal construction of power dynamics *within* heterosexual families. A broader look at the case, embedded in context, exposes just how pervasive old-norms of the family, as male-dominated, still govern the law, and are reflective in the issue at hand.

While the Supreme Court noted that "[t]he technology that made the twins' conception and birth possible . . . was not contemplated by Congress when the relevant provisions of the Social Security Act originated[,]"[20] it is nonetheless crucial in order to critically evaluate *Capato*'s legacy, to take a fuller account of the legislative history of the Act and of the historical context of reproduction and breadwinning, than that offered by the Court. Although it is likely that Congress did not contemplate posthumous conception when enacting the Social Security Act in the 1930s, history can shed light on the purposes of the Act and allow us to better interpret and understand its goals and underlying concepts.

This Article goes beyond *Capato*'s technical and narrow analysis and offers an analysis rooted in the historical context of reproduction and breadwinning. The Article illustrates that institutions enabling male control of female reproductive powers have long dominated history, and that breadwinning came

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15. 42 U.S.C. §§ 401-34 (2006 & Supp. V 2011).

16. Social Security Act Amendments of 1939, Sec. 201, Pub. L. No. 76-379, § 202, 53 Stat. 1360, 1364.

17. *Capato III*, 132 S. Ct. at 2027.

18. *Id.* at 2033-34.

19. *Id.* at 2028-34.

20. *Id.* at 2026.

to be one such institution. It further demonstrates that behind the enactment of Social Security survivors' benefits lays a concept of male power within the family. It is by situating *Capato* within this larger context that it becomes clear how the Act at issue in *Capato*, and the Court's affirmation of the Social Security Administration's statutory interpretation of the Act are underlined by a traditional male-dominated concept of family, in which male control over reproduction governs. The Supreme Court's decision, at least in the context of opposite-sex spouses, unfortunately, weakened women's power vis-à-vis their spouses regarding reproduction and left patriarchy to reign by tying men's desires regarding reproduction to their financial power.

On one level, this Article's contribution is shedding necessary light on an important case, and so far a rather under-studied one, pertaining to families using ART. This Article seeks to uncover some of the underlying presuppositions pertaining to the nature of the twenty-first century family by broadening the scope of inquiry and delving into context. The Article understands the *Capato* decision to be part of a long process of family construction, in which reproductive powers are male-dominated.

On a second level, this Article is part of an emerging area of law—the Law of Work and Family ("LWF")—which seeks to demonstrate the implications and connections between the family and the labor market.[21] This Article combines insights from two usually distinct areas of law, employment law and family law—insights regarding breadwinning and reproduction, which converge in the discourse over Social Security benefits awarded to surviving children of a deceased wage earner. Combining insights from these two distinct areas of law allows for close observation of the mutual effects of breadwinning on reproduction, and vice versa, and exposes the gendered family model espoused in *Capato*.

On a third level, this Article exemplifies how inequality is often hidden under the guise of a formally gender-neutral law, and that such law can have disparate implications for men and women because of the unequal gendered realities of familial care and breadwinning. It exposes *Capato*'s message to women to be financially independent, however, in a world in which financial independence and caretaking seldom go hand in hand.

Part I discusses the *Capato* case and the Supreme Court's interpretation of the provisions of the Act at hand. Part II offers a contextual history of reproduction and breadwinning in America. Part III probes into the history of the Act, and especially the provisions at issue in *Capato*. Part IV analyses the *Capato* decision in light of the context put forth, offers an explanation of the Court's opinion that

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21. *See*, *e.g.*, Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415 (2011); Arianne Renan Barzilay, *Labor Regulation as Family Regulation: Decent Work and Decent Families*, 33 BERKELEY J. EMP. & LAB. L. 119 (2012) [hereinafter Renan Barzilay, *Labor Regulation as Family Regulation*]; Arianne Renan Barzilay, *Back to the Future: Introducing Constructive Feminism for the Twenty-First Century—A New Paradigm for the Family and Medical Leave Act*, 6 HARV. L. & POL'Y REV. 407 (2012) [hereinafter Renan Barzilay, *A New Paradigm for the Family and Medical Leave Act*].

is informed by history, and shows how the Court drew the lines of the hetero-family model as, for the most part, still male-dominated. As this Article will demonstrate, the *Capato* Court's recent embarking into the world of reproductive technologies provides a unique opportunity to discuss the Court's construction of family, family relationships, and power dynamics for the twenty-first century.

I. A TWENTY-FIRST CENTURY FAMILY—THE CAPATOS IN COURT

Brian Nicholas Capato and Kayla N. Capato were conceived using the frozen sperm of their deceased father, Nick.[22] Robert (Nick) Nicholas Capato and Karen Kuttner (later: Karen Capato) met in the mid-1990s in Washington, lived together in Colorado and Florida, and were married in 1999 in New Jersey.[23] Shortly after their wedding, "[Mr. Capato] was diagnosed with esophageal cancer and was told that the chemotherapy he required might render him sterile."[24] However, the Capatos yearned to have children together, and so, before beginning chemotherapy, Nick "deposited his semen in a sperm bank" in Florida, where it was cryopreserved.[25] Despite Nick's undergoing an aggressive course of treatment for his disease, the Capatos were able to conceive through sexual intercourse, and Karen gave birth to a son, D.C., in August 2001.[26] Shortly thereafter, however, Nick's health worsened.[27] Still, the Capatos wanted their son to have a sibling.[28] But by March 2002, Nick passed away in Florida, where the Capatos had then resided.[29] After Nick's death, Karen underwent fertility treatments, first in Florida, then in New Jersey, using Nick's frozen sperm.[30] Karen conceived in January 2003 and gave birth to twins, eighteen months after Nick's death.[31] Soon after the twins' birth, Karen applied for surviving child's insurance benefits under the Act on their behalf, based on Nick's earning record.[32]

Today there are over half a million embryos in frozen storage in the U.S., countless vials of cryopreserved sperm, and a burgeoning fertility industry.[33] There is a growing trend of using ART, specifically including posthumous

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22. *Capato I*, No. 08-5405 (DMC), 2010 WL 1076522, at *3-6 (D.N.J. May 23, 2010), *aff'd in part*, *vacated in part*, *Capato II*, 631 F.3d 626 (3d Cir. 2011), *rev'd*, *Capato III*, 132 S. Ct. 2021 (2012).

23. *Capato II*, 631 F.3d at 627.

24. *Capato III*, 132 S. Ct. at 2026.

25. *Id.*

26. *Capato I*, 2010 WL 1076522, at *1.

27. *Capato III*, 132 S. Ct. at 2026.

28. *Id.*

29. *Id.*

30. *Capato I*, 2010 WL 1076522, at *3.

31. *Capato III*, 132 S. Ct. at 2026.

32. *Id.*

33. Judith Daar, *Is There Life After Death? The Rise of the High-Tech Family*, 54 ORANGE CNTY. LAW. 16, 17 (2012), *available at* http://www.calbarjournal.com/april2012/topheadlines/th3.aspx.

conception. Over one hundred women have already applied on behalf of their posthumously conceived children for social security benefits.[34]

Title II of the Act provides retirement and disability benefits to insured wage earners.[35] In 1939, Congress amended Title II to provide benefits to a deceased wage earner's surviving family members, including minor children, who were dependent on the wage earner.[36] Title II allows certain categories of children to receive survivors' benefits following the death of an insured individual.[37] To qualify for the child's insurance benefits under the Act, the applicant must be the child, as defined in § 416(e) of the Act, of an individual entitled to benefits.[38]

Section 416(e) defines "child" broadly.[39] But another provision, § 416(h) entitled "Determination of family status," contains reservations:

> In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death.[40]

Section 416(h) therefore refers to state intestacy law to determine whether a child is eligible for Social Security benefits. The question in *Capato* was which statutory provisions govern the availability of child survivors' benefits,[41] and the interpretation of the relationship between § 416(h) and (e) was at the forefront of the judicial opinions issued in the case, at all the different stages.

At first, the Social Security Administration rejected Karen's claim, and she subsequently applied for a hearing before an administrative law judge ("ALJ"), who upheld the denial.[42] The ALJ found that although allowing benefits appears

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34. Petition for a Writ of Certiorari at *19, *Capato III*, 132 S. Ct. 2021 (2012) (No. 11-159).

35. 42 U.S.C. § 40 (2006).

36. Social Security Act Amendments of 1939, Pub. L. No. 76-379, § 202, 53 Stat. 1362 (current version at 42 U.S.C. § 402 (2006)).

37. 42 U.S.C. § 402(d)(1) (2006).

38. *See id.* § 416(e) (For example, the term "child" in this provision means "(1) the child or legally adopted child of an individual, (2) a stepchild who has been such stepchild for not less than one year immediately preceding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died, and (3) a person who is the grandchild or stepgrandchild of an individual or his spouse," in certain circumstances).

39. *See infra* discussion. Additionally, the child must (A) have filed an application for benefits, (B) be unmarried and less than eighteen years old, and (C) have been dependent upon the deceased individual at the time of his or her death. 42 U.S.C. § 402(d)(1)(A)-(C) (2006).

40. 42 U.S.C. § 416(h)(2)(A) (2006).

41. *Capato II*, 631 F.3d 626, 628 (3d Cir. 2011), *rev'd*, *Capato III*, 132 S. Ct. 2021 (2012).

42. *Id.*

"consistent with the purposes of the Social Security Act," the twins were not eligible for Social Security survivor benefits.[43] The ALJ referred to § 416(h) and determined Nick was domiciled in Florida at the time of death and that, under Florida law, the twins were neither heirs nor beneficiaries of Nick's will and, therefore, they were not children of the deceased wage earner according to § 416(h)(2)(A) of the Act.[44]

The denial was upheld on appeal to the U.S. District Court for the District of New Jersey.[45] According to the district court, for purposes of determining survivors benefits under the Social Security Act, a "child" can mean (1) "the child or legally adopted child of an individual[,]" (2) a stepchild, and (3) a grandchild or step-grandchild.[46] However, the court stated that in determining whether one is a "child," § 416(h)(2)(A) provides the proper guideline: that the administration shall apply the applicable state law determining the devolution of intestate property.[47] Under Florida law, a child posthumously conceived is not eligible to inherit unless the child has been provided for in the decedent's will.[48] Nick did not include unborn children in his will.[49] Thus, the district court held the Capato twins were not entitled to inherit from their father and accordingly were not entitled to benefits pursuant to § 416(h)(2)(A)'s intestacy-law criterion.[50]

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43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 629; *see also* 42 U.S.C. § 416(e) (2006).

47. *Capato II*, 631 F.3d at 630. There is an alternative mechanism under 42 U.S.C. § 416(h)(2)(B), § 416(h)(2)(C)(i), or § 416(h)(2)(C)(ii), that requires the insured to be alive at the time of the child's conception, and, therefore, does not apply. *See* 42 U.S.C. § 416(h)(2)(B) (2006) (applicant is deemed to be the child of the insured if the insured and the other parent "went through a marriage ceremony resulting in a purported marriage between them" that would have been valid "but for [certain] legal impediment[s]"); *id.* § 416(h)(3)(C)(i) (applicant is deemed the child of the insured if the insured had acknowledged paternity in writing, or if a court decreed the insured to be the parent or ordered the insured to pay child support, and "such acknowledgment, court decree, or court order was made before the death of such insured"); and *id.* § 416(h)(3)(C)(ii) (applicant is deemed the child if there is satisfactory evidence that the insured was the applicant's parent, and the insured was living with or supporting the applicant at the time of death).

48. Under Florida's inheritance law, possible heirs to an intestate estate include children. FLA. STAT. §§ 731.201(9), 732.103(1) (2012). The law of intestate succession specifically refers to "[a]fterborn heirs" as "[h]eirs of the decedent conceived before his or her death, but born thereafter." *Id.* § 732.106. Florida law also provides that

> [a] child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will.

Id. § 742.17(4).

49. *See Capato III*, 132 S. Ct. 2021, 2026 (2012).

50. *Capato I*, No. 08-5405 (DMC), 2010 WL 1076522, at *5 (D.N.J. Mar. 23, 2010), *aff'd in part*, *vacated in part*, *Capato II*, 631 F.3d at 626, *rev'd*, *Capato III*, 132 S. Ct. at 2021.

Karen appealed to the U.S. Court of Appeals for the Third Circuit, which reversed the district court's ruling on the question of whether the twins were "children" under the Act.[51] The Third Circuit found the twins were "children" within the meaning of the Act,[52] then vacated and remanded to determine whether, as of the date of Mr. Capato's death, his children were "dependent" on him, which was an additional criterion for eligibility. Importantly, the *Capato II* court did not accept the district court's usage of § 416(h)(2)(A) to determine who is a child under § 416(e).[53] It held that the twins qualified as "children" under the Act according to § 416(e), and that § 416(h) had no relevance for determining whether a claimant was the "child" of a deceased wage earner when parentage was not in dispute.[54] The *Capato II* court noted that "[i]t goes without saying that these [reproductive] technologies were not within the imagination, much less the contemplation, of Congress when the relevant sections of the Act came to be,"[55] but held that the plain language of the statute dictates that the term "child" in § 416(e) of the Act requires no further definition when it is clear that the twins are the biological offspring of the Capatos.[56]

The U.S. Supreme Court granted certiorari, as the question of statutory interpretation raised was of recurring significance in the administration of social security benefits, and the courts of appeal were divided.[57] During oral argument, questions from the bench focused on understanding the doctrinal relationship between provision § 416(e) and (h).[58] In resolving the case, the Supreme Court embarked on a technical, black-letter examination of the relationship between the Act's provisions to determine whether the twins were eligible for benefits under the Act's definition of "children."[59] Karen Capato relied on the definition of "child" in § 416(e) when, as was here, the children were the uncontested

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According to the Court, since the twins did not meet the requirements of § 416(e) and § 416(h), there was no need to address dependency, the Act's second requirement of eligibility for benefits under 42 U.S.C. § 402(d) (2006). *Id.* at *7.

51. *Capato II*, 631 F.3d at 632 (2011).

52. *Id.*

53. *Id.* at 631.

54. *Id.* at 631-32.

55. *Id*. at 627.

56. *Id*. at 631.

57. *Compare id. and* Gillett-Netting v. Barnhart, 371 F.3d 593, 596-97 (9th Cir. 2004) (finding biological but posthumously conceived child of insured wage earner and his widow qualified for benefits), *with* Beeler v. Astrue, 651 F.3d 954, 960-64 (8th Cir. 2011), *and* Schafer v. Astrue, 641 F.3d 49, 54-63 (4th Cir. 2011) (finding posthumously conceived child's qualification for benefits depends on intestacy law of state in which wage earner was domiciled).

58. Transcript of Oral Argument at 4-8, 15-17, 23-24, 27, 38, 45, 52, 54, *Capato III*, 132 S. Ct. 2021 (2012) (No. 11-159); *see also* Kristine Knaplund, *Argument Recap: Old Law, New Technology, and Social Security Benefits*, SCOTUSBLOG (Mar. 22, 2012, 2:59 PM), http://www.scotusblog.com/2012/03/argument-recap-old-law-new-technology-and-social-security-benefits/.

59. *Capato III*, 132 S. Ct. at 2029.

biological child of a married couple.[60] By contrast, the Social Security Administration argued that § 416(h) governs the meaning of "child" in § 416(e)(1) and serves as a gateway through which all applicants for insurance benefits as "child" must pass.[61]

The Supreme Court examined the relationship among the different provisions of the Act, paying specific attention to its cross-references and textual cues, and determined that the Administration's "reading is better attuned to the statute's text and its design to benefit primarily those supported by the deceased wage earner [during] his . . . life time."[62] It declared that the Third Circuit's interpretation, that § 416(h) governs when a child's family status needs to be determined and § 416(e) governs when it does not, could not stand.[63] According to the Third Circuit, there was no need to determine a child's family status whenever the claimant was the biological child of a married couple.[64] But the Supreme Court ruled that "[n]othing in § 416(e)'s tautological definition" of "'child' referr[ed] only to children of married parents, . . . [n]or d[id] § 416(e) indicate that Congress intended 'biological' parentage to be a prerequisite to 'child' status."[65] The Supreme Court explained that a biological parent is not always a child's parent under law, and that marriage does not make a child's parentage certain, nor does the absence of marriage make a child's parentage necessarily uncertain.[66] It refused to treat children born in wedlock under a different statutory provision, as the Third Circuit decided.[67] The Supreme Court held that in order to qualify for benefits, the twins must pass through § 416(h)(2)(A)'s intestacy-law criterion.[68] While the Court sympathized with the Capatos, calling their circumstances "tragic," the Court nevertheless concluded that the application for benefits was governed by reference to state intestacy law rather than an interpretation of the federal rule that "the statute's text scarcely supports."[69]

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60. *Id.*

61. *Id.*

62. *Id.* at 2026. Furthermore, the Court noted that even if the administration's interpretation was not the only reasonable one, it was at least a permissible construction entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

63. *Capato III*, 132 S. Ct. at 2029, 2031.

64. *Capato II*, 631 F.3d 626, 631-32 (3d Cir. 2011), *rev'd by Capato III*, 132 S. Ct. at 2021.

65. *Capato III*, 132 S. Ct. at 2029-30.

66. *Id.* at 2030.

67. *Id.*

68. *Id.* at 2028.

69. *Id.* at 2034. The case was remanded for further proceedings to determine domicile and the applicable intestacy law. *Id.* State intestacy laws vary on whether and under which restriction posthumously conceived children may inherit. *See, e.g.*, CAL. PROB. CODE § 249.5(c) (2013) (allowing inheritance if child is in utero within two years of parent's death). Similar provisions are contained in COLO. REV. STAT. § 15-11-120(11) (2012); GA. CODE ANN. § 53-2-1(b)(1) (2012); IDAHO CODE ANN. § 15-2-108 (2013); IOWA CODE § 633.220A(1) (2013); LA. REV. STAT. ANN. § 9:391.1(A) (2013); MINN. STAT. § 524.2-120(10) (2012); N.D. CENT. CODE § 30.1-04-19(11) (2013); S.C. CODE ANN. § 62-2-108 (2012); and S.D. CODIFIED LAWS § 29A-2-108 (2013). *But*

The Supreme Court, it appears, was mindful of new forms of family in which biological bonds are non-conclusive in determining benefits, and marriage is not a prerequisite—perhaps specifically thinking of unmarried couples, single parents, or same-sex partners. Furthermore, from a doctrinal perspective, the Court's opinion is reasonable. The Social Security Administration's interpretation and application of an old statute to new technology resulted in an interpretation that merits deference under *Chevron*. There may also be ample normative, distributive and bio-ethical reasons to agree with the Court's conclusion, but these were not addressed as part of the opinion.

However, situating the decision within the context of the history of reproduction, breadwinning, and the purposes of Social Security precisely illuminates which power relations between a hetero-married couple are reconstructed by the decision, exposing the contours of gender and family legitimacy. Therefore, in order to understand the broader significance of the *Capato* decision, one must take account of a fuller context of reproduction, wage earning, and dependency.

II. REPRODUCTION AND PRODUCTION IN CONTEXT

Historically, postmortem deliveries took place when a husband passed away while his wife was pregnant, with the child born within a period of gestation after the father's death and considered the decedent's child for all purposes.[70] Today, reproductive technology, as exemplified in *Capato*, has made things more complex.[71]

Today, reproductive technologies, such as artificial insemination and in-vitro fertilization ("IVF"), are common practice and used in great numbers annually.[72] The first documented use of artificial insemination goes back to the late eighteenth century,[73] but artificial insemination did not become widely used until

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see, *e.g.*, ALA. CODE § 26-17-707 (2013); DEL. CODE ANN. tit. 13, § 8-707 (2013); FLA. STAT. § 742.17(4) (2012); N.M. STAT. ANN. § 40-11A-707 (2013); TEX. FAM. CODE ANN. § 160.707 (West 2013); UTAH CODE ANN. § 78B-15-707 (West 2013); VA. CODE ANN. § 20-158(B) (2013); WASH. REV. CODE § 26.26.730 (2012); WYO. STAT. ANN. § 14-2-907 (2013) (all either excluding posthumously conceived children from intestate succession or limiting the inheritance rights of such children to situations in which the deceased parent consented in a record to posthumous conception).

70. Daar, *supra* note 33, at 16.

71. *See* Transcript of Oral Argument, *supra* note 58, at 47.

72. Benjamin C. Carpenter, *A Chip Off the Old Iceblock: How Cryopreservation Has Changed Estate Law, Why Attempts to Address the Issue Have Fallen Short, and How to Fix It*, 21 CORNELL J. L. & PUB. POL'Y 347, 352-54 (2011); *see also* Michael E. Eisenberg, Comment, *What's Mine is Mine and What's Yours is Mine—Examining Inherence Rights by Intestate Succession from Children Conceived Through Assisted Reproduction Under Florida Law*, 3 BARRY L. REV. 127, 127 (2002); Browne C. Lewis, *Dead Men Reproducing: Responding to the Existence of Afterdeath Children*, 16 GEO. MASON L. REV. 403, 404 (2009).

73. Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at*

the 1950s.[74] By the 1980s, the first child was born in the U.S. using IVF, and today over 1% of all children born annually are conceived through IVF.[75] But, for those who have difficulty conceiving "naturally," using ART to have genetically related children is a very expensive endeavor. The average cost per cycle of IVF is over $12,000, and "actually producing a live birth through IVF" costs, on average, between $66,000 and $115,000.[76] Recent reports suggest that around one-third of women using ART are unmarried.[77]

Specifically for this analysis, cryopreservation of gametes offers gamete providers an option to freeze and store their gamete in order to procreate at a later time.[78] Posthumous conception is the fertilization of egg and sperm from a gamete provider who is deceased at the time of conception and implantation but who had gametes cryopreserved.[79] Cryopreservation may be used with either artificial insemination or IVF.[80] "The ability to freeze sperm and later thaw it while still retaining its fertility has been available since at least the 1940s,"[81] "and the first human pregnancy resulting from a frozen sperm was reported in" the 1950s.[82] The use of posthumous conception was considered by legal scholars as early as 1962,[83] but it is only recently that this trend has grown. Success rates using thawed eggs are substantially lower than those using thawed sperm, and the usage of cryopreserved sperm is significantly more common than that of cryopreserved eggs.[84] Furthermore, cryopreserved sperm can remain viable for decades.[85] Today, in the United States, all clinics that provide assisted reproduction services offer cryopreservation as well.[86]

It is, however, important to step back and realize that the history of scientific theorizing about reproduction is, for the most part, "a history of scientists

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Artificial Insemination, 77 WASH. L. REV. 1035, 1037 (2002).

74. Carpenter, *supra* note 72, at 353.

75. *Id.* at 354.

76. I. Glenn Cohen & Daniel L. Chen, *Trading-Off Reproductive Technology and Adoption: Does Subsidizing IVF Decrease Adoption Rates and Should It Matter?*, 95 MINN. L. REV. 485, 486 (2010).

77. Joslin, *supra* note 12, at 1178.

78. Gloria I. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV. 251, 272-73 (1999).

79. *Id.*

80. Carpenter, *supra* note 72, at 355; *see also* Judith Daar, Litowitz v. Litowitz*: Feuding Over Frozen Embryos and Forecasting the Future of Reproductive Medicine*, *in* 97 HEALTH LAW & BIOETHICS: CASES IN CONTEXT, ch. 5 (Sandra H. Johnson et al. eds., 2009).

81. Knaplund, *Postmortem Conception*, *supra* note 12, at 93.

82. Carpenter, *supra* note 72, at 355-56.

83. *See* W. Barton Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent*, 48 A.B.A. J. 942, 942 (1962).

84. Carpenter, *supra* note 72, at 356.

85. *Id.* at 356-57.

86. *Id.* at 355.

emphasizing the *male* contribution" to reproduction while "minimizing the degree to which" women are primarily responsible for creating offspring.[87] Scholars have recently shown that "since Aristotle, philosophers and scientists have" minimized the importance of gestation and have emphasized the prominence of the *male*'s role in reproduction.[88] To Aristotle, male "semen [supposedly] contained the motive force" that acted upon woman to form a new being."[89] Later, the medieval church believed that "a minuscule, fully formed *homunculus*, complete with soul, was deposited by the male in the female body, which simply acted as incubator."[90] Still later, Enlightenment scientific theory too envisioned that the semen is like a "seed" growing in a "field." "Erasmus Darwin, grandfather of Charles . . . , held 'that the embryo[] is produced by the male,'" with a supporting role by the female who provides nourishment but played no role in producing any part of the embryo itself.[91] In the modern-era, with the discovery of DNA in the late nineteenth century and genetic coding residing in both sperm and egg, scientists concede that women contribute not only the "field" but part of the "seed" as well.[92] Today, some scientists have moved to challenge the dichotomy between genes and environment, believing that the maternal environment itself *and* parents' genetics influence embryos and their future generations.[93] The notion, however, of conception as a "seed" being planted is still culturally prevalent.[94]

Throughout history, men's disconnect from their "seed" in the process of creating offspring "has underpinned . . . a relentless male desire to master nature, and to construct social institutions and cultural patterns that will not only subdue the waywardness of women but also give men an illusion of procreative . . . power."[95] Thus marriage long consisted of "coverture"—men's legal control of the household.[96] A vivid example is that first attempts at artificial insemination in the late eighteenth century included husbands' administration of the procedure.

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87. Jennifer S. Hendricks, *Not of Woman Born: A Scientific Fantasy*, 62 CASE W. RES. L. REV. 399, 402 (2011) (emphasis added).

88. *Id.* at 418.

89. *Id*. at 419. Similarly, in Ancient Greek mythology, Apollo resonated, "The mother is no parent of that which is called her child, but only nurse of the new-planted seed that grows." 1 AESCHYLUS, THE COMPLETE GREEK TRAGEDIES (David Grene & Richmond Lattimore eds., 1942) (*The Eumenides*).

90. ADRIENNE RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION 120 (1976).

91. Hendricks, *supra* note 87, at 420.

92. *Id.* at 422-24.

93. *Id.* at 424.

94. Barbara Katz Rothman, *Daddy Plants a Seed: Personhood Under Patriarchy*, 47 HASTINGS L.J. 1241, 1244-45 (1996).

95. Michelle Stanworth, *Reproductive Technologies and the Deconstruction of Motherhood*, *in* REPRODUCTIVE TECHNOLOGIES: GENDER, MOTHERHOOD, AND MEDICINE 16 (Michelle Stanworth ed., 1987).

96. *See* HENDRIK HARTOG, MAN & WIFE IN AMERICA: A HISTORY 119-22 (2000).

At that time, doctors did not perform artificial insemination but gave husbands syringes containing sperm and directed them to inject their wives with them after intercourse.[97] In the nineteenth century, husbands continued to execute at least part of the procedure with medical guidance.[98] This insistence on involving husbands in the artificial procedure of insemination indicates a reluctance to sever husbands' control over procreation. "Because men are biologically uninvolved in gestation and birth, they are more dependent on women than women are on them in achieving parenthood."[99] Scholars have argued that historically, "men have designed" such practices and institutions to offset women's reproductive powers and "to appropriate for themselves the procreative potential they feared and admired in women."[100]

And so, as science came to the stark discovery, shattering the belief in male dominance in the makeup of their offspring, the industrial revolution, and twentieth century welfare capitalism, seems to have helped restore man's virility: the Industrial Revolution transformed the majority of working people from self-employed agricultural workers to wage earners working for large industrial concerns.[101] Unlike the pre-industrial, agrarian era in which the family worked together to sustain itself, the Industrial Revolution invented an "iconic" figure of dependency—"the housewife."[102] This figure melded women's traditional sociological and political subordination with new economic dependence.[103] The Industrial Revolution created a stark line between the public and the private spheres. Men and women were engaged in separate spheres of activity in the nineteenth century: men in the market, business, and the professions, and women in the home. The public sphere, in which males worked productively in marketplace for money, was seen as an essential engine of human survival and development.

However, by the turn of the twentieth century, some "women began to move beyond the . . . domestic sphere and into the paid labor force."[104] Many believed

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97. Bernstein*, supra* note 73, at 1049-50.

98. *Id.* at 1050.

99. Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 306.

100. *Id.* at 306 n.20.

101. *See* Arianne Renan Barzilay, *Women at Work: Towards an Inclusive Narrative of the Rise of the Regulatory State*, 31 HARV. J. L. & GENDER169, 175 (2008) [hereinafter Renan Barzilay, *Women at Work*].

102. Nancy Fraser & Linda Gordon, *A Genealogy of* Dependency*: Tracing a Keyword of the U.S. Welfare State*, 19 SIGNS 309, 318 (1994).

103. *Id.*

104. Renan Barzilay, *Labor Regulation as Family Regulation*, *supra* note 21, at 126 (citing JOANNE J. MEYEROWITZ, WOMEN ADRIFT: INDEPENDENT WAGE EARNERS IN CHICAGO, 1880-1930, at xvii (1988)). "While poor, black and immigrant women had long labored in the marketplace, 'they had excited little public controversy because they had not been considered subject to middle class expectations of domesticity.'" *Id.* at 126 n.34 (quoting LYNN Y. WEINER, FROM WORKING GIRL TO WORKING MOTHER: THE FEMALE LABOR FORCE IN THE UNITED STATES, 1820-1980, at 4

that working mothers and wives would undermine the institution of marriage, as working wives might no longer need their husbands' economic support.[105] Others thought that the family might dissolve altogether if women earned enough to provide for themselves.[106] Yet, that did not occur.

In the 1930s, in the midst of the Great Depression and as the national government was ready to enact national labor standards to alleviate unemployment, "the focus of public concern about unemployment was [on] working *men*," who were "understood as providers for their families."[107] During the New Deal era, males legally constituted the breadwinners, and their wives and children constituted dependents.[108] Legislative debates over national labor standards have revealed promotion of an underlying concept of family in which the husband is productive and the major actor in the market place.[109] Scholars contend that the New Deal helped re-erect husbands' place in the family as necessary breadwinners and providers.[110] This is especially evident in the context of Social Security and, specifically, in the 1939 Amendments to the Act, which were at issue in *Capato*.[111]

III. A LEGAL HISTORY OF SOCIAL SECURITY CHILD SURVIVOR BENEFITS

Even before the Depression hit, states had been forced to deal with the problems of economic insecurity in a wage-based, industrial economy.[112] Workers compensation programs were established at the state level, and "Mother's Aid" and other forms of public assistance predated New Deal welfare policies,[113] but still the government established the American welfare state predominantly during the 1930s.[114] At that time of dire unemployment, working

(1985)).

105. ANNELISE ORLECK, COMMON SENSE AND A LITTLE FIRE: WOMEN AND WORKING-CLASS POLITICS IN THE UNITED STATES, 1900-1965, at 102 (1995).

106. *See* KATHRYN KISH SKLAR, FLORENCE KELLEY & THE NATION'S WORK: THE RISE OF WOMEN'S POLITICAL CULTURE, 1830-1900, at 182 (1995).

107. *See* NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 172 (2000).

108. Renan Barzilay, *Labor Regulation as Family Regulation*, *supra* note 21, at 121-22.

109. *Id.* at 142.

110. COTT, *supra* note 107, at 158, 172-74.

111. In 1965, the Act was amended again and codified § 416(h)(3)(c), but this section had little, if any, barring on the case. Old Age, Survivors, and Disability Insurance Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 409; *see also* S. REP. NO. 404-89, at 109 (1965).

112. Renan Barzilay, *Women at Work*, *supra* note 101, at 182-86; Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L. J. 314, 325 (2012).

113. "Mother's Aid" was a program designed to support mothers of children "maintain[ing] households . . . without husbands" and was precursor to the later Aid to Families with Dependent Children Program which became Title IV of the Act. LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890-1935, at 42, 61, 256 (1994).

114. LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 152-53 (2002); Renan

men's ability to provide for their families was "at the heart of New Deal domestic policies."[115]

Congress enacted the Act in 1935 providing, inter alia, old-age pensions, unemployment compensation, and aid to dependent children.[116] It contained two distinct segments: Title II of the Act incorporated a "social insurance" model in social security's old-age insurance and unemployment compensation, while Title IV incorporated a discretionary welfare model in social security's public assistance programs—i.e., Aid to Families with Dependent Children.[117] The former is known as "social security,"[118] an honorable, rather generous though restricted program ("Social Security"), while the latter is known as "welfare," a "stingy and humiliating" form of public assistance.[119] Social Security disproportionally served white males while public assistance programs served mainly women and minorities.[120] President Roosevelt envisioned work-related social insurance as the main route to social security (acknowledging the necessity of some form of public assistance crafted narrowly to apply to particularly "deserving" groups).[121] Scholars note that this segmentation helped "create[] a new hierarchy of" families in which female-headed households were economically and socially at rock bottom.[122]

A pillar of Social Security is that it provides a financial safety net and "protection for workers from the cradle to the grave."[123] In the original Act, retirement benefits were to be paid to the primary worker when he retired at age sixty-five.[124] Benefits were to be based on payroll tax contributions that the worker made during his working life.[125] Social Security was "[f]iercely

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Barzilay, *Women at Work*, *supra* note 101, at 174.

115. COTT, *supra* note 158, at 173.

116. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620-48.

117. NICHOLAS BARR, THE ECONOMICS OF THE WELFARE STATE 29 (2d ed. 1993).

118. Robert M. Ball, *The 1939 Amendments to the Social Security Act and What Followed*, *in* NAT'L CONFERENCE ON SOC. WELFARE, 50 ANNIVERSARY EDITION: THE REPORT OF THE COMMITTEE ON ECONOMIC SECURITY OF 1935, at 159 (1985); COTT, *supra* note 158, at 174-75.

119. GORDON, *supra* note 113, at 253-54. *But see* Tani, *supra* note 112, at 334 (claiming mid-level administrators didn't make such stark distinctions at the time).

120. GORDON, *supra* note 113, at 293-94.

121. SUZANNE METTLER, DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY 55 (1998).

122. GORDON, *supra* note 113, at 254-56; *see also* METTLER, *supra* note 121, at 81-82; GWENDOLYN MINK, THE WAGES OF MOTHERHOOD: INEQUALITY IN THE WELFARE STATE, 1917-1942, at 134-38 (1995).

123. Jill S. Quadagno, *Welfare Capitalism and the Social Security Act of 1935*, 49 AM. SOC. REV. 632, 634 (1984).

124. *Id.*

125. The Social Security Administration explains, "The significance of the new social insurance program was that it sought to address the long-range problem of economic security for the aged through a contributory system in which the workers themselves contributed to their own future retirement benefit by making regular payments into a joint fund." *Historical Background*

challenged . . . after its passage . . . because it restricted individual autonomy and assumed that government" responsibility was essential for the economy.[126] Additionally, these old-age insurance provisions of the Act received only meager support due to three major hindrances. First, contributions were rapidly accumulating a surplus that threatened to carry out "a deflationary effect" in the depression economy.[127] Second, the state sponsored, non-contributory, old-age public assistance programs were gaining popular support.[128] Third, old-age insurance in Social Security "excluded nearly half the working population," such as agriculture, casual, domestic, or self-employed workers.[129]

The government needed to take dramatic measures to save the Social Security system. In 1936, "[t]he Democratic Party's presidential platform . . . pledged [greater] protection of the family and the home."[130] By 1937, the U.S. Senate set up a Federal Advisory Council ("Council") to propose ways of revising the two-year-old Social Security system by recommending a way to deal with ballooning reserves and to garner wider support.[131] The Council chose to reduce the surplus by providing benefits to dependents and survivors of primary wage workers.[132] The years between the enactment of the Act in 1935 and the passage of the 1939 amendments, "witnessed an 'amazing change'" in the relationship between government and citizens,[133] and the amended Social Security system gathered wider support due, in large part, to the 1939 amendments.[134]

The Council's goals in constructing the 1939 amendments were to provide adequate support of the family as a unit[135] and promote protection of the family.[136] But, historians have questioned what it means to protect the family. Specifically, whose families were to be protected?[137] Which families would be entitled? The Advisory Council, as history shows, adopted the notion of the *male-centered*

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and Development of Social Security, U.S. SOC. SEC. ADMIN., http://www.ssa.gov/history/briefhistory3.html (last visited Aug. 6, 2013). However, researchers have long argued that despite the contributory rhetoric, in effect Social Security redistributes income from the poor to the rich. *See generally* GORDON, *supra* note 113.

126. Alice Kessler-Harris, *Designing Women and Old Fools: The Construction of the Social Security Amendments of 1939*, *in* U.S. HISTORY AS WOMEN'S HISTORY: NEW FEMINIST ESSAYS 90 (Linda K. Kerber et al. eds., 1995).

127. *Id*. at 92.

128. *Id.*

129. *Id*.

130. MINK, *supra* note 122, at 135 (internal quotation marks omitted).

131. Kessler-Harris, *supra* note 126, at 92-93.

132. *Id.* at 93.

133. David Waldron, *Social Security Amendments of 1939: An Objective Analysis*, 7 U. CHI. L. REV. 83, 83 (1939).

134. Kessler-Harris, *supra* note 126, at 90.

135. *See* H.R. REP. NO. 728-76, at 5,7 (1939).

136. MINK, *supra* note 122, at 135.

137. Kessler-Harris, *supra* note 126, at 94.

family.[138] First, the Advisory Council agreed that benefits would be allocated to fatherless children, as the derivation "of thoughtful and thrifty fathers."[139] Additionally, the Council provided insurance to widowed mothers, with "[t]he sums granted, and the restrictions on them," signifying this pension was "conceived of as a matter of peace of mind for the husband."[140] According to historians, the discussions within the Council and the adopted provisions "negated any possibility that the [accumulated] pension might be considered a . . . product of the *joint* efforts of" the marriage, and that women might have a fair, vested interest in and of themselves in the pension as partners in their husband's wage earning efforts.[141]

The 1939 amendments incorporated the Council's vision and made a fundamental change in the Social Security program.[142] The amendments "promoted family security by bringing the insured male worker's family under the umbrella of social insurance."[143] The amendments added two new categories of benefits to the existing retirement benefits: the first, payments to the spouse and minor children of a retired worker (so-called dependents benefits) and the second, survivors' benefits paid to the family in the event of the premature death of a covered worker.[144] This change altered "Social Security from a retirement program for workers [only] into a *family-based* economic security program."[145] However, such support was to take place by enlarging the rights of male breadwinners in the family by granting *them* benefits that would strengthen their capacity to perform their assigned gender roles as breadwinners, and by "enabling [*males*] to provide for their families, even after their own deaths."[146] For example, the Council eliminated any annuity to a widow who remarried.[147] Importantly, the Council overrode an objection made by one Council member, who pointed out that during the years the widow was married to the insured wage earner, she was also accumulating certain rights because she was a partner in his rights.[148] Although policy makers added survivors' benefits to dependents of a deceased wage-earner and revised the system to improve standards of living for some Americans, policy makers did not extend coverage to already excluded

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138. *Id.* at 94-98.

139. *Id.* at 94; *1937-1938 Advisory Council on Social Security—Final Report*, *in* NAT'L CONFERENCE ON SOC. WELFARE, *supra* note 118, at 173-204 [hereinafter *Final Report*].

140. Kessler-Harris, *supra* note 126, at 94.

141. *Id*. at 94-95 (emphasis added).

142. *See* Social Security Act Amendments of 1939, Pub. L. No. 76-379, 53 Stat. 1360 (codified as amended in scattered sections of 42 U.S.C.); *see also* ARTHUR J. ALTMEYER, THE FORMATIVE YEARS OF SOCIAL SECURITY: A CHRONICLE OF SOCIAL SECURITY LEGISLATION AND AMENDMENTS, 1934-1954, at 99-117 (1968); *Final Report*, *supra* note 139, at 173-204.

143. MINK, *supra* note 122, at 135.

144. COTT, *supra* note 158, at 176; U.S. SOC. SEC. ADMIN., *supra* note 125.

145. U.S. SOC. SEC. ADMIN., *supra* note 125.

146. METTLER, *supra* note 121, at 99 (citing Kessler-Harris, *supra* note 126, at 94-100).

147. Kessler-Harris, *supra* note 126, at 94-95.

148. *Id*.

workers, where females and minorities were heavily gathered (such as "part-time, seasonal, agricultural, domestic[, or] philanthropic" workers).[149] Instead, policy makers gave more privileges to the worker-husbands already covered as an "incentive [for] men to marry and have families" and for women to remain dependents rather than enter the work-force.[150] Social Security assumed the male earner to be the primary breadwinner and granted entitlements to him as provider while codifying women's dependency.[151]

Thus, the 1939 amendments rewarded and reconstituted male workers as husband-providers and the economic center of their family.[152] Congress's 1939 amendments provided a monthly benefit for designated surviving family members of a deceased wage earner, and the child survivor benefits at issue in *Capato* were among these "family-protective" measures.[153] Not only has the legislature constructed family, but as the following section demonstrates, the Court has re-established a vision of the modern American family.

IV. RE-POWERING THE AMERICAN FAMILY—*CAPATO* REVISITED

The rise of the modern American family accompanied the emergence of industrial capitalist society, which reorganized work and home life.[154] "The 'modern' family of historical convention and sociological theory describes an intact nuclear family unit, in which husband is the breadwinner, and his wife is dependent—although this designation was unrealistic for many groups.[155] The modern family, composed of father-mother-children, has a long "assumed

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149. COTT, *supra* note 158, at 175-76.

150. *Id.* at 176-77.

151. *Id.* at 178. Almost forty years later, the Supreme Court accepted then lawyer Ruth Bader Ginsburg's argument in *Weinberger v. Wiesenfeld* that Stephen Wiesenfeld, a widower and lone parent of an infant child, was entitled to Social Security benefits based on his late wife's contributions. 420 U.S. 636, 651-52 (1975). The Court struck down "archaic and overbroad generalization[s]" that did not grant survivors' benefits to male widowers as unfairly discriminating against women because their contributions to Social Security did not buy as much as the contributions of men. *Id.* at 643 (internal quotation marks omitted). However, yet again, the benefits were not regarded as a result of a *joint*-contribution of the married couple. Furthermore, the fact that women might be primary breadwinners does not negate the male-centered concept of family espoused by Congress, nor make the *Capato* decision less gendered. *See* discussion *infra* Part IV.

152. COTT, *supra* note 158, at 176-78.

153. *Capato III*, 132 S. Ct. 2021, 2027 (2012) (citing Social Security Act Amendments of 1939, Pub. L. No. 76-379, 53 Stat. 1360, 1364 (codified as amended at 42 U.S.C. § 402(d) (2006))).

154. JUDITH STACEY, BRAVE NEW FAMILIES: STORIES OF DOMESTIC UPHEAVAL IN LATE-TWENTIETH-CENTURY AMERICA 8 (1998); *see also* Pierre Bourdieu, *On the Family as a Realized Category*, 13 THEORY, CULTURE & SOC'Y 19, 20-21 (1996) (considering the family "a well-founded fiction").

155. STACEY, *supra* note 154, at 5-10.

'naturalness,'" institutionalized and supported by law,[156] with marriage, consummated by sexual intercourse, constituting a pillar of the nuclear family.[157] The marital, nuclear family has been characterized as "one that encourages monogamy, procreation, industriousness, [and] insularity," meaning that the "family is understood as a closed unit."[158]

In the modern family, "[f]amily work and productive work became separated, rendering women's work invisible as [women] and their children became economically dependent on the earnings of men."[159] Some feminist scholars have therefore characterized marriage as a hierarchical relationship in which women are subordinate to men, as an economic dependence of woman on man, "as [with] the guarantee to a man of 'his' children," and "the denial [of] work done by women at home [as] part of 'production.'"[160] Furthermore, the law's preference for nuclear family situates "[]responsible reproduction" firmly within this traditional male-centered family context, in which reproductive decisions are considered and controlled by responsible fathers.[161]

Reproductive technology has long threatened to disintegrate the social-legal norms of the nuclear family.[162] By contrast to the marital unit, some argue that single motherhood "should be viewed . . . as a practice resistive to patriarchal ideology . . . because it presents a 'deliberate choice' in a world with birth control" to reproduce without marriage.[163] Others have further noted the "radical potential" of reproductive technologies that separate sex from conception to have a profoundly transformative potential for women by "alter[ing] the basic reproductive unit, destroying the centrality of (hetero)sexed couple and re-centering woman."[164]

If during most of the twentieth century manhood has rested on the ability to earn and to provide for a family, many women today share substantial economic responsibility for families.[165] If substantial earning capacity is now shared by

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156. MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 150 (1995).

157. Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1251-52 (2010).

158. *Id.* at 1256-57.

159. STACEY, *supra* note 154, at 8 ("Women devoted increased attention to nurturing fewer . . . children as mothering came to be [a] demanding vocation [and] [l]ove and companionship became the ideal purposes of marriages that were to be freely contracted by individuals.").

160. RICH, *supra* note 90, at 276-77.

161. FINEMAN, *supra* note 156, at 213.

162. Bernstein, *supra* note 73, at 1042, 1047.

163. FINEMAN, *supra* note 156, at 125.

164. Kate Harrison, *Fresh or Frozen: Lesbian Mothers, Sperm Donors, and Limited Fathers*, *in* MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD 167-68 (Martha Albertson Fineman & Isabel Karpin eds., 1995).

165. RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE?: HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE 20, 40, 47 (2011); *see also* Renan Barzilay, *A New Paradigm for the Family and Medical Leave Act*, *supra* note 21, at 411; Sarah Jane Glynn,

women, and reproductive technology allows women to have babies "on their own"[166] without male control, then what role is there for men in the future of the family and the human race? This anxiety seems to be an underlying presupposition in the *Capato* debate.

As the twentieth century neared a close, a postindustrial labor market enmeshed in a postindustrial society gave increasing rise to post-modern families.[167] Today, postindustrial society has opened up a diverse array of familial relationships, as same-sex partnerships, single-parent households, and dual-earner households are increasingly common.[168] The post-modern family's boundaries are uncertain, fluid, its contours unclear and its implications unresolved.[169] It is an unsettled alternative, accentuating possibly more joint, and vertically collaborative features of family than the modern family currently affords.[170] Today, one can no longer speak of "the family"; there are many types, and "family" is in flux. Yet, some of its modern elements have remained intact.

Families have long been recognized by scholars as sites of value formation and moral socialization,[171] with the state encouraging, incentivizing, and subsidizing familial institutions that "produce the right kind of citizens."[172] Some scholars have noted that the Supreme Court has long had a share in constituting the American family as a mostly modern, marital, and nuclear family,[173] with constitutional jurisprudence constructing the marital, nuclear family as an ideal family.[174] The Act, as interpreted by the *Capato* Court, fits that mold. Indeed,

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The New Breadwinners: 2010 Update, CTR. FOR AM. PROGRESS 31-32 (2012), *available at* http://www.americanprogress.org/wp-content/uploads/issues/2012/04/pdf/awn/breadwinners.pdf.

166. I share the critique that there is really no such thing as being "on one's own," and that dependency is part of the human condition, independence illusionary. MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 30-40 (2004). However, my use of the term in this paper is meant to illustrate how the law constitutes us so as not to be dependent on the state.

167. STACEY, *supra* note 154, at 16-17.

168. Ariela R. Dubler, *Constructing the Modern American Family: The Stories of* Troxel v. Granville, *in* FAMILY LAW STORIES, 95, 111 (Carol Sanger ed., 2008) [hereinafter Dubler, *Modern American Family*].

169. STACEY, *supra* note 154, at 16-18, 251.

170. *Id.* at 30.

171. *See, e.g.*, SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 17-23 (1989) (discussing "the family as a school of justice").

172. Ristroph & Murray, *supra* note 157, at 1251; *see also* Bernstein, *supra* note 73, at 1047.

173. *See generally* Ristroph & Murray, *supra* note 157; Dubler, *Modern American Family*, *supra* note 168, at 95-112.

174. Ristroph & Murray, *supra* note 157, at 1251-59 (arguing constitutional law has established a marital, nuclear, and ideal legal family form); *see also* Dubler, *Modern American Family*, *supra* note 168, at 96, 107-11 (illustrating how the Court constructed the modern family as complicated, yet nuclear); Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 1020 (2000) (arguing marriage is the reigning normative model against which all other unions are evaluated).

on its face, *Astrue v. Capato* makes an effort to update the legal understanding of family and reflect the increasing diversity of family life[175]—*Capato* insisted that marriage need not determine a child's status, and that biology needn't either.[176] The Court supported a progressive, diverse meaning of family: children need not be biological children to be entitled to benefits, nor does a couple necessarily have to be married for their children to be eligible, on par with children born in wedlock, for benefits.[177]

However, this seemingly departure from the marital family ideal model may be less promising than it first appears, as a deeper look casts doubts on just how progressive the Court's construction is actually. Consider Karen Capato's predicament following Nick's death: in mourning, with a baby at hand, she used her reproductive powers to promote her vision of family. Her actions demonstrate that her vision included siblings to her orphaned child. The family she created, under her vision, did not receive the law's support, in that it did not entitle the twins to benefits.[178] Had Nick indicated in his will his wish to include future offspring, they would have received Social Security survival benefits, under the Court's interpretation, but Nick had not issued a will stating his desire as such.[179]

It has long been noticed that "technological change[s] require[] new choices and responsibilities."[180] Greater reproductive choices may provide an opportunity "for greater personal fulfillment"[181] but may also increase pressure to use the new available technologies.[182] Some strenuously object any change in the basic procreative process, while others recognize that the particular choices are highly controversial, as they are bound up with issues of sexuality, family, and gender.[183] Some scholars have feared that reproductive technologies that use women's bodies by the masculine nature of the medical profession,[184] are an attempt to seize the reproductive capacities which have traditionally been "women's [distinctive] source of power."[185] Certainly, most women are subject to social

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175. *Capato III*, 132 S. Ct. 2021, 2029-31 (2012).

176. *See* discussion *supra* Part I.

177. *Capato III*, 132 S. Ct. at 2029-31.

178. *Id.*

179. *Id.* at 2026.

180. Shultz, *supra* note 99, at 299.

181. *Id.* at 300.

182. Arianne Renan Barzilay, *Working Parents*, 35 TEL AVIV U. L. REV. 307 (2012).

183. The Catholic Church has voiced religious objections over all types of ART. *See* Shultz, *supra* note 99, at 300 n.9. Some feminists fear that reproductive technology accelerates dominance over women's reproduction. *See* GENA COREA, THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS 272-324 (1985). Other feminists contend that reproductive technologies may free women from the bonds of pregnancy, and therefore, from vulnerability caused by reproduction. *See* SHULAMITH FIRESTONE, THE DIALECTIC OF SEX 233 (1970).

184. Stanworth, *supra* note 95, at 10, 13.

185. Michelle Stanworth, *Editor's Introduction*, *in* REPRODUCTIVE TECHNOLOGIES, GENDER,

pressures to procreate and mother in varying degrees even when unable to conceive through sexual intercourse. Yet women respond to these pressures in myriad "ways, depending upon their social circumstances, their health and their fertility," culture, and class.[186] The energy and commitment involved in achieving and sustaining a wanted pregnancy, in giving birth, and raising the children, however, cannot be disregarded. Karen Capato's decision is especially costly, putting her body, health, and finances through cycles of IVF.

But what was there for Karen Capato to do? "Women have always been seen as waiting: waiting to be asked, . . . waiting for men to come home from wars, or from work," or waiting for a new man to take over the place of an old-sponsor.[187] Karen Capato could not wait. She had been through enough. She wanted to have a family. She had a one-year-old at hand. She was in mourning of her husband's tragic death. One can imagine that she was hardly in mood for dating. Yet, she strongly desired to create her vision of family. She would not wait for a new sponsor. She viewed her physicality as a source of making that dream a reality.

But a woman's sole decision to consciously and deliberately create *a-priori* a single parent family, centered on the women, and to fully control and determine her reproductive life is perhaps too much for law to currently fully enable and support. An important distinction has been made between the potential relationship of a woman to her powers of reproduction and the institution of motherhood which aims to ensure that women's powerful potential "remain[s] under male control."[188] "[T]he legal and technical control by men" of reproduction, are symbols of a patriarchal system.[189] Behavior that threatens the *institution* of motherhood, such as women choosing the terms of their reproductive, familial lives, cannot, under this view, be supported.[190]

The law's incorporation of the male need to feel in control of female reproductive power is an underlying issue in *Capato*. The ancient continuing "dread" of the male for the female capacity to make life[191] may have played out yet again in the Social Security Administration's interpretation of the Act and the Court's subsequent decision, telling women that if they do not procreate under male authority, they are left to fend for themselves. By not granting social security benefits, women like Karen Capato will now have less control over their reproductive lives and bodies. They may become more dependent upon male sponsorship. By tying the twin's benefits to state intestacy law, asking who under these laws is entitled to inherit the wage earner's property, the law gives power to fathers' control over reproductive decision-making.

True, one can argue that the Court's result is equitable as it may work both ways: if a woman were to be the deceased wage earner, her husband's claim on

MOTHERHOOD, AND MEDICINE, *supra* note 95, at 3.

186. *Id.* at 3-4.

187. RICH, *supra* note 90, at 39.

188. *Id.* at 13.

189. *Id.* at 34.

190. *Id.* at 42-43.

191. *Id.* at 40.

behalf of posthumously conceived children, would be denied in similar circumstances. But such formal equality does not take into account the disparate ways this law impacts husbands and wives. One must not mistake men and women to be on even ground in this context for three reasons. First, technologically, frozen eggs are much less likely to produce live births after extended periods of time.[192] Technology, however, has nearly perfected the act of freezing sperm, retaining its fertility for decades and making posthumous conception far more common by using frozen sperm than frozen eggs.[193] Second, such a hypothetical husband would need to contract with a surrogate mother, which is far more complicated than becoming pregnant by one's own reproductive capacity. Third, women still conduct more family carework and earn less in the market than men, , thus making their dependency on benefits different from men's.[194] *Capato*, thus, will have a different effect on women than it will on men. If a woman today is more independent in reproduction by technology, she remains dependent in production by law and society.[195]

Women's bodies are full of contradiction; they are a space invested both with unprecedented power and acute vulnerability. Law and society can choose to support this power or enhance its vulnerability. The Act, the Social Security Administration's interpretation, and the subsequent Supreme Court decision have chosen the latter. Furthermore, they have constructed the hetero-married American family as *male-centered*. In the twenty-first century, the Court insisted that the hetero-family definition to be promoted by law is the modern, rather than the postmodern, one: the family in which male control of women's reproductive power persists through an economic mechanism. For heterosexual couples, at least, the Court has kept traditional gendered power dynamics intact.

CONCLUSION

ART is a source of ambivalence; it is celebrated as eliminating "the pain of infertility" and yet "vilified as challenging appropriate methods of family

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192. Carpenter, *supra* note 72, at 356.

193. *Id.*

194. *See* Glynn, *supra* note 165, at 4-5 (stating that women still conduct more family carework and earn less in the market than men).

195. Albeit granting benefits to the Capato twins would have perhaps increased Karen's power, but is not enough to increase women's power over reproduction in cases where there is no husband, and there are no husband's benefits to begin with. Enhancing power for mothers not necessarily associated with a male breadwinner could require, as some scholars have suggested, *inter alia*, extended welfare rights (GORDON, *supra* note 113, at 291, 293, 305-06), remuneration of motherhood (*see generally*, Martha M. Ertman, *Love and Work: A Response to Vicki Schultz's* Life's Work, 102 COLUM. L. REV. 848 (2002)), and a more egalitarian workforce geared towards caretakers (*see* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 8 (1999); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000); Renan Barzilay, *A New Paradigm for the Family and Medical Leave Act, supra* note 21, at 407-08, 430, 432-33). Of course, these measures were outside the Court's scope in *Capato*.

formation."[196] This ambivalence resonates with the practice of reproduction itself. Recently, and for the first time in history, the U.S. Supreme Court addressed the status of children born through ART in *Astrue v. Capato*.[197] It issued an opinion addressing the status of twins, conceived after their biological father's death, for purposes of obtaining Social Security survivors' benefits.[198] The unanimous opinion provides a strict, black-letter analysis of the Act, technically examining the relationship among its competing provisions.[199] My objective in analyzing the case was not to argue for a correct interpretation of the statute at hand, nor to argue for the desirability of posthumous conception but to show the complex family ideology underlying the Act and the Court's decision. Considering context has proved essential to understanding the underlying assumptions and future lessons of this decision.

By providing a context of reproduction and breadwinning history, this Article illustrates that developments in reproductive technology have created social and biological options that expose old assumptions about gender and the family and posit new dilemmas for legal policy. A critique of reproductive technologies regulation must ask how society may "create the political and cultural conditions in which" women can employ these technologies according to their own definitions of parenthood and family.[200] *Capato* has not done so. Even when the Court tries to modify the social norm of the nuclear family in considering new family forms, it does not undermine the basic premise of the hetero- family as patriarchal.[201] By choosing to rely on formal black-letter interpretation of the law, the Court refrained from opening up the underlying questions regarding familial power relations. The decision, thus, missed an important opportunity by choosing to amplify and reinforce, rather than soften and offset, gendered dependency that presently is a dominant feature of the modern American family. The male-dominated family unit has been cast, yet again, as the norm.[202] Following *Capato*, if a legislature is committed to the pursuit of reproductive choices, maintaining that women deserve the social, financial, political, and legal conditions required to make genuine choices about reproduction, then it must break with current paradigms on reproduction and production and be to creating a legal world in which reproductive choices are respected, enabled, and supported.

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196. Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L.J. 295, 295 (2005).

197. *Capato III*, 132 S. Ct. 2021 (2012).

198. *Id.* at 2025-26.

199. *Id.* at 2029-34.

200. *See* Stanworth, *supra* note 95, at 35.

201. *Capato III*, 132 S. Ct. at 2029-31.

202. *See* FINEMAN, *supra* note 166, at 227.

WHEN MAKING MONEY AND MAKING A SUSTAINABLE AND SOCIETAL DIFFERENCE COLLIDE: WILL BENEFIT CORPORATIONS SUCCEED OR FAIL?

JOSEPH KARL GRANT*

INTRODUCTION

A quiet, but important, corporate revolution is afoot in the United States. Many of us, laypersons and corporate scholars alike, have not even noticed. Recently, Arizona, Arkansas, California, Colorado, Hawaii, Illinois, Maryland, Massachusetts, Louisiana, Nevada, New Jersey, New York, Oregon, Pennsylvania, South Carolina, Vermont, Virginia, and Washington, D.C. became the first states in this country to pass legislation for the creation of a new type of corporation—the benefit corporation.[1] Benefit corporations are "a new class of corporation[s]" and are "required to consider the impact of their decisions" on society as well as shareholders.[2] As proponents of benefit corporations argue, benefit corporations are "[a] [n]ew [k]ind of [c]orporation for a [n]ew [e]conomy."[3]

As the Occupy Wall Street Movement has demonstrated, up close and personally, corporations have been maligned in this country for quite some time[4] and particularly in recent years as we continue to emerge from the Financial

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1. *State by State Legislative Status*, BENEFIT CORP INFO. CTR., http://www.benefitcorp.net/state-by-state-legislative-status (last visited July 6, 2013) [hereinafter *Legislative Status*].

2. *Quick FAQ's*, BENEFIT CORP INFO. CTR., http://www.benefitcorp.net/quick-faqs (last visited July 6, 2013).

3. CERTIFIED B CORP., http://www.bcorporation.net (last visited July 6, 2013).

4. *See* Andrew Kassoy, *Occupy Wall Street: A Powerful Demand for Something New—Like This*, FORBES (Oct. 20, 2011, 4:35 PM), http://www.forbes.com/sites/csr/2011/10/20/occupy-wall-street-a-powerful-demand-for-something-new-like-this/ (discussing the discontent of the Occupy Wall Street Movement with the quest for profit maximization).

Crisis.[5] For those who hate corporations because of their perceived unholy quest to make a profit at all costs (known as maximization of shareholder value), benefit corporations hold a great deal of appeal due to their ability to perhaps rewrite the corporate landscape.[6] For proponents and opponents of corporations in our society, a force of interest convergence may be percolating beneath the surface.[7] Corporations can direct and channel this pursuit of profit. Perhaps the pursuit of profit can be directed and channeled to achieve societally optimal and positive goals. Making money or profit and leaving a positive footprint on the environment or society might not be mutually exclusive and competitive goals. Benefit corporations hold promise, and competing interests may converge.

This Article explores benefit corporations as a tool entrepreneurs can use to make money, foster environmental sustainability, and create societal improvement. Part I briefly examines who has been advocating for the creation and passage of benefit corporation legislation in the United States. Part II analyzes the statutory requirements to form a benefit corporation. Specifically, Part II discusses the issues of purpose, accountability, transparency, rights of action, and enforcement of those rights in connection with the creation and operation of a benefit corporation. Part III highlights the states that have passed benefit corporation statutes and highlights those considering similar legislation. Part IV examines the pre-existing use of benefit entities, in unincorporated form, through exploration of the benefit certification process. Finally, Part V offers a future prognosis and debates whether benefit corporations will succeed or fail.

I. THE ARCHITECTS OF THE BENEFIT CORPORATION MOVEMENT

A number of organizations that support sustainable businesses have been integral to supporting the benefit corporation movement.[8] However, three parties rise to the forefront. Most notably, the American Sustainable Business Council has been the national sponsor of benefit corporation legislation in states adopting or considering benefit corporation legislation.[9] B Lab, a non-profit corporation,

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5. *See* Birju Pandya, *'Benefit' Corporations: The Future of Business*, HUFFINGTON POST (May 20, 2010, 7:39 PM), http://www.huffingtonpost.com/birju-pandya/benefit-corporations-the_b_583824.html (describing unfavorable perception of capitalism and the quest to balance out the desire to make profits and obtaining socially desirable results).

6. *Id*.

7. The late Professor Derrick A. Bell, Jr. perhaps best defined and articulated interest convergence theory in his seminal article, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980), arguing that the *Brown* decision came about when the interests of controlling groups and dominated groups converged. Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, HARV. BUS. REV. (Dec. 2006).

8. *See Community Partners*, CERTIFIED B CORP., http://www.bcorporation.net/community/community-partners (last visited July 6, 2013).

9. *See Promote Corporate Responsibility Through Benefit Corporation Statutes*, AM. SUSTAINABLE BUS. COUNCIL, http://asbcouncil.org/campaigns/promote-corporate-responsibility-

has also been a key player in the movement to get states to adopt benefit corporation legislation.[10] William H. Clark, Jr., a prominent corporate attorney and Partner at Drinker Biddle & Reath LLP in Philadelphia, served as the primary drafter of model benefit corporation legislation.[11] Clark gained a great deal of attention in 2007 when he drafted North Dakota's progressive and forward-thinking Publicly Traded Corporations Act.[12]

II. BENEFIT CORPORATIONS: THE MODEL STATUTORY LANDSCAPE

Benefit corporations are very similar to standard corporations, but they differ from their traditional cousins in four main ways. First, the purpose section of the Articles of Incorporation requires specific items not found in traditional purpose sections.[13] Second, the Articles of Incorporation for benefit corporations are statutorily mandated to provide a specific level of accountability to certain stakeholders not found in most traditional corporate codes.[14] Third, benefit corporations have unique transparency requirements unheard of in traditional corporate codes.[15] Finally, specific rights of action are granted to particular stakeholders based on breach of the benefit corporation charter.[16]

Newly formed corporations may elect to be recognized as benefit corporations.[17] Existing corporations may become benefit corporations under

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through-benefit-corporation-statutes (last visited July 6, 2013).

10. *The Non-Profit Behind B Corps*, CERTIFIED B CORP., http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps (last visited July 6, 2013).

11. *Model Legislation*, BENEFIT CORP INFO. CTR., http://www.benefitcorp.net/for-attorneys/model-legislation (last visited July 6, 2013).

12. *See William H. Clark, Jr.*, DRINKERBIDDLE, http://www.drinkerbiddle.com/wclark/ (last visited July 6, 2013). For further discussion of North Dakota's Publicly Traded Corporations Act, see Joshua P. Fershee, *The North Dakota Publicly Traded Corporations Act: A Branding Initiative Without a (North Dakota) Brand*, 84 N.D. L. REV. 1085 (2008); Stephen M. Bainbridge, *Why the North Dakota Publicly Traded Corporations Act Will Fail*, 84 N.D. L. REV. 1043 (2008).

13. *What Are the Requirements*, BENEFIT CORP INFO. CTR., http://www.benefitcorp.net/for-business/what-are-the-requirements (last visited July 6, 2013) [hereinafter *Requirements*]; *see* MODEL BENEFIT CORP. LEGISLATION § 201(a)-(b) (William Clark, Jr. 2012), *available at* http://benefitcorp.net/storage/documents/Model_Benefit_Corporation_Legislation.pdf (requiring that "[a] benefit corporation shall have a purpose of creating general public benefit," while permitting the adoption of a "specific public benefit purpose").

14. *See* MODEL BENEFIT CORP. LEGISLATION, *supra* note 13, §§ 301-02 (requiring officers and directors to consider how their actions impact the specific and general public benefit purposes, along with environment and local community); *Requirements*, *supra* note 13.

15. *See* MODEL BENEFIT CORP. LEGISLATION, *supra* note 13, §§ 401-02 (requiring, among other things, filing with the Secretary of State "an annual benefit report" for public viewing); *Requirements*, *supra* note 13.

16. *See* MODEL BENEFIT CORP. LEGISLATION, *supra* note 13, § 305.

17. *See How to Become a Benefit Corp.*, BENEFIT CORP INFO. CTR., http://www.benefitcorp.net/for-business/how-to-become-a-benefit-corp (last visited July 6, 2013).

prescribed procedures: amendment of their articles of incorporation by a two-thirds shareholder vote.[18]

A. Purpose

Pennsylvania provides a good example of a state's recent legislative adoption of the Model Benefit Corporation Legislation. In order to create a benefit corporation in Pennsylvania, the incorporators are required to mandate the following in the Articles of Incorporation:[19]

(a) The "corporation shall have [the] purpose of creating [a] general public benefit;"[20]
(b) The corporation shall have the right to name "one or more specific public benefit[]" purposes;[21] and
(c) "The creation of [a] general public benefit and specific public benefit . . . . [must be] in the best interests of the benefit corporation."[22]

At a minimum, a benefit corporation must have a "general public benefit."[23] "General public benefit" means the corporation must have "[a] material positive impact on society and the environment, taken as a whole" by "operations of [the] benefit corporation"[24] as measured using "a third-party standard,"[25] through activities that promote some combination of specific public benefits.[26] Additionally, and at the benefit corporation's option, the corporation could pursue a "specific public benefit purpose[,]"[27] which could include the following:

(1) providing low-income or underserved individuals or communities with beneficial products or services;
(2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;
(3) protecting or restoring the environment;
(4) improving human health;

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18. *Id*.

19. Pennsylvania's benefit corporation statute is viewed as the model statute for the creation and incorporation of benefit corporations. Much of the material, *infra*, discussing benefit corporation purpose, accountability, transparency, and rights of action is drawn from the Pennsylvania statutory model. *See* 15 PA. CONS. STAT. §§ 3301-31 (2013); MODEL BENEFIT CORP. LEGISLATION, *supra* note 13, §§ 103-04.

20. MODEL BENEFIT CORP. LEGISLATION, *supra* note 13, § 201(a).

21. *Id*. § 201(b).

22. *Id*. § 201(c).

23. *Id.* § 201(a).

24. *Id.* § 102.

25. *Id.* A "third-party standard" is "a recognized standard for defining, reporting, and assessing corporate social and environmental performance is: (1) [c]omprehensive"; (2) independently developed; (3) "[c]redible"; and (4) "[t]ransparent." *Id.*

26. *Id.*

27. *See id.* § 201(b).

> (5) promoting the arts, sciences, or advancement of knowledge;
> (6) increasing the flow of capital to entities with a purpose to benefit society or the environment; and
> (7) conferring any other particular benefit on society or the environment.[28]

B. Accountability

The accountability standards that directors of benefit corporations must meet include the following:

> In discharging the duties of their respective positions and in considering the best interests of the benefit corporation, the board of directors, committees of the board, and individual directors of a benefit corporation, in considering the interests of the benefit corporation:
> (1) shall consider the effects of any action upon:
> (i) the shareholders of the benefit corporation;
> (ii) the employees and work force of the benefit corporation, its subsidiaries, and its suppliers;
> (iii) the interests of customers as beneficiaries of the general public benefit or specific public benefit purposes of the benefit corporation;
> (iv) community and societal factors, including those of each community in which offices or facilities of the benefit corporation, its subsidiaries, or its suppliers are located;
> (v) the local and global environment;
> (vi) the short-term and long-term interests of the benefit corporation, including benefits that may accrue to the benefit corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the benefit corporation; and
> (vii) the ability of the benefit corporation to accomplish its general public benefit purpose and any specific public benefit purpose; and
> (2) may consider:
> [*(i) the interests referred to in [cite constituencies provision of the business corporation law if it refers to constituencies not listed above]; and*
> (ii)] other pertinent factors or the interests of any other group that they deem appropriate; but
> (3) need not give priority to the interests of a particular person or group referred to [above] over the interests of any other person or group unless the benefit corporation has stated in its articles of incorporation its intention to give priority to certain interests related

28. *Id.* § 102.

> to its accomplishment of its general public benefit purpose or of a specific public benefit purpose identified in its articles.[29]

Generally, standards of accountability are identical for operating and liquidity/change of control decisions.[30] A director is not personally liable, as such, for monetary damages for any action taken as a director if the director performed the duties of his or her office under the applicable duty of care.[31]

C. Transparency

Benefit corporations are required to publish an annual benefit report prepared in accordance with recognized "third-party standard[s]" "for defining, reporting, and assessing corporate social and environmental performance."[32] Additionally, the Benefit Report must assess the successes and failures of the corporation in achieving the general and specific public benefit purposes of the corporation, and consider the effects of decisions on stakeholders.[33] The benefit report must contain the following information:

> (1) A narrative description of:
> (i) [t]he ways in which the benefit corporation pursued general public benefit during the year and the extent to which general public benefit was created[;]
> (ii) [b]oth:
> (A) the ways in which the benefit corporation pursued a specific public benefit that the articles of incorporation state it is the purpose of the benefit corporation to create; and
> (B) the extent to which that specific public benefit was created[;]
> (iii) [a]ny circumstances that have hindered the creation by the benefit corporation of general public benefit or specific public benefit[;]
> (iv) [t]he process and rationale for selecting or changing the third-party standard used to prepare the benefit report.
> (2) An assessment of the overall social and environmental performance of the benefit corporation against a third-party standard:
> (i) applied consistently with any application of that standard in

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29. *Id.* § 301(a) (first and second alterations in original).

30. *See id.* § 301; 15 PA. CONS. STAT. ANN. § 3321 cmt. (West 2013) ("[T]he provisions of 15 [PA. CONS. STAT.] § 1715(b)-(e) apply to a benefit corporation. Those provisions, among other things, make inapplicable to Pennsylvania corporations the holdings in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), and *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).).

31. MODEL BENEFIT CORP. LEGISLATION, *supra* note 13, § 301(c).

32. *Id.* § 102, § 401(a)(2).

33. *Id.* § 302(b).

prior benefit reports; or
(ii) accompanied by an explanation of the reasons for:
(A) any inconsistent application; or
(B) the change to that standard from the one used in the immediately prior report.

(3) The name of the benefit director and the benefit officer, if any, and the address to which correspondence to each of them may be directed.
(4) The compensation paid by the benefit corporation during the year to each director in the capacity of a director.
(5) The statement of the benefit director described in [the annual compliance statement provision].
(6) A statement of any connection between the organization that established the third-party standard, or its directors, officers or any holder of 5[%] or more of the governance interests in the organization, and the benefit corporation or its directors, officers or any holder of 5[%] or more of the outstanding shares of the benefit corporation, including any financial or governance relationship which might materially affect the credibility of the use of the third-party standard.[34]

A statement by the benefit director whether, in "the opinion of the benefit director[,]" "the benefit corporation acted in accordance with its general public benefit purpose and any specific public benefit purpose in all material respects during the period covered by the report" and "[w]hether the directors and officers complied with [standards of conduct for directors and officers of benefit corporations], respectively."[35] "If, in the opinion of the benefit director, the benefit corporation or its directors or officers failed to act or comply . . .," then the statement of the benefit director must include "a description of the ways in which the benefit corporation or its directors or officers failed to act or comply."[36]

The benefit corporation must deliver the report to all shareholders[37] "(1) within 120 days following the end of the fiscal year of the benefit corporation; or (2) at the same time that the benefit corporation delivers any other annual report to its shareholders."[38] Also, in an effort to foster transparency, the benefit report must be posted "on the public portion of its Internet website, if any; but the compensation paid to directors and financial or proprietary information . . . may be omitted from the benefit reports as posted."[39]

34. *Id.* § 401(a).
35. *Id.* § 302(c).
36. *Id.* § 302(c)(3).
37. *Id.* § 402(a).
38. *Id.*
39. *Id.* § 402(b).

D. Rights of Action: Benefit Enforcement Proceedings

Benefit corporations offer entrepreneurs and investors the option to create, invest in, and operate businesses in a socially responsible manner. "Enforcement of those duties comes not from governmental oversight, but rather from new provisions on transparency and accountability included in [the legislation]."[40] The duties of directors and officers, and the general and specific public benefit purposes of a benefit corporation, may be enforced only "in a benefit enforcement proceeding."[41] "[N]o person may bring an action or assert a claim against a benefit corporation or its directors or officers with respect to" breach of a duty or enforcing general or specific purposes "[e]xcept in a benefit enforcement proceeding[.]"[42]

To commence and maintain "[a] benefit enforcement proceeding[,]" standing may be established:

> (1) directly by the benefit corporation; or
> (2) derivatively by:
> (i) a person or group of persons that owned beneficially or of record at least 2% of the total number of shares of a class or series outstanding at the time of the act or omission complained of;
> (ii) a director;
> (iii) a person or group of persons that owned beneficially or of record 5% or more of the outstanding equity interests in an entity of which the benefit corporation is a subsidiary at the time of the act or omission complained of; or
> (iv) other persons as specified in the articles of incorporation or bylaws of the benefit corporation.[43]

III. STATES ADOPTING OR CONSIDERING BENEFIT CORPORATION LEGISLATION

Thus far, benefit corporation legislation has been passed in the following states and territories: Arizona, Arkansas, California, Colorado, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Nevada, New Jersey, New York, Oregon, Pennsylvania, South Carolina, Vermont, Virginia, and Washington, D.C.[44]

It appears that benefit corporation legislation is gaining some traction nationwide. The following states have introduced model benefit corporation legislation: Alabama, Connecticut, Delaware, Florida, Iowa, Montana, North Carolina, Rhode Island, Texas, and West Virginia.[45] Indeed, with some deviation from the model legislation, the corporate bell weather state of Delaware recently

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40. *Id.* § 101 cmt.
41. *Id.* § 305(a).
42. *Id.*
43. *Id.* § 305(b).
44. *Legislative Status*, *supra* note 1.
45. *Id.*

put forth legislation to allow for the creation of "public benefit corporations."[46]

Finally, a movement to support sustainable business currently is underway at the local and municipal level as well. In December 2009, the City of Philadelphia passed an ordinance that included tax and investment incentives and government purchasing preferences to facilitate the growth of sustainable businesses.[47] A number of municipalities have considered tax and investment incentives to foster sustainable business growth, including Portland, Oregon.[48]

IV. NOTES FROM THE FIELD: ARE BUSINESS PEOPLE USING BENEFIT CORPORATIONS IN ONE FORM OR ANOTHER ALREADY?

Albeit not in legal or incorporated form, certified benefit entities have been around for some time. In addition to supporting legislative initiatives to adopt benefit corporation statutes, B Lab has been one of the most active certifiers of benefit corporations. Certified benefit corporations are not always legally recognized benefit corporations. In order to become a certified benefit corporation, B Lab examines the company's operations based on an extensive set of details and criteria. In order to become certified, a company must meet three requirements established by B Lab:

(1) The company must earn a "minimum score of 80 out of 200 points" on B Lab's "B Impact Assessment;"[49]
(2) The company must adopt a benefit corporation legal framework, which "bakes sustainability into the DNA of your company as it grows, brings in outside capital, or plans succession, ensuring that your mission can better survive new management, new investors, or even new ownership[;]"[50] and
(3) The company must sign a "Term Sheet" and "Declaration of

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46. S.B. 47, 147th Gen. Assemb. (Del. 2013), *available at* http://www.legis.delaware.gov/LIS/LIS147.NSF/vwLegislation/SB+47?Opendocument. Delaware's legislation differs in four (4) ways from other states: (1) A higher threshold of shareholders (90% versus 2/3) have to approve the switch from a traditional corporate format to the benefit format; (2) directors have a different mix of priorities to consider; (3) there is a requirement of greater clarity and specificity regarding intended public benefit; and (4) public reporting requirements are relaxed. Michelle Baker, *All Eyes on Delaware's Public Benefit Corporation Legislation*, NONPROFIT L. BLOG (May 20, 2013), http://www.nonprofitlawblog.com/home/2013/05/all-eyes-on-delawares-public-benefit-corporation-legislation.html. *See* Sophie Menin, *Benefit-Corporations on the Rise*, BARRON'S (Apr. 29, 2013, 11:46 AM), http://blogs.barrons.com/penta/2013/04/29/benefit-corporations-on-the-rise/.

47. PHILA. PA. CODE § 19-2604(10) (2013); *see also B Corporations Gain Tax Advantage in Philly*, ENVTL. LEADER (Dec. 4, 2009), http://www.environmentalleader.com/2009/12/04/b-corporations-gain-tax-advantage-in-philly/.

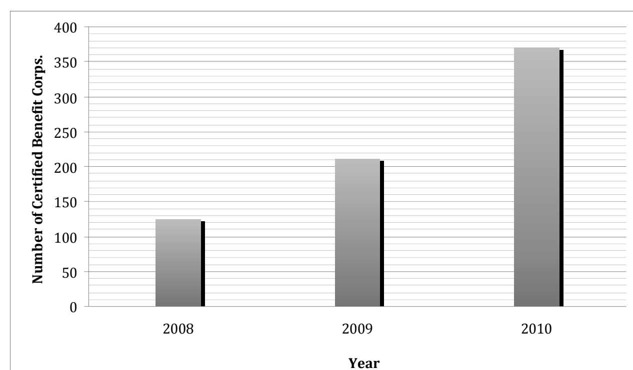
48. *Financing and Incentives for an Expanding Business*, BUS. PORTLAND, http://www.pdx4biz.org/expanding-your-business/financing-and-incentives (last visited July 7, 2013).

49. *How to Become a B Corp*, CERTIFIED B CORP., http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp (last visited July 7, 2013).

50. *Protect Your Mission*, CERTIFIED B CORP., http://www.bcorporation.net/become-a-b-corp/why-become-a-b-corp/protect-your-mission (last visited July 8, 2013).

Interdependence" to make the certification official.[51]

Once certified, "B Lab randomly conducts on-site reviews for 10% of B Corporations each year."[52] According to B Lab, there are currently 782 benefit corporations operating across 60 industries.[53] According to the B Lab's 2012 Annual Report, the number of certified benefit corporations increased over 75% from 2009 to 2010 and 74% from 2010 to 2011; Chart 1, below represents the number of certified benefit corporations from 2008 to 2010:[54]



Indeed, though not in a formal or legal sense, benefit corporations have been around for a number of years. B Lab maintains an extensive directory of certified benefit corporations.[55]

If formal benefit corporation legislation is any barometer, business owners seem to be warming up to the idea of creating legally recognized benefit corporations. In Maryland alone, the first state to adopt formal benefit corporation legislation, during the first three months that the statute was on the books, at least fifteen businesses formally organized as benefit corporations.[56] Indeed, twelve businesses signed up for benefit corporation recognition on the

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51. *How to Become a B Corp*, *supra* note 49.

52. TERM SHEET FOR B CORPORATIONS, CERTIFIED B CORP. 1 (2012), *available at* http://www.bcorporation.net/sites/all/themes/adaptivetheme/bcorp/pdfs/term_sheet_constituency_states_llcs_llps_3.pdf.

53. CERTIFIED B CORP., http://www.bcorporation.net (last visited July 7, 2013).

54. CERTIFIED B CORP., B CORPS REDEFINE SUCCESS IN BUSINESS 8 (2012), *available at* http://www.bcorporation.net/sites/all/themes/adaptivetheme/bcorp/pdfs/BcorpAP2012_Web-Version.pdf.

55. It appears that at least 782 companies are members of B Lab's directory. *Find a B Corp*, CERTIFIED B CORP., http://www.bcorporation.net/community/find-a-b-corp (last visited July 9, 2013).

56. Danielle Douglas, *15 Firms Take Advantage of New Maryland Law Establishing 'Benefit' Corporations*, WASH. POST (Jan. 23, 2011, 6:59 PM), http://www.washingtonpost.com/wp-dyn/content/article/2011/01/23/AR2011012303556.html.

first day the Maryland legislation went into effect.[57]

V. A FUTURE PROGNOSIS: WILL BENEFIT CORPORATIONS SUCCEED OR FAIL?

If early success is any indicator, it looks like benefit corporations will succeed. "Benefit corporations offer clear market differentiation, broad legal protection to directors and officers, expanded shareholder rights, and greater access to capital than current alternative approaches."[58] Additionally, "the benefit corporation is also attracting broad support from entrepreneurs, investors, legal experts, citizens, and policy makers interested in new corporate form legislation."[59] "Accelerating consumer and investor demand has resulted in the formation of a substantial marketplace for companies that put purpose, not profit, at the center of [their] business."[60] In order to look into the future and predict whether benefit corporations will succeed or fail, the impact of social cause business practices must be examined through the eyes of four important and relevant constituencies: consumers, employees, social investors, and social entrepreneurs.

A. American Consumers

In the past decade, the role and perception of business in American society has been tumultuous. American consumers have weathered the storm of a near-Depression like collapse of the American banking system and housing market,[61] topped off by the largest and most impactful environmental accident in our nation's history—the 2010 BP oil spill in the Gulf of Mexico.[62] American consumers are seeking products, services, and retailers that support causes such as sustainability and the environment. In a 2010 survey, "83[%] of Americans" indicated that they "wish[ed] more of the products, services and retailers they use would support causes."[63] Indeed, 85% of those surveyed indicated that they "have a more positive image of a product or company when it supports a cause

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57. *Id*.

58. WILLIAM H. CLARK, JR. & LARRY VRANKA, THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION 1 (Jan. 26, 2012), *available at* http://benefitcorp.net/storage/documents/The_Need_and_Rationale_for_Benefit_Corporations_April_2012.pdf.

59. *Id.*

60. *Id.* at 2.

61. *See generally* Joseph Karl Grant, *What the Financial Services Industry Puts Together Let No Person Put Asunder: How the Gramm-Leach-Bliley Act Contributed to the 2008-2009 American Capital Markets Crisis*, 73 ALB. L. REV. 371 (2010); andrè douglas pond cummings [sic], *Racial Coding and the Financial Market Crisis*, 2011 UTAH L. REV. 141, *available at* http://epubs.utah.edu/index.php/ulr/article/view/547/408; and STEVEN A. RAMIREZ, LAWLESS CAPITALISM: THE SUBPRIME CRISIS AND THE CASE FOR AN ECONOMIC RULE OF LAW (2013).

62. *See* Joseph Karl Grant, *What Can We Learn from the 2010 BP Oil Spill?: Five Important Corporate Law and Life Lessons*, 42 MCGEORGE L. REV. 809, 809-10 (2011).

63. CONE, 2010 CONE CAUSE EVOLUTION STUDY 5 (2010), *available at* http://ppqty.com/2010_Cone_Study.pdf.

they care about."[64] "More than 278 million people in the [United States,]" or "90% of consumers[,] want companies to tell them the ways they are supporting causes."[65] "Forty-one percent of Americans say they have brought a product because it was associated with a cause or issue in the last year. . . ."[66] "[C]ause branding not only drives purchase[s], but it also serves as a powerful differentiator."[67] "Eighty percent of Americans are likely to switch brands, about equal in price and quality, to one that supports a cause."[68]

> A company's commitment to social and environmental issues has undeniable weight in the marketplace, but today it is slightly less influential on other decisions than it has been in the past, including which companies consumers want to see doing business in their communities (79%), where to work (69%) and which stocks or mutual funds to invest in (59%).[69]

"Support of social and environmental issues makes a marked difference on the store shelf, but it's really just the jewel in the citizenship crown."[70] Table 1 below exhibits the amount of influence that a company's connection with a particular cause has on consumers:[71]

Table 1

	2010	2007	2004
Which companies you want to see doing business in your community	79%	86%	85%
Which products and services to recommend to other people	76%	79%	74%
What to buy or where to shop	75%	80%	63%
Where to work	69%	77%	81%
Which stocks or mutual funds to invest in	59%	66%	70%

Cause branding is growing across wide and divergent industry segments. "Consumers are looking beyond the usual suspects (the products on store shelves; those with a recognized environmental footprint) and holding all industries accountable."[72] When surveyed and asked if they believe it is important for the following industries to support social or environmental causes, American consumers registered their responses in the following manner:

64. *Id*.
65. *Id*.
66. *Id.* at 6.
67. *Id*.
68. *Id*.
69. *Id*. at 8.
70. *Id*.
71. *Id*.
72. *Id*. at 10.

Table 2

Americans believe it's important for the following industries to support social or environmental causes:[73]	
Food and beverage	82%
Automotive and transportation	81%
Manufacturing	81%
Electronics and household appliances	80%
Sports, media and entertainment	80%
Retail (stores and online)	79%
Financial services (e.g., banking, insurance, investing)	79%
Health and beauty	78%
Telecommunications	78%
Household goods and furniture	77%
Footwear and apparel	77%
Professional services (e.g., law firms)	76%

In terms of marketing, mothers "and Millennials[74] are the two most sought-after consumer marketing segments."[75] "Moms control about 80[%] of the household shopping, and college-aged Millennials have near $40 billion in discretionary income to spend."[76] "Still, each wants to shop wisely, and more than any other demographic groups . . . tested, they buy with an eye toward the greater good."[77] On a host of issues, it is interesting to see how Moms and Millennials compare to one another and to others in society. Table 3 below illustrates how the two groups compare:

73. *Id.*

74. Millennials are defined as the purchasing demographic between the ages of eighteen and twenty-four years of age. *Id.* at 12 n.3.

75. *Id.* at 12 (footnote added).

76. *Id*. (footnotes omitted).

77. *Id*.

Table 3

How moms and Millennials compare:[78]			
Shopping attitudes and behaviors:	Total	Millennials	Moms
Believe cause marketing is acceptable	88%	94%	95%
Bought a cause product/service in past 12 months	41%	53%	61%
Likely to switch brands	80%	85%	93%
Willing to try a NEW brand or one they've never heard of	61%	73%	73%
Willing to buy a more expensive brand	19%	26%	27%
Cause branding is important when they decide:	**Total**	**Millennials**	**Moms**
Which companies they want to see doing business in their communities	79%	88%	90%
Which products and services to recommend to other people	76%	86%	88%
What to buy and where to shop	75%	84%	88%
Where to work	69%	87%	79%
Which stocks or mutual funds to invest in	59%	79%	74%
They want opportunities to support causes, such as:	Total	Millennials	Moms
Buy a product in which a portion of the sales goes to the support of the cause or issue	81%	85%	92%
Learn about a social or environmental issue	80%	86%	91%
Make changes to their own behavior, such as get more physical activity, eat healthier or reduce their impact on the environment	78%	84%	88%
Offer their ideas and feedback on the company's cause-related efforts and programs	75%	83%	89%
Donate money to a nonprofit the company has identified	75%	84%	88%
Serve as an advocate for an issue they care about, such as signing a petition or engaging their community	72%	82%	81%
Volunteer for the cause or issue	72%	81%	85%

In surveys over the years, American consumers have remained largely steadfast in their expectations of what issues companies should support. What issues matter to consumers? What issues do consumers expect companies to address? Table 4 below provides these answers:

78. *Id.* at 13.

Table 4

Leading issues consumers think companies should address:[79]		
	2010	2008
Economic Development (job creation, income generation, wealth accumulation)	77%	80%
Health and Disease	77%	79%
Hunger	76%	77%
Education	75%	80%
Access to Clean Water	74%	79%
Disaster Relief	73%	77%
Environment	73%	77%
Homelessness/Housing	70%	71%
Crime/Violence Prevention	69%	73%
Equal Rights/Diversity	66%	63%

American consumers are a demanding lot, as survey data indicates. "They want companies to tackle most major issues around the world and in their backyards. They want companies to support issues aligned with their businesses (for greatest impact), but they also want issues to be relevant to them and other key stakeholders."[80] When choosing an issue to support, what are consumer's expectations? Table 5 below examines what consumers expect from companies:

Table 5

When choosing an issue to support, consumers believe companies should consider:[81]	
One that is important in the communities where they do business	91%
One that is consistent with their responsible business practices or the way they make and distribute their products (e.g., impact on the environment, treatment of employees, financial transparency)	91%
One that is important to their consumers	89%
One where their business can have the most social and/or environmental impact	88%
One that is important to their employees	85%

Consumers are personally invested in corporate, social, environmental, and other cause issues.[82] Consumers care about the footprint and impact that companies they patronize have on society.[83] "They hope to make a difference by lending their time, money and brainpower."[84] Just how personally involved are American consumers? How willing are they to roll-up their sleeves? Table 6

79. *Id.* at 14.
80. *Id.* at 16.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 18.

below provides some insight, when asked what opportunities American consumers want companies to provide, the consumers responded in the following manner:

Table 6

Americans want companies to give them the opportunity to:[85]		
	2010	2008
Buy a cause-related product	81%	75%
Learn about a social or environmental issue	80%	74%
Change their behavior	78%	72%
Offer ideas/feedback on company efforts	75%	–
Donate to company-identified nonprofit	75%	66%
Advocate for an issue	72%	64%
Volunteer	72%	61%

Today, we live a society where no company seeks to end up in the news as the company that hires underage workers or the company that pollutes the environment. Consumers are demanding more social responsibility and accountability from the companies that offer them goods and services.[86] Corporate marketers have become very adept at using all the terms and buzzwords they think will peak consumers interest[87]—i.e., "green," "socially responsible," "low-impact," "sustainable," "earth-friendly," and "environmentally-friendly" get bantered about constantly in print and digital media advertisements. Companies tout their product's certification or endorsement as a "LEED," "Energy Star," "Organic," or "Fair Trade."[88] In many regards, American consumers have become somewhat skeptical of corporate "green" claims.[89] With no reliable mechanism of third-party verification or standard to test claims and assertions, consumers have become subjects of "greenwashing,"[90] and are therefore dubious of these claims made by many

85. *Id.*

86. *See id.* at 14 (table).

87. *See About Greenwashing*, GREENWASHING INDEX, http://www.greenwashingindex.com/about-greenwashing/ (last visited July 9, 2013).

88. *See* Blythe Copeland, *Energy Star, Organic, and More: Understanding Eco-Friendly Certifications*, TLC, http://tlc.howstuffworks.com/home/understanding-eco-friendly-certifications.htm (last visited July 10, 2013).

89. *See, e.g.*, *About Greenwashing*, *supra* note 87.

90. *See* Robert Lamb, *How Greenwashing Works*, HOWSTUFFWORKS, http://www.howstuffworks.com/greenwashing.htm (last visited July 9, 2013) ("The term greenwashing is an environmental take on **whitewashing**—the attempt to cover up or excuse wrongdoing through false statements or the biased presentation of data. While the term greenwashing first emerged around 1990, the practice itself dates back to the mid-1960s, when corporations were already making an effort to improve their public image in light of the emerging modern environmental movement."). *See also* William S. Laufer, *Social Accountability and Corporate Greenwashing*, 43 J. BUS. ETHICS 253, 253-61 (2003); Jacob Vos, Note, *Actions Speak Louder Than Words: Greenwashing in*

corporate actors. "As consumer demand for socially responsible products and companies is increasing, consumer trust in corporations is decreasing."[91] "Consumers are less likely to trust a company's claims versus consumer reports or third party certifications."[92] "As cause branding explodes, transparent communication continues to be a key challenge for marketers, and consumers agree: Nearly two-thirds (61%) don't think companies are giving them enough details about their efforts, including the amounts donated and the length of the promotions."[93] Finally, "[t]his disconnect may also explain why more than half (53%) of all Americans believe corporate cause marketing should be regulated."[94]

As survey data demonstrates, cause-related marketing is important—consumers really do want to have an impact in terms of sustainability.[95] As a result of greenwashing and other deceptive marketing practices, consumers are somewhat mistrustful of sustainability claims that companies make.[96] Indeed, consumers clamor for regulation of cause-marketing initiatives.[97] In a cluttered marketing landscape, where corporations can easily make unsupported and unsubstantiated sustainability claims, consumers seem to be asking for a mechanism to sift the wheat from the chaff.[98] Benefit corporations, due to their mandate of a general public benefit, accountability, and transparency, now offer a formal, tangible, and verifiable base for consumers to judge and reward corporations that are truly committed to sustainability.[99] Over time, benefit corporations will succeed because consumers will have a yardstick by which to measure the claims and successes of corporations that say they are committed to achieving sustainability. As benefit corporations take hold, flashy and sometimes deceptive marketing will no longer work. Corporations will have to back up their claims with results and clearly demonstrate the areas in which they are having an impact. Because consumer demand is driving the need for the benefit corporation, benefit corporations likely will succeed.

Corporate America, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 673, 673-74 (2009). To explore false and spurious green marketing claims that have been debunked, see *Greenwash: Exposing False Environmental Claims*, GUARDIAN, http://www.guardian.co.uk/environment/series/greenwash (last visited July 9, 2013).

91. CLARK & VRANKA, *supra* note 58, at 2.

92. *Id*. at 3.

93. CONE, *supra* note 63, at 24.

94. *Id*.

95. *Id.* at 18.

96. *See About Greenwashing*, *supra* note 87.

97. *See generally* CAUSE MARKETING F., http://www.causemarketingforum.com (last visited July 8, 2013) (search Vermont regulating "cause marketing").

98. *See About Greenwashing*, *supra* note 87.

99. *See Why B Corps Matter*, CERTIFIED B CORP., http://www.bcorporation.net/what-are-b-corps/why-b-corps-matter (last visited July 8, 2013).

B. Employees

Cause-related business practices are impacting and influencing the behavior and choices made by employees.[100] Survey data indicates that employees are heavily invested in their company's support of critical cause related business practices.[101] Employees hunger to work for companies that embrace causes and direct their business efforts toward identified causes.[102] Table 7 below demonstrates the multitude of ways that employees are willing to engage in cause-related efforts in the workplace:

Table 7

Employees want to get involved in their company's cause-related efforts through:[103]	
Matching grants	81%
Dollars for doers	77%
Paid time off to volunteer	76%
Information about volunteer opportunities outside of work	76%
Company-sponsored volunteer days	75%
Skills based volunteer opportunities	75%
A forum or opportunity for feedback and ideas	72%
Paid sabbaticals/extended time off	70%

"Just like consumers, employees want to feel vested in their employers' programs and are willing to roll up their sleeves to have an impact."[104] Cause-related business efforts pay dividends for companies—i.e., by improving employee morale. "Employees who are very involved in their company's cause program are 28[%] more likely to be proud of their company's values and 36[%] more likely to feel a strong sense of loyalty than those who are not involved."[105] "Companies who are not fully engaging their employees are clearly leaving equity on the table."[106]

Employees want to work for corporations that have an impact and that are positively changing lives.[107] Perceptive corporate leaders will want to tap into this impetus and desire in order to have a sustainability impact in order to build equity in employee morale, engagement, loyalty, and general job satisfaction. For these reasons, benefit corporations have a unique advantage in recruiting employees who will make a conscious choice and decision to work for a corporation with an egalitarian mission, as opposed to a statutory duty to return

100. *See* CONE, *supra* note 63, at 19.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id*.
105. *Id*.
106. *Id*. at 21.
107. *Id.*

maximum profits to one constituency—shareholders. Furthermore, benefit corporations will succeed because employees will have increased pride and utility from a corporation that provides a positive public benefit to society.

C. Investors

"Consumers aren't the only ones who pay attention to environmental ethics before they decide when to pull out their wallets. Some investors also pay attention to the environmental [and social] ethics of the companies they support."[108] In recent decades, the sustainable/socially responsible investing ("SRI") movement in the United States has blossomed and expanded dramatically. According to US SIF—the Forum for Sustainable and Responsible Investment—in 2010, there were "$3.74 trillion in total assets under management using one or more sustainable and responsible investing strategies[,]" including screening, shareholder advocacy, and community investing.[109] Interestingly,

> [f]rom 2010 to 2012, sustainable and responsible investing enjoyed a growth rate of more than 22[%], increasing from $3.07 trillion in 2010. More than one out of every nine dollars under professional management in the United States today—11% of the $33.3 trillion in total assets under management tracked by Thomson Reuters Nelson—is involved in sustainable and responsible investing.[110]

"As of 2012, there were 333 mutual fund products in the United States . . . with assets of $640.5 billion. By contrast, there were just 55 SRI funds in 1995 with $12 billion in assets."[111] In addition, "SRI mutual funds span a range of investments, including domestic and international investments, and a growing range of products are available, including hedge funds and ETFs (exchange traded funds)."[112]

"SRI has evolved in both the public and private markets, becoming an institutionalized sector of the professional asset management market and giving rise to a distinct venture capital and private equity industry of funds and individual investors seeking values-aligned investment opportunities."[113] In many regards, greenwashing is impacting SRI investors like consumers. "Like consumers, investors lack the comprehensive tools to understand the complete picture of a company's performance across the full range of social and environmental measures. Likewise, businesses may have a hard time attracting investors by distinguishing themselves among the sea of companies that claim to

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108. Vos, *supra* note 90, at 682.

109. *SRI Basics*, US SIF, http://www.ussif.org/sribasics (last visited July 7, 2013).

110. *Id*.

111. *Id*.

112. *Socially Responsible Investing Facts*, MYSENIORPORTAL, http://www.myseniorportal.com/app/webroot/arthurdocs/socially_responsible_investing.php (last visited July 8, 2013).

113. CLARK & VRANKA, *supra* note 58, at 3.

be 'socially responsible.'"[114] With regard to greenwashing and dubious social and environmental claims, one commentator has observed the following:

> Unfortunately, despite their best intentions, green investors are often suckered into investing in polluting corporations through greenwashing. Without verifiable information it is difficult for investors to make informed decisions about environmentally responsible practices and companies. The investors have little more to rely on aside from corporate representations—representations which, as we have already seen, are often major mischaracterizations of corporations' actual activities. With nothing to rely upon besides the corporations' own information, green investors end up investing in many corporations with unsavory environmental practices. Many corporations creatively manage their environmental reputations for this very reason."[115]

"Companies which do not project a green image are avoided by green investors . . . ."[116] "Individual investors aren't the only ones paying attention."[117] Other key players are taking note as well. "'Over the last few years, banks have been waking up to the fact that the environmental and social risks on projects they lend money to, while hard to quantify, can be very damaging to . . . business.'"[118]

The numbers don't lie: SRI investing has a huge footprint on the financial landscape and is continuing to grow at a staggering rate.[119] Benefit corporations promise to have a big impact on the burgeoning SRI investment community. With the promised accountability and transparency that benefit corporations provide, they are an attractive vehicle for members of the SRI communal to invest capital and earn a return on their investment.[120] The SRI investors' ever-increasing role in the financial marketplace is one more indication that benefit corporations will succeed.

D. Social Entrepreneurs

"For-profit social entrepreneurs have gained increasing prominence on the business landscape."[121] Social entrepreneurship rocketed to the spotlight in 2006 when Muhammad Yunus, of Bangladesh, won the Nobel Peace Prize for his pioneering work in microlending.[122] "Although there is no reliable data on 'social

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114. *Id*. at 4.

115. Vos, *supra* note 90, at 683 (footnotes omitted).

116. *Id.* at 682.

117. *Id*.

118. *Id*. at 682-83 (alteration in original) (quoting DANIEL C. ESTY & ANDREW S. WINSTON, GREEN TO GOLD: HOW SMART COMPANIES USE ENVIRONMENTAL STRATEGY TO INNOVATE, CREATE VALUE, AND BUILD COMPETITIVE ADVANTAGE 95 (2006)).

119. *See* CLARK & VRANKA, *supra* note 58, at 3-4.

120. *Id.* at 28.

121. *Id.* at 4.

122. *Id.* To view Dr. Yunus's biography, visit *Muhammad Yunus—Facts*, NOBELPRIZE.ORG,

enterprise' company revenues, an aggregation of businesses belonging to membership associations generally identified with the sustainable business movement reveals a marketplace of over 65,000 businesses with over $40 billion in revenues."[123]

American business schools are taking note of this social entrepreneurship movement. The premier business schools in America are taking social impact very seriously in their educational models and programs.[124] "The pipeline of future for-profit social entrepreneurs is filling rapidly as most top business schools offer a program in Social Entrepreneurship."[125]

The rising profile of social entrepreneurship, coupled with the increasing topical focus on social responsibility at American business schools, promises to foster a rising generation of dynamic socially-minded business leaders and innovators. As new business opportunities and ideas emerge, social entrepreneurs will need a reliable legal entity within which to form their fledgling business enterprises. As benefit corporations become more established and recognizable, social entrepreneurs will gravitate toward benefit corporations as the legal entity of choice for structuring and operating their socially focused businesses. Demand will drive the success of benefit corporations. Social responsibility has proven to be good business and will only become more impactful. Benefit corporations will certainly aid social entrepreneurs in meeting the demands of customers, employees, and investors for a chance to participate in a corporation that holistically focuses on being a positive steward in the community and the environment.

CONCLUSION

"For-profit social entrepreneurship, social investing and the sustainable business movement have reached critical mass and are now at an inflection point."[126] Four main constituencies—consumers, employees, investors, and social entrepreneurs—are driving the social business revolution.[127] "Accelerating consumer and investor demand has resulted in the formation of a substantial

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http://www.nobelprize.org/nobel_prizes/peace/laureates/2006/yunus.html (last visited July 7, 2013). *See generally* MUHAMMAD YUNUS WITH KARL WEBER, BUILDING SOCIAL BUSINESS: THE NEW KIND OF CAPITALISM THAT SERVES HUMANITY'S MOST PRESSING NEEDS (2010).

123. CLARK & VRANKA, *supra* note 58, at 4-5.

124. For instance, the University of Pennsylvania's Wharton School of Business has a Social Impact Initiative. *See Social Impact Initiative*, WHARTON, http://www.wharton.upenn.edu/socialimpact/index.cfm (last visited July 7, 2013). *See also, e.g.*, *Social Enterprise*, HARV. BUS. SCH., http://www.hbs.edu/socialenterprise/ (last visited July 7, 2013); *Center for the Advancement of Social Entrepreneurship*, DUKE FUQUA SCH. BUS., http://www.caseatduke.org/ (last visited July 7, 2013); *Social Enterprise at Kellogg (SEEK)*, KELLOGG SCH. MGMT., http://www.kellogg.northwestern.edu/Departments/seek.aspx (last visited July 7, 2013).

125. CLARK & VRANKA, *supra* note 58, at 5.

126. *Id.* at 2.

127. *See id.* at 2-6.

marketplace for companies that put purpose, not profit, at the center of the business."[128]

By enacting legislation to create benefit corporations, visionary states like Arizona, Arkansas, California, Colorado, Hawaii, Illinois, Maryland, Massachusetts, Louisiana, Nevada, New Jersey, New York, Oregon, Pennsylvania, South Carolina, Vermont, Virginia , and the District of Columbia have answered the call of consumers and investors who have long fueled the social responsibility movement.[129] "The benefit corporation is the most comprehensive yet flexible legal entity devised to address the needs of entrepreneurs and investors and, ultimately, the general public."[130]

The benefit corporation is distinct in three ways: (1) a benefit corporation must have the purpose of making a positive, substantial "impact on society and the environment;" (2) the directors' duties include "consideration of non-financial stakeholders," along with shareholders' financial interests; and (3) a duty "to report on its overall social and environmental performance using a" third-party standard that is "comprehensive, credible, independent and transparent."[131] Market demands and pressures have necessitated the creation of the benefit corporation. Only time will tell how successful they will be, but the early prognosis suggests that benefit corporations have an important role to play in the marketplace, and they will ultimately succeed as entities of choice for social investors and entrepreneurs.

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128. *Id*. at 2.
129. *See id.* at 1-4.
130. *Id*. at 1.
131. *Id*.

CONSUMER SOVEREIGNTY TRUMPS POPULAR SOVEREIGNTY: THE ECONOMIC EXPLANATION FOR *ARIZONA FREE ENTERPRISE V. BENNETT*

TIMOTHY K. KUHNER*

INTRODUCTION

The Supreme Court's unsettling jurisprudence on money in politics appeared to reach a logical endpoint in 2010 with *Citizens United v. FEC*.[1] Over the preceding thirty-four years of campaign finance cases, a free-market theory of the Constitution had triumphed as the Court attributed to the Constitution the views that money is speech, campaign finance reform is censorship, equality and democratic integrity are unconstitutional rationales for limiting political spending, and democracy must remain a market for competing donations and expenditures.[2] Given this trajectory, *Citizens United*'s definitive statement on corporate political power was predictable enough.[3] The case became an instant classic, cementing the Court's judgment that corporations are citizens within our democracy, and the First Amendment guarantees them the right to unlimited political spending.[4] Outrage resounded within the populace, numerous proposals to amend the Constitution issued forth, and many states defied the ruling.[5] By this point in

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1. 558 U.S. 310 (2010).

2. I discuss the cases establishing these principles elsewhere. *See generally* TIMOTHY K. KUHNER, CAPITALISM V. DEMOCRACY (Stanford University Press, forthcoming 2014); Timothy K. Kuhner, *Citizens United as Neoliberal Jurisprudence: The Resurgence of Economic Theory*, 18 VA. J. SOC. POL'Y & L. 395 (2011) [hereinafter, Kuhner, *Neoliberal Jurisprudence*].

3. This is especially so, given the Court's 1978 decision striking down a ban on corporate contributions and expenditures in the state referendum context. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source . . . .")

4. For an analysis of these conclusions and the reasoning leading up to them, see Kuhner, *Neoliberal Jurisprudence*, *supra* note 2, at 448-56.

5. Approximately a month after the opinion was decided, a major poll found that 85% of Democrats, 81% of Independents, and 76% of Republicans opposed the ruling. The findings "show[ed] remarkably strong agreement . . . across all demographic groups, [including] those with household incomes above and below $50,000." Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST, Feb. 16, 2010, http://articles.washingtonpost.com/2010-02-16/politics/36773318_1_corporations-unions-new-limits. For more on public opinion, see Hart Research Assocs., *Free Speech for People Nationwide Voter Survey*, FREESPEECHFORPEOPLE.ORG, 6-10 (Dec. 2010/Jan.2011), http://freespeechforpeople.org/sites/default/files/FSFP%20Nationwide%20Voter%20Survey-1.pdf, *discussed in* Bob Edgar, Op-Ed., *The Only Way to Revive Real Democracy*, N.Y. TIMES, Oct. 24, 2012, http://www.nytimes.com/

time, however, the Court had succeeded in kicking the legs out from under many of the most significant types of campaign finance reform at both the state and federal levels.[6] *Citizens United* seemed an appropriate resting place from the standpoint of doctrinal and political concerns.

The following year, the Court decided *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*.[7] The holding, striking down another significant campaign finance reform measure, came as a shock to everyone who believed that the possibilities for reform had already been sufficiently narrowed, that money in politics had reached sufficiently towering heights, that the First Amendment had already been bent far enough in favor of moneyed interests, or that the Court was even mildly sensitive to public opinion. On the other hand, the holding was unsurprising to those who had been keeping track of meaningful avenues for campaign finance reform yet to be foreclosed by the Court. If the Court wished to preclude the efforts of insurgent reformers, it could not rest on its laurels. Several additional principles of constitutional law would be required. It is there, in regard to those new principles, that a truly astonishing constitutional shift has occurred.[8]

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roomfordebate/2012/10/24/amend-the-constitution-to-limit-political-spending/the-only-way-to-revive-real-democracy. By late November 2012, approximately 350 municipalities, twelve states, numerous members of Congress, and even the President joined the call for an amendment in one form or another. Eliza Newlin Carney, *Bevy of Fixes Might Complicate Efforts to Reshape Campaign Finance System*, ROLL CALL (Nov. 21, 2012, 3:41 PM), http://www.rollcall.com/news/bevy_of_fixes_might_complicate_efforts_to_reshape_campaign_finance_system-219338-1.html; Paul Blumenthal, *Obama Endorses Anti-*Citizens United *Amendment in Reddit Chat*, HUFFINGTON POST (Aug. 29, 2012, 6:45 PM), http://www.huffingtonpost.com/2012/08/29/barack-obama-citizens-united-reddit_n_1841258.html. Millions of voters registered their agreement on ballot questions to the same effect. On state ballot initiatives, see Common Cause, *Fed Up with Runaway Campaign Spending, Voters Back Constitutional Amendment to Overturn* Citizens United, AMEND 2012 (Nov. 7, 2012), http://amend2012.org/2012/11/07/fed-up-with-runaway-campaign-spending-voters-back-constitutional-amendment-to-overturn-citizens-united/.

6. *See* Stephen Ansolabehere, Arizona Free Enterprise v. Bennett *and the Problem of Campaign Finance*, 2011 SUP. CT. REV. 39, 40-46 (discussing the Court's major cases since 1976). The process of reversing significant campaign finance reforms begun in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Bellotti*, 435 U.S. at 765, has accelerated in the Roberts Court era. *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011); *Citizens United*, 558 U.S. at 310; Davis v. FEC, 554 U.S. 724, 728 (2008); FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007); Wis. Right to Life, Inc. v. FEC, 546 U.S. 410 (2006); and Randall v. Sorrell, 548 U.S. 230 (2006).

7. 131 S. Ct. at 2806, *consolidated with* McComish v. Bennett, 611 F.3d 510 (9th Cir. 2010), *rev'd*, *Bennett*, 131 S. Ct. at 2806.

8. It is necessary to concede that the Court's earlier decision in *Davis v. FEC*, 554 U.S. 724 (2008), contained many of the elements of the *Bennett* opinion, as will be discussed shortly. Those who read *Davis* carefully and predicted how the Court might extrapolate from it would comprise the group of people least likely to be surprised by the principles announced in *Bennett*. Hints about the shape that *Bennett* could take can also be found in the circuit split on trigger mechanisms between 1994 and 2010. *See* Robert Steele, Note & Comment, Arizona Free Enterprise Club's

The Arizona law[9] at issue in *Bennett* provided "matching funds" for publicly-financed candidates.[10] These public funds were triggered by private expenditures, ensuring that public candidates could afford to keep pace with their privately-financed rivals throughout an election.[11] Indeed, the Arizona law constituted a leading example of how to make public financing a viable choice, inspiring similar laws in Connecticut, Florida, Maine, Minnesota, and North Carolina.[12] The Supreme Court might have upheld the law as a valid pursuit of well-known First Amendment[13] goals, such as a vibrant marketplace for ideas, diverse political viewpoints, competitive campaigns, or an informed electorate. These formulations had dominated the Court's jurisprudence for fifty years or longer.[14] Consider, for example, the Court's description of the public subsidy in *Buckley v. Valeo*,[15] the seminal case on campaign finance: "[This was a] congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people."[16] However, instead of taking *Bennett* as an opportunity to reaffirm this conventional, democratic view, the Court took its free-market theory of the Constitution to the next level.[17]

Does the First Amendment tolerate government subsidies awarded to publicly-financed candidates on the basis of their opponents' success in the market for political donations and expenditures? Viewing the issue in this light, the *Bennett* Court reasoned that trigger mechanisms might reduce the effects of

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Freedom Club PAC v. Bennett*: Taking the Government's Finger off the Campaign Finance Trigger*, 28 GA. ST. U. L. REV. 467, 474-87 (2012) (discussing various courts of appeals cases).

9. *See* ARIZ. REV. STAT. ANN. §§ 16-940 to -961 (2013).

10. *Bennett*, 131 S. Ct. at 2813-14 (citing ARIZ. REV. STAT. ANN. §§ 16-952(A), (B), and (C)(4)-(5) (2012) (amended 2012)).

11. *Id.* at 2814.

12. Adam Liptak, *Justices Reject Another Campaign Finance Law*, N.Y. TIMES, June 28, 2011, at A15, *available at* http://www.nytimes.com/2011/06/28/us/politics/28campaign.html?_r=0 (electronic version's title is different from print version: *Justices Strike Down Arizona Campaign Finance Law*).

13. U.S. CONST. amend. I.

14. These conceptions appear to become dominant in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In that case, the Court described the First Amendment as designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources[,]'" *id.* at 266 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)), and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people[,]'" *id*. at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)). An earlier iteration of this conception of First Amendment values can be found in *Associated Press*, 326 U.S. at 20, where the Court pronounced the following: "[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ."

15. 424 U.S. 1 (1976) (per curiam).

16. *Id.* at 92-93.

17. On the Court's free-market theory, see *supra* note 2 and accompanying text.

(and incentives for) private investment in the political market.[18] The Court then reached the remarkable conclusion that the First Amendment guards against this potential effect.[19] Upon examination, the subjective judgments—i.e., the new rules of constitutional law—fueling this conclusion are clear. First, the First Amendment protects the optimal, market-determined level of speech effectiveness. Second, to artificially lessen or enhance that level of effectiveness is to disrupt an economic form of political accountability—accountability to donors and spenders, not citizens as a whole. *Bennett* decided that it is for the market, not the state, to determine the precise level of funding, visibility, and ultimately, effectiveness that candidates and political viewpoints enjoy.[20]

Of the one hundred and twenty-three law review articles citing *Bennett* thus far,[21] none is devoted to analyzing the economic reasoning at the heart of the case.[22] This essay contributes to the literature by exposing and discussing the fact that the First Amendment has come to protect what is known as "consumer sovereignty" in economic theory.[23] This is *Bennett's* most profound effect. As an emerging constitutional guarantee, consumer sovereignty has tremendous implications for political finance cases and democratic theory. Indeed, it flips the traditional model of popular sovereignty on its head. Justice Kagan intuitively recognized this point by calling the new view of the First Amendment tenable only "in a world gone topsy-turvy."[24] Drawing also on *Davis v. FEC*,[25] decided three years before *Bennett*, this Essay explores the components of this new world. Part I explains *Bennett*'s and *Davis*'s facts, highlighting the two key issues framed by the Court. Parts II and III isolate the new constitutional requirements that proved decisive in both cases. This Essay concludes by discussing how consumer sovereignty and the political market mechanism are a tempting, but ultimately damning, alternative to democratic politics.

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18. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2818-21 (2011).

19. *Id.* at 2829 ("Laws like Arizona's matching funds provision that inhibit robust and wide-open political debate without sufficient justification cannot stand.").

20. *Id.* at 2826.

21. This is the number of articles revealed on June 25, 2013 by a search on Westlaw's law review database for "131 S. Ct. 2806." *Bennett* was decided one year and four days prior to the date of this search.

22. The closest exception is David A. Westbrook's *If Not a Commercial Republic? Political Economy in the United States After* Citizens United, 50 U. LOUISVILLE L. REV. 35 (2011). Although this Article was written before the Court handed down its opinion in *Bennett*, Westbrook analyzes *Citizens United* in terms of the Court's "fail[ure] to recognize (or perhaps understand) the distinctions between democratic and economic modes of self-governance" and its use of "a much simpler dualistic model of American public life [in which] an undifferentiated society, dominated by its markets, constitutes its rulers through periodic and formally neutral political processes." *Id.* at 36. My analysis of *Bennett* supports both observations.

23. For further discussion, see *infra* Part III.

24. *Bennett*, 131 S. Ct. at 2833 (Kagan, J., dissenting).

25. 554 U.S. 724 (2008).

I. TWO RIDDLES THAT DEMOCRATIC THEORY CANNOT SOLVE

The curious facts of *Davis* and *Bennett* reveal two riddles in need of solution. *Bennett* held unconstitutional the matching funds provision of the Arizona Citizens Clean Elections Act,[26] which can be summarized for our purposes as follows.[27] Participation in public financing is optional.[28] Those who bypass the public financing system are subject only to pre-existing contribution limits and disclosure rules.[29] Those who choose public financing agree to rely only on state funds in the form of an initial subsidy and, possibly, matching funds[30] (The one exception is that they may spend up to $500 of their own personal funds.[31]). Once a privately-funded opponent spends more than the amount of the initial subsidy, the public candidate receives dollar-for-dollar (minus fundraising expenses fixed at 6%) what the private candidate spends.[32] The same occurs when the private candidate's expenditures, in conjunction with independent expenditures in favor of a private candidate or against the public candidate, top the initial grant.[33] From that point forward, additional spending by the private candidate and independent expenditures made in support of a private candidate or against a public candidate trigger the distribution of matching funds.[34] However, there is a cap: matching funds top off at three times the amount of the initial grant.[35] As the Ninth Circuit put it, "a nonparticipating candidate who is able to raise funds in excess of three times the amount of his or her participating candidate's initial grant gains a potentially unlimited financial advantage."[36]

The essence of the law is simple: in the matching funds stage, which spans the distance between the initial lump-sum grant (which serves as a threshold) and the statutory maximum (three times the threshold), additional revenue to public candidates directly tracks the additional revenue employed by private candidates and adverse independent expenditure groups.[37] Thus, direct economic gains by private candidates and indirect gains occasioned by expenditures friendly to a private candidate's election result in nearly identical economic gains to each public candidate.

Justices Thomas, Kennedy, Scalia, and Alito joined Chief Justice Roberts's

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26. ARIZ. REV. STAT. ANN. §§ 16-940 to -961 (2013).

27. The facts I list are taken from the Court's own description. *See Bennett*, 131 S. Ct. at 2813-16.

28. *Id.* at 2813.

29. *Id.* at 2815.

30. *Id.* at 2814.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* On the facts of the case, see also *McComish v. Bennett*, 611 F.3d 510, 514-16 (9th Cir. 2010), *rev'd*, *Bennett*, 131 S. Ct. at 2828-29.

36. *McComish*, 611 F.3d at 517.

37. *Bennett*, 131 S. Ct. at 2813-14.

majority opinion in *Bennett*, striking down the matching funds provision.[38] Justice Kagan dissented, joined by Justices Ginsburg, Breyer, and Sotomayor.[39] This is the same majority that, almost exactly three years earlier, invalidated a different trigger mechanism in *Davis*. There, Justice Alito wrote the majority opinion.[40] Justice Stevens authored the principal dissenting opinion, which Justices Souter, Ginsburg, and Breyer joined.[41] These cases, thus, line up across ideological lines and also across biographical lines, the new Justices following in the steps of their predecessors.[42]

Davis confronts the "Millionaire's Amendment" of the 2002 Bipartisan Campaign Reform Act ("BCRA") (i.e., McCain-Feingold).[43] Under the BCRA, there is no public financing for congressional elections,[44] but there are limits on the amount of money parties may spend in coordination with their candidates.[45] Moreover, individual donations to candidates were, at the time, capped at $2300 per two-year election cycle.[46] Section 319(a), part of the Millionaire's Amendment, added a curious twist to this scheme. If a candidate spent more than $350,000 of her personal wealth on her own campaign, this triggered an "asymmetrical regulatory scheme" that benefitted her non-self-financing opponents.[47] Her opponents could then legally obtain unlimited coordinated party expenditures and individual contributions up to $6900 until they equaled, individually, the amount of personal funds spent by the self-financing candidate.[48] Meanwhile, the self-financing candidate remained subject to the usual limits.[49]

In contrast to *Bennett*, the mechanism in *Davis* did not give public candidates a cash subsidy pegged to the gains achieved by private candidates; rather, it gave public candidates a legal subsidy, to wit, the benefit of an asymmetrical regulatory regime that might enable them to collect additional funds more easily. The *Davis* regime functioned only to counter the amount of personal funds spent by candidates who were, ostensibly, millionaires. That regime expired, reverting back to the baseline limitations applicable to all candidates once the role of personal funds had been countered. This did nothing to equalize the role of private funds donated, raised from, or spent by each candidate's respective supporters, nor did it do anything to equalize the role of independent expenditure

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38. *See id.* at 2813, 2829.

39. *See id.* at 2829-47 (Kagan, J., dissenting).

40. *See* Davis v. FEC, 554 U.S. 724, 728 (2008).

41. *See id.* at 749 (Stevens, J., concurring in part and dissenting in part).

42. *See* Anne R. Carey & Ron Coddington, *Supreme Court Justices' Roots*, USA TODAY, usatoday30.usatoday.com/news/graphics/supreme_courtline/flash.htm (last visited Aug. 6, 2013) (providing an interactive view of each Justice's predecessors).

43. 2 U.S.C. § 441a-1(b)(1)(B) (2012), *preempted by Davis*, 554 U.S. at 744-45.

44. *Davis*, 554 U.S. at 728.

45. *Id.*

46. *Id.*

47. *Id.* at 729.

48. *Id.*

49. *See id.* at 728-31.

groups in giving one candidate an advantage over others.

Thus, the difference between the two regimes is that the Arizona law gave direct subsidies to improve the position of public candidates, whereas the BCRA gave public candidates the benefits of relaxed fundraising limits, making it easier for them to raise funds, assuming the existence of willing donors and spenders. Therefore, the Millionaire's Amendment enabled non-self-financing candidates to catch up to private candidates only insofar as they were able to appeal to private donors and spenders.

The similarities between these provisions are clear, at least at a high level of abstraction: in each case, some candidates are given an advantage by the government, that advantage is pegged specifically to gains by their opponents, and the effect (and possibly intention) is to equalize financial resources among candidates.[50] A final similarity must be noted as well: neither law limited the amount, content, form, or venue of unsubsidized candidates' speech nor the amount of the funds they might raise to fund such speech. The same is true for independent expenditure groups: such groups remained free to raise and spend as much money as they wished. This is to say that any equalization of funds occurring under either mechanism resulted from an increase in the total amount of funds that could be devoted to political speech. Both cases concern government subsidies for speech, not government limitations of speech.

This leads us to the first of our two riddles. How can a First Amendment violation be found in the absence of any actual abridgment or curtailment of speech? Recall *Buckley*'s view that lump-sum subsidies "facilitate and enlarge public discussion and participation in the electoral process."[51] There was, however, no trigger mechanism at issue in *Buckley*. The plaintiff in *Davis* reasoned that the trigger mechanism "burdens his exercise of his First Amendment right to make unlimited expenditures of his personal funds because making expenditures . . . has the effect of enabling his opponent to raise more money."[52] He went on to specify that the burden to his speech (or right to spend) resulted from his opponents' ability to "use [their additional government] money to finance speech that counteracts and thus diminishes the effectiveness of [his] own speech."[53]

The Roberts Court agreed, five to four, noting that "the vigorous exercise of the right to use personal funds to finance campaign speech produces [under the law] fundraising advantages for opponents in the competitive context of electoral politics."[54] Despite recognizing that the BCRA "does not impose a cap on a candidate's expenditure of personal funds," Justice Alito surmised that "it

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50. In *Bennett*, public officials received the governmental advantage, which was pegged specifically to private candidates through a matching funds mechanism. In *Davis*, non-self-financing candidates received the governmental advantage, which related specifically to self-financing candidates' own personal contribution.

51. Buckley v. Valeo, 424 U.S. 1, 92-93 (1976) (per curiam).

52. *Davis*, 554 U.S. at 736.

53. *Id.*

54. *Id*. at 739.

imposes an unprecedented penalty."[55] The *Bennett* majority cited this same passage of *Davis*.[56] Both opinions construed this penalty of increased funds for public candidates as a "burden" on private candidates' speech that warrants the application of strict scrutiny.[57]

Still, this remains a most mysterious construction of the issue. The laws produced additional funds for speech, thus, presumably, increasing the total amount of speech at the outset. This appears consistent with Justice Roberts's view of the First Amendment as "protect[ing] the free discussion of governmental affairs"[58] and "reflect[ing] our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[59] *Buckley*'s reasoning still might have applied. Justice Kagan was right to wonder how an accessible program that subsidized speech could be considered to inhibit debate or otherwise detract from its strength and breadth. She wrote that the Arizona law "adhere[s] to 'our tradition that more speech, not less, is the governing rule[,]'"[60] "'do[es] not prevent anyone from speaking[,]'"[61] and does not "discriminate[] against particular ideas."[62] Justices Stevens, Souter, Ginsburg, and Breyer had a similar response, dissenting in *Davis*.[63]

Thus, the riddle of how speech can be 'abridged' without being limited breaks apart into a series of questions: How could the provision of increased funds for public candidates constitute a violation of private candidates' right to political speech? What conception of speech rights or democracy causes the Court to hold that the First Amendment protects the effectiveness of speech? What type or level of effectiveness does it require?

In order to successfully confront these questions, we must consider a second riddle, another mysterious point of disagreement between the majority and the dissent. Criticizing the Millionaire's Amendment in *Davis*, Justice Alito stated that "[t]he Constitution . . . confers upon voters, not Congress, the power to choose the Members of the House of Representatives, and it is a dangerous

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55. *Id*. at 726.

56. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2818 (2011).

57. *See Davis*, 554 U.S. at 740 ("Because § 319(a) imposes a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech, that provision cannot stand unless it is justified by a compelling state interest." (quoting FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 256 (1986) (internal quotation marks omitted))); *Bennett*, 131 S. Ct. at 2817 ("Laws that burden political speech are accordingly subject to strict scrutiny." (quoting Citizens United v. FEC, 130 S. Ct. 876, 898 (2010) (internal quotation marks omitted))).

58. *Bennett*, 131 S. Ct. at 2828 (quoting Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam)).

59. *Id.* at 2828-29 (quoting *Buckley*, 424 U.S. at 14) (internal quotation marks omitted).

60. *Id.* at 2834 (Kagan, J., dissenting) (quoting Citizens United v. FEC, 130 S. Ct. 876, 911 (2010)).

61. *Id.* at 2833 (quoting *Citizens United*, 130 S. Ct. at 914).

62. *Id*. at 2834.

63. Davis v. FEC, 554 U.S. 724, 753-54 (2008) (Stevens, J., dissenting).

business for Congress to use the election laws to influence the voters' choices."[64] He then reminded the government that it "'is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves.'"[65] How can these remarks be reconciled with the facts that campaign finance reform was highly popular with the general public, and it was the people's representatives who enacted the BCRA?[66] This contradiction applies with additional force to the Arizona law, which was enacted by popular referendum.[67]

Thus, in *Bennett*, Chief Justice Roberts moved to refine Justice Alito's phrasing: "[T]he whole point of the First Amendment is to protect speakers against unjustified government restrictions on speech, even when those restrictions reflect the will of the majority. When it comes to protected speech, the speaker is sovereign."[68] The Chief Justice did not explain the relationship between public financing and sovereignty, or what it means for the speaker, not the majority of citizens, to be sovereign. Although *Davis* and *Bennett* reached the same conclusion, the distance between Justice Alito's phrasing and Chief Justice Roberts's is significant. The former noted that the people must govern themselves,[69] while the latter insisted that the speaker is sovereign and must be protected from the people.[70]

This significant refinement did not escape Justice Kagan. She praised purposes of the law that contradict Chief Justice Roberts's notion of sovereignty: "The public financing program . . . was needed because the prior system of private fundraising had . . . favored 'a small number of wealthy special interests' over 'the vast majority of Arizona citizens[.]'"[71] She built on this formulation in what was a direct response to the idea that speakers, not the general public, are sovereign: "Arizonans wanted their government to work on behalf of all the State's people . . . a law designed to sever political candidates' dependence on

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64. *Id.* at 742 (majority opinion) (citation omitted).

65. *Id.* (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 791 (1978)).

66. *See* William G. Mayer, *Public Attitudes on Campaign Finance*, *in* A USER'S GUIDE TO CAMPAIGN FINANCE REFORM 48–51, 115 (Gerald C. Lubenow ed., 2001) [hereinafter USER'S GUIDE] (noting the following: 77% of Americans say "that elected officials in Washington are mostly influenced by the pressure they receive on issues from major campaign contributors"; 76% believe that "Congress is largely owned by special-interest groups"; 71% agree that "[m]oney makes elected officials not care what average citizens think"; only 19% said that officials were most influenced by the "best interests of [the] country"). Corporate political spending, for example, is tremendously unpopular. *See* Eggen, *supra* note 5 (noting that 85% of Democrats, 76% of Republicans, and 81% of independents polled are opposed to the *Citizens United* ruling (with a margin error of "plus or minus 3 percentage points")).

67. *Bennett*, 131 S. Ct. at 2829-30 (Kagan, J., dissenting).

68. *Id*. at 2828 (majority opinion).

69. *Davis*, 554 U.S. at 742.

70. *Bennett*, 131 S. Ct. at 2828. Surely "the people" in this sense is a bookmark for concerns over majority power.

71. *Id.* at 2841-42 (Kagan, J., dissenting) (citation omitted) (quoting ARIZ. REV. STAT. ANN. § 16-949(B) (2013)).

large contributors . . . to ensure that their representatives serve the public, and not just the wealthy donors who helped put them in office."[72] This raised the question of whether by "the speaker" Chief Justice Roberts really meant "the spender."

Who else could cease to be sovereign on account of government subsidies pegged to private spending? The second riddle, then, concerns the sort of sovereignty that the majority had in mind. What kind of political power and accountability do the *Bennett* and *Davis* trigger mechanisms disturb? Here, the facts of each case require a brief caveat. The Millionaire's Amendment at issue in *Davis* only served to counter the role of the candidates' personal wealth, and it did so by selectively increasing the role of donors and spenders. That said, the private funds used to counter candidates' personal funds were either capped at $6900 per person or funneled through the vehicle of political parties.[73] These forms of private wealth are more moderate than candidates' personal expenditures of $350,000 or more.[74] The Millionaire's Amendment, as its name suggests, indeed attempted to counter the aristocracy of wealthy candidates and politicians. The Arizona law, in contrast, attempted to counter the role of candidate wealth, donors, and spenders altogether.[75] Thus, the trigger mechanisms in these two cases do not have the same effect on the sources and nature of political power. The Millionaire's Amendment used several forms of private financial power to equalize another form of private financial power, while the Arizona law sought to reduce the role of private financial power in general through injecting public funds into the mix.

The riddles of speech effectiveness and sovereignty discussed in the preceding paragraphs cannot be solved on the face of either opinion. Indeed, they cannot be solved by legal analysis or even democratic theory. Recall Justice Kagan's phrase: "a world gone topsy-turvy."[76] It is to this world that we must turn for answers—not the world of laissez-faire, free market theory, per se, but rather the Roberts Court's world in which that theory governs constitutional interpretation.

II. THE TOPSY-TURVY REQUIREMENT OF OPTIMAL, MARKET-DETERMINED EFFECTIVENESS

A. Cars, Cola, Boxers, and Speech: Accessing the Intuitive Economic Mindset

The following examples help to explain the majority opinions. Imagine two car companies competing in the market for sports coupes. Let us posit that each time company A sells a car, the state awards company B a sum of money equal to company A's profit on that sale. Or imagine instead two soft drink companies.

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72. *Id*. at 2845.

73. *Davis*, 554 U.S. at 729.

74. *Id.*

75. *Bennett*, 131 S. Ct. at 2814 (discussion of matching funds mechanism).

76. *Id*. at 2833 (Kagan, J., dissenting).

Each time company A advertises its product the state awards company B a sum of money equal to the cost of that advertisement. Company B must then use that subsidy to fund its own advertisements. In the case of both of the B companies, the "matching funds" come in addition to an initial lump-sum subsidy (start-up costs) granted for purposes of building the facilities and hiring the personnel necessary to enter the market.

Although the analogy to campaign subsidies is far from perfect,[77] these examples generate questions that shed light on economic theory's disdain for trigger mechanisms. As you consider the following questions, imagine their applications to privately-financed candidates (the A companies) and publicly-funded ones (the B companies). First, given the subsidies to the B companies, what incentives do the A companies have for selling or advertising? Second, how will the subsidies affect the overall market mechanism for producing high quality products at the lowest possible prices?[78] Third, to what extent can consumers in either market influence the B companies' decisions to make adjustments in their products or advertisements?[79]

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77. In order to improve the analogy to campaign finance, we would have to further stipulate these final conditions: B products are priced as closely as possible to A products; the B companies' revenues are stored in a separate fund and are dispersed to the state and to the companies' directors and employees. And still, the analogy would fall short. Cars and sodas are for sale; they are consumer goods. While manufacturers produce their products for purposes of selling them at a profit, candidates produce speech for purposes of convincing the electorate to vote for them or against their rivals. Pressure groups and candidates benefit when their speech is heard, or at least when it has some desired effect on listeners. But because this is ultimately uncontrollable, the ultimate object is for the speech to be disseminated. Cars and sodas are not an end unto themselves. Companies need them to be purchased. Thus, in the examples above, it is unclear where the B companies' sales revenues should go. The products cannot be offered for free because then consumers may prefer B cars and B sodas even though they are far inferior to the A variety. I have resolved this dilemma as faithfully to the case of subsidized candidates as I could. Another difficulty attends the question of what consumers are paying for. When individuals donate money to private candidates, and when expenditure groups produce political ads benefitting one candidate over another, they seek to influence the outcome of a future election, facilitate the dissemination of information and viewpoints beneficial to their interests, and obtain access and influence over elected officials with power to facilitate those same interests. While these political transactions are essentially speculative, conventional consumer transactions are less so. In exchange for paying the money, you get the car or the soda. The amount of utility that car or soda brings to you is, admittedly, uncertain, but prior to payment you have better faculties of prediction here than in the political world.

78. This question is not meant to imply that more political speech equates with higher quality political speech.

79. These two examples contain an inherent limitation for understanding political subsidies. Whereas sodas and cars are manufactured exclusively by companies and purchased by consumers, political speech is manufactured by all sorts of actors (parties, candidates, expenditure groups, and individual citizens), and political speech is not a consumer good. While members of the general public view and hear political speech, they need not pay any money for most forms of speech.

The answers to questions one through three listed above are not identical in each case. What is more, the precise answers depend on variables left unspecified in the facts above. Still, potentially correct, intuitively appealing answers are easy to form. It is important to engage these questions in this intuitive spirit because the Court's own approach to the analogous issues in *Davis* and *Bennett* is almost entirely evidence-free.[80] The following answers lead us into the spirit of the Court's reasoning.

The first question asks how the subsidies alter the effects of the A companies' sales or ads—whether, that is, sales or ads are as beneficial to A's interests as they would be absent the subsidy to B. The A companies have diminished incentives for both sales and advertising. Sales (the car company example) are still essential to survival, but absent the "matching funds" subsidy, the benefits of each sale would accrue to A only. If each sale leads to equal profit for one's competitor, then increased sales do not produce an advantage in the market. Still, revenue is essential nonetheless, and thus gains to B do not destroy A's incentive to sell. And because the matching funds program only targets sales, A is free to advertise its cars without fear of triggering unfavorable advertisements by B that could decrease A's sales.

In the context of matching funds for advertising (the cola companies), incentives decrease much further. This is the closest analogy to the political context because political advertisements, like product advertisements, are only useful insofar as they affect behavior. Unlike sales, advertisements are not ends in and of themselves. Quite the contrary, absent a desired effect on the audience, advertisements are a deadweight loss. While state funds are free, the A company's advertising budget was earned through toil. Because the matching funds result in presumptively unfavorable advertisements by its competitor, A's incentives are considerably reduced. Its advertising department could outsmart B's advertising department, and, while an equality of funds could lead to a most entertaining back and forth, it is clear that A will spend more hesitantly than before.[81]

Thus, the examples above are poor comparisons in that something must be done with the revenues from the B companies' cars and sodas. The only "revenue" produced by state subsidized candidates' speech, on the other hand, is either non-economic (public approval and voting behavior) or functionally irrelevant (private donations cannot be accepted by these candidates or can only be accepted up until the point of equalization of resources with privately-funded candidates). Still, the first and third questions above remain answerable on the facts in play and remain central to understanding the economic view of political subsidies.

80. *See infra* note 83 and accompanying text.

81. Beyond a certain stage, advertising does not make new points. Rather, it makes the same and similar points over and over again, thus achieving dominance in the market for ideas. *See generally* John Philip Jones, *What Does Effective Frequency Mean in 1997?*, 37 J. ADVERTISING RES. 14-20 (1997), *available at* http://uts.cc.utexas.edu~tecas/syllabi2/adv382jfall2002/readings/JonesJAR.pdf (discussing repetition in advertising). This is much the same as the case of Coca Cola. Everyone knows the names of the major colas and knows what they taste like. The function of the constant advertisements are not to contribute any new information, but rather to make Coca

The second question, addressing the effects of subsidies on the market mechanism, has an immediate answer. Because the B companies obtain revenue and advertising funds on the basis of the A companies' sales and advertisements, the B companies' products and advertisements are not a reflection of their success in the market. The B companies may continue to operate and advertise even if their products are subpar. The market mechanism of incentives for greater efficiency and innovation has been reduced, if not destroyed by the provision of state funds. Because rewards no longer flow from deserts, a market blighted by subsidies cannot be expected to produce overall social gains (or so the theory goes).[82]

An inefficient and distorted market could nonetheless satisfy consumer preferences to some extent. Consumers could get more or less what they desired, albeit at higher prices and lower quality. The third question, however, asks whether companies receiving the state subsidies have any incentive to respond to consumer signals in the market. They may still have some incentive to pay attention to consumer preferences, but it is uncontroverted that pegging the B companies' revenue and advertising budget to actions by the A companies will reduce the B companies' responsiveness. The B companies may even develop a perverse interest in facilitating sales and advertisements by A companies.

An additional example helps to solidify our commitment to the intuitive answers noted above. Imagine a boxing match between a coordinated, strong fighter and his uncoordinated, weak competitor. The weak boxer is given an initial state allotment to warrant his participation in the fight. The strong boxer is given no initial allotment. Whoever wins receives a prize. Regardless of whether the strong boxer has inherited his strength from a relative or acquired it through training, the reality is that he stands as a most formidable specimen. Let us posit, however, that each time he inflicts a blow on his weak, uncoordinated rival, state employees enter the ring, pin him, and inflict upon him a blow of equal force. For purposes of prolonging the fight, these state blows are delivered piecemeal, not at the end of each round.

Discounting the novelty value of this unfamiliar arrangement, virtually all reactions ought to take one of three forms: (1) the match should be postponed—if that tiny boxer wishes to fight, let him go out and train like everyone else, let him earn his coordination and strength through hard work, and then fight in

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Cola the most salient choice, the first beverage that comes to mind. If the state were to grant Pepsi additional advertising funds on the basis of whatever success Coca Cola were to have in generating advertising funds, it is doubtful that Coca Cola would continue to deploy its own money in such high quantities on advertisements. This is because, while the state's money is essentially free, one's own money, or one's supporter's money, is costly. Private money spent on campaign activity is a deadweight loss unless it contributes to some advantage. If spending that money also serves to help get one's opponent's message out, the incentive to spend is reduced.

82. A general exception occurs in the case of monopoly and otherwise non-competitive markets. In that context, subsidies to new companies can help ensure entrance of new firms into the market and break up monopolies and duopolies, which are notorious for price setting, inefficiency, and unresponsiveness.

accordance with his actual worth and ability; (2) let the strong boxer knock this guy out in the first round and move on to his next match; or (3) let us exclude this weak, uncoordinated boxer at the outset and begin each match with two well-qualified fighters in the ring.

These reactions spring from the correct answers to the same three questions above. First, the strong boxer has greatly diminished incentives to land a punch (or even to show up in the first instance). Second, state inflicted blows compromise the quality of the fight and its output in terms of consumer satisfaction. And, third, the general public's decision to boycott the weak boxer's matches does not provide as strong an incentive for change as it would, absent state intervention.

The intuitive answers that arise in all three examples are our key to understanding the otherwise unintelligible majority opinions in *Davis* and *Bennett*. After all, the Roberts Court majority did not base its holding on facts or figures. Chief Justice Roberts wrote that "[a]s in *Davis*, we do not need empirical evidence to determine that the law at issue is burdensome."[83] He *knew* that private speech would be rendered less effective by the matching funds. The Court in *Buckley v. Valeo* did not *know* this. There, the Court insisted that proof is required in adjudication.

> Appellants voice concern that public funding will lead to governmental control of the internal affairs of political parties, and thus to a significant loss of political freedom. The concern is necessarily wholly speculative and hardly a basis for invalidation of the public financing scheme on its face. Congress has expressed its determination to avoid the possibility.[84]

The Ninth Circuit panel, later reversed by the Supreme Court in *Bennett*, followed *Buckley's* lead, holding unanimously that evidence was necessary:

> In this case, as in *Buckley* and *Citizens United*, the burden that Plaintiffs allege is merely a theoretical chilling effect on donors who might dislike the statutory result of making a contribution or candidates who may seek a tactical advantage related to the release or timing of matching funds. The matching funds provision does not actually prevent anyone from speaking in the first place or cap campaign expenditures. Also, as in *Buckley* and *Citizens United*, there is no evidence that any Plaintiff has actually suffered the consequence they allege the Act

83. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2823 (2011) (describing *Davis* as "requiring no evidence of a burden whatsoever"). It is not that no evidence can be found, however. *See, e.g.*, Steele, *supra* note 8, at 467-69 (attributing Rick Scott's erratic political spending to a trigger mechanism in the Florida Election Campaign Financing Act). For a thoughtful critique of *Bennett's* evidence-free stance, see Roya Rahmanpour, Comment, Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*: Money Talks, Matching Funds Provision Walks*, 45 LOY. L.A. L. REV. 657, 667-69 (2012).

84. *See* Buckley v. Valeo, 424 U.S. 1, 93 n.126 (1976) (per curiam).

imposes.[85]

The Ninth Circuit cited undisputed evidence "that overall campaign spending in Arizona has increased since the Act's passage."[86] This did not prove, however, that campaign spending might not have increased more had the Act not been passed, or that individual instances of "self-censorship" did not occur because of the Act. Still, the Chief Justice, in *Bennett*, eliminated in one pen stroke the need for factual evidence of the law's burdensome character.[87] The need for proof of the existence of a penalty or impermissible burden, in fact, was waived.[88]

Whether the subsidies diminish the effectiveness of non-subsidized speech in practice is an empirical question whose actual answer matters much less than our intuitive guess. A case in which the public candidate raises the additional funds that do not work to the candidate's advantage would be aberrational, at least logically speaking.[89] Asymmetrical fundraising rules and matching funds subsidies must diminish (at least theoretically, as the court of appeals put it)[90] the incentives of private candidates and their supporters to spend money on speech. What would-be spender would not be deterred by the knowledge that her favored candidate's opponents would receive free money from the government as a result of her spending? Perhaps only those who sincerely desire to communicate a particular point of view and are convinced of that point of view's validity and urgency could be expected to spend under such circumstances. It stands to reason that this scenario would deter instrumental speakers most strongly—those who

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85. McComish v. Bennett, 611 F.3d 510, 525 (9th Cir. 2010), *rev'd*, *Bennett*, 131 S. Ct. at 2806.

86. *Id*. at 517.

87. *See Bennett*, 131 S. Ct. at 2823 ("The State contends that if the matching funds provision truly burdened the speech of privately financed candidates and independent expenditure groups, spending on behalf of privately financed candidates would cluster just below the triggering level, but no such phenomenon has been observed. That should come as no surprise. . . . While there is evidence to support the contention of the candidates and independent expenditure groups that the matching funds provision burdens their speech, 'it is never easy to prove a negative'—here, that candidates and groups did not speak or limited their speech because of the Arizona law." (citation omitted) (quoting Elkins v. United States, 364 U.S. 206, 218 (1960))).

88. *Id.*

89. This would happen only if they spent the money unwisely by, for example, advancing an unpopular message, packaging a popular message offensively, or inadvertently exposing an inconsistency in their position. Such mistakes are unintentional and, indeed, significant resources are devoted to avoiding them. As a general rule, or at least as a logical proposition, additional funds translate into additional success in the market. *See, e.g.*, Michael Tomz & Robert P. Van Houweling, Candidate Inconsistency and Voter Choice, at 4 (Aug. 2009), *available at* http://www.stanford.edu/~tomz/working/TomzVanHouweling-2009-08.pdf (inconsistent candidates received 43% of the vote, consistent candidates 57%, and the cost of flipping positions can be up to fourteen points).

90. *McComish*, 611 F.3d at 525 ("[T]he burden that Plaintiffs allege is merely a *theoretical* chilling effect on donors . . . .") (emphasis added)).

wish to spend only in order to tip the quantity (as opposed to the substance) of speech in their favor. Like evidence, however, this logic was irrelevant in *Bennett*.

Chief Justice Roberts *knew* what the First Amendment required: a state of affairs in which additional private funds worked only to the advantage of the candidate generating them or on whose behalf they were spent. This is the principle contravened without a doubt (logical, factual, or otherwise).[91] Recall the basic holdings in these cases: the First Amendment protects the market for political speech not only from limits, but also from trigger-mechanism subsidies.[92] We must intuit, then, that the First Amendment requires that the market for speech be both unfettered *and undistorted*. Distortion occurs if (1) the incentive to spend private funds is decreased, or (2) when private funds are spent nonetheless, but publicly-funded speech issues are triggered as a result.[93] At minimum, the Arizona law triggered the second type of distortion.[94] Both types of distortion would also occur in the car, cola, and boxing hypotheticals.

The rule that the market for donations and expenditures must not be distorted represents a significant change in constitutional principle. Neither case explicitly announces this new economic rule of constitutional law, but it is easy enough to demonstrate that it is implied.

B. Redefining the First Amendment in Order to End Entitlements and Distortion

Recall the plaintiff's reasoning in *Davis*. The trigger mechanism "burdens his exercise of his First Amendment right to make unlimited expenditures of his personal funds because making expenditures . . . has the effect of enabling his opponent to raise more money."[95] The plaintiff also maintained that the burden to his speech resulted from his opponents' ability to "use [their additional

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91. *See Bennett*, 131 S. Ct. at 2813 ("[A] publically financed candidate receives roughly one dollar for every dollar spent by an opposing privately financed candidate.").

92. *See supra* Part I.

93. Other types of distortion of the market political spending have been noted as well. *See* Nicholas Bamman, *Campaign Finance: Public Funding After* Bennett, 27 J. L. & POL. 323, 341-43 (2012). (discussing various forms of "gaming" the system of matching funds).

94. *See generally Bennett*, 131 S. Ct. at 2806 (analyzing triggering funds). A related type of distortion necessarily occurred as a result of the BCRA trigger mechanism in *Davis*. Davis v. FEC, 554 U.S. 724, 729 (2008). As a result of private donations or expenditures, public candidates were given the right to raise larger contributions from private sources. *Id.* This might seem to reduce market distortion because candidates raise funds in accordance with the preferences of private holders of capital. But the private contributions to public candidates necessarily flow from the candidates' degree of strength and sophistication at the moment when the asymmetrical limit is triggered, a moment which comes only after the public candidate has received the initial lump-sum subsidy. Thus, the public candidate who appeals to the private market does so from an artificial position—the position that public funds enable.

95. *Davis*, 554 U.S. at 736.

government] money to finance speech that counteracts and thus diminishes the effectiveness of [his] own speech."[96] The Davis majority agreed.[97] The majority in *Bennett* concurred with the petitioners' argument: "the matching funds provision . . . burdened their ability to fully exercise their First Amendment rights."[98]

Consider the curious shape of the plaintiffs' arguments: the First Amendment protects not just the right to speak without government limits on one's own speech, but also a right to speak without government assistance to others.[99] The first component contains a negative right—a right to be free from government action that directly limits one's own speech. The second appears to contain a positive right—a right so vigorous and full as to require that the government do or cease to do something that is necessary to make the exercise of one's right effective. This apparent positive right to *effective* political speech, this enhanced First Amendment, prohibits actions by the government that diminish speech.

Upon examination, however, there are good reasons to doubt that the plaintiffs in *Davis* and *Bennett* were really making a positive rights claim in the first place. The plaintiffs did not urge the state to give them anything, to provide for them, or to otherwise boost them up.[100] They claimed, rather, that the state's effort to provide for others had diminished what was theirs.[101] The key to this argument lies in its underlying demand: a return to the supposedly natural, private order of things.[102] The deceiving, positive law shape of plaintiffs' argument is incidental to the broader purpose of dismantling an edifice that allowed the state to guarantee the effectiveness of publicly-financed candidates' speech. The enhanced First Amendment enables candidates to assert a successful claim against the government on grounds of government disruption of the private order, which includes the pre-existing distribution of resources devoted to political speech.

The reality, then, is exactly the opposite of what it initially appears: the new First Amendment *prohibits* a positive right to effective political speech. Only those who are unsuccessful in (or scornful of) the market require such a guarantee, a fact which reveals on its own why such a guarantee must be unlawful. It distorts the market mechanism for sorting out which candidates, expenditure groups, and political messages receive the most funds and obtain the loudest, most effective speech. Rather than asking the government to do anything, the *Davis* and *Bennett* plaintiffs asked the Court to issue a simple command: *laissez-faire*.[103]

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96. *Id*.

97. *Id.* at 744-45.

98. *Bennett*, 131 S. Ct. at 2816.

99. *Id.*

100. *See generally id.* (only asking to remove government finance).

101. *Id.* at 2816, 2818 (discussing that the BCRA in *Davis* "had 'the effect of enabling [the] opponent to raise more money and to use that money to finance speech that counteract[ed] and thus diminishe[d] the effectiveness of Davis'[s] own speech" (second and third alterations in original)).

102. *See id.* at 2816 (asking the Court to strike down the statute).

103. Essentially, both plaintiffs asked the Court to find the laws unconstitutional and, thus,

Laissez-faire means that the current status of longstanding distributive contests between many groups ought to be considered final as far as the state is concerned.[104] Let the market determine whatever gains and losses must occur from here out.[105] This is not a call for the natural order of things, but rather for the natural order of things absent any additional state intervention. It is not obvious, however, why the First Amendment should throw its weight behind the market order and demand the destruction of government assistance.

Let us begin by examining how the *Bennett* and *Davis* majority validated the claim that the government impermissibly burdened the plaintiffs' speech by helping other candidates raise money. To support the argument that one violates another's constitutional rights by helping his foe, the *Bennett* majority cited the traditional gamut of First Amendment purposes, including "'protect[ing] the free discussion of governmental affairs'" and upholding "our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'"[106] This raises one of the same riddles as before. In a conventional, democratic sense, both trigger mechanisms sought to ensure the robustness of debate and an actual discussion of government affairs (instead of dominance by the best funded view).[107] The majority's understanding of the concepts of free discussion and uninhibited, robust, and wide-open debate was therefore mysterious.

Justice Kagan's response retorted that the First "Amendment protects no person's, nor any candidate's, right to be free from vigorous debate" and "that falsehood and fallacies are exposed through discussion, education, and more speech."[108] She praised the Arizona law for "subsidiz[ing] and so produc[ing] *more* political speech" and claimed that "[n]o one can say that [it] discriminates against particular ideas."[109] These statements are true only in a civic sense. The law produces more political speech in allowing public candidates the financial means to counter and reply to the speech of private candidates.[110] The law discriminates against no particular idea. It cares only for the amounts of money spent.

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invalid. *See id.*; Davis v. FEC, 554 U.S. 724, 736 (2008).

104. *See* BLACK'S LAW DICTIONARY 892 (8th ed. 2004) ("Governmental abstention from interfering in economic or commercial affairs.").

105. *Id.*

106. *Bennett*, 131 S. Ct. at 2828-29 (quoting Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam)).

107. *See id.* at 2829 (Kagan, J., dissenting).

108. *Id*. at 2835 (quoting Pac. Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1, 14 (1986) (plurality opinion); Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (internal quotation marks omitted)).

109. *Id*. at 2833-34.

110. *Id.* at 2836 ("'[L]aws providing financial assistance to the exercise of free speech'—including the campaign finance statute at issue—'enhance these First Amendment values.'" (alteration in original) (quoting Buckley v. Valeo, 724 U.S. 1, 93 n.127 (1976) (per curiam))).

Justice Roberts had no trouble countering Justice Kagan's reasoning: "Any increase in speech resulting from the Arizona law is of one kind and one kind only—that of publicly financed candidates."[111] It is imprecise to say that the law produces more political speech overall, when, in fact, it only produces more speech by state-subsidized candidates. Although Chief Justice Roberts had reasons to doubt that such a regime would increase the overall quantum of speech, he dwelled on the selective effects of the law: "[E]ven if the matching funds provision did result in more speech . . . in general, it would do so at the expense of impermissibly burdening (and thus reducing) the speech of privately financed candidates and independent expenditure groups."[112]

This emphasis on boosting the speech of only one subset of candidates helped the majority portray the law as another impermissible effort to equalize resources. Striking down independent expenditure and candidate expenditure limits, *Buckley* famously stated the following: "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[113] That is not the same concept, however, as the government subsidizing the speech of some in order to enhance their relative voice. The *Bennett* majority conceded the point,[114] but it sought to extend the *Buckley* principle to cases where the effectiveness of speech was limited (or, in the Court's other words, "penalized" and "impermissibly burden[ed]").[115] In any case, the majority had already determined that petitioners were penalized and burdened by the Arizona law; accordingly, the majority had begun the search for a compelling state interest.[116]

The majority went further than necessary, however. Instead of merely pretending to be in a *Buckley* situation and, thus, reminding the state that equality was not a compelling interest, the Court decided that equality was not even a *legitimate* interest.[117] No case before *Davis* addressed to the impermissibility of equalization through subsidies. The Court had already decided that achieving equality through limiting protected speech was unconstitutional because of the tremendous seriousness of direct infringements on free speech rights. This says

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111. *Id*. at 2820 (majority opinion).

112. *Id*. at 2821. The majority cited some evidence of a decrease in speech by the actors "burdened" by the matching funds, but ultimately empirical data was not the point. *Id.* at 2823. The law subsidized only one type of speech and that it did so in a way that reduced the spending incentives of privately-funded candidates and their supporters. *Id.*

113. Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (per curiam).

114. *See Bennett*, 131 S. Ct. at 2826 ("[I]n *Buckley*, we held that *limits* on overall campaign expenditures could not be justified by a purported government 'interest in equalizing the financial resources of candidates.'" (emphasis added) (quoting *Buckley*, 424 U.S. at 56)).

115. *Id.* at 2820-21.

116. *Id.* at 2824.

117. *Id.* at 2825 ("In *Davis*, we stated that discriminatory contribution limits meant to level electoral opportunities for candidates of different personal wealth did not serve a legitimate government objective, let alone a compelling one." (quoting Davis v. FEC, 554 U.S. 724, 741 (2008)) (internal quotation marks omitted)).

nothing of the legislative designs in *Bennett* and *Davis*, however.

The *Buckley* quote above continued by describing the First Amendment as "designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[118] It was plausible to argue that the expenditure limitations at issue in *Buckley* frustrated this First Amendment design.[119] But the subsidies in *Davis* and *Bennett* appeared to achieve the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas.[120] If no restriction on anyone's speech was involved, what caused the Court to lower equality to a patently illegitimate state interest?

The necessary clue resides in the fact that the Court does not consider equality a problem in and of itself.[121] A field of independently wealthy candidates and candidates with wealthy supporters could cancel out the role of wealth (albeit only after preventing poorer candidates from mounting viable campaigns). A wealthy supporter could even emerge late in the game and equalize the financial resources of candidates indirectly by funding an expenditure organization. Indeed, that organization could go so far as to carry out a "trigger mechanism" policy, systematically countering each advertisement against a certain candidate with an advertisement in favor of that same candidate.[122] The majority seems to apparently welcome these developments. Why is it permissible for private actors to equalize resources by bestowing one or another candidate with wealth, and yet impermissible for the state to do so? What is the difference between the private and the public in this regard? We thus return to the baseline assumption that courts and state legislatures should respect the existing distribution of political resources.

The explanation for this total condemnation of state-produced equality is illuminating. *Bennett* credited *Davis* for this achievement.[123] Justice Alito's

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118. *Buckley*, 424 U.S. at 48-49 (internal quotation marks omitted) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266, 269 (1964)).

119. *Cf.* Harper v. Canada (Attorney Gen.), [2004] 1 S.C.R. 827, para. 91 (Can.) ("Equality in the political discourse . . . is achieved, in part, by restricting the participation of those who have access to significant financial resources. The more voices that have access to the political discourse, the more voters will be empowered to exercise their right in a meaningful and informed manner.").

120. *But see Bennett*, 131 S. Ct. at 2825-26 (arguing that subsidies "level[ing] the playing field" limit free speech); *Davis*, 554 U.S. at 738-39 (arguing that the subsidy makes candidates choose between "unfettered political speech" or "discriminatory fundraising limitations").

121. *See Bennett*, 131 S. Ct. at 2824 (subsidizing an opponent's speech makes one's speech less effective).

122. This private "triggering mechanism" essentially resembles the matching funds triggering mechanism in *Bennett*, except that this example deals with the wealthy private candidates (or at least attractive to wealthy donors), while the Arizona law in *Bennett* deals with private candidates and public candidates who are not as attractive to wealthy donors. *See id.* at 2813-14.

123. *See id.* at 2826 (citing *Davis* to explain that "leveling the playing field" is not a legitimate

reasoning was unabashedly honest. He seized on the government's view that the law intended "'to reduce *the natural advantage* that wealthy individuals possess in campaigns for federal office.'"[124] He described such a plan as enabling "Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office."[125] Thus, Justice Alito portrayed the use of subsidies as a government attempt to determine which strengths should be allowed to operate and, thus, an attempt to remove authority from voters.[126]

The opposite conclusion seems far more reasonable, however. The voters with authority to evaluate candidates' strengths are the same voters who overwhelmingly support campaign finance reform and believe political representatives to be unduly controlled by corporations and the wealthy.[127] Consider Justice Stevens' dissenting view, which echoed the congressional judgment behind the BCRA: "If only one candidate can make himself heard, the voter's ability to make an informed choice is impaired."[128] This view maintains that resource inequalities between candidates, not campaign finance subsidies, prevent voters from evaluating candidates' strengths.[129] Tremendous variations in campaign resources enable some candidates to dominate the airwaves and characterize the issues as they see fit.[130] In such a media market, the public can hardly hear, much less consider, competing, poorly funded points of view.[131]

Once again, however, democratic arguments miss the point. When Justice Alito mentioned voters' authority to evaluate candidates' strengths, he was referring only to financial strength.[132] He made this remarkably clear in a passage that appeared to be taken from a political parody or dystopian novel.

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interest).

124. *Davis*, 554 U.S. at 741 (quoting Buckley v. Valeo, 424 U.S. 1, 33 (1976) (per curiam)). Justice Alito added that precedent "provide[s] no support for the proposition that this is a legitimate government objective." *Id*. This implies that the Court would have had to affirmatively sanction a particular state interest in order for that interest to be viable. This would assign an essentially legislative function to the Court—that of specifying *ex ante* the scope of important and compelling state interests, instead of deciding *ex post* whether a given interest was important or compelling on the facts of a particular case. Alito's legislative posture on this matter is in keeping with the Court's post-*Buckley* function as an ideological gatekeeper and architect of capitalist democracy. *See generally* Kuhner, *Neoliberal Jurisprudence, supra* note 2.

125. *Davis*, 554 U.S. at 742.

126. *See id.* (arguing that "it is a dangerous business for Congress to use the election laws to influence the voters' choices").

127. *See Bennett*, 131 S. Ct. at 2829 (Kagan, J., dissenting).

128. *Davis*, 554 U.S. at 753-54 (Stevens, J., concurring in part and dissenting in part).

129. *Id.* at 754 ("[T]he self-funding candidate's ability to engage meaningfully in the political process is in no way undermined by th[e BCRA].").

130. *See id.* at 751-52 (arguing that "flooding the airwaves with slogans and sound bites . . . obscure[s]" speech).

131. *See id.*

132. *See id.* at 742 (majority opinion).

> Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives, and it is a dangerous business for Congress to use the election laws to influence the voters' choices.[133]

Notably absent from Justice Alito's list of strengths was any attribute traditionally thought to be a sound basis for electoral choice—such as a candidate's intelligence, policy platform, political record, values, character, eloquence, and employment history. But Justice Alito was not concerned with civic strengths and weaknesses. Beyond omitting them from his list, his entire analysis served to discredit the citizens' and government's intention to prevent such civic strengths from being obviated by the role of private wealth in the political process.[134]

A certain amount of funds is necessary to expose voters to candidates and enable voters to evaluate the candidates' intelligence, policy platforms, and so on. The trigger mechanisms at issue in both cases sought to make this happen for candidates who would otherwise be outspent by their opponents or beholden to interests they do not wish to coddle.[135] This function is in keeping with the robust and vibrant "market" sought by the First Amendment.[136] Tremendous inequality in funds enables moneyed candidates to dominate the market, overshadowing other points of view and even discrediting them through mere innuendo or repetition.[137] This is what the Court appeared to recognize in 1969: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market . . . ."[138] But what if we assume that the Court seeks an unregulated market, one in which the varying quantities of wealth accumulating to the candidates must be left alone? In such a market, intelligence, policy platforms, eloquence, and all other manner of strengths would still be relevant, but candidates would employ them primarily to obtain friendly donations and

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133. *Id*. (citation omitted).

134. *See id.* at 741 (arguing that "level[ing] electoral opportunities" is not a legitimate government interest).

135. *See id.* at 755 (Stevens, J., concurring in part and dissenting in part) (describing generally "statutes designed to protect against the undue influence of aggregations of wealth on the political process").

136. *See id.* at 755-56 (arguing the First Amendment's purpose is to "preserve" the "marketplace of ideas").

137. *See id.* at 752 n.3 (explaining that "campaign expenditures are not" speech, but something that "*enable[s]* . . . speech (as well as its repetition *ad nauseam*)").

138. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

expenditures. These strengths would be useful, then, in order to compete in a financial market for political dominance.

Let us be clear on Justice Alito's complaint: through the trigger mechanism, the government impermissibly interfered with the role of personal wealth and constituent wealth in electoral outcomes.[139] Formal market theory would demand that we assume candidates' economic success to convey the degree of their other, non-economic strengths.[140] Portraying the trigger mechanism as a penalty or burden on speech, instead of an effort to make the political marketplace diverse and competitive, does nothing to change the essence of his complaint. Speech is only penalized or burdened insofar as subsidized candidates are given a chance to compete, step by step, with the private candidates.[141] It is uncertain how that function bodes for Justice Holmes's dictum, approvingly quoted by Justice Kagan, that "'[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market.'"[142] Recall Justice Kagan's view that the "[First] Amendment protects no person's, nor any candidate's, 'right to be free from vigorous debate'"[143] and "that 'falsehood and fallacies' are exposed through 'discussion,' 'education,' and 'more speech.'"[144] She believed that the Arizona law was consistent with Justice Holmes's decree because it "produce[d] *more* political speech."[145]

By implication, Justice Alito's viewpoint must be that discussion, education, and more speech are only valid tests of truth in the market insofar as they are produced by the market itself.[146] If the government intervenes to facilitate that discussion, supplying the funds necessary for the discussion to occur, then this

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139. *See Davis*, 554 U.S. at 742.

140. *See id.* at 756-57 (Stevens, J., concurring in part and dissenting in part) ("A well-functioning democracy distinguishes between market processes of purchase and sale on the one hand and political processes of voting and reason-giving on the other." (quoting Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390 (1994) (internal quotation marks omitted))).

141. *See id.* at 756 (discussing the BCRA's "'Opposition Personal Funds Amount' formula" as permitting competition).

142. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2837 (2011) (Kagan, J., dissenting) (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

143. *Id.* at 2835 (quoting Pac. Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1, 14 (1986) (plurality opinion)).

144. *Id*. (quoting Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

145. *Id*. at 2833. Justice Kagan appears to assume that the tax revenue collected from citizens and then distributed to public candidates would not have otherwise been spent by taxpayers on political speech. In this Essay, I do not account for the possibility that the tax revenues from which matching funds are drawn serve to deplete citizens' petty cash, the reserves from which citizens would draw in order to finance their own political speech.

146. *See Davis*, 554 U.S. at 742 (Justice Alito only mentions wealth, and "celebrities," and "well-known family name[s]" as examples that "[d]ifferent candidates have different strengths.").

is not truly "the competition of the market."[147] Nobody would think that the government could bleep out portions of televised speeches in order to equalize eloquence or intelligence, or limit donations and expenditures to a point where the political discourse was muted. But only a radical, *laissez-faire* view of the market holds that the state cannot dedicate funds to stimulating competition.

The addition of government funds to the mix can be objected to (1) on the basis of reducing the portion of economic incentives for speech that corresponds to the desire for viewpoint dominance, and (2) on the basis of reducing the actual role of economic power in determining the saliency of different candidates and viewpoints. The possibility that private wealth could level electoral opportunities poses no danger in this regard—indeed, any leveling that occurs as a result of candidates' or supporters' wealth is consistent with Justice Alito's insistence on market competition.[148] The government would have to respect disparate quantities of wealth between political candidates and their supporters. Government limits and subsidies disrupt the contest between candidates' relative economic strengths. This explains why equality in resources resulting from the market is acceptable, but equality from state subsidies or state limits is not.

Trigger mechanisms constitute undue government interference in this private realm of financial competition for political power. This is how a majority of the Court now understands those cryptic words: "uninhibited, robust, and wide-open."[149] Matching funds that make political debate robust may simultaneously inhibit private speech and, by reducing incentives, close the doors to the "open marketplace"[150] the First Amendment has been held to protect.[151]

It stands to reason that lump-sum subsidies also interfere with the Court's view of an open marketplace. Like matching funds, lump-sum subsidies level resources, at least at the outset. For a time, they may even raise public candidates well above private ones. Private donations and expenditures are, thus, immediately put on the defensive. They must compete against speech that, absent subsidies, might not otherwise exist. Therefore, lump-sum subsidies arguably diminish the effectiveness of donations and expenditures made by or on behalf of privately-financed candidates.

Still, neither *Bennett* nor *Davis* openly questioned Buckley's tolerance of FECA's lump-sum public financing system for presidential campaigns,[152] nor did *Bennett* call into question the lump-sum component of the Arizona law.[153] Why should a lump-sum system be tolerated, but a trigger mechanism invalidated?

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147. *Abrams*, 250 U.S. at 630.

148. *See Davis*, 554 U.S. at 742

149. *Bennett*, 131 S. Ct. at 2828-29 (quoting Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam)).

150. N.Y. State Bd. of Elections v. López Torres, 552 U.S. 196, 208 (2008).

151. *See Bennett*, 131 S. Ct. at 2829.

152. *See Davis*, 554 U.S. at 754 (Stevens, J., concurring in part and dissenting in part) (explaining the *Buckley* Court's reasons for allowing limits).

153. *See Bennett*, 131 S. Ct. at 2824 (explaining it is not the subsidy that is problematic but "the manner in which that funding is provided").

Does a lump-sum subsidy impose a "penalty" or "burden" on speech? If so, what makes that penalty and burden permissible in comparison to the effects of a trigger mechanism subsidy?

C. Not All Subsidies Neutralize the Political Market

Beginning here, we must focus mostly on *Bennett*. While *Davis* contains a great deal of the reasoning employed in *Bennett*, the *Davis* trigger mechanism invokes some of the strengths mentioned by Justice Alito above. Recall that the millionaire candidates' personal expenditure of over $350,000 allows other candidates to raise larger sums of money from private donors and to benefit from unlimited coordinated party expenditures. These are essentially private funds, and, therefore, *Davis* concerns the use of private funds to counter the use of other private funds: personal wealth versus the wealth of donors and parties. Much of what was said above regarding matching funds does not apply to the ill-fated Millionaire's Amendment.[154] Let us proceed, then, to explain why lump-sum subsidies are tolerable and matching fund subsidies are intolerable.

Continuing with our intuitive mindset inspired by the comparison to car companies, soda companies, and boxers, little effort is required to answer this question. In the case of traditional, lump-sum subsidies, the candidate agrees to spend no more than the amount of the subsidy, and, thus, as Justice Kagan puts, "he will lack the means to respond if his privately funded opponent spends over that threshold."[155] This provides a dollar amount that the market (the private candidates, their supporters, and the public candidates' detractors) can bear in mind. Because the lump-sum is stable and will not increase, every dollar raised by each private challenger benefits his campaign. The state has valued the election at this set dollar amount, but campaign contributions and expenditures can exceed this amount.[156] Calculations can be made on the basis of how far that dollar amount goes in funding political ads and political activities, and the market can respond as it will.

This is why Justice Kagan is mistaken when she writes that the "lump-sum model upheld in *Buckley*[] imposes a similar burden on privately funded candidates . . . . That system would 'diminis[h] the effectiveness' of a privately funded candidate's speech at least as much."[157] Not so. The lump-sum subsidy, once awarded, ensures that private candidates' speech will serve two functions: asserting their own viewpoints and countering the (already funded) viewpoints of their opponents. Every dollar spent on political ads takes private candidates one step closer to outspending their publicly-funded rivals.[158] Private speech is

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154. *See id.*

155. *Id.* at 2831 (Kagan, J., dissenting).

156. *Id.* at 2832-33 ("Once the publicly financed candidate has received three times the amount of the initial disbursement, he gets no further public funding . . . no matter how much more his privately funded opponent spends." (citation omitted)).

157. *Id*. at 2837-38 (third alteration in original).

158. *Cf.* Joel M. Gora, *Don't Feed the Alligators: Government Funding of Political Speech*

therefore effective, and its urgency is clear.

Still, lump-sum subsidies do distort the market. Advertisements and campaign activities are not pegged to their *natural, market determined levels*—that is, the level that results from the donations and expenditures of private individuals, including the candidates themselves. Such subsidies place private candidates at an initial disadvantage because their opponents are given free money without having to expend much energy to raise it. Public funding in the rudimentary, lump-sum form is comparable to a lump-sum state subsidy to a particular company within a particular market, except that it adds a novel condition: the company cannot raise more money in the market.[159] Thus, they distort the market in an additional way; a publicly-funded candidate who becomes wildly popular will not end up being able to register his or her popularity in economic terms.

Either way, that candidate's political power will not be set at the market level: unpopular candidates will raise an artificially high level of funds, thanks to the state subsidy, while popular candidates will raise an artificially low amount because they could have raised more without the subsidy. People may wish to donate to a given candidate, but are prohibited from doing so. This is the bargain that public candidates strike with the state—a Faustian bargain as far as the market is concerned. However, the essential point remains: lump-sum subsidies do not remove the incentive for private investment. When lump-sum subsidies are in place, private donations and expenditures still work exclusively to the benefit of the intended private candidate or political position. Although lump-sum subsidies do distort this market by providing public candidates with unearned money that the candidates can inject into the political market, they do not neutralize the political market mechanism.

Matching fund subsidies, on the other hand, decrease or even eliminate incentives for private investment. As the *Bennett* majority noted, no past case "involved a subsidy given in direct response to the political speech of another, to allow the recipient to counter that speech."[160] The Roberts Court's notion of a penalty is well conveyed by the "doctrine of the malignant state."[161] Consider this description:

> [T]hrough progressive income taxation, the government more or less deliberately "deprives its successful citizens of their product and gives it to the less successful; thus it penalizes industry, thrift, competence, and

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and the Unyielding Vigilance of the First Amendment, 2011 CATO SUP. CT. REV. 81, 125 ("[T]he ultimate . . . viewpoint-based preference . . . is[] muting the voices of . . . the rich on the theory, *however mistaken*, that the policy views of those groups will prevail unfairly and undemocratically unless there's a level playing field." (emphasis added)).

159. *See id.* at 83 (explaining that publicly-funded candidates cannot raise or spend more than what they are given).

160. *Bennett*, 131 S. Ct. at 2822.

161. JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER 29 (Transaction Publishers 1993) (1952).

> efficiency, and subsidizes the idle, spendthrift, incompetent and inefficient. By despoiling the thrifty it dries up the source of capital, reduces investment and . . . slows down industrial progress . . . ."[162]

Progressive taxation is similar to trigger mechanisms, and especially matching funds, because it penalizes success in the market. The state imposes higher tax rates on those who have earned more wealth. In the context of trigger mechanisms, the state deprives successful candidates and expenditure groups of the effects of their wealth.[163] It penalizes the successful by using their success as the criterion for rewarding their opponents.[164]

Similarly, if the state is going to give boxer B an advantage at the start, so be it. Extra money for coaching or free gym hours would be objectionable but not fatal to the notion of fair competition. Apprised of the state's intervention, boxer A can prepare accordingly. Nobody can prepare, however, for a fight in which every punch boxer A lands triggers a counterpunch of equal force. Indeed, nobody in their right mind would enter such a fight.

It is therefore possible to reason that, while lump-sum subsidies *distort* the market, matching funds *destroy* the market. Recall that the Arizona law

> adjust[s] the public subsidy in each race to reflect the expenditures of a privately financed candidate and the independent groups that support him. . . . [F]or every dollar his privately funded opponent (or the opponent's supporters) spends over the initial subsidy, the publicly funded candidate will—to a point—get an additional 94 cents.[165]

Privately-funded candidates cannot outcompete the public candidate except by raising more money than the maximum amount (set at three times the initial distribution).[166] Money raised between the matching funds trigger and the matching funds ceiling is only effective insofar as it is certain to surpass the ceiling.[167]

Despite the knowable goal of three times the initial disbursement,[168] significant coordination problems arise for private spenders wishing to defeat publicly-funded candidates.[169] The incentives for private donations and

162. *Id.* (third alteration in original).

163. *See, e.g.*, Davis v. FEC, 554 U.S. 724, 736-37 (2008).

164. *Id.*

165. *Bennett*, 131 S. Ct. at 2832 (Kagan, J., dissenting) (citation omitted) (citing ARIZ. REV. STAT. ANN. §§ 16-940 to -961 (2013); *id.* § 16-952).

166. *Id.* at 2833.

167. *Id.* Even then, matching funds may result in an opponent's message reaching a tipping point or in an opponent discovering a new, successful message through focus group spending.

168. *Id.*

169. With traditional lump-sum models or models that restrict the ultimate amount a public candidate can receive, private candidates still held an advantage because private spenders could still outspend public candidates once public candidates reached the maximum allowable amount. However, "[b]y tying public funding to private spending, the state can afford to set a more generous

expenditures sink correspondingly. In the matching funds scenario, it is only rational to add funds to a private campaign if (a) the candidate has certain substantive points that he or she believes the opposing party cannot successfully counter by the resulting speech credit to public candidates, or (b) the candidate is certain of raising more than the matching funds limit and, therefore, certain of obtaining an advantage by producing more speech than the publicly-funded candidates. Some donors and spenders will not receive sufficient assurances on either point and will, thus, donate and spend more hesitantly, if at all.

Because independent expenditures also trigger matching funds for the public candidate,[170] a tremendous amount of coordination would be required in order for actors who favor the private candidate to decide on the optimal level of spending. Absent such coordination, these actors may make counterproductive expenditures without knowing it.[171] Comparatively speaking, the lump-sum model that props up a public candidate with a pre-established amount of funds is a firm, predictable event that markets can take into account and respond to rationally.[172]

This brings us to the deeper effect of the matching funds program. Consider what it means for every unit of private candidate success—i.e., each dollar registered by the private candidates, spent by groups supporting such candidates, or spent opposing the public candidate—to produce a unit of public candidate success. Under this regime, political consumers (donors and spenders) no longer control the level at which certain points of view are expressed or the extent to which candidates can express their views (or otherwise build their campaigns). As the *Bennett* majority wrote, "It is not the amount of funding that the State provides to publicly financed candidates that is constitutionally problematic in this case. It is the manner in which that funding is provided—in direct response to the political speech of privately financed candidates and independent expenditure groups."[173] This is the problem with both *Davis* and *Bennett*—*Davis*'s asymmetrical contribution limits and *Bennett*'s matching funds aim to remedy the economic plight of those competing against private wealth.[174]

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upper limit—because it knows that in each campaign it will only have to disburse what is necessary to keep a participating candidate reasonably competitive." *Id.*

170. *Id.* at 2814 (majority opinion).

171. *Id.* at 2819 (addressing uncertainty and coordination problems: "Spending by independent expenditure groups to promote the privately financed candidate's election—regardless whether such support is welcome or helpful—could trigger matching funds. What is more, that state money would go directly to the publicly funded candidate to use as he saw fit. That disparity in control—giving money directly to a publicly financed candidate, in response to independent expenditures that cannot be coordinated with the privately funded candidate—is a substantial advantage for the publicly funded candidate.").

172. *Id.* at 2833 (Kagan, J., dissenting) (After public candidates reach the lump-sum amount or maximum, private candidates "hold a marked advantage").

173. *Id.* at 2824 (majority opinion).

174. *Id.* at 2818, 2824 (The matching funds scheme "plainly forces the privately financed candidate to 'shoulder a special and potentially significant burden' when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy. If the law at issue in *Davis*

The Court writes that even if political speech is a not a zero-sum game, "an advertisement supporting the election of a candidate that goes without a response is often more effective than an advertisement that is directly controverted."[175] The virtue of effectiveness lies in its direct tie to the market-determined level of money available to the candidate, one of the principle determinants of effectiveness. Effectiveness, in the majority view, should vary with private preferences, not with public subsidies.[176] The Roberts Court seeks the optimal, market-determined level of spending.

The Roberts Court does not want competition for competition's sake. That is the outmoded market conception of the First Amendment, one whose primary criteria are the diversity of views expressed, the robustness of competition, and the value of difference for the sake of informed electoral choice.[177] In this outmoded Keynesian conception, [178] it is appropriate for the state to intervene to ensure a competitive dynamic, to break up monopolies and even duopolies, and possibly even to establish job training, environmental regulation, and other such programs to enable people to meaningfully participate in the market and to ensure that the market internalizes its externalities, thus presenting consumers with the true prices of products.[179]

Such a regulated market is one thing. The *laissez-faire* market conception is quite another thing.[180] It considers it acceptable for certain views and groups to become dominant, assuming that their dominance is the result of their talent and persuasiveness *as expressed and elaborated through a quantity of resources appropriate to their preexisting wealth and success in the market*. This is why the conservative majority thought it relevant to point out the obvious: the subsidy only increases the speech of the publicly-funded candidate, not speech in general.[181] If all speech were equally boosted, the market level of disparities

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imposed a burden on candidate speech, the Arizona law unquestionably does so as well." (citation omitted) (quoting Davis v. FEC, 554 U.S. 724, 739 (2008))). The asymmetrical fundraising limits in *Davis* do rely on the market, but they still distort the market because one candidate's supporters can spend in higher quantities while the other candidate had been raising funds in smaller chunks, ostensibly requiring more effort, which of course saps a candidate's strength and prevents her from competing at her full ability.

175. *Id*. at 2824.

176. *Id.* at 2822 (discussing how public subsidies should not be "given in direct response to the political speech of another, to allow the recipient to counter that speech").

177. *Id.* at 2835 (Kagan, J., dissenting) ("[T]o invalidate a statute that restricts no one's speech and discriminates against no idea—that only provides more voices, wider discussion, and greater competition in elections—is to undermine, rather than to enforce, the First Amendment.").

178. For more on the Keynesian theory, see generally JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY (1936).

179. *See* JOHN RAWLS, A THEORY OF JUSTICE 277 (1971) (discussing how the market alone is insufficient to deal with "monopolistic restrictions," and "unreasonable externalities").

180. BLACK'S LAW DICTIONARY, *supra* note 104.

181. *Bennett*, 131 S. Ct. at 2821-22 ("The direct result of the speech of privately financed candidates and independent expenditure groups is a state-provided monetary subsidy to a political

would be respected. What the Court means by a "chilling effect,"[182] then, is not the old-fashioned suppression of speech—the characteristic injury to speech—but rather destruction of the market mechanism. The market for speech only works when spending money leads to an increase in speech containing the message that the contributor has paid for. If spending leads to an increase in that sort of speech as well as speech containing an opposing message, then it becomes irrational, or at least less beneficial, to speak. The chilling effect does not refer to any individual actor, in particular, because the Court considers empirical evidence unnecessary.[183] Rather, it is a chilling effect on the market itself.

Therefore, when the *Davis* and *Bennett* majorities cite precedent on *diverse and antagonistic* sources[184] and "the *unfettered* interchange of ideas[,]"[185] a private meaning is intended. Unfettered now means not only unlimited but also unsubsidized. Diverse and antagonistic does not mean diverse and antagonistic generally. It means, rather, as diverse and antagonistic as the private order commands—that is, as diverse and antagonistic as political consumers themselves. Not all citizens' views are included in this definition of diversity, only the views of those citizens who are able and willing to devote sufficient resources to participating in the market for speech. The operation and desirability of this market design are the only subjects left to ponder.

III. THE TOPSY-TURVY REQUIREMENT OF CONSUMER SOVEREIGNTY

Standard quotations from John Rawls can be revised to demonstrate the effects of optimal, market-determined speech effectiveness. In his seminal work, Rawls wrote the following:

> [T]he [C]onstitution must take steps to enhance the value of the equal rights of participation for all members of society. . . . [T]hose similarly endowed and motivated should have roughly the same chance of attaining positions of political authority irrespective of their economic and social class. . . . The liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantages to control the course of public debate.[186]

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rival. That cash subsidy, conferred in response to political speech, penalizes speech to a greater extent and more directly than the Millionaire's Amendment in *Davis*. The fact that this may result in more speech by the other candidates is no more adequate a justification here than it was in *Davis*.").

182. *Id.* at 2823-24.

183. *See supra* note 85 and accompanying text.

184. Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (per curiam) (discussing "diverse and antagonistic sources" (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 266, 269 (1964))).

185. Davis v. FEC, 554 U.S. 724, 739 (2008); *Bennett*, 131 S. Ct. at 2818, 2826 (emphasis added) (internal quotation marks omitted) (quoting *Buckley*, 424 U.S. at 14).

186. RAWLS, *supra* note 179, at 224-25.

The Roberts Court effectively made the following modifications:

> [T]he Constitution must take steps to *safeguard* the *market-calibrated* value of the rights of participation for all members of society. . . . [T]hose similarly endowed *with the strengths of wealth and wealthy supporters,* and *similarly* motivated *to exploit those strengths* should have roughly the same chance of attaining positions of political authority *and influencing the public debate* . . . . The liberties protected by the principle of participation lose much of their value whenever those who have greater *public* means are permitted to use their advantages to control the course of public debate.

Let us also consider Rawls's subsequent description of what the "fair value" of "political liberties" would mean: "the worth of the political liberties to all citizens, whatever their social or economic position, must be approximately equal, or at least sufficiently equal, in the sense that everyone has a fair opportunity to hold public office and to influence the outcome of political decisions."[187] The Roberts Court's design can be stated in the same sentence structure: "[T]he worth of the political liberties to all citizens *of approximately equal* economic position must be approximately equal, or at least sufficiently equal, in the sense that everyone has *an effective, market-based* opportunity to hold public office and to influence the outcome of political decisions." These modifications to Rawls's quintessentially democratic doctrine means that accountability to donors and spenders is the essential postulate of the First Amendment.

In objecting to this design, Professor Blasi explains the operation of consumer sovereignty.[188] His conclusion that "[l]egislators and aspirants for legislative office who devote themselves to raising money round-the-clock are not in essence representatives"[189] comes from a series of observations on how consumer sovereignty works:

> The quality of representation has to suffer when legislators continually concerned about re-election are not able to spend the greater part of their workday on matters of constituent service, information gathering, political and policy analysis, debating and compromising with fellow representatives, and the public dissemination of views. Likewise, the quality of future representation has to suffer when aspirants for legislative office are not able to spend the bulk of their time learning what questions and problems most trouble voters, formulating positions on major issues, and holding themselves and their views up to public scrutiny. No doubt when candidates spend so much time fund-raising they encounter grievances, information, and ideas of potential donors that

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187. JOHN RAWLS, POLITICAL LIBERALISM 327 (1996).

188. Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1283 (1994).

189. *Id.*

> an enlightened representative would want to consider. If the candidate is not substantially free, however, to spend her time considering as well the grievances, information, and ideas of non-donors—in particular her geographic constituents—the process falls short, not just of the ideal but of the constitutional norm.[190]

Blasi argues that these dynamics of consumer sovereignty are prohibited by several constitutional provisions: "Article One, the Republican Form of Government Clause, and the Seventeenth Amendment guarantee to the People of the United States and of the individual states that they shall be governed by representatives."[191] From these norms and the above analysis, Blasi concludes that "certain forms of campaign finance legislation can be justified, even against First Amendment challenge, by resort to the constitutionally ordained value of representation."[192]

The Arizona law fought for its life under the banner of such arguments whose incompatibility with the Supreme Court's market design has turned out to be fatal. Blasi references the "quality of representation"[193] as though it could be determined through some objective measure other than the market's response to each candidate's platform and each representative's actions. He describes the tasks of representatives in broad, autonomous terms, as though representatives were supposed to exercise independent judgment and serve a constituency broader than their allied donors and spenders.[194] This would be unaccountable behavior as far as consumer sovereignty is concerned—representatives gone rogue. Blasi describes voters as primary, as though the vote were the dominant mode of allocating political power.[195] First, it is the market for political fundraising and spending that determines candidates' viability and relative strength.[196] Only after this primary form of accountability has been brought to bear can the vote be exercised. The vote is therefore secondary—a popular referendum to choose from among the leading brands in the market.[197]

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190. *Id*. at 1282-83 (footnote omitted).

191. *Id*. at 1283.

192. *Id.*

193. *Id.* at 1282, 1302-09.

194. *Id.* at 1305 ("Representatives who must devote huge portions of their time to fund-raising no doubt learn something in the process about the regulatory issues that most concern their financial constituents, but not as much as they could if spending limits curtailed the importance of fund-raising. For those who . . . see representation as a process by which elected officials 'refine' and 'enlarge' the views of their constituents, the focus on fund-raising is diversionary even when not corrupting." (footnote omitted)).

195. *Id.* ("Representatives must have the opportunity and the incentive to serve well the political objectives of the persons they represent, not just their own political objective of getting elected.").

196. Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 86-89 (2004).

197. Although that market does not have formal control over the vote itself, it does have a

Bennett states that the "First Amendment embodies our choice as a Nation that, when it comes to [campaign] speech, the guiding principle is freedom—the 'unfettered interchange of ideas'—not whatever the State may view as fair."[198] That unfettered exchange relies on background conditions, which are nothing short of candidates', citizens', and interest groups' ability and willingness to spend.[199] Their ability to spend is a function of economic factors—such as their credit, disposable income, and their savings. Their willingness to spend is a function of other variables, especially their preferences and their assessment of the odds that an expenditure of funds would satisfy those preferences. This is precisely the design of consumer sovereignty in economic markets.

Professor Janet Hiebert explains her view:

> In contemporary elections . . . [t]he ability to purchase advertising determines how much attention will be drawn to particular issues, and how these will be portrayed. Only those whose desire to participate in election debate is matched by the financial resources they need to "speak" can participate in this marketplace. The majority of voices must remain silent, resulting in attention given to only some issues and only partial perspectives on these. Far from encouraging a free exchange of all ideas, the commercial marketplace for election advertising is more aptly characterised as an exclusive club where membership is restricted to the extremely wealthy or to those with access to others' wealth.[200]

Although the present-day media market has exacerbated the effects of financial inequality, it is doubtful that the supposed constitutional norm that Blasi describes ever existed in U.S. history.[201]

Still, there is nothing to say that the constitutional text could not conform to changes in public sentiment and political conditions. Thus, Blasi cites as a rationale for campaign finance reform "the frustration politicians now feel concerning how much time they must devote to courting potential donors, often by methods borrowed from the marketplace that can only be described as

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great deal of de facto control over which aspiring candidates can afford to launch their campaigns, which of those candidates are able to successfully disseminate, refine, and popularize their message, which can adequately respond to their critics, and which, in the end, can make their way into a place of saliency in the public eye.

198. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2826 (2011) (quoting Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam)).

199. Janet L. Hiebert, *Elections, Democracy and Free Speech: More at Stake than an Unfettered Right to Advertise*, *in* PARTY FUNDING AND CAMPAIGN FINANCING IN INTERNATIONAL PERSPECTIVE 269, 279-80 (K D Ewing & Samuel Issacharoff eds., 2006).

200. *Id.*

201. *See generally* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM (1990); DAVID F. PRINDLE, THE PARADOX OF DEMOCRATIC CAPITALISM: POLITICS AND ECONOMICS IN AMERICAN THOUGHT (2006); CHILTON WILLIAMSON, AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY, 1760-1860 (1960).

demeaning."[202] All of this culminates in a proposal for "protect[ing] the time of elected representatives and candidates for office."[203] The time-protection rationale was indeed among the Arizona law's[204] purposes. But, in *McComish*, the Ninth Circuit panel correctly noted that the Roberts Court had already overruled the time protection rationale. This rationale, "under which the government claims an interest in 'protect[ing] candidates from spending too much time raising money rather than devoting that time to campaigning among ordinary voters[,]' may not serve as the basis for restricting campaign finance activity."[205] By invalidating this state interest in popular representation, the Court had preserved the market mechanism as the arbiter of speech effectiveness.

This recalls the words of one of the Roberts Court's ideological progenitors. Disagreeing with the *Buckley* Court's tolerance of a limited public financing system, Chief Justice Burger located politics within the private market sphere.[206]

> The system for public financing of Presidential campaigns is, in my judgment, an impermissible intrusion by the Government into the traditionally private political process. . . . I think it is extraordinarily important that the Government not control the machinery by which the public expresses the range of its desires, demands, and dissent.[207]

His use of the word "private" is remarkable. Democracy is a public system of governance, the system that wrested power from nobles and religious elites, daring to empower the people as a whole, albeit gradually so, as civil rights movements succeeded in making democracy more inclusive over the years. Chief Justice Burger's meaning appears to be that the public expresses its desires and demands through machinery that is beyond the reach of politics itself. While the

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202. Blasi, *supra* note 188, at 1281.

203. *Id*. at 1282.

204. ARIZ. REV. STAT. ANN. §§ 16-940 to 16-941 (2013); *see also* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2825 (2011) (discussing the "level . . . playing field" purpose of the Arizona law).

205. McComish v. Bennett, 611 F.3d 510, 515 n.3 (9th Cir. 2010) (first alteration in original) (quoting Randall v. Sorrell, 548 U.S. 230, 243-45 (2006)), *rev'd*, *Bennett*, 131 S. Ct. at 2806.

206. Buckley v. Valeo, 424 U.S. 1, 235 (1976) (per curiam) (Burger, J., concurring in part and dissenting in part).

207. *Id.* at 235, 248 (internal quotation marks omitted). Justice Burger also stated that "[r]ecent history shows dangerous examples of systems with a close, incestuous relationship between government and politics." *Id.* at 249 (internal quotation marks omitted). His concerns are expressed in that familiar form of the slippery slope:

> [D]elegate selection and the management of political conventions have been considered a strictly private political matter, not the business of Government inspectors. But once the Government finances these national conventions by the expenditure of millions of dollars from the public treasury, we may be providing a springboard for later attempts to impose a whole range of requirements on delegate selection and convention activities.

Id. at 250.

end result of the public's desires and demands has social ramifications, the process for producing those ramifications belongs, in Burger's view, to the private market sphere.[208]

This shows that Chief Justice Burger and now the Roberts Court have mistaken Joseph Schumpeter's genre-breaking description of democracy for a normative requirement. Consider Schumpeter's words, written twenty-six years before *Buckley*, "[T]o understand how democratic politics serve . . . social end[s], we must start from the competitive struggle for power and office and realize that the social function [of democracy] is fulfilled, as it were, incidentally—in the same sense as production is incidental to the making of profits."[209] Schumpeter suggests that the public functions of democracy are fulfilled through the operation of private incentives.[210] This is precisely what Adam Smith said about free market capitalism when he posited the existence of an invisible hand.[211] Smith ascribed a collective purpose to self-interest, writing that "[t]he natural effort of every individual to better his own condition, when suffered to exert itself with freedom and security, is so powerful a principle, that it is alone, and without any assistance . . . capable of carrying on the society to wealth and prosperity[.]"[212] While Smith had set out to explain why some nations prospered and others failed, his words rapidly (and fairly) acquired a normative quality. Schumpeter, on the other hand, was openly critical of the market approach to politics and had no intention of making his description a requirement.[213] This was, rather, the prerogative of Chief Justice Burger and the Roberts Court.[214]

Today, the Court guarantees the operation of the invisible political hand only consequentially—that is, as a logical result of the postulate of optimal speech effectiveness.[215] The operation of the invisible political hand itself is nowhere specified, however. One explanation comes from those who view standard economics as "a scoreboard on which people's unequal financial status appropriately reflects the wide range of their individual talents and energy."[216] In this view, "inequality of income and wealth is actually quite equitable."[217] Transplanting this reasoning into the political sphere, we can predict the effects

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208. *Id.* at 235, 248.

209. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 282 (3d ed. 1950).

210. *Id.*

211. 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 120 (Edwin Cannan ed., 1904).

212. *Id.*

213. *See, e.g.*, SCHUMPETER, *supra* note 209, at 263, 287 (describing the excesses of competition and the manufacture of consent through political advertisements).

214. *See generally* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) (Burger, J., dissenting) (promoting *laissez-faire* approach to campaign finance).

215. *Bennett*, 131 S. Ct. at 2824.

216. Robert Lekachman, *Capitalism or Democracy*, *in* HOW CAPITALISTIC IS THE CONSTITUTION? 129 (Robert A. Goldwin & William A. Schambra eds., 1982).

217. *Id.*

of incentivizing those of great economic means to use their money for political influence. Thus, the talented and energetic would get involved in politics, which could only be a good thing for which leaders get elected and which policies get enacted. It also follows that candidates' unequal financial status is a function of their talents and energy, and that government interference with this most equitable inequality would jam up the invisible political hand.

The same conclusion flows from considering the political activity of legal persons and associations. The market assumes that a company's success will vary based on the quality of its goods and services, the efficiency with which those are produced or offered, and sometimes on innovations in bringing them to market, advertising, and so on.[218] Competition between an inferior firm and a successful firm made possible by state subsidies to the inferior firm is not the kind of competition thought to increase general welfare.[219] Inferior firms should fail, and successful firms should succeed. After all, absent subsidies, the amount of money one raises is the final statement of one's value. Free-market theory ascribes a great deal of wisdom to political consumers and pre-existing levels of wealth, which together make up a natural order entitled to respect.

Consumers in the political market are not demanding traditional goods or services but rather (1) political messages concerning particular candidates or issues, the content of which they hope will become increasingly popular and dominant, and (2) the success of a particular candidate or, at least, a particular sort of political platform[220] (Because of this inherent uncertainty, political spending may be more analogous to spending on stocks than spending on cars.). By spending money on either independent speech or campaign donations, political consumers spur the success of particular viewpoints, platforms, and candidates.[221] In an unregulated market, consumers, including interest groups, register their preferences through donations and expenditures; the power of particular candidates, parties, and issue characterizations changes accordingly.[222]

This economic form of accountability (to those who are energetic and talented) functions constantly, not just during the election season. Elected candidates face elections again in a few short years. Inevitably, they will be concerned with maintaining their donors and favorable spenders and minimizing their interest—group opponents. Through their donations and expenditures, political consumers gain access to elected officials and express their policy preferences. Disappointed donors and spenders will logically donate and spend in favor of other candidates in the next election cycle. Per *Citizens United*, they

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218. *Id.* at 128.

219. Kuhner, *Neoliberal Jurisprudence*, *supra* note 2, at 454 (discussing a passage in *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 790 (1978): "[C]orporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it.").

220. *Id.* at 420.

221. *Id.* at 439-40.

222. *Id.* ("[P]eople who contribute to campaigns and special interests spend heavily because politics decides the outcome of the contests that matter most.").

may even spend unlimited funds on negative advertisements to punish officeholders who have not given them what they wanted.[223]

If the state reduces the effectiveness of privately-funded speech, it diminishes the extent to which democracy is accountable to political consumers. By preserving the effectiveness of the right to spend (and thus the vitality of private speech incentives), *Bennett* protects the political market mechanism through which competition for individual gains is thought to indirectly produce social gains.[224] Invalidating the matching funds provision served to draw a new constitutional line, elevating consumer sovereignty to the status of a mandatory design and discrediting arguments (and legislation) premised on popular sovereignty. Justice Kagan nonetheless repeated those arguments in her final paragraphs:

> This case arose because Arizonans wanted their government to work on behalf of all the State's people . . . [to] serve the public, and not just the wealthy donors who helped put them in office . . . [and to run] campaigns leading to the election of representatives not beholden to the few, but accountable to the many.[225]

She described the majority as having "invalidate[d] Arizonans' efforts to ensure that in their State, '[t]he people . . . possess the absolute sovereignty.'"[226]

Missing from Justice Kagan's perceptive rhetoric (and from the majority opinion, needless to say) was any concrete sense of who benefits from a political regime of consumer sovereignty. Indeed, the Supreme Court has never cared to inquire as to what particular demographic and which particular interests benefit from a laissez-faire regime of political finance. Justice Brennan's classic statement from *Federal Election Committee v. Massachusetts Citizens for Life*[227] communicates the inaccurate assumption under which the Court labors: "Political 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources. Relative availability of funds is after all a rough barometer of public support."[228] Even though Justice Brennan called funding a "rough" barometer,[229] this qualifier does not save his remark from inaccuracy.

Wealth and economic conservatism are the distinguishing characteristics of the "donor class."[230] In Spencer Overton's reading of data on political

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223. *See id.* at 405, 412.

224. *See, e.g.*, SCHUMPETER, *supra* note 209, at 282.

225. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2845 (2011) (Kagan, J., dissenting).

226. *Id*. at 2846 (second and third alterations in original) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 274 (1964)).

227. 479 U.S. 238 (1986).

228. *Id.* at 257-58 (citation omitted).

229. *Id.*

230. *See* Overton, *supra* note 196, at 100-04 (defining the characteristics of those most likely to make political contributions).

contributions, the donor class has the following shape: "70.2% are male, 70.6% are age 50 or older, 84.3% have a college degree, 85.7% have family incomes of $100,000 or more, and 95.8% are white."[231] Yet donors are not representative of any of these groups on the whole.[232] They are not typical college-educated, wealthy, white males of some years; rather, they are a special cross-section of each of these demographics.[233] Their defining characteristic across all groups to which they belong, even the wealthy elite group, is their especially conservative views on economic issues.[234] From eight years of National Election Studies data, Clyde Wilcox concludes "that donors are significantly more conservative than other wealthy and well-educated citizens on economic issues—guaranteed jobs, spending on social programs, affirmative action—but not on social issues such as women's roles or abortion, or on foreign policy."[235]

Larry Bartels's longitudinal study of senators' votes on a variety of issues supports the conclusion that senators are most accountable to the donor class, not the general public: "[T]he views of constituents in the bottom third of the income distribution received no weight at all in the voting decisions of their senators."[236] "[R]egardless of how the data are sliced," writes Bartels, "there is no discernible evidence that the views of low-income constituents had any effect on their senators' voting behavior."[237] Overton reaches the same conclusion based on the effect of political money emanating from such an exclusive and homogenous group: "When less than 2% of voting-age Americans dominate a crucial element of political participation like funding campaigns, a narrow set of ideas and viewpoints obstruct fully-informed decision making."[238]

These remarks suggest that consumer sovereignty is not an inclusive or *democratic* proposition. It empowers those with money to spend who, on the whole, represent a financially conservative, socio-economic elite.[239] Rather than

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231. *Id.* at 102 (footnote omitted); *see also* Clyde Wilcox, *Contributing as Political Participation*, *in* USER'S GUIDE, *supra* note 66, at 117-18 (labeling income "the best single predictor of giving in politics"). Wilcox cites studies showing that it is actually the wealthiest of the wealthy—those in the top 5% of the total population—who give drastically more money drastically more often. This group gives seven times more frequently than the bottom two-thirds of the population combined. *Id.*

232. Wilcox, *supra* note 231.

233. *Id.*

234. *Id.*

235. *Id.* at 116-19.

236. LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 254 (2008).

237. *Id.* at 280.

238. Overton, *supra* note 196, at 102.

239. It seems plausible and perhaps not coincidental that this is the demographic whose material interests tend to be served by the economic ideology reshaping the Constitution.

substantive debates, deliberative forums, and conditions calculated to showcase a full diversity of views and empower average citizens, consumer sovereignty allows existing economic disparities to migrate, unadulterated, into the political sphere, where, as in the economic sphere, they may reap their natural produce.

FACEBOOK IS OFF-LIMITS? CRIMINALIZING BIDIRECTIONAL COMMUNICATION VIA THE INTERNET IS PRIOR RESTRAINT 2.0

DOUGLAS B. MCKECHNIE*

INTRODUCTION

It is nearly universally "*[r]ecognize[d]* [that] the global and open nature of the Internet [is] a driving force in accelerating progress towards development in its various forms."[1] At the same time, the Internet has opened a forum for a hitherto non-existent criminality—cybercrime. In 2011, the FBI's Internet Crime Complaint Center received in excess of 300,000 complaints, an increase in online criminal activity for the third year in a row.[2] With the ubiquitous Internet access that pervades modern society and its potential for abuse by criminal elements, state governments have laudably sought to prevent one form of exploitation that lurks in cyberspace—sexual predators who prey on children.[3] Through a series of laws, states have tried to minimize the possibility of children's exposure to Internet users who have been convicted of crimes against minors[4] and, more often, sexual assault of a minor.

One of many attempts to rein in children's exposure to online sexual predators is through criminal statutes forbidding state sex offender registrants access to certain Internet platforms.[5] Louisiana, Indiana, and Nebraska are three

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1. U.N. GAOR, 20th Sess., agenda item 3 at 2, U.N. Doc. A/HRC/20/L.13 (June 29, 2012), *available at* http://geneva.usmission.gov/2012/07/05/internet-resolution/.

2. Press Release, Fed. Bureau of Investigation, IC3 2011 Internet Crime Report Released (May 10, 2012), http://www.fbi.gov/sandiego/press-releases/2012/ic3-2011-internet-crime-report-released.

3. *See, e.g.*, COUNCIL OF STATE GOVT'S, LEGISLATING SEX OFFENDER MANAGEMENT: TRENDS IN STATE LEGISLATION 2007 AND 2008, at 22-25 (2010), *available at* http://csg.org/policy/documents/SOMLegislativeReport-FINAL.pdf.

4. The Internet restrictions are not limited solely to persons who have committed sexual assault. For example, Nebraska's law forbids a person convicted of "[k]idnapping of a minor" from accessing, among other Internet platforms, social networking sites. NEB. REV. STAT. § 28-322.05 (2013).

5. The Internet platforms that are banned by the statutes discussed below include social networking sites, chat rooms, peer-to-peer networks, and instant messaging. *See, e.g.*, IND. CODE § 35-42-4-12(e) (2013); LA. REV. STAT. ANN. § 14:91.5 (2013); NEB. REV. STAT. § 28-322.05 (2013). The Internet is "[a]n interconnected system of networks that connects computers around the world via the TCP/IP protocol." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 915 (4th ed. 2000) [hereinafter AMERICAN HERITAGE DICTIONARY]. A platform is "[t]he basic technology of a computer system's hardware and software that defines how a computer is operated and determines what other kinds of software can be used." *Id.* at 1345. Therefore, an Internet platform is a programmable, computer-based system that is customizable by "third-party

states that have enacted such statutes, and each has seen its statute challenged on First Amendment grounds, among other legal theories.[6] At the time of this writing, two federal district courts have ruled on the merits of those challenges—one of which the Seventh Circuit overturned[7]—and one court is proceeding with discovery.[8] Each statute and the reviewing courts' decisions are discussed in Part I below. A recurring First Amendment doctrine used to analyze the constitutionality of the states' statutes is the content-neutral doctrine.[9] As a result, Part II of this Article discusses the content-neutral doctrine and suggests why it is inapplicable. Part III suggests that the appropriate analytical framework to apply to these laws is the prior restraint doctrine. This Article suggests that the statutes are prior restraints on speech and, thus, are unconstitutional because they prevent communication regardless of the content. This Article's analysis only applies to those who are registered sex offenders, subject to the statutes discussed below, have completed their sentences, and are no longer subject to supervised release.[10]

I. State Statutes Banning Registered Sex Offenders From Accessing Certain Internet Platforms

A. Louisiana

1. Unlawful Use or Access of Social Media, LSA-R.S. 14:91.5.—On March 25, 2011, Representative Ledricka Thierry of the Louisiana House of Representatives prefiled Louisiana House Bill No. 55.[11] The Act aimed to criminalize sex offenders' use or access of social media.[12] More specifically, the Act sought to "prohibit certain convicted sex offenders from using or accessing

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developers for mutual . . . benefit," such as E-bay, Flickr, and Google. Rajiv Jayaraman, *So What Is an Internet Platform?*, KNOLSKAPE, http://www.knolskape.com/blog/so-what-is-an-internet-platform/ (last visited July 7, 2013).

6. IND. CODE § 35-42-4-12 (2013); LA. REV. STAT. ANN. § 14:91.5 (2013); NEB. REV. STAT. § 28-322.05 (2012).

7. Doe v. Prosecutor, Marion Cnty., No. 1:12-cv-00062-TWP-MJD, 2012 WL 2376141 (S.D. Ind. June 22, 2012), *rev'd*, 705 F.3d 694 (7th Cir. 2013).

8. Doe v. Nebraska, 734 F. Supp. 2d 882 (D. Neb. 2010).

9. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) ("[A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . need not be the least restrictive or least intrusive means of doings so.").

10. "Probationers and parolees have limited constitutional rights during their terms of conditional release[,]" but "[t]he Constitution affords standard First Amendment protection to offenders who are no longer on probation, parole, or supervised release." Jasmine S. Wynton, Note, *Myspace, Yourspace, but Not Theirspace: The Constitutionality of Banning Sex Offenders from Social Networking Sites*, 60 DUKE L.J. 1859, 1879, 1887 (2011).

11. H.R. 55, 2011 Reg. Sess. (La. 2011) (Enrolled Act No. 26).

12. *Id.*

social networking websites, chat rooms, and peer-to-peer networks."[13] After some revision, Governor Bobby Jindal signed it into law on June 14, 2011.[14]

The Act originally contained four parts.[15] Section A articulated the actions that the Act criminalized.[16] Pursuant to section A, it was unlawful for those convicted of committing certain crimes to use or access "social networking websites, chat rooms, and peer-to-peer networks."[17] In particular, persons forbidden from using or accessing social media included registered sex offenders who were also convicted of "indecent behavior with juveniles,"[18] "pornography involving juveniles,"[19] "computer-aided solicitation of a minor,"[20] "video

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13. *Id*.

14. LA. REV. STAT. ANN. § 14:91.5 (2012); Doe v. Jindal, 853 F. Supp. 2d 596, 599 (M.D. La. 2012).

15. H.R. 55, 2011 Reg. Sess. (La. 2011) (enacted).

16. *Id.*

17. *Id.*

18. *Id.*

> Indecent behavior with juveniles is the commission of any of the following acts with the intention of arousing or gratifying the sexual desires of either person: (1) Any lewd or lascivious act upon the person or in the presence of any child under the age of seventeen, where there is an age difference of greater than two years between the two persons. Lack of knowledge of the child's age shall not be a defense; or (2) The transmission, delivery or utterance of any textual, visual, written, or oral communication depicting lewd or lascivious conduct, text, words, or images to any person reasonably believed to be under the age of seventeen and reasonably believed to be at least two years younger than the offender. It shall not be a defense that the person who actually receives the transmission is not under the age of seventeen.

LA. REV. STAT. ANN. § 14.81 (2013).

19. H.R. 55, 2011 Reg. Sess. (La. 2011) (enacted).

> (1) It shall be unlawful for a person to produce, promote, advertise, distribute, possess, or possess with the intent to distribute pornography involving juveniles. (2) It shall also be a violation of the provision of this Section for a parent, legal guardian, or custodian of a child to consent to the participation of the child in pornography involving juveniles.

LA. REV. STAT. ANN. § 14:81.1 (A) (2013).

20. H.R. 55, 2011 Reg. Sess. (La. 2011) (enacted).

> Computer-aided solicitation of a minor is committed when a person seventeen years of age or older knowingly contacts or communicates, through the use of electronic textual communication, with a person who has not yet attained the age of seventeen where there is an age difference of greater than two years, or a person reasonably believed to have not yet attained the age of seventeen and reasonably believed to be at least two years younger, for the purpose of or with the intent to persuade, induce, entice, or coerce the person to engage or participate in sexual conduct or a crime of violence . . . , or with the intent to engage or participate in sexual conduct in the presence of the person who has not yet attained the age of seventeen, or person reasonably believed to have not yet attained the age of seventeen.

LA. REV. STAT. ANN. § 14:283(A)(1) (2013).

voyeurism,"[21] or convicted of a sex offense . . . in which the victim . . . was a minor"[22] ("offenders"). Section B permitted parole or probation officers and courts to grant leave to offenders to use or access social media.[23]

Section C defined the social media that offenders were forbidden from using.[24] This included "chat room[s]," which were defined as "any Internet website through which users have the ability to communicate via text and which allows messages to be visible to all other users or to a designated segment of all other users."[25] The forbidden social media also included "peer-to-peer network[s]," which were defined as "connection[s] of computer systems whereby files are shared directly between the systems on a network without the need of a central server."[26] Finally, the forbidden social media included "social networking website[s,]" which were defined as websites with either or both of the following attributes: "(a) Allows users to create web pages or profiles about themselves that are available to the general public or to any other users[; or] (b) Offers a mechanism for communication among users, such as a forum, chat room, electronic mail, or instant messaging."[27] Section D described the sentencing guidelines for violations of the Act.[28]

2. Doe v. Jindal.[29]—Two months after Jindal signed the Act into law, two registered sex offenders filed a complaint challenging the law,[30] along with a motion for a temporary restraining order.[31] The Middle District of Louisiana denied the plaintiffs' motion for a temporary restraining order,[32] and, after various pretrial briefs, the case moved to a hearing on the merits,[33] which was followed

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21. H.R. 55, 2011 Reg. Sess. (La. 2011) (enacted).

> Video voyeurism is: (1) The use of any camera, videotape, photo-optical, photo-electric, or any other image recording device for the purpose of observing, viewing, photographing, filming, or videotaping a person where that person has not consented to the observing, viewing, photographing, filming, or videotaping and it is for a lewd or lascivious purpose; or (2) The transfer of an image . . . by live or recorded telephone message, electronic mail, the Internet, or a commercial online service.

LA. REV. STAT. ANN. § 14:283(A) (2013).

22. H.R. 55, 2011 Reg. Sess. (La. 2011) (enacted). *See* LA. REV. STAT. ANN. §§ 14:91.5(A), 15:541(5), (12) (2013).

23. H.R. 55, 2011 Reg. Sess. (La. 2011) (enacted).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*; *see also* LA. REV. STAT. ANN. § 14:91.5(c) (2013).

29. 853 F. Supp. 2d 596 (M.D. La. 2012).

30. *Id.* at 599.

31. Doe v. Jindal, No. 11-554-BAJ-SCR, 2011 WL 3664496, at *1 (M.D. La. Aug. 19, 2011) (denying Doe's motion for a temporary restraining order).

32. *Id.* at *3.

33. *Jindal*, 853 F. Supp. 2d at 599.

by post-trial briefs.[34]

The plaintiffs relied on two constitutional arguments—First Amendment overbreadth and Fourteenth Amendment vagueness.[35] First, the plaintiffs argued that the Act was facially overbroad because, in addition to the criminal activity the Act sought to prohibit, it also criminalized a substantial amount of otherwise protected speech.[36] The plaintiffs argued they would be unable to legally access various news websites, shopping websites, video sharing websites, email, and some federal and state websites, among others.[37] Access to these websites would violate the law, the plaintiffs argued, because they "offer a mechanism for communication among users."[38] While the plaintiffs conceded that the state's interest in protecting children on the Internet, they argued that the Act posed a greater intrusion on their First Amendment rights than was reasonably necessary.[39] In addition, the plaintiffs argued that the Act violated the Due Process Clause of the Fourteenth Amendment because the Act's language failed to provide reasonable notice of constitutes violating conduct.[40]

In response, the defendants argued that the plaintiffs never sought to take advantage of Section B, the parole officer/judicial leave section of the Act, described above.[41] As a result, the defendants argued, the implementation of the Act, its application to the plaintiffs, and the First Amendment implications were unknowable.[42] The defendants also argued that regulations providing interpretation and guidance for the Act's operation demonstrated that "the Act [was] not targeted at the sort of general media websites [the] plaintiffs fear[ed] it [would] reach."[43]

After analyzing and rejecting standing challenges the defendants raised, the court addressed the plaintiffs' First Amendment overbreadth argument. First, the court noted the guiding principles for an overbreadth analysis: "a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[44] Following that standard, the court found that, while Louisiana's interest in protecting children was undoubtedly legitimate, the Act was nevertheless unconstitutionally overbroad.[45] The court reasoned that the Act imposed a far-reaching ban on many more websites than were necessary in light of the state's

34. *Id.*
35. *Id.* at 599-600.
36. *Id.* at 603.
37. *Id.* at 600.
38. *Id.* at 600-01.
39. *Id.* at 603.
40. *Id.* at 600-01, 604.
41. *Id.* at 600-01.
42. *Id.* at 601.
43. *Id.*
44. *Id.* at 603 (quoting United States v. Stevens, 130 S. Ct. 1577, 1587 (2010)).
45. *Id.* at 604-05.

interest.[46] For example, access to "news and information websites, in addition to social networking websites such as MySpace and Facebook" would be banned along with access to ill-defined "chat rooms" that could include the court's own website.[47] Also problematic was the Act's application to both intentional and mistaken access of those sites.[48] In the end, the court found the Act was not drawn narrowly enough to both accomplish its legitimate goals and avoid running afoul of the First Amendment.[49] While the defendants conceded that the Act could be interpreted in a way that banned the plaintiffs from accessing some of the websites that the court mentioned, the defendants argued that the regulations were narrowed, thereby saving, the Act.[50] In rejecting the defendants' argument, the court noted that the regulations applied only to sex offenders who are under Louisiana probation officers' supervision but were silent regarding offenders, like the plaintiffs, who were subject to supervision in other jurisdictions.[51]

In a related discussion, the court also found the Act to be unconstitutionally vague.[52] The court reasoned that the Act failed to sufficiently explain which websites were prohibited.[53] The Act's attempt to describe and define forbidden websites was insufficient, particularly in light of the punishment for accessing those websites.[54] In addition, the Act's vagueness was particularly troubling as it forced the plaintiffs to avoid "accessing many websites that would otherwise be permissible for fear that they may unintentionally and unknowingly violate the law[,]" thus having a chilling effect on First Amendment activity.[55]

B. Indiana

1. Application of Section; Use of Internet Social Networking Site or Chat Room Program.—In 2008, the Indiana General Assembly passed Indiana Code section 35-42-4-12, which outlawed registered sex offenders' or violent offenders' knowing or intentional use of certain social networking sites, instant messaging programs, and chat room programs.[56] While the statute excluded some who might otherwise fall into the defined category of those forbidden from accessing social networking sites and chat rooms,[57] it applied to sex or violent

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46. *Id.* at 603.
47. *Id.* at 604.
48. *Id.*
49. *Id.* at 605.
50. *Id.* at 603, 605.
51. *Id.* at 605.
52. *Id.* at 605-06.
53. *Id.* at 606.
54. *Id.*
55. *Id.*
56. IND. CODE § 35-42-4-12(e) (2013).
57. For example, the statute did not apply to registered sex or violent offenders who were dating their victim or were in an ongoing personal relationship with their victim. *Id.* § 35-42-4-12(a).

offenders who, for example, were found to be sexually violent predators or convicted of such crimes as child molestation, possession of child pornography, or kidnapping where the victim was younger than eighteen.[58] Any person who fell into these categories was forbidden from accessing social networking websites, instant messaging programs, and chat room programs when the offender knew that those Internet platforms allowed minors to access or use the platform.[59]

For the purposes of the statute, "instant messaging" programs and "chat room" programs were defined as "software program[s] that require[] a person to register or create an account, a username, or a password to become a member or registered user of the program and allow[] two (2) or more members or authorized users to communicate over the Internet in real time using typed text."[60] A "social networking web site" was defined as

> an Internet web site that: (1) facilitates the social introduction between two (2) or more persons; (2) requires a person to register or create an account, a username, or a password to become a member of the web site and to communicate with other members; (3) allows a member to create a web page or a personal profile; and (4) provides a member with the opportunity to communicate with another person.[61]

"[E]lectronic mail program" and a "message board program[s]" were excluded from the definitions of instant messaging programs, chat room programs, and social networking sites.[62] Offenders had an affirmative defense to prosecution under the statute if they did not know that the banned websites or programs allowed minors to access or use them and "upon discovering that the web site or program allow[ed] [minors, the offender] immediately ceased further use or access of the web site or program."[63]

2. Doe v. Prosecutor, Marion County, Indiana.[64]—On January 17, 2012, a registered sex offender filed a complaint challenging the constitutionality of the statute[65] and, three months later, filed a motion seeking a preliminary injunction banning enforcement of Indiana Code section 35-42-4-12.[66] The motion was consolidated with a bench trial on the merits of the complaint.[67] In its decision following trial, the U.S. District Court for the Southern District of Indiana found that the statute was content-neutral, narrowly tailored enough to leave open

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58. *Id.* § 35-42-4-12(b).

59. *Id.* § 35-42-4-12(e)-(f).

60. *Id.* § 35-42-4-12(c).

61. *Id.* § 35-42-4-12(d).

62. *Id.*

63. *Id.* § 35-42-4-12(f).

64. No. 1:12-cv-00062-TWP-MJD, 2012 WL 2376141 (S.D. Ind. June 22, 2012), *rev'd*, 705 F.3d 694 (7th Cir. 2013).

65. *Id.* at *1.

66. *Id.*

67. *Id.*

alternative channels of communication, and not overly broad.[68]

The court began by noting the phenomenon of the very Internet platforms the statute purported to regulate.[69] For example, Facebook, one of the most prolific social networking sites, has garnered "901 million active users, including 526 million daily active users," within only eight years, and it "is available in more than 70 languages."[70] Indeed, the court noted, social networking sites have become integrally intertwined with communication in modern society.[71] They not only tie different Internet platforms together, including news and current affairs websites, but have been credited, in part, with "animat[ing] numerous social movements, providing activists with a powerful launch pad to communicate with their fellow citizens."[72] The court continued that the interconnectedness provided an opportunity for sexual predators to prey on children and use the various Internet platforms to commit terrible crimes.[73] The court added that this misuse of the Internet and the undeniable fact that "the virtual world can be [a] dangerous place[] for vulnerable minors" led states to enact statutes like Indiana Code section 35-42-4-12.[74]

The court then analyzed the statute's constitutionality and, more specifically, whether the statute violates the First Amendment.[75] The court found the First Amendment's content-neutral doctrine to be the appropriate analytical framework because the statute was "'justified without reference to the content of the regulated speech.'"[76] The court noted that content-neutral regulations are constitutional so long as they are "*narrowly tailored* to serve a *significant governmental interest*," and they "*leave[] open ample alternative channels for communication of the information*."[77]

First, the court found that the statue was narrowly tailored to serve the state's legitimate interest in protecting minors online.[78] While the plaintiff conceded that the state's interest was legitimate, he argued that its means of achieving that goal regulate more speech than is necessary.[79] For example, the statute prevents offenders from "making comments about current events on the *Indianapolis Star* web site; participating in political discussions in certain chat rooms; advertising for businesses using certain social networking sites; or sharing photos and having

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68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at *2.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at *5. The court conducted a brief analysis and found that the statute clearly implicates First Amendment rights. *Id.*

76. *Id.* at *6 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). Indeed, the plaintiff conceded that statute is content-neutral. *Id.*

77. *Id.* (quoting *Ward*, 491 U.S. at 791).

78. *Id.* at *6-7.

79. *Id.* at *7.

group discussions with family members through Facebook."[80] While the court agreed that the statute prevented offenders from accessing some websites, it found those websites included only a small subset of the Internet regularly used by minors, and offenders could still legally access the rest.[81]

Within the context of the "narrowly tailored" analysis, the court also rejected the plaintiff's argument that the statute was needlessly duplicative because an existing state statute made it illegal to solicit a child through the Internet.[82] The court reasoned that the two "statutes serve different purposes."[83] The statute criminalizing the solicitation of a child through the Internet was aimed at punishing those who have committed a crime.[84] However, the statute before the court "aim[ed] to *prevent* and *deter* the sexual exploitation of minors by barring certain sexual offenders from" accessing banned websites.[85] This was particularly necessary because "the risk of recidivism by sex offenders has been described by the United States Supreme Court as 'frightening and high.'"[86] The court continued, "[M]any sex offenders [will] have difficulty controlling their internal compulsions . . . [and] *might* sign up for social networking with pure intentions, only to succumb to their inner demons when given the opportunity to interact with potential victims."[87]

In the second prong of its analysis, the court rejected the plaintiff's argument that the statute prevented him from accessing various means of communication.[88] The court found the plaintiff could still access countless alternative forms of communications and recited a list of both Internet and non-Internet based forms of communication he could still use.[89] Indeed, the court quipped, "[C]ommunication does not begin with a 'Facebook wall post' and end with a '140–character Tweet.'"[90] The court reasoned that even without access to Facebook and Twitter, the plaintiff still has an adequate number of ways to communicate his ideas.[91]

On appeal, the Seventh Circuit Court of Appeals reversed, finding the Indiana statute unconstitutional.[92] Agreeing with the district court's finding that the law satisfied the content-neutral requirement, the Seventh Circuit determined the statute was not narrowly tailored.[93] The Seventh Circuit noted that Indiana "has

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80. *Id.*
81. *Id.*
82. *Id.* at *8 (citing IND. CODE §§ 35-42-4-6(a)(4), 35-42-4-13(c) (2012)).
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* (quoting Smith v. Doe, 538 U.S. 84, 103 (2003)).
87. *Id.* at *8 (emphasis added).
88. *Id.* at *9.
89. *Id.* at *9-10.
90. *Id.* at *10.
91. *Id.*
92. Doe v. Prosecutor, Marion Cnty., 705 F.3d 694, 695 (7th Cir. 2013).
93. *Id.*

other methods to combat unwanted and inappropriate communication between minors and sex offenders."[94] Despite its reversal the Seventh Circuit did "not foreclose the possibility that keeping certain sex offenders off social networks advances the state's interest."[95] The state legislature is left free "to craft constitutional solutions to [the] modern-day challenge."[96]

C. Nebraska

1. Unlawful Use of the Internet by a Prohibited Sex Offender.—On May 29, 2009, the Nebraska governor signed Nebraska Revised Statute section 28-322.05 into law,[97] which became effective on January 1, 2010.[98] The statute, like those discussed above, seeks to outlaw the use of certain websites and Internet-based forms of communication.[99] In particular, any registered sex offender who has also been convicted of crimes listed in the statute[100] is forbidden from "knowingly and intentionally use[ing] a social networking web site, instant messaging, or chat room service that allows a person who is less than eighteen years of age to access or use" the site.[101] Section 28-322.05, unlike its Louisiana and Indiana counterparts, does not define the terms "social networking web site," "instant messaging," or "chat room."[102] However, Nebraska Revised Statute section 29-4001.01, which was included with the same legislation, defines the three types of Internet platforms that section 28-322.05 proscribes.[103]

First, section 29-4001.01 defines "[c]hat room" as a "web site or server space on the Internet or communication network primarily designated for the virtually instantaneous exchange of text or voice transmissions or computer file attachments amongst two or more computers or electronic communication device users."[104] It also defines "[i]nstant messaging" as "a direct, dedicated, and private communication service, accessed with a computer or electronic communication device, that enables a user of the service to send and receive virtually instantaneous text transmissions or computer file attachments to other selected users of the service through the Internet or a computer communications

94. *Id.* at 699.

95. *Id.* at 701.

96. *Id.* at 702.

97. Legis. B. 285 § 1, 101 Leg., 1st Sess. (Neb. 2009).

98. NEB. REV. STAT. § 28-322.05 (2013).

99. *Id.*

100. The enumerated crimes include, among others, "[k]idnapping of a minor," "[s]exual assault of a child[,]" and "[v]isual depiction of sexually explicit conduct of a child." *Id.* §§ 28-322.05(1)(a)-(c), (f).

101. *Id.* § 28-322.05(1).

102. *Id.*

103. *Id.* § 29-4001.01(3), (10), (13); Doe v. Nebraska, 734 F. Supp. 2d 882, 907 (D. Neb. 2010).

104. NEB. REV. STAT. § 29-4001.01(3) (2011).

network."[105] Finally, it defines a "[s]ocial networking web site" as

> a web page or collection of web sites contained on the Internet (a) that enables users or subscribers to create, display, and maintain a profile or Internet domain containing biographical data, personal information, photos, or other types of media, (b) that can be searched, viewed, or accessed by other users or visitors to the web site, with or without the creator's permission, consent, invitation, or authorization, and (c) that may permit some form of communication, such as direct comment on the profile page, instant messaging, or email, between the creator of the profile and users who have viewed or accessed the creator's profile.[106]

2. Doe v. Nebraska.[107]—In late 2009 and early 2010, numerous plaintiffs filed four separate state and federal complaints challenging Nebraska's Sex Offender Registration Act.[108] Among other things, the plaintiffs alleged Nebraska Revised Statute section 28-322.05 violated the First and Fourteenth Amendments.[109] The United States District Court for the District of Nebraska consolidated the cases,[110] and, after various non-dispositive decisions,[111] the parties filed cross-motions for summary judgment.[112] The court granted portions of both the defendant's and plaintiffs' motions for summary judgment but denied both parties' motions for summary judgment regarding the constitutionality of the statute.[113] Initially, and conceptually related to their First Amendment claim, the plaintiffs argued that the statute was overly vague pursuant to the Fourteenth Amendment.[114] However, the court held that neither party was able to demonstrate how the state would enforce the portion of the statute criminalizing the knowing use of a banned Internet platform because it permits access by minors.[115]

In their First Amendment claim, the plaintiffs argued that the statute's "partial

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105. *Id.* § 29-4001.01(10).

106. *Id.* § 29-4001.01(13).

107. 734 F. Supp. 2d 882 (D. Neb. 2010).

108. *Id.* at 892-94.

109. *Id.* at 906-07, 910-11.

110. *Id.* at 892.

111. *See, e.g.*, Doe v. Nebraska, No. 8:09CV456, 2009 WL 5184328, at *1, *5, *8-10 (D. Neb. Dec. 30, 2009) (denying preliminary injunction against Nebraska's Sex Offender's Registration Act, but enjoining defendants from enforcing statutes against those convicted of sex offenses who have completed their sentences, are not on parole, probation, or court-ordered supervision); *Doe*, 734 F. Supp. 2d at 882 (granting a motion to vacate a state court's Ex Parte Temporary Restraining Order).

112. *Doe*, 734 F. Supp. 2d at 892.

113. *Id.* at 896-98.

114. *Id.* at 908. The court, however, noted that it would consider the plaintiffs' vagueness argument pursuant to the Due Process Clause of the Fifth Amendment, which is applicable to the states through the Fourteenth Amendment. *Id.* at 908-09.

115. *Id.* at 909-10.

ban on Internet use by certain offenders . . . violates [their] speech rights."[116] The court rejected the parties' motions for summary judgment on the First Amendment claim due to a lack of undisputed material facts.[117] First, the court established that the statute and its restriction undoubtedly implicate First Amendment interests, and registered sex offenders retain First Amendment rights to speak through the Internet.[118] When applying the First Amendment, the court couched its decision in the context of the "content-neutral regulation" doctrine.[119] While the court did not discuss the "significant governmental interest" prong,[120] it held that a trial was necessary to determine whether the statute was narrowly tailored.[121] The court proffered its own examples of why a trial was necessary.[122] For example, the court queried whether an offender would violate the statute by accessing "a [web]site that allows users to connect with individuals who speak different languages for the purposes of enhancing language learning as native speakers and to help non-native speakers improve their language skills" simply because teens can access the site as well.[123] Similarly, the court asked whether a twenty-three-year-old male convicted of child molestation for having sex with a fourteen-year-old female would be subject to the statute where there was no evidence he used a computer to commit the crime.[124] As a result of these uncertainties, the court found a trial and findings of fact were necessary to rule on the plaintiffs' First Amendment challenges.[125]

D. Common Themes Among the Statutes and Cases Reviewing Them

1. Statutory Common Themes.—Through the social networking statutes discussed above, the states seek to create yet another tool to fight the threat posed by online sexual predators and to protect minors. In particular, the states seek to prevent individuals who have already demonstrated a propensity to commit crimes, as evidenced by their prior convictions and obligation to register as sex offenders, from accessing certain parts of the Internet: social networking sites, chat rooms, peer-to-peer sites, and instant messaging services. The states have determined that these types of websites and services create particularly threatening and easily accessible Internet forums for sexual predators to misuse.[126]

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116. *Id.* at 910; *see also* NEB. REV. STAT. § 28-322.05 (2013).

117. *Doe*, 734 F. Supp. 2d at 911.

118. *Id.*

119. *Id.* at 912.

120. *Id.* Presumably, the plaintiffs would concede that the government has a legitimate, significant interest in protecting children from online sexual predators.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 911, 937.

126. *See, e.g.*, IND. CODE § 35-42-4-12 (2013); KY. REV. STAT. ANN. § 17.546(2) (West 2013); NEB. REV. STAT. § 28-322.05 (2013).

States certainly have an interest in protecting their citizens, particularly minors, from sexual predators, whether online or in the corporeal world. However, because of their unique attributes, these banned websites have been singled out as online environments that enable the predators' crimes. While the states use different definitions to describe the banned Internet platforms, common themes quickly emerge. Most generally, the platforms facilitate bidirectional[127] communication. This contrasts with other kinds of websites such as commercial pages dedicated solely to selling products, or unidirectional[128] information websites that simply present material to educate a reader. Whether anonymously or through personal profiles, each banned platform allows users to communicate with individuals or groups of people who have also chosen to join the same Internet platform. The potential means of communication include mediums as simple as instantaneous text[129] and voice messaging between users,[130] as well as more technology-savvy mediums like user profiles[131] and file sharing.[132] Whether simple or advanced, each of these means of communication represents a way for users to connect, share, and interact with one another's ideas.

When reviewing the specific Internet platforms carved out as impermissible, states have criminalized websites that fall into two basic categories: (1) "social networking sites" and (2) Internet platforms that facilitate instant communication.[133] First, states have defined "social networking" websites as sites that not only allow users to create passive, unidirectional profiles containing biographical information others can view, but also as a way for users to communicate among themselves.[134] Second, states have defined "chat rooms," "instant messaging," and, relatedly, "peer-to-peer networks," as Internet websites, programs, or communication networks that allow users to communicate instantaneously, most commonly through typed text in real time or, perhaps less

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127. For the purposes of this Article, "bidirectional" means "[m]oving or operating in two usually opposite directions: bidirectional data flow." AMERICAN HERITAGE DICTIONARY, *supra* note 5, at 178.

128. For the purpose of this Article, "unidirectional" means "[m]oving or operating in one direction only." *Id.* at 1880.

129. *See, e.g.*, http://pidgin.im/ (last visited July 6, 2013) (chat service enabling users to send and receive instant, written messages to and from numerous messaging programs).

130. *See, e.g.*, PIDGIN, http://support.google.com/chat/?hl=en (last visited July 6, 2013) (service through Google that facilitates, among other things, computer to computer voice and video communication).

131. *See, e.g.*, FACEBOOK, https://www.facebook.com/; LINKEDIN, http://www.linkedin.com/; TWITTER, https://twitter.com/ (last visited July 6, 2013).

132. *See, e.g.*, 4SHARED, http://www.4shared.com/ (last visited July 6, 2013) (file sharing service that permits the user to, among other things, share documents, photographs and media files).

133. For example, several state statutes prohibit a sex offender's use of "social networking sites." *See* IND. CODE § 35-42-4-12 (2013); KY. REV. STAT. ANN. § 17.546(2) (West 2013); NEB. REV. STAT. § 28-322.05 (2013).

134. *E.g.*, IND. CODE § 35-42-4-12(d) (2013).

commonly, through voice or file sharing.[135] As discussed above, the common thread connecting these two types of banned Internet platforms is the user's ability to engage in bidirectional communication.

While bidirectional communication is both the large-scale and small-scale commonality among the banned websites, the statutes also share the same goal: prevention. Each statute identifies a subgroup of people based on their status as convicted criminals and, more specifically, as sex offender registrants.[136] The underlying presumption implicit in the statute is that this identified subgroup is more dangerous and more likely to recidivate than other criminals. In an effort to prevent the recidivism by way of the Internet, the statutes forbid the identified subgroup from accessing Internet platforms that would allow them to communicate with minors, among others.[137] Therefore, the statutes preclude registered sex offenders from accessing these platforms because of the offenders' previous criminal activities.[138] The punishment the statutes provide is not based on the criminality of specific, constitutionally unprotected speech that takes place on the banned Internet platforms.[139] Instead, it is based on the act of speaking itself. Thus, the statutes' objective and effect are to stop a particular speaker from speaking because of his or her past actions.

2. Common Themes Among the Cases.—While the statutes discussed above proscribe certain individuals from accessing Internet platforms that facilitate bidirectional communication and attempt to prevent speech based on the speaker's status, common themes can also be found among the cases interpreting these statutes. From a constitutional perspective, two of the courts subjected the statutes to vagueness arguments, whether pursuant to the Fifth Amendment or Fourteenth Amendment.[140] In addition, each court subjected its respective statute to First Amendment scrutiny.[141] In that regard, two courts applied a content-neutral analysis, and the third applied an overbreadth analysis.[142] While these two First Amendment principles have their own analytical framework, they also share similar concerns and considerations.

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135. *E.g.*, *id.* § 35-42-4-12(c).

136. *See, e.g.*, *id.* § 35-42-4-12; KY. REV. STAT. STAT. § 17.546(2); NEB. REV. STAT. § 28-322.05.

137. *See, e.g.*, IND. CODE § 35-42-4-12; KY. REV. STAT. ANN. § 17.546(2); NEB. REV. STAT. § 28-322.05.

138. *See, e.g.*, NEB. REV. STAT. § 28-322.05 (listing the numerous offenses that will require an individual to register).

139. *See, e.g.*, *id.* § 28-322.05(1) (punishing one "who knowingly and intentionally uses a social networking web site" that minors are able to access).

140. Doe v. Jindal, 853 F. Supp. 2d 596, 599 (M.D. La. 2012); Doe v. Nebraska, 734 F. Supp. 2d 882, 908-09 (D. Neb. 2010).

141. Doe v. Prosecutor, Marion Cnty., No. 1:12-cv-00062-TWP-MJD, 2012 WL 2376141, at *5 (S.D. Ind. June 22, 2012), *rev'd*, 705 F.3d 694 (7th Cir. 2013); *Jidal*, 853 F. Supp. 2d at 605; *Doe*, 734 F. Supp. 2d at 910-11.

142. *See Doe*, 2012 WL 2376141, at *6 (applying content-neutral analysis); *Doe*, 734 F. Supp. 2d at 912 (same); *see also Jindal*, 853 F. Supp. 2d at 603-05 (applying an overbreadth analysis).

As discussed above, the court in *Doe v. Prosecutor, Marion County*[143] correctly stated that the content-neutral doctrine is applicable not when a regulation of speech is based on the speech's content, but when a regulation is of the "time, place, and manner" available to the speaker to speak.[144] When faced with those sorts of statutes, courts consider whether (1) there is a significant government interest at stake, (2) the statute is narrowly tailored to serve that interest, and (3) the regulation "'leave[s] open ample alternative channels of communication.'"[145] Underlying the content-neutral regulation analysis is an examination of whether the challenged law is broader than necessary in relation to its goals, thus encompassing and preventing more speech than necessary. The principle's aim is to force the state to, as exactingly as possible, only proscribe speech in as limited a number of situations as possible when trying to achieve its legitimate goals.[146]

The other First Amendment principle applied in analyzing the statutes discussed above—overbreadth—asks a very similar question and has a very similar goal as that of content-neutral analysis. As correctly articulated in *Doe v. Jindal*,[147] the overbreadth analysis requires a court to invalidate a law when "'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'"[148] The overbreadth doctrine permits a facial challenge to a law even though the law's application in the case before the court would be constitutional.[149] Laws struck down for overbreadth are unconstitutional not because of their underlying goals, but because they could impermissibly be applied to and punish a substantial amount of protected speech.[150] While these laws could be applied constitutionally, they are not sufficiently targeted—they are not narrowly tailored.[151] Indeed, the very means by which courts save unconstitutionally overbroad statutes from being invalidated is by narrowing their construction.[152]

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143. *Doe*, 2012 WL 2376141, at *1.

144. *Id.* at *6.

145. Frisby v. Schultz, 487 U.S. 474, 482 (1988) (alteration in original) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

146. *See, e.g.*, United States v. Stevens, 130 S. Ct. 1577, 1584 (2010) (noting that the First Amendment disfavors content-based restrictions of speech except for "in a few limited areas." (internal quotation marks omitted) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83 (1992))).

147. 853 F. Supp. 2d at 596.

148. United States v. Stevens, 130 S. Ct. 1577, 1587 (2010) (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008)).

149. Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 129 (1992).

150. *See* New York v. Ferber, 458 U.S. 747 (1982) ("insist[ing] that the overbreadth involved be 'substantial' before the statute involved will be invalidated on its face").

151. City of Hous. v. Hill, 482 U.S. 451, 465 (1987); *see also Stevens*, 130 S. Ct. at 1591-92 (noting need for legislatures to draft narrowly tailored laws).

152. *See, e.g.*, Osborne v. Ohio, 495 U.S. 103, 112-14 (1990) (where, although an Ohio child pornography statute was overbroad as written, the Ohio Supreme Court saved it by narrowly

These principles examine the contours of a statute: whether a statute crosses a constitutional line and goes too far in attempting to regulate unprotected speech or conduct the state has an otherwise legitimate right to regulate. The courts have been more apt to rely on the content-neutral doctrine to analyze the constitutionality of the social networking statutes. Moreover, the overbreadth doctrine is only necessary when the party challenging the statute must raise the constitutional claims of third-parties not immediately before a court. Therefore, the discussion below focuses only on the content-neutral doctrine and why it is inapplicable to the social networking statutes.

II. The Content-Neutral Doctrine is the Wrong Analytical Approach to Statutes That Criminalize Bidirectional Communication via the Internet

A. The Content-Neutral Doctrine

The content-neutral doctrine calls for the application of two distinct, yet related, analytical frameworks.[153] First, the content-neutral doctrine is applied to content-neutral laws that regulate behavior that could be expressive in nature, under some circumstances. This expression through action is often referred to as "symbolic speech."[154] The Supreme Court has considered a law that regulates behavior because of the message associated with the behavior, and a desire to inhibit the message animates the law, as content-based.[155] However, the Supreme Court will uphold a law that regulates behavior upon a challenge pertaining to its inhibiting effect on expression if the governmental interest in regulating the behavior is unrelated to suppressing the expression with which the behavior could be associated.[156] As a result, when these types of laws do not attempt to regulate the expressive nature of an activity because of its content, but by some other legitimate governmental reason, courts consider these regulations to be content-neutral, instead of content-based, restrictions.[157] To be sure, the social networking statutes discussed above do not regulate behavior that could constitute symbolic speech; therefore, the concomitant content-neutral principle is not applicable. Instead, the content-neutral principle referred to by the district court in *Doe v. Prosecutor, Marion County, Indiana*,[158] arises out of a different, second

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construing it).

153. Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 650-54 (1991).

154. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376 (1968).

155. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 411-12 (1989).

156. *See O'Brien*, 391 U.S. at 378-79, 381 (finding the punishment for destroying a draft card furthered a legitimate government interest unrelated to the potential expressive nature of the act).

157. The Supreme Court also has applied this content-neutral analysis in the context of public broadcasting over television airways. *See* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997).

158. No. 1:12-cv-00062-TWP-MJD, 2012 WL 2376141, at *6 (S.D. Ind. June 22, 2012), *rev'd*,

branch of the "content-neutral" tree.

While content-neutral laws may regulate behavior without reference to, and irrespective of, the behavior's expressive features, content-neutral laws may also regulate fundamentally expressive activities when there is a legitimate governmental interest in "public safety, health, welfare or convenience."[159] On their face, these laws are applied to all speakers, regardless of their message, and limit expression based on of the government's need to enforce "reasonable police and health regulations of [the] time and manner of" expression.[160] The applicable doctrine and analysis of these sorts of content-neutral laws requires a court to determine whether the law is "'justified without reference to the content of the regulated speech, . . . narrowly tailored to serve a significant governmental interest, and . . . leave[s] open ample alternative channels for communication of the information.'"[161] Because the laws analyzed under this doctrine do not regulate speakers based on the content of their speech, the Supreme Court has noted that content-neutral laws regulating the time, place, and manner of expression do not call for strict scrutiny.[162]

As these content-neutral laws seek to ensure public convenience and well-being, this version of the content-neutral doctrine is applied when the government aims to regulate expressive activities in quintessential public forums, such as public streets and sidewalks.[163] Indeed, it is the government's unique, mandated duty to ensure the safe and orderly use of public forums as "liberty itself would be lost in the excesses of unrestrained abuses."[164] Intermediate scrutiny of these regulations is appropriate because the nature of the law is not to regulate a speaker based on his or her identity or message but to regulate activities that take place in public spaces to ensure an expedient and orderly use of those public spaces.[165] It is this time, place, and manner analysis that the district court in *Doe v. Prosecutor, Marion County* used to analyze the Indiana statute and uphold it as constitutional.[166]

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705 F.3d 694 (7th Cir. 2013).

159. Schneider v. New Jersey, 308 U.S. 147, 160 (1939).

160. Martin v. City of Struthers, 319 U.S. 141, 146-47 (1943).

161. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

162. *Id.* at 798-99. The time, place, and manner analysis has developed "into a . . . fairly lenient standard [with] [t]he government interest and tailoring requirements [coming] quite close to the rational basis standard applied to regulations that do not affect fundamental rights at all." Williams*, supra* note 153, at 644.

163. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 768 (1994).

164. Cox v. New Hampshire, 312 U.S. 569, 574 (1941).

165. *Cf.* Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 150 (1981) ("While governmental attempts to regulate the content of expression undoubtedly deserve strict judicial review, it does not logically follow that equally serious threats to [F]irst [A]mendment freedoms cannot derive from restrictions imposed to regulate expression in a manner unrelated to content.").

166. Doe v. Prosecutor, Marion Cnty., No. 1:12-cv-00062-TWP-MJD, 2012 WL 2376141, at

B. Why a Content-Neutral/Time, Place, and Manner Analysis Is Inapplicable

As discussed above, the content-neutral doctrine applied in *Doe v. Prosecutor, Marion County* grew out of the government's exclusive and essential obligation to regulate public forums—not only so that society can function, but also to ensure that citizens can exercise the liberties an organized society values. The laws calling for a content-neutral analysis are those that regulate expressive activity, not based on the speaker's identity, but instead aim to ensure the community's unobstructed use and enjoyment of the world around it. By narrowly regulating the time, place, or method through which a speaker can communicate his or her message, while ensuring there are other avenues for the speaker to express his or her message, the government can balance the competing interests of non-speakers' enjoyment of their environs and the speaker's right to speech. These same interests, however, are neither the impetus nor the scheme of the social networking statutes.

Instead, the social networking statutes are designed to prevent an identified and defined group of would-be speakers from accessing Internet platforms that facilitate bidirectional communication. Unlike time, place, and manner restrictions, the schemes criminalizing this access do not aim to balance the speakers' rights with the orderly and convenient use of the community environs, be they corporeal or even ethereal. Indeed, time, place, and manner restrictions are not created because of, or formulated to deal with, the inherent dangerousness—perceived or otherwise—of a speaker, the content of his or her message, or the message's effect on the listener.[167] However, that is precisely the impetus and scheme of social networking statutes; they identify a group based on the members' previous illegal actions and criminalize a form of bidirectional communication because of the potential dangers that communication could pose. The lynchpin of a content-neutral time, place, and manner regulation—ensuring orderliness and convenience—is nowhere to be found.

The Supreme Court has held the content-neutral doctrine applicable in some circumstances when, as with the social networking statutes, a group is identified, defined, and its speech restricted because of its members' past actions and concern for continued lawlessness.[168] For example, in *Madsen v. Women's Health Center, Inc.*, a group of abortion protesters challenged an injunction limiting their expressive activities near an abortion clinic.[169] The Supreme Court found that the injunction significantly regulated the time, place, and manner of the abortion protesters' expressive activities on public property; yet, the regulation was content-neutral and, in part, constitutional.[170] In determining what

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*6 (S.D. Ind. June 22, 2012), *rev'd*, 705 F.3d 694 (2013).

167. *See, e.g.*, Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647-50 (1981).

168. *See Madsen*, 512 U.S. at 758.

169. *Id.*

170. *Id.* at 775-76. The Court found that noise restrictions and a thirty-six-foot buffer zone

doctrine to apply to the injunction in light of its effect on expressive activities, the Court rejected the call to apply either of two stricter analyses: content-based restriction doctrine or prior restraint doctrine.[171]

The Court reasoned that the challenged injunction was specifically directed at the abortion protesters because of their repeated flouting of a narrower court order enjoining them from blocking access to an abortion clinic.[172] While the challenged, broader injunction singled out the abortion protesters, all of whom shared the same message, suppressing the message's content was not the injunction's genesis.[173] Moreover, the scheme of the injunction was not designed to prevent the abortion protesters' speech because of their identity as abortion protesters.[174] Instead, the Court noted that a content-neutral analysis was appropriate because any group whose history of prior actions was similar to the protesters' activities would have been subjected to the same sort of injunction.[175] Indeed, there was a history of previous, specific, and ongoing activities giving rise to the extensive—but tailored—regulation of the time, place, and manner in which they could protest.[176] The regulation grew out of the identified group's past actions within the context of the specific dispute before the court,[177] not a general disagreement with the group or its message and a need to prevent the members from speaking. In approving the singling out of the protesters and an injunction limiting their expressive rights, the Court noted the unique situation of crafting an injunction to address the specific, past, and continuing objectionable practices of a party compared "with the drafting of a statute addressed to the general public."[178]

While the social networking statutes initially appear to be content-neutral regulations, akin to the injunction in *Madsen*, they are motivated by different interests and the means by which they accomplish their goals, and, thus, their impact on speech is different.[179] First, in *Madsen*, the court issued its injunction based on the specific activities in which the protesters were engaged.[180] As part of their protests, the protesters were violating a standing order to avoid blocking

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around an abortion clinic entrances and driveway did not burden more speech than necessary. *Id.* at 776. It also found that a private property thirty-six-foot buffer zone, an "images observable" provision, a 300-foot no-approach zone around the clinic, and a 300-foot buffer zone around close-by residences were unconstitutional because the provisions were broader than necessary to accomplish the permissible goals of the injunction. *Id.* at 760, 775-76.

171. *Id.* at 765-66.

172. *Id.* at 760-62.

173. *Id.* at 762.

174. *Id.* at 762-63.

175. *Id.* at 763. The Court referred to the applicable doctrine as a "heightened" version of the content-neutral doctrine. *Id.* at 764-65.

176. *Id.* at 765.

177. *Id.* at 762-63

178. *Id.* at 762.

179. *See id.*

180. *See id.*

access to an abortion clinic.[181] Therefore, the trial court expanded and more strictly enforced limitations on a group within the context of an existing dispute between two parties regarding access to an abortion clinic.[182] Indeed, the restrictions were a direct response to the protesters' defined, continuing impermissible activity and were time, place, and manner restrictions custom-made to stop that ongoing, impressible activity.[183] The injunction was motivated by the need to ensure safe, orderly, and convenient use of and access to the abortion clinic.[184] The social networking statutes, however, are not motivated by defined, ongoing impermissible activities that require the government to criminalize expression related activity. Instead, the social networking statutes are motivated by a desire to prevent a group from engaging in bidirectional Internet communication based on the possibility that some group members may recidivate and engage in unprotected speech. Unlike the injunction in *Madsen*, social networking statutes draw no link between their prohibitions and an identifiable, ongoing pattern of unprotected speech or illegality.[185]

Moreover, the injunction in *Madsen* accomplished its goals by creating a scheme that balanced protesters' rights with those of the abortion clinic's patients.[186] While it restricted the time, place, and manner of speech, the abortion protesters were nevertheless able to engage in speech near the locus of their protest and reach their desired audience.[187] The social networking statutes, however, constitute a complete prohibition on accessing certain forms of bidirectional communication over the Internet. They define a group and entirely preclude that group from communicating via certain proscribed Internet platforms. There is no way for the group to legally connect or communicate with specific, inimitable communities of people who access the verboten Internet platforms; thus, those unique audiences are wholly unreachable. Indeed, the Internet's unique means of facilitating communication and forming incorporeal communities highlights why the time, place, and manner analysis is impractical outside of the corporeal world. Therefore, while the content-neutral doctrine may seem applicable to the social networking statutes because their prohibitions are absolute, regardless of the content of the speaker's message, the goal, scheme, and effect of the statutes reveal that applying the doctrine is unworkable, and thus ill-suited to determine the statutes' constitutionality.

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181. *Id.* at 758.
182. *See id.*
183. *See id.* at 762.
184. *Id.*
185. *See id.*
186. *See id.*
187. *Id.* at 768-70.

III. CRIMINALIZING THE USE OF INTERNET PLATFORMS BECAUSE OF THEIR BIDIRECTIONAL COMMUNICATIVE FUNCTION IS PRIOR RESTRAINT

A. The Prior Restraint Doctrine

From this country's founding through the development of modern free speech jurisprudence, no other principle has been so immutable, so revered, and so sacrosanct as the First Amendment's rejection of prior restraints on speech.[188] Even as modern First Amendment jurisprudence developed in the early twentieth century, and the Supreme Court wrestled with its contours and limitations, no principle was more zealously recognized and singled out as entirely presupposed.[189]

A prior restraint prohibits the expression of ideas prior to their dissemination.[190] Prior restraint was, and is, such an anathema to the principles of free speech because of its power to not simply punish speech, but to prevent it. Indeed, while the government retains the right to punish constitutionally unprotected speech after it is disseminated, that punishment is doled out after (1) the speech occurs; (2) society has had an opportunity consume the ideas; and (3) the speaker receives the protections afforded him or her through the judicial process.[191] It has often been noted that statutes criminalizing and punishing unprotected speech are not prior restraint because the criminal penalty is "subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted."[192] Prior restraint, however, excludes the speaker's ideas entirely from the marketplace of ideas.[193] A criminal statute "'chills' speech," whereas "prior restraint 'freezes' it."[194] Thus, the Supreme Court has called prior restraint "the most serious and the least tolerable infringement on First Amendment rights."[195]

No clear doctrine has emerged regarding the appropriate analysis of a prior restraint on speech;[196] however, the Supreme Court has set an extraordinarily high

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188. Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713-14 (1931); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 732 (1833).

189. *See, e.g.*, Schenck v. United States, 249 U.S. 47, 51-52 (1919); Patterson v. Colorado *ex rel.* Attorney Gen., 205 U.S. 454, 462, (1907).

190. Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 53 (1984) [hereinafter Redish, *Proper Role*].

191. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976); Redish, *Proper Role*, *supra* note 190, at 59.

192. *Stuart*, 427 U.S. at 559.

193. *See* Planned Parenthood Comm. of Phx., Inc. v. Maricopa Cnty., 375 P.2d 719, 725 (Ariz. 1962 (in banc).

194. *Stuart*, 427 U.S. at 559.

195. *Id.*

196. *See, e.g.*, N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (illustrating a case in which the Supreme Court was unable to agree on an example permissible prior restraint); Redish, *Proper Role*, *supra* note 190, at 54.

bar for establishing the constitutionality prior restraint—the highest bar in First Amendment jurisprudence.[197] The Court has characterized prior restraints as presumptively unconstitutional[198] and only permissible when the speech would immediately imperil the nation's security.[199] While the Court has yet to articulate a specific analytical paradigm, both the Court and commentators have identified prior restraint's two forms: administrative and judicial prior restraints.[200] Administrative prior restraints are "government limitation[s], expressed in statute, regulation, or otherwise, [which] undertake[] to prevent future publication or other communication without advance approval of an executive official."[201] The punishment for failure to comply with these licensing schemes lies not in whether the form or content of the expression is constitutionally protected, but in whether the speaker has complied with the advanced approval scheme.[202] These non-judicial restrictions have been described as the most intolerable form of prior restraint because of their similarity to the historically reviled English licensing schemes[203] and the potential for the scheme to become a means of overly broad censorship.[204] Judicial prior restraints, which most commonly take the form of restraining orders and permanent injunctions, are "court orders that actually forbid speech activities."[205] Injunctions and judicial orders restraining speech are of particular concern because of the collateral bar rule which requires "persons subject to an injunctive order . . . to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order."[206] Modern commentators and Supreme Court precedent have singled out these two restrictions as virtually the sole manifestations of prior restraint[207] and contrasted

197. *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); *see also N.Y. Times Co.*, 403 U.S. at 717, 720, 726-7, and 730 (Black, Douglas, Brennan, and Stewart, JJ., concurring).

198. *Bantam Books, Inc.*, 372 U.S. at 70.

199. *See N.Y. Times Co.*, 403 U.S. at 714-40 (Black and Douglas, Marshall, Stewart, White, JJ., concurring) (indicating a national security exception as the only prior restraint some of the Justices might tolerate). *See id.* at 726-27 (Brennan, J., concurring) ("[O]nly governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order."); *id.* at 730 (Stewart and White, JJ., concurring) (noting that prior restraint may be tolerable when "disclosure of [information would] surely result in direct, immediate, and irreparable damage to our Nation or its people").

200. Alexander v. United States, 509 U.S. 544, 550 (1993); Redish, *Proper Role*, *supra* note 190, at 54.

201. Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 655 (1955).

202. *Id.*

203. Redish, *Proper Role*, *supra* note 190, at 57.

204. *See* Freedman v. Maryland, 380 U.S. 51, 56, 58 (1965); Redish, *Proper Role*, *supra* note 190, at 75-77.

205. *Alexander*, 509 U.S. at 550.

206. GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc., 445 U.S. 375, 386 (1980).

207. *Alexander*, 509 U.S. at 550; Redish, *Proper Role*, *supra* note 190, at 57.

these forms of regulation with, as described above, content-based expression-restricting statutes that restrict speech through subsequent punishment.[208]

However, seemingly lost to history is the recognition that prior restraints do not always appear as administrative or judicial schemes. When the Supreme Court was first developing its modern prior restraint doctrine, it took a more expansive view of what sorts of government restrictions could constitute prior restraint.[209] For example, in *Grosjean v. American Press Co.*, the Court considered whether a tax upon the gross receipts of newspapers and periodicals with a weekly circulation exceeding 20,000 constituted a prior restraint.[210] In finding the tax a prior restraint, the Court established that prior restraints need not only appear in preapproved forms.[211] Indeed, the Court stated "the First Amendment . . . was meant to preclude the . . . government . . . from adopting any form of previous restraint upon printed publications, or their circulation, including that which had . . . been effected by . . . wellknown [sic] and odious methods."[212] Recounting its recent, seminal prior restraint decision in *Near v. Minnesota* from six years earlier, the Court went on to note that the First Amendment was meant to "prevent previous restraints on publication; and the [C]ourt [in *Near*] was careful not to limit the protection of the right to any particular way of abridging it."[213] Finally, the Court not only refused to limit the potential forms of prior restraint but also the universe of speakers protected from prior restraint.[214] Lest there be any confusion, the Court specified that prior restraints were not only impermissible censorship of the press, "but *any action of the government* by means of which it might *prevent* such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."[215]

Prior restraint is easily identified in its typical forms of judicial orders and licensing schemes. However, not allowing or recognizing other types of prior restraint is a doctrinaire adherence to form over substance. It allows for the application of a less speech-protective doctrine—like the content-neutral doctrine—to a governmental restriction of expression. It fails to apply the most exacting standard of constitutional law to the freezing of speech by means other than judicial orders and licensing schemes. Here, the question should not be whether the prior restraint arrived in the form of an injunction or licensing scheme. Instead, the question must be whether the expression was prohibited "prior to a full and fair hearing in an independent judicial forum to determine whether the challenged expression is constitutionally protected."[216]

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208. *Alexander*, 509 U.S. at 553.

209. *See* Grosjean v. Am. Press Co., 297 U.S. 233, 244, 249-50 (1936).

210. *Id.* at 240.

211. *Id.* at 249.

212. *Id.*

213. *Id.*

214. *Id.* at 249-50.

215. *Id.* (emphasis added) (internal quotation marks omitted).

216. Redish, *Proper Role*, *supra* note 190, at 75.

B. The Social Networking Statutes Are a Prior Restraint on Bidirectional Communication and Violate the First Amendment.

The Internet has had a revolutionary—and hitherto incomprehensible effect—on communication.[217] It has transformed and democratized communication such that it transcends the corporeal boundaries associated with the human experience of expression and association.[218] At no other time in history have so many people instantaneously been able to share ideas, opinions, and knowledge.[219] While previous forms of mass communication have been unidirectional and concentrated in the hands of a few, the Internet has dispersed the means to express ideas and enabled their bidirectional exchange.[220] The Internet has become the "new marketplace of ideas[,]"[221] and bidirectional communication via the Internet has become an essential part of modern communication.[222]

This democratization of the channels of human communication also has facilitated the creation of previously unimaginable communities.[223] Internet communities, like Internet communication, transcend geographical and physical boundaries.[224] These communities are inherently voluntary associations where users can enter and leave as they wish,[225] providing any number of community members with a forum to easily communicate information to others with shared interests or shared identities.[226] As a result, the composition of any particular Internet-based community is unique and cannot be replicated.[227] It is because of these revolutionary, communicative, and interconnected characteristics—and their potential for abuse—that the social networking statutes prohibit certain bidirectional communication via the Internet. This prohibition constitutes a prior restraint. To be sure, the social networking statutes share all of the repugnant qualities of prior restraint in its recognized forms.

The statutes do not prohibit expression based on its content. The content of the prospective, as yet unarticulated speech is irrelevant. Instead, the social

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217. Douglas B. McKechnie, *The Death of the Public Figure Doctrine: How the Internet and the Westboro Baptist Church Spawned a Killer*, 64 HASTINGS L.J. 469, 471 (2013).

218. *Id.* at 471-72.

219. *Id.*

220. *Id.*

221. *Id.* at 486 (quoting Reno v. ACLU, 521 U.S. 844, 885 (1997)).

222. *See, e.g.*, United States v. Crume, 422 F.3d 728, 733 (8th Cir. 2005) (noting the Internet is an "important medium of communication, commerce, and information-gathering"); *see also* Doe v. Prosecutor, Marion Cnty., No. 1:12-cv-00062-TWP-MJD, 2012 WL 2376141, at *1-2, *10 (S.D. Ind. June 22, 2012), *rev'd*, 705 F.3d 694 (7th Cir. 2013).

223. McKechnie, *supra* note 217, at 485.

224. *Id.* at 485-86.

225. *Id.* at 488.

226. *Id.* at 486-90.

227. *Id.* at 487-88.

networking statutes aim to stop communication before it occurs.[228] The statutes ignore the substance of the speech and criminalize the act of communicating itself. Subsequent punishment schemes criminalize unprotected speech based on its content and allow the speaker an independent judicial forum that can adequately decide whether the First Amendment protects the expression at issue.[229] However, in the social networking statutes' scheme, whether the content of the speech is protected is inconsequential. Instead, like speaking in violation of a court order or before gaining advanced approval under a licensing scheme, the social networking statutes' punishment lies in the act of engaging in expression.[230] Thus they are not a subsequent punishment of speech.

Criminalizing the act of expression is the quintessential description of prior restraint.[231] The social networking statutes do no less than freeze expression before it takes place on certain Internet platforms. While administrative prior restraints present the intolerable possibility that licensure regulations will be misapplied and result in an abuse of the censor's power, it is conceivable that some expression will be permitted—however inconsistently that may be. Paradoxically, the social networking statutes result in an even more impenetrable freezing of speech. As discussed above, there is no opportunity for the speaker, *after* he or she has spoken, to persuade an independent judicial body that the content of his or her expression was protected. In addition, the social networking statutes provide no opportunity, *prior* to expression, to seek out a regulator's approval of the speech. Thus, while administrative prior restraint is unacceptable because of expression's subjection to the censor's whim, with only the possibility that the speaker may be permitted to speak, the social networking statutes leave no hope, indeed no chance at all, that expression will be permitted. The only option is to refrain from communicating. The only analysis is a post-expression analysis of whether the speaker engaged in expression. Therefore, the threat of punishment does not simply chill the speaker's desire to communicate, it "'freezes' it."[232]

The social networking statutes also freeze communication in a way similar to the "collateral bar rule" that accompanies injunctions. Injunctions are inherently suspect when they enjoin speech since the "collateral bar rule" permits punishment for violating a court's order without considering whether the order was constitutionally permissible in the first instance.[233] The way the social

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228. *See, e.g.*, IND. CODE § 35-42-4-12 (2013) (prohibiting registered sex offenders from using social networking cites); KY. REV. STAT. ANN. § 17.546(2) (2013) (same); LA. REV. STAT. ANN. § 14:91.5 (2013) (same); NEB. REV. STAT. § 28-322.05 (2013) (same).

229. *See* Redish, *Proper Role*, *supra* note 190, at 77.

230. *See, e.g.*, *In re* State Farm Lloyds, 254 S.W.3d 632, 634 (Tex. Ct. App. 2008) (finding a gag order was "presumptively unconstitutional," as a prior restraint on speech).

231. *See, e.g.*, LA. CONST. art. I, § 7 ("No law shall curtail or restrain the freedom of speech or of the press.").

232. *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

233. *See, e.g.*, United States v. Terry, 802 F. Supp. 1094, 1101 (S.D.N.Y. 1992) (finding no punishment warranted).

networking statutes function mimics the "collateral bar rule." The speaker who is subjected to the social networking statutes is punished for violating the statutes' command that he or she not speak—the content of the speaker's expression and whether it is constitutionally protected are irrelevant. The speaker has no opportunity to defend himself or herself by demonstrating that the content of the speech was, in fact, protected. Like violating a court order enjoining speech and being punished for the act of speaking, not its content, the social networking statutes forbid some forms of bidirectional communication via the Internet and punish the act of communication, not its content.

The concern for high rates of sex offender recidivism is undeniably legitimate. Indeed, the Supreme Court has noted that sex offenders are more likely to recidivate than other offenders.[234] However, while the possibility that sex offender may recidivate is palpably alarming, the Framers of the Constitution and First Amendment jurisprudence leave no room for preemptively prohibiting a citizen's free speech rights because of previous criminal acts.[235] As the Court held in *Near*, a speaker's past criminal actions do not authorize the government to apply a prior restraint on future speech.[236] The government may not use a prior restraint scheme to enforce its presumption that a speaker who has been convicted of engaging in criminal acts will misuse his or her right to speak in the future.[237] Even when the previous crimes were speech related, the First Amendment compels courts to consider each act of communication as distinct unto itself.[238] If any future, discrete communication is indeed unprotected, those crimes may be punished.[239] "The prospect of crime, however, by itself does not justify laws suppressing protected speech."[240] The social networking statutes run afoul of these First Amendment principles.

The social networking statutes single out a viscerally reviled and intuitively indefensible group of people based on their past crimes. The statutes then carve out certain forms of bidirectional communication on the Internet and punish any communication via those channels.[241] The states' goal is to forbid access to those singled-out forms of communication because of the prospect that the individuals in the group will misuse the sites to further a criminal end.[242] While the Southern District Court in *Doe v. Prosecutor, Marion County*, noted that "the vast majority of the [I]nternet is still at [their] fingertips[,]"[243] the government has nevertheless

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234. Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 4 (2003).

235. Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 720 (1931).

236. *See id.*

237. *Id.*

238. *Id*. at 718.

239. *Id*. at 712-13.

240. Ashcroft v. Free Speech Coal., 535 U.S. 234, 245 (2002).

241. *See, e.g.*, IND. CODE § 35-42-4-12 (2013); LA. REV. STAT. ANN. § 14.91.5 (2013); NEB. REV. STAT. § 28-322.05 (2013).

242. *See* Doe v. Jindal, 853 F. Supp. 2d 596, 603 (M.D. La. 2012).

243. Doe v. Prosecutor, Marion Cnty., No. 1:12-cv-00062-TWP-MJD, 2012 WL 2376141, at *7 (S.D. Ind. June 22, 2012), *rev'd*, 705 F.3d 694 (7th Cir. 2013).

imposed a prior restraint on the use of banned bidirectional communication platforms. The unique communities those platforms create, which may amount to millions of users, are entirely inaccessible for those who belong to the defined group—sexual offenders. The group members cannot deliver or receive communication within those communities and, furthermore, cannot identify other members of the communities in order to disseminate their ideas by some other means. Prior restraint is no less dangerous when it is only the despised members of society who are subjected to it or only applied to a particular medium of communication.

The tempting argument to which the Southern District Court in *Doe v. Prosecutor, Marion County* fell prey is that the Internet is a vast media universe with countless other access points.[244] However, just as a ban on publishing a newspaper in only one city would leave open the rest of the country for the publisher to disseminate his or her ideas, the publisher is nevertheless silenced as to that particular city. The prior restraint is no more tolerable simply because the publisher may still exercise his or her right to publish elsewhere. Likewise, the ban on accessing certain proscribed bidirectional communication platforms comes with the modern form of silencing communication with those specific audiences. Certainly, the speaker can go elsewhere, but silencing his or her expression of opinion robs the speaker and the inaccessible audiences of the opportunity to exchange error for truth or the opportunity to gain a clearer perception of truth.[245]

The potential for criminal exploitation of bidirectional communication via the Internet is undeniable. However, a prior restraint on communication is intolerable in almost any form or amount; it is presumptively unconstitutional.[246] As discussed above, the bar is so high for a prior restraint to be constitutional that the Court has suggested a prior restraint on speech would only be tolerable under the most extreme circumstances.[247] Thus, no expression, save the sort that poses the most immediate and irreparable damage to the country, could be subject to the prior restraint levied by the social networking statutes, on however small a scale. Whatever the proper bounds of policing the Internet may be,[248] they are exceeded by statutes that single out a group of speakers to completely prevent the dissemination of their ideas and reception of the ideas of others via certain bidirectional communication platforms.[249]

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244. *Id.* at *2.

245. JOHN STUART MILL, ON LIBERTY 87, 118 (David Bromwich & George Kale eds., 2003).

246. *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70-71 (1963).

247. *Id.*

248. Policy makers have a variety of creative alternatives to both protect a citizen's unfettered right to free speech via the Internet while, at the same time, protecting potential victims from cybercrime. Although those policy ideas are beyond the scope of this article, one solution may be to require sex offenders to include a conspicuous notice in their online representations that they are a registered sex offender. *See, e.g.*, LA. REV. STAT. § 15:541.2(D) (2013).

249. *Cf.* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

CONCLUSION

The Internet has revolutionized our lives. It has opened its users to the world and each other. With the Internet's openness and interconnectivity comes the potential for misuse and criminal activity. Governments are struggling to keep up with these swift changes in the human experience brought by the Internet. To that end, some states have identified a group of people based on their previous criminal activity and banned them from accessing some Internet platforms that facilitate bidirectional communication. Courts struggle with the implications of such bans and finding the appropriate constitutional doctrines through which to view them.

The First Amendment principles regarding prior restraints on speech provide the answer. While a rejection of prior restraints on speech is one of the earliest, immutable First Amendment values,[250] it is no less applicable to today's modern forms of communication. Indeed, the government's attempt to ban access to certain forms of bidirectional communication via the Internet has the same effect as the well-established and recognizable forms of prior restraint. It punishes the act of speaking, not the content of the speech. As a result, while these statutes are directed at a group who is easily reviled and distrusted, they nevertheless violate a fundamental tenet of the First Amendment—a tenet that was vigorously defended at the beginning of the First Amendment's evolution and must be vigorously applied to modern forms of communication as the prior restraint doctrine 2.0.

250. *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 733 (1931).

WHAT ROUGH BEAST AWAITS? *GRAHAM*, *MILLER*, AND THE SUPREME COURT'S SEEMINGLY INEVITABLE SLOUCH TOWARDS COMPLETE ABOLITION OF JUVENILE LIFE WITHOUT PAROLE

JAMES DONALD MOOREHEAD*

Things fall apart . . .
Mere anarchy is loosed upon the world . . .
The ceremony of innocence is drowned . . .
And what rough beast, its hour come round at last,
Slouches towards Bethlehem to be born?

—William Butler Yeats, *The Second Coming*

Tammy Mungin didn't die. That was good news for her. And it was good news for Michiah Banks.

On a warm May afternoon, exactly one month shy of his eighteenth birthday, Banks and his nephew drove twenty-year-old Tammy to a remote area in the woods where they handcuffed her.[1] Banks forced Tammy, a virgin, into the back seat of his car and raped her at knifepoint. As she screamed in pain, Banks began to choke Tammy and threatened to stab her to death unless she performed "various sexual acts."[2] Tammy complied.[3] After the rape, Banks handcuffed Tammy to a tree and left her there for thirty minutes to contemplate her fate.[4]

Banks returned and removed the handcuffs.[5] He took off his belt, wrapped it around Tammy's throat and tried to strangle her.[6] Tammy managed to free herself and run, but Banks caught her and began stabbing her.[7] The knife blade broke.[8] Banks began to scream profanities at Tammy, went to his automobile, removed a tire iron, and again attacked Tammy—beating her over the head fifteen to twenty times.[9] He then stuffed a rag in her mouth.[10] Believing her dead, Banks

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1. Banks v. State, 520 So. 2d 43, 47, 49 (Fla. Dist. Ct. App. 1987) (Nimmons, J., dissenting).
2. *Id.* at 47.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 44 (majority opinion).
10. Information obtained through a request made under the Freedom of Information Act, 55 U.S.C. § 552 (2006), and is on file with the author.

stopped his onslaught.[11] But when Tammy began to cry, Banks knew that he had not completed the job.[12] As Tammy listened, Banks and his partner discussed other ways that they might finish what they had started[13]: they considered tying her between two trees and running over her with the car;[14] they considered putting her in the trunk, driving her to the river, and drowning her there.[15] They considered roping her by the neck to a tree.[16] Eventually, they settled on the latter.[17] Banks tied a rope tightly around Tammy's neck, put the rope around a tree, and pulled it taut.[18] Thinking her dead or near death, Banks and his friend left Tammy tied to the tree.[19] They decided that they would return at ten o'clock the following morning to bury her body.[20] Astonishingly, Tammy freed herself from the noose and escaped.[21] She lived, and eventually she bravely testified to the horrific ordeal just described.[22]

The State of Florida "direct filed" against Banks, charging him as an adult with one count of armed kidnapping, two counts of sexual battery with a deadly weapon, and one court of attempted first-degree murder.[23] Banks pleaded guilty to all of the counts except one of the sexual battery charges.[24] The trial judge sentenced him to concurrent terms that equaled forty years in prison.[25] Banks was released eighteen years later.[26]

Should Banks have received a sentence longer than forty years? Should he have been eligible for parole after just ten years? Should he have been released after only eighteen years? These questions are certainly open to debate.

On the other hand what if the trial judge, in exercising his discretion, had concluded that Banks was such a danger to society, so irreparably depraved, and his crimes so horrific, that he had sentenced Banks to life in prison without the possibility of parole?[27]

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11. *Banks*, 520 So. 2d at 47 (Nimmons, J., dissenting).
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 48.
22. *Id.*
23. *Id.* at 44 (majority opinion).
24. *Id.*
25. *Id.*
26. *Inmate Release Information Detail*, FLA. DEP'T OF CORRECTIONS, http://www.dc.state.fl.us/InmateReleases/detail.asp?Bookmark=132&From=list&SessionID=572285112 (last visited June 3, 2013).
27. With regard to persons sentenced under the Criminal Punishment Code, Florida abolished its parole system in 1983, thus requiring that all sentences be served in their entirety, unless

The Supreme Court has recently certified that such a sentence would be unconstitutional.[28] If a seventeen-year-old juvenile, one month shy of his eighteenth birthday, were to commit the same crimes today as Michiah Banks did twenty-seven years ago—indeed, if that juvenile were to torture his victim for days on end, maim her for life, leave her a quadriplegic, or beat her into a permanent coma—a judge could not constitutionally sentence that juvenile to life without the possibility of parole.[29] Moreover, according to the Court, even if that perpetrator's victim did not miraculously survive the onslaught, the perpetrator would still be ineligible for mandatory life without parole.[30] And, even in cases of rape, torture, and death, there is mounting evidence that the Court will soon do away with the *discretionary* imposition of life without parole in those cases as well.[31]

Yet, if Michiah Banks or the hypothetical perpetrator had been a mere thirty-one days older, the imposition of mandatory or discretionary life without parole would—according to the United States Supreme Court—be perfectly constitutional.[32]

INTRODUCTION

In 2010, the Supreme Court issued its groundbreaking decision in *Graham v. Florida*.[33] *Graham* held that sentencing a juvenile to life without the possibility of parole ("JLWOP") for a nonhomicide crime violates the Eighth Amendment's ban on cruel and unusual punishment.[34] Recently, in *Miller v. Alabama*,[35] the Court once again took up the issue of JLWOP, this time holding that *mandatory* JLWOP violates the Eighth Amendment under all circumstances, including intentional first-degree murder.[36] This Article argues that *Graham* and *Miller* are a portent of things to come—namely, the complete abrogation of *discretionary* JLWOP even for the most heinous premeditated murders, despite the advanced age of the juvenile offender. The Article demonstrates that the majority opinions in *Graham* and *Miller* are ambiguous and internally inconsistent. Yet, in spite of this discordance, and sometimes owing to it, the two opinions provide evidence that the Court is moving toward the wholesale

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abrogated by executive clemency. *See* FLA. STAT. § 921.002(1)(e) (2012); FLA. DEP'T OF CORRECTIONS, FLORIDA'S CRIMINAL PUNISHMENT CODE: A COMPARATIVE ASSESSMENT 6 (2011), *available at* http://www.dc.state.fl.us/pub/sg_annual/1011/sg_annual-2011.pdf.

28. *See, e.g.*, Miller v. Alabama, 132 S. Ct. 2455, 2463 (2012); Graham v. Florida, 130 S. Ct. 2011, 2034 (2010).

29. *See* discussion *infra* Part I.

30. *See* discussion *infra* Part I.

31. *See* discussion *infra* Part I.

32. *See* discussion *infra* Part I.

33. 130 S. Ct. 2011 (2010).

34. *Id.* at 2034.

35. 132 S. Ct. 2455 (2012).

36. *Id.* at 2475.

prohibition of JLWOP.

Part I of the Article provides a comprehensive overview of *Graham* and *Miller*, explaining the reasoning of the majority in each case and the objections raised by the dissenters. This synopsis sets the stage for the remainder of the Article, which offers a comprehensive critique. Part II presents a critical analysis of the two decisions, focusing on specific aspects that are unclear or contradict other reasonings within the opinions. These difficulties include inconsistent statements regarding a sentencing authority's ability to discern the dangerousness of a defendant and an overall theoretical inconsistency within and between the two opinions. Part III of the Article explores evidence suggesting the Court will soon declare JLWOP unconstitutional. Among the indications are the easy choice of cases, the decision to invalidate *mandatory* JLWOP, the rejection of incapacitation as a sufficient penological goal, the categorical rejection of JLWOP for nonhomicide crimes based on rationales that equally apply to homicide offenses, the unnecessary defense of a national consensus against mandatory imposition of the sentence, and the Court's curious opining and corresponding lack of guidance regarding legitimate applications of JLWOP.

I. *GRAHAM*, *MILLER*, AND THE EROSION OF JLWOP

Is JLWOP ever appropriate in the nonhomicide context? Is *mandatory* JLWOP ever appropriate, even in cases of intentional first-degree murder? *Graham* and *Miller* addressed these questions squarely and answered both in the negative.

A. Graham's Prohibition of JLWOP for Nonhomicide Crimes

Terrance Jamar Graham, at the age of sixteen, participated in a botched robbery.[37] He was accompanied by three other juveniles.[38] One of Graham's accomplices hit a store employee over the head with a metal bar, and the juveniles fled the scene without taking any money.[39] Graham was later arrested and charged as an adult with armed burglary and attempted armed robbery.[40] Because the burglary involved "assault or battery," and because he was charged as an adult, Graham was eligible for a maximum sentence of life imprisonment without parole.[41] Graham entered a guilty plea and, under the terms of a plea agreement, was sentenced to concurrent three-year probationary periods.[42]

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37. *Graham*, 130 S. Ct. at 2018.

38. *Id.*

39. *Id.* The employee required a few stitches but was otherwise unharmed. *Id.*

40. *Id.*

41. FLA. STAT. § 810.02(1)(b), (2)(a) (2012) (defining burglary as a felony of the first degree when it involves assault or battery upon a person).

42. *Graham*, 130 S. Ct. at 2018. Technically, Graham's plea was not accepted by the court, which withheld adjudication of guilt pending satisfactory completion of probation. Order of Probation, State v. Graham, No. 16-2003-CF-11912-AXXX-MA, 2003 WL 25835975, at 1-4 (Fla. Cir. Ct. Dec. 18, 2003).

Approximately one year after pleading guilty, just shy of eighteen and during his probationary period, Graham reoffended.[43] Participating in a home invasion, Graham (along with two adult accomplices) allegedly held two victims at gunpoint, forced them into a closet, and blocked the door.[44] Graham was arrested later that night.[45] Following a request by the probation officer, the judge overseeing the case accepted Graham's deferred plea to the earlier crimes.[46] At sentencing, despite a recommendation by the State of Florida for a combined sentence of forty-five years, the judge imposed the maximum penalty under the law—life without parole.[47] After the trial court's effective denial of Graham's motion to set aside the sentence and the exhaustion of the state's appeals process, the United States Supreme Court granted Graham's petition for certiorari.[48]

1. Graham *Majority Opinion*.—In a 5-4 decision authored by Justice Kennedy, the Court categorically declared the imposition of JLWOP a violation of the Eighth Amendment in all nonhomicide cases.[49] Initially, the Court explained the two ways in which it had previously reviewed the proportionality of a sentence.[50] One method, applied to all non-capital sentences, involved an individualized inquiry.[51] In the other approach, the Court had categorically banned certain impositions of the death penalty.[52] In discussing these methods of sentence review, the *Graham* Court acknowledged that the Court had never

43. *Graham*, 130 S. Ct. at 2018.

44. *Id.* at 2018-19.

45. *Id.* at 2019.

46. *Id.*

47. *Id.* at 2019-20.

48. *Id.* at 2020.

49. *Id.* at 2030-33. In his concurrence, Chief Justice Roberts narrowly sided with the majority decision, but only insofar as it related to Graham. *Id.* at 2036 (Roberts, C.J., concurring). Chief Justice Roberts rejected the majority's categorical ban on JLWOP. *Id.* at 2036-38.

50. *Id.* at 2021-22 (majority opinion).

51. In considering the constitutionality of the length of a "term-of-years sentence," the Court required that the lower court "begin by comparing the gravity of the offense and the severity of the sentence." *Id.* at 2022 (quoting Harmelin v. Michigan, 501 U.S. 957, 1005 (1991)). If that initial inquiry suggested "gross disproportionality," the lower court was then to engage in a comparison of the defendant's sentence with other sentences in the same jurisdiction and other jurisdictions. *Id.* If the lower court's "comparative analysis 'validate[d] an initial judgment that [the] sentence [was] grossly disproportionate,' the sentence is cruel and unusual." *Id*. (second alteration in original) (quoting *Harmelin*, 501 U.S. at 1005).

52. These generally involved cases where either "the nature of the offense," e.g., nonhomicide crimes, or "the characteristics of the offender," e.g., juveniles or the intellectually impaired, lent itself naturally to categorization. *Id.* In determining whether a categorical ban was appropriate in the death penalty context, the Court first "determine[d] whether there [was] a national consensus against the sentencing practice at issue." *Id.* (citing Roper v. Simmons, 543 U.S. 551, 572 (2005)). If such a consensus was found, the Court then exercised "its own independent judgment whether the punishment in question violate[d] the Constitution." *Id.* (citing *Roper*, 543 U.S. at 572).

before employed a categorical approach to invalidate a term-of-years sentence.[53] Nevertheless, because "[t]his case implicate[d] a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes . . . , a threshold comparison between the severity of the penalty and the gravity of the crime d[id] not advance the analysis."[54] The Court thus determined that in the context of JLWOP, "the appropriate analysis is the one used in cases that involved the categorical approach."[55]

Having concluded that this new categorical approach should be applied to review Graham's sentence, the Court first searched for a national consensus.[56] After considering the data, the Court announced that "[t]he sentencing practice now under consideration is exceedingly rare. And 'it is fair to say that a national consensus has developed against it.'"[57]

Once the Court identified a national consensus,[58] it embarked upon its second task—determining as a matter of first impression whether the imposition of JLWOP violated the Eighth Amendment. Declaring juvenile offenders less culpable than adults, nonhomicide crimes less serious than homicide crimes, and life without parole a severe punishment, the Court found that it did.[59]

The Court next discussed the possible penological justifications for nonhomicide JLWOP.[60] One by one, the Court was able to dispose of each rationale, finding none of them sufficient to support the sentence.[61] The Court

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53. *Id.*

54. *Id.* at 2022-23.

55. *Id.* at 2023.

56. *Id.* Relying first on state and federal legislation, the Court found that the laws of thirty-seven states and the federal government permitted JLWOP for nonhomicide offenders. *Id.* (citing Atkins v. Virginia, 536 U.S. 304, 312 (2002)). This, however, was not sufficient to demonstrate the necessary accord. *Id.* The Court continued its inquiry by examining "[a]ctual sentencing practices" and found that, across the country, JLWOP for nonhomicide crimes was "most infrequent," with only 123 juveniles serving the sentence. *Id.* at 2023-24. Moreover, the Court pointed out that "only [eleven] jurisdictions nationwide *in fact* impose life without parole sentences on juvenile nonhomicide offenders—and most of those do so quite rarely—while [twenty-six] States, the District of Columbia, and the Federal Government *do not impose them* despite apparent statutory authorization." *Id.* at 2024 (emphases added).

57. *Id.* at 2026 (quoting *Atkins*, 536 U.S. at 316).

58. *Id.* (explaining again that the consensus itself was insufficient to brand the sentencing practice cruel and unusual).

59. *Id.* at 2026-28.

60. *Id.* The Court recognized four "legitimate penological goals"—retribution, deterrence, incapacitation, and rehabilitation—and reiterated its earlier pronouncements that "'[t]he Eighth Amendment does not mandate adoption of any one penological theory'" and that "[a] sentence lacking *any* legitimate penological justification is by its nature disproportionate to the offense." *Id.* at 2026, 2028 (emphasis added) (internal quotation marks omitted).

61. *Id.* at 2028-30. The Court found retribution to be inapplicable because a juvenile, by nature, is less culpable than an adult, and the punishment does not fit the crime. *Id.* at 2028. The deterrence justification met with a similar fate: the immaturity of juveniles renders them "less

also rejected two arguments advanced by the States: (1) that adequate safeguards were present in the very process of determining whether to charge a juvenile as an adult and (2) a categorical rule was unnecessary because a case-by-case approach could identify specific juveniles who deserved the sentence.[62] Finally, in support of its conclusions, the Court looked to international law and determined that "the United States is the only Nation that imposes life without parole sentences on juvenile nonhomicide offenders."[63]

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susceptible to deterrence" because juveniles are "less likely to take a possible punishment into consideration when making decisions," and, even if the imposition of nonhomicide JLWOP deters a few juveniles, punishment must not be "grossly disproportionate in light of the justification offered." *Id.* at 2028-29. Because of the already established "diminished moral responsibility" of a juvenile nonhomicide offender, "any limited deterrent effect provided by life without parole is not enough to justify the sentence." *Id.* at 2029. As for incapacitation, the Court recognized that while incapacitation "may be a legitimate penological goal sufficient to justify life without parole in other contexts, it is inadequate to justify that punishment for juveniles who did not commit homicide." *Id.* Incapacitation based on the rationale "that the juvenile offender forever will be a danger to society" is tenuous considering that "expert psychologists" have difficulty making such a determination, and thus incapacitation cannot serve as a sole rationale to support JLWOP in the nonhomicide context. *Id.* Lastly, in examining the rehabilitation justification, the Court found that JLWOP "forswears altogether the rehabilitative ideal." *Id.* at 2030. Echoing previous parts of the opinion, the Court stated that denying the juvenile nonhomicide offender the "right to reenter the community . . . is not appropriate in light of [his] capacity for change and limited moral culpability." *Id.*

62. The Court defended its adoption of a categorical rule by demonstrating that it had duly considered these two possibilities. *Id.* First, the Court rejected the argument, advanced by the State of Florida, that the process of up-charging juveniles into the adult criminal system provided adequate safeguards to ensure that only deserving juveniles could be sentenced to JLWOP. *Id*. at 2030-31. It reasoned that because a court could sentence a juvenile to life without parole "based on a subjective judgment that the defendant's crimes demonstrate an 'irretrievably depraved character,'" the practice did not pass constitutional muster. *Id.* at 2031 (quoting Roper v. Simmons, 543 U.S. 551, 572 (2005)). Second, and similarly, the Court rejected the case-by-case approach—until then the exclusive means of evaluating a term-of-years sentence—because courts could not "with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." *Id.* at 2032. According to the Court, "Here, as with the death penalty, '[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive' a sentence of life without parole for a nonhomicide crime 'despite insufficient culpability.'" *Id*. (alteration in original) (quoting *Roper*, 543 U.S. at 572-73). In a concluding defense of its categorical rule, the Court noted that such a "rule gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform." *Id.*

63. *Id*. at 2034. Justice Kennedy noted that "only [eleven] nations authorize life without parole for juvenile offenders under any circumstances; and only [two] of them, the United States and Israel, ever impose the punishment in practice." *Id.* at 2033. Further, the Court found that Israel did not impose JLWOP for nonhomicide crimes because all of those serving the sentence in that country "were convicted of homicide or attempted homicide." *Id*. The confusing equation of "homicide" with "attempted homicide" is discussed *infra* Part III.A.

Concluding that JLWOP in nonhomicide cases violates the Eighth Amendment, the Court succinctly expressed its holding:

> The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.[64]

2. Chief Justice Roberts's Concurrence in Graham.—Chief Justice Roberts concurred in the Court's judgment,[65] but he rejected the majority's "invent[ion] [of] a new constitutional rule of dubious provenance."[66] Rather, he argued that the Court should abide by its previous noncapital precedents and apply a "narrow proportionality review" using a "case-by-case" analysis.[67] The Chief Justice then applied the "narrow proportionality" framework and found that Graham's sentence violated the Eighth Amendment.[68] He confirmed this conclusion by reviewing sentences for similar crimes, inside and outside of Florida, and found that Graham's sentence was indeed extraordinary.[69] That being said, his opinion left no doubt that "[s]ome crimes are so heinous, and some juvenile offenders so highly culpable, that a sentence of life without parole may be entirely justified under the Constitution."[70] In the Chief Justice's mind, Graham's case did not rise nearly to such a heinous level. Thus, the Chief Justice concluded that the Court

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64. *Graham*, 130 S. Ct. at 2034.

65. *Id.* at 2036 (Roberts, C.J., concurring). Roberts' concurrence followed a concurrence by Justice Stevens, in which he took Justice Thomas to task for effectively ignoring the Nation's "evolving standards of decency." *Id*. (Stevens, J., concurring).

66. *Id*. (Roberts, C.J., concurring).

67. *Id*. at 2037 (internal quotation marks omitted). The Chief Justice's explanation of this type of review was entirely consistent with that of the majority. Like the majority, he set forth the accepted two-step analysis: a violation of the Eighth Amendment occurs if the gravity of the offense is "grossly disproportionate" to the severity of the penalty, and, only then, if a comparison of sentences within and outside the subject jurisdiction "confirm[s] the inference of gross disproportionality." *Id.* at 2037-38.

68. *Id*. at 2039-41. First, in considering the gravity of the crime, he determined that Graham's crimes, while serious, did not rise to the level of "murder or rape." *Id.* at 2040. With regard to the harshness of the punishment, the Chief Justice was troubled by the trial judge's imposition of life without parole despite the contrary recommendations of every party, including the State. *Id.* As for the ability of courts to engage in this proportionality analysis, Chief Justice Roberts reiterated the "justified assumption that courts are competent to judge the gravity of an offense, at least on a relative scale." *Id*. at 2042 (internal quotation marks omitted). And in discussing juvenile culpability, the Chief Justice expressed his belief that juveniles "are *generally*—though not necessarily in every case—less morally culpable than adults who commit the same crimes." *Id.* at 2038.

69. *Id*. at 2040-41.

70. *Id*. at 2042 (relying on descriptions of two particularly disturbing juvenile nonhomicide crimes).

was presented with an "exceptional case" in which an appellate court may overturn a term-of-years sentence based on gross disproportionality.[71]

3. The Graham *Dissent*.—The dissent was led by Justice Thomas, who derided the majority for extending the bounds of the Eighth Amendment by ignoring laws duly enacted by legislatures and, instead, basing the definition of cruel and unusual on "snapshot[s] of American public opinion."[72] He stated that "[f]or the first time in its history, the Court declares an entire class of offenders immune from a noncapital sentence using the categorical approach it previously reserved for death penalty cases alone."[73] Justice Thomas proclaimed that the majority's decision "eviscerate[d]" the distinction between homicide and nonhomicide cases. "Death," he declared, "is different no longer."[74]

According to Justice Thomas, the heart of the majority's argument was "its 'independent judgment' that this sentencing practice does not 'serv[e] legitimate penological goals.'"[75] "The Court begins that analysis," he said, "with the obligatory preamble that '[t]he Eighth Amendment does not mandate adoption of any one penological theory,' then promptly mandates the adoption of the theories the Court deems best."[76] Finally, Justice Thomas questioned the Court's decision

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71. *Id*.

72. *Id*. at 2045 (Thomas, J., dissenting) (quoting Roper v. Simmons, 543 U.S. 551, 572 (2005)). Justice Thomas first took issue with the long line of Supreme Court precedents that had established proportionality as the lynchpin of Eighth Amendment jurisprudence. *Id.* at 2044. As for the "snapshot" of public opinion, he argued that the majority was not willing even to accept that snapshot but instead "reserve[d] the right to reject the evidence of consensus it [found] whenever its own 'independent judgment' point[ed] in a different direction." *Id.* at 2045-46 (quoting *Roper*, 543 U.S. at 561).

73. *Id*. at 2046.

74. *Id*. (internal quotation marks omitted). Justice Thomas noted that in the preceding twenty-eight years, the Court had considered three challenges to a term-of-years sentence and had "rejected them all." *Id.* at 2047. He also took the majority to task by refuting the existence of a national consensus against nonhomicide JLWOP. *Id.* at 2048-49. All of the majority's efforts to statistically prove the existence of a national consensus were, he declared, "merely ornaments in the Court's analysis, window dressing that accompanies its judicial fiat." *Id.* at 2053; *see also supra* text accompanying note 38.

75. *Graham*, 130 S. Ct. at 2053 (alteration in original) (quoting the majority opinion, *id.* at 2026).

76. *Id*. (alteration in original) (citations omitted) (quoting Harmelin v. Michigan, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in judgment)). Justice Thomas noted that JLWOP "ensur[es] that juvenile offenders who commit armed burglaries, or those who commit the types of grievous sex crimes described by THE CHIEF JUSTICE, no longer threaten their communities." *Id.* Justice Thomas concluded that these observances "should settle the matter, since the Court acknowledges that incapacitation is an 'important' penological goal." *Id.* (quoting the majority opinion, *id.* at 2029). "A similar fate befalls deterrence," as the majority recognizes its occasional utility, but finds it "insufficient." *Id.* at 2053-54. Justice Thomas then ventured that rejection of retribution—"the notion that a criminal sentence should be proportioned to 'the personal culpability of the criminal offender'"—is the key to the majority's "independent

by arguing that it "does not even believe its pronouncements about the juvenile mind" because, "[i]f it did, the categorical rule it announces today would be most peculiar because it leaves intact state and federal laws that permit life-without-parole sentences for juveniles who commit homicides."[77]

B. Miller*'s Prohibition of Mandatory JLWOP for Homicide*

Miller v. State,[78] and its companion case, *Jackson v. Norris*,[79] concerned two juveniles who committed their crimes at the age of fourteen and were convicted of murder and sentenced to *mandatory* JLWOP.[80]

In *Miller v. State*, Evan Miller, high on marijuana, attacked his mother's drug dealer, Cole Cannon, and severely beat him with a baseball bat.[81] Miller and his friend, who had also assaulted Cannon, later returned to Cannon's trailer and set it afire to conceal the crime.[82] Succumbing to the beating and smoke inhalation, Cannon died.[83] Miller was arrested and charged as an adult with "murder in the course of arson,"[84] a crime carrying the mandatory sentence of life without

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judgment" that nonhomicide JLWOP is unconstitutional. *Id.* at 2054 (quoting the majority opinion, *id.* at 2026, 2028).

77. *Id*. at 2055. Justice Thomas perceived an inconsistency in the majority's willingness to impose JLWOP on a seventeen-year-old who "pulls the trigger" and murders someone, and its unwillingness to impose the same sentence on "a [seventeen]-year-old who rapes an [eight]-year-old and leaves her for dead." *Id.* Justice Thomas did not spare the Chief Justice and his advocacy of a case-by-case "gross proportionality" review, arguing that the Court had previously upheld life without parole in less egregious cases and that the Chief Justice's rationale depended on "the same type of subjective judgment as the" majority's, even though it was cloaked in a case-by-case analysis. *Id.* at 2056. Concluding his dissent, Justice Thomas stated,

> The fact that the Court categorically prohibits life-without-parole sentences for juvenile nonhomicide offenders in the face of an overwhelming legislative majority *in favor* of leaving that sentencing option available under certain cases simply illustrates how far beyond any cognizable constitutional principle the Court has reached to ensure that its own sense of morality and retributive justice pre-empts that of the people and their representatives.

Id. at 2058. In a short, three-paragraph dissent, Justice Alito stressed that "[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole." *Id*. (Alito, J., dissenting). Justice Alito also expressed his belief that the case-by-case proportionality question was not properly before the Court, and, therefore, he found no need to discuss the issue further. *Id.*

78. 63 So. 3d 676 (Ala. Crim. App. 2010), *rev'd*, 132 S. Ct. 2455 (2012).

79. 378 S.W.3d 103 (Ark. 2011), *rev'd*, *Miller*, 132 S. Ct. at 2455.

80. *Miller*, 132 S. Ct. at 2460.

81. *Id.* at 2462.

82. *Id.*

83. *Id.*

84. *Id.* at 2462-63.

parole.[85] Miller was convicted and sentenced to the mandatory life term.[86] Subsequent to his unsuccessful appeal to the intermediate court and the Alabama Supreme Court's denial of his petition for review, the United States Supreme Court granted Miller's petition for certiorari.[87]

In *Jackson*, Kuntrell Jackson and two of his friends planned to rob a store.[88] Before arriving at the store, Jackson learned that one of his accomplices was carrying a weapon.[89] Jackson waited outside while the two other juveniles entered the store.[90] One brandished the weapon and ordered the store clerk to give them money.[91] The clerk resisted, saying that she did not have any money to give.[92] When the clerk threatened to call the police, Jackson's accomplice shot her in the face and killed her.[93] The prosecutor made the decision to try Jackson as an adult and charged him with felony murder.[94] Under Arkansas's sentencing guidelines, mandatory life without parole was the only available sentence.[95] Four and a half years later, the United States Supreme Court declared capital punishment for juveniles unconstitutional in *Roper v. Simmons*.[96] Subsequent to this opinion, Jackson filed a petition for habeas corpus. Despite the Court's holding in *Graham*, the Arkansas Supreme Court affirmed the denial of his petition.[97] The United States Supreme Court granted Jackson's petition for

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85. *Id.* at 2463. *See* ALA. CODE §§ 13A-5-40(a)(9), 13A-6-2(c) (2013).

86. *Miller*, 132 S. Ct. at 2463.

87. *Id.*

88. *Id.* at 2461.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* This demand and refusal continued, during which time Jackson entered the store, viewed the scene before him, and stated either "[w]e ain't playin'," or "I thought you all was playin'." *Id.* (alteration in original) (internal quotation marks omitted).

93. Jackson v. State, 194 S.W.3d 757, 759 (Ark. 2004), *aff'd*, Jackson v. Norris, 378 S.W.3d 103 (Ark. 2011), *rev'd*, *Miller*, 132 S. Ct. at 2455. Following the shooting, Jackson and the two others then ran to Jackson's house. *Id.* Their robbery attempt was a bust—no money was taken. *Id.*

94. *Miller*, 132 S. Ct. at 2461. Technically, the prosecutor also charged Jackson with aggravated robbery in the course of which he or his accomplice caused death and manifested an "extreme indifference to . . . human life." *Id.* at 2477 (Breyer, J., concurring).

95. ARK. CODE ANN. § 9-27-318(c)(2)(A)-(B) (2010) (permitting a prosecutor to charge a fourteen-year-old in either the adult or juvenile system when the crime is capital or first-degree murder), *invalidated by* State v. A.G., 383 S.W.3d 317 (Ark. 2011). *See id.* § 5-4-104(b) ("A defendant convicted of capital murder, or treason, shall be sentenced to death or life imprisonment without parole . . . ." (citations omitted)), *amended by* H.R. 1993, 89th Leg., Reg. Sess. (Ark. 2013). Jackson did not file a petition for post-conviction relief, and the Arkansas Supreme Court affirmed his conviction. *Miller*, 132 S. Ct. at 2461.

96. 543 U.S. 551, 578 (2005).

97. Norris, 378 S.W.3d at 106. In dissent, two Arkansas justices argued that the sentence violated the Eighth Amendment because "Jackson did not kill and any evidence of intent to kill was

certiorari and joined his case with Miller's.[98]

1. Miller*'s Majority Opinion*.—Justice Kagan delivered the Court's 5-4 decision.[99] Describing *Graham* as the "foundation stone" of the analysis, Justice Kagan reaffirmed the overarching importance of "proportionality."[100] She explained that two lines of Court cases demonstrate the absence of proportionality in sentencing structures that mandate JLWOP for homicide crimes.[101] The first line of cases supports the categorical ban on the imposition of certain sentences "based on mismatches between the culpability of a class of offenders and the severity of a penalty."[102]

Second, because *Graham* "likened life without parole for juveniles to the death penalty," Justice Kagan concluded that the series of Court precedents prohibiting mandatory death sentences was implicated.[103] Again pointing to *Graham*, Justice Kagan explained that "because we viewed this ultimate penalty for juveniles as akin to the death penalty, we treated it similarly to that most severe punishment."[104] With this equation thus established, she reviewed the Court's cases that had required "individualized sentencing when imposing the death penalty."[105] The Court had based those decisions on the rationale that "the death penalty is reserved only for the most culpable defendants committing the most serious offenses."[106] Because mandatory imposition of capital punishment gave a sentencing authority no opportunity to consider mitigating factors, it axiomatically could not assess the defendant's culpability.[107] Here, the majority found the practice even more egregious, because of "the mitigating qualities of youth"—the "signature qualities" of which "are all transient."[108] The Court was particularly concerned that under a mandatory JLWOP scheme for homicide crimes, "every juvenile will receive the same sentence as every other—the [seventeen]-year-old and the [fourteen]-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one."[109] The practice was also flawed because "[i]t neglects the circumstances of

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severely lacking." *Id.* at 109 (Danielson, J., dissenting).

98. *Miller*, 132 S. Ct. at 2463.

99. *Id.* at 2460.

100. *Id.* at 2463, 2464 n.4.

101. *Id.* at 2463-65.

102. *Id*. at 2463. *Roper* and *Graham* figured heavily here. *Id.* at 2463-68. Justice Kagan reiterated the majority's oft explained belief that juveniles have "lesser culpability" and, therefore, cannot be subjected to the most severe punishments. *Id.* at 2463-64.

103. *Id.* The second strand of precedent relied upon by the Court included cases in which it had overturned laws that mandated imposition of the death penalty.

104. *Id.* at 2466.

105. *Id.* at 2467.

106. *Id.*

107. *Id.*

108. *Id*. at 2459, 2467 (internal quotation marks omitted) (quoting Johnson v. Texas, 509 U.S. 350, 367-68 (1993)).

109. *Id.* at 2467-68.

the homicide offense."[110] Thus, the majority held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."[111]

The majority then addressed the arguments raised by the States and the dissent. First, the majority considered the argument that the decision conflicted with the Court's previous Eighth Amendment jurisprudence.[112] Justice Kagan addressed the claim that a national consensus in favor of mandatory JLWOP for homicide crimes precluded a finding that the sentence was unconstitutional.[113] She explained that, unlike in *Roper* and *Graham*, the majority's holding in this case "does not categorically bar a penalty for a class of offenders or type of crime."[114] Rather, the holding simply bars "a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile offenders."[115] Thus, the sentencing decision was individualized, and the inquiry into national consensus was of no moment.[116] Nevertheless, in a lengthy exposition, Justice Kagan addressed the dissent's suggested existence of a national consensus favoring mandatory JLWOP for homicide crimes, using essentially the same data and reaching the opposite conclusion.[117] Second, the majority assessed whether adequate safeguards already existed in the procedures used for upcharging juveniles into the adult system.[118] The Court dispensed with both arguments.

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110. *Id.* at 2468.

111. *Id*. at 2469. The majority acknowledged, but refused to "consider," the Petitioners' "alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those [fourteen] and younger." *Id.* Nevertheless, it made the following statement:

> But given all we have said in *Roper, Graham,* and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. . . . Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

Id.

112. *Id.* at 2470. The majority dispatched this argument swiftly. *Id.* Responding to the assertion that its instant decision contravened an earlier holding that an adult convicted of possessing more than 650 grams of cocaine could constitutionally be sentenced to mandatory life without parole, *id.* (citing Harmelin v. Michigan, 501 U.S. 957, 995 (1991)), Justice Kagan stressed that "*Harmelin* had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders." *Id.* Therefore, the Court's decision "neither overrules nor undermines nor conflicts with *Harmelin*." *Id.*

113. *Id.* at 2470-71.

114. *Id.* at 2471.

115. *Id.* at 2469 (emphasis added).

116. *Id.* at 2471-72.

117. *Id.* at 2471-73.

118. *Id.* at 2471. In considering whether state transfer statutes provide adequate safeguards against the permanent life imprisonment of undeserving juveniles, Justice Kagan initially pointed

In conclusion, the Court stated,

> *Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.[119]

2. Justice Breyer's Concurrence in Miller.—In a concurring opinion, Justice Breyer focused on the importance of intent in determining whether JLWOP for a homicide crime is constitutional.[120] As an initial matter, he expressed his understanding that "[i]f the State continues to seek a sentence of life without the possibility of parole for Kuntrell Jackson, there will have to be a determination whether Jackson 'kill[ed] or intend[ed] to kill' the robbery victim."[121] Justice Breyer made clear that his immediate concern was with the potential eligibility of juvenile felony murder defendants for life without parole.[122] Recognizing that

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out that many such statutes are non-discretionary, depending upon only the age of the defendant and the nature of the offense, while others "lodge this decision exclusively in the hands of prosecutors"—in both instances there is no opportunity for judicial review. *Id.* at 2474. Additionally, according to Justice Kagan, even when the transfer statute gives discretion to a judge, often, the judge possesses neither a fully developed record nor the breadth of information necessary to make an informed decision. *Id.* Next, Justice Kagan distinguished the decision to try a juvenile as an adult with a decision regarding the appropriate sentence once the juvenile is in the adult system. *Id.* at 2474-75. In the former, the choice is between a relatively short juvenile sentence and a possibly lengthy adult sentence, making the decision one of "extremes." *Id.* But in the latter, the sentencing authority has wide latitude to sentence the juvenile to a term that it finds appropriate (so long as its hands are not tied by a mandatory life sentence without parole). *Id.* Noting this distinction, the majority perceived "a certain irony in [the dissents'] repeated references to [seventeen]-year-olds who have committed the 'most heinous' offenses, and their comparison of those defendants to the [fourteen]-year-olds here," and emphasized that "[o]ur holding requires factfinders to attend to exactly such circumstances—to take into account the differences among defendants and crimes." *Id.* at 2469 n.8 (quoting *id.* at 2477-78 (Roberts, C.J., dissenting)).

119. *Id*. at 2475.

120. *Id.* (Breyer, J., concurring).

121. *Id*. (second and third alterations in original) (quoting Graham v. Florida, 130 S. Ct. 2011, 2027 (2010)). Justice Breyer based that opinion on *Graham*'s statement that "a juvenile offender *who did not kill or intend to kill* has a twice diminished moral culpability." *Id.* (quoting *Graham*, 130 S. Ct. at 2027). Therefore, homicides in which a juvenile lacks the intent to kill "must [be] exclude[d]" from eligibility for JLWOP. *Id*. at 2475-76. By the same token, "if the juvenile either kills or intends to kill the victim, he lacks 'twice diminished' responsibility" and could, at least under the current state of the law, be sentenced to JLWOP. *Id*. at 2476.

122. *Id.*

the felony murder doctrine technically includes the element of intent, he expressed his opinion that "this type of 'transferred intent' is not sufficient to satisfy the intent to murder that could subject a juvenile to a sentence of life without parole."[123] Justice Breyer made clear that for Jackson to be sentenced to life without parole, the prosecution must establish true formed intent.[124] Justice Breyer then concluded by suggesting his support for a possible extension of the majority's holding: "If, on remand, however, there is a finding that Jackson did intend to cause the clerk's death, *the question remains open whether the Eighth Amendment prohibits the imposition of life without parole upon a juvenile in those circumstances as well*."[125]

3. The Miller *Dissent*.—Chief Justice Roberts led the dissenters.[126] For Roberts, the mandatory sentencing schemes of the States could not be labeled "unusual" because of the sheer number of juveniles incarcerated under such laws.[127] Therefore, in his view, the sentencing schemes could not violate the Eighth Amendment's prohibition.[128] The Chief Justice then engaged in a lengthy interpretation of the data regarding the prevalence of statutes imposing mandatory JLWOP and the frequency of their imposition, and he found that a consensus *in*

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123. *Id*. Even though felony murder based on such transferred intent may support a life sentence without parole for an adult offender, Justice Breyer echoed the Court's repeated statements regarding the juvenile mind and a juvenile's "[in]ability to consider the full consequences of a course of action and to adjust one's conduct accordingly." *Id.* Thus, the lynchpin of felony murder—"the idea that one engaged in a dangerous felony should understand the risk that the victim of the felony could be killed, even by a confederate"—is missing in the case of juveniles. *Id.*

124. *Id.*

125. *Id.* at 2477 (emphasis added).

126. *Id.* at 2477-82 (Roberts, C.J., dissenting). Acknowledging that "determining the appropriate sentence for a teenager convicted of murder presents grave and challenging questions of morality," he advised that the Court's "role . . . is to apply the law, not to answer such questions." *Id.* at 2477.

127. *Id.*

128. *Id*. According to Chief Justice Roberts, the "objective indicia of society's standards" had been made clear "in legislative enactments and state practice." *Id*. (internal quotation marks omitted) (quoting Graham v. Florida, 130 S. Ct. 2011, 2022 (2010)). He also explained his understanding of society's "evolving standards of decency":

> Mercy toward the guilty can be a form of decency, and a maturing society may abandon harsh punishments that it comes to view as unnecessary or unjust. But decency is not the same as leniency. A decent society protects the innocent from violence. A mature society may determine that this requires removing those guilty of the most heinous murders from its midst, both as protection for its other members and as a concrete expression of its standards of decency. As judges we have no basis for deciding that progress toward greater decency can move only in the direction of easing sanctions on the guilty.

Id. at 2478. The evidence of societal evolution, he stated, was apparent in the nation's movement since the 1980s toward harsher sentences. *Id.*

favor of the sentence and its imposition was evident.[129] The Chief Justice next disposed of the majority's suggestion that legislatures had inadvertently imposed the sentence, unaware of the effect of the criminal statutes they enacted.[130] Noting the clear delineation in *Roper* and *Graham* between "[s]erious nonhomicide crimes" and "murder," Chief Justice Roberts pointed to statements in those prior decisions specifically reserving the right of legislatures to impose JLWOP for murder—statements of "reassurance" that proved hollow.[131] Finally, the Chief Justice was troubled by the majority's "unnecessary" statement that even discretionary life without parole for juvenile murderers should be "uncommon."[132]

Justice Thomas was next in dissent.[133] He first took issue with the majority's interpretation that the Eighth Amendment requires proportionality.[134] He then took on another issue previously decided by the Court—namely the prohibition of mandatory imposition of the death penalty.[135] Justice Thomas also argued that *individualized* sentencing had never been required outside the death penalty arena.[136] Finally, like Chief Justice Roberts, Justice Thomas was troubled by the

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129. *Id*. at 2477-79. In spite of his lengthy assessment, the Chief Justice concluded it may nonetheless be unnecessary because "[i]n the end, the Court does not actually conclude that mandatory life sentences for juvenile murderers are unusual." *Id.* at 2480.

130. *Id.* at 2479-80. Distinguishing *Graham*, he pointed to the fact that the data in that case suggested that JLWOP for nonhomicide crimes was rare. *Id*. at 2480. The same could not be said here, as some 2000 juveniles were presently serving a sentence of mandatory JLWOP, and this was surely not adventitious. *Id.* at 2477, 2480. Moreover, the Chief Justice was "aware of no effort in the wake of *Graham* to correct any supposed legislative oversight." *Id.* at 2480.

131. *Id*. at 2481.

132. *Id*. (referencing the majority opinion, *id.* at 2469). As such, he opined, "the Court will have bootstrapped its way to declaring that the Eighth Amendment absolutely prohibits" the imposition of JLWOP under any circumstances. *Id.* "This process," the Chief Justice surmised, "has no discernible end point," because of the majority's declaration that "none of what [*Graham*] said about children . . . is crime-specific." *Id.* at 2481-82 (alterations in original) (quoting *id.* at 2465 (majority opinion)).

133. *Id.* at 2482-87 (Thomas, J., dissenting).

134. *Id.* at 2483. As in previous opinions, he made clear his belief that the framers of the Constitution prohibited cruel and unusual punishment in order to preclude "torturous *methods* of punishment . . . akin to those that had been considered cruel and unusual at the time the Bill of Rights was adopted." *Id.* (quoting Graham v. Florida, 130 S. Ct. 2011, 2044 (2010) (Thomas, J., dissenting) (internal quotation marks omitted)); *see also* Ewing v. California, 538 U.S. 11, 32 (2003) (Thomas, J., concurring in judgment).

135. *Id.* at 2484-85. Arguing that previous cases were "wrongly decided," he rejected the very foundation of the majority's argument that JLWOP equates with the death penalty and therefore cannot be mandatorily imposed. *Id.*

136. *Id.* at 2485-86. Justice Thomas maintained that, under the Court's decision in *Harmelin*, "the defendant's age is immaterial to the Eighth Amendment analysis." *Id.* at 2486 (citing Harmelin v. Michigan, 501 U.S. 957, 995 (1991)). "What *has* changed (or, better yet 'evolved')," he stated, "is this Court's ever-expanding line of *categorical* proportionality cases." *Id*. (second

Court's assertion that "appropriate occasions for sentencing juveniles to [life without parole] will be uncommon."[137]

Finally, Justice Alito added his dissenting voice.[138] He dramatically initiated his objection to the Court's decision by positing that "[e]ven a [seventeen-and-a-half]-year-old who sets off a bomb in a crowded mall or guns down a dozen students and teachers is a 'child' and must be given a chance to persuade a judge to permit his release into society."[139] Justice Alito questioned, as an initial matter, the Court's by now entrenched reference to society's "evolving standards of decency," challenging the assumption that societal evolution runs toward the decent.[140] Recounting an historic line of Court cases,[141] Justice Alito declared that, as the years went by, "evidence of a national consensus . . . became weaker and weaker,"[142] until *Graham* finally dispatched "any pretense of heeding a legislative consensus."[143] Moreover, he pointed out that "[t]he two (carefully selected) cases before us concern very young defendants . . . delicately call[ed] 'children,'" and, as such, they are "anomalies" who do not represent the vast number of "young men who are fast approaching the legal age of adulthood."[144]

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emphasis added). It is unclear from these statements whether Justice Thomas believed that the Court's decision required an *individualized,* case-by-case, approach to juvenile sentencing, or whether he thought that the Court had expanded its list of *categorically* banned sentences. Here, at least, he interpreted the majority's decision as creating a categorical ban, while Justice Kagan asserted that the decision was based on a case-by-case proportionality analysis because it did not "categorically bar a penalty for a class of offenders or type of crime." *See id.* at 2471 (majority opinion).

137. *Id*. at 2486 (alteration in original) (quoting the majority opinion, *id.* at 2469). Justice Thomas envisioned that lower courts influenced by that statement will "shy away from imposing life without parole sentences and embolden appellate judges to set them aside when they are imposed." *Id.* As such sentences are rejected, he surmised, the Court will later be quick to cite "actual sentencing practices" as justification for further erosion of JLWOP imposition. *Id.* (internal quotation marks omitted).

138. *Id.* at 2487-90 (Alito, J., dissenting).

139. *Id.* at 2487.

140. *Id*. (internal quotation marks omitted). Nevertheless, having conceded that such precedent was firmly established, he reminded the Court that theretofore it had relied largely on "the positions taken by state legislatures" to reflect and define those standards. *Id.* at 2487-88.

141. *Id*. at 2487-89.

142. *Id*. at 2488.

143. *Id*. Noting that *Graham* forbade a trial judge from imposing JLWOP for a nonhomicide offense, Justice Alito speculated that "the Justices in the majority may soon extend that holding to minors who commit murder. We will see." *Id.* at 2489-90.

144. *Id*. at 2489. Justice Alito noted that "[s]eventeen-year-olds commit a significant number of murders every year," and many of them "are at least as mature as the average [eighteen]-year-old." *Id.* He asserted that "[twenty-eight] States and the Federal Government have decided that *for some of these offenders* life without parole should be mandatory." *Id*. (emphasis added). This statement is curious, however, because statutes that *mandate* life without parole do not impose the sentence only on *some defendants*. Rather, *all defendants,* regardless of their age or perceived

Justice Alito conceded that a judge or jury may still exercise discretion and "make an individualized decision" to impose JLWOP.[145] "[B]ut," he cautioned, "do not expect this possibility to last very long."[146] And, giving a nod to incapacitation as a valid penological justification for JLWOP, Justice Alito stated,

> If imprisonment does nothing else, it removes the criminal from the general population and prevents him from committing additional crimes in the outside world. . . . [W]hat the majority is saying is that members of society must be exposed to the risk that these convicted murderers, if released from custody, will murder again.[147]

II. Inconsistency and Ambiguity in the Supreme Court's JLWOP Jurisprudence

Could the Supreme Court of the United States, comprised of the greatest legal minds in the nation, inadvertently overlook fairly conspicuous instances of linguistic and theoretical incongruence in its decisions? Or do the Court's seemingly unintended lapses, in actuality, represent fully considered and even calculated measures to achieve some unstated purpose? Perhaps each could be the case.

A. The Ephemeral Capacity of Judges and Juries to Evaluate Immaturity and Culpability

Defending its categorical ban on JLWOP for nonhomicide crimes, the *Graham* majority explained the reasons for its determination that a "case-specific gross disproportionality inquiry," which "would allow courts to account for factual differences between cases and to impose life without parole sentences for particularly heinous crimes[,]" would be unconstitutional.[148] Pointing to a need for "some boundaries" in juvenile sentencing, the Court explained,

> [E]ven if we were to assume that some juvenile nonhomicide offenders might have "sufficient psychological maturity, and at the same time demonstrat[e] sufficient depravity" to merit a life without parole sentence, it does not follow that courts . . . could with sufficient accuracy

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depravity, are required by law to serve a life sentence without parole. This echoes Chief Justice Roberts's equally odd statement that *Roper* and *Graham* do not stand for the proposition that legislators "may not require life without parole for *juveniles who commit the worst types of murder*." *Id.* at 2480 (Roberts, C.J., dissenting) (emphasis added). Again, a mandatory sentencing scheme does not distinguish between types of murders or murderers.

145. *Id*. at 2489 (Alito, J., dissenting).

146. *Id*.

147. *Id*. at 2490. Envisioning that the Court is on an as-yet unrevealed "march toward some vision of evolutionary culmination," Justice Alito warned that "[t]he Constitution does not authorize [this Court] to take the country on this journey." *Id.*

148. Graham v. Florida, 130 S. Ct. 2011, 2031 (2010).

> distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.[149]

The Court expressed concern over three perceived risks associated with a case-by-case approach that could lead a sentencing authority to inappropriately impose JLWOP for a nonhomicide offender: (1) the risk "that the brutality or cold-blooded nature of [the] crime would overpower mitigating arguments based on youth"; (2) the risk that a judge would ignore the "special difficulties encountered by counsel in juvenile representation"; and (3) the risk that an individualized approach would deny some "juvenile nonhomicide offenders a chance to demonstrate maturity and reform."[150]

And what of the argument that judges and juries can be guided by the considerable knowledge and expertise of seasoned mental health professionals? The Court made short shrift of that suggestion, determining that the "salient characteristics" of youth make it "difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[151]

The Miller majority addressed the problem of mandatory JLWOP for homicide offenders, and began its opinion by expressing uneasiness that

> [i]n neither [Jackson's nor Miller's] case did the sentencing authority have any discretion to impose a different punishment. State law mandated that each juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence . . . more appropriate.[152]

Thus, while JLWOP could be an appropriate sentence for a homicide crime, the sentencing authority's inability to exercise discretion—by considering age, depravity, family circumstances, etc.—was the problem. According to the Court, "these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender."[153] The majority then gave a clear admonition: "Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[154]

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149. *Id.* at 2031-32 (second alteration in original) (citations omitted) (quoting Roper v. Simmons, 543 U.S. 551, 572 (2005)).

150. *Id.* at 2032.

151. *Id.* at 2026 (internal quotation marks omitted) (quoting *Roper*, 543 U.S. at 573).

152. Miller v. Alabama, 132 S. Ct 2455, 2460 (2012) (emphasis added).

153. *Id*. at 2466.

154. *Id.* at 2469. The Court further espoused, "At the least, a sentencer should look at [the attendant] facts before depriving a [fourteen]-year-old of any prospect of release from prison." *Id.* In a footnote, Justice Kagan detected "a certain irony in [the dissent's] repeated references to [seventeen]-year-olds who have committed the 'most heinous' offenses, and their comparison of

Thus, all of the *Graham* majority's pronouncements, purporting to establish, in the *nonhomicide* context, a sentencing authority's inability to distinguish between the incorrigible and the reformable juvenile (in a constitutionally sound way), are turned on their collective heads with the simple recognition that the Court permits imposition of JLWOP in homicide cases. Put simply, one cannot escape *Graham*'s glaring and supposedly indubitable truth that, in nonhomicide cases, judges, juries, and even expert mental health professionals are utterly incapable of determining whether a juvenile defendant is irreparably corrupt.[155] Therefore, per the Court, JLWOP in the nonhomicide context is inconsistent with providing the inherently transformable juvenile an opportunity for growth and change. Yet, under *Miller*, this supposed inability to recognize entrenched depravity inexplicably disappears when the juvenile has murdered. In such cases, sagacity suddenly materializes and the sentencer's capacity to identify ineradicable degeneracy magically emerges, rendering a sentence of JLWOP constitutional. This is an extraordinarily syllogistic fallacy. The Court simply cannot have its cake and eat it too. And, as we shall see, this absurd conclusion was not lost on the Chief Justice and Justice Thomas.

So why, once again, do we see ambiguity in the Court's decisions? Justice Kennedy, Justice Kagan, and the rest of the *Graham* and *Miller* majorities surely recognized that they had discordant theories on their hands. The only reasonable explanation is that the *Graham* Court wanted to impose the ban on JLWOP for nonhomicide offenses, needed the inability to determine juvenile maturity and depravity rationale to support that prohibition, was not yet ready (or able)[156] to declare a categorical ban on all JLWOP, and therefore had to ignore the glaring inconsistency. From there, the *Miller* majority made the easy jump to a ban on *mandatory* JLWOP[157] and offered its prescient statements about the rarity with which the sentence should be imposed. At the same time, *Miller* allowed Justices Sotomayor and Breyer to clarify where they were headed. Finally, an additional possible reason for *Miller*'s restraint, and its willingness to suffer the conspicuous ambiguity, is that Justice Kennedy may not have (at least at that time) joined the majority if it had imposed a full-out ban on JLWOP.[158]

B. The Upshot of Discordance

The theoretical inconsistencies in and between *Graham* and *Miller* are

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those defendants to the [fourteen]-year-olds here." *Id.* at 2469 n.8. She flatly stated that the Court's holding "requires factfinders to attend to exactly such circumstances—to take into account the differences among defendants and crimes." *Id.*

155. *See infra* note 190 and accompanying text.

156. *See, e.g.*, *Graham*, 130 S. Ct. at 2029. Possibly, the *Graham* majority would have fallen apart if an absolute ban had been imposed at that time.

157. *See infra* Parts III.A, D.

158. It is somewhat curious that Justice Kennedy, who had authored the Court's opinions in *Roper* and *Graham*, would (as the senior Justice in the majority) assign the duty of drafting the *Miller* opinion to Justice Kagan. *See Miller*, 132 S. Ct. at 2460.

startling. Despite all that it has said, the Court, at least for the time being, has not prohibited the imposition of *discretionary* JLWOP in the homicide context.[159] Two questions emerge from this tenuous allowance. First, given the repeated likening of JLWOP with the unconstitutional juvenile death penalty, how can JLWOP survive even in the homicide context? Second, as will be discussed in Part III.B.2, if no one can divine a juvenile's intractable depravity or his capacity for positive transformation in the nonhomicide context, then what possible rationale can exist for the imposition of JLWOP in homicide cases? The only answer is that this distinction appears to depend on something rather unsatisfying—whether, regardless of the attendant circumstances, the victim lives or dies.

1. If JLWOP Is Akin to the Death Penalty and Violates the Eighth Amendment in Nonhomicide Cases, Why Can it Still Be Imposed in Homicide Cases?—In *Graham*, Justice Kennedy began his comparison of the JLWOP with the death penalty with the fairly measured statement that "life without parole sentences share *some* characteristics with death sentences that are shared by no other sentences."[160] Acknowledging that a State's imposition of JLWOP does not result in execution of the juvenile, Justice Kennedy stressed that the sentence nevertheless "alters the offender's life by a forfeiture that is irrevocable" and extinguishes all "hope."[161] He concluded the analogy by noting that "[l]ife without parole is an especially harsh punishment for a juvenile"[162] because the juvenile will often have more years of incarceration than an adult given the same sentence.[163] Thus, the categorical ban on JLWOP for nonhomicide offenses was supported by the Court's death penalty jurisprudence.[164]

In *Miller*, Justice Kagan latched onto these statements and took them to the next level. As described previously in this Article,[165] her analysis hinged, in part, on a further extension of *Graham*'s comparison of previous death penalty cases to JLWOP. Specifically, she sought to employ the requirement of an individualized approach to capital sentencing, established in cases such as *Woodson v. North Carolina*[166] and *Lockett v. Ohio*,[167] thereby invalidating the mandatory schemes in a non-capital context.

How did Justice Kagan get there? She simply bootstrapped her way to the desired result. First, Justice Kagan rightly noted that *Graham* "likened life

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159. *See id.* at 2469 (noting that the ruling "d[id] not foreclose a sentencer's ability to [impose JLWOP] in homicide cases").

160. *Graham*, 130 S. Ct. at 2027 (emphasis added).

161. *Id.*

162. *Id.* at 2028.

163. *Id.*

164. *See* Roper v. Simmons, 543 U.S. 551, 567-68 (2005).

165. *See supra* Part I.A.1.

166. 428 U.S. 280, 303-04 (1976) (requiring sentencing authorities to consider characteristics of defendant and details of offense before sentencing to death).

167. 438 U.S. 586, 608 (1978) (holding death penalty statute violated the Eighth Amendment by precluding consideration of relevant mitigating factors).

without parole for juveniles to the death penalty itself."[168] Having established this parallel, Justice Kagan then declared JLWOP the successor to the juvenile capital punishment and the new "ultimate penalty for juveniles."[169] Awarded the formidable title of "ultimate penalty," mandatory JLWOP could clearly no longer stand because the juvenile death penalty did not stand.

This circular logic, while quite a thing to behold, was not lost on Chief Justice Roberts. Acknowledging that *Roper* prohibited imposition of the death penalty on juveniles, he admonished that "*Roper* also set itself in a different category than this case, by expressly invoking 'special' Eighth Amendment analysis for death penalty cases."[170]

What could Justice Kagan's intellectual gymnastics tell us about the fate of discretionary JLWOP? The answer appears simple. If JLWOP has replaced the death penalty as the "ultimate penalty" for juveniles, and if it is unconstitutional for the same reasons that the Court deemed juvenile capital punishment unconstitutional, then the fact that *Miller* was addressing the *mandatory* imposition of the sentence is of no moment. The *Miller* majority relied on *Roper*. But *Roper* not only banned *mandatory* imposition of the juvenile death sentence, it banned the sentence *in toto*. Therefore, the result that flows from Justice Kagan's reliance on *Roper* is this: the same wholesale ban should apply to the *discretionary* imposition of JLWOP. This logical extension would mean that the law's harshest punishment for juveniles is unconstitutional, and that a life sentence given to a depraved, sadistic seventeen-and-a-half-year-old murderer must include the opportunity for parole just in case the corrupt youth should become mature and reformed at some point in his life.

2. If a Juvenile's Capacity for Change Cannot Be Discerned in Nonhomicide Cases, How Can It Be Discerned in Homicide Cases?—And what of the fact that JLWOP remains constitutional *when the sentence is discretionary*, despite the Court's pronouncements about a juvenile's developing brain, a sentencer's supposed inability to reasonably forecast a juvenile's capacity for change, and the absence of a sufficient penological justification? The *Graham* dissenters could not allow these glaring inconsistencies to go unchallenged. Chief Justice Roberts pointed to "the Court's apparent recognition that it is perfectly legitimate for a juvenile to receive a sentence of life without parole for committing murder."[171] Hence, he reasoned, "there is nothing *inherently* unconstitutional about imposing

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168. Miller v. Alabama, 132 S. Ct. 2455, 2463 (2012); *see also id.* at 2466 ("*Graham* makes plain these mandatory schemes' defects in another way: by likening life-without-parole sentences imposed on juveniles to the death penalty itself.").

169. *Id.*

170. *Id*. at 2481 (Roberts, C.J., dissenting) (quoting Roper v. Simmons, 543 U.S. 551, 568-69 (2005)). In *Graham*, Justice Thomas presaged this further extension of *Roper*, stating that "'[d]eath is different' no longer," and that "[n]o reliable limiting principle remains to prevent the Court from immunizing any class of offenders from the law's third, fourth, fifth, or fiftieth most severe penalties as well." Graham v. Florida, 130 S. Ct. 2011, 2046 (2010) (Thomas, J., dissenting) (quoting *Roper*, 543 U.S. at 568).

171. *Graham*, 130 S. Ct. at 2041 (Roberts, C.J., concurring).

sentences of life without parole on juvenile offenders."[172] "[R]ather," he stated, "the constitutionality of such sentences depends on the particular crimes for which they are imposed."[173] Likewise, Justice Thomas lamented that "the Court does not even believe its pronouncements about the juvenile mind," for "[i]f it did, the categorical rule it announces today would be most peculiar because it leaves intact state and federal laws that permit life-without-parole sentences for juveniles who commit homicides."[174] Echoing the Chief Justice, Justice Thomas pointed out the logical conclusion "that there is nothing inherent in the psyche of a person less than [eighteen] that prevents him from acquiring the moral agency necessary to warrant a life-without-parole sentence."[175] Thus, to the Chief Justice and Justice Thomas, the question is not whether JLWOP is constitutional, but "which *acts* are sufficient to demonstrate that moral agency."[176]

Yet, as the law stands now, the answer does not depend on the "particular crimes" or the "acts that are sufficient" to impose JLWOP. Rather, the determination whether a sentencer constitutionally may impose life without parole on a juvenile is based on nothing more than the *outcome* of the crime. It does not matter how intentional, how debased, how brutal, how heinous, or how sadistic the acts of the juvenile defendant are. Nor does it matter if the juvenile intended premeditated murder but failed in his task because the victim was especially resilient or the physicians particularly skilled. Instead, the Court's straightforward rule is this: if the victim dies, JLWOP is constitutional; if the victim lives, JLWOP is unconstitutional.[177]

That the Court can adhere to this questionable state of affairs much longer is doubtful. Indeed, there is clear evidence in *Graham* and, especially, *Miller* that the incongruity will not long survive.

III. SIGNS OF A *FAIT ACCOMPLI*

The previous part of this Article argued that the Court's decisions in *Graham* and *Miller* are anything but clear, and this ambiguity may be an indicator of the

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172. *Id.*

173. *Id.*

174. *Id.* at 2055 (Thomas, J., dissenting).

175. *Id.*

176. *Id.*

177. This point was not lost on Chief Justice Roberts. In describing a seventeen-year-old's horrific rape of an eight-year-old, and his burial of her under 197 pounds of rock in a landfill, the Chief Justice stated that "[t]he single fact of being [seventeen] years old would not afford [the defendant] protection against life without parole if the young girl had died—as [the defendant] surely expected she would—so why should it do so when she miraculously survived his barbaric brutality?" *Id.* at 2042 (Roberts, C.J., concurring). Justice Thomas echoed this concern: "The Court is quite willing to accept that a [seventeen]-year-old who pulls the trigger on a firearm can demonstrate sufficient depravity and irredeemability to be denied reentry into society, but insists that a [seventeen]-year-old who rapes an [eight]-year-old and leaves her for dead does not." *Id.* at 2055 (Thomas, J., dissenting).

Court's move toward a wholesale abolition of life without parole for juveniles. But is there additional evidence that JLWOP is on its last legs? There are many aspects of the two decisions that seemingly presage this possibility.

A. The Poor (But Purposeful?) Choice of Cases

Reading *Graham* and *Miller*, one cannot help but be struck by the cases the Court selected to address the constitutionality of various JLWOP scenarios. At first glance, this selection of these cases appears deft. Indeed, in both cases, the majority erects straw men (dissenters who do not care about a sixteen-year-old accomplice who commits no assault or a fourteen-year-old who waits outside while his friends commit a robbery) and knocks them down. The exercise, while interesting, is ultimately unpersuasive.

Graham involved a crime committed by a sixteen-year-old juvenile and his later probation violations at the age of seventeen.[178] The primary charge was for assault and robbery, although it was Graham's accomplice that committed the assault.[179] The State recommended a combined sentence of forty-five years, but the trial judge imposed a life sentence (which, in Florida, did not provide an opportunity for parole).[180]

Miller and its companion case, *Jackson v. Norris*, were equally remarkable for their apparent ease of decision. In both cases, the defendant was fourteen-years-old when he committed the crime.[181] Jackson was a non-triggerman accomplice, charged with capital felony murder and aggravated robbery.[182] At least by one account, he was essentially along for the ride and was surprised by the violence that ensued.[183] Miller's case was more egregious. He was charged with murder in the course of arson for beating his victim and setting fire to the trailer in which the victim lay.[184] Despite the varying nature of their crimes, the fact of their age remains. Heinous murders committed by seventeen-year-olds abound,[185] yet the Court instead decided to use these two cases as the vehicles to confine the parameters of JLWOP.

Once again, in *Graham* and *Miller*, Chief Justice Roberts and the dissenters had a field day. In *Graham,* the Chief Justice remarked that the majority had used the case "as a vehicle to proclaim a new constitutional rule—applicable well

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178. *Id.* at 2018-19.

179. *Id.* at 2019.

180. *Id.* at 2019-20.

181. Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012).

182. *Id.* at 2461.

183. *Id.* At worst, Jackson was a willing participant in the robbery, but there was no evidence that he had formed any intent to kill. *Id.* at 2461-62.

184. *Id.* at 2462.

185. *See Miller*, 132 S. Ct. at 2489 n.1 (Alito, J., dissenting) ("Between 2002 and 2010, [seventeen]-year-olds committed an average combined total of 424 murders and nonnegligent homicides per year." (citing DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, § 4, *Arrests, Age of Persons Arrested* (Tbl. 4.7))).

beyond the particular facts of [the] case—that a sentence of life without parole imposed on *any* juvenile for *any* nonhomicide offense is unconstitutional."[186] "This categorical conclusion," he stated, "is as unnecessary as it is unwise,"[187] and it "unsettl[es] our established jurisprudence and fashion[s] a categorical rule applicable to far different cases."[188] Justice Thomas took pains to point out that the cases in which JLWOP had been handed down for nonhomicide crimes were rare and reflected the severity of the crime, as "judges and juries have decided to use it in the very worst cases they have encountered."[189] Recounting the brutally violent acts of sixteen-year-old Keighton Budder, who "put [his victim's] head into a headlock and sliced her throat, raped her, stabbed her about [twenty] times, beat her, and pounded her face into the rocks alongside a dirt road," Justice Thomas remarked that "Budder's crime was rare in its brutality."[190] He noted that JLWOP is imposed sparingly, and usually reserved for defendants whose acts are "exceptionally depraved."[191]

Justice Alito most clearly articulated why the two cases in *Miller* were poorly chosen. Because the majority holding banned the mandatory imposition of JLWOP for all juveniles, "any category of murderers under the age of [eighteen]" was spared the sentence.[192] Thus, Justice Alito opined, "Even a [seventeen-and-a-half]-year-old who sets off a bomb in a crowded mall or guns down a dozen students and teachers is a 'child' and must be given a chance to persuade a judge to permit his release into society."[193] Justice Alito pointed out that the Court had "carefully selected" these two cases involving "very young defendants."[194] "It is hard," he suggested, "not to feel sympathy for a [fourteen]-year-old sentenced to life without the possibility of release."[195]

The Court's remarkably poor choice of cases could merely reflect inattention to detail. Perhaps, in granting certiorari, the Court neglected to recognize that these defendants were either quite young (*Miller*)[196] or not particularly culpable (*Graham*).[197] Of course, it is extremely doubtful that the Court did not consider these pertinent factors. Again, one must believe that the Court operates on a level unmatched by any other group of jurists, and little or nothing slips by the Justices.

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186. Graham v. Florida, 130 S. Ct. 2011, 2041 (2010) (Roberts, C.J., concurring).

187. *Id.*

188. *Id.* at 2042.

189. *Id.* at 2043 (Thomas, J., dissenting). Justice Thomas pointed to the joint opinion of Justices Stewart, Powell, and Stevens in *Gregg v. Georgia*, 428 U.S. 153, 182 (1976), to establish that the "relative infrequency" of a verdict shows that it "should be reserved for a small number of *extreme* cases." *Id.* at 2051 (emphasis added).

190. *Id.* (internal quotation marks omitted).

191. *Id.* at 2052.

192. Miller v. Alabama, 132 S. Ct. 2455, 2487 (2012) (Alito, J., dissenting).

193. *Id.*

194. *Id.* at 2489.

195. *Id.*

196. *Id.* at 2469.

197. Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

As such, why would the Court choose *these* cases to develop precedent or jurisprudence in this arena? Were there no other appeals involving older youths or premeditated (even depraved) juvenile murderers? That, too, seems unlikely. The only reasonable explanation is that a majority of the Court is headed down a road that ends with the complete abrogation of JLWOP. Using "easy" cases has made that journey more palatable because the Court has not had to confront the case of a brutal, premeditated murder or attempted murder by a seventeen-year-old defendant. By doing so, public support for the decisions is bolstered, while public outcry is diminished.

B. Picking the Low-Hanging Fruit of Mandatory Juvenile Life Without Parole

The Court's decision to grant certiorari in two cases involving the *mandatory* imposition of juvenile life without parole[198] suggests a move towards a complete ban on the *discretionary* imposition of the sentence. It may be that the Court simply wanted to invalidate JLWOP in cases where the sentencer had no choice but to impose the "ultimate penalty."[199] But that reason, while possible, seems unlikely on two counts.

1. Providing Courts with Some Measure of Discretion Seems More Humane.—First, while the dissenters focused heavily on the existence of a "national consensus" in favor of mandatory JLWOP,[200] the majority appealed to morality by invoking the nation's "evolving standards of decency."[201] In this battle of competing theories, the majority appears to prevail. Chief Justice Roberts and Justice Alito acknowledged the "moral" issues involved in the case, and attempted to allay any concern that their position was less ethical than the majority's.[202]

As for the Chief Justice, he questioned whether the benefits of the evolution of decency should always inure to defendants.[203] An alternative interpretation, he suggested, is that "[a] decent society protects the innocent from violence."[204] Justice Alito was more pessimistic when he asked, "Is it true that our society is

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198. *Id.* at 2020; *Miller*, 132 S. Ct. at 2462.

199. *Miller*, 132 S. Ct. at 2466.

200. *See supra* Part II.A.

201. *Miller*, 132 S. Ct. at 2463 (internal quotation marks omitted) ("And we view that concept less through a historical prism than according to 'the evolving standards of decency that mark the progress of a maturing society.'" (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976))); *Graham*, 130 S. Ct. at 2021 ("To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" (quoting *Estelle*, 429 U.S. at 102)).

202. *See Miller*, 132 S. Ct. at 2477 (Roberts, C.J., dissenting) ("Determining the appropriate sentence for a teenager convicted of murder presents grave and challenging questions of morality and social policy."); *Id.* at 2487 (Alito, J., dissenting) ("[T]he Court looked for objective indicia of our society's moral standards and the trajectory of our moral 'evolution.'").

203. *Id.* at 2478 (Roberts, C.J., dissenting); *see also id.* at 2487 (Alito, J., dissenting).

204. *Id*. at 2478 (Roberts, C.J., dissenting).

inexorably evolving in the direction of greater and greater decency?"[205] The dissenters also tried to regain the moral high ground by suggesting that mandatory JLWOP was a reasonable societal response to particularly revolting murders.[206] The Chief Justice argued that "[a] mature society may determine that [protecting the innocent] requires removing those guilty of the *most heinous murders* from its midst, both as protection for its other members and as a concrete expression of its standards of decency."[207] He surmised that state legislators were fully aware of what they were doing when they "require[d] life without parole for juveniles *who commit the worst types of murder*."[208] Justice Alito echoed these sentiments, citing statistics demonstrating "[s]eventeen-year-olds commit a significant number of murders every year, and some of these crimes are incredibly brutal."[209] He concluded that "[twenty-eight] States and the Federal Government have decided that *for some of these offenders* life without parole should be mandatory."[210]

These claims are quite remarkable because the learned Justices either overlooked or, more likely, chose to ignore the fact that the laws at issue mandated that sentencers impose JLWOP for certain murders, regardless of whether the offense was the "most heinous"[211] or an "incredibly brutal"[212] murder. That lack of discretion and inability to consider degrees of depravity was the very problem with the mandatory scheme at issue. Therefore, despite the dissenters' admirable attempts to win the battle over morality, in the end, the majority's argument is more persuasive. Put simply, requiring the possibility of at least some measure of sentencing discretion, especially when the specific inquiry involves fourteen-year-old defendants, seems more humane. Harnessing this, the Court was able to whittle away at JLWOP rather easily.

2. Justice Kagan's Negative Portrayal of JLWOP in Miller *Is Telling*.—As discussed in detail in Part II.A, Justice Kagan, writing for the *Miller* majority, specifically took the opportunity afforded by these easily decided cases to make some blanket statements about JLWOP in general.[213] That the mandatory JLWOP sentence structure has survived for so long is, to say the least, surprising. That the Court used these easy cases to reaffirm its sweeping pronouncements, first made in *Roper* and *Graham*, regarding the intrinsic propensity of all juveniles to make positive change. They go so far as to suggest, in dicta, that even

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205. *Id*. at 2487 (Alito, J., dissenting).

206. *Id.* at 2478 (Roberts, C.J., dissenting).

207. *Id.* (emphasis added).

208. *Id.* at 2480 (emphasis added). The Chief Justice continued along this line of reasoning, forcefully arguing that "[i]n a classic bait and switch, the Court now tells state legislatures that . . . they do not have power to guarantee that *once someone commits a heinous murder*, he will never do so again." *Id.* at 2481 (emphasis added).

209. *Id.* at 2489 (Alito, J., dissenting) (footnote omitted).

210. *Id.* (emphasis added).

211. *Id.* at 2478 (Roberts, C.J., dissenting).

212. *Id.* at 2489 (Alito, J., dissenting).

213. *See generally id.* at 2455; *see supra* notes 65-68 and accompanying text.

discretionary JLWOP is highly suspect in homicide cases.

C. Penological Bases and the Transience of Sentencing Ability (Part Deux)

The *Graham* Court relied heavily on a methodical analysis of the conceivable penological justifications for a JLWOP sentence in nonhomicide cases.[214] Ultimately, the Court disposed of all of them.[215] Initially, the Court identified four "legitimate penological goals"—retribution, deterrence, rehabilitation, and incapacitation.[216] Setting forth some first principles of the penological inquiry, the Court explained that "[t]he Eighth Amendment does not mandate adoption of *any one* penological theory."[217] Moreover, "[a] sentence lacking *any* legitimate penological justification is by its nature disproportionate to the offense."[218] This, of course, suggests that a sentence adequately grounded on a single penological justification could support a finding of proportionality under the right circumstances. Having identified these criteria, the Court declared that "[w]ith respect to life without parole for juvenile nonhomicide offenders, none of the goals . . . provides an adequate justification."[219]

1. Retribution.—Systematically discounting these rationales, the Court first declared retribution inadequate because the juvenile defendant's "personal culpability" was less than that of an adult.[220] Although the Court did not go into detail here, its pertinent opinions have all based the lessened culpability of youth on an unformed character.[221] According to Justice Kennedy, the rationale for retribution in the juvenile context loses its punch when the victim does not die because JLWOP "is the second most severe penalty" surpassed only by death.[222]

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214. Graham v. Florida, 130 S. Ct. 2011, 2028-30 (2010).

215. *Id.*; *see also supra* notes 26-27 and accompanying text.

216. *Graham*, 130 S. Ct. at 2026, 2028.

217. *Id.* at 2028 (emphasis added) (quoting Harmelin v. Michigan, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in judgment)) (internal quotation marks omitted).

218. *Id.* (emphasis added).

219. *Id.* (citation omitted).

220. *Id.*

221. *See* Miller v. Alabama, 132 S. Ct. 2455, 2458 (2012) (stating that "a child's character is not as well formed as an adult's" (quoting Roper v. Simmons, 543 U.S. 551, 570 (2005) (internal quotation marks omitted))); *Graham*, 130 S. Ct. at 2026 (noting that "juveniles have a lack of maturity . . . and their characters are not as well formed" (quoting *Roper*, 543 U.S. at 569-70) (internal quotation marks omitted)); Johnson v. Texas, 509 U.S. 350, 367 (1993) (finding "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young").

222. *Graham*, 130 S. Ct. at 2027 (quoting *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in judgment) (internal quotation marks omitted)). Justice Kennedy's equation of the death penalty and life without parole is questionable here. Although *Roper* declared that the death penalty was never an appropriate retributive response to juvenile murder, 543 U.S. at 571, it does not necessarily follow that imposition of life without parole would be equally at odds with a particularly heinous crime where the victim himself is left completely and

2. *Deterrence*.—Although the Court acknowledged a "limited deterrent effect provided by life without parole," this penological justification was also unpersuasive.[223] Once again, the majority relied on the "characteristics that render juveniles less culpable than adults," namely a "lack of maturity and underdeveloped sense of responsibility [that] often result in impetuous and ill-considered actions and decisions."[224]

3. *Rehabilitation*.—The Court easily dispatched rehabilitation as a possible penological justification for nonhomicide JLWOP because "[t]he penalty forswears altogether the rehabilitative ideal."[225]

4. *Incapacitation*.—So what of incapacitation as the basis for a JLWOP parole in nonhomicide cases? Here, Justice Kennedy appeared to struggle. He first acknowledged that incapacitation is "an important goal" and that "[r]ecidivism is a serious risk to public safety."[226] He conceded that "[sixty-seven] percent of former inmates released from state prisons are charged with at least one serious new crime within three years."[227] He even admitted that "incapacitation may be a legitimate penological goal sufficient to justify life without parole *in other contexts*."[228]

Yet, in the case of juveniles who did not commit murder, Justice Kennedy flatly declared incapacitation "inadequate" under any circumstances.[229] And what was the reason given for incapacitation's shortcoming? According to Justice Kennedy, the penological justification for incapacitation rests on the tenuous belief that a particular juvenile will always be dangerous and such a

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irreparably damaged. In *Miller*, Justice Kagan also likened JLWOP to the death penalty, with equally unpersuasive effect. *See supra* notes 182-86 and accompanying text.

223. *Graham*, 130 S. Ct. at 2029.

224. *Id.* at 2028 (quoting *Roper*, 543 U.S. at 571; *Johnson*, 509 U.S. at 367) (internal quotation marks omitted). It is interesting to note that the *Graham* Court relies on a comparison of juveniles with mentally retarded individuals, finding that they have many of the same mental and emotional characteristics. *Id.* at 2032. Yet, in spite of the acknowledged similarities, the Court has continued to allow the imposition of life without parole for mentally retarded persons. *See* Natalie Pifer, Note, *Is Life the Same as Death?: Implications of* Graham v. Florida*,* Roper v. Simmons*, and* Atkins v. Virginia *on Life Without Parole Sentences for Juvenile and Mentally Retarded Offenders*, 43 LOY. L.A. L. REV. 1495, 1510-11 (2010) (Instead of "requiring that mental retardation be considered as either a complete bar to all extreme punishments . . . or as a mitigating factor, . . . the Court has so far left the treatment of mental retardation at sentencing to the discretion of individual jurisdictions."). Given the Court's admitted likeness between the two groups, one must conclude that mentally retarded persons cannot be deterred by life without parole. *See infra* note 190.

225. *Graham*, 130 S. Ct. at 2029-30.

226. *Id.* at 2029.

227. *Id.*

228. *Id.* (emphasis added).

229. *Id.* In case any doubt remained, Justice Kennedy made clear that "[i]ncapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity." *Id.*

determination is virtually impossible to make:[230]

> To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable. "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." . . . "[I]ncorrigibility is inconsistent with youth."[231]

Thus, according to the Court, a sentencing authority's determination that a juvenile is intractably depraved and is a permanent danger to society necessarily ignores a juvenile's presumed capacity for change.[232] So the Court forbids it—again, and inexplicably, only in the case of nonhomicide crimes.[233] Yet again, one is left to wonder: how can the *end result* of a crime, no matter how fortuitous, provide a sentencer with the capacity to divine whether a juvenile's character is fixed, while the *nature* of the crime cannot provide the same sentencer with a

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230. *Id.* In a scathing rebuttal, Justice Thomas points to the majority's incongruous assertion that no single penological justification is mandatory after which it "promptly mandates the adoption of the theories the Court deems best." *Id.* at 2053 (Thomas, J., dissenting). He states, "the Eighth Amendment does not mandate 'any one penological theory,' just the one the Court approves." *Id.* at 2054 (citation omitted) (quoting the majority opinion, *id.* at 2028).

231. *Id.* at 2029 (majority opinion) (citation omitted) (quoting Roper v. Simmons, 543 U.S. 551, 572 (2005); Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. Ct. App. 1968)). In *Miller v. Alabama*, Justice Kagan echoed a similar sentiment. 132 S. Ct. 2455, 2465 (2012) (majority opinion).

232. The Court's contrary treatment of mentally retarded defendants is again curious. Given the similarities noted by the Court between juveniles and persons with mental retardation, it is arguably equally true that the mentally retarded have the capacity for growth and change and that the penological rationale of incapacitation is therefore insufficient. Yet, the Court must have approved of life without parole for the mentally retarded based on the incapacitation rationale. *See* Atkins v. Virginia, 536 U.S. 304, 317-21 (2002) (noting "the relationship between mental retardation and the penological purposes served by the death penalty" and finding retribution and deterrence were not adequate penological rationales for mentally disabled defendants). This is because, like juveniles, the mentally retarded are rarely *deterred* by a life without parole sentence. *Id.* at 319-20. Retribution is similarly inapplicable because of the comparably lessened culpability of the mentally retarded. *Id.* at 319. Moreover, the Court's rejection of *rehabilitation* as a sufficient penological justification for JLWOP equally applies to life without parole for the mentally retarded because rehabilitation is not meaningful in either case. This leaves only *incapacitation* as a valid penological justification for imposing life without parole on mentally retarded persons. If—having disposed of retribution, deterrence, and rehabilitation—the Court believes that incapacitation is a sufficient, stand-alone penological justification for life without parole in the case of the mentally retarded, then it should equally stand as a sufficient penological justification for JLWOP.

233. *See supra* Part I.B.

concomitant ability to evaluate the same juvenile?

The Court's evisceration of incapacitation as a legitimate, stand-alone basis for imposition of juvenile life without parole in the nonhomicide context is telling. If the barbaric nature of a juvenile crime and the resulting need to protect the public are never sufficient to support a life sentence without parole when the victim happens to survive (often despite the best efforts of the perpetrator), one can only imagine that incapacitation will become, at most, an impotent penological justification for JLWOP in murder cases.

D. The Unnecessary Defense of a National Consensus

How did the nation, as represented by its legislators, view the mandatory imposition of JLWOP in homicide cases? That question was hotly debated in *Miller*.[234] Indeed, in an argument that comprised the bulk of his dissent, Chief Justice Roberts took the majority to task for its "disregard[ ]" of evidence that purportedly established a national consensus in favor of mandatory JLWOP.[235] As discussed in Part II.A, however, the *Miller* majority had rejected the mandatory imposition of JLWOP for homicide cases and announced the adoption of an *individualized* sentencing approach in that context.

Justice Kennedy had previously explained this approach in *Graham*, where he stated that an individualized approach required a two-part analysis addressing the following: (1) Whether "the gravity of the offense" was proportional to "the severity of the sentence"; and (2) "[i]n the rare case" where that inquiry is answered in the negative, whether the sentence was in line with sentences imposed by other courts for the same crime.[236] By contrast, according to Justice Kennedy, a categorical approach to sentencing required a very different two-part analysis: (1) Whether "a national consensus against the sentence[e] at issue" exists, as determined by "objective indicia of society's standards"; and, if so, (2) whether the Court, "exerci[sing] its own independent judgment," finds the sentence unconstitutional.[237]

In *Miller*, Justice Kagan made it clear the Court was using the individualized approach, and that the determination of whether "a national consensus" existed was therefore unnecessary.[238] "[T]he cases here [*Miller* and *Jackson*]," she explained, "are different from the typical one in which we have tallied legislative enactments [because] [o]ur decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or

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234. *Miller*, 132 S. Ct. at 2460.

235. *Id.* at 2479 (Roberts, C.J., dissenting). At the very least, he stated, the majority could not point to evidence, like the data in *Graham*, to support the existence of a national consensus against the mandatory sentence. *Id.*

236. Graham v. Florida, 130 S. Ct. 2011, 2022 (2010).

237. *Id.* (quoting Roper v. Simmons, 543 U.S. 551, 572 (2005)) (internal quotation marks omitted).

238. *Miller*, 132 S. Ct. at 2459.

Graham."[239] And if any question remained whether the search for a national consensus was superfluous in the individualized approach, Justice Kagan reiterated that the Court had not "scrutinized or relied in the same way on legislative enactments" when applying a case-by-case analysis in the past.[240] "We see no difference here," she stated.[241] Therefore, the national consensus inquiry—advanced so forcefully by Chief Justice Roberts—was completely irrelevant to the approach that the Court was, by its precedents, bound to employ.

The fact that the *Miller* Court was employing the individualized approach should have settled the matter and disposed of the issue. Justice Kagan could have directly stated that Chief Justice Roberts was applying the wrong test in his attempt to show the imprudence of a categorical ban and that his search for a national consensus in favor of the sentence was inconsequential.[242] Despite her accurate description of the Court's established approach to individualized sentencing, Justice Kagan instead embarked on a six-page defense of the supposed existence of a national consensus against mandatory JLWOP. Her seemingly unnecessary dispute with Chief Justice Roberts remarkably consumes nearly one-quarter of the Court's opinion.[243]

Why would Justice Kagan proffer this lengthy and needless exposition in an attempt to disprove the existence of a national consensus? Perhaps, with no particular purpose in mind, she just wanted to prove a point, and was simply unwilling to let the Chief Justice's assertion go unchallenged. This, however, seems unlikely. By focusing so intently on the Chief Justice's misplaced national consensus argument, instead of summarily dismissing it as irrelevant, Justice Kagan actually drew attention to it. Moreover, it seems doubtful that Justice Kagan, and the four other Justices comprising the majority, would have devoted so much of the opinion to a meaningless issue.

In truth, the majority's argument with Chief Justice Roberts was anything but meaningless. A close reading of the Court's opinion suggests that its six-page

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239. *Id.* at 2471.

240. *Id.*

241. *Id.* Addressing the dissents' claim that the majority had ignored the distinction between nonhomicide and homicide crimes, Justice Kagan noted that the Court's decision "retain[ed] that distinction: *Graham* established one rule (a flat ban) for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses." *Id.* at 2466 n.6.

242. Interestingly, had Justice Kagan chosen this narrow approach, it would have been much the same as Chief Justice Roberts's approach in the *Graham* concurrence. In deciding that Terrence Graham's sentence was unconstitutional, the Chief Justice summarily dismissed the majority's adoption of a new categorical ban on JLWOP for nonhomicide offenses. *Graham*, 130 S. Ct. at 2038 (Roberts, C.J., concurring). He did so by applying the established case-by-case approach that the Court had used for a term-of-years sentence. *Id.* at 2042. He found it unnecessary to address the lengthy arguments advanced by the majority to purportedly show a national consensus against JLWOP in the nonhomicide context, so he simply ignored it. It was enough for the Chief Justice to state that "[t]he Court errs . . . in using this case as a vehicle for unsettling our established jurisprudence . . . ." *Id.*

243. *See Miller*, 123 S. Ct. at 2470-73.

exercise served a critical purpose—namely, preserving the possibility of a complete ban on all JLWOP sentences. Justice Kagan, and the Justices who joined her opinion, absolutely could not let Chief Justice Roberts's interpretation of the data go unchallenged. This is because the Chief Justice made a forceful and compelling argument that *Miller*'s evidence of a national consensus against mandatory JLWOP in homicide cases was even weaker than *Graham*'s evidence of a national consensus against JLWOP in nonhomicide cases.[244] If the majority had left Chief Justice Roberts's argument uncontested, then future courts interpreting the *Miller* decision could easily interpret the Court's omission as a concession that a national consensus in favor of mandatory JLWOP existed (regardless of whether the majority had declared the national consensus inquiry inapplicable to the individualized sentencing inquiry).

That possibility was untenable to the majority because, when a future murder defendant inevitably challenged the imposition of a *discretionary* JLWOP sentence, evidence of a supposed national consensus supporting that sentence would be far more substantial than any evidence supporting a national consensus in favor of the *mandatory* sentence in *Miller*.[245] If the *Miller* majority, by ignoring the Chief Justice's interpretation of the data, had arguably conceded the presence of a national consensus in favor of mandatory JLWOP in the murder context,[246] it would be hard pressed to maintain, in a subsequent homicide case, the existence of a national consensus against discretionary JLWOP. Therefore, in an attempt to keep its powder dry, the *Miller* Court went to great lengths to refute the Chief Justice and provide an alternative interpretation of the data. There is simply no other reasonable explanation for the lengths to which Justice Kagan went to win this argument.

E. Death Is No Longer Different

Graham marked an extraordinary departure for the Court from its previous Eighth Amendment cases: an across the board ban on a term-of-years sentence for a distinct group of defendants was unique indeed.[247] Before announcing the Court's new categorical ban, Justice Kennedy acknowledged that "[a]nother possible approach would be to hold that the Eighth Amendment requires courts to take the offender's age into consideration as part of a case-specific gross disproportionality inquiry, weighing it against the seriousness of the crime."[248] "This approach," he explained, "would allow courts to account for factual

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244. *Id.* at 2478-79 (Roberts, C.J., dissenting).

245. Discretionary JLWOP for homicide is permitted in fifteen jurisdictions, while, prior to *Miller*, twenty-nine jurisdictions allowed mandatory JLWOP. *Id.* at 2471 n.10 (majority opinion). This means, at present, forty-three States permit the imposition of discretionary JLWOP. *Id.*

246. This argument would surely have been raised by the dissent in any future case challenging the discretionary imposition of JLWOP for homicide.

247. *Graham*, 130 S. Ct. at 2022-23. "The present case involves an issue the Court has not considered previously: a categorical challenge to a term-of-years sentence." *Id.* at 2022.

248. *Id.* at 2031.

differences between cases and to impose life without parole sentences for particularly heinous crimes."[249] That "possible approach," of course, was the very one the Court had exclusively instructed lower courts to apply. Even Justice Kennedy found it difficult to intellectually purge this long-held approach from his creation of the new rule. In fact, prior to his declaration that a sentencer cannot ascertain a juvenile's capacity for growth and change,[250] Justice Kennedy made the following extraordinary statement: "The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question."[251] But this is the very case-by-case analysis that he jettisoned one paragraph later.[252] Because a juvenile's culpability, crimes, and characteristics cannot be determined—except in the nonhomicide context—a categorical ban was necessary. Apparently, the incongruity was lost on Justice Kennedy.

In his concurrence in *Graham*, Chief Justice Roberts offered his interpretation of Court precedent.[253] In the noncapital context, he explained, reviewing courts have always been instructed to apply a "narrow proportionality principle" based on a "case-by-case" analysis.[254] Justice Thomas was not so diplomatic. "For the first time in its history, the Court declares an entire class of offenders immune from a noncapital sentence using the categorical approach it previously reserved for death penalty cases alone."[255] "Death," he stated, "is different no longer."[256]

Facially, it is difficult to argue with that statement. If true, would it be unreasonable to envision the Court's facile jump from the ban on JLWOP in the nonhomicide context to a wholesale ban on the sentence in all juvenile cases—including murder? After all, if death is truly no longer different and the Court can easily move from a categorical ban on the juvenile death penalty to a categorical ban on JLWOP for nonhomicide offenses, what stands in the way of extending this ban to all juvenile offenses? Consider this: Since the death penalty is no longer on the table, JLWOP now holds the title of the new "harshest penalty" for juveniles. With all the Court has said about the lessened culpability of juveniles and the inability of sentencers to recognize intractable depravity, it seems quite reasonable that the Court will one day find it difficult to allow the

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249. *Id.*

250. *See supra* Part I.B.

251. *Graham*, 130 S. Ct. at 2026 (citing Roper v. Simmons, 543 U.S. 551, 568 (2005)). Of course, those "crimes and characteristics" are unique to each defendant.

252. *Id.*

253. *Id.* at 2036 (Roberts, C.J., concurring).

254. *Id.* at 2037.

255. *Id*. at 2046 (Thomas, J., dissenting). *See Roper*, 543 U.S. at 575 ("holding that the death penalty cannot be imposed upon juvenile offenders"); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that death penalty is unconstitutional for mentally retarded individuals). Indeed, prior to *Graham*, the Court had only invalidated one term-of-years sentence and that ban was not categorical. *See* Solem v. Helm, 463 U.S. 277, 278 (1983).

256. *Graham*, 130 S. Ct. at 2046 (Thomas, J., dissenting) (internal quotation marks omitted).

sentence to stand even in the face of murder.[257]

To be sure, the Court, implicitly in *Graham* and explicitly in *Miller*, affirmed its support for the continued use of individualized sentencing in juvenile homicide cases.[258] According to Justice Kagan, "*Graham*'s flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder . . . ."[259] Addressing the dissent's claim that the Court had abandoned the distinction between homicide and nonhomicide crimes, Justice Kagan defended the Court's decision: "*Graham* established one rule (a flat ban) for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses."[260]

However, *Miller*'s allowance of discretionary JLWOP for homicide was tenuous at best.[261] Indeed, one need only listen to Justice Kagan to hear the echo of a future rationale for a complete ban on JLWOP: "*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."[262] That, in and of itself, is a remarkable statement for *Graham* and *Roper* said no such thing.

Rather, each established a categorical ban on the imposition of a particular sentence, regardless of whether the sentencing authority had the discretion to account for individualized mitigating factors.[263] In *Roper,* it did not matter whether the sentencer had an "opportunity to consider mitigating circumstances before imposing" the death penalty on a juvenile.[264] Likewise, in *Graham*, it did not matter whether the sentencer had an "opportunity to consider mitigating circumstances before imposing" JLWOP for a nonhomicide crime.[265] In both cases, an inquiry into mitigating circumstances would have been completely unnecessary, because the invalidation of each sentence was categorical. And why was it categorical? One reason – because the offender was under the age of

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257. Indeed, the following statement, made by Justice Kennedy, should apply equally to JLWOP:

> The Court concluded [in *Roper*] that an "unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."

Id. at 2032 (majority opinion) (quoting *Roper*, 543 U.S. at 573).

258. *Id.* at 2027 ("Serious nonhomicide crimes . . . cannot be compared to murder . . . ."); Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012) ("[W]e do not foreclose a sentencer's ability to [distinguish between reformable and irreparably depraved juveniles] in homicide cases . . . .").

259. *Miller*, 132 S. Ct. at 2465.

260. *Id.* at 2466 n.6.

261. *See supra* Part II.A.

262. *Miller*, 132 S. Ct. at 2475.

263. *See id.*

264. Roper v. Simmons, 543 U.S. 551, 572-73 (2005); *see Miller*, 132 S. Ct. at 2475.

265. Graham v. Florida, 130 S. Ct. 2011, 2032, 2034 (2010); *see Miller*, 132 S. Ct. at 2475.

eighteen.

The same, of course, can be said of the juvenile murderer sentenced to life without parole, even when the sentencer has discretion. And if that is not enough, perhaps the following sweeping statement by Justice Kagan will make the point: "Our decision flows straightforwardly from . . . the principle of *Roper*, *Graham*, and our individualized sentencing cases that youth matters for purposes of meting out the law's most serious punishments."[266] Youth mattered in *Roper* and *Graham*, and led to a categorical ban in both cases. So, are these statements a promise to the juvenile murderer of things to come? If not, as discussed below, then Justice Kagan wasted a great deal of ink in a superfluous sparring match with Justices Thomas and Alito.

F. Dramatic Foreshadowing

Standing alone, Sections A through E of this Part raise serious doubts about the future of *all* JLWOP sentences—even the discretionary imposition of the sentence for first-degree premeditated murder. If any doubt remained about the future demise of JLWOP, Justice Kagan and Justice Breyer laid those doubts to rest with their sweeping, and wholly unnecessary, statements about the continued viability of the sentence.

Justice Kagan's statements strongly suggest the majority's intent to expand its JLWOP rationale. Interpreting *Graham*, Justice Kagan made the expected pronouncements about the inadequacy of incapacitation as a penological rationale and the ephemeral characteristics of youth.[267] Having explained these two cardinal *Graham* tenets, however, Justice Kagan made this telling statement:

> To be sure, *Graham*'s flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm. But none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific.[268]

With this said, she refused to explicitly confine *Graham*'s categorical ban on JLWOP to the nonhomicide context. "*Graham*'s reasoning," she stated, "implicates *any* life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses."[269]

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266. *Miller*, 132 S. Ct. at 2471.

267. *Id.* at 2458.

268. *Id.* at 2465 (citation omitted). Chief Justice Roberts jumped on this statement, lamenting that "[t]his process has no discernible end point . . . [a]fter all, the Court tells us, 'none of what [*Graham*] said about children . . . is crime specific.'" *Id.* at 2481-82 (Roberts, C.J., dissenting) (third and fourth alterations in original). "There is no clear reason," he ventured, "that principle would not bar . . . any juvenile sentence as harsh as what a similarly situated adult would receive." *Id.* at 2482.

269. *Id.* at 2465 (majority opinion) (emphasis added). Did Justice Kagan mean that *Graham*'s

Next, Justice Kagan clearly announced the Court's holding and mused about the holding's impact, demonstrating, at the very least, that the majority is not far from prohibiting JLWOP in all circumstances:

> We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. Cf. *Graham*, 560 U.S., at ___, 130 S. Ct., at 2030 ("A State is not required to guarantee eventual freedom," but must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation").[270]

Addressing petitioners' alternative arguments, Justice Kagan declared that "[b]ecause that holding is sufficient to decide *these cases*, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles."[271] It was hardly necessary for the Court to make this statement. Indeed, by announcing its refusal to address the petitioners' "alternative argument" the Court effectively addressed it but found it unnecessary to reach a conclusion on those facts. Justice Kagan continued: "But given all we have said . . . about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."[272] Why did the Court think this the case? Because, Justice Kagan explained, it is so hard for a judge or jury to identify "the rare juvenile offender whose crime

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categorical ban was confined to the facts of that case? Or did she mean that, on its facts, *Graham* had addressed only the limited question of JLWOP for nonhomicide crimes? Her subsequent statements make clear that it was the latter and that *Graham*'s categorical ban could logically be extended.

270. *Id.* at 2469. One must wonder why the majority chose this particular excerpt from *Graham* to employ a signal indicative of support. "Cf." is used when the "[c]ited authority supports a proposition different from the main proposition *but sufficiently analogous to lend support*." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2, at 55 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010) (emphasis added). *Graham* was analogous to *Miller*—not because *Miller* established "some meaningful opportunity," *Miller*, 132 S. Ct. at 2469, for parole (it did not)—but because it established a categorical ban on JLWOP. That aspect of *Graham* would have been appropriate for a "Cf." signal. But, the *Graham* requirement that a State provide "some meaningful opportunity" for parole is not analogous to *Miller* because the *Miller* majority was purportedly only banning mandatory JLWOP for homicide crimes, not discretionary JLWOP for homicide crimes. Discretionary JLWOP, by definition, does not include the possibility of parole. Thus, *Miller*'s holding still allowed a sentencer to continue to impose discretionary JLWOP and still prevented the juvenile sentenced to discretionary JLWOP from being afforded "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id*. Thus, the "Cf." was not only unnecessary, but also nonsensical. Nonsensical, that is, unless the Court intended to eventually apply *Graham*'s categorical rule to *discretionary* JLWOP in homicide cases.

271. *Miller*, 132 S. Ct. at 2469 (emphasis added).

272. *Id.*

reflects irreparable corruption."[273] Yet, that statement is equally applicable to *any* juvenile offender—whether being sentenced for a homicide or a nonhomicide crime.[274] Why, then, should the same reasoning not apply in the homicide context? The Court does not provide any guidance on this point: "Although we do not foreclose a sentencer's ability to make that judgment in *homicide* cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[275]

While Justice Kagan's intentions were arguably thinly veiled, Justice Breyer's concurrence was not so finessed. He first stated his objection to Jackson's sentence because Jackson, as a non-triggerman accomplice convicted of felony murder, did not necessarily "have intent to kill."[276] That finding, he argued, had to be made on remand before JLWOP could be imposed even discretionarily.[277] Justice Breyer then concluded with the following revealing statement: "If, on remand, however, there is a finding that Jackson *did* intend to cause the clerk's death, *the question remains open* whether the Eighth Amendment prohibits the imposition of life without parole upon a juvenile in those circumstances as well."[278]

Chief Justice Roberts did not let all of this go unchallenged. He found cold comfort in the "restraint" that *Roper* and *Graham* had promised in the application of their rationales.[279] Admitting that the majority was focusing its analysis "on the mandatory nature of" JLWOP in this case, the Chief Justice nevertheless found disturbing the Court's announcement "that discretionary life without parole for juveniles should be 'uncommon'—or, to use a common synonym, 'unusual.'"[280] He could discern "no clear reason that principle would not bar . . . any juvenile sentence as harsh as what a similarly situated adult would receive."[281] "Unless confined," Chief Justice Roberts stated, "the only stopping point for the Court's analysis would be never permitting juvenile offenders to be tried as adults."[282]

Justice Thomas also attacked the majority's seemingly unnecessary excursion into the discretionary JLWOP inquiry. "Today," he stated, "the Court makes

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273. *Id.* (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)) (internal quotation marks omitted).

274. *See supra* Part II.A.

275. *Miller*, 132 S. Ct. at 2469 (emphasis added). Later in the opinion, again without any explanation or instruction to sentencing authorities, Justice Kagan reiterated the point that a judge or jury must consider[ ] an offender's youth and attendant characteristics—before imposing [JLWOP]. And in so requiring, our decision flows straightforwardly from our precedents . . . that youth matters for purposes of meting out the law's most serious punishments." *Id.* at 2471.

276. *Id.* at 2477 (Breyer, J., concurring).

277. *Id.* at 2475.

278. *Id.* at 2477.

279. *Id.* at 2481 (Roberts, C.J., dissenting).

280. *Id.*

281. *Id.* at 2482.

282. *Id.*

clear that, even though its decision leaves intact the discretionary imposition of life-without-parole sentences for juvenile homicide offenders, it 'think[s] appropriate occasions for sentencing juveniles to [life without parole] will be uncommon.'"[283] Justice Thomas then noted the clear future implication of the majority's admonition:

> That statement may well cause trial judges to shy away from imposing life without parole sentences and embolden appellate judges to set them aside when they are imposed. *And, when a future petitioner seeks a categorical ban on sentences of life without parole for juvenile homicide offenders, this Court will most assuredly look to the "actual sentencing practices" triggered by this case.*[284]

Thus, to Justice Thomas, a categorical ban on JLWOP for homicide cases was just a matter of time.

Finally, Justice Alito echoed the concerns of the Chief Justice and Justice Thomas. Acknowledging that "at least for now, the Court apparently permits a trial judge to" sentence a juvenile murderer to life-without-parole, he warned, "do not expect this possibility to last very long."[285] According to Justice Alito, "Having held in *Graham* that a trial judge with discretionary sentencing authority may not impose a sentence of life without parole on a minor who has committed a nonhomicide offense, the Justices in the majority may soon extend that holding to minors who commit murder."[286] Were the majority holdings in *Graham* and *Miller* auguries of a wholesale ban on JLWOP? In the words of Justice Alito, "We will see."[287]

CONCLUSION

A majority of the members of the United States Supreme Court are poised to abolish life without parole for juvenile offenders convicted of first-degree murder—regardless of whether the "child" is almost eighteen-years-old and regardless of whether the murder is particularly heinous. *Graham* began the journey down this path by banning JLWOP for all nonhomicide crimes. Under *Graham*, the juvenile perpetrator's advanced age, murderous intent, and extreme depravity do not matter. The only relevant factor is that the victim—through resilience, good medical treatment, or sheer luck—did not die. *Miller* extended the ban on JLWOP to homicide cases, but only where the sentence is mandated by statute. In doing so, however, the majority gave numerous indications that the JLWOP is on its last legs. Therefore, even where the trial judge has the discretion to consider the relative age and culpability of the juvenile murderer, it seems

283. *Id.* at 2486 (Thomas, J., dissenting) (alterations in original) (quoting the majority opinion, *id.* at 2469).

284. *Id.* (emphasis added).

285. *Id.* at 2489 (Alito, J., dissenting).

286. *Id.* at 2489-90.

287. *Id.* at 2490.

evident that the United States Supreme Court will inevitably rule that JLWOP is unconstitutional. If a "rough beast" does await, to terrorize and murder the innocent, this Court appears bound and determined to afford him the opportunity for release.

BACK TO THE FUTURE: THE IN LOCO PARENTIS DOCTRINE AND ITS IMPACT ON WHETHER K-12 SCHOOLS AND TEACHERS OWE A FIDUCIARY DUTY TO STUDENTS

JOHN E. RUMEL*

INTRODUCTION

The relationship between primary and secondary ("K-12") schools, school administrators and teachers ("school personnel") and students—and the legal obligations arising from that relationship—have never been more complex or important. In recent years, society has increasingly viewed, and courts have increasingly referred to, teachers as role models for students.[1] In spite of, and sometimes because of, online educational options and e-mail, as well as extracurricular activities, students spend increasing amounts of time interacting with teachers both at school and away from campus.[2] Studies have shown that the single most important factor in a K-12 student's academic development is the teacher in the classroom.[3] And, the media invariably covers those relatively infrequent, but high profile, cases involving inappropriate personal relationships

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1. *See* Rebecca DeLuccia-Reinstein, *What is the Role of Teachers in Education?*, EHOW, http://www.ehow.com/about_6509642_role-teachers-education_.html (last visited July 2, 2013); *see also* Wright v. Kan. State Bd. of Educ., 268 P.3d 1231, 1238 (Kan. Ct. App. 2012) (citing Hainline v. Bond, 824 P.2d 959 (Kan. 1992)); Thompson v. Dep't of Pub. Instruction, 541 N.W.2d 182, 189 (Wis. Ct. App. 1995) ("[A] teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values." (quoting Ambach v. Norwick, 441 U.S. 68, 78-79 (1979))).

2. *See, e.g.*, MICHAEL YOAKAM WITH NANCY FRANKLIN & RON WARREN, DISTANCE LEARNING: A GUIDE TO SYSTEM PLANNING AND IMPLEMENTATION 8-9 (3d ed. 1999) (discussing email interaction); I. Karasavvidis et al., *Exploring the Mechanisms through which Computers Contribute to Learning*, 19 J. COMPUTER ASSISTED LEARNING 115, 115-28 (2003) (discussing in class and online instruction); Bridget K. Hamre & Robert C. Pianta, *Student—Teacher Relationships*, *in* CHILDREN'S NEEDS III: DEVELOPMENT, PREVENTION, AND INTERVENTION 59-72 (George G. Bear & Kathleen M. Minke eds., 2006) (discussing extracurricular activities).

3. JOHN A. C. HATTIE, VISIBLE LEARNING: A SYNTHESIS OF OVER 800 META-ANALYSES RELATING TO ACHIEVEMENT 2, 22-26 (2009).

between teachers and students.[4]

In the past twenty-five years, a number of courts, although divided on the issue, and even more commentators have opined that K-12 schools and school personnel owe a fiduciary obligation to the students with whom they interact. This Article addresses that issue. It proposes and concludes that, based on a proper understanding of both the law underlying the in loco parentis doctrine and the law relating to the creation and regulation of fiduciary relationships, K-12 schools and teachers generally should not be held to owe or violate a fiduciary duty to students when they engage in conduct undertaken as a legitimate part of the purpose for which they are employed, i.e., the education of the student or the group of students of which the student is a member. In contrast, school personnel should only be held to owe or violate a fiduciary duty when they either engage in conduct—such as sexual harassment or abuse—that is wholly outside of, but made possible by, their educational relationship, or when they take on a traditional fiduciary role, such as holding money in trust or otherwise administering funds for students.

Part I of the Article addresses the in loco parentis doctrine.[5] Specifically, it discusses the historic and current use of the in loco parentis doctrine in expanding the rights of K-12 schools and school personnel vis-à-vis students and limiting the individual rights of students. It further discusses the limitations contained within the doctrine concerning its application to activities and conduct outside the educational purpose. It also discusses the doctrine's effect on the breadth and/or nature of tort and constitutional liability owed by schools and school personnel to individual students. Part II of this Article discusses the case law and commentary that surrounds the creation and regulation of fiduciary duties, paying special attention to the judiciary's proclivity to use analogistic and moralistic reasoning to expand the universe of fiduciary relationships.[6] It also focuses on well-settled legal principles relating to the lack, generally speaking, of any fiduciary obligation owed by parents to their children and the duty of undivided loyalty that a fiduciary owes to the person to whom his or her fiduciary duty runs. Part III of the Article chronicles the split in the decisional law concerning whether K-12 schools, administrators and teachers owe a fiduciary duty to students.[7] Specifically, it divides the cases in each category between those relying upon the in loco parentis doctrine and those cases that do not. It also discusses the near-unanimity amongst scholars and commentators that K-12 schools and school personnel have a fiduciary obligation to their student charges. Part IV of the Article discusses the reasons for the current state of the case law and commentary/scholarship.[8] In so doing, it further discusses the jurisprudential tendency to expand the categories of fiduciary relationships based on analogistic

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4. *See, e.g.*, *A Lingering Shame: Sexual Abuse of Students by School Employees*, EDUC. WK., http://www.edweek.org/ew/collections/apsexabuse/index.html (last visited July 2, 2013).

5. *See infra* Part I.

6. *See infra* Part II.

7. *See infra* Part III.

8. *See infra* Part IV.

and moralistic thinking, while simultaneously ignoring or misunderstanding the impact of the in loco parentis doctrine on the analysis of this important legal issue. Part V of the Article proposes and discusses in detail the above-mentioned standard emanating from a proper understanding of the in loco parentis doctrine and the law underlying the creation and regulation of fiduciary relationships.[9] As alluded to above, it concludes that school personnel do not have a fiduciary relationship with students when they are engaged in activities that further the legitimate purpose of education and only have such a relationship when they engage in *ultra vires* conduct and activities—in other words, engage in conduct and activities made possible by, but falling outside of, the purpose for which they were hired—or take on a traditional fiduciary role beyond the role of furthering their legitimate educational purpose.

I. THE IN LOCO PARENTIS DOCTRINE

A. The School- and School Personnel-Empowering Aspect of In Loco Parentis

In loco parentis literally means "in the place of a parent."[10] The doctrine,

> according to its generally accepted common law meaning, refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties.[11]

Although applied to a variety of custodial relationships,[12] the in loco parentis doctrine has had its most significant application to the teacher-student or school administrator-student relationship in the K-12 educational setting.[13] Thus,

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9. *See infra* Part V.

10. BLACK'S LAW DICTIONARY 803 (8th ed. 2004).

11. Niewiadomski v. United States, 159 F.2d 683, 686 (6th Cir. 1947), *quoted in* Megonnell v. Infotech Solutions, Inc., No. 1:07-cv-02339, 2009 WL 3857451, at *9 (M.D. Pa. Nov. 18, 2009); *see also* BLACK'S LAW DICTIONARY, *supra* note 10 (defining in loco parentis as the person or entity charged with "taking on all or some of the responsibilities of a parent").

12. *See* 67A C.J.S. *Parent and Child* § 347 (2013).

13. *See generally* John C. Hogan & Mortimer D. Schwartz, *In Loco Parentis in the United States 1765-1985*, 8 J. LEGAL HIST. 260 (1987). As more fully discussed *infra* at note 140 and accompanying text, the in loco parentis doctrine currently has little to no application at the college and university level. *See* Jack L. Stewart, Comment, *University Liability for Student Alcohol-Related Injuries: A Reconsideration and Assessment under Oregon Law*, 27 WILLAMETTE L. REV. 829, 835-36 (1991) (discussing the demise of the in loco parentis doctrine in the higher education context); *see also* McCauley v. Univ. of the Virgin Is., 618 F.3d 232, 243 (3d Cir. 2010) ("'[P]ublic elementary and high school administrators,' unlike their counterparts at public universities, 'have the unique responsibility to act *in loco parentis*.'" (quoting DeJohn v. Temple Univ., 537 F.3d 301, 314 (3d Cir. 2008))).

Blackstone, in discussing the meaning of the doctrine at common law stated that

> [the father] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then in loco parentis, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.[14]

In this context, modern commentators reviewing judicial decisions have found that courts have viewed the doctrine primarily as a grant of power to schools and teachers and as a limitation on the rights of students to protection from harm occurring in the school setting or caused by school personnel.[15] Indeed, in one of the first cases in the United States discussing the doctrine in the primary school setting, the North Carolina Supreme Court stated as follows:

> One of the most sacred duties of parents, is to train up and qualify their children, for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits . . . . The teacher is the substitute of the parent; . . . and in the exercise of these delegated duties, is invested with his power.[16]

Similarly, this grant of power to teachers and schools carried with it a concomitant restraint on the judiciary's ability to interfere with "[t]he right of the school-master to require obedience to reasonable rules and a proper submission to his authority, and to inflict corporal punishment for disobedience."[17] Or, as stated by the Maine Supreme Judicial Court in discussing the discretion vested in school authorities under the in loco parentis doctrine,

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14. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441 (1765); *see also* Hogan & Schwartz, *supra* note 13, at 260.

15. *See, e.g.*, Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused and in Need of Change*, 78 U. CIN. L. REV. 969, 970 (2010) (arguing the "unsuitability" of the use of the in loco parentis doctrine in public schools and stating "[f]rom its origins in U.S. public education law, the common law doctrine of in loco parentis was applied almost exclusively to student discipline. Rarely was it understood to also apply to parental-like responsibilities for the care of students."); Tyler Stoehr, Comment, *Letting the Legislature Decide: Why the Court's Use of In Loco Parentis Ought to be Praised, Not Condemned*, 2011 BYU L. REV. 1695, 1730 (disagreeing with Stuart regarding the suitability of the in loco parentis doctrine in public schools, but stating that "[i]n the case of in loco parentis, there appear to be good reasons why American courts accepted only the disciplinary side of the doctrine as traditionally understood, while rejecting the custodial side"); *see also* Perry A. Zirkel & Henry F. Reichner, *Is the* In Loco Parentis *Doctrine Dead?*, 15 J.L. & EDUC. 271, 281 (1986) (Although "the courts have accepted with relative ease the notion that in loco parentis gives rise to duties as well as rights of educators . . . , they have implemented this notion with notable difficulty . . . leaving negligence liability to remain or fall on other grounds.").

16. State v. Pendergrass*,* 19 N.C. (2 Dev. & Bat.) 365, 365–66 (1837).

17. Sheehan v. Sturges, 2 A. 841, 842 (Conn. 1885).

> To accomplish th[e] desirable ends [of teaching self-restraint, obedience, and other civic virtues], the master of a school is necessarily invested with much discretionary power. . . . He must govern these pupils, quicken the slothful, spur the indolent, restrain the impetuous, and control the stubborn. He must make rules, give commands, and punish disobedience. What rules, what commands, and what punishments shall be imposed are necessarily largely within the discretion of the master, where none are defined by the school board.[18]

This power invested in schools, administrators, and teachers to control students, although limited by constitutional and tort principles,[19] has continued to the present day. Thus, as recently as 2012, a Connecticut trial court, quoting the above-cited, late-Nineteenth century decision of the Connecticut Supreme Court, stated that "[a] teacher stands in loco parentis toward a pupil. He must maintain discipline, and if a pupil disobeys his orders it is his duty to use reasonable means to compel compliance."[20]

B. Internal Doctrinal Limitations of In Loco Parentis

As quoted above, Blackstone's classic formulation of the school- and school personnel-empowering aspect of the in loco parentis doctrine contains within it a limitation on its use in the primary and secondary school settings. Thus, one commentator, discussing the Restatement (Second) of Torts' codification of that aspect of Blackstone's formulation making applicability of the doctrine turn on whether the power exercised by school personnel is "necessary to answer the purposes for which he is employed," has stated that "the *in loco parentis* authority of a school over a student is limited to the purpose of the school's existence: the student's education or the education of the group of which the student is a member."[21] Courts, adhering to this same doctrinal limitation, have refused to

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18. Patterson v. Nutter, 7 A. 273, 274 (Me. 1886). Thus, Justice Thomas, the sole current member of the United States Supreme Court espousing the view that the in loco parentis doctrine continues to grant schools and their administrators and teachers virtually unfettered discretion in regulating the constitutional rights of students, has tersely stated in reviewing early cases that "[t]he doctrine of in loco parentis limited the ability of schools to set rules and control their classrooms in almost no way." Morse v. Frederick, 551 U.S. 393, 416 (2007) (Thomas, J., concurring).

19. Hurlburt v. Noxon, 565 N.Y.S.2d 683, 684 (Sup. Ct. 1990) (tort limitations); Smith v. W. Va. State Bd. of Educ., 295 S.E.2d 680, 685 (W. Va. 1982) (constitutional limitations).

20. Straiton v. New Milford Bd. of Educ., No. DBDCV106003255S, 2012 WL 1218160, at *6 (Conn. Super. Ct. Mar. 13, 2012) (citing *Sheehan*, 2 A. at 841).

21. Stephen R. Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373, 379, 382 (1969) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *453). *See id.* at 381 ("One who is charged only with the education or some other part of the training of a child has the privilege of using force or confinement to discipline the child only in so far as the privilege is necessary for the education or other part of the training which is committed or delegated to the actor." (quoting RESTATEMENT

absolve school personnel from liability in a number of cases. Those cases have included personal injury and/or civil rights cases involving non-emergency medical treatment[22] and excessive or abusive corporal punishment.[23] These cases also include instances where school administrators went well beyond legitimate educational purposes—and, hence, their delegated in loco parentis power—in operating a cafeteria and school supply store and requiring students to boycott a competitor.[24]

C. Student-Protective Aspect of In Loco Parentis

As previously alluded to, the other—albeit less forceful—principle embodied in the in loco parentis doctrine entails K-12 schools and school personnel discharging the parental duty of supervising or protecting students.[25] Thus, courts have recognized that schools, administrators and teachers, based on their in loco parentis status, must supervise and/or protect students from foreseeable harm to both their physical and emotional well-being.[26] The duty to protect students, however, has traditionally been cabined by, at most, negligence principles. Rather than impose upon school supervisory personnel a heightened duty of care concerning their responsibility toward students, courts have made clear that the duty stemming from the in loco parentis doctrine to supervise and/or protect requires schools, administrators, and teachers to act reasonably under the circumstances.[27] In this regard, several courts, paying homage to the genesis of the in loco parentis doctrine, have defined that duty as how a reasonable parent of the student would have acted under the circumstances giving rise to the alleged

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(SECOND) OF TORTS, § 152 (1965))); *id.* at 382-83 ("One who is in charge of the training or education of a group of children is privileged to apply such force or impose such confinement upon one or more of them as is reasonably necessary to secure observance of the discipline necessary for the education and training of the children as a group." (quoting RESTATEMENT (SECOND) OF TORTS § 154 (1965))); *see also* Paul O. Proehl, *Tort Liability of Teachers,* 12 VAND. L. REV. 723, 727 & n.24 (1958-59) (discussing teacher authority as limited to circumstances under a teacher's control and related to the purposes of education).

22. Guerrieri v. Tyson, 24 A.2d 468, 469 (Pa. Super. Ct. 1942).

23. *Smith*, 295 S.E.2d at 685-87.

24. Hailey v. Brooks, 191 S.W. 781, 783 (Tex. Civ. App. 1916).

25. *See supra* note 15 and commentary discussed therein.

26. Castaldo v. Stone, 192 F. Supp. 2d 1124, 1144 (D. Colo. 2001); Doe Parents No. 1 v. Dep't of Educ., 58 P.3d 545, 585 (Haw. 2002). For a discussion concerning whether courts have recognized that schools and school personnel have only a duty to supervise, rather than to protect, students under the in loco parentis doctrine, see Stuart *supra* note 15, at 992 n.106.

27. Thompson v. Rochester Cmty. Sch., No. 269738, 2006 WL 3040137, at *10 n.5 (Mich. Ct. App. Oct. 26, 2006) (citing Gaincott v. Davis, 275 N.W. 229 (Mich. 1937)); Brooks v. Logan, 903 P.2d 73, 79 (Idaho 1995), *superseded by statute*, IDAHO CODE ANN. § 33-512B (1996), *as recognized in* Stoddart v. Pocatello Sch. Dist. #25, 239 P.3d 784 (Idaho 2010); Eisel v. Bd. of Educ., 597 A.2d 447, 451-52 (Md. 1991); Phyllis v. Super. Ct., 228 Cal. Rptr. 776, 778 (Ct. App. 1986); Downs v. Conway Sch. Dist., 328 F. Supp. 338, 348 (E.D. Ark. 1971).

harm to the student.[28] A minority of courts, based on the in loco parentis doctrine, have required even less from schools and teachers: those courts have held that schools and teachers are only liable when the school personnel's willful and wanton conduct causes the student's injury.[29]

Whether the duty of care requires avoiding negligence or avoiding willful and wanton conduct, courts have made clear that the situs of the child's injury may be important. Thus, courts have held that schools and school personnel must satisfy the applicable, in loco parentis-derived, standard of care when injury to a student occurs on school grounds[30] or during supervised educational activities, such as field trips, which occur off school grounds.[31] Conversely, courts have held that schools do not have an in loco parentis-derived duty where the harm to a student occurs off school grounds and involves teacher conduct, such as sexual liaisons with a student, outside of the teacher's job responsibilities.[32]

Consistent with the secondary nature of the duty owed to students under the in loco parentis doctrine, the United States Supreme Court has made clear that the duty of schools and teachers to protect students is not of constitutional magnitude.[33] The Court, however, has relied on the student-protective aspect of the in loco parentis doctrine in reaching its decisions in student search and seizure and student speech cases.[34] Significantly, in each of those decisions, the Court used the student-protective aspect of the doctrine to justify *limitations* on the

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28. W. Shield Investigations & Sec. Consultants v. Super. Ct., 98 Cal. Rptr. 2d 612, 626 (App. 2000); Garcia v. City of N.Y., 646 N.Y.S.2d 508, 510-11 (App. Div. 1996).

29. Martin v. Plude, No. CV91 028393S, 1994 WL 116337, at *3 (Conn. Super. Ct. Mar. 17, 1994); Kobylanski v. Chi. Bd. of Educ., 347 N.E.2d 705, 709 (Ill. 1976); Doe v. Lawrence Hall Youth Servs., 966 N.E.2d 52, 62 (Ill. App. Ct. 2012).

30. *Castaldo*, 192 F. Supp. 2d at 1144.

31. Stiff v. E. Ill. Area of Special Educ., 621 N.E.2d 218, 222 (Ill. App. Ct. 1993).

32. *See, e.g.*, Hallberg v. State, 649 So. 2d 1355, 1358 (Fla. 1994).

33. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995) ("[W]e do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional duty to protect . . . ." (internal quotation marks omitted) (quoting DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989)).

34. *See, e.g.*, Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 831 (2002) ("Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults."); *Vernonia Sch. Dist.*, 515 U.S. at 662 ("In the present case, moreover, the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction."); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) ("The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission."). For a discussion of the Tenth Circuit's decision in *Earls*, and the Supreme Court's decisions in *Vernonia* and *Fraser*, see Todd A. Demitchell, *The Duty to Protect: Blackstone's Doctrine of In Loco Parentis: A Lens for Viewing the Sexual Abuse of Students*, 2002 BYU EDUC. & L.J. 17, 23-24 & n.31.

constitutional rights of individual students.[35] Thus, in *Vernonia School District 47J v. Acton*[36] and *Board of Education v. Earls*,[37] the Court upheld random drug and alcohol testing of student-athletes and student participants in extracurricular school activities, respectively, as against Fourth Amendment challenges.[38] Additionally, in *Bethel School District No. 403 v. Fraser*,[39] the Court upheld the suspension of a student for engaging in vulgar, sexually-suggestive speech during a school assembly as against a First Amendment challenge.[40] Notably, in the portion of the *Vernonia* decision discussing the duty *owed* by schools to provide a safe environment for students and to protect them from harm, the Court supported that proposition by citing to its decisions—several of which relied on the in loco parentis doctrine—discussing the right of school boards, school administrators and teachers to *control* students or *limit* their rights.[41]

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35. *Earls*, 536 U.S. at 828-38; *Vernonia*, 515 U.S. at 654-66; *Fraser*, 478 U.S. at 681-86. For a discussion critical of both Demitchell's formulation of the duty to protect based on Blackstone and the Supreme Court's in loco parentis jurisprudence treating the duty to protect as a collective or third party, as opposed to an individual, right, see Stuart, *supra* note 15, at 992 n.106, 994.

36. 515 U.S. at 646.

37. 536 U.S. at 822.

38. *Vernonia*, 515 U.S. at 664-65; *Earls*, 536 U.S. at 825, 828.

39. 478 U.S. at 675

40. *Id.* at 685-86.

41. In upholding the right of a school district to drug test student-athletes, the *Vernonia* Court stated, "[W]e have acknowledged that for many purposes 'school authorities ac[t] *in loco parentis*,' with the power and indeed the duty to 'inculcate the habits and manners of civility.'" *Vernonia*, 515 U.S. at 655 (second alteration in original) (citation omitted) (quoting *Fraser*, 478 U.S. at 681, 684). "Thus, while children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate,' the nature of those rights is what is appropriate for children in school." *Id.* at 655-56 (alteration in original) (citation omitted) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)). The *Vernonia* Court also referenced *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988). *Id.* at 656 (holding that "public school authorities may censor school-sponsored publications, so long as the censorship is 'reasonably related to legitimate pedagogical concerns'"); *Fraser*, 478 U.S. at 683 ("[I]t is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."); Ingraham *ex rel.* Ingraham v. Wright, 430 U.S. 651, 682 (1977) ("Imposing additional administrative safeguards [upon corporal punishment] . . . would . . . entail a significant intrusion into an area of primary educational responsibility[.]"); Goss v. Lopez, 419 U.S. 565, 581-82 (1975) (holding that "due process for a student challenging disciplinary suspension requires only that the teacher 'informally discuss the alleged misconduct with the student minutes after it has occurred'").

II. FIDUCIARY DUTY

A. Definition, General Principles, and Jurisprudential Tendencies

The term "fiduciary" has its origins in equity jurisprudence.[42] It has been defined as "[a] person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor."[43] Traditionally, courts have found a fiduciary duty to exist in relationships involving financial or economic dealings where one party puts his or her trust in and/or relies on the expertise of another, such as in business partnerships,[44] and trustee-beneficiary[45] and investment advisor-client[46] relationships. Indeed, it was in the "coadventurer"/partnership context where Justice Cardozo, then Chief Judge of New York's highest court, penned his oft-quoted words about the nature of fiduciary relationships:

> Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.[47]

However, "a 'fiduciary or confidential relationship' is not limited to relationships with a financial duty involved."[48] Thus, one state high court has stated that "fiduciary duty" is

> [a] very broad term embracing both technical fiduciary relations and those informal relations which exist wherever one man trusts in or relies upon another. One founded on trust or confidence reposed by one person

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42. L.S. Sealy, *Fiduciary Relationships,* 1962 CAMBRIDGE L.J. 69, 69-70.

43. BLACK'S LAW DICTIONARY, *supra* note 10, at 658.

44. *See, e.g.*, Klotz v. Klotz, 117 S.E.2d 650, 656 (Va. 1961) ("The relationship of partners is of a fiduciary character and imposes upon them the obligation to exercise good faith and integrity in their dealings with one another in the partnership affairs.").

45. *See, e.g.*, Fuller Family Holdings, L.L.C. v. N. Trust Co., 863 N.E.2d 743, 754 (Ill. App. Ct. 2007) ("A trustee owes a fiduciary duty to a trust's beneficiaries and is obligated to carry out the trust according to its terms and to act with the highest degrees of fidelity and utmost good faith.").

46. *See, e.g.*, People *ex rel.* Cuomo v. Merkin, No. 450879/09, 2010 WL 936208, at *10 (N.Y. Sup. Ct. Feb. 8, 2010) ("[I]nvestment advisors . . . owe fiduciary duties to their clients, particularly where the investment advisor has broad discretion to manage the client's investments.").

47. Meinhard v. Salmon, 164 N.E. 545, 546-47 (N.Y. 1928).

48. *In re* Estate of Karmey, No. 223270, 2002 WL 207572, at *5 (Mich. Ct. App. Feb. 8, 2002) (per curiam), *rev'd on other grounds*, 658 N.W.2d 796 (Mich. 2003).

> in the integrity and fidelity of another. A "fiduciary relation" arises whenever confidence is reposed on one side, and domination and influence result on the other; the relation can be legal, social, domestic, or merely personal. Such relationship exists when there is a reposing of faith, confidence and trust, and the placing of reliance by one upon the judgment and advice of the other.[49]

Notwithstanding the broad definition of fiduciary duty utilized by some courts, other courts have been less willing to read the term so expansively. Those other courts have made clear that "[t]he mere placing of a trust in another person does not create a fiduciary relationship."[50] Likewise, courts and commentators, in refusing to place their imprimatur on relationships that litigants have characterized as fiduciary, have stated that

> "[f]iduciary" is a vague term, and it has been pressed into service for a number of ends. . . . [T]he term "fiduciary" is so vague that plaintiffs have been able to claim that fiduciary obligations have been breached when in fact the particular defendant was not a fiduciary *stricto sensu* [i.e., in the strict sense] . . . .[51]

Although disagreeing about the jurisprudential underpinnings of fiduciary obligations,[52] several commentators have noted that cases announcing the existence of fiduciary obligations are "laden with moralizing language"[53] such as that employed by Cardozo in *Meinhard*. One commentator has further argued that the courts' use of moralistic rhetoric has been a mechanism to control behavior, has obscured the limits of fiduciary obligations, and has been caused

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49. Kurth v. Van Horn, 380 N.W.2d 693, 695-96 (Iowa 1986) (alteration in original) (quoting BLACK'S LAW DICTIONARY 564 (5th ed. 1979)).

50. Zumbrun v. Univ. of S. Cal., 101 Cal. Rptr. 499, 506 (Cal. Ct. App. 1972); *see also* Woods v. Pub. Logistics, Inc., No. G042821, 2011 WL 1907525, at *13 (Cal. Ct. App. May 18, 2011); Wimmer v. Greenleaf Arms, Inc., No. 101285/11, 2011 WL 6187127, at *4-5 (N.Y. Sup. Ct. Nov. 22, 2011).

51. *See* United States v. Milovanovic, 678 F.3d 713, 729 (9th Cir. 2012) (Clifton, J., concurring); Carlson v. Warren, 878 N.E.2d 844, 851 n.3 (Ind. Ct. App. 2007); Marmelstein v. Kehillat New Hempstead, 841 N.Y.S.2d 493, 496 (App. Div. 2007); Doyle v. Turner, 90 F. Supp. 2d 311, 333 (S.D.N.Y. 2000), *aff'd sub nom.*, Hughley v. Local 1199, Drug, Hosp. & Health Care Emps. Union, 231 F.3d 889 (2d Cir. 2000); *see also* D.W.M. WATERS, THE CONSTRUCTIVE TRUST: THE CASE FOR A NEW APPROACH IN ENGLISH LAW 4 (1964), *quoted in* BLACK'S LAW DICTIONARY 702 (9th ed. 2009).

52. *See* Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. REV. 1039, 1039 n.1 (2011) (collecting scholarly authorities).

53. Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 440 (1993); *accord* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 891 ("Judicial opinions applying the fiduciary constraint are also distinctive, among private law cases, in that they frequently and explicitly use the language of moral obligation to justify their outcomes.").

by both imprecision in the legal standard and an inability of courts to define those limitations.[54] Several commentators have taken the view that judicial reliance on metaphorical and analogistic thinking, rather than on context-based or situation-specific analysis, has hindered, rather than helped, courts in appropriately determining whether particular relationships constitute fiduciary relationships or not.[55]

B. Principles of Fiduciary Duty Particularly Relevant to the K-12 Teacher-Student Relationship

Irrespective of the breadth of one's definitional view concerning the term "fiduciary," and in light of in loco parentis principles discussed previously, several well-settled legal principles inform the analysis of whether K-12 schools and school personnel owe fiduciary obligations to students. First, it has long been settled that "there may be [a] fiduciary relationship for one purpose and not for another."[56] In addition, although parents may be considered fiduciaries to their children in the context of paying child support or administering trust funds,[57] the

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54. J.A.C. Hetherington, *Defining the Scope of Controlling Shareholders' Fiduciary Responsibilities*, 22 WAKE FOREST L. REV. 9, 11 (1987) ("By obscuring the limits of fiduciary obligations under moralistic rhetoric and by verbally chastising those who are found to have violated the standard, or come close to doing so, the courts seek to maintain the standard by discouraging marginal behavior which might or might not violate it. It is the imprecision of the standard and the fact that there are limitations on its scope which cannot be acknowledged in the judicial formulations that lead the courts to employ excessive rhetorical force in promulgating fiduciary doctrine. . . . Ambiguity breeds vehemence. Further, the knowledge that fiduciary principles cannot be precisely and minutely enforced leads to the use of strong language as a control mechanism.").

55. DeMott, *supra* note 53, at 879-80, 923-24; *see also* Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 805 (1983). DeMott, although recognizing that judicial reliance on metaphorical reasoning when analyzing whether a fiduciary relationship exists is both "powerful" and "inevitable," concludes,

> Fiduciary obligation . . . continuing tie to Equity's legacy make it unusually context-bound as a legal obligation. . . . Determining whether fiduciary obligation applies in a particular context and what requirements inhere in the imposition of fiduciary obligation demands recognition of this situation-specificity.
>
> Although . . . careful analysis can resolve many questions about fiduciary obligation, the difficulty of that undertaking should not be underestimated. Shortcuts in legal reasoning through metaphoric and unanalytic appeals to contract law serve only to muddle the analysis. Only a move from metaphor to analysis can resolve these recurrent questions of fiduciary obligation.

DeMott, *supra* note 53, at 891, 923-24.

56. Polaroid Corp. v. Horner, 197 F. Supp. 950, 956 (D.D.C. 1961) (quoting Gedge v. Cromwell, 19 App. D.C. 192, 198 (D.C. 1902)).

57. *In re* Paxson Trust I, 893 A.2d 99, 118-22 (Pa. Super. Ct. 2006) (holding that the Paxsons could not dispose of the premises in which they had interest as life tenants because they were, first

parent-child relationship alone is typically insufficient to create a fiduciary relationship.[58] Further, with certain exceptions in the corporate and partnership arenas, judicial recognition of a fiduciary relationship places a higher duty of care on a fiduciary than does the reasonable person standard under negligence principles.[59] Moreover, a fiduciary has a "duty of undivided loyalty" to the person with whom he or she has a fiduciary relationship.[60] In this latter regard, a fiduciary must avoid or, at the very least, disclose conflicts of interests.[61] Also, while bad faith conduct may constitute a breach of the duty of loyalty owed by a fiduciary,[62] good faith intentions, except in the corporate or partnership management context, will not absolve otherwise improper conduct.[63] Thus, as stated by one court, "[g]ood faith does not provide a defense to a claim of a breach of these fiduciary duties; 'a pure heart and an empty head are not

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and foremost, trustees and had a fiduciary obligation to act in the best interests of their children with respect to the premises); Boyd v. Boyd, 545 S.W.2d 520, 524 (Tex. Civ. App. 1976) (holding the mother had a fiduciary duty to use child support payments "for support").

58. Eagerton v. Fleming, 700 P.2d 1389, 1391-92 (Ariz. Ct. App. 1985); Cooper v. Cavallaro, 481 A.2d 101, 104 (Conn. App. Ct. 1984); La Salle Nat'l Bank v. 53rd-Ellis Currency Exch., Inc., 618 N.E.2d 1103, 1112 (Ill. App. Ct. 1993); *In re* Koch, 849 P.2d 977, 999-1000 (Kan. Ct. App. 1993); Economopoulos v. Kolaitis, 528 S.E.2d 714, 718 (Va. 2000).

59. *See, e.g.*, Marks v. Chicoine, No. C 06-06806 SI, 2007 WL 1056779, at *7 (N.D. Cal. Apr. 6, 2007) (stating that the "defendant . . . owes plaintiff a fiduciary duty, an even higher responsibility than that required under a negligence claim"); Kwiatkowski v. Bear, Stearns & Co., No. 96 Civ. 4798(VM), 2000 WL 640625, at *3 (S.D.N.Y. May 18, 2000) ("[T]he standard of conduct and the duty of care demanded of fiduciaries are set higher than that of ordinary care which governs negligence."); Ford v. Brooks, No. 11AP-664, 2012 WL 760741, at *2 (Ohio Ct. App. Mar. 8, 2012) ("A claim for breach of fiduciary duty is basically a negligence claim requiring a higher standard of care."); Mafrige v. United States, 893 F. Supp. 691, 702 (S.D. Tex. 1995) (noting that "a breach of a fiduciary duty or of a duty of utmost good faith . . . impose[s] higher standards . . . than the duty of reasonable care associated with negligence law"). *But cf.* IDAHO CODE ANN. § 53-3-404(c) (2012) (Under the Revised Uniform Partnership Act, "[a] partner's duty of care to the partnership and the other partners in the conduct . . . of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law."); Rosenthal v. Rosenthal, 543 A.2d 348, 352-53 (Me. 1988) (noting that under the business judgment rule, corporate officers—although fiduciaries—owe a duty of good faith, rather than a duty of reasonable care, in managing corporate affairs).

60. Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386-87 (2d Cir. 1976); Prob. Ct. *ex rel.* Lawton v. Bank of America, N.A., 813 F. Supp. 2d 277, 301 (D.R.I. 2011); Wolf v. Super. Ct., 130 Cal. Rptr. 2d 860, 864 (Cal. Ct. App. 2003).

61. *In re* Brook Valley VII, 496 F.3d 892, 900-01 (8th Cir. 2007); Lifespan Corp. v. New Eng. Med. Ctr., Inc., No. 06-cv-421-JNL, 2011 WL 2134286, at *23 (D.R.I. May 24, 2011); IBEW Local 98 Pension Fund v. Cent. Vt. Pub. Serv. Corp., No. 11-cv-222, 2012 WL 928402, at *13 (D. Vt. Mar. 19, 2012).

62. Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 369-70 (Del. 2006).

63. Ertel v. O'Brien, 852 S.W.2d 17, 22 (Tex. App. 1993).

enough.'"[64] And, courts have invariably found the existence and breach of a fiduciary duty where a person in a position of authority in a relationship of trust and confidence—such as an attorney-client, physician-patient or group home supervisor-ward relationship—exploits his or her authoritative position by engaging in sexual relations with the more vulnerable person in the relationship.[65]

III. Cases and Scholarship/Commentary Discussing Whether K-12 Schools and School Personnel Owe a Fiduciary Duty to Students

A. The Case Law

Notwithstanding the longstanding judicial treatment of the in loco parentis doctrine as granting rights to school supervisory personnel and only secondarily and minimally protecting the rights of students, a surprising split has developed in the case law over the past twenty-five years concerning whether schools and school supervisory personnel owe a fiduciary duty to primary and secondary students.[66] This Article will now chronicle that judicial split. It will first discuss the cases refusing to recognize a fiduciary relationship between teachers and students in the K-12 setting. It will next discuss the cases acknowledging the possibility of (or, at least, not definitively rejecting) a fiduciary relationship in that setting, but finding no such relationship on the facts or allegations of the specific case before the court. Finally, this Article will discuss the cases that recognize the existence of a fiduciary relationship and likewise find such a relationship on the facts or allegations of the case before the court. Within each discussion, the Article will first examine cases relying on or referring to the in loco parentis doctrine before considering cases that reach the same conclusion without mentioning the doctrine.

1. Cases Categorically Refusing to Recognize the Existence of a Fiduciary Relationship Between K-12 Schools and School Supervisory Personnel and Students.—

a. In loco parentis cases.—In *Franchi v. New Hampton School*,[67] the mother of a student, who had been discharged from a private boarding school for reasons

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64. DiFelice v. U.S. Airways, Inc., 497 F.3d 410, 418 (4th Cir. 2007) (quoting Donovan v. Cunningham, 716 F.2d 1455, 1467 (5th Cir. 1983)).

65. Doe v. Harbor Schs., Inc., 843 N.E.2d 1058, 1064-65 (Mass. 2006) (group home supervisor-ward relationship); Hoopes v. Hammargren, 725 P.2d 238, 242-43 (Nev. 1986) (physician-patient relationship); Allen Cnty. Bar Ass'n v. Bartels, 924 N.E.2d 833, 835 (Ohio 2010) (attorney-client relationship).

66. One appellate panel, in discussing (but without resolving the issue of) the existence of a fiduciary relationship between a public school and a middle and high school student in a sexual abuse case involving the possible tolling of the statute of limitations, "note[d] that whether a public school has a fiduciary duty to a middle or high school student is contested by the parties and not settled law." Dymit v. Indep. Sch. Dist. #717, No. A04-471, 2004 WL 2857375, at *5 n.1 (Minn. Ct. App. Dec. 14, 2004).

67. 656 F. Supp. 2d 252 (D.N.H. 2009) (internal citation omitted).

related to an alleged eating disorder, sued the school under various theories, including a claim for breach of fiduciary duty.[68]

The district court dismissed Franchi's breach of fiduciary duty claim, stating as follows:

> NHS argues that no fiduciary relationship existed between it and [the student] as a matter of law. Franchi's argument to the contrary is based on the New Hampshire Supreme Court's decision in *Schneider v. Plymouth State College*, that "[i]n the context of sexual harassment by faculty members, the relationship between a post-secondary institution and its students is a fiduciary one." This case, however, involves neither a post-secondary institution nor sexual harassment by faculty members. This court predicts that the New Hampshire Supreme Court would not expand the obligations imposed by *Schneider* beyond its context and into the circumstances here.
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> . . . .
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> As a matter of law, then, the nature of the duty owed from NHS-a secondary school-to [the student] was a duty of care arising out of its in loco parentis status . . . rather than a fiduciary duty arising from any "unique relationship" as in *Schneider.*
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> . . . .
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> In line with these authorities, this court rules that, even if the allegations of Franchi's amended complaint suggest that she placed "a special trust or reliance" in NHS on [the student]'s behalf, that was insufficient to give rise to a fiduciary duty. Though NHS, like any other secondary school, owes its students a duty to use reasonable care to protect them, this court predicts that the New Hampshire Supreme Court would not extend its holding in *Schneider* to elevate that duty to a fiduciary one under the circumstances alleged here. NHS's motion to dismiss Franchi's claim for breach of fiduciary duty is granted.[69]

In *Doe v. Greenville County School District*,[70] the parents of a fourteen-year-old student brought claims (among others) for breach of fiduciary duty and breach of an assumed duty in loco parentis against a school district after a substitute

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68. *Id.* at 255-56.

69. *Id.* at 261-65 (second alteration in original) (citation omitted); *see also* Brodeur v. Claremont Sch. Dist., 626 F. Supp. 2d 195, 219 n.24 (D.N.H. 2009) (strongly suggesting, but not deciding, that because the New Hampshire Supreme Court had held that the relationship between a secondary school and student is "a special relationship" based on the in loco parentis doctrine "that gives rise to a duty enforceable in negligence," "New Hampshire [law] does not appear to treat the relationship between a public secondary school and its students as fiduciary in nature").

70. 651 S.E.2d 305 (S.C. 2007).

teacher hired by the school district had been convicted of having sexual relations with their minor daughter.[71] After the trial court dismissed these two claims and several others, the South Carolina Supreme Court affirmed, holding that

> In the instant case, the trial court found that Mr. and Mrs. Doe's claims for breach of fiduciary duty and breach of an assumed duty *in loco parentis* were based only on their claim of negligent supervision. The trial court further found that these causes of action were alleged as an attempt to heighten any duty owed by the School District in this situation.
>
> We agree with the trial court's analysis of these causes of action. The Legislature has clearly provided that the School District may be liable for negligent supervision of a student only if that duty was executed in a grossly negligent manner. Mr. and Mrs. Doe have not alleged any facts under which this Court could find another duty owed by the School District other than the duty of supervision as outlined by the Tort Claims Act.
>
> Accordingly, we hold that the trial court did not err in dismissing the causes of action for breach of fiduciary duty and breach of an assumed duty *in loco parentis*.[72]

b. Non-in loco parentis cases.—In *Thomas v. Board of Education of Brandywine School District*,[73] the parents of an elementary school student filed an action on the student's behalf against a school district's board of education, its board members, and superintendent, alleging that school administrators failed to take appropriate steps to prevent a teacher from sexually abusing the student.[74] The court granted summary judgment in favor of the school district defendants on the parents' breach of fiduciary duty claim, holding as follows:

> Finally, Plaintiff also alleges a novel theory of liability based on the "special relationship" between public school administrators and their students. Specifically, Plaintiff contends that the School District Defendants "owed fiduciary duties" to the District's students, including Plaintiff, duties which the School District Defendants "grossly breached." Both parties concede that this is an issue of first impression in Delaware.
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> Little more need be said about Plaintiff's breach of fiduciary duty claim beyond the undisputed fact that Plaintiff can cite to no authority for recognizing this theory under Delaware law. . . . Plaintiff provides no

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71. *Id.* at 306.
72. *Id.* at 309-10 (citation omitted).
73. 759 F. Supp. 2d 477 (D. Del. 2010).
74. *Id.* at 481.

> basis for predicting that the Delaware Supreme Court would accept Plaintiff's invitation to be the first state to recognize a fiduciary relationship between a public school district and its students.
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> . . . .
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> Here, Plaintiff does not allege that there is a "confidential" relationship of any sort, nor does Plaintiff allege that there is a special relationship of dependency between him and the School District Defendants. While there may be, as Plaintiff contends, cases from other states that recognize a "special relationship" between public schools and their students, none of these cases explicitly identify a fiduciary relationship, nor state that a student may pursue civil litigation for breach of such a fiduciary relationship.
>
> The Court concludes that Delaware law does not recognize a fiduciary relationship between a public school district and its students. Consequently, the Court will grant summary judgment to the School District Defendants on Plaintiff's claim for breach of fiduciary duty.[75]

Likewise, in *Key v. Coryell*,[76] the mother of a special needs student brought suit, individually and on behalf of the student, against a Catholic school, its current and former principal, two teachers, several other individuals, and the Catholic Diocese.[77] In her complaint, the mother alleged that the school did not meet the student's needs and, because of his alleged behavioral problems, forced him to withdraw from the school in violation of, among other legal duties, a fiduciary duty owed to the student.[78] The Arkansas Court of Appeals affirmed the trial court's dismissal of the entire complaint, holding with respect to the breach of fiduciary claim:

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75. *Id.* at 503-04; *see also* C.A. v. William S. Hart Union High Sch. Dist., 117 Cal. Rptr. 3d 283, 292 (Cal. Ct. App. 2010) (where student alleged that school district and school personnel, by not preventing or by participating in sexual relations with the student, engaged in constructive fraud which, under California law, requires proof of a fiduciary or confidential relationship, and where the Court of Appeal stated that the student did "not cite, and we have not found, any authority stating that a fiduciary relationship exists between a school district and an individual student," the Court refused to recognize the existence of a fiduciary relationship in the K-12 school and school personnel-student relationship), *rev'd on other grounds*, 270 P.3d 699 (Cal. 2012); John R. v. Oakland Unified Sch. Dist., 240 Cal. Rptr. 319, 325 (Ct. App. 1987) (In a sexual abuse case involving delayed discovery/fraudulent concealment issues, another California Court of Appeal panel stated that "[t]eachers, while not fiduciaries, are professionals who occupy a special relationship with adolescent students invoking higher obligations."), *aff'd in part, rev'd in part*, 769 P.2d 948 (Cal. 1989).

76. 185 S.W.3d 98 (Ark. Ct. App. 2004).

77. *Id.* at 101.

78. *Id.* at 101-02.

> Appellant further argues, without citation to any supporting authority, that the relationship of a student with special needs and an educator who represents that he or a school can meet those needs and provide an education appropriate for the student's age and grade level is of a fiduciary nature. We are aware of no case in Arkansas that supports appellant's argument. . . . In *Cherepski v. Walker*, the supreme court held that a defendant priest did not owe a fiduciary duty to a parishioner. We cannot say that appellees owed appellant and Taylor any greater duty than a priest owes a parishioner. . . . [79]

In *Eng v. Hargrave*,[80] one of the more recent judicial decisions discussing the issue, a federal district court dismissed, with prejudice, a complaint involving a claim by the plaintiff against his student in an unspecified endeavor relating to the martial arts.[81] In so doing, the district court stated that "a teacher ordinarily does not owe his student a fiduciary duty, and a student presumably owes his teacher even less."[82]

2. Cases Recognizing the Possibility of (or, at Least, Not Definitively Rejecting) a Fiduciary Relationship Between K-12 Schools and School Supervisory Personnel and Students, but Not Finding Such Relationship on the Allegations or Facts Before It.—

a. In loco parentis cases.—In *Bass ex rel. Bass v. Miss Porter's School*,[83] a student who had been expelled from a private high school for dishonesty and alcohol use, after requesting medical leave relating to harassment she had suffered at school, brought suit against the school and the head of the school.[84] In her complaint, the student alleged that the defendants' expulsion decision and their conduct leading up to it, among other legal theories, breached a fiduciary duty owed to the student.[85] The district court disagreed, finding and concluding

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79. *Id.* at 106 (citation omitted); *see also* J.W. v. Johnston Cnty. Bd. of Educ., No. 5:11-cv-707-D, 2012 WL 4425439, at *15 (E.D.N.C. Sept. 24, 2012) (because North Carolina law did not recognize a fiduciary relationship between school board or school administrators and middle school students, North Carolina federal district court dismissed breach of fiduciary duty claim brought by middle school special education student); Cook v. Kudlacz, 974 N.E.2d 706, 724 (Ohio Ct. App. 2012) (because "no case . . . provides that a coach would definitely have a fiduciary relationship with [a] player," court affirmed trial court's grant of summary judgment against high school tennis team member and her mother on their breach of fiduciary duty claim against private religious school and school personnel).

80. No. C 10-01776 RS, 2012 WL 116560 (N.D. Cal. Jan. 13, 2012).

81. *Id.* at *1.

82. *Id.* at *2; *see also* Zimmerman v. Poly Prep Country Day Sch., 888 F. Supp. 2d 317, 335 n.5 (E.D.N.Y. 2012) (in a case alleging sexual abuse at a private school, the court stated that "[t]hough the plaintiffs denominate their claim as one for breach of fiduciary duty, New York courts do not describe the duty of a school to its students as such").

83. 738 F. Supp. 2d 307 (D. Conn. 2010).

84. *Id.* at 310-11, 327-28.

85. *Id.* at 330.

as follows:

> Plaintiff argues that "the context of the present case" shows there to be a question for the jury as to the existence of a fiduciary duty: "Tatum was a minor child in a boarding school, which was expected to provide care, supervision, and protection at all times, to meet students' physical and emotional needs." Neither these facts, nor the remainder of the record, demonstrate or suggest that Porter's owed Tatum a fiduciary duty. The facts do not show that "that [Porter's] undertook to act primarily for the benefit of [Tatum]." . . . Even if Plaintiff could establish a relationship of unique trust or confidence in one or more of the specific adults who supervised her—her dormitory mother, academic advisors, or teachers—these individuals are not defendants, and the record shows Windsor, the only individual defendant, not to have had substantial contact with Plaintiff prior to the incidents at issue in this suit, and therefore not to support any conclusion that the Windsor–Tatum relationship was characterized by such trust or confidence.
>
> Because the record, taken in the light most favorable to Plaintiff, does not show that either of the named Defendants owed any fiduciary duty to Plaintiff, Defendants are entitled to summary judgment on Count 9.[86]

In *L.C. v. Central Pennsylvania Youth Ballet*,[87] the parents of a private school student brought a multi-count complaint against the school, one of its faculty members, and the parents of another student stemming from an alleged sexual assault against their son.[88] Among other claims, the parents of the student suffering the assault alleged that the school had breached contractual obligations that it owed to them under a student handbook.[89] Although the district court dismissed the breach of contract claim, it opined that the school may have breached a fiduciary duty:

> At this juncture, we note that "school districts are charged with the responsibility of supervising children under their control during the time that they are at school under the doctrine of *in loco parentis* to protect children." Accordingly, since L.C. was a student at CPYB, we believe that CPYB may have incurred a *fiduciary* duty to protect L.C. from harm. However, Plaintiffs have failed to lodge a claim for breach of *fiduciary* duty, electing instead to pursue a claim for breach of alleged *contractual* duty. As stated above, Plaintiffs have failed to adequately aver that CPYB was *contractually* obligated to ensure the welfare of its students. Accordingly, Plaintiffs have failed to state a claim upon which relief can

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86. *Id*. at 330-31 (first and second alterations in original) (citations omitted).
87. No. 1:09-cv-2076, 2010 WL 2650640 (M.D. Pa. July 2, 2010).
88. *Id.* at *1-2.
89. *Id.* at *4.

be granted.[90]

b. Non-in loco parentis cases.—In *Stotts v. Eveleth*,[91] an eighteen-year-old high school student brought an action against a school district and a junior high school teacher alleging, among other claims, that the teacher breached a fiduciary duty when they engaged in a consensual sexual relationship.[92] The Iowa Supreme Court affirmed the lower court's grant of summary judgment in favor of the teacher, holding as follows:

> Stotts also contends that a fiduciary relationship existed between Eveleth and her, and for that reason Eveleth owed Stotts a duty to refrain from sexual contact with her. That duty, she argues, is based on a teacher's general duty to act in the best interest of a student. Stotts asserts that Eveleth abused his position as a teacher and the trust she as a student placed in him by taking sexual advantage of her. Therefore, Stotts concludes, the district court erred in finding (1) that a fiduciary duty does not automatically exist between a teacher and student and (2) as a matter of law no such duty existed between Eveleth and her.
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> . . . .
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> Because the circumstances giving rise to a fiduciary duty are so diverse, whether such a duty exists depends on the facts and circumstances of each case.
>
> Here, it is uncontroverted that Eveleth was not Stotts's teacher and never had been. In addition, Stotts generated no genuine issue of material fact on whether she reposed faith, confidence, and trust in Eveleth; that she relied on his judgment and advice; or that he dominated and influenced her. The uncontroverted facts are that the relationship was simply one of a sexual nature between two consenting adults. We therefore agree with the district court that as a matter of law no fiduciary duty existed.[93]

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90. *Id.* at *5 n.11; *see also* Bernie v. Catholic Diocese, 821 N.W.2d 232, 242 (S.D. 2012) (affirming grant of summary judgment in favor of a Catholic Diocese where boarding school students "failed to establish the existence of an in loco parentis or fiduciary relationship" with the Diocese).

91. 688 N.W.2d 803 (Iowa 2004).

92. *Id.* at 805-06.

93. *Id.* at 811 (citation omitted). Although the Iowa Supreme Court concluded that the teacher's conduct did not constitute a breach of fiduciary duty, the teacher's conduct, which involved sexual relations with a current student, almost certainly violated Iowa's Code of Professional Conduct and Ethics for educators because the teacher engaged in "acts or behavior" that constituted "[c]ommitting or soliciting any sexual or otherwise indecent act with a student or any minor" and "[s]oliciting, encouraging, or consummating a romantic or otherwise inappropriate relationship with a student." IOWA BD. OF EDUC. EXAMINERS, CODE OF PROFESSIONAL CONDUCT

Likewise, in *Walsh v. Krantz*,[94] a father filed a law suit on behalf of his middle school student sons against a school district and a number of school employees alleging, among other claims, breach of fiduciary based on the school employees having made recommendations to the father concerning one son's evaluation for learning disabilities and the other son's assignment to a lower grade level in math, which recommendations the father rejected.[95] The district court dismissed the breach of fiduciary duty claim, holding,

> Assuming, *arguendo*, that a fiduciary relationship exists between defendants and each of Walsh's sons, the breach of fiduciary duty claims nonetheless fail.
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> . . . The amended complaint alleges that Weinberg and Heisey breached a fiduciary duty by ordering the Special Education Office to deliver a request for evaluation of C.R.W. to Walsh each year that C.R.W. is in the Dallastown Area schools and that Stone and Anderson breached a fiduciary duty by attempting to assign S.J.W. to a lower grade level in math and refusing to discuss the matter with Walsh. The court finds that such conduct is not a breach of any fiduciary duty. Notably, the alleged conduct involved *recommendations* by defendants that Walsh could, and in fact did, refuse. As the amended complaint and brief in opposition reveal, C.R.W. and S.J.W. experienced no actual change in their educational status at school. Walsh's mere disagreement with the educational recommendations and practices, without more, does not transform them into breaches of a fiduciary duty.[96]

The court of appeals affirmed, adopting the reasoning of the district court.[97]

Lastly, the United States Supreme Court has not directly addressed the issue of whether K-12 teachers owe a fiduciary duty to students. In *Gebser v. Lago Vista Independent School District*,[98] the Court, in a 5-4 decision, held that

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AND ETHICS, ch. 25, §§ 282-25.3(1)e.(3) and (4); *see also* Nkemakolam *ex rel.* K.N. v. St. John's Military Sch., 890 F. Supp. 2d 1260, 1263-64 (D. Kan. 2012) (refusing to allow parents of private school students to amend complaint to add cause of action for breach of fiduciary duty against school president where parents failed to sufficiently allege facts under exception to teacher immunity statute); Menachem S. v. L.A. Unified Sch. Dist., No. B183336, 2006 WL 1381656, at *11 (Cal. Ct. App. May 22, 2006) (holding that a mother and her son, a student in a private religious school, had failed to plead facts suggesting a breach of fiduciary duty by the school district and a public school teacher for not protecting the student from sexual abuse by another teacher employed by the private school).

94. No. 1:07-cv-0616, 2008 WL 3981492 (M.D. Pa. Aug. 22, 2008), *aff'd*, 386 Fed. Appx. 334 (3d Cir. 2010).

95. *Id.* at *1-2.

96. *Id.* at *7 (footnotes omitted) (citation omitted).

97. *Walsh*, 386 Fed. Appx. at 341.

98. 524 U.S. 274 (1998).

students do not possess a private right of action to sue school districts and teachers for sexual harassment under Title IX, absent actual notice or deliberate indifference of the harassment by school officials.[99] Four Justices, in an opinion written by Justice Stevens, disagreed.[100] The dissenters, without using the term "fiduciary," but very much describing "fiduciary-like" circumstances, believed that a private right of action should be available to students, stating as follows:

> This case presents a paradigmatic example of a tort that was made possible, that was effected, and that was repeated over a prolonged period because of the powerful influence that Waldrop had over Gebser by reason of the authority that his employer, the school district, had delegated to him. As a secondary school teacher, Waldrop exercised even greater authority and control over his students than employers and supervisors exercise over their employees. His gross misuse of that authority allowed him to abuse his young student's trust.[101]

3. Cases Recognizing a Fiduciary Relationship Between K-12 Schools and School Personnel and Students.—

a. In loco parentis cases.—In *McMahon v. Randolph-Macon Academy*,[102] McMahon was a boarding school student at Randolph–Macon Academy who claimed "that a staff member developed a sexual relationship with her and that this conduct, among other things, violated a fiduciary duty which the school owed to her."[103] McMahon brought suit on this theory, and defendants filed a demurrer seeking dismissal of the claim.[104] The trial court allowed McMahon to proceed on her breach of fiduciary duty claim, stating as follows:

> [T]he defendants rely upon *Abrams v. Mary Washington College* for the proposition that "there is no *in loco parentis* relationship or any other fiduciary relationship between senior college officials and every student attending that institution." This court believes that a different rule applies to a boarding school which takes minors into its custody.
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> . . . .
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> The significance of imposing fiduciary duties upon an agent is that it restricts the permissible range of the agent's actions and requires that the agent act solely in the interests of his principal.[105]

The court noted that courts have previously found the existence of fiduciary

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99. *Id*. at 277.

100. *Id.* at 293-306 (Stevens, J., joined by Souter, Ginsburg and Breyer, JJ., dissenting).

101. *Id.* at 299.

102. No. 97-11, 1997 WL 33616521 (Va. Cir. Ct. June 16, 1997).

103. *Id.* at *1.

104. *Id.*

105. *Id.* (citations omitted) (citing Greenwood Assoc. v. Crestar Bank, 448 S.E.2d 399 (Va. 1994); Hooper v. Musolino, 364 S.E.2d 207 (Va. 1988)).

rights and duties in relationships such as between a banker and customer during foreclosure proceedings and between business partners.[106] As such, the court believed that "the relationship between a boarding school and its minor student has the same dignity under the law as the relationship between a bank and its customers and that between partners"[107] and concluded as follows:

> Applying these principles to the present case it would appear that in its dealings with its students that a boarding school for minors does act *in loco parentis* and that where a choice exists between the interests of a staff member and the best interests of a student that the school must choose to act in the student's best interests . . . . As noted by the court during the oral argument and by the defendants in their memorandum, it would appear that the breach of fiduciary duty action is subsumed with the negligence counts of the motion for judgment, so the practical effect of this ruling remains to be demonstrated.[108]

Also, in *In re the Arbitration Between Howell Public Schools and Howell Education Association*,[109] a teacher grieved a school board's decision to suspend her for one year based on alleged unethical conduct for her having received compensation (per student commissions and chaperone fees) from a travel company for having booked a trip with it to Washington, D. C. for her middle school students. The arbitrator denied the grievance, opining as follows concerning the school district's contention that the teacher breached a fiduciary obligation owed to her students:

> The grievant has challenged the employer's claim that she had a fiduciary relationship to the students as she acted in the dual role of teacher and tour director. However, the grievant herself testified that when she was in charge of the children on a trip she stood in the place of the student's parents. Beyond that there is a special relationship of trust between a teacher and a pupil. The teacher's role is one of in loco parentis. In this status the teacher is bound to take reasonable care of the students in his/her custody. This responsibility creates a fiduciary duty,

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106. *Id.* at *2.

107. *Id.*

108. *Id.* Although the trial court believed that plaintiff's breach of fiduciary duty claim would be subsumed by her negligence claim, as discussed previously, proof of a breach of fiduciary duty claim would impose a higher duty on a defendant than would proof of a negligence claim. *See supra* note 59 and accompanying text; *see also* Daly v. Derrick, 281 Cal. Rptr. 709, 717-18 (Cal. Ct. App. 1991) (holding that "[a] teacher, who stands in loco parentis has a fiduciary or confidential relationship to his or her students and assumes a corresponding duty of disclosure" (internal citation omitted)); Nelson v. Turner, 256 S.W.3d 37, 41 (Ky. Ct. App. 2008) (holding, in a case regarding a teacher's negligent supervision and failure to report an elementary school girl's sexual assault, that "[a] special, fiduciary quasi-parental relationship is created as a practical matter under such circumstances").

109. 1991 WL 692932 (Arb.) (1991) (Brown, Arb.).

> that is[,] there is a relationship of trust which can be relied upon by the students. A teacher who takes financial advantage of this relationship may be guilty of unethical conduct. The standards of the teaching profession would be violated if this role of trust is abused.[110]

And, in *State v. Evans*,[111] at a re-sentencing hearing for a public high school teacher convicted of trafficking in cocaine, the trial judge stated as a basis for sentencing the teacher to consecutive, rather than concurrent, terms that "[y]our [sic] were in a fiduciary relationship with the public, serving in loco parentis for all of Clyde High School."[112] The appellate court affirmed, finding and concluding that the trial court's reasoning based on the in loco parentis doctrine supported its sentencing decision.[113]

b. Non-in loco parentis cases.—In *Doe v. Terwilliger*,[114] a student brought a breach of fiduciary duty claim against her high school coaches, Terwilliger and Ford, stemming from sexual contact between the student and Terwilliger that occurred while she was a student-athlete.[115] The Judge Trial Referee denied Terwilliger's motion to strike, ruling as follows:

> It is well established that "[a] fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interest of the other . . . The superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him."
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> . . . .
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> In the present case, the plaintiff alleges the following: "Terwilliger was a coach (and is) employed by the Guilford Public Schools during all relevant times . . . Terwilliger was plaintiff's coach, mentor, and/or confidant for several years . . . Between the late fall of 2005 and the spring of 2006, defendant Gary Terwilliger committed numerous acts of harmful and/or offensive touching on the person of plaintiff Jane Doe, a then minor." The complaint goes on to allege several other incidents of harmful and offensive touching and harassment by the defendant. Count six specifically alleges: Terwilliger, as plaintiff's public school coach, mentor and confidant, a position of trust and confidence and superiority by defendant . . . and was in a fiduciary relationship with plaintiff . . . Terwilliger breached his fiduciary duty owed to plaintiff Jane Doe when he willfully and repeatedly engaged in harmful and offensive conduct

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110. *Id.* (citation omitted).
111. No. S-00-016, 2000 WL 1643515 (Ohio Ct. App. Nov. 3, 2000).
112. *Id.* at *1.
113. *Id.* at *3.
114. No. CV095024692S, 2010 WL 2926168 (Conn. Super. Ct. June 8, 2010).
115. *Id.* at *1.

> against the plaintiff . . . .
>
> Given the plaintiffs allegations in this case, the court is satisfied that she has plead sufficient facts to allege the existence of a fiduciary relationship between herself and the defendant and as a result, denies the defendant's motion. The court is persuaded by the Supreme Court's disinclination to confine the fiduciary duty doctrine to a precise definition and its willingness to allow for case-by-case analysis in new situations.
>
> The court is further persuaded by the fact that Connecticut courts, addressing the existence of a fiduciary relationship, attach significance to whether the plaintiff was a minor and additionally, draw a line between a typical student-teacher relationship and those relationships that include "something more," namely acts of fraud, misconduct or misappropriation on behalf of the superior party. Given the collaborative nature of the relationship between a public school coach and a student-athlete, and that the minor plaintiff has alleged that the defendant, her "mentor and confidant," engaged in several acts of sexual misconduct and harassment, the court is convinced that more factual development is warranted in this case.[116]

In *Vicky M. v. Northeastern Educational Intermediate Unit 19*,[117] the parents of an autistic student filed a fourteen-count complaint against a school district, an educational intermediate unit, various supervisory employees and officials, and a special education teacher who allegedly used aversive techniques and restraints on autistic students.[118] In addition to claims under special education law and the United States Constitution, the parents alleged a claim for breach of fiduciary duty against the student's special education teacher under Pennsylvania law.[119] The district court denied the defendants' motion to dismiss as it pertained to the breach of fiduciary duty claim, holding that

> [u]nder Pennsylvania law, "[t]he general test for determining the existence of . . . a [fiduciary] relationship is whether it is clear that the parties did not deal on equal terms." Indeed, a fiduciary relationship "is not confined to any specific association of the parties." Rather, a fiduciary relationship will be found to exist "when the circumstances make it certain the parties do not deal on equal terms, but, on the one side

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116. *Id.* at *1, *4 (alterations in original) (citation omitted). Less than two months later, another judge of the same court, relying on the same reasoning discussed above, denied a motion to strike the student's claim for breach of fiduciary duty against the other coach, Ford, who had allegedly facilitated the student's contact with Terwilliger. Doe v. Terwilliger, No. CV095024692, 2010 WL 3327861, at *1-2 (Conn. Super. Ct. July 29, 2010).

117. 486 F. Supp. 2d 437 (M.D. Pa. 2007).

118. *Id.* at 445-47.

119. *Id.* at 446, 451.

> there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed; in both an unfair advantage is possible." . . . Failure to act in the other's interest results in breach of the duty imposed by the fiduciary relationship.
>
> Certainly, Defendant Wzorek, as the special education teacher in charge of the instruction of Minor-Plaintiff AJM, a child with autism, was in an overmastering position in this relationship, and was trusted and depended upon by AJM to exercise sound judgment in handling his care and instruction. Consequently, when viewed in the light most favorable to the Plaintiffs, Defendant Wzorek's motion to dismiss this Count must be denied.[120]

Finally, in *Rocci v. Ecole Secondaire MacDonald-Cartier*,[121] a teacher brought a defamation action against a teacher-chaperone and the school, alleging that the chaperone's letter to the teacher's principal, which criticized the teacher's supervisory conduct of students on a school trip, was defamatory.[122] The New Jersey Supreme Court affirmed the trial court's grant of summary judgment on the teacher's defamation claim based, in part, on the teacher's characterization of her duty to students as fiduciary in nature.[123] According to the court,

> [i]n her supplemental brief, plaintiff acknowledges that defendant's letter implicates a matter of public concern. More specifically, she states that her "role was one as a fiduciary charged with the care of her students. On its face, the letter appears to concern itself with the students [sic] well being." In view of that fiduciary role and the public interest, we believe that there must be free discourse, commentary, and criticism regarding a teacher's professionalism and behavior during a school-sponsored event. That principle, which is at the heart of this case, tips the scale in favor of requiring plaintiff to allege more than mere embarrassment to survive summary judgment. Hence, although a private figure, plaintiff is required to allege and prove pecuniary or reputational harm.[124]

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120. *Id.* at 458-59 (first, second, and third alterations in original) (citations omitted). For additional decisions in cases brought by other plaintiffs against the same defendants where the court denied motions to dismiss claims for breach of fiduciary duty on identical grounds, see Joseph M. v. Ne. Educ. Intermediate Unit 19, 516 F. Supp. 2d 424, 442-43 (M.D. Pa. 2007); Sanford D. v. Ne. Educ. Intermediate Unit 19, No. 3:06-CV-019042007, WL 1450310, at *15-16 (M.D. Pa. May 15, 2007); Kimberly F. v. Ne. Educ. Intermediate Unit 19, No. 3:06-CV-01902, 2007 WL 1450364, at *15-16 (M.D. Pa. May 15, 2007). Also, for a decision by the same court denying defendant Wzorek's motion for summary judgment on the breach of fiduciary duty claim, see Vicky M. v. Ne. Educ. Intermediate Unit, 689 F. Supp. 2d 721, 739-40 (M.D. Pa. 2009).

121. 755 A.2d 583 (N.J. 2000).

122. *Id.* at 584-85.

123. *Id.* at 587.

124. *Id.* (alteration in original).

B. Scholarship/Commentary

1. Scholarship/Commentary Indirectly Discussing the K-12 Fiduciary Relationship Issue.—The split in judicial opinion concerning whether or not a fiduciary relationship exists between K-12 schools and school personnel and their students has not been replicated in the scholarship addressing the issue. Instead, the vast majority of commentators, although invariably addressing the fiduciary relationship issue only indirectly and in broader discussions concerning sexual abuse or sexual harassment, have assumed or opined that primary and secondary school teachers are fiduciaries to their student charges—primarily because of the power that teachers hold, the trust placed in them by society, parents and students, and the vulnerability of students.[125] Certainly, some of those commentators have hedged their bets, characterizing the K-12 teacher-student relationship as "fiduciary-like"[126] or "fiduciary-type"[127] or "resembl[ing] a fiduciary relationship."[128] Other commentators, however—again, in discussing broader issues and not analyzing the fiduciary relationship issue in detail—have been far less equivocal: those commentators have stated that "[t]eachers are fiduciaries who hold the trust, intellectual development, and academic advancement of their students in their hands;"[129] that "the role of a teacher is that of a fiduciary, and . . . leaders of our children . . . "[130] and that, "in the context of sexual victimization, fiduciaries include employers, clergy, *teachers*, youth leaders, professors, attorneys and other professionals."[131]

2. Scholarship/Commentary Directly Discussing the K-12 Fiduciary Relationship Issue.—Those scholars who have directly addressed the issue are far fewer, but have likewise urged or concluded that K-12 teachers owe a fiduciary

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125. *See, e.g.*, Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 483 (1999); Stefanie H. Roth, *Sex Discrimination 101: Developing a Title IX Analysis for Sexual Harassment in Education*, 23 J.L. & EDUC. 459, 509-10 (1994); Carrie N. Baker, *Sexual Extortion: Criminalizing Quid Pro Quo Sexual Harassment*, 13 LAW & INEQ. 213, 242 n.203 (1994); Neera Rellan Stacy, Note, *Seeking a Superior Institutional Liability Standard Under Title IX for Teacher-Student Sexual Harassment,* 71 N.Y.U. L. REV. 1338, 1342, 1372 (1996); Kimberly A. Lake, Casenote, *First Amendment—Freedom of Speech—Where Alleged Defamatory Speech Implicates a Matter of Public Interest, Reputational or Pecuniary Harm May Not Be Presumed Absent a Showing of Actual Malice* – Rocci v. Ecole Secondaire MacDonald-Cartier*, 755 A.2d 583 (N.J. 2000),* 11 SETON HALL CONST. L.J. 887, 911 (2001); Gregory M. Posner-Weber, *Sexual Abuse by Professionals: A Legal Guide*, 69-NOV WIS. LAW. 59, 60 (1996) (reviewing STEVEN B. BISBING ET AL., SEXUAL ABUSE BY PROFESSIONALS: A LEGAL GUIDE (1995)).

126. Gergen, *supra* note 125.

127. Stacy, *supra* note 125, at 1342, 1372.

128. Baker, *supra* note 125, at 242 n.203.

129. Roth, *supra* note 125, at 509-10.

130. Lake, *supra* note 125, at 911.

131. Posner-Weber, *supra* note 125, at 60 (emphasis added).

duty to students—although they differ as to whether the duty is ethical and/or moral, as opposed to legal.[132] Thus, one scholar has focused on the teacher's fiduciary role as ethical and moral, stating as follows:

> This article proposes that the relationship between teacher and student is fiduciary. It develops the thesis that a primary or secondary school teacher has especially high duties to the student: obligations, resembling those of a guardian, a trustee, an executor, and an attorney, of fidelity, zealous devotion to the well-being of the other party, and full disclosure. This article does not endorse this approach for the positive law. It is not here proposed that teachers be held legally liable for violations of those obligations. The topic of this article, rather, is ethics. The teacher, it is here proposed, is morally a fiduciary.[133]

Two other scholars, in the most comprehensive article on the teacher-student fiduciary relationship issue yet written, have assumed, both historically and currently, that fiduciary relationships existed, and will exist, between teachers and students in certain circumstances.[134] Those scholars have noted the shortcomings of applying "[t]raditional [d]octrinal [a]pproaches" such as the duty of care and loyalty in resolving fiduciary duty cases in the education setting.[135] Focusing primarily on college and university case law and issues, these scholars have developed the following "underlying organizing principles"[136] in determining when a fiduciary relationship exists between a teacher and student, the nature of the fiduciary duty involved, and the existence and magnitude of any breach of that duty:

> [I]n determining the likelihood of legal liability for an alleged breach of fiduciary duty, one should engage in three inter-related enquiries. (1) The first enquiry involves considering and analyzing a set of factors and indicia to determine whether a fiduciary relationship between two parties exists and, more importantly, the magnitude of duty that arises within that particular relationship and context. Such an enquiry helps determine whether a fiduciary in a particular situation owes a relatively high or relatively low degree of duty. (2) The second enquiry involves analyzing a related set of factors and indicia that will help determine the height or

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132. *See, e.g.*, Scott FitzGibbon, *Educational Justice and the Recognition of Marriage,* 2011 BYU EDUC. & L.J. 263, 274-76; Brett G. Scharffs & John W. Welch, *An Analytic Framework for Understanding and Evaluating the Fiduciary Duty of Educators*, 2005 BYU EDUC. & L.J. 159, 163-65; Commentators in Canada likewise view the K-12 teacher-student relationship as fiduciary in nature. *See, e.g.*, Jim Davies, *Sexual Abuse of Children by Teachers: A Canadian Perspective on Direct and Vicarious Employer Liability*, 11 EDUC. & L.J. 131 (2001-2002); G. V. La Forest, *Off-Duty Conduct and the Fiduciary Obligations of Teachers*, 8 EDUC. & L. J. 119 (1997).

133. FitzGibbon, *supra* note 132, at 263.

134. Scharffs & Welch, *supra* note 132, at 159-64.

135. *Id.* at 165-66.

136. *Id.* at 166.

> degree of the fiduciary's behavior. (3) The third step is to measure the amplitude of the fiduciary's performance to determine the extent to which that conduct exceeded or fell short of the required level of performance. If there has been a shortfall or breach of duty, this enquiry then determines the amount or type of appropriate remedies. This step also considers how easy or difficult it would have been for the fiduciary to fulfill his or her duty, whether there are any special reasons why a court should not get involved in second guessing the fiduciary or substituting its judgment for that of the fiduciary, and whether there is an available remedy that would be appropriate in rectifying or at least ameliorating the effects of the breach of duty.
>
> This approach to analyzing fiduciary duties is helpful in several ways. It inherently recognizes that all fiduciary duties are not created equal, and that all breaches will not be regarded as equally harmful. For example, by conducting this type of analysis we learn that courts are most likely to find liability in cases involving duties of a high magnitude coupled with breaches of a high magnitude and where there is an available appropriate remedy. Conversely, if a low-degree duty is coupled with a low-degree breach and there is no remedy that seems appropriate for the situation, courts are unlikely to impose legal liability. Cases involving a high degree of duty and a low degree breach, or cases involving a low degree duty and a serious breach prove to be the most difficult situations in which to predict outcomes; but even in such cases, the approach outlined below allows lawyers, judges, and litigants to identify and produce all the evidence systematically relevant to a sound resolution of the case. In all cases, this approach identifies specific, quantifiable elements that allow judges, lawyers, and administrators to marshal the evidence and make reasonable judgments in calculating the magnitude of duty owed and the degree of violation of duty that may have occurred.[137]

Specifically, the authors identified the factors alluded to above as follows:

> As is the case in each unique context, some of the factors that contribute to an analysis of the magnitude of duties and the magnitude of breaches are of particular significance in the educational setting. For example, in assessing magnitude of duties and breaches in the educational context, the following considerations are often important: the degree of actual power or control entrusted to the fiduciary, the age and vulnerability of the beneficiary, the experience and sophistication of both the fiduciary and the beneficiary, the formality in the creation of the agreement between the fiduciary and beneficiary, the history and duration of the relationship, the degree and cause of reliance in a relationship, the divergence of interests between the fiduciary and beneficiary, and the

137. *Id.* at 167-68 (footnotes omitted).

specificity of duty, among others.[138]

Applying this analytical framework and these factors to four areas—evaluation and grading, research relationships, patents and inventions, and sexual harassment—where courts have attempted to determine whether teachers or educational institutions are liable for breach of fiduciary duties to students, the authors conclude that courts should find and have found breaches of a fiduciary duty in several circumstances.[139] A chart summarizing their analysis and conclusions shows the following:

Educational Area	**Magnitude of Duty**	**Magnitude of Breach**	**Breach of Fiduciary Duty**
Evaluation/Grading	Relatively Low	Relatively Low	No
Research Relationships	Relatively High	Relatively High	Yes
Patents and Inventions	Relatively High	Relatively High	Yes
Sexual Harassment	High	High	Yes

Given the nature of the four educational areas selected, it is not surprising that the authors focused their analysis on decisions and issues in the higher education setting. Indeed, of the four areas selected, only sexual harassment (and sexual abuse) and, to a far lesser extent, grading and evaluation present themselves in the K-12 setting. And, given the in loco parentis doctrine's current inapplicability to higher education,[140] it is likewise not surprising that the authors did not discuss, let alone analyze, the effect of that doctrine on the existence of teacher-student fiduciary relations.

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138. *Id.* at 168-69.

139. *Id.* at 161, 219-29.

140. *See supra* note 13 and cases and commentary discussed therein; *see also* Buttny v. Smiley, 281 F. Supp. 280, 286 (D. Colo. 1968) (noting "that the doctrine of 'In Loco Parentis' is no longer tenable in a university community"); Univ. of Md. E. Shore v. Rhaney, 858 A.2d 497, 499 n.2 (Md. Ct. Spec. App. 2004) ("Most jurisdictions have rejected the proposition that a college owes an *in loco parentis* obligation to its students." (citing Nero v. Kan. State Univ., 861 P.2d 768 (Kan. 1993))). Commentators have also almost uniformly proclaimed the in loco parentis relationship defunct at the college and university level. *See, e.g.*, WILLIAM A. KAPLIN, THE LAW OF HIGHER EDUCATION 5-7 (2d ed. 1985) (outlining factors leading to the demise of the *in loco parentis* doctrine in higher education); Zirkel & Reichner, *supra* note 15, at 282 (noting that in "the college context . . . *in loco parentis* . . . has undergone a clear rise and complete demise in [American] courts").

IV. WHY A PORTION OF THE CASE LAW HOLDS AND NEARLY ALL OF THE SCHOLARSHIP/COMMENTARY OPINES THAT K-12 TEACHERS ARE FIDUCIARIES TO STUDENTS

Several reasons can explain the split in the case law and the near-unanimity in the commentary and scholarship concerning whether K-12 teachers should owe fiduciary duties to their students.

A. Analogistic and Moralistic Reasoning and the Teacher's Professional Role

First and foremost, the judicial and scholarly inclination to recognize K-12 teachers as fiduciaries to their students stems from the characterization of teachers as fiduciaries when doctrinal analysis—including, in particular, doctrinal analysis under the in loco parentis doctrine—might not lead to that result. More and more frequently, teachers are identified as role models.[141] Indeed, depending on school boards' (and judges' and juries') views concerning teacher conduct—both on- and off-duty—and its nexus to a teacher's qualifications and fitness to teach, a teacher's job may depend on whether his or her conduct satisfies role model criteria.[142] And, the education community has rightly attempted to professionalize teachers—by adopting and enforcing Codes of Professional Conduct[143] and continuing education requirements[144] and by seeking increases in teacher salaries and other forms of compensation.[145]

B. Student Vulnerability and Need for Protection

Students, of course, are on the other side of the equation. At the K-12 level and, particularly, in the primary and middle school grades, students constitute the quintessential vulnerable population. Judges, commentators and society in general rightly expect teachers to protect students from harm and exploitation to the extent teachers have the power to do so. At the very least, teachers are expected to not cause students harm, to not exploit students—physically or emotionally—and to certainly avoid doing so in the sexually abusive and/or sexually harassing manner that makes up the allegations in so many of the K-12 teacher-student fiduciary duty cases discussed above.[146]

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141. *See supra* note 1 and accompanying text.

142. *See, e.g.*, Walthart v. Bd. of Dirs. of Edgewood-Colesburg Cmty. Sch. Dist., 694 N.W.2d 740, 748 (Iowa 2005).

143. *See, e.g.*, IDAHO STATE DEP'T OF EDUC., CODE OF ETHICS FOR IDAHO PROFESSIONAL EDUCATORS (2009), *available at* http://www.sde.idah.

144. *See, e.g.*, Thomas B. Corcoran, *Helping Teachers Teach Well: Transforming Professional Development*, CPRE POLICY BRIEFS (June 1995), *available at* http://www2.ed.gov/pubs/CPRE/t61/index.html.

145. *See, e.g.*, *Take Action to Honor and Reward Teachers*, AM. TEACHER, http://www.theteachersalaryproject.org/outreach.php (last visited July 6, 2013).

146. Of the nearly twenty-five cases surveyed and discussed in Part III.A. of this Article, more than half involved allegations of teacher-on-student sexual relations or harassment.

C. The K-12 Teacher-Student Relationship and the Uncertainty Stemming from Analogy

The confluence of these three factors—increased professionalism expectations placed upon teachers, the vulnerability of K-12 students, and the morally-laden fact patterns of a substantial number of the reported decisions—has led to analogistic, non-doctrinal reasoning on the part of judges. In turn, that reasoning has led to the conclusion that primary and secondary school teachers are fiduciaries to their student charges and/or deciding breach of fiduciary duty claims against those same teachers. Thus, in *Evans*, both the trial judge and appellate court, in re-sentencing and in reviewing the re-sentencing of a public school teacher for drug trafficking, were able to justify a harsher sentence by blithely stating that the teacher, under the in loco parentis doctrine, was a fiduciary to the public (not just the students) served by the high school where the teacher taught.[147]

Similarly, in *Rocci*, the teacher's own acknowledgment that her "role was one as a fiduciary charged with the care of her students" in supervising students on a field trip went well beyond the duties required of teachers under the in loco parentis doctrine.[148] And, in the two cases where courts expressly used analogistic thinking, they came to diametrically-opposite results. Thus, in *McMahon*, a case involving an alleged sexual relationship between a boarding school staff member and a student, the court, relying on the in loco parentis doctrine and analogizing that "the relationship between a boarding school and its minor student has the same dignity under the law as the relationship between a bank and its customers and that between partners," held that the student had stated a claim for breach of fiduciary duty against the school.[149]

Conversely, in *Key*, where the mother of a special needs student brought suit on behalf of herself and the student against a Catholic school, its administrators and teachers who allegedly caused the student to withdraw from the school by failing to meet the student's needs under the law, the appellate court, not relying on or mentioning the in loco parentis doctrine, analogized the facts to prior case law holding that priests do not owe a fiduciary duty to parishioners and affirmed the lower court's holding that the school and its personnel did not owe a fiduciary duty to the student.[150]

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147. State v. Evans, No. S-00-016, 2000 WL 1643515, at *1 (Ohio Ct. App. Nov. 3, 2000); *see also* discussion *supra* notes 111-13 and accompanying text.

148. Rocci v. Ecole Secondaire MacDonald-Cartier, 755 A.2d 583, 587 (N.J. 2000); *see also* discussion *supra* notes 121-24 and accompanying text.

149. McMahon v. Randolph-Macon Acad., No. 97-11, 1997 WL 33616521, at *2 (Va. Cir. Ct. June 16, 1997); *see also* discussion *supra* notes 102-08 and accompanying text.

150. Key v. Coryell, 185 S.W.3d 98, 101, 106 (Ark. Ct. App. 2004); *see also* discussion *supra* notes 76-79 and accompanying text.

D. Return to Doctrine

As discussed more fully below, a return to doctrinal underpinnings—specifically, a return to a proper understanding and application of the in loco parentis doctrine and law of fiduciary duty relevant to the K-12 teacher-student context—should enable courts to avoid (or, at the very least, augment) the analogistic and moralistic reasoning that has led to a split in the case law. Equally important, greater reliance on doctrinal thinking will better enable courts to properly determine whether and when K-12 teachers have a fiduciary relationship with students. That doctrinal-based proposal as to whether and/or when K-12 schools and school personnel owe a fiduciary duty to students and a discussion linking that proposal to well-settled principles of in loco parentis and fiduciary law follows.[151]

V. THE PROPOSED STANDARD AND EXCEPTIONS

Applying well-settled principles from the in loco parentis doctrine and the law creating and regulating fiduciary relationships, this Article proposes the following standard regarding whether, and/or when, K-12 schools and school personnel, including teachers and administrators, owe a fiduciary duty to students:

(1) As a general rule, K-12 schools and school personnel should not be held to owe a fiduciary duty to students. Specifically, no fiduciary duty should exist when school personnel engage in conduct undertaken as a legitimate part of the purpose for which they are employed. Primary and secondary school administrators and teachers are employed for the purpose of the student's education or the education of the group of which the student is a member; and

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151. To be sure, doctrinal or rules-based analysis *and* analogistic reasoning are fundamental to legal analysis and are not mutually exclusive. *See* Wilson Huhn, *The Stages of Legal Reasoning: Formalism, Analogy, and Realism*, 48 VILL. L. REV. 305, 305-06, 359-61 (2003). In this regard, the decision to recognize or not recognize a fiduciary relationship between K-12 teachers and students, guided by duty of care principles derived from the in loco parentis doctrine, requires analogistic thinking in the sense that a decision-maker should and must evaluate the comparative factual and legal circumstances informing that relationship when deciding whether to recognize a fiduciary relationship in one set of circumstances, but not in another. Indeed, this Article's conclusion that a fiduciary relationship should exist between a K-12 teacher and a student when the teacher engages in *ultra vires* acts relies on *both* a negative implication from the application of the in loco parentis doctrine to circumstances where a teacher engages in conduct stemming from the purposes for which he or she is employed *and* on analogizing to other fiduciary relationships. The point, ultimately, is one of emphasis. Reliance on analogistic (and moralistic) thinking to the exclusion or at the expense of in loco parentis (and fiduciary duty) doctrinal principles when analyzing the question of whether K-12 schools and school personnel owe students a fiduciary duty would be shortsighted—particularly where the in loco parentis doctrine has had such a long pedigree and analogistic reasoning has led to less-than-consistent judicial decision making.

(2) K-12 schools and school personnel should only be held to owe a fiduciary duty to students under two general circumstances: when they either (a) engage in conduct, such as sexual harassment or abuse, wholly outside the purpose of, but made possible by, that educational relationship or (b) take on traditional fiduciary role such as holding money in trust or otherwise administering funds for students.

A. The General Rule: K-12 Schools and School Personnel Do Not Owe a Fiduciary Duty to Students When Administrators and Teachers Engage in Conduct for the Purposes for Which They Were Hired, i.e., the Education of Students

1. The In Loco Parentis-Derived Standard of Care is Lower than a Fiduciary Duty.—As discussed previously, the in loco parentis doctrine generally enhances the authority of K-12 schools and school personnel over students or, stated conversely, limits the rights of individual students.[152] Although the in loco parentis doctrine has a student-protective aspect, the standard of care for administrators and teachers under the doctrine favors school and school personnel: as a matter of tort law, schools and school personnel will be liable to students only when they act unreasonably, i.e., negligently, or, even more forgiving, when they engage in willful and wanton conduct.[153] In contrast, as also discussed previously, a fiduciary duty is a higher and more exacting standard of care than the reasonableness standard under negligence principles.[154] Thus, courts, such as in *Franchi* and *Thomas*, which have expressly or implicitly acted consistent with the in loco parentis doctrine by refusing to impose a higher, fiduciary duty on K-12 schools and school personnel vis-à-vis students,[155] have acted in a doctrinally-sound manner. Conversely, courts, such as in *Terwilliger* and *McMahon*, which have suggested or held that K-12 schools and school personnel owe a fiduciary duty to students—either without reference to the in loco parentis doctrine or, worse, in reliance on the doctrine[156]—have strayed from or, in the latter instance, misapprehended fundamental principles of in loco parentis.

2. Parents and Guardians, i.e., the Source of In Loco Parentis Authority, Are Not Generally Fiduciaries to Their Children.—Although not directly addressed by the cases and scholarship discussed above, parents and guardians, i.e., the

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152. *See supra* notes 15-20 and accompanying text.

153. *See supra* notes 25-29 and accompanying text.

154. *See supra* text accompanying note 59.

155. *See* Franchi v. New Hampton Sch., 656 F. Supp. 2d 252, 264-65 (D.N.H. 2009); Thomas v. Bd. of Educ., 759 F. Supp. 2d 477, 503-04 (D. Del. 2010); *see also supra* text accompanying notes 67-69, 73-75.

156. *See, e.g.*, Doe v. Terwilliger, No. CV095024692, 2010 WL 3327861, at *1-2 (Conn. Super. Ct. July 29, 2010); McMahon v. Randolph-Macon Acad., No. 97-11, 1997 WL 33616521, at *1-2 (Va. Cir. Ct. June 16, 1997); *see also supra* text accompanying notes 102-08, 114-16.

individuals from whom K-12 schools and school personnel receive their delegated in loco parentis authority, do not generally owe a fiduciary duty to their children.[157] Thus, again, any suggestion that, as general matter, K-12 schools and school personnel owe a fiduciary duty to students fails to take into account the source of and limitations on the delegated authority exercised by schools and school personnel under the in loco parentis doctrine.

3. The In Loco Parentis-Derived Standard of Care, and Not a Higher Fiduciary Duty, Is Applicable Where Teachers Engage in Conduct Undertaken for the Educational Purposes for Which They Are Employed.—As pointed out previously, the in loco parentis doctrine, by focusing on the fact that school districts employ teachers for the purpose of educating students, contains within it both the breadth of and limitations on its applicability in the K-12 teacher-student context.[158] Specifically, courts have defined the duties arising from a teacher's employment as follows:

> The basic duties which arise from the teacher-student relationship are a duty to supervise, a duty to exercise good judgment, and a duty to instruct as to correct procedures, particularly, not but exclusively, when potentially hazardous conditions or instrumentalities are present, and these basic duties must co-exist with the whole purpose for the teacher-student relationship, viz. education.[159]

Thus, as long as school personnel engage in conduct undertaken as a legitimate part of the educational purpose for which they are employed—and, more particularly, engage in conduct consistent with their job duties of supervising and instructing students—the duty of care standard derived from the in loco parentis doctrine should apply. In turn, under in loco parentis, a negligence (or willfulness) standard, rather than the more exacting fiduciary duty standard, should govern the K-12 teacher-student relationship. As discussed below, only when a teacher engages in conduct beyond the purposes for which he or she is employed—in other words, engages in *ultra vires*[160] acts such as sexual harassment or sexual abuse—(or acts as a traditional fiduciary by holding money or property in trust for a student) should the K-12 teacher owe a fiduciary obligation to students.[161]

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157. *See supra* notes 57-58 and accompanying text.

158. *See supra* notes 21-24 and accompanying text.

159. Walsh v. Krantz, No. 1:07-CV-0616, 2008 WL 3981492, at *7 (M.D. Pa. Aug. 22, 2008) (citing Vicky M. v. Ne. Educ. Intermediate Unit 19, 486 F. Supp. 2d 437, 458 (M.D. Pa. 2007)), *aff'd*, 386 Fed. Appx. 334 (3d Cir. 2010).

160. "Ultra vires" means literally "beyond the powers of" in Latin and has been defined as "[u]nauthorized; beyond the scope of power allowed or granted by a corporate charter or by law." BLACK'S LAW DICTIONARY, *supra* note 10, at 1559.

161. As discussed previously, this differentiation of roles is consistent with well-settled principles of fiduciary law recognizing that an individual or entity may owe a fiduciary duty to another person for one purpose, but not to the same person for another purpose. *See supra* text accompanying note 56. More important, this distinction not only comports with the internal

4. Recognition of a Fiduciary Duty May Conflict with the Duty of Undivided Loyalty and Conflict of Interest Principles.—Recognition of a fiduciary relationship between K-12 schools and school personnel and their students would run contrary to both the duty of undivided loyalty owed by fiduciaries to their beneficiaries, partners and the like and the prohibition on conflicts of interest which governs fiduciaries' conduct.[162] Teachers, in the course of performing their teaching duties, have many "constituents" or "clients"—individual students, to be sure, but also groups of students in the classroom and in the building in which they work, parents, school administrators, and school boards. Indeed, one commentator has explained why K-12 teachers should not have a fiduciary duty to students as a matter of positive law (as opposed to ethical or moral compunction) as follows:

> The law's omission to subject teachers to fiduciary duties can be explained in part by institutional considerations. Most teachers are civil servants, subject to supervision by school administrators, school boards, and other elected officials. Teachers are also, to some extent, subject to supervision by parents. Perhaps these supplementary sources of direction and control are sufficient to remedy the incapacity and lack of experience of the students.[163]

The above-quoted language suggests that courts should not hold teachers to be fiduciaries because student vulnerability can be compensated for by other educational stakeholders. However, at least one court has looked at some of those institutional considerations and reached the same conclusion by alluding to the divided loyalties and/or conflicts of interest they may cause:

> The facts do not show that "that [the school] undertook to act primarily for the benefit of [the student]." To the contrary, the Head of School's Welcome Letter in the Student Handbook sets a tone that suggests that the paramount interest of all members of the Porter's community should be *Porter's,* and *not* the students. Windsor's letter states that "[w]hat makes our community successful is the personal dedication of each individual to fulfilling her own dreams and desires and to *working*

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limitations set forth in the in loco parentis doctrine itself, but is also consistent with the broader in loco parentis doctrine's focus on the situs of teacher-student interaction and possible student injury. In this regard, a teacher will invariably engage in conduct consistent with the education purposes for which he or she was hired either on school grounds or on an authorized school activity, such as a field trip or extracurricular athletic or academic event, away from school grounds. Under these circumstances, in loco parentis-derived liability for tortious conduct would be under a negligence (or willful and wanton) standard, not the higher duty of care owed by a fiduciary. Conversely, a teacher is more likely to engage in *ultra vires* conduct—such as engaging in sexual relations with a student—away from school grounds. Under these latter circumstances, in loco parentis has no application and the higher, fiduciary duty standard of care should apply.

162. *See supra* notes 60-61 and accompanying text.

163. FitzGibbon, *supra* note 132, at 268.

wholeheartedly for the good of Porter's."[164]

In this day and age, with increasingly larger class sizes and inclusionary models for teaching students of all abilities in the same classroom, it is hard to imagine a teacher, while engaging in conduct designed to fulfill the educational purposes for which he or she is employed, fulfilling a duty of loyalty to every individual student. Indeed, in contrast to the classroom teaching scenario, the paradigmatic examples of fiduciary relationships, such as the attorney-client or trustee-beneficiary relationships, typically involve one-on-one relationships or relationships where only a small number of individuals are entitled to the benefits and protections of the relationship. Certainly, there are many instances where teachers, performing their job duties, have no conflict of interest as between and amongst students and other constituencies, including the school itself. Delivering instruction to groups of regular education students and supervising students on school grounds should, generally speaking, not raise any such issues. However, attempting to deliver instruction to, and provide appropriate supervision and discipline of, both regular education and special education students in the same classroom setting inherently tests the limits of a teacher's ability to fulfill a duty of loyalty to any one student. In so doing, the teacher must struggle with teaching and regulating the conduct of students with wildly differing intellectual, not to mention emotional, physical, and social abilities.

5. *Recognition of a Fiduciary Duty Is Not Necessary to Fill a Remedial Gap*.—Lastly, a refusal to recognize liability for breach of fiduciary duty when K-12 teachers engage in conduct designed to fulfill the educational purposes for which they are employed would not meaningfully reduce or limit the remedies to which a student would be entitled. Remedies for breach of fiduciary duty often replicate the damages for breach of contract,[165] which typically are insignificant in the public school setting because of the lack of consideration changing hands between students or their parents/guardians and schools, and would also include tort remedies.[166] As discussed above, however, state law tort remedies are available to students, either individually or through their parents or guardians, when schools and school personnel fail to satisfy their duty to supervise students or when they otherwise act negligently or willfully and wantonly.[167] Likewise, federal civil rights remedies are available to students when schools or school personnel violate their rights under Section 1983.[168] And, federal remedies under Section 504 of the Rehabilitation Act and the Individuals with Disabilities in

164. Bass *ex rel.* Bass v. Miss Porter's School, 738 F. Supp. 2d 307, 331 (D. Conn. 2010) (third alteration in original) (citation omitted).

165. Hartford Fin. Servs. Grp., Inc. v. Carl J. Meil, Jr., Inc., No. WDQ-10-2720, 2011 WL 1743177, at *6 (D. Md. May 5, 2011); Fin. Servs. Vehicle Trust v. Saad, 900 N.Y.S.2d 353, 354 (N.Y. App. Div. 2010).

166. Gen. Bus. Machs. v. Nat'l Semiconductor Datachecker/DTS, 664 F. Supp. 1422, 1425 (D. Utah 1987); Multimedia Techs., Inc. v. Wilding, 586 S.E.2d 74, 78 (Ga. Ct. App. 2003).

167. *See supra* notes 26-29 and accompanying text.

168. *See, e.g.*, C.B. v. Sonora Sch. Dist., 819 F. Supp. 2d 1032, 1052 (E.D. Cal. 2011).

Education Act will be available to special education students when schools fail to comply with the mandates of special education law.[169] Thus, the ability to recover damages for breach of fiduciary duty when teachers do not fulfill the purposes for which they are employed adds little to the remedies otherwise available to students under those circumstances.[170]

B. Exceptions to the General Rule: K-12 Schools and School Personnel Should Owe a Fiduciary Duty to Students When Administrators and Teachers Engage in Conduct Made Possible by, but Beyond, the Educational Purposes for Which They Are Employed or When They Act as Traditional Fiduciaries

1. K-12 School Personnel Should Owe a Fiduciary Duty to Students for Ultra Vires *Acts Resulting from their Educational Relationship*.—This Article's determination that the in loco parentis doctrine and relevant principles of fiduciary duty compel the conclusion that K-12 schools and school personnel do not owe a fiduciary duty to students when administrators and teachers engage in conduct undertaken as a legitimate part of the educational purposes for which they are employed does not necessarily mean that a fiduciary duty exists when administrators and teachers engage in *ultra vires* acts. At most, that determination suggests by negative implication that either the converse is true or that it would be consistent with the in loco parentis doctrine to hold K-12 school personnel to a higher, fiduciary duty standard when they engage in conduct with students that was made possible by, but was beyond, the legitimate educational purposes for which they were hired. The key, then, is to evaluate the nature of the K-12 teacher-student relationship to determine whether there are additional factors—both doctrinal and analogistic—that support the imposition of a fiduciary duty on teachers for their *ultra vires* acts. As discussed below, both by negative implication from application of in loco parentis principles to circumstances where teachers engage in conduct in furtherance of legitimate educational purposes and assessment of the K-12 teacher-student relationship lead

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169. E.S. v. Konocti Unified Sch. Dist., No. 1:10–cv–02245–NJV, 2010 WL 4780257, at *6 (N.D. Cal. Nov. 16, 2010); Breanne C. v. S. York Cnty. Sch. Dist., 732 F. Supp. 2d 474, 483 (M.D. Pa. 2010).

170. Courts have almost universally refused to recognize tort claims for educational malpractice brought by or on behalf of students against educational institutions, including K-12 schools, seeking to challenge the quality or sufficiency of the services provided by school employees, the course of instruction, and overall education provided. *See, e.g.*, Waugh v. Morgan Stanley & Co., 966 N.W.2d 540, 549-54 (Ill. App. Ct. 2012) (collecting cases). Because claims for educational malpractice are not available to students and/or their parents or guardians, courts have rejected educational malpractice claims when they have been recast as breach of fiduciary duty claims. *See, e.g.*, Houston v. Mile High Adventist Acad., 846 F. Supp. 1449, 1456, 1459 (D. Colo. 1994); Ogindo v. DeFleur, No. 07-CV-1322, 2008 WL 5105153, at *8 (N.D.N.Y. Oct. 16, 2008) ("New York's policy of precluding educational malpractice claims may not be circumvented by couching the claim in terms of some other cause of action." (citing Alligood v. Cnty. of Erie, 749 N.Y.S.2d 349 (N.Y. App. Div. 2002))).

to the conclusion that teachers are fiduciaries to students when their education relationship leads to *ultra vires* conduct.[171]

a. Recognition of a fiduciary duty for ultra vires conduct is consistent (or, at least, not inconsistent) with application of the in loco parentis doctrine.—As discussed above, the in loco parentis doctrine is self-limiting: by its terms, it applies only when K-12 school personnel engage in conduct designed to fulfill the educational purposes for which they are employed.[172] Thus, in loco parentis—and more important, its limitations on the tort liability of school personnel to negligent or even wanton and willful conduct directed toward students—has no application where teachers engage in conduct wholly inconsistent with their educational mission. Teacher conduct involving sexual abuse or harassment directed toward students clearly falls into this *ultra vires* category. Indeed, such conduct violates ethical canons of the teaching profession,[173] and can lead to discharge from employment,[174] civil liability,[175] or criminal sanctions.[176] For these reasons, nothing in the in loco parentis doctrine itself limits the extension of fiduciary obligations to the K-12 teacher-student relationship when teachers engage in *ultra vires* conduct affecting students.

b. The relationship of trust and confidence created by the K-12 teacher-student educational relationship, as well as the teacher's superior authority and the student's vulnerability in that relationship, mandate recognition of a fiduciary duty for ultra vires teacher conduct.—As discussed previously, where a person in a position of authority in a relationship of trust and confidence exploits that position and relationship by engaging in sexual relations with the more vulnerable person in the relationship, courts will invariably find a breach of fiduciary duty.[177]

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171. The doctrine of negative implication is a canon of construction whereby a court determines the meaning of a statute or legal doctrine by analyzing items or circumstances specifically addressed therein and then determines that items or circumstances omitted, or not specifically addressed by the statute or doctrine, are not covered by that provision. *See, e.g.*, United States v. Vonn, 535 U.S. 55, 65 (2002). The negative implication doctrine is only a guide, is not an infallible indicator of meaning, and can be overcome by contrary indications of intent or coverage. *Id.*; *see also* John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 179. The doctrine, however, has been utilized by the United States Supreme Court on numerous occasions to determine the meaning of federal statutes and constitutional provisions, most notably in the Court's Dormant Commerce Clause jurisprudence. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 174-77 (16th ed. 2007).

172. *See supra* notes 21-24 and accompanying text.

173. *See, e.g.*, IDAHO STATE DEP'T OF EDUC., *supra* note 143, Principle II, at 9.

174. *See, e.g.*, Bethel Park Sch. Dist. v. Bethel Park Fed'n of Teachers, Local 1607, 55 A.3d 154, 158-60 (Pa. Commw. Ct. 2012); Crosby v. Holt, 320 S.W.3d 805, 808 (Tenn. Ct. App. 2009).

175. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998); Kinman v. Omaha Pub. Sch. Dist., 171 F.3d 607, 611 (8th Cir. 1999); Chancellor v. Pottsgrove Sch. Dist., 501 F. Supp. 2d 695, 709-10, 714 (E.D. Pa. 2007).

176. *See, e.g.*, State v. Berrio, 690 S.E.2d 559 (Table), No. COA09-608, 2010 WL 157566, at *2 (N.C. Ct. App. Jan. 19, 2010).

177. *See supra* note 65 and accompanying text.

An obvious disparity of power exists between K-12 teachers and their students because of the nature of their relationship. Based on that relationship, trust typically emanates from the student to the teacher. And, the existent vulnerability of those same students increases when they are alone with teachers and/or are outside of the classroom setting. For these reasons, the K-12 teacher-student relationship provides an ideal setting for those few opportunistic teachers and administrators who wish to exploit their students. To quote Justice Stevens from his dissent in *Gebser*, a teacher's *ultra vires* conduct is "made possible . . . by reason of the authority that his employer, the school district, had delegated to him."[178]

Moreover, *ultra vires* conduct by teachers involving exploitative sexual conduct with students falls far more squarely within the classic definition of a breach of fiduciary duty than a teacher who might have shortcomings in the classroom instructional setting. Indeed, as alluded to above, the one-on-one context that typically characterizes teacher-student liaisons is consistent with the more common examples of fiduciary relationships. And, given the opprobrium appropriately directed toward such conduct, sexual abuse and harassment of students by K-12 teachers is the one area where the moralistic tendency of judges and commentators to create and regulate what they deem to be a fiduciary relationship is particularly well taken.

For these reasons, K-12 teachers and administrators should be held to be fiduciaries to students when engaging in conduct facilitated by, but beyond, the educational purposes for which they are employed.

2. K-12 School Personnel Should Owe a Fiduciary Duty to Students When They Perform Traditional Fiduciary Roles Resulting From Their Educational Relationship.—As discussed previously, even parents, who typically do not have a fiduciary relationship with their children, will owe a fiduciary duty to their children when they (the parents) go beyond their usual parental role and serve as trustees of funds for their children or fail to pay child support.[179] Likewise, teachers who go beyond their role and purpose as a teacher and hold funds for students should have a fiduciary duty to students as to that aspect of their relationship. For example, in *In re the Arbitration Between Howell Public Schools and Howell Education Association*, where a teacher took financial advantage of students by receiving a kickback in the form of per student commissions and a chaperone fee from a travel company on an out-of-town field trip on which she acted both as a teacher and tour director, the arbitrator correctly ruled that the teacher had breached a fiduciary duty that she owed to the students.[180] Thus, as a second exception to the general rule, K-12 teachers who

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178. 524 U.S. at 299 (Stevens, J., joined by Souter, Ginsburg and Breyer, JJ., dissenting), discussed *supra* at notes 98-101 and accompanying text.

179. *See supra* note 57 and accompanying text.

180. *See* discussion *supra* at notes 109-10 and accompanying text. In *Howell Public Schools*, the arbitrator held that the teacher's fiduciary duty stemmed from the in loco parentis responsibilities that the teacher owed to the students. 1991 WL 692932 (Arb.) (1991) (Brown, Arb.). However, under the analytical approach discussed above, a teacher's duty under the in loco

act as traditional fiduciaries (beyond their teaching role) should likewise be held to owe a fiduciary obligation to their students.[181]

3. Recognition of a Fiduciary Duty under these Circumstances Will Fill a Remedial Gap.—In contrast to the lack of any significant remedial utility for recognizing breach of fiduciary duty claims when teachers fail to fulfill the educational purposes for which they are employed, recognition of a breach of fiduciary duty claim when teachers act in an *ultra vires* manner or as a traditional fiduciary may add to the remedies available to students and their parents.

Certainly, as to *ultra vires* acts, including sexual relations with minor students, students and their parents or guardians may recover tort remedies under various theories, including battery and intentional infliction of emotional distress.[182] However, recognition of a breach of fiduciary duty claim in cases involving sexual assault or sexual harassment would enhance the remedies available to student victims—primarily because the legal standards governing existing claims for sexual abuse or harassment against public entities, including schools, under common law respondeat superior, constitutional, and federal statutory theories, such as Title IX, impose significant barriers to recovery.[183]

Likewise, as to conduct by teachers involving the performance of traditional fiduciary duties—such as the administration of funds—recognition of breach of fiduciary claims will make tort remedies available, including non-economic damages and, in cases of outrageous or despicable conduct, punitive damages.[184]

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parentis doctrine does not translate to a higher, i.e., fiduciary, duty of care when the teacher is engaged in conduct undertaken for the educational purposes for which he or she is employed. Rather, a fiduciary duty will only arise where in loco parentis has no application, i.e., where a teacher engages in conduct beyond the educational purpose for which he or she is employed or acts as a traditional fiduciary long-recognized outside the K-12 educational context. In *Howell Public Schools*, the teacher's conduct arguably fell into both categories, although her relationship with her students looked to be more that of a traditional fiduciary than an *ultra vires* actor. *Id.* In either event, considerations unrelated to the in loco parentis doctrine should have driven the arbitrator's decision that the teacher owed a fiduciary obligation to her students.

181. Recognition of a fiduciary duty when a teacher engages in *ultra vires* conduct or acts as a traditional fiduciary is consistent with longstanding principles of fiduciary duty holding that good faith is not a defense to a breach of fiduciary duty claim. *See* discussion *supra* at notes 62-64 and accompanying text. As to *ultra vires* acts—particularly where a teacher's conduct involves sexual abuse or harassment of a student—given the deplorable nature of such conduct, the possibility that the teacher acted in good faith will be remote, if not nonexistent. Likewise, where a teacher acts as a traditional fiduciary, but mishandles student funds or property, the expertise required of the teacher under those circumstances mandates more than an empty head and a good heart. Thus, under either of the two exceptions to the general rule, a teacher's purported or actual good faith should not be a defense.

182. *See, e.g.*, Doe v. Fournier, 851 F. Supp. 2d 207, 225-27 (D. Mass. 2012).

183. Demitchell, *supra* note 34, at 20, 28-51.

184. Dury v. Ireland, Stapleton, Pryor & Pascoe, P.C., No. 08-cv-01285-LTB-MEH, 2009 WL 2139856, at *6 (D. Colo. 2009) (recognizing the availability of non-economic damages); Gen. Bus. Machs. v. Nat'l Semiconductor Datachecker/DTS, 664 F. Supp. 1422, 1426 (D. Utah 1987)

By so doing, courts will enhance a student's remedies beyond the compensatory and economic damages typically available for breach of contract.[185]

CONCLUSION

Under the in loco parentis doctrine and well-settled principles underlying the creation and regulation of fiduciary relationships, K-12 schools and school personnel should not be considered fiduciaries to their students when they render the educational services called for by their employment. Rather, they should only have a fiduciary duty to their students when they engage in conduct completely beyond, but made possible by, their educational mission—or when they act as traditional fiduciaries. By focusing on the doctrinal principles underlying in loco parentis and fiduciary duty, courts and commentators, although appropriately insisting on high standards of behavior for administrators and teachers vis-à-vis students, will avoid or augment the moralistic and analogistic thinking that has caused some authorities to expand fiduciary relationships in the K-12 setting beyond their doctrinal roots and likewise fail to recognize a fiduciary relationship, and the breach thereof, where it would be appropriate to do so. In so doing, courts and commentators will more accurately and appropriately define and regulate student-teacher relationships in the K-12 setting.

(requiring a showing of willful, malicious, or reckless indifference for the award of punitive damages). At least one jurisdiction has legislatively prohibited recovery of punitive damages against public entities for tort claims. *See, e.g.*, IDAHO CODE ANN. § 6-918 (2013) ("Governmental entities and their employees shall not be liable for punitive damages on any claim allowed under the provisions of this act.").

185. *See, e.g.*, *In re* Montagne, 425 B. R. 111, 123 (Bankr. D. Vt. 2009) (finding "non-economic damages [for] emotional distress, anxiety," and the like generally are not recoverable on a claim for breach of contract).

WHOSE FOURTH AMENDMENT AND DOES IT MATTER? A DUE PROCESS APPROACH TO FOURTH AMENDMENT STANDING

NADIA B. SOREE*

INTRODUCTION

Imagine that your name is Michael Wolstencroft, and you hold a comfortable position as an executive of the Castle Bank and Trust Company of the Bahamas.[1] Your position frequently brings you to the United States, and, like most business travelers, you travel with your briefcase.[2] A few months ago, your friend, Norman Casper, introduced you to Sybol Kennedy, and when you find yourself again on business in the Miami area, you pay her a visit at her apartment and head out to dinner on Key Biscayne, leaving the briefcase behind.[3]

What you don't know (and how could you?), is that Mr. Casper is an informant for IRS Special Agent Richard Jaffe, and your date for the evening is actually a private detective working for Casper.[4] While you are enjoying balmy tropical breezes, a delightful dinner, and Ms. Kennedy's engaging company, Casper has retrieved your briefcase from Ms. Kennedy's apartment, has taken it to the IRS-recommended locksmith (one whose discretion could be counted upon) to have a key made, and has brought it to the agreed-upon rendezvous point, where over 400 documents are removed and hurriedly photographed by an IRS expert.[5] As you leave the restaurant, the lookout who has been watching you throughout the evening gives Casper the signal that you have finished your dinner, and the briefcase and its contents are returned to Ms. Kennedy's apartment, all of this having taken place in the space of one and a half hours.[6]

Luckily for you, although you are likely outraged over this invasion of your privacy (not to mention your briefcase), the United States Government is not seeking information about you. Since Castle Bank is a suspected "illegal tax haven," the IRS commenced Operation Trade Winds, a large-scale investigation utilizing more than thirty informants, to seek out information about American citizens using the bank to shelter their money from their tax responsibilities.[7] Jack Payner is not as lucky as you. Although it is not his briefcase that was

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1. The following facts are set out in *United States v. Payner* (*Payner I*), 434 F. Supp. 113, 118-22 (N.D. Ohio 1977), *rev'd*, 447 U.S. 727 (1980).

2. *Id.* at 119.

3. *Id.*

4. *Id.* at 118-19.

5. *Id.* at 119-20.

6. *Id.* at 120.

7. *Id.* at 118.

broken into, and, in fact, the Government was actually investigating an alleged drug dealer named Allen Palmer, the documents photographed by Casper furnished the evidence[8] that eventually led to the indictment of Payner for falsifying his income tax returns.[9]

Criminal Procedure scholars are certainly familiar with the facts underlying the Supreme Court's decision in *United States v. Payner* (*Payner III*),[10] a decision that has become somewhat of a poster child for the perverse result that renders such conduct by the Government permissible (and perhaps even encouraged) under the Court's current Fourth Amendment standing doctrine.[11] However, when Criminal Procedure students first come across this case, the reaction is universally disbelieving: "Can the Government *really* do that?" Oh yes, it can.

The events depicted above, aptly termed "the briefcase caper" by Casper himself,[12] occurred fresh on the heels of the Supreme Court's decision in *Rakas v. Illinois*,[13] which held that a defendant has standing to suppress evidence discovered during an arguably unlawful *search* only if she has a legitimate or reasonable expectation of privacy in the place searched.[14] Thus, the Court conditioned a defendant's ability to challenge the Government's investigatory activities on her ability to demonstrate that the substantive definition of a search, derived from *Katz v. United States*,[15] has been met *as to her*, thereby merging standing with the substantive scope of the Fourth Amendment.[16]

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8. *Id.* at 122. As part of the investigation, Casper also sent Kennedy to visit Wolstencroft in the Bahamas for the purpose of retrieving more information, which she did by stealing a rolodex file from his office, which was later, of course, turned over to Special Agent Jaffe. *Id.* at 120.

9. *Id.* at 122.

10. 447 U.S. 727 (1980).

11. The use of the word "permissible," does not imply that the Government's conduct was legal. The Government clearly violated the Fourth Amendment, and Wolstencroft may arguably have sued in tort to vindicate his Fourth Amendment interests. However, the evidence was nonetheless admissible against Payner, and thus, *as to him*, the Government's investigative activities were, in effect, permissible. *See Payner I*, 434 F. Supp. at 126.

12. *Id.* at 133 n.71 (internal quotation marks omitted).

13. 439 U.S. 128 (1978).

14. *Id.* at 148-49. The Court emphatically affirmed *Rakas*'s holding in *United States v. Salvucci*, 448 U.S. 83, 92-93 (1980), and in *Rawlings v. Kentucky*, 448 U.S. 98, 106 (1980), expressly stating that only the legitimate expectation of privacy in the searched location was sufficient to grant "standing," even when the defendant claims a possessory interest in the item seized, a question arguably left open in *Rakas* itself: "Judged by the foregoing analysis, petitioners' claims must fail. They asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized." *Rakas*, 439 U.S. at 148.

15. 389 U.S. 347 (1967). The reasonable expectation of privacy test is actually derived from Justice Harlan's concurring opinion: "My understanding of the rule . . . is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognized as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring).

16. As the definition of standing became coextensive with, and synonymous with, the

Returning to Mr. Payner, he was unable to claim a legitimate expectation of privacy in someone else's briefcase, even though that briefcase contained information about his own finances.[17] Therefore, he lacked (in pre-*Rakas* terms) standing to suppress the illegally seized documents that furnished the evidence against him, notwithstanding the shocking illegality of the Government's methods in obtaining that evidence.[18] With its hands tied by the Supreme Court's recent decision in *Rakas*, the district court selected two avenues by which to arrive at what it intuitively felt was the correct result—a result that would not implicitly condone and encourage the Government's misconduct.[19] Thus, although Mr. Payner concededly did not have Fourth Amendment standing to contest the search of Wolstencroft's briefcase, the district court exercised its supervisory powers to exclude the evidence nonetheless.[20] However, even if the district court was confident in the exercise of such power, the court's primary justification for excluding the proffered evidence was anchored, instead, in due process.[21]

On the Government's first appeal, the Court of Appeals for the Sixth Circuit found that the supervisory powers justification was sufficient, and rather summarily affirmed the lower court's decision without addressing the due process rationale.[22] The Supreme Court reversed the Sixth Circuit's decision, stating that

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definition of a search, the Court eliminated standing as a separate, threshold inquiry, reasoning that "the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." *Rakas*, 439 U.S. at 139. I will continue to use the term in its traditional sense—to denote the legal capacity of a defendant to seek suppression in her criminal trial. I have elsewhere critiqued the Court's merger of standing and substance, arguing, among other things, that the merger solidified and entrenched the Court's narrow view of what constitutes a Fourth Amendment search. *See* Nadia B. Soree, *The Demise of Fourth Amendment Standing: From Standing Room to Center Orchestra*, 8 NEV. L.J. 570, 571 (2008) [hereinafter Soree, *The Demise of Fourth Amendment Standing*]. In addition, I have also urged a more balanced approach to the reasonable expectation of privacy test that would offer a more meaningful examination of governmental conduct (or misconduct) in defining the Fourth Amendment search. *See* Nadia B. Soree, *Show and Tell, Seek and Find: A Balanced Approach to Defining a Fourth Amendment Search and the Lessons of Rape Reform*, 43 SETON HALL L. REV. 127, 133-34 (2013).

17. *Payner I*, 434 F. Supp. at 126.

18. *See Payner III*, 447 U.S. 727, 731-32 (1980).

19. *See Payner I*, 434 F. Supp. at 130-35.

20. *Id.* at 135 ("The Court finds the Government's action . . . was both purposefully illegal and an intentional, bad faith act of hostility directed at Wolstencroft's reasonable expectation o[f] privacy. The Court therefore finds that the evidence obtained by the Government as a result of the seizure of Wolstencroft's briefcase must be excluded under this Court's supervisory function." (footnotes omitted)).

21. *Id.* at 133 ("That outrageous behavior on the part of the Government infringes Payner's Due Process rights, and can only be deterred by granting Payner's motion to suppress.").

22. United States v. Payner (*Payner II*), 590 F.2d 206, 207 (per curiam) (6th Cir. 1979) ("Since we base our decision upon the exercise of supervisory powers, it is not necessary to reach the constitutional questions raised on the appeal."), *rev'd*, 447 U.S. 727 (1980).

the supervisory power of the courts serves the same interests as the exclusionary rule: deterrence and judicial integrity.[23] The Court found that the district court had overstepped the proper bounds of its supervisory power when that power was used "as a substitute for established Fourth Amendment doctrine."[24] In other words, the district court could not undo, through its supervisory power, what the Supreme Court had done in *Rakas*. Perhaps because the Sixth Circuit had not addressed the due process rationale, the Supreme Court dismissed a due process right to exclusion in a footnote relegated to the end of the majority opinion by concluding that the Due Process Clause is only implicated "'when the Government activity in question violates some protected right of the *defendant*.'"[25]

The district court provided ample justification for a due process requirement of exclusion, beginning with an iteration of the long-standing "principle that all criminal prosecutions must meet the bare minimum requirements of Due Process of law."[26] The district court turned to *Rochin v. California*,[27] in which the Court overturned the defendant's conviction for morphine possession when the evidence supporting that conviction was obtained by forcibly utilizing a stomach pump to extract the contents of the defendant's stomach.[28] The *Rochin* Court found this method of obtaining evidence "offend[s] those canons of decency and fairness" and "shocks the conscience," thus supporting the Court's adoption of an exclusionary principle grounded in due process.[29] The district court in *Payner I* touched on the concept of judicial responsibility in ensuring the integrity of its proceedings.[30] However, much of the discussion centered on the role of due process exclusion in deterring egregious governmental misconduct,[31] offering a conception of due process exclusion as a matter of third-party standing.[32] It should come as no surprise that the Supreme Court, having recently decided against recognizing third-party standing in the Fourth Amendment context,[33]

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23. *Payner III*, 447 U.S. at 735-37.

24. *Id.* at 735 n.8.

25. *Id.* at 737 n.9 (quoting Hampton v. United States, 425 U.S. 484, 490 (1976)).

26. *Payner I*, 434 F. Supp. at 126-27.

27. 342 U.S. 165 (1952).

28. *Payner I*, 434 F. Supp. at 127 (discussing *Rochin*, 342 U.S. at 172).

29. *Rochin*, 342 U.S. at 169, 172.

30. *See Payner I*, 434 F. Supp. at 124.

31. *See id.* at 125, 126-32.

32. *Id.* at 129 n.65 ("However, under the Due Process concept, the *Janis* balancing test shifts markedly in favor of extending standing to third parties, such as Payner, to raise the exclusionary rule because an element of the Due Process violation is *outrageous* official conduct which violates the constitutional rights of an individual, situated like Wolstencroft, in a fashion which is knowing, purposeful, and with a bad faith hostility toward the right violated. Such intentional bad faith conduct is as susceptible of deterrence as any crime committed purposefully by an ordinary civilian." (emphasis added)).

33. By insisting that only defendants whose personal Fourth Amendment rights were violated were able to seek suppression, the Court in *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978),

would follow suit when offered a similar rationale in relation to due process.

Part I of this Article emphasizes what the facts of *Payner* make quite obvious: current Fourth Amendment standing doctrine is highly susceptible to exploitation by police and other government agents who effectively have been given carte blanche to violate the Fourth Amendment as long as the evidence uncovered implicates someone other than the most direct victim of the violation. However, as the facts of *Payner* may seem somewhat removed from the most common, everyday police-citizen encounters—after all, *Payner* concerned an ongoing investigation of white-collar criminal activities involving off-shore accounts[34]—the Article returns to the more familiar setting that triggered the Court's decision in *Rakas*: the search of a car with multiple occupants. Part II of the Article argues that defendants whose very own Fourth Amendment rights have been violated have an individual due process right to exclusion. Thus, the Article envisions an exclusionary rule mandated by the Due Process Clause, which is a departure from the Court's current understanding of exclusion as a judicially created remedy meant to deter future Fourth Amendment violations. For support, the Article turns to the Court's early exclusionary rule decisions, tracing the transformation of exclusion from its constitutionally-based roots to its current deterrence-based approach, as well as to the structure and function of the Fourth Amendment itself, which the Article proposes is a specific application of due process.

Finally, Part III of the Article argues that once exclusion is grounded in due process, defendants have a right to exclusion even when the Fourth Amendment violation "belongs" to another. This Part suggests a broad "target" theory of standing, under which defendants have a due process right to exclusion when the Government violates the Fourth Amendment rights of one individual for the purpose of obtaining incriminating information about anyone other than, or in addition to, the individual whose direct rights the Government initially violated.

I. FROM BRIEFCASES TO AUTOMOBILES: FOURTH AMENDMENT PROTECTION FOR PASSENGERS

Although the misconduct in *Payner* seems blatantly offensive, the

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effectively closed the door on the possibility of third-party standing and then locked it tight by eliminating the separate standing inquiry. Soree, *The Demise of Fourth Amendment Standing*, *supra* note 16, at 575-76, 582-83 (discussing the merger of standing into the substantive Fourth Amendment inquiry and providing an overview of third-party standing generally). The irony, of course, is that if deterrence of future Fourth Amendment violations is the sole justification of the exclusionary rule, then all exclusion effectively acts as a third-party remedy. *See* Donald A. Dripps, *Beyond the Warren Court and its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure,* 23 U. MICH. J.L. REFORM 591, 624 (1990) ("So long as the Court subscribes to the proposition that the ruptured privacy of the victims' homes and effects cannot be restored, every application of the exclusionary rule involves the vicarious assertion of fourth amendment rights." (footnote omitted) (internal quotation marks omitted)).

34. *See Payner I*, 434 F. Supp. at 118-22.

investigation in that case does not represent the majority of government activities that trigger Fourth Amendment concerns. While the investigation of white-collar crime at issue in *Payner* provides a clear example of how the Court's standing doctrine endangers Fourth Amendment rights,[35] the type of search at issue in *Rakas v. Illinois*,[36] where police searched a car containing multiple occupants,[37] is a great deal more common. According to a recent Department of Justice study, in 2008, nearly 60% of all police-resident contact related to traffic situations.[38] While approximately 44% of all such contact involved drivers of vehicles, 3% of all United States residents experiencing interactions with the police did so as passengers in vehicles, with both these rates showing a steady increase over a six-year period.[39]

Moreover, roughly 5% of traffic stops resulted in a search, with approximately 60% of the ensuing searches (of either the driver or vehicle) conducted with the driver's consent.[40] Consenting or not, however, only about 20% of drivers whose vehicles were searched "believed police had a legitimate reason to do so[,]"[41] and more troubling still, "[b]lack drivers were about three times as likely as white drivers and about two times as likely as Hispanic drivers to be searched during a traffic stop."[42] So, what about any passengers who may be riding in these cars that are being searched?

In *Rakas*, the Court, in applying its new approach to standing, held that those who were "merely passengers" had no "legitimate expectation of privacy" in the areas of the car that were searched.[43] This result led Justice White, in dissent, to express his fear that, since the fruits of a search of multi-occupant vehicles will generally be inadmissible against only the vehicle's owner, "[t]his decision invites police to engage in patently unreasonable searches every time an automobile contains more than one occupant."[44]

The Court offered "mere" passengers a glimmer of hope in *Brendlin v. California*,[45] holding that in the course of a traffic stop the vehicle's passengers

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35. The district court, in *Payner I*, found that "the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties . . . ." *Id.* at 132-33.

36. 439 U.S. 128 (1978).

37. *Id.* at 130.

38. CHRISTINE EITH & MATTHEW R. DUROSE, U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008, at 3 tbl.2 (2011), *available at* http://www.bjs.gov/content/pub/pdf/cpp08.pdf.

39. *Id.*

40. *Id.* at 10.

41. *Id.* at 11.

42. *Id.* at 1.

43. Rakas v. Illinois, 439 U.S. 128, 148-49 (1978).

44. *Id.* at 168 (White, J., dissenting).

45. 551 U.S. 249 (2007).

are subjected to a Fourth Amendment seizure, as is the driver.[46] In fact, the Court expressed the same concern voiced by Justice White in his *Rakas* dissent, that a contrary rule "would invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal."[47] Thus, although passengers are unable to challenge the *search* of the vehicle they occupy, they may at least seek exclusion of evidence derived from a search that stems from an unlawful *stop* of the vehicle.

Brendlin, however, may not be all that much of a victory for passengers subjected to traffic stops. After all, the Court in *Whren v. United States*[48] held that as long as officers who stop a vehicle have probable cause to believe that the driver has committed a traffic offense, the stop is reasonable regardless of the subjective motivations of the officer in deciding to effectuate the stop.[49] This of course results in a regime in which officers may choose from a myriad of minor traffic offenses to justify stops of vehicles. And, even if officers are motivated by racial animus or engaging in racial profiling, the stop will not provide a means to suppress evidence under the Fourth Amendment.[50]

Despite the relative ease with which police may lawfully stop a vehicle, even as a pretext, some circuit courts have gone even further in eroding the Fourth Amendment protection of passengers. The Sixth, Ninth, and Tenth Circuits have adopted and "applied a *heightened* 'factual nexus' test"[51] that passengers must overcome when seeking suppression of evidence as fruit of an unlawful seizure, at least where the initial stop of the car is lawful (which will often be the case) but is then unlawfully extended as officers decide to conduct a search. Under this approach, no matter how egregious the violation, the passenger defendant must demonstrate a narrowly construed but/for causal relationship between *her* unlawful seizure and the discovery of the evidence being used against her.

For example, in *United States v. Carter*,[52] officers stopped a van with a temporary tag.[53] Upon investigating, the officers confirmed that the driver had recently purchased the vehicle, that his license was valid, and also established the absence of any outstanding warrants in the driver's name.[54] After questioning the driver and defendant, a passenger in the van, the officers were not entirely satisfied with the accounts of where they had been and felt that both the driver and the defendant appeared nervous.[55] Nonetheless, one of the officers notified

46. *Id.* at 263.

47. *Id.*

48. 517 U.S. 806 (1996).

49. *Id.* at 813.

50. *Id.* ("But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.").

51. United States v. DeLuca, 269 F.3d 1128, 1142, 1148 (10th Cir. 2001) (Seymour, J., dissenting).

52. 14 F.3d 1150 (6th Cir. 1994).

53. *Id.* at 1151.

54. *Id.*

55. *Id.* at 1151-52.

the driver that "he was free to leave."[56] Before he was able to leave, however, the officer asked for consent to search the vehicle for contraband, which the driver refused.[57] Upon that refusal, the officer informed the driver "that he would have to call a superior" and "took [the driver] by the arm and confined him, over protest, in the back of the patrol car."[58] If this police behavior exemplifies the norm for roadside traffic stops, it is no small wonder that such a large percentage of vehicle searches pursuant to these stops are conducted pursuant to consent.[59]

The superior arrived on the scene and reiterated the request for consent to search.[60] Although the superior testified that the driver consented orally to his request, the driver did not sign a consent form, and the magistrate ruling on the suppression motion found that the driver "never consented in any way to the search of his vehicle."[61] The ensuing search of the van uncovered five suitcases containing 437 pounds of marijuana.[62] The driver was successful in his motion to suppress—after all, as the driver and owner of the van, he was permitted to contest the search itself, and the indictment against him was dismissed.[63]

Carter, the passenger, also sought to suppress the marijuana found in the van as fruit of his own unlawful seizure.[64] The Sixth Circuit, interestingly, did not reach the question of whether the initial stop was lawful, although clearly the continued detention and arrest of the driver were not.[65] Thus, the Sixth Circuit leaves open the possibility that the passenger may have to overcome this heightened causal test even if the initial stop was unlawful.[66]

> [W]e shall assume, for purposes of analysis, not only that the subsequent arrest of the driver was unconstitutional, but also that the detention of Mr. Carter, if not illegal from the outset, became illegal when the driver was arrested. It does not follow from any of this, however, that the discovery and seizure of the marijuana represented "fruit" of Mr. Carter's

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56. *Id.* at 1152.

57. *Id.*

58. *Id.*

59. *See* EITH & DUROSE, *supra* note 38, at 10.

60. *Carter*, 14 F.3d at 1152.

61. *Id.* These facts also highlight the very real possibility of police perjury in the context of supposedly consensual searches and also demonstrate the strong-arm techniques that some officers may resort to in order to obtain consent. Therefore, it is not unreasonable to suspect that many, or at least a good part, of the searches that are classified as consent searches may in reality be nonconsensual.

62. *Id.*

63. *Id.* at 1153-54. The judge granted the suppression motion because he found the search to be unlawful. *Id.* Alternatively, however, had the driver consented, the search would nonetheless have been a direct result of the driver's unlawful seizure. *Id.*

64. *Id.* at 1152. Carter also unsuccessfully tried to claim a reasonable expectation of privacy in the van based on the fact that he had placed personal items inside the vehicle. *Id.*

65. *See id.* at 1154.

66. *See id.*

> unlawful detention. Suppose that at the time of the driver's arrest the police had summoned a taxi cab for Mr. Carter and told him he was free to leave. The marijuana would still have been discovered, because it was located in a van owned and controlled by [the driver] (who was not going anywhere until his vehicle had been searched) and not in a vehicle controlled by Mr. Carter.[67]

The Ninth Circuit, in *United States v. Pulliam*,[68] used similar reasoning to deny the passenger defendant's motion to suppress a gun found following the defendant's unlawful seizure.[69] Pulliam and his companion, Richards, aroused police suspicion in a known gang area, after which Richards drove the car in which they both left.[70] The officers followed the men, having made the decision "that they were 'going to follow them' and 'find a reason to stop them.'"[71] The reason presented itself by way of a broken break light, and the officers "also assert[ed] that the car rolled through a stop sign."[72] The officers, having approached the car with their weapons drawn, ordered both men out of the car, led them to the curb, handcuffed them, and patted them down, finding nothing of interest on Pulliam.[73] One officer went directly to the car, finding a gun under the passenger seat, which Pulliam later admitted was his.[74]

The district court granted Pulliam's suppression motion, finding that although the initial stop was lawful, "the officers had no reasonable basis for going further, and that the car search was invalid."[75] The Ninth Circuit agreed that Pulliam's detention was unlawful, but did not find the requisite causal connection between *his* detention, rather than the detention of the vehicle, and the search that revealed the gun.[76] The court suggested two ways in which Pulliam could have demonstrated that the gun was fruit of his detention: by demonstrating that something he said, or evidence found on him, during his detention prompted the search of the car, or by showing that, had he been permitted to leave, "he would have been able to do so in [the] car."[77]

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67. *Id.*

68. 405 F.3d 782 (9th Cir. 2005).

69. *Id.* at 783, 787.

70. *Id.* at 784.

71. *Id.*

72. *Id.* The court does not state the failure to stop as a fact, but merely as an assertion made by the officers, which, at least on this author's reading, suggests the possibility that the officers felt the need to add further justification for stopping the car.

73. *Id.*

74. *Id.*

75. *Id.* at 785.

76. *Id.* at 786.

77. *Id.* at 787 (alteration in original) (quoting United States v. DeLuca, 269 F.3d 1128, 1132 (10th Cir. 2001)) (internal quotation marks omitted). It is difficult, indeed, to imagine how a defendant would demonstrate a hypothetical answer to a question that he never asked: whether he could simply drive away in the automobile. In fact, the very reason that passengers are "seized"

The Ninth Circuit, however, stated that the outcome would have been different had the initial stop been unlawful: "But when, as here, the initial stop is lawful . . . . [t]he continued detention of the vehicle does not necessarily entail the detention of its occupants; they could simply be permitted to walk away."[78] Ironically, the majority cited to *Payner III* for the proposition "that the officers' supposedly nefarious motives have [no] relevance in this case."[79]

Finally, in *United States. v. DeLuca*,[80] an officer stopped a car at a lawful "license and registration checkpoint."[81] Although the driver was able to produce a valid license and registration (the owner of the vehicle was in the rear seat), the officer felt that the occupants of the car, including DeLuca in the front passenger seat, appeared nervous, and the officer directed them to the shoulder, neglecting to return the license or registration.[82] The officer then obtained consent from the driver to search the car and eventually, with the aid of a drug-sniffing canine, discovered narcotics in the car.[83] Although the continued detention was unlawful,[84] the court denied DeLuca's motion to suppress based on his unlawful detention: "Mr. DeLuca has failed to show that had he requested to leave the scene of the traffic stop, he would have been able to do so in [the owner's] car."[85] In other words, the defendant, in order to prevail, had to demonstrate that the narcotics "would never have been found but for *his*, and only his, unlawful detention."[86]

How much Fourth Amendment protection can passengers in automobiles actually count on? After *Rakas*,[87] a mere passenger cannot contest the search of the car she occupies, and although passengers of stopped vehicles are seized as are the drivers, at least in three circuits, as long as the initial stop is lawful (or perhaps even if it is not),[88] it is of no consequence that the passenger's seizure ripens into an unlawful one if she cannot demonstrate the heightened factual nexus described above. As for the initial stop, it is not difficult to establish the existence of some traffic violation or other (officers have so many to choose

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in the first place is because "a sensible person would not expect a police officer to allow people to come and go freely" from the scene of a traffic stop, and "no passenger would feel free to leave in the first place." Brendlin v. California, 551 U.S. 249, 257 (2007). Therefore, it is highly unlikely that asking for permission to depart in the vehicle would ever even cross the passenger's mind.

78. *Pulliam*, 405 F.3d at 788.

79. *Id.* at 788 n.2 (referring to *Payner III*, 447 U.S. 727, 731-37 (1980)).

80. 269 F.3d 1128 (10th Cir. 2011).

81. *Id.* at 1130.

82. *Id.*

83. *Id.* at 1130-31.

84. *Id.* at 1131-32. The Government conceded the fact that once a valid license and registration were produced the continued detention, based solely on nervous appearance, was unlawful. *Id.*

85. *Id.* at 1133.

86. *Id.*

87. Rakas v. Illinois, 439 U.S. 128 (1978).

88. *See* text accompanying *supra* notes 66-67.

from), and the officer's motivations, even if "nefarious," are simply irrelevant.[89] More alarming, however, these cases raise the specter of police perjury as to consent,[90] or even as to the existence of the infraction that provides the basis for the initial stop.[91]

Judge Wardlaw, dissenting from the decision in *Pulliam*, was correct to fear that the majority's decision

> invites police officers to engage in patently unreasonable detentions, searches, and seizures every time an automobile contains more than one occupant. Should something be found, only the owner of the vehicle will be able to successfully move to suppress the evidence; the evidence will be admissible against the other occupants. After this decision, police officers will have little to lose, but much to gain, by legally stopping but illegally detaining vehicles occupied by more than one person.[92]

Justice White made a similar argument in his *Rakas* dissent, expressing his concern that "[a]fter this decision, police will have little to lose by unreasonably searching vehicles occupied by more than one person."[93] Given the incentive officers will have to conduct searches of multi-occupant vehicles, as well as the court's demonstrated indifference to blatant misconduct, even if such misconduct is racially motivated, it is necessary to reevaluate the court's standing doctrine. As standing acts as a constraint on the exclusionary rule, the next Part begins there, urging a conception of exclusion less vulnerable to such limitation—one that is rooted in due process and attains the status of a true constitutional requirement.

II. EXCLUSION AS A DUE PROCESS RIGHT

A. From Due Process to Deterrence: A Tale of Transformation

This Part commences by briefly highlighting, through selected cases, the Fourth Amendment exclusionary rule's journey and transformation from a constitutionally required right to its modern identity as a quasi-remedy, the purpose of which is to deter future Fourth Amendment violations, not to remedy the harm that already occurred to the defendant seeking suppression.[94] In 1914,

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89. *See Pulliam*, 405 F.3d at 787-88 & 788 n.2.

90. *See supra* note 61 and accompanying text.

91. *See supra* note 72 and accompanying text.

92. *Pulliam*, 405 F.3d at 796 (Wardlaw, J., dissenting).

93. Rakas v. Illinois, 439 U.S. 128, 169 (1978) (White, J., dissenting).

94. There is already a great deal of excellent scholarly literature detailing this transformation and the history of the exclusionary rule. *See, e.g.*, Ruth W. Grant, *The Exclusionary Rule and the Meaning of Separation of Powers*, 14 HARV. J.L. & PUB. POL'Y 173 (1991); William C. Heffernan, *The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 GEO. L.J. 799 (2000); Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1982-1983), Thomas S. Schrock

the Court gave birth to an exclusionary rule that did not rely on Fifth Amendment self-incrimination exclusionary principles,[95] but that conceived of exclusion as a constitutional requirement arising directly from the Fourth Amendment violation itself in *Weeks v. United States*.[96]

In *Weeks*, the Court reversed a conviction supported by evidence obtained in violation of the Fourth Amendment and offered a justification for exclusion based on due process principles.[97] This approach conceived of courts themselves being bound by the Fourth Amendment, as well as being charged with ensuring that the executive branch complied with its requirements.[98] As to the first prong of this theory of exclusion, the Court considered the judiciary to be a partner in the enforcement of the law, and thus, equally subject to the constraints of the Fourth Amendment:

> The effect of the [Fourth] Amendment is to put the courts of the United States *and* Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and

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& Robert C. Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974-1975); Lane V. Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle*, 69 J. CRIM. L. & CRIMINOLOGY 141 (1978). For present purposes, this Article will focus on a few principal cases that exemplify the shift in rationale for justifying the exclusionary rule, from its origins to its current deterrence-based conception. There are, of course, many more cases developing the Court's exclusionary rule jurisprudence, and the Court's focus on deterrence has led to numerous exceptions to the rule, including the doctrines of inevitable discovery, *see* Nix v. Williams, 467 U.S. 431, 443-44 (1984); attenuation, *see* Wong Sun v. United States, 371 U.S. 471, 487-88 (1963); and the good-faith exception to the rule, *see* United States v. Leon, 468 U.S. 897, 919 (1984).

95. *See* Boyd v. United States, 116 U.S. 616, 633 (1886) ("[W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."), *rejected by* Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 302-03, 310 (1967) (reasoning that the seizure of tangible, non-testimonial evidence does not in effect compel the defendant "to become a witness against himself" and holding that the Fourth Amendment permits the seizure of "mere evidence" in addition to contraband and fruits or instrumentalities of crime); *see also* Sunderland, *supra* note 94, at 142.

96. 232 U.S. 383, 392-94 (1914).

97. *Id.* at 398-99.

98. *Id.* at 392; *see also* Grant, *supra* note 94, at 77 (stating that the *Weeks* Court "established that the judiciary has the constitutional duty to give 'force and effect' to the Fourth Amendment by excluding unconstitutionally seized evidence"); Sunderland, *supra* note 94, at 143 (describing the "essence" of the *Weeks* Court's argument as urging "that all bodies entrusted with enforcement of the law, including the judiciary, must enforce that law as written").

> effect is obligatory upon *all* intrusted [sic] under our Federal system with the enforcement of the laws.[99]

As to the second, the *Weeks* Court emphasized the role of the courts as guardians of the Constitution:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.[100]

We discover in this language a personal right, belonging to all people, to seek the enforcement of fundamental rights and due process of law. The Due Process Clause of the Fifth Amendment states that no person shall "be deprived of life, liberty or property, without due process of law."[101] As stated by Professor Lane Sunderland, whatever meaning we ascribe to due process, "it surely means at least this: the only condition under which one may be deprived of life, liberty or property is if that deprivation be in accordance with due process of law."[102]

That the *Weeks* Court envisioned a due process right to exclusion is made evident by its language admonishing the *courts* that their efforts, as well as those of "their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."[103] The phrase "law of the land" is derived from the Magna Carta and is the source of what we refer to as due process of law.[104] At the very least, due process of law, or the law of the land, must refer to the provisions and great principles of law embodied in our most sacred legal text—the Constitution. According to *Weeks*, any court that enters a judgment of

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99. *Weeks*, 232 U.S. at 391-92 (emphases added).

100. *Id.* at 392. It is precisely this perception of the judiciary being bound by constitutional constraints that led the Court to hold that judicial enforcement of racially restrictive agreements between private parties constitutes a denial of equal protection. *See* Shelley v. Kraemer, 334 U.S. 1, 19-21 (1948). The Court, in reaching its decision, affirmed that "[t]he federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government." *Id.* at 15 (quoting Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 680 (1930)) (internal quotation marks omitted).

101. U.S. CONST. amend. V. Of course, most of the provisions enshrined in the Bill of Rights, including most of those involving criminal procedure, were incorporated against the states through the Due Process Clause of the Fourteenth Amendment. U.S. CONST. amends. IV, XIV. *See, e.g.*, WELSH S. WHITE & JAMES J. TOMKOVICZ, CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF, at xv (7th ed. 2012).

102. Sunderland, *supra* note 94, at 149.

103. *Weeks*, 232 U.S. at 393.

104. *E.g.*, Sunderland, *supra* note 94, at 149.

conviction based on evidence obtained through a violation of any provision of the Constitution, "affirm[s] by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."[105]

By this account, the courts are entrusted with enforcing laws without violating fundamental constitutional principles and also with enforcing those principles against the other government branches.[106] This understanding of a due process right to exclusion under *Weeks* fully supports the argument for a constitutionally-required exclusionary rule, articulated by Professor Ruth Grant, based on a "unitary model" of government and a theory of "separation of powers."[107] The unitary model (and the judiciary's role in such a model) was first delineated by Professors Thomas Schrock and Robert Welsh as arising from *Weeks*.[108] According to this model, there is

> a conceptual and moral connection between the trial court and the evidence-seizing police. This connection exists because every search for or seizure of evidence points beyond itself to use at trial. Search, seizure, and use are all part of one "evidentiary transaction," and every such transaction presupposes a court as well as a policeman. Because the court is integral to the evidentiary transaction, it cannot insulate itself from responsibility for any part of that transaction, and specifically not from responsibility for the manner in which evidence is obtained.[109]

Within this unitary framework, "each participant in the proceedings is responsible for the constitutionality of the entire proceeding. The unitary model of judicial responsibility thus accords with the understanding of separation of powers as the means by which limits on government action can be maintained."[110]

Nearly half a century later, the Court was presented with a case that would prove an ideal vehicle to extend to state prosecutions the exclusionary rule announced in *Weeks* as "an essential part of the right to privacy" that previously had been "declared enforceable against the States through the Due Process Clause of the Fourteenth [Amendment] . . . ."[111] Officers searching for a suspect connected to a recent bombing arrived at the home of Miss Mapp, but were not

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105. *Weeks*, 232 U.S. at 394.

106. Interestingly, the *Weeks* Court charges all branches with the "*enforcement* of the laws" but refers to the executive actors as those who "*execute* the criminal laws." *Id.* at 392 (emphases added).

107. *See* Grant, *supra* note 94, at 176.

108. Schrock & Welsh, *supra* note 94, at 295-98.

109. *Id.* at 298.

110. Grant, *supra* note 94, at 199.

111. Mapp v. Ohio, 367 U.S. 643, 655-56 (1961). In 1949, the Court, in *Wolf v. Colorado*, held that the right to privacy protected by the Fourth Amendment was "implicit in the concept of ordered liberty and as such enforceable against the States through the Due Process Clause," but declined to hold that the exclusionary rule was "an essential ingredient of the right." 338 U.S. 25, 27-29 (1949) (internal quotation marks omitted), *overruled by Mapp*, 367 U.S. at 643.

permitted by her to enter.[112] Eventually, the officers broke in, confronted Mapp on the stairs, and refused to allow Mapp's attorney access to her.[113] When Mapp demanded to see a warrant, officers presented her with a piece of paper, which she secured "in her bosom," from where the officers forcibly retrieved it.[114] The Court described the police as acting in a "highhanded manner" and "running roughshod over appellant."[115] It further stated that an officer had "grabbed her, twisted (her) hand, and [that] she yelled (and) pleaded with him because it was hurting."[116] The officers then searched the second floor, including Mapp's bedroom and that of her daughter, as well as the basement, discovering the "obscene materials" that furnished the basis of her conviction.[117]

Although the *Mapp* Court quoted *Weeks* extensively and adhered to the due process model of exclusion,[118] the Court provided several alternative justifications for extending the exclusionary rule to the states. This resulted in an opinion that overstated its arguments, did not clearly indicate the primary rationale, and left the door open to the almost exclusively deterrence-based rationale that would ultimately prevail.[119] For example, the *Mapp* Court invoked the rationale of judicial integrity[120] and a theory of exclusion based on a synthesis of Fourth and Fifth Amendment self-incrimination concerns.[121] Both of these rationales, of

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112. *Mapp*, 367 U.S. at 644. Mapp resided on the top story of a two-family home. *Id.*

113. *Id.*

114. *Id.* The Court noted that no warrant was in fact produced at trial. *Id.* at 645.

115. *Id.* at 644-45.

116. *Id.* at 645 (internal quotation marks omitted).

117. *Id.*

118. The Court specifically focused on the *use* of unconstitutionally obtained evidence and quoted *Weeks*'s powerful language that if such use is condoned by the courts, the Fourth Amendment "might as well be stricken from the Constitution." *Id.* at 648 (quoting Weeks v. United States, 232 U.S. 383, 393 (1914)). In addition, the Court invoked *Weeks*'s reference to "the fundamental law of the land," and concluded "that the Weeks rule is of constitutional origin." *Id.* at 648-49 (quoting *Weeks*, 232 U.S. at 393). Clearly, the *Mapp* Court understood the exclusionary rule as a constitutional rule and requirement, or it would not have had the authority to enforce the rule against the states. As described by Professor Sunderland, "The essence of *Mapp* is that the exclusionary rule is an essential part of the [F]ourth [A]mendment, and the right that [A]mendment embodies applies to the states through the [D]ue [P]rocess [C]lause of the [F]ourteenth [A]mendment." Sunderland, *supra* note 94, at 144.

119. Sunderland, *supra* note 94, at 144.

120. *Mapp*, 367 U.S. at 659 ("[T]here is another consideration—the imperative of judicial integrity. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." (citation omitted) (quoting Elkins v. United States, 364 U.S. 206, 222 (1960) (internal quotation marks omitted)).

121. *Id.* at 656 ("Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effect, documents, etc.?"). Justice Black, concurring in the opinion, based the right to exclusion on this rationale, finding that the

> Fourth Amendment does not itself contain any provision expressly precluding the use

course, support a constitutional basis for exclusion.[122] However, the *Mapp* Court also offered a practical reason to extend the exclusionary rule to state proceedings: "the purpose of the exclusionary rule is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[123] This language provided future Courts with grist for an anti-exclusionary mill that would produce numerous limitations and exceptions to the exclusionary rule.

For example, in *United States v. Calandra*,[124] the Court, in holding the Fourth Amendment exclusionary rule inapplicable to grand jury proceedings, speculated that excluding evidence in this context would have negligible deterrent effect.[125] Further, the harm suffered by the victim of the unlawful government intrusion, according to the Court, "is fully accomplished by the original search without probable cause. Grand jury questions based on evidence obtained thereby involve no independent governmental invasion of one's person, house, papers, or effects."[126] Thus, the *Calandra* Court elevated deterrence as the primary justification for the exclusionary rule.[127] By focusing solely on the preservation of privacy as the protected interest under the Fourth Amendment, rather than recognizing that the *use* of illegally obtained evidence also violates the Fourth Amendment, and thus Due Process, the Court dismissed a personal, constitutionally required right to exclusion.[128] In the Court's words,

> The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim:
>
> (T)he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late.
>
> Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.[129]

The exclusionary rule was transformed into "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect,

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> of such evidence . . . . Reflection on the problem, however, . . . has led me to conclude that when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.

Id. at 661-62 (Black, J., concurring).

122. *Id.* at 657.

123. *Id.* at 656 (quoting *Elkins*, 364 U.S. at 217) (internal quotation marks omitted).

124. 414 U.S. 338 (1974).

125. *Id.* at 351.

126. *Id.* at 354.

127. *Id.* at 347.

128. *Id.* at 347-48.

129. *Id.* at 347 (alteration in original) (citation omitted) (quoting Linkletter v. Walker, 381 U.S. 618, 637 (1965)) (internal quotation marks omitted).

rather than a personal constitutional right of the party aggrieved."[130]

As for judicial integrity, the Court, in *Stone v. Powell*,[131] downplayed the importance of "preserving the integrity of the judicial process" as a justification for exclusion,[132] and in *United States v. Janis*,[133] equated judicial integrity with "the inquiry into whether exclusion would serve a deterrent purpose."[134] Of course, with deterrence as the primary and perhaps sole justification for exclusion, the Court is free to decline to enforce the exclusionary rule any time it believes exclusion will not sufficiently deter future behavior, or when the deterrence is simply not worth the cost to society of lost convictions.

Thus, a knock-and-announce violation does not trigger the exclusionary rule, as "the value of deterrence depends upon the strength of the incentive to commit the forbidden act. Viewed from this perspective, deterrence of knock-and-announce violations is not worth a lot."[135] While the Court seems willing to accept that flagrant violations are capable of being discouraged by the threat of exclusion,[136] an exclusively deterrence-based approach recognizes little

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130. *Id.* at 348.

131. 428 U.S. 465 (1976).

132. *Id.* at 485-86 ("Although our decisions often have alluded to the 'imperative of judicial integrity,' they demonstrate the limited role of this justification in the determination whether to apply the rule in a particular context." (citation omitted) (quoting United States v. Peltier, 422 U.S. 531, 536-39 (1975))). The *Powell* Court held that a defendant is not entitled to habeas corpus relief arising from a claim that his conviction was based on unconstitutionally seized evidence if the Fourth Amendment claim was fully litigated through the state trial and review process. *Id.* at 494.

133. 428 U.S. 433 (1976).

134. *Id.* at 458 n.35. The *Janis* Court held the exclusionary rule inapplicable in federal civil proceedings when evidence was seized unlawfully but in good faith. *Id.* at 453-54.

135. Hudson v. Michigan, 547 U.S. 586, 596 (2006). The Court in *Wilson v. Arkansas* held that the common-law requirement of knocking and announcing before entering the home is part of the Fourth Amendment reasonableness inquiry. 514 U.S. 927, 930 (1995). Therefore, a search conducted without adhering to this requirement violates the Fourth Amendment, and constitutes an unlawful search. *Id.* at 934. The Court, in *Hudson*, applied a novel approach to attenuation, reasoning that the finding, and therefore the exclusion, of evidence was attenuated from, or not directly related to, the purposes of the knock-and-announce requirement. *Hudson*, 547 U.S. at 593 ("The interests protected by the knock-and-announce requirement are quite different—and do not include the shielding of potential evidence from the government's eyes."). The *Hudson* majority also pointed to the existence of other available means of deterrence, such as civil suits or internal police department discipline, *id.* at 597-99, and referred to "suppression of evidence [as having] always been our last resort." *Id.* at 591.

136. *See* Brown v. Illinois, 422 U.S. 590, 603-04 (1975) (holding that Miranda warnings are one of several factors relevant to determining whether a statement made subsequent to a Fourth Amendment violation is sufficiently attenuated from the violation and therefore admissible). A "particularly" important factor is an assessment of "the purpose and flagrancy of the official misconduct." *Id.* at 604. In *Brown*, two detectives surprised the defendant as he returned home to his apartment and, with guns drawn, broke in, searched the apartment, and arrested Brown with no warrant and no probable cause. *Id.* at 592. As another example, in deciding that the testimony of

justification for excluding unlawfully obtained evidence where the officers were acting in good faith,[137] or at very least, were not acting with "reckless disregard of constitutional requirements."[138] In the Court's words, "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[139]

Ironically, considering the Court's view that exclusion is all about preventing future violations, each limitation to the rule's application has an anti-deterrent effect, or even worse, provides police with an incentive to violate the Fourth Amendment.[140] Moreover, there is no way to empirically measure the deterrent effect of the exclusionary rule, or perhaps even the "cost" to society against which the deterrent value of the rule is measured.[141] This second point is worth consideration; if it were to be decided that, even in the case of flagrant violations, the threat of exclusion does not actually deter such misconduct, then the Court (or Congress) could abolish the rule altogether, as long as the rule is considered to be a preventative measure rather than a personal constitutional right belonging to the one aggrieved by the unlawful search or seizure. In fact, the Court has noted that, when officers are not acting in the interests of apprehending criminals and gathering evidence for prosecution, but are instead motivated by racial animus and the desire to harass minority citizens, the knowledge that any evidence they

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a live witness discovered as a result of a Fourth Amendment violation was admissible, the Court noted that the officer who casually picked up and examined the contents of an envelope on a shop counter likely had no intent of finding a witness, and, thus, "[a]pplication of the exclusionary rule in this situation could not have the slightest deterrent effect on the behavior of [such] an officer." United States v. Ceccolini, 435 U.S. 268, 280 (1978).

137. *See* United States v. Leon, 468 U.S. 897, 922 (1984) (holding the exclusionary rule does not apply when an officer, in good faith, relies on an invalid warrant); *see also* Arizona v. Evans, 514 U.S. 1, 15-16 (1995) (holding that an officer's reasonable good-faith reliance on an erroneous police record indicating an outstanding arrest warrant did not require exclusion, when the error in the record was that of court employees).

138. Herring v. United States, 555 U.S. 135, 147 (2009). In *Herring*, the Court extended the holding of *Evans* to include record-keeping errors committed by the police that are not sufficiently culpable as to warrant the costs of exclusion. *Id.* *See Evans*, 514 U.S. at 16.

139. *Herring*, 555 U.S. at 144.

140. The reader has already seen this incentive at work, as demonstrated by the Government's conduct in *Payner I*, 434, F. Supp. 113, 132-33 (N.D. Ohio 1977), *rev'd*, 447 U.S. 727 (1980). *See supra* note 35 and accompanying text. *See also* Murray v. United States, 487 U.S. 533, 546 (1988) (Marshall, J., dissenting) ("Under the circumstances of these cases, the admission of the evidence 'reseized' during the second search severely undermines the deterrence function of the exclusionary rule. Indeed, admission in these cases affirmatively encourages illegal searches.") The *Murray* Court held that the independent source doctrine applies to tangible evidence rediscovered during a lawful search, even if originally discovered through unlawful means, as long as the second discovery stems from a source that is truly independent of the first, unlawful, search. *Id.* at 542-43 (majority opinion).

141. *See* Grant, *supra* note 94, at 186-87.

may find will not be admitted to trial is not likely to affect their behavior, and thus, in this context, the exclusionary rule, having no deterrent value, is not deemed appropriate.[142] It is critical, then, to reinvigorate the original understanding of exclusion as a due process right against the Government's use of unlawfully seized evidence to obtain a conviction. This Article seeks further support for this view by examining the structure and function of the Fourth Amendment, concluding that the Amendment is itself a due process clause, albeit one addressing the specific context of searches and seizures.[143]

B. Fourth Amendment Values and a Due Process Model of Criminal Procedure

This Section begins by briefly discussing the values underlying the criminal process generally, in order to place the Fourth Amendment in its larger criminal procedure context. Professor Peter Arenella identifies three broad objectives of criminal procedure.[144] The first is to provide a process that effectuates and defends the goals of substantive criminal law by determining questions of guilt or innocence accurately, decisively, and with regard to sentencing purposes.[145] Thus, once a defendant's guilt is established, the process should aim to achieve the goals of punishment to promote legislative intent.[146] Second, our adversarial system must allocate power and resources efficiently and in a way that reflects "the system's judgments about which state officials, institutions, and community representatives are best suited to investigate, apprehend, charge, adjudicate, and sentence."[147] Finally, the criminal process can also serve to legitimize the State's

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142. *See* Terry v. Ohio, 392 U.S. 1, 14-15 (1968) ("The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial. Yet a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime."). *See also* Whren v. United States, 517 U.S. 806, 813 (1996) ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."). For a strong critique of the Court's refusal to use the exclusionary rule as a tool to prevent officer harassment of minority citizens, see Amy D. Ronner, *Fleeing While Black: The Fourth Amendment Apartheid*, 32 COLUM. HUM. RTS. L. REV. 383, 405-06 (2001).

143. U.S. CONST. amend. IV.

144. Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 188 (1983).

145. *Id.*

146. *Id.* at 199.

147. *Id.* Note that this understanding of the criminal process does not conflict with the unitary model of government discussed above, *see* text accompanying *supra* notes 107-10 and accompanying text, in which a criminal prosecution constitutes one larger transaction involving a variety of governmental actors at different stages.

exclusive and vast power to punish its citizens by articulating and adopting norms that enhance fairness and reliability or, at the very least, the *appearance* thereof.[148]

It is important to note that fairness and reliability are two distinct values.[149] If one goal of the criminal justice system is to validate the coercive power of the State over the individual, then the articulation and use of "fair process norms" are crucial.[150] After all, a system that results in groundless or arbitrary punishment loses all moral legitimacy and directly frustrates the deterrent goals of substantive criminal law.[151] However, some of these fair process norms also serve functions having little to do with the accuracy of the results and, in fact, "impair procedure's guilt-determination function."[152] These result-independent norms seek to recognize and respect the dignity of the individual, especially in light of the tremendous imbalance of power between the individual and the State.[153]

Identifying the main goals of the criminal process—promotion of substantive criminal law values, efficient and proper allocation of power between institutional actors, and respect for the dignity of the accused—is only the first step.[154] Deciding on a model of procedure that best achieves these goals is the next, and more difficult, task. Adding to the complexity of this endeavor, these goals are not necessarily independent of one another. For example, the reliability of the outcome of a trial implicates both substantive law goals and dignitary interests.[155] The promotion of reliability, as a primary objective, will also entail deciding which actors can best determine facts (police, judges, or juries).[156] If, instead, the primary focus is on fairness of process and mitigating the imbalance between the individual and the State, this interest also legitimizes substantive criminal law to the community, puts a premium on individual dignity, and influences the choice of which actor can best determine innocence or guilt. This is especially pertinent when one takes into account a full conception of guilt that includes a moral judgment.[157]

Many factors will influence the Court's choice of model, including the Court's normative understanding of each of these goals, as well as its assessment

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148. Arenella, *supra* note 144, at 202.

149. *Id.*

150. *Id.* at 188, 202.

151. *See id.* at 202-03. One goal of punishment is to deter undesirable social behavior, and the threat of punishment encourages obedience of criminal laws. For that threat to be effective, however, the justice system must administer punishment only when the individual has, in fact, acted in a manner contrary to the law, as the individual must be able to confidently assume that compliance with the law will prevent her from being punished.

152. *Id.* at 202.

153. *Id.* at 201-02.

154. *Id.* at 188.

155. *Id.* at 202-03.

156. *Id.* at 213-15.

157. *See id.* at 214.

of their relative importance.[158] For example, the Court that places a higher value on the promotion of substantive criminal law goals than it does on furthering the dignity of the accused may favor a procedural model that looks quite different from one that might be derived from the opposite calculus.[159] Political ideology and current social concerns, such as the ongoing War on Terror, will also influence the Court's model selection.[160]

The Article next turns to Professor Herbert Packer's seminal and highly influential work, *The Limits of the Criminal Sanction*,[161] in which he identifies two normative models of criminal procedure—the Crime Control and the Due Process Models.[162] Professor Packer perceives these models as polar opposites[163] with respect to the value choices being made, although there is general agreement under both models that some limitations on police power are necessary and proper.[164] Plainly stated, the Crime Control Model's central mission is "the repression of criminal conduct."[165] The surest way to maximize such repression is by inflicting punishment on those individuals who are factually guilty.[166] Further, preventing criminal conduct most effectively requires a process that results in "a high rate of apprehension and conviction" and puts "a premium on speed and finality."[167] Further, a system that needs to dispose of a great many criminal cases with limited resources at its disposal should also aim to limit challenges. Such a system would naturally exhibit a preference for extra-judicial identification of facts, such as occurs in the interrogation room, and would also favor extra-judicial determinations of guilt, such as police and prosecutors make when deciding whom to continue investigating and whom to prosecute.[168] Under the Crime Control Model, police and prosecutors act to screen suspects and whittle down the numbers at each successive stage prior to trial, similar to "an assembly-line conveyor belt . . . ."[169] Thus, by the time the suspect has become a defendant, this Model embraces a presumption of guilt based on the assumption that the "conveyor belt" operated smoothly.[170]

If the Crime Control Model is an "assembly-line conveyor belt," due process

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158. This Article focuses on the Supreme Court's choice of models, although the Court is certainly not the only institutional actor that influences which model or models dominate the process.

159. Arenella, *supra* note 144, at 200.

160. *Id.*

161. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968).

162. *Id.* at 153.

163. *Id.* at 154.

164. *Id.* at 155-57.

165. *Id.* at 158.

166. *See id.* at 158-59.

167. *Id.* at 159.

168. *Id.* at 158-59.

169. *Id.* at 159-60.

170. *Id.* at 159-61.

places an "obstacle course" in that assembly line.[171] The presumption of innocence requires that officials, in their interactions with the defendant, ignore the likelihood that the defendant may very well be factually guilty.[172] The central mission of the Due Process Model is to assert the preeminence of the individual while simultaneously affirming the need to limit official power.[173] This Model espouses a preference for formal adjudication of guilt, rather than the informal *ex officio* procedures preferred by the Crime Control Model.[174] Thus, factual guilt that has been determined by proper legal process defines legal guilt.[175] While the Due Process Model demands maximum security against erroneous convictions, it also seeks to limit official power over *all* defendants, factually innocent and guilty alike.[176] Unlike the Crime Control Model, the Due Process Model does not value finality for the sake of finality, but expresses a preference for formal, judicial process that not only adjudicates guilt and innocence, but also serves to correct (and punish) the system's own abuses.[177] The Due Process Model is concerned not only with reliability, but with individual dignity.[178] Under this Model, we not only care about the result, but we care *how* the Government went about achieving that result.[179]

A common claim among scholars is that the Warren Court's ideologies trended towards the Due Process Model this Article has just described, while the Burger Court (and subsequent Courts), favored the Crime Control Model.[180] As Professor Arenella claims, this may be oversimplified, and although the Court may gravitate towards one or the other of these models, depending on its particular makeup, the Court, at any given time, is essentially engaged in an effort to resolve the tension between individual rights and the power of the State.[181] Rather than conceiving of these two models as mutually exclusive polar opposites, the Court may develop a jurisprudence primarily adhering to one model while accommodating some of the values espoused in the other.[182] For example, a Crime Control Model can express a preference for efficiency, finality, and the use of informal fact-finding that, nevertheless, puts a premium on

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171. *Id.* at 159, 163.

172. *Id.* at 166-67.

173. *Id.* at 165.

174. *Id.*

175. *Id.* at 166.

176. Arenella, *supra* note 144, at 213 (offering a reconstruction of Packer's models).

177. PACKER, *supra* note 161, at 171-72. Professor Arenella highlights how the Crime Control Model seeks to push factually guilty defendants quickly through the system: "In contrast, the [C]rime [C]ontrol [M]odel secures the conviction of the 'factually guilty' by encouraging defendants to forfeit their factual guilt defeating claims in exchange for some sentencing concession." Arenella, *supra* note 144, at 213 (footnote omitted).

178. Arenella, *supra* note 144, at 210, 236.

179. *Id.* at 210.

180. *See id.* at 209-13.

181. *See id.* at 195.

182. *Id.* at 226-28.

reliability and dignity by placing adequate procedural controls on the various stages of the assembly-line.[183]

Turning to the criminal procedure provisions of the Bill of Rights, the Framers endeavored to strike a balance between individual rights and the power of the State.[184] The Supreme Court continues the Framers' work by interpreting and applying these provisions centuries after they were written. Although the Bill of Rights provisions are stated in terms of curbing the power of the State, many of the provisions may also be read to validate the exercise of the State's power over the individual. For example, by prohibiting *unreasonable* searches and seizures, the Fourth Amendment implicitly recognizes the power of the State to search and seize, subject to certain restrictions and requirements—i.e., probable cause and a warrant.[185] Thus, neither an individual's right to prevent the Government's entry into her home or to avoid a forcible arrest, nor the Government's power to search for and seize evidence or persons suspected of crime is absolute.[186] Similarly, implicit in the Due Process Clause is the Government's power to deprive individuals of life, liberty, and property, subject to due process of law. One already can begin to see the parallel between these two constitutional provisions.

When interpreting the various constitutional criminal procedure provisions, the Court's preference for a particular model should adequately reflect the different functions of those provisions in relation to the general goals of the criminal process outlined above.[187] To that end, this Article will examine the Fourth Amendment and its rather unique role among the criminal procedure rights. In particular, the Article will focus on the Fourth Amendment's relationship with (1) the goals of substantive criminal law; (2) the efficiency and reliability of the truth-seeking process; and (3) the aim of limiting official power over the individual. The Article endorses a Due Process Model of criminal procedure and will illustrate that the Fourth Amendment is in and of itself a due process provision, which will further support the original understanding that exclusion of evidence obtained in violation of the Fourth Amendment is a constitutionally required right.

The criminal procedure rights are mostly reposed in the Fourth, Fifth, and Sixth Amendments, as incorporated against the states in the Fourteenth Amendment. The Supreme Court, however, has differentiated between the Fourth Amendment and its criminal procedure counterparts in order to justify differing treatment of these provisions with respect to the availability of exclusion.[188] The Court's disposition towards the Fourth Amendment has led

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183. *Id.* at 226.

184. *See* 16A AM. JUR. 2D *Constitutional Law* § 404 (2013).

185. *See* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 199-201 (1993) [hereinafter Maclin, *Central Meaning*].

186. *Id.*

187. Arenella, *supra* note 144, at 198-99.

188. *See* United States v. Leon, 468 U.S. 897, 906 (1984) ("The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands . . . .").

Professor Tracey Maclin to ask, "Why is the Fourth Amendment considered a second-class right?"[189] The Court's explanation of its disparity in treatment finds support among scholars as well.[190] The Fifth Amendment privilege against compelled self-incrimination and the rights arising under the Sixth Amendment are procedural—or trial—rights, while the Fourth Amendment's guarantees are substantive.[191] This Article questions the continuing validity and force of this distinction and the resulting conclusion with respect to exclusion, in Part II.D.

This author, however, agrees that the Fourth Amendment, both normatively and descriptively, promotes quite different, and sometimes opposing, values from those of the so-called trial rights.[192] The Fourth Amendment is not exclusively a substantive right, but is rather both substantive and procedural—much like the Due Process Clause. Before the Article develops the analogy between the Fourth Amendment and the Due Process Clause, it briefly will reflect on the relationship of the Fourth Amendment to the criminal procedure goals identified above, comparing and contrasting with the Fifth and Sixth Amendment provisions where helpful.

If the primary goal of substantive criminal law is to identify and prosecute (and, thus, also prevent) undesirable conduct, then the Fifth and Sixth Amendment trial rights thwart the prosecution and punishment aspect of that goal, but only to the extent that the securing of convictions is seen as a win, regardless of accuracy.[193] To the extent that these provisions actually promote reliability and protect innocence, they are meant to thwart erroneous convictions. Thus, they are not purposely antagonistic to the goals of criminal procedure even though, through their enforcement, the factually guilty will sometimes escape punishment.[194]

The Fourth Amendment, on the other hand, impedes prosecution and

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See *infra* Part II.D for further discussion of this distinction.

189. Maclin, *Central Meaning*, *supra* note 185, at 238. Professor Maclin answers that question by speculating "that the Court sees the typical Fourth Amendment claimant as a second-class citizen, and sees the typical police officer as being overwhelmed with the responsibilities and duties of maintaining law and order in our crime-prone society." *Id.* Professor Maclin's argument is consistent with the Supreme Court's tendency towards a Crime Control Model, in which defendants are presumed to be factually guilty. *See supra* text accompanying note 170.

190. Maclin, *Central Meaning*, *supra* note 185, at 202.

191. *See* discussion *infra* Part II.D; *see also, e.g.*, Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 909 (1989) [hereinafter Loewy, *Police-Obtained Evidence and the Constitution*] ("First and foremost, [F]ourth [A]mendment rights are substantive as opposed to procedural rights."). Professor Loewy argues that "[p]rocedural rights are supposed to exclude evidence. Substantive rights need not." *Id.* at 910. Although Professor Loewy does not classify substantive rights as any less important and, indeed, believes "it makes good sense from a utilitarian perspective to engraft an exclusionary rule onto the [F]ourth [A]mendment." *Id.* at 911.

192. *See* Loewy, *Police-Obtained Evidence and the Constitution*, *supra* note 191, at 911.

193. *See* Arenella, *supra* note 144, at 232-35.

194. *See id.* at 190.

conviction by making criminal conduct more difficult to detect.[195] In this way, the Fourth Amendment directly frustrates the goals of substantive criminal law.[196] While the aim of the Fifth and Sixth Amendment guarantees are not to set the guilty free, but to ensure that the innocent are not convicted, one cannot make the same normative claim quite as forcefully in the case of the Fourth Amendment.[197] After all, the Fourth Amendment is not designed to make searches easier,[198] just as due process is not designed to make convictions easier.[199]

Since the Fourth Amendment makes discovering crime more difficult, the Amendment has a unique relationship with substantive criminal law. The Fourth Amendment may act as a direct check on the legislature since, as a practical matter, the legislature may refrain from criminalizing conduct that would be difficult to detect absent a Fourth Amendment violation.[200] For example, how do police go about developing probable cause that a married couple is using contraception in its bedroom, and that a search of the bedroom will yield evidence of such offense? In *Griswold v. Connecticut*,[201] the Court, in striking down Connecticut's birth control law, which forbade the use of contraception, described a "zone of privacy created by several fundamental constitutional guarantees[,]" including the Fourth Amendment.[202] To demonstrate how antagonistic the birth control law was to privacy, Justice Douglas, writing for the Court, asked, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."[203]

Reaching back to the colonial-era grievances that gave birth to the Fourth Amendment, the Framers sought to limit the power of the Government to detect (and thus punish and prevent) the offense of smuggling[204] and also were

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195. Tracey Maclin, *Constructing Fourth Amendment Principles From the Government Perspective: Whose Amendment Is It, Anyway?*," 25 AM. CRIM. L. REV. 669, 671 (1987-1988) [hereinafter Maclin, *Constructing Fourth Amendment Principles*].

196. *Id.*

197. *See* Arenella, *supra* note 144, at 232-33.

198. Maclin, *Constructing Fourth Amendment Principles*, *supra* note 195.

199. In fact, such a high burden of proof may thwart accuracy of the verdict, but the possibility that a factually guilty defendant will be found legally not guilty is an error that the system is willing to tolerate and, indeed, prefers over the alternative—that a factually innocent defendant be convicted. *See* Arenella, *supra* note 144, at 190, 196.

200. *See* Darryl K. Brown, *The Warren Court, Criminal Procedure Reform, and Retributive Punishment*, 59 WASH. & LEE L. REV. 1411, 1413 (2002).

201. 381 U.S. 479 (1965).

202. *Id.* at 485.

203. *Id.* at 485-86.

204. *See* Boyd v. United States, 116 U.S. 616, 625 (1886) (discussing the opposition to the writs of assistance issued to revenue officers, "empowering them, in their discretion, to search suspected places for smuggled goods"), *rejected by* Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967). There were other offenses in colonial America, including those that sought to regulate such areas as trade, debauchery, vagrancy, and observance of the Sabbath for purposes of "political

influenced by the unlawful use of general warrants in England to root out perpetrators of seditious libel.[205] The writs and warrants used to aid the enforcement of these offenses were tools of an oppressive regime, antithetical to the development of a fledgling democratic republic.[206]

Thus, while a generously construed Fourth Amendment may serve to limit the conduct that the legislature should or may criminalize, a narrow construction may have the opposite effect.[207] To illustrate, police are permitted to perform full warrantless searches of the person incident to lawful arrests.[208] Police may examine containers and packages located on the arrestee without any reason to believe they contain evidence of a crime or a weapon.[209] If the recent occupant of an automobile is arrested, police also may search the entire passenger compartment of the car "if the arrestee is within reaching distance of the [vehicle]" or if officers have reason to believe the car may contain evidence of the crime of arrest.[210]

In addition, the police may choose to effectuate a full custodial arrest of the driver of a vehicle simply for having committed one of a myriad of traffic offenses, no matter how minor,[211] regardless of the arresting officer's true motivation for arresting.[212] And, upon incarceration, even for a minor offense, the Fourth Amendment does not forbid an invasive strip search.[213] Thus, a legislature that wishes to make searching and seizing easier (and more frequent) can simply create more traffic offenses, and police can vigorously enforce them.

Having seen that the Fourth Amendment has a direct relationship with substantive criminal law, the Article turns to the next goal of the criminal process: reliability. Again, the Fourth Amendment is unique. The so-called trial rights

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and religious control," that were enforced by general searches, either without warrant or pursuant to a general warrant. Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 939-41 (1997) [hereinafter Maclin, *The Complexity of the Fourth Amendment*] (quoting William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning, 602-1791, at 379 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (published by Oxford University Press in 2009)) (internal quotation marks omitted) (discussing colonial-era general search practices).

205. *Boyd*, 116 U.S. at 626 (praising *Entick v. Carrington*, (1765) 19 How. St. Tr. 1029, *reprinted in* (1765) 95 Eng. Rep. 807 (K.B.) (partial reprint), as a decision that was "welcomed and applauded by the lovers of liberty in the colonies" and a "monument of English freedom" with which "every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar").

206. *See* Maclin, *The Complexity of the Fourth Amendment*, *supra* note 204, at 941.

207. Brown, *supra* note 200, at 1413 n.17.

208. Chimel v. California, 395 U.S. 752, 762-63 (1969), *abrogated by* Davis v. United States, 131 S. Ct. 2419 (2011).

209. United States v. Robinson, 414 U.S. 218, 236 (1973).

210. Arizona v. Gant, 556 U.S. 332, 351 (2009).

211. Atwater v. City of Lago Vista, 532 U.S. 318, 353-54 & nn.23-24 (2001).

212. Whren v. United States, 517 U.S. 806, 813 (1996).

213. Florence v. Bd. of Chosen Freeholders, 135 S. Ct. 1510, 1522-23 (2012).

promote the reliability of the criminal trial.[214] For example, one justification for excluding coerced confessions under the Due Process Clause was their inherent unreliability.[215] Similarly, the use of counsel at trial presumably will result in a more fair and accurate result than likely would be achieved if the defendant were forced to answer the Government's charges on her own.[216] On the other hand, excluding evidence found and seized in violation of the Fourth Amendment frustrates the accuracy of the trial by withholding perfectly reliable evidence from the fact-finder.[217]

This is not to say that the Fifth and Sixth Amendments are exclusively aimed at ensuring the reliability of the final verdict. These Amendments also promote values of fair play independent of reliability.[218] For example, while exclusion of coerced confessions may have been originally founded on reliability concerns, over time, concern with the Government's methods of obtaining confessions attained primary significance.[219] In *Colorado v. Connelly*,[220] the Court upheld the inclusion of a dubiously reliable confession of a man suffering from chronic schizophrenia because the police had done nothing improper to elicit the confession.[221] Thus, even if the confessor is suffering from mental illness, the use of the confession at trial does not violate due process unless the officers knew or had reason to know of the illness and exploited it to obtain the confession.[222] In other words, *Connelly* rejected reliability altogether as relevant to the due process inquiry.[223]

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214. *See* Arenella, *supra* note 144, at 188.

215. *See* Yale Kamisar, *On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 937-38 (1995).

216. *See* Arenella, *supra* note 144, at 200.

217. *See id.* at 201.

218. *Id.* at 200-01.

219. *See* Spano v. New York 360 U.S. 315, 320-21 (1959) ("The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law . . . .").

220. 479 U.S. 157 (1986).

221. *Id.* at 165-67 (holding that a due process violation requires "coercive police activity"). *Id.* at 167.

222. *Id.* at 165-67.

223. *Id.* at 167 ("'The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.'" (quoting Lisenba v. California, 314 U.S. 219, 236 (1941))). A sole focus on police misconduct as determinative of a due process violation illustrates a fragmentary conception of due process as exclusively addressing the executive branch. *See* text accompanying *supra* notes 107-10. Justice Brennan, in dissent, urged a unitary model, under which the court receiving an unreliable confession into evidence was also a state actor, for purposes of due process. *Connelly*, 479 U.S. at 180 (Brennan, J., dissenting) ("Police conduct constitutes but one form of state action. 'The objective of deterring improper police conduct is only part of the larger objective of safeguarding the integrity of our adversary system.'" (quoting Harris v. New York, 401 U.S. 222, 231 (1971) (Brennan, J., dissenting))).

Similarly, courts have also interpreted the Sixth Amendment to promote values of fairness in process independent of reliability.[224] For example, the Sixth Amendment right to counsel attaches once formal process against the defendant has begun, whether through an indictment, arraignment, or even upon an initial court appearance.[225] At that point, if the Government sends an undercover agent or an informant to "deliberately elicit[ ]"[226] a confession from the defendant, outside the presence of a lawyer, any statements made by the defendant will be excluded, not because they are unreliable, but because fairness demands this result once the relationship between citizen and State has become truly adversarial (if it was not before), and the Government's purpose has shifted from investigation to accusation.[227] Reliability is not the Court's concern here because there would be no principled reason to treat virtually identical statements differently based solely on whether the statements elicited were uttered by a defendant or a suspect.[228]

It seems self-evident that the Fourth Amendment is meant to limit state power over its citizens,[229] and the reader is no doubt familiar with the maxim equating one's home with one's castle.[230] Thus, before the Government can intrude upon our houses, persons, papers, and effects, it must show justification.[231] The Framers' primary concern was not with preventing searches of the innocent, but with preventing arbitrary searches.[232] The Fourth Amendment, born out of

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224. *See* Arenella, *supra* note 144, at 201.

225. Rothgery v. Gillespie Cnty., Tex., 554 U.S. 191, 198 (2008).

226. Massiah v. United States, 377 U.S. 201, 206 (1964).

227. *Id.* at 205 (quoting *Powell v. Alabama*, 287 U.S. 45, 57 (1932), for the proposition that defendants are entitled to the assistance of counsel prior to trial, in what the Court described as "perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation (are) vitally important" (alteration in original) (internal quotation marks omitted)).

228. Justice White criticizes the rule because it "would exclude all admissions made to the police, no matter how voluntary and reliable," and urges that the admissibility of the uncounseled statements should be based on their voluntariness. *Id.* at 209-10 (White, J., dissenting).

229. *See* Arenella, *supra* note 144, at 201.

230. William Pitt powerfully expressed this ideal to Parliament: "'The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the king of England may not enter; all his force dares not cross the threshold of the ruined tenement.'" Nelson B. Lasson, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (Da Capo Press 1970) (1937) (quoting THOMAS M. CORDLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS (8th ed. 1927)).

231. Maclin, *Central Meaning*, *supra* note 185, at 210.

232. Maclin, *The Complexity of the Fourth Amendment*, *supra* note 204, at 970-74. *But see* Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1272 (1983) ("The [F]ourth [A]mendment is designed to protect innocent people, *i.e.*, people who have not committed a crime or who do not possess sought-after evidence.").

colonial-era abuses of general searches,[233] places a direct limitation on all branches of the government.[234] Naturally, the Fourth Amendment restricts the police power by its requirement that searches and seizures be reasonable and—unless an exception applies—based on probable cause and accompanied by a warrant that meets its specifications. However, both Congress and the judiciary are also constrained by the Amendment: Congress cannot authorize non-specific warrants, and should it try, no judge may issue them.[235] The Fourth Amendment additionally addresses the judiciary with respect to the use of evidence obtained in violation of the Fourth Amendment.[236]

Whether the Government is training its investigatory eye on the citizen, or pointing its accusatory finger, the gap in power between the individual and the State is vast, greater perhaps than the Framers ever could have anticipated.[237] Under current Fourth Amendment doctrine, police may fly over and peer into our yards,[238] employ or entice informants and snitches to win our confidences,[239] discover the telephone numbers we dial,[240] and rifle through our curbside garbage.[241] Police, often bearing weapons, may board and take control of buses to move slowly through the aisle and ask passengers for consent to search their personal belongings.[242] These surveillance activities are not even considered searches or seizures and, thus, are not subject to any Fourth Amendment restraints. A vast number of citizens may be seized at nighttime vehicle checkpoints[243] and, in certain circumstances, the Government may extract blood

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233. *See supra* note 204-05 and accompanying text.

234. *See* Brown, *supra* note 200.

235. *See* Maclin, *The Complexity of the Fourth Amendment*, *supra* note 204, at 971-74.

236. *See supra* Part II.A.

237. *See* Maclin, *Central Meaning*, *supra* note 185, at 238.

238. Florida v. Riley, 488 U.S. 445, 450-52 (1989) (finding no reasonable expectation of privacy from police observation of defendant's greenhouse from a helicopter flying at 400 feet); California v. Ciraolo, 476 U.S. 207, 213-14 (1986) (finding no reasonable expectation of privacy from police observation of defendant's cartilage from an airplane flying at 1000 feet, within navigable airspace).

239. United States v. White, 401 U.S. 745, 749-50 (1971) (finding no reasonable expectation of privacy in conversations between defendant and an informant, even when such conversations are simultaneously transmitted to police).

240. Smith v. Maryland, 442 U.S. 735, 745-46 (1979) (holding that the use of a pen register, installed by the phone company to monitor the phone numbers dialed from defendant's home, did not constitute a Fourth Amendment search).

241. California v. Greenwood, 486 U.S. 35, 40-42 (1988) (holding that one does not have a reasonable expectation of privacy in garbage left at the curb for collection).

242. Florida v. Bostick, 501 U.S. 429, 438-40 (1991) (rejecting a per se rule that a Fourth Amendment seizure occurs when police approach an individual on a bus and holding that such encounters must be analyzed under the totality of circumstances to determine whether the individual felt free to "terminate the encounter") .

243. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (holding that a sobriety checkpoint constituted a reasonable seizure).

and urine samples from its citizens without any suspicion at all.[244] These intrusions, while at least triggering the Fourth Amendment, are deemed reasonable. The balance between individual and State has been decidedly struck in favor of the State.

A Due Process Model account of the Fourth Amendment, however, would strike a different balance: one that puts preeminence on process and the dignity of the individual. This Article also argues that the Fourth Amendment, because of its unique nature among the criminal procedure provisions, is better suited to such a model. That Amendment, unlike other criminal procedure provisions, does not aim to promote reliability at trial, in fact making the discovery and prosecution of crime more difficult to achieve.[245] The Fourth Amendment, instead, enjoys a more direct relationship with substantive criminal law, in that it functions to check the power of the legislature to criminalize, which can be conceived as a specific application of substantive due process.[246] Also, if the Fourth Amendment is to achieve its goal of restricting governmental power over the individual in a meaningful way, it must be broadly construed and understood to forbid the use of evidence derived in violation of that right as a function of procedural due process.[247]

C. The Fourth Amendment as a Due Process Clause

The preceding section sets the stage for engaging a parallel between the Fourth Amendment and the Due Process Clause by demonstrating that, in light of that Amendment's role within the broader criminal procedure universe, the Fourth Amendment takes on the functions of both substantive and procedural due process. Developing this thread even further, this Section demonstrates that the internal structure of the Fourth Amendment mirrors that of the Due Process Clause. In other words, the Fourth Amendment is itself a due process clause.[248]

Let us remember that the Due Process Clause of the Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without

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244. *E.g.*, Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 633-34 (1989) (upholding as reasonable suspicionless drug testing of the blood and urine of railroad employees in the wake of major accidents).

245. *See supra* text accompanying note 195.

246. *See* Brown, *supra* note 204 and accompanying text.

247. Professor Donald Dripps also proposes "that the Warren Court criminal procedure landmarks can be recharacterized as procedural due process cases." Dripps, *supra* note 33, at 618. Of course, *Mapp v. Ohio*, 367 U.S. 643 (1961), is one of those landmarks.

248. Professor Dripps also proposes that the Fourth Amendment protects a due process interest in avoiding punishment without proper adjudication, as he equates "detention and home invasion *without cause*" to "punishment without a trial." Dripps, *supra* note 33, at 621 (emphasis added). Thus, he argues that "[i]f the [F]ourth [A]mendment had never been written, the [F]ourteenth [A]mendment due process clause would justify something very similar to the Warren Court restrictions on searches and seizures." *Id.* at 620.

due process of law."[249] The Fourth Amendment can be fairly said to vindicate three primary interests as well: liberty, property, and privacy. The Court, in fashioning its remedial approach to Fourth Amendment violations, has treated violations of privacy as incapable of being truly remedied, leading to the argument that exclusion of evidence does not repair the damage already done by the unlawful search.[250]

If a property interest has been violated, then the correct remedy is the return of property. In fact, this remedial model provides one justification for the exclusionary rule announced in *Weeks v. United States*.[251] Unfortunately, under current standing doctrine, as stated most explicitly in *Rawlings v. Kentucky*,[252] the Court no longer recognizes this ground as the basis of a right-remedy relationship.[253] Likewise, when a liberty interest is impermissibly violated, the correct remedy is to return that liberty.[254] Thus, if one is illegally seized, the direct repair to that violation is the restoration of liberty. However, privacy, the Court tells us, unlike property or liberty, cannot be restored once it has been breached. Thus, the restitution of property or liberty return the aggrieved individual back to the state she enjoyed prior to the violation, while it is impossible, when privacy is at stake, for the victim to regain what was lost. Or so the Court tells us.

What, then, is a breach of privacy? If a police officer, or anyone for that matter, breaks into my home, that officer or person will see the paintings I enjoy, the books I read, the movies I watch, and the music I love. A brief look at my home office will reveal my profession, and the stacks of bills on my desk will reveal what I buy and how much I owe. What the intruder has received, without my consent, is *information*. While we generally think of privacy as some intangible state of being, privacy is simply the right to exclude others from one's information. By this account, privacy begins to look very much like property. The *Katz* Court understood this as well, by holding that a conversation, which is simply information consensually relayed from one person to another, can, for

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249. U.S. CONST. amend. V.

250. *See supra* text accompanying notes 124-30 (discussing United States v. Calandra, 414 U.S. 338 (1974)). Professor Heffernan concedes that privacy wrongs are irreversible but urges a constitutional requirement of exclusion based on a theory of disgorgement of the wrongdoer's gains. Heffernan, *supra* note 94, at 848-51.

251. 232 U.S. 383, 398 (1914). The Court refers to the Fourth Amendment's protection of property rights and refers to the accused as having "made timely application to the court for an order for the return of these letters, as well [as] other property." *Id.* at 393.

252. 448 U.S. 98, 105-06 (1980).

253. *See* Rakas v. Illinois, 439 U.S. 128, 148-49 (1978); *see also supra* note 14 and accompanying text.

254. *See* Sheehan v. Beyer, 51 F.3d 1170, 1176 (3d Cir. 1995) ("[T]here is little difference between depriving a person of liberty without due process of law, on the one hand, and failing to restore someone's liberty after any legal justification for its deprivation has been eliminated, on the other hand." (quoting Childs v. Pellegrin, 822 F.2d 1382, 1388 (6th Cir. 1987))).

purposes of the Fourth Amendment, be seized.[255] Thus, *Katz* gave conversations the same protection as papers, and phone booths the same protection as houses, because information is worthy of Fourth Amendment protection.

In addition, the distinction between privacy on the one hand, and liberty and property on the other, may not be so clear; restoring liberty and returning property are not in themselves truly complete remedies. After all, there is no way to restore the time spent without one's property or liberty, other than seeking damages as a proxy for the harm. If privacy is viewed as informational property, then returning the information restores at least some control over its use to its rightful owner, and in the case of exclusion, prevents, at least to one extent, its further dissemination. Nonetheless, returning the property cannot erase the acquired information from the intruder's mind, nor can the intruder be prevented from revealing to others what she has learned about me from her entry into my home.[256] However, the exclusionary rule can limit the use of that information in a way that perhaps matters most, certainly for criminal defendants: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[257]

Although this Article presents the case for recognizing the exclusionary rule as a first-party remedy, and raises the possibility of a conception of privacy that can be restored, at least to some extent, once breached, this Article urges a conception of exclusion that goes beyond remedy and achieves the status of constitutional right. This Article has already made the case that one may equate the taking of information with the taking of property. Alternatively, the argument can be made that a violation of privacy impinges on a liberty interest. The Supreme Court has, in a variety of contexts, lodged the protection of privacy in the liberty interest of substantive due process.[258] If our liberty and property

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255. Katz v. United States, 389 U.S. 347, 353, 358-59 (1967) (holding that the Government's conduct of listening through an electronic device attached to the outside of a public phone booth to the defendant's phone conversation, without a warrant, constituted an unreasonable search and seizure). Justice Black dissented from the opinion, urging fidelity to the text of the Fourth Amendment and reasoning that "a conversation overheard by eavesdropping, whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized." *Id.* at 365 (Black, J., dissenting).

256. *See* Heffernan, *supra* note 94, at 845 (challenging the argument that exclusion has "a fully restorative effect with respect to the informational privacy interest infringed by an illegal search" because the "*condition* of informational privacy" cannot be restored once violated). Professor Heffernan maintains that there is a "stark" contrast between "property and liberty interests on the one hand and privacy interests on the other." *Id.*

257. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

258. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965), discussed *supra* text accompanying notes 201-03; *see also* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (striking down a Texas law criminalizing sodomy: "The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to

interests are violated through an unlawful search, then the Government potentially deprives us of those interests without due process. What does due process require in this context? Obedience to the requirements of the Fourth Amendment! Thus, an unlawful search violates due process *because* it violates the Fourth Amendment.

Further, the Fourth Amendment is, itself, a due process clause, sharing an identical structure. Under due process, a court cannot convict and sentence a defendant to punishment[259] without both cause and process.[260] *In re Winship*[261] tells us that due process requires the State to prove each element of its charge beyond a reasonable doubt.[262] While this level of proof provides the substantive justification for the deprivation of liberty, that alone is not sufficient to satisfy due process; the determination of guilt must be made in a constitutionally acceptable manner, at a trial before a neutral arbiter (guilty pleas notwithstanding).[263] In other words, a properly adjudicated determination of the cause must occur *prior* to the deprivation.

This Article posits that searches and seizures also constitute deprivations of liberty and property. While the deprivations contemplated by the Fourth Amendment are generally not as severe as the loss of liberty resulting from a conviction, neither is the necessary justification.[264] The Fourth Amendment generally requires "only" probable cause, rather than the proof beyond a reasonable doubt required to convict. The difference in standard aside, the structures of the Fourth Amendment and the Due Process Clause are the same: each urges judicial determination of cause or justification *prior* to the deprivation. In the case of the Fourth Amendment, a magistrate generally makes that determination, which is expressed in the form of a warrant.[265]

Each step in the criminal process requires more justification and more process

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engage in their conduct without intervention of the government. 'It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.'" (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992))).

259. Punishment, of course, often constitutes a deprivation of liberty through incarceration, or in the most extreme circumstances, a deprivation of life when the death penalty is imposed.

260. U.S. CONST. amend. V.

261. 397 U.S. 358 (1970).

262. *Id.* at 364, 368.

263. *Id.* at 367-68. Even in the context of a plea, where a defendant chooses not to exercise his right to a trial, a judge must still accept the plea and ensure that it has met constitutionally required standards. *See* Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978).

264. Dripps, *supra* note 33, at 620 ("Arrest and search differ obviously from punishment without trial, because arrest and search involve a lesser intrusion, and justifications for arrest and search are easier to prove. These differences are of degree, however, not of kind.").

265. Here, the Article is focusing on Fourth Amendment *searches*, and, referring to the view adhered to by earlier Courts, "that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967) (footnotes omitted).

as the severity of the liberty deprivation increases. In the federal system, and in many states, before the State imposes a liberty deprivation upon the would-be defendant by way of a formal charge, process demands input from the community: although the level of proof remains the same, an indictment can only be justified if a grand jury adds its assertion that there is cause to subject this individual to the further deprivation of a trial.[266] Thus, taking into account these varying levels of justification for each incremental increase in deprivation, if the Court permits the prosecution's use at trial of evidence seized in violation of the Fourth Amendment, the ultimate deprivation of liberty (the conviction and subsequent punishment) is itself predicated on a denial of due process and cannot be tolerated.

While a robust due process model of exclusion would restrict introduction of all evidence derived from any Fourth Amendment violation, a slightly more moderate approach may be preferable—one based on an understanding of due process that takes into account the nature and severity of the government conduct in committing the violation. Professor Sunderland, in advocating for a due process approach to exclusion, traces an understanding of due process from its English roots[267] to its American usage,[268] sharing the common thread that due process is concerned with setting a standard of governmental behavior that avoids "arbitrary, flagrant or fundamental violations of an individual's rights."[269] The early English and American applications of due process "emphasize[d] the profound and non-trivial character of the protections associated with due process of law."[270]

Thus, in *Rochin v. California*, officers forcibly took the defendant to the hospital where, at the officers' direction, "a doctor forced an emetic solution through a tube into Rochin's stomach[,]" causing him to vomit the contents of his stomach, which included two morphine capsules.[271] The Court found that this conduct not only "offend[ed] some fastidious squeamishness" but also "shock[ed] the conscience."[272] According to Professor Sunderland, *Rochin* demonstrates "an interpretation of and historical authority for the view that due process of law requires the exclusionary rule but not in response to *all* police violations of

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266. The Fifth Amendment states, in relevant part, that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. CONST. amend. V.

267. Sunderland, *supra* note 94, at 150-51, 154 (tracing the history of due process to the "law of the land" provision enshrined in the Magna Carta).

268. *Id.* at 151 (discussing various formulations in American case law that shed light on the meaning of due process as protective of rights that are "profound and non-trivial").

269. *Id.* at 154 (internal quotation marks omitted).

270. *Id.* at 151.

271. 342 U.S. 165, 166 (1952).

272. *Id.* at 172. The Court also affirmed a characterization of due process as being violated when the methods used to obtain convictions "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples . . . ." *Id.* at 169 (quoting Malinski v. New York, 324 U.S. 401, 416-17 (1945)).

constitutional requirements."[273] As discussed above, the facts of *Mapp v. Ohio*[274] demonstrate flagrant abuse of police power as well, and the district court in *Payner I* described the Government's behavior as "outrageous," "purposeful[ly] criminal," "gross[ly] illegal," and exhibiting a "purposeful, bad faith hostility toward the Fourth Amendment rights."[275]

This understanding of due process as being implicated only by flagrant governmental misconduct would permit the use of evidence derived from non-egregious, or "insubstantial violations which do not offend those great purposes which give the concept of due process its fundamental justification."[276] Furthermore, this understanding of due process would leave intact the Court's denial of an exclusionary remedy for good-faith violations,[277] but based on due process, rather than deterrence, grounds.

D. Fourth Amendment Rights Versus Trial Rights: A Distinction Losing Legitimacy as a Basis for Denying Exclusion

Finally, before turning to exclusion and standing, the Article wishes to challenge the distinction that the Court has drawn, in forming its exclusionary rule doctrine, between the Fourth Amendment as a "substantive" right versus the "trial" rights embodied in the Fifth and Sixth Amendments. For example, the Court in *Kimmelman v. Morrison* declined to extend the limitations on federal habeas review of defendants' Fourth Amendment claims to ineffective assistance of counsel claims arising under the Sixth Amendment, stating,

> Although it is frequently invoked in criminal trials, the Fourth Amendment is not a trial right; the protection it affords against governmental intrusion into one's home and affairs pertains to all citizens. . . . The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process.[278]

As another example, in *Withrow v. Williams*,[279] the Court "explained that

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273. Sunderland, *supra* note 94, at 152.

274. Mapp v. Ohio, 367 U.S. 643, 660 (1961) (holding the exclusionary rule applicable to state prosecutions). *See supra* notes 111-17 and accompanying text.

275. *Payner I*, 434 F. Supp. 113, 125, 131-33 (N.D. Ohio 1977), *rev'd*, 447 U.S. 727 (1980); see text accompanying *supra* notes 1-9 for a description of the facts of the case.

276. Sunderland, *supra* note 94, at 155; s*ee also Payner I*, 434 F. Supp. at 128-29 (discussing numerous cases in which the Court declined to exclude evidence based on due process grounds where governmental conduct was insufficiently egregious and concluding that "Due Process requires exclusion of reliable evidence only in those cases in which government officials obtain the challenged materials in a grossly improper fashion").

277. *See supra* notes 137-39 and accompanying text.

278. Kimmelman v. Morrison, 477 U.S. 365, 374 (1986).

279. 507 U.S. 680, 696 (1993) (holding, in part, that the Fourth Amendment habeas restrictions of *Stone v. Powell*, 428 U.S. 465 (1976), do not apply to habeas claims based on

unlike the Fourth Amendment, which confers no 'trial right,' the Sixth confers a 'fundamental right' on criminal defendants, one that 'assures the fairness, and thus the legitimacy, of our adversary process.'"[280] The Court continued, turning to violations of *Miranda v. Arizona*,[281] by again comparing exclusion in the Fourth Amendment context to exclusion based on *Miranda*: "*Miranda* differs from *Mapp* in both respects. 'Prophylactic' though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards 'a fundamental *trial* right.'"[282]

The Court has, however, blurred the lines between trial and substantive rights, expanding the protection of the Fifth and Sixth Amendments to the pre-trial context. The Fifth Amendment tells us that one cannot be compelled to be a witness against oneself "*in any criminal case*."[283] Taken literally, it seems to say that the prosecution cannot force a defendant to take the witness stand and answer questions. *Miranda*, however, removed any doubt as to the reach of the self-incrimination provision: it reaches all the way to the interrogation room.[284] If an unwarned statement acquired at the stationhouse is considered presumptively compelled,[285] then such compulsion took place long before and is far removed from the criminal trial. If the Fourth Amendment search is conducted with an eye towards procuring evidence for a trial,[286] then there seems to be practically little difference between the probing of one's house, person, or

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violations of *Miranda v. Arizona*, 384 U.S. 436 (1966)).

280. *Id.* at 688 (quoting *Kimmelman*, 477 U.S. at 374).

281. *Miranda*, 384 U.S. at 498-99 (holding that custodial interrogation in the absence of certain warnings required exclusion of those statements at a subsequent criminal trial).

282. *Withrow*, 507 U.S. at 691 (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990)). The Court classifies the Fifth Amendment privilege as one that "embodies principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle," and also notes that Fifth Amendment violations implicate reliability concerns, as a "system of criminal law enforcement which comes to depend on the confession will, in the long run, be less reliable." *Id.* at 691-92 (quoting *Verdugo-Urquidez*, 494 U.S. at 264; Michigan v. Tucker, 417 U.S. 433, 448 n.23 (1974); Bram v. United States, 168 U.S. 532, 544 (1897)) (internal quotation marks omitted).

283. U.S. CONST. amend. V (emphasis added).

284. *Miranda*, 384 U.S. at 457-58.

285. *Id.* at 458 ("Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice. From the foregoing, we can readily perceive an intimate connection between the privilege against self-incrimination and police custodial questioning.").

286. Law enforcement does not, of course, conduct all Fourth Amendment searches with the purpose of gathering evidence of crime. For example, detention center personnel conduct inventory searches of an arrestee's belongings upon jailing the arrestee for the purposes of protecting the arrestee's property, protecting the police from false claims of theft, and keeping the jail free of dangerous items and contraband. *See* Illinois v. Lafayette, 462 U.S. 640, 646 (1983). However, as the focus of this Article is standing to exclude evidence in criminal cases, the Article is primarily concerned with searches aimed at the discovery and subsequent prosecution of criminal activity.

papers during a search, and the probing of one's mind during an interrogation. This Article does not claim, as the Court in *Boyd* did, that the Fourth and Fifth Amendments "run almost into each other[,]"[287] but proposes that the Fourth Amendment itself governs the use of seized evidence.

Once the Court has taken the Fifth Amendment compulsion out of the trial, the argument for symmetrical treatment of the Fourth (by bringing the right into the trial) can be made. Similarly, the Sixth Amendment's right to assistance of counsel applies to "all criminal prosecutions,"[288] and yet, the right, once it has attached, has been extended to various pre-trial stages, such as interrogations[289] and pre-trial lineups.[290]

Exclusion of evidence can be a tough pill to swallow, and the Court has, therefore, tried to have its cake and eat it too. For example, the Court has distinguished between "mere" *Miranda* violations and actual violations of either the Due Process or Self Incrimination Clauses in holding that the physical "fruits" of *Miranda* violations are not fruit after all, or at least not fruit of any constitutional violation:

> It follows that police do not violate a suspect's constitutional rights (or the *Miranda* rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda*. Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial.[291]

It was not a large step for the Court to reason that "with respect to mere failures to warn, [there is] nothing to deter. . . . [and] therefore, no reason to apply the fruit of the poisonous tree doctrine."[292]

Similarly, in *Oregon v. Elstad*,[293] the Court differentiated between "technical" violations of *Miranda* and truly coerced confessions,

> conclud[ing] that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier

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287. Boyd v. United States, 116 U.S. 616, 630 (1886), *rejected by* Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967).

288. U.S. CONST. amend. VI.

289. *See* Massiah v. United States, 377 U.S. 201, 204-06 (1964); Spano v. New York, 360 U.S. 315, 326 (1959).

290. United States v. Wade, 388 U.S. 218, 227 (1967).

291. United States v. Patane, 542 U.S. 630, 641 (2004).

292. *Id.* at 642 (internal quotation marks omitted) (tracing the "fruit of the poisonous tree" doctrine to *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)).

293. 470 U.S. 298 (1985).

statement.[294]

Again, there was no poisonous tree bearing similarly poisonous fruit, as the Court found that the failure to provide warnings is not a constitutional violation: "Thus, in the individual case, *Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm," through the exclusion of the unwarned statement itself.[295] Therefore, Elstad's fully warned statement, which followed on the heels of an initial statement given without benefit of *Miranda* warnings, was admissible.[296]

Due to the "prophylactic" nature of the *Miranda* rule, an unwarned statement is also admissible in certain situations because "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."[297] Thus, in the context of *Miranda*, because the potential constitutional violation would only occur at trial (it is, after all, a trial right), and is for the most part avoided altogether because the unwarned statement itself (usually) is excluded,[298] all derivative evidence is admissible because the "fruit of the poisonous tree" doctrine simply does not apply. Once the Court conceives of *Miranda* as "prophylactic" or "preventive," and dismisses the need to deter violations, the decision not to exclude the fruit of *Miranda* violations begins to resemble the reasoning employed to limit the Fourth Amendment exclusionary rule: deterrence is simply not always worth the cost.[299]

While the Fifth Amendment violation does not occur until trial, if and when the unwarned statement at issue is actually introduced, the Sixth Amendment—on the other hand, and rather extraordinarily—is a trial right than can be violated prior to trial. In *Kansas v. Ventris*,[300] the Court held that statements taken in violation of the Sixth Amendment right to counsel and, more specifically, in violation of *Massiah v. United States*,[301] are admissible to impeach a defendant's trial testimony.[302] In so holding, the Court admitted that "[t]he core of the right to counsel is indeed a trial right,"[303] yet "conclude[d] that the *Massiah* right is a

294. *Id.* at 314.

295. *Id.* at 307.

296. *Id.* at 317-18.

297. New York v. Quarles, 467 U.S. 649, 657 (1984).

298. In addition to public safety exception announced in *Quarles*, *id.*, statements taken in violation of *Miranda* are admissible to impeach the defendant's testimony. *See* Harris v. New York, 401 U.S. 222, 226 (1971).

299. *Quarles*, 467 U.S. at 656-58.

300. 556 U.S. 586 (2009).

301. 377 U.S. 201, 211-12 (1964).

302. *Ventris*, 556 U.S. at 593. The statements at issue were those made by the defendant, prior to trial, to an informant whom police had planted in the defendant's holding cell. *Id.* at 589. The State conceded that the statements were likely taken in violation of the Sixth Amendment and were thus inadmissible in the State's case in chief. *Id.*

303. *Id.* at 591.

right to be free of uncounseled interrogation, and is infringed at the time of the interrogation. That, we think, is when the 'Assistance of Counsel' is denied."[304] The Court's ensuing discussion of the role of exclusion in this situation strikingly resembles its Fourth Amendment exclusionary rule discourse:

> This case does not involve, therefore, the prevention of a constitutional violation, but rather the scope of the remedy for a violation that has already occurred. Our precedents make clear that the *game* of excluding tainted evidence for impeachment purposes is not worth the candle. The interests safeguarded by such exclusion are "outweighed by the need to prevent perjury and to assure the integrity of the trial process. . . . On the other side of the scale, preventing impeachment use of statements taken in violation of *Massiah* would add little appreciable deterrence.[305]

Ventris, then, represents quite a paradox. The Court has distinguished the Fourth Amendment from the so-called trial rights, reasoning that the constitutional harm is fully accomplished at the time of an unlawful search, and, therefore, the exclusion of evidence, by not undoing that harm, is not a personal, constitutionally required remedy.[306] However, even in the context of a trial right, the Court has utilized the very same reasoning to limit the exclusion of statements taken in violation of the Sixth Amendment right to counsel by asserting that the constitutional harm was fully accomplished at the time the statement was made. Therefore, as in the Fourth Amendment context, excluding the statement would not remedy the harm already done. In the meantime, neither of the rights granted by *Massiah* or *Miranda* seems to be a "core" trial right. However, *Miranda* violations, on the one hand, do not bear fruit (pun intended) until and unless the unwarned statements are admitted at trial. Until that time, there is nothing to deter, and all evidence derived from these violations is admissible. On the other hand, *Massiah* violations contravene the Constitution at the time the statements are elicited, so derivative evidence is excluded only if deterrence is worth the price, and in the end, exclusion is just a "game."[307]

This Part has urged a return to the original understanding of the Fourth Amendment exclusionary rule as a personal, constitutional right rooted in due process. The Article has further supported this concept of exclusion by examining the structure of the Fourth Amendment and its function within the broader criminal procedure realm. The Article then concludes that a violation of the Fourth Amendment *is* a violation of due process, and that the Fourth Amendment is *itself* a due process provision. Thus, a conviction based on unlawfully obtained evidence causes compounded due process harm. Finally, the Article has shown that Courts have significantly eroded the distinction between substantive and trial rights, at least for purposes of exclusion. What remains,

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304. *Id.* at 592.

305. *Id.* at 593 (emphasis added) (quoting Stone v. Powell, 428 U.S. 465, 488 (1976)).

306. *See supra* text accompanying notes 126-29.

307. *See supra* text accompanying note 305.

then, once it is acknowledged that exclusion of evidence derived from a Fourth Amendment violation is constitutionally required, is to answer the question suggested by the title of this Article: "Does it matter *whose* Fourth Amendment right has been violated?"

III. Reviving a Target Theory of Standing: A Due Process Right to Standing and Exclusion

Returning to Mr. Payner, we can rephrase that question. Should he have been entitled to seek suppression of the evidence used against *him* but obtained by an egregious violation of his *banker's* Fourth Amendment right?[308] And, what of the countless passengers in vehicles that are stopped on the basis of one of many minor traffic violations, even if the violation is in reality a pretext available to the officer who simply wishes to investigate some other offense, and even if (as is the case, in some circuits) the lawful stop evolves into an unlawful, prolonged detention?[309] This Article proposes that both of these situations not only permit, but require, exclusion—or at least the opportunity to seek exclusion—based on the due process rights of those being prosecuted.

Just as this Article is willing to concede that due process does not necessarily require exclusion of evidence derived from *all* Fourth Amendment violations,[310] it also suggests that it is appropriate to recognize some limits to the expanded model of standing being proposed—both to make this theory more palatable, and also to avoid true "windfalls" to defendants.

Imagine the following scenario: police officers suspect that Mr. X is involved with a criminal organization, but they have not yet developed probable cause. The officers break into Mr. X's home, perhaps even in a "highhanded manner."[311] While the police are rummaging through Mr. X's home, Mr. X, hoping to divert attention from himself, blurts out that Mr. Y, his neighbor, is a drug dealer and furnishes evidence against him. If Mr. Y is later prosecuted, the broadest possible notion of due process standing would permit him to suppress the evidence, derived from the violation of Mr. X's rights, that the State seeks to use when prosecuting Mr. Y, simply because such evidence was unlawfully obtained. Intuitively, though, as much as the police acted improperly, excluding the evidence against Mr. Y seems somewhat fortuitous, especially since Mr. X played such an instrumental role in providing the evidence.

However, imagine instead that the police unlawfully entered Mr. X's home in order to find evidence against Mr. Y. Perhaps the police successfully encourage Mr. X to divulge information about Mr. Y. Again, by the current understanding, it was Mr. X's Fourth Amendment right that was violated by the search of his home; yet, it does not seem as objectionable to claim that the

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308. *Payner I*, 434 F. Supp. 113, 118-22 (N.D. Ohio 1977), *rev'd*, 447 U.S. 727 (1980); *see supra* Introduction.

309. *See supra* Part I.

310. *See supra* discussion preceding and accompanying notes 276-77.

311. *See* Mapp v. Ohio, 367 U.S. 643, 644 (1961).

prosecution's use of the evidence obtained in this example against Mr. Y violates his due process rights. This Article is proposing, therefore, the revival of a target theory of standing, although in a slightly modified version, to permit a defendant, as a due process right, to seek exclusion of evidence obtained in violation of another's Fourth Amendment rights.

The so-called target theory of standing sources from *Jones v. United States*,[312] in which the Court held that a defendant had standing to suppress evidence found pursuant to the search of the apartment he occupied as a guest.[313] The Court classified the "victim of a search or seizure" as "one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else."[314] Nearly twenty years later the *Rakas* Court would dismiss this language as dicta, while also obliterating one of the alternative avenues to standing announced in *Jones*: that the defendant was "legitimately on [the] premises where a search occurs."[315]

This Article proposes a target theory slightly broader than the one articulated in *Jones* and that would include defendants whom the police directly or indirectly target.[316] Under this proposal, a defendant would have standing to suppress evidence derived from an unlawful police search conducted with the intent of obtaining incriminating information or evidence against someone other than, or in addition to, the individual whose Fourth Amendment rights were directly violated. Thus, Mr. Payner would have standing to suppress because the Government, in searching the banker's briefcase, was trying to obtain information about the banker's clients. In the second hypothetical above, Mr. Y would have standing to suppress because the police were searching Mr. X's home to find evidence against Mr. Y.[317] And, finally, passengers in cars would have standing to contest the search of the automobile yielding evidence against them when police unlawfully search with the hope of finding evidence against the driver *and* others.

While there may be inherent difficulties in determining police officers'

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312. 362 U.S. 257 (1960).

313. *Id.* at 272-73.

314. *Id.* at 261.

315. Rakas v. Illinois, 439 U.S. 128, 134-35, 141-42 (1978) (quoting *Jones*, 362 U.S. at 267). *Jones* also conferred automatic standing to defendants seeking to suppress the possession of contraband, which is the basis of their criminal charge. *Jones*, 362 U.S. at 263-64. However, the Court, in *United States v. Salvucci*, 448 U.S. 83, 93-95 (1980), disposed of "the automatic standing rule[,]" which resulted in the current doctrine of standing. *See supra* notes 14-16 and accompanying text.

316. A broader target theory than the one announced in *Jones* is warranted because, while *Jones* sought to define the person who has suffered a *Fourth Amendment* harm, this Article is basing exclusion on due process and, thus, identifies the group of defendants who can claim a *due process* deprivation when evidence derived from violations of others' Fourth Amendment rights are admitted in trial.

317. This is consistent with the target theory advanced in *Jones*. *See Jones*, 362 U.S. at 267.

subjective states of mind when they conduct searches, objective facts and circumstances will often demonstrate officers' intent. Further, the rule announced in *Whren* does not preclude inquiry into the searching officer's subjective intent in these circumstances, where the search is unlawful, because such intent is not based on any objectively proper justification.[318] In *Whren*, the Court held that a seizure is reasonable if based on probable cause, regardless of the officer's "actual motivations" to effect the seizure.[319] Although susceptible to grave abuse, such a rule can at least be defended on the basis that the requisite level of proof (probable cause) that justifies Fourth Amendment intrusions has been met, so that, objectively speaking, the officer is justified in his action, and the victim of the intrusion (certainly in the case of a seizure of the person)[320] has demonstrated the requisite level of blameworthiness to justify the intrusion. When searches and seizures are not based on probable cause (or some other circumstances lawfully permitting these intrusions), however, the police are simply not justified in acting, objectively or otherwise, and the individual subject to such an intrusion has not (as far as the officer can know) in any way diminished her right to be free from such police interference. Therefore, *Whren* is simply inapplicable.

Moreover, in assessing whether governmental conduct violates due process, the Court has already considered the nature and flagrancy of official conduct. Recall that in *Rochin*, the Supreme Court excluded evidence of the contents of the defendant's stomach on due process grounds because the police methods used to obtain that evidence "shock[ed] the conscience."[321] On the other hand, in *Connelly*, the Court held that the admission of a mentally ill defendant's confession did not violate due process, despite its suspect reliability, because police were unaware of, and did not exploit, his illness.[322] Thus, when standing is a matter of due process, it is entirely appropriate to examine the subjective intent of the government actor.

Finally, the Court has recently become increasingly willing to consider police intent when defining the Fourth Amendment search. In 2000, the Court held that a border patrol agent's squeezing of the defendant's luggage constituted a search

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318. *See* Whren v. United States, 517 U.S. 806, 811-12 (1996). The *Whren* Court discussed prior rulings in which the Court had stated that inventory and administrative searches should not be conducted as a pretext for criminal investigation, noting that

> [i]n each case we were addressing the validity of a search conducted in the *absence* of probable cause. Our quoted statements simply explain that the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes.

Id.

319. *Id.* at 813.

320. This statement is qualified because one can imagine a situation where police have probable cause to search the home or automobile, for example, of one not suspected of any wrongdoing.

321. Rochin v. California, 342 U.S. 165, 172 (1952).

322. Colorado v. Connelly, 479 U.S. 157, 167 (1986).

because he "fe[lt] the bag in an exploratory manner."[323] While this phrase may describe how strong, in a physical sense, the agent's handling of the bag was, the Court seems to equally (or perhaps even more so) suggest that what matters is the agent's purpose in squeezing the luggage (which will, of course, dictate how intensely he must prod in order to fulfill that purpose).[324]

Even more recently, the Court, in holding that the Government's attachment of a Global-Positioning-System ("GPS") on defendant's vehicle and its use to track his movements over an extended period constituted a Fourth Amendment search, used the following language to support its holding: "It is important to be clear about what occurred in this case: The Government physically occupied private property *for the purpose of obtaining information*."[325] If the Court has made the officer's purpose (to obtain information) an element that defines the activity as a Fourth Amendment search, then it seems entirely proper to consider the officer's intent when making a standing determination. After all, the definition of a search and the definition of standing are one and the same.[326]

CONCLUSION

The current definition of Fourth Amendment standing simply leaves too many citizens vulnerable to arbitrary, or worse, racially motivated, police practices in the name of law enforcement. Passengers in multi-occupant vehicles are particularly susceptible to a doctrine that permits officers to violate one individual's constitutional rights through an unlawful search, with the knowledge that any evidence found may be used against those who, at least as narrowly defined, did not suffer a direct Fourth Amendment violation. Due process requires more. If the exclusion of evidence derived from an unlawful search is once again conceived of as a personal constitutional right grounded in due process, then even those defendants whose Fourth Amendment rights were not violated by the search in question may rightfully claim a due process right that their convictions should not be based on egregiously unconstitutional governmental conduct. This is particularly so when officers unlawfully search and seize with the intent to find evidence incriminating individuals other than, or in addition to, the direct victim of the violation. This due process approach to the exclusionary rule and to standing will once again ensure that the Fourth Amendment, rather than being "stricken from the Constitution,"[327] shall be venerated and honored as one of "those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."[328]

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323. Bond v. United States, 529 U.S. 334, 338-39 (2000).

324. *See id.* at 339.

325. United States v. Jones, 132 S. Ct. 945, 949 (2012) (emphasis added).

326. *See supra* note 16 and accompanying text.

327. Weeks v. United States, 232 U.S. 383, 393 (1914).

328. *Id.*

DYSFUNCTIONAL CONTRACTS AND THE LAWS AND PRACTICES THAT ENABLE THEM: AN EMPIRICAL ANALYSIS

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INTRODUCTION

A review of purchase agreement forms used by condominium developers in Chicago, Illinois from 2003-2008 (the "Condo Contracts Study"[1]) discovered that 79% contained highly unfair, one-sided remedies clauses. Specifically, as detailed in Part I, these forms provided that the buyer's sole remedy in the event of the seller's breach was the return of the buyer's own earnest money.[2] This is not a meaningful remedy because it does not cover any of the losses buyers would normally be entitled to under the law due to a breach of the contract, creating—as one court put it—"heads-I-win, tails-you-lose" illusory agreements.[3] In essence, these clauses constitute a waiver of the right to recover benefits of the bargain/expectation damages, consequential damages, reliance-type damages, and

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1. The Condo Contracts Study was based on a Freedom of Information Act ("FOIA") request by Professor Stark of the City of Chicago to view all of the property reports filed by developers of condominiums in Chicago, Illinois during 2003-2008 (attached as one of the exhibits to each property report was a form purchase and sale contract for the condominium units that the developer planned to use). Boxes of such filed property reports were made available to Debra Stark's research assistants, and approximately twenty-five property reports (one report is issued for each condo building) were randomly selected to review for each of those years for a total of 155 form purchase contracts from a base of 631 property reports. Debra Pogrund Stark et al., Condo Contracts Study: Chicago, Illinois 2003-2008, which were accessed in 2009-2010 (on file with author) [hereinafter Condo Contracts Study]. A detailed analysis of some of the other contracts clauses reviewed under this study will appear in a future article.

2. *See* Condo Contracts Study, *supra* note 1.

3. Blue Lakes Apts., Ltd. v. George Gowing, Inc., 464 So. 2d 705, 709 (Fla. Dist. Ct. App. 1985).

the remedy of specific performance. Further compounding the unfairness of this limited remedy clause is the fact that these same form contracts also provide the seller with the ability to recover substantial damages in the event of the buyer's breach. Typically, the contracts provided that for the buyer's breach of the contract the seller could retain the buyer's deposit (usually an amount between 5-10% of the purchase price).[4] We argue that these overly one-sided remedies clauses create "dysfunctional contracts" because one party, the more sophisticated party (the seller/developer who drafted the form contract), can willfully default and terminate the contract with no harm to that party.[5] Hence, the contract provides no true binding agreement from that party. Meanwhile, under these contracts, the other party is bound and would suffer a material harm if she failed to perform. Since the main function of entering into a contract is for both parties to be bound through risk of exposure to negative consequences if they breach, these form contracts are dysfunctional because they remove all negative consequences for the sellers. Indeed, such contracts could be construed as invalid and lacking in consideration because one of the party's promises are illusory, a conclusion drawn by some courts in Florida, but one that courts in other jurisdictions have rejected.[6] Courts in jurisdictions outside of Florida have refused to strike down this type of liability limiting clause under the unconscionability test due to the "clear" wording of these "bargained for" clauses.[7]

But do laypersons really comprehend these clauses that appear to lawyers and judges as clearly limiting liability? And if not, how does this impact, first, the premise that the laypersons bargained for this result when they signed the purchase agreement and, second, the application of the unconscionability test for striking down a limitation of liability clause? This Article discusses a "Remedies Experiment"[8] the authors ran which attempts to assess the layperson's comprehension of the highly unfair limitation-of-remedy clauses found in so

4. *See* Condo Contracts Study, *supra* note 1; *Blue Lakes Apts., Ltd.*, 464 So. 2d at 709.

5. Terminating the contract and returning the purchaser's earnest money is technically a legal consequence of rescission and partial restitution, but it does not provide the buyer with a recovery for the buyer's losses caused by the seller's breach, nor does it impose a loss on the seller for terminating the contract or create a disincentive to engage in strategic defaults.

6. *Compare* Port Largo Club, Inc. v. Warren, 476 So. 2d 1330, 1333 (Fla. Dist. Ct. App. 1985) (finding that limiting the purchaser's damages to the return of his deposit "render[ed] the seller's obligation wholly illusory and would permit him to breach with impunity") *and Blue Lakes Apts., Ltd.*, 464 So. 2d at 709 (finding such clauses render the seller's obligations to be illusory), *with* Tanglewood Land Co. v. Byrd, 256 S.E.2d 270, 271 (N.C. Ct. App. 1979) (applying Virginia law, the court held that if a seller fails to perform under a contract, the buyer may "sue for specific performance or breach of contract," but unless it can be shown the seller acted in bad faith, the fact that the seller's only obligation would be to refund the buyer's payment does not render the contract illusory).

7. *See infra* Part III.

8. Debra Pogrund Stark et al., Consumer Remedies, Chicago, Illinois (2010-2011) (on file with the author) [hereinafter Remedies Experiment]. *See infra* Part II.B.

many real estate developer form contracts. We found that the results from our experiment reflect a widespread failure of the participants to understand the impact of this type of clause on their rights after a breach. These results undercut the premise upon which the unconscionability test rests: that the home purchaser understood the clearly worded limitation clause and therefore bargained for this result.[9] Thus, while many courts refuse to strike down these clauses under the unconscionability test, this Article argues that the results from the Remedies Experiment should lead courts to adopt a different set of tests for ruling on the enforceability of limitation-of-remedy clauses in home purchase contracts.

Part I of this Article highlights the relevant results from two empirical studies Professor Stark conducted regarding major problems with the fairness of purchase agreement forms used by residential real estate developers in Illinois. Part I also discusses the lack of home purchaser understanding of key relevant laws and legal documents examined in an empirical study conducted by Professor Michael Braunstein in Columbus, Ohio.[10] Part II of this Article contains a detailed report of the results from the Remedies Experiment we ran.[11] This experiment demonstrated that, contrary to the assumption of many judges, even after carefully reviewing limitation-of-remedies clauses, a very large percentage of laypersons believed they were entitled to remedies that were "clearly" (at least to an attorney or judge's eyes) excluded in the contract clause. In Part III, the Article examines and critiques case law on the enforceability of these limitation-of-remedies clauses noting the split of authority among the reported case law in the United States on this issue and why Florida's approach of providing greater protection to home purchasers is more appropriate. In Part IV, the Article proposes four legal reforms to address the problem of dysfunctional contracts that contain highly unfair and problematic remedies clauses.

I. HIGHLIGHTS FROM TWO EMPIRICAL STUDIES IN ILLINOIS AND AN EMPIRICAL STUDY IN COLUMBUS, OHIO

As previously noted, a key finding from Professor Stark's Chicago Condo Contracts Study was that 79% of the form contracts reviewed contained terms that provided no remedy to the condo purchaser to cover the purchaser's losses due to the seller's breach or to deter the seller from strategic, willful defaults.[12] At the same time, however, the seller/developer retained valuable remedies upon default of the buyer's contractual obligations.[13] The form contracts overwhelmingly contained a clause limiting the buyer's sole and exclusive remedy in the event of the seller's breach to termination of the contract and

9. *Tanglewood Land Co.*, 256 S.E.2d at 271 (determining the contract was supported by consideration).

10. Michael Braunstein & Hazel Genn, *Odd Man Out: Preliminary Findings Concerning the Diminishing Role of Lawyers in the Home-Buying Process*, 52 OHIO ST. L.J. 469, 476-79 (1991).

11. *See* Remedies Experiment, *supra* note 8.

12. *See* Condo Contracts Study, *supra* note 1.

13. *Id.*

return of the buyer's own earnest money (an obligation that would exist regardless of the contract clause identifying it as the buyer's sole remedy[14]). This creates a waiver of other more meaningful remedies to address the seller's breach, such as specific performance, benefit of the bargain, reliance, or consequential damages, without explicitly setting forth these rights and saying these rights are now waived. Only 4% of the sampled form contracts' remedies clauses permitted the buyer to seek compensatory/bargain type remedies available under the law in the event of the seller's default had the contract been silent on the issue of remedies.[15] In the same form contracts, sellers were granted the compensatory remedy of liquidated damages (in the form of retention of the buyer's earnest money—typically under those contracts at somewhere between 5-10% of the purchase-price amount) in 68% of the contracts and were permitted all available remedies in the event of the buyer's default in 23% of the contracts.[16]

Equally important to any limitation-of-remedies clause is how the contract treats attorneys' fees for enforcing the agreement. Unless the contract provides for attorneys' fees for the prevailing party, few buyers could afford to bring a lawsuit to challenge the validity of a limitation-of-remedy clause because the attorneys' fees are likely to be substantial, sometimes even exceeding their damages claims.[17] According to the Condo Contracts Study, only 14% of the contracts contained a provision entitling the prevailing party in a lawsuit relating to a purchase contract to attorneys' fees.[18] Therefore, in 86% of these form contracts, the purchaser is far less able to bring a claim for specific performance or damages and to challenge any applicable limitation-of-remedy clause when the seller has breached the contract.[19]

A survey of over one hundred attorneys in Illinois conducted by Stark ("Attorney Survey") also reflects the serious problems with remedies clauses in condo purchase agreements found in the Condo Contracts Study.[20] In the

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14. *Id.* Generally, when a buyer deposits a sum of money with the seller, or with a third party, it is with the express intent that it be used to pay a portion of the purchase price if the deal is closed and serve as security if the buyer defaults. In fact, if the deal does not close due to the seller's default or other reasons not the fault of the buyer, then the seller is obligated to repay that amount of money to the buyer. *See* Kopis v. Savage, 498 N.E.2d 1266, 1269-72 (Ind. Ct. App. 1986).

15. Condo Contracts Study, *supra* note 1.

16. *Id.*

17. According to one source, fees associated with litigating a lawsuit range from 30-60% of the total recovery. *See* JEFFREY O'CONNELL, THE LAWSUIT LOTTERY: ONLY THE LAWYERS WIN 86 (1979). When the claim involves a construction defect, experts are likely to be necessary, adding to the typical costs of litigation.

18. *See* Condo Contracts Study, *supra* note 1.

19. *Id.* If the contract is silent on the recovery of attorneys' fees for a suit based on the contract, the prevailing party is not entitled to an award of its attorney's fees unless there is an applicable statute to the contrary. *See infra* note 81.

20. Debra Pogrund Stark, Illinois Real Estate Attorney Survey (circulated in 2010) (on file

Attorney Survey, when asked in an open-ended question what terms in the condo purchase contracts they have seen that were highly unfair or highly problematic, 51% referred to the limitation-of-liability to the seller or the limitation-of-remedies to the buyer as their chief concern.[21] When asked to rate their level of satisfaction with various terms in the condo purchase contracts they have seen, in response to the remedies available to the buyer, 32% of surveyed attorneys rated their level of satisfaction as "1" (with "1" being the lowest level of satisfaction and "7" being the highest), another 22% rated it with a "2," 15% rated it with a "3," leaving only a total of 29% who rated it with a "4" or better.[22] In addition, when asked, "To what extent do you think a buyer, unrepresented by an attorney, would have read the form contract, realized that they should have raised the same important changes you would, and would then be able to raise these points with the seller," 69.6% of the attorneys surveyed reported a "7," and 92.1% reported either a "6" or "7" (on a 1-7 scale) that they felt strongly that they did not think they (the buyers) would raise the same points.[23] The results of the Remedies Experiment we ran in connection with spotting problems with the unfair remedies clauses of the contract supports this opinion.[24] These results suggest a need for homebuyers to have an attorney represent the homebuyer at the contract formation/negotiation stage or under an attorney approval of the contract clause. It should also be noted that only 35% of the attorneys reported that they were successful in negotiating a modification or deletion of highly unfair or problematic terms contained in the developer's form contract greater than 50% of the time.[25] As Part IV of the Article discusses, this result suggests the need to create legislation prohibiting the most unfair and problematic terms developers use in their form contracts, especially ones that laypersons do not understand. Finally, we asked attorneys to report how often major disputes arose between the parties after the contract was signed (before or after closing the deal).[26] Approximately half of respondents (50.5%) reported that such major disputes arose in only 1-10% of the matters they handled, with only 3.8% reporting experiencing such major disputes more than 50% of the time but only

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with author) [hereinafter Attorney Survey]. The Attorney Survey was based upon dissemination of an online survey designed to elicit the opinions and experiences of Illinois real estate attorneys regarding residential real estate form contracts prepared by developers with a focus on the level of fairness of the terms to buyers and ability of the lawyers to negotiate for better terms, but covering other related matters. The form was sent to members of the Illinois State Bar Association and the Chicago Bar Association, various residential real estate attorneys who had listings on Lawyers.com, alumni of The John Marshall Law School, and real estate lawyers located on the Martindale-Hubbell directory. In total, 108 lawyers submitted responses to the survey. A detailed analysis of the Attorney Survey will appear in a future article.

21. *Id.*

22. *Id.*

23. *Id.*

24. Remedies Experiment, *supra* note 8.

25. Attorney Survey, *supra* note 20.

26. *Id.*

9.7% reporting they never had a major dispute arise after the contract was signed.[27] The fact that most reported such a low percentage of major disputes (1-10%) may explain why the Special Master in New Jersey noted no evidence of public harm from having homebuyers unrepresented by attorneys.[28] But this Article disagrees, first, with the belief that it is acceptable even if 1-10% of homebuyers have no remedies when the seller has breached a home purchase contract, and, second, that it does not pose a public harm worthy of state intervention. For example, most states require automobile drivers to obtain casualty insurance due to the likelihood that drivers will, at some point, be involved in a car accident, and motorists must be insured to pay for any damage inflicted on other motorists.[29] One might imagine that a very large percentage of claims are filed each year; yet in 2011, only 1% of policyholders brought bodily injury claims, and the average amount paid on those claims was $14,848.[30] Only 5% of policyholders brought a claim for collision damages, and the average amount paid on these claims was only $2869. Similarly, it is the practice of mortgage lenders, and a requirement for FHA insured loans, to require that the borrower obtain casualty insurance on the home as a condition to obtaining the loan.[31] Yet, in 2008 only 6% of insured homeowners filed a claim (97% of claims were for property damage, including theft) on their homeowner's insurance policies.[32] Even though the percentage of insurance claims filed for car insurance and home damage ranges from 1-10%, federal and state laws still require insurance coverage in these areas. Likewise, this Article argues that state laws should require specially trained and licensed attorneys to represent homebuyers at the contract formation stage. Such representation provides a type of "insurance" because the attorneys can review the contract, spot problems, and negotiate changes to the contract to address those problems, consequently placing homebuyers in a far better position when major disputes arise in 1-10% of the deals. If unable to negotiate for changes to address the problems, the lawyer will make the buyer aware of the risks, and some buyers may choose not to proceed with the deal and seek out a safer alternative.[33]

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27. *Id.*

28. *In re* Opinion No. 26 of Comm., 654 A.2d 1344, 1345 (N.J. 1995) (per curiam).

29. Harvey Rosenfield, *Auto Insurance: Crisis and Reform*, 29 U. MEM. L. REV. 69, 70 (1998).

30. *Auto Insurance*, INS. INFO. INST., http://www.iii.org/facts_statistics/auto-insurance.html (last visited June 29, 2013).

31. *See* Kenneth S. Klein, *Following the Money—The Chaotic Kerfuffle When Insurance Proceeds Simultaneously Are the Only Rebuild Funds and the Only Mortgage Collateral*, 46 CAL. W. L. REV. 305, 306 (2010) ("A standard condition of mortgages or, more precisely, the security instruments accompanying mortgages in the United States is that the borrower must have casualty insurance protecting not just the borrower, but also the bank." (internal parentheses omitted)).

32. *Homeowners and Renters Insurance*, INS. INFO. INST., http://www.iii.org/facts_statistics/homeowners-and-renters-insurance.html (last visited June 16, 2013).

33. The area of major dispute most reported in the Attorney Survey was the physical condition of the home (86%), followed by failure to complete on time (58.1%), failure of a

There is another empirical study on the impact of attorney representation in home purchases that has relevant findings. In Braunstein's 1989 study, noted earlier, recent purchasers of homes near Columbus, Ohio, were interviewed in lengthy telephone conversations.[34] Of the 132 homebuyers surveyed, 41% had hired an attorney to represent them in some capacity of the purchase, and the rest had not.[35] He noted that "many of those who hired a lawyer" did so where "the lawyer was involved fairly early in the process," but it is not clear if this refers to the time the contract was being negotiated.[36] When asked why they hired a lawyer, the most frequent response was a vague "to protect me" answer, apparently without any further details.[37] Braunstein notes several areas where the purchasers failed to understand basic real estate laws as applied to their deal: (i) "50[%] did not know whether their deed was a general warranty deed, a limited warranty deed, a quit claim deed, or some other type," (which impacts liability of the seller to the buyer for defects in title and encumbrances); (ii) although many knew they had taken title as joint tenants (only 22.6% did not know how they took title), almost 50% of those who knew they took as joint tenants "did not know the significance of how they held title" (such as rights of survivorship, which might not be what the buyers intended if, for example, it is the couple's second marriage and there are children from the first marriage); and (iii) a large percentage of buyers displayed a substantial lack of understanding of title insurance, with "only 7% realiz[ing] that there were any exceptions to their policy," and over half not realizing "that title insurance did not cover faulty construction, but did cover adverse legal claims to the house and land."[38] Equally problematic is the fact that an "overwhelming majority of buyers were not given a copy of the title policy until at or after the closing"[39] when it is difficult or too late to address title problems disclosed in the title commitment. Some of the home buyers also did not realize that the real estate agent's loyalty was to the seller, and not the buyer, unless the agent was the buyer's agent or a dual agent.[40] These results reflect that the homebuyers were ignorant of important legal matters relating to their home purchases, suggesting that the buyers should be represented by an attorney who is aware of these matters and able to ensure that the buyer's goals and expectations are met. Having said that, a disturbing finding from the telephone interviews was that purchasers who used lawyers were no more educated on relevant legal matters, no more content with the exchange, and no more likely to deflect disagreement than those who did not hire representation.[41] These results show poor diligence by the attorneys who

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condition to close (44.1%), breach of contract (37.6%), title defects (35.5%), and other (12.9%).

34. Braunstein & Genn, *supra* note 10, at 469.

35. *Id*. at 471.

36. *Id*.

37. *Id*.

38. *Id*. at 476-77.

39. *Id*. at 477.

40. *Id*.

41. *Id*. at 479-80.

represented those home buyers[42] and the authors here contend underscore the need for attorneys who practice in this area of law to be specially trained and licensed in order provide real value to their clients.[43]

II. CONSUMER UNDERSTANDING OF REMEDIES EXPERIMENT

A. Summary of Background Laws Relating to Contract Remedies Experiment

Under the common law, the usual contract remedies that can be sought when a party breaches an agreement to sell or buy real estate are as follows: (i) "specific performance" (i.e., the right to force the other party to close the deal, with the buyer paying the purchase price and the seller deeding the property to the buyer);[44] (ii) benefit of the bargain damages,[45] also sometimes referred to as expectation damages or "loss-of-bargain damages," which calculation is based upon the difference between the fair market value of the real estate on the date of the breach and the contract price[46] (for example, if the contract price is $100,000, and the fair market value is $115,000, if the seller breaches the contract, the buyer can recover $15,000 in expectation damages); (iii) reliance damages, which are based upon any expenditures made by the non-breaching party in order to perform under the contract (if the seller breaches the contract, and the buyer has incurred expenses, such as expenditures from securing financing paying for a home appraisal or inspection, the buyer can recover these expenses as their reliance damages);[47] (iv) "restitution and rescission," which means termination of the contract and return of any sums the non-breaching party has paid to the other party (such as the earnest money);[48] (v) incidental damages, which are damages that arise due to breach of the contract that the breaching party could have reasonably anticipated and which the non-breaching party could not have reasonably avoided[49] (such as the buyer having to pay a fee to the lender to obtain the same interest rate on the loan if during the closing delay the interest rate increased); and (v) liquidated damages, which is an agreement in the contract

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42. Braunstein did note that while 41% of those surveyed said they hired their own lawyers to help them purchase the house, a later question revealed that nine of the fifty-four respondents paid no fee to their lawyer, and two of the fifty-four said they never had met or spoke with their lawyer. *Id.* at 471 & n.5.

43. Alan M. Weinberger, *Some Further Observations on Using the Pervasive Method of Teaching Legal Ethics in Property Courses*, 51 ST. LOUIS U. L.J. 1203, 1205 (2007) (stating "transactional real estate practice generates a greater proportion of legal malpractice claims than any other field (twenty-five percent)"). *See also infra* Part IV.

44. *See* WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 10.5, at 738 (3d ed. 2000).

45. *Id.* § 10.3, at 724.

46. *Id.*

47. *Id.* at 727-28.

48. *Id.* § 10.7, at 748-49.

49. *Id.* § 10.3, at 727-29.

of the damages that the breaching party will owe as a specified amount (such as, for a breach by the buyer, the amount of money serving as the earnest money deposit [typically an amount between 5-10% of the purchase price]). This liquidated amount is generally due notwithstanding the actual damages the non-breaching party might otherwise recover[50] (i.e., if the actual damages end up being more or less than the liquidated amount, the liquidated amount, would control). The amount must be a reasonable estimate of damages at the time the contract is entered into.[51]

With the exception of liquidated damages, the other remedies exist even if a contract is silent on the issue of remedies.[52] When a contract attempts to limit any of these otherwise available remedies, this is called an "exculpation clause" or a "limitation of liability" clause, which exist in the "clearly unfair" and "vaguely unfair" contract conditions categories described below.[53] As will be discussed in detail in Part II, most exculpation/limitation of liability clauses are enforced but may not be enforced by some courts in extreme cases. The list of remedies described above (except for liquidated damages) would all apply to the "fair" contract condition. The possibility of recovering attorneys' fees to enforce the agreement is a special category and is not covered by the common law as a remedy for breach of contract.[54] To recover attorneys' fees for enforcing the agreement and to seek remedies after a breach, one needs either to specially provide for this in the agreement (as done in the fair contract condition but not in the clearly unfair or vaguely unfair contract conditions), or there must be a statute on point that covers the situation (for example, a consumer fraud claim).[55] There are also limits to the combination of remedies that a non-breaching party can recover, such as not being able to recover both specific performance or benefit of the bargain damages and also reliance-type damages.[56]

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50. *Id.* § 10.4, at 733.

51. *Id.* at 734. To be enforceable, the amount must "be a reasonable estimate," at the time the parties enter into the contract, of the amount of damages the non-breaching party will sustain. *Id.* at 734-35. But some courts will look at the actual damages, and if they are far less than the liquidated amount, might rule that the liquidate amount is a penalty and not enforceable. *Id*. at 735.

52. RESTATEMENT (SECOND) OF CONTRACTS §§ 344-346 (1981).

53. *See* 8 RICHARD A. LORD, WILLISTON ON CONTRACTS § 19:25 (4th ed. 2012).

54. RESTATEMENT (SECOND) OF CONTRACTS § 345; *see* Clevert v. Jeff W. Soden, Inc., 400 S.E.2d 181, 183-84 (Va. 1991) (awarding attorney's fees because the contract contained a provision requiring the defaulting party to pay them).

55. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967) ("The rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.").

56. The participant responses on this issue reflected a lack of knowledge of such limitations. Details of these results are on file with the second author. We asked participants questions related to that and since this knowledge is not relevant to how the contract remedies clause should be drafted, we are not reporting in this Article the results from those questions.

B. The Consumer Remedies Experiment

In designing the Consumer Remedies Experiment, we were inspired by a similar study conducted by Stolle and Slain in 1997.[57] In their study, participants imagined that they were injured while using exercise equipment at a health club in one scenario and imagined that their car was scratched in a repair shop in another.[58] Participants reviewed the exculpation clauses in the gym's and the shop's contracts.[59] The language, if enforceable, would have severely restricted the gym's and the shop's liability.[60] Two-thirds of the participants correctly identified that there was a clause that prevented their potential for recovery in a lawsuit.[61] In 2011, the authors of this Article conducted an experiment to investigate the abilities of individuals to understand restrictive remedies clauses in home purchase contracts and the methods and results of this experiment are described below.[62]

1. Methods.—

a. Participants.—One hundred seventy-seven undergraduate students completed the questionnaire for course credit. Participants were randomly assigned as follows: fifty-two to the fair condition, sixty-five to the clearly unfair condition, and sixty to the vaguely unfair condition. The sample was 64.9% female, 62.5% white, 13.6% Hispanic, 5.7% Asian American, 5.7% African American, and 2.3% Native American. The majority of participants identified as Democrats (52.3%), followed by Independents (19.3%), Republicans (13.6%), Libertarians (7.4%), and Green Party (3.4%). Participants rated their family income levels as high (6.8%), upper-middle (39.7%), middle (42.0%), or low (8.0%). These participants had little to no personal experience with home purchase scenarios like the one described in this experiment. They were asked whether they had ever had an experience similar to this one and to respond on a 7-point scale with "1" representing "not at all similar," "4" representing "somewhat similar," and "7" representing "very similar." The average response was 1.37. Participants were also asked how reputable they thought most professional real estate developers are in general on a 7-point scale with "1" representing "not at all reputable," "4" representing "somewhat reputable," and "7" representing "very reputable." The average response was 4.20.

b. Materials and procedure.—Participants entered the laboratory and were given a randomly assigned questionnaire with either a fair, clearly unfair, or vaguely unfair remedies clause.

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57. Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers' Propensity to Sue*. 15 BEHAV. SCI. & L. 83 (1997).

58. *Id.* at 87.

59. *Id.*

60. *Id.*

61. *Id.* at 88.

62. Remedies Experiment, *supra* note 8. The following information, including the *Methods*, *Results*, and subsequent analysis are all attributed to the Remedies Experiment.

In the "*fair condition*" questionnaire, the remedies clause read,

> *In the event of default by Seller or Buyer, the Parties are free to pursue any legal remedies at law or in equity. The prevailing party in litigation shall be entitled to collect reasonable attorney's fees and costs from the losing party as ordered by a court of competent jurisdiction*.

This clause provides both parties with equal protection. Both parties are free to pursue all of the legal remedies described above and liabilities were reciprocal.

In the "*clearly unfair condition*" group, the remedies clause read,

> *In the event this sale is not closed within sixty (60) days from the date hereof, and Buyer is not then in default, then Seller shall, upon written request of Buyer, return Buyer's earnest money and this Agreement shall become null and void. Seller's liability in the event of Seller's breach of the contract shall be limited to the return of Buyer's earnest money. In the event of Buyer's default hereunder then the Seller shall retain the earnest money as Seller's liquidated damages and sole remedy.*

This clearly unfair clause is problematic from the perspective of the buyer, because if the seller defaults, the seller's liability is limited to the return of the buyer's earnest money. By contrast, if the buyer defaults, the seller would retain the buyer's earnest money (a significant sum of money at 5% of the purchase price under the scenario we described in the study). That is, the seller never risks their own money and the buyer, in essence, has waived four potentially significant remedies listed above (specific performance, benefit of the bargain/expectation damages, reliance damages, and consequential damages) even though those remedies were not specifically noted as being waived in the clause.

In the "*vaguely unfair condition*" questionnaire, the remedies clause was identical to the remedies clause in the *clearly unfair condition* except that the words "*in the event of Seller's breach of the contract*" were dropped from the second sentence, making that sentence simply state, "*Seller's liability shall be limited to the return of Buyer's earnest money*." This change makes it unclear under what circumstances the seller's liability is limited to return of buyer's earnest money. It could potentially relate to only a termination of the contract due to a failure of a condition to closing occurring, such as the buyer obtaining financing, as contrasted with having the limitation of liability clause also cover a seller default situation. Because the language is broad, it is likely a court would interpret it to cover the default situation, and the clause is likely to have the same effect as the clearly unfair contact condition clause.

Participants were then told to imagine that they had performed all of the duties required by the contract, including depositing 5% of the purchase price as earnest money ($10,000) under the contract. They wished to close the deal, but the seller refused. They suspected that the seller had received a better offer, and their attorney advised them that the seller would be in breach of the contract if the seller did not close. In addition, if the deal did not close, they would still owe their attorney $300 in fees for the work performed on the deal. They had already paid $400 for an inspection of the home, $450 for the appraisal report on the

home, and for a credit check to get a loan to purchase this home. They were told to imagine that, based upon an appraisal of the home, the purchase price under the contract was $15,000 lower than the property, appraised price and that if they desired to buy a comparable home the purchase price would likely be $15,000 higher. In addition, interest rates had risen since they first locked in the interest rate. The mortgage broker told them that obtaining the same loan with the same interest rate on another house would cost an additional $1000.

Participants were then asked to answer a series of questions regarding the actions they would take in the scenario, and their interpretations of the rights they would have under the contract. These questions along with participants' responses in each of the three conditions are described in the following results section.

2. Results.—

a. Participants were asked to briefly explain what they would do in similar circumstances.—We were curious to see if those in the fair condition group stated they would seek more remedies than those in the unfair conditions group in light of the different remedies language in the contracts. Responses were categorized as pursuing legal remedies, such as suing or speaking to an attorney, or not pursuing remedies beyond the return of the earnest money. When responses were ambiguous as to which category was most appropriate, responses to subsequent questions were used to determine the appropriate category. When it was not possible to categorize responses, they were dropped from analysis. Of the participants who answered the question and had clear responses, more participants indicated that they were inclined to pursue remedies in the *fair condition* group (43/48 or 89.6%) than in the *clearly unfair condition* group (38/55 or 69.1%) or in the vaguely unfair condition group (30/47 or 63.8%). These differences were statistically significant, $\chi^2 (2, N = 150) = 9.27, p < .01$.[63]

b. Participants were asked how similar they thought the remedies clause in the contract was to those used by most professional real estate developers.—They answered on a 7-point scale, with "1" representing "not at all similar," "4" representing "somewhat similar," and "7" representing "very similar." This question was intended to get a sense of whether the participants assumed the remedies clause was typical or not. If there was no statistical difference in the results among the three conditions, it could indicate that there was no knowledge of what is customary. Based on the results from the Condo Contracts Study,[64] the correct answer under the *fair condition* clause would be a "1," the correct answer under the *vaguely unfair* condition would be a "6"and a "7" under the *clearly unfair* condition.

By contrast, participants in the *fair condition* group gave the fair clause an average of 4.9 on this scale, participants in the *clearly unfair condition* group gave it a 4.7, and participants in the *vaguely unfair condition* group gave it a 4.8. These responses were not different by a statistically significant amount between

63. This statistic reports the results of a chi-square analysis used to investigate categorical data P-values less than .05 are considered statistically significant by convention.

64. Condo Contracts Study, *supra* note 1.

conditions, $F(2, 174) = 0.40, p > .05$.[65] The finding that ratings differed so drastically from the results from the Condo Contracts Study[66] suggests that the participants did not know what type of remedies clauses are customary. This result underscores the need for consumers to have the necessary contractual scripts and schemas to protect themselves. Our participants lacked these scripts and schemas.

c. Participants rated how difficult they found it to understand the language of the remedies clause in the contract.—Participants again based their answers on a 7-point scale, with "1" representing "not at all difficult," "4" representing "somewhat difficult," and "7" representing "very difficult." Prior to running the experiment, we thought that both the *fair* and *clearly unfair* remedies clauses were easy to understand, and the *vaguely unfair* clause was more difficult because it was not clear what situations the limitation-of-remedies related to. While the participants would not have known all of the precise remedies available in the absence of an exculpation/limitation of liability clause, we thought they would at least recognize that they would be limited to a refund of their own money.

Contrary to this original prediction, all participants rated their clause as "somewhat difficult." Differences were not statistically significant, $F(2,174) = 0.92, p > .05$.[67] Participants in the *clearly unfair condition* group rated this clause a 4.6 in difficulty, participants in the *fair condition* group rated it a 4.3, and participants in the *vaguely unfair condition* group rated it a 4.2; but this difference was not statistically significant despite the major differences in these remedies clauses.

Based on other results from the Consumer Remedies Experiment, it appears that the clearly worded *fair* remedies clause was "somewhat difficult" for them to understand because they did not precisely know what "legal remedies" were available to them "at law or in equity," legal terminology that any lawyer or judge who has taken a contracts course in law school should readily understand but apparently not understandable to laypersons. Similarly, the clearly worded *unfair* remedy clause was also "somewhat difficult" for them to understand, perhaps because many were not precisely sure what words like "sole remedy" meant. Their admitted difficulties in understanding the clauses most likely accounts for their difficulties identifying the portions of the remedies clause that would prevent them from recovering damages, an issue discussed below.

d. Participants were asked how likely they would be to demand that the Seller pay for their losses and to rate how successful they thought they would be if they demanded that the Seller pay for their losses.—Participants used on the same 7-point likelihood scale described above. Prior to running the study, we thought that participants who were given the *fair* remedies clause would have been most likely to make this demand, followed by the *vaguely unfair* and *clearly*

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65. This statistic reports the results of an analysis of variance used to investigate quantitative values such as ratings. P-values less than .05 are considered statistically significant by convention.

66. *Id.*

67. *See supra* note 65.

unfair clauses. After all, the *fair remedies* clause would have given the participants who were given that clause grounds for making this demand.

Contrary to this original prediction, the type of remedies clause did not have a substantial effect on participants' ratings of how likely they would be to make this demand. Participants given the *fair* clause rated their likelihood of making this demand a 5.8, participants given the *clearly unfair* clause rated their likelihood a 5.5, and participants given the *vaguely unfair* clause rated their likelihood a 5.6. These ratings were quite high, between "somewhat likely" and "very likely," but did not statistically differ across conditions, $F(2,172) = 0.42, MSE = 2.88, p > .05$.[68]

The finding that participants' responses did not differ across the different remedies clauses reflects a lack of understanding of the impact of the contract remedies language on their rights to recover their losses (Why make a demand for losses if you are unlikely to be able to recover on this demand?). It may also reflect a failure to understand the types of losses they could be recovering—depending on the language in the contract—with some viewing the loss of their earnest money paid as their only loss (perhaps due to the language in all three contracts that refer to this possible loss), versus the range of other losses they would be compensated for under the law.

Participants were optimistic on the question of how successful they thought they would be in making demands. If knowledgeable of the impact of the remedies clause language, participants who were given the *fair* remedies clause would rate a likely chance of success, and participants who were given the *vaguely unfair* and *clearly unfair* clauses would rate a less likely chance of success. However, participants in the *fair condition* group were unduly pessimistic, and participants in the *clearly unfair* and *vaguely unfair conditions* groups were unduly optimistic about their chances given how those remedies clauses read. Responses were all in the "somewhat successful" range and did not differ across the different remedies clauses by a statistically significant amount, $F(2,172) = 1.57, MSE = 2.66, p > .05$.[69] Participants given the *fair* clause rated their likelihood of success as 4.5; whereas, participants given the *clearly unfair* clause rated their likelihood a 3.9, and participants given the *vaguely unfair* clause rated their likelihood a 4.2. These are all small differences without statistical or practical significance. These results suggest that participants either did not understand the legal consequences or implications of the remedies clauses they were given or possibly confined their understanding of "losses" in the two *unfair* conditions clauses to their earnest money.

e. Similar to the study performed by Stolle and Slain (1997),[70] *participants were asked whether the remedies clause in the contract might prevent them from recovering on their demand.*—We asked this because participant answers to the question of their likelihood of success may have been influenced by their beliefs regarding the legal system (i.e., whether the legal system is fair or rigged against

68. *See supra* note 65.
69. *See supra* note 65.
70. Stolle & Slain, *supra* note 57.

them), rather than making an appraisal based upon the actual reading of the remedies clauses. To address this question and focus more specifically on the reading of the remedies clause, participants were asked, as a simple "yes" or "no" question, whether they thought that the remedies clause in the contract, as opposed to other factors, might prevent them from recovering on their demand. The normative answer was "no" in the *fair condition* group and "yes" in the *clearly unfair* and *vaguely unfair conditions* groups. Consistent with the normative answer, approximately two thirds of participants (68.0%) in the *fair condition* group correctly answered "no." This left, however, approximately one-third of the participants given the *fair* clause who failed to comprehend how *fair* the fair remedies clause was. Although 65.6% of participants who were given the *clearly unfair* clause correctly answered "yes," 34.4% failed to comprehend how the wording of that clause would prevent them from recovering on their demand. The percentages in the Remedies Experiment who stated "yes" to understanding there is a limitation on what remedies they can recover is similar to the percentage in Stolle and Slain's experiment of those who identified the clause—after reading the entire contract—that limited their ability to recover in a lawsuit.[71] We did not provide an entire contract in the Remedies Experiment but only provided them with the limitation of remedies clause.

When we asked the participants to circle the portion of the clause that limited their remedies (discussed in the next section), participants were much less likely to correctly do so than the two-thirds of participants who correctly identified that the clause limited their remedies. This finding suggests that participants may have been guessing when they identified that the clause limited their liability as they could not correctly explain their response. Also troubling, was the finding that only 44.1% of participants who were given the *vaguely unfair* remedies clause correctly answered "yes." Thus, more than half of the participants (55.9%) failed to comprehend how the wording of that clause would prevent them from recovering on their demand. The differences between these groups were statistically significant, $\chi^2(2,173) = 13.43, p < .01$[72] with the participants in the *vaguely unfair condition* group the most likely to fail to comprehend how the remedies clause would affect their likelihood of succeeding in recovering their losses. This is consistent with one of our hypotheses that consumers under the *vaguely unfair* clause are less likely to realize how their remedies have been reduced than those in the clearly unfair clause. It should be noted, however, that the other two conditions also reflected a significant amount of inaccurate understandings on this issue.

f. Participants were asked to circle the portions of the remedies clause that might prevent them from recovering.—Of those given the *fair* clause, where nothing prevented them from recovering, seventeen participants out of fifty-two (32.7%) incorrectly circled something. In the *clearly unfair* clause, the words "limited to" in the sentence "Seller's liability in the event of Seller's breach of the contract shall be limited to the return of Buyer's earnest money" was the key

71. *Id.*

72. *See supra* note 63.

portion that prevented recovery. Likewise, in the *vaguely unfair* clause, the words "limited to" in the sentence "Seller's liability shall be limited to the return of Buyer's earnest money" was the key portion that prevented recovery. Only a minority (seventeen out of sixty-five; 26.2% of participants given the *clearly unfair* clause) correctly circled those words in that sentence. Even fewer (six out of fifty-seven; 10.5%) correctly circled those words when given the *vaguely unfair* clause. This difference between the *clearly unfair* and *vaguely unfair* clauses was statistically significant, $\chi^2 (1, N = 122) = 8.03, p < .01$.[73]

g. Participants were asked how likely they would be to seek advice from an attorney.—Participants based their answers on the 7-point likelihood scale described above. Ratings were high for all three conditions but were not lower in the fair condition than in the *clearly unfair* and *vaguely unfair conditions*, $F(2,174) = 0.17, MSE = 1.38, p > .05$.[74] Participants rated themselves a 6.3 (very likely) on this scale in the *fair condition* group, 6.3 in the *clearly unfair condition* group, and 6.2 in the *vaguely unfair condition* group. This finding suggests that it is not clear to the participants what rights they have under the remedies clauses and would benefit from advice of an attorney on this.

h. Participants were asked, assuming their attorney had advised them that a lawsuit was possible, to rate on the likelihood scale described above how likely they would be in successfully recovering what they desired in a lawsuit.—This question is similar to the earlier question of the likelihood of recovering losses upon demand but is different in two ways. This question, by referring to a lawsuit, clarifies that a judge is making the decision now, versus "demands" where the seller may be deciding. Second, by referring to recovering what they "desire," this question expands on the recovery notion by asking participants to consider what they desire (for example getting the property) versus just recovering their losses (such as earnest money and out of pocket expenses). The normative answer should have been "7" (very likely) for participants who were given the *fair* clause, "1" (not at all likely) for participants who were given the *clearly unfair* clause, and "1.5" for participants who were given the *vaguely unfair* clause, in light of the summary of background laws on contract remedies previously provided. Contrary to these normative answers, responses were all slightly above "somewhat likely," and while they differed by an amount that is considered marginally significant, $F(2,174) = 2.94, MSE = 1.82, p = .06$,[75] they did not differ by an amount that would have practical consequences. The average of the responses of the participants given the *fair* clause were 5.2, the average of the responses of the participants given the *clearly unfair* clause was 4.8, and the average of the responses of the participants given the *vaguely unfair* clause was 4.5. Again, since the responses to this question on the likelihood of being successful in a lawsuit across conditions did not statistically differ, this is evidence that consumers did not understand the impact of the contract language on what they can recover for a breach of contract.

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73. *See supra* note 63.
74. *See supra* note 65.
75. *See supra* note 65.

i. Participants were asked how successful they thought they would be in a lawsuit to recover five specific losses.—These losses included: (1) attorneys' fees for negotiating the contract and handling the matter before the default (an example of reliance damages); (2) attorneys' fees for handling the litigation (only recoverable if the contract or applicable statute provides for attorneys' fees); (3) the $400 paid for the inspection and $450 for the appraisal report and credit check to obtain the loan (examples of reliance damages); (4) the $10,000 for the difference between the fair market value of the home and the purchase price (the expectation/benefit of bargain damages); and (5) the $1000 to obtain a new loan at the same rate (although rates have risen) to close on the purchase of a home (an example of consequential damages). In addition to this general question regarding how successful they thought they would be on each of these items, participants were asked more specifically, as "yes" or "no" questions, whether the remedies clause or any laws on remedies might prevent them from recovering. In general, participants who were given the *fair* remedies clause were unduly pessimistic, and participants who were given the *clearly unfair* and *vaguely unfair* remedies clauses were unduly optimistic. Each result reflects a major lack of understanding of the impact of the contract language on what they could recover.

(1) Recovery of attorneys' fees for negotiating the contract and handling the matter before default:

On the question asking the likelihood of recovering attorneys' fees for negotiating the contract and handling the matter before the default, the normative answer should have been a "7" among participants who were given the *fair* remedies clause, a "1.5" among those given the *clearly unfair* remedies clause, and a "2" among those given the *vaguely unfair* remedies clause, based on the laws relating to contract remedies summarized earlier.[76] Consistent with these normative answers, the remedies clause affected participants' judgments by a statistically significant amount, $F(2,174) = 3.95, MSE = 3.71, p < .05$,[77] although the majority of responses were in the "somewhat likely" range. Responses of participants who were given the *fair* clause (mean = 4.8, slightly above "somewhat likely") differed from the responses of participants who were given the clearly unfair clause (mean = 3.7, slightly below "somewhat likely"), $t(115) = 3.08, p < .01$, and the responses of participants who were given the *vaguely unfair* clause (mean = 3.1, slightly below "somewhat likely"), $t(110) = 4.97, p < .01$.[78] The responses of participants who were given the *clearly unfair* and the *vaguely unfair* clauses did not differ from each other once error control is taken

76. The attorneys' fees to handle the deal should be treated like other reliance type damages. However, we speculate some courts might confuse this with the attorneys' fees relating to enforcing the agreement (i.e., litigation costs) and mistakenly not permit a recovery of the pre-litigation attorneys' fees.

77. *See supra* note 65.

78. This statistic reports the results of a t-test used to investigate whether the quantitative values from one group differ from the quantitative values from a second group (only works when there are two groups). P-values less than .05 are considered statistically significant by convention.

into consideration, $t(123) = 1.90, p > .017$.[79]

To try to understand the factors that could have affected participants' judgments on the likelihood of recovering attorneys' fees for negotiating the contract and handling the matter before the default, participants were also asked to indicate as simple "yes" or "no" answers whether there were any portions of the remedies clause or, in a separate question, any laws of remedies that could prevent them from recovering. The normative answer should have been "no" among participants who were given the *fair* remedies clause and "yes" among participants who were given the *clearly unfair* and *vaguely unfair* remedies clauses because, under the *fair* condition, the buyer has not waived her right to recover reliance type damages. Consistent with these normative answers, 73.1% of the participants who were given the *fair* remedies clause correctly identified that the remedies clause would not prevent them from recovering, leaving 26.9% of the participants who incorrectly believed there were portions that could prevent them from recovering. More troubling, however, is the finding that 55.4% of participants who were given the clearly unfair remedies clause and 51.7% of participants who were given the vaguely unfair remedies clause (i.e., more than half) incorrectly believed that no portion of their remedies_clause would prevent them from recovering attorneys' fees incurred before the default, even though the clauses, especially the clearly unfair one, states the buyer's sole remedy in the event of the seller's breach is return of the buyer's earnest money. The differences between groups were marginally significant, $\chi^2(2,N = 177) = 5.95, p = .05$,[80] but the number of participants who failed to understand how their remedies clause would prevent them from recovering was troubling.

(2) Recovery of attorneys' fees for handling the litigation (only recoverable if the contract provides for this or a statute does):

On the question of recovering attorneys' fees for handling the litigation, the normative answer is "7" ("very likely") under the *fair* condition and "1" ("not at all likely") in the *clearly unfair* and *vaguely unfair* conditions. This is because laws of remedies prevent plaintiffs from recovering attorneys' fees for handling litigation unless the contract states otherwise,[81] and the *fair* condition contract clause provides for recovery of these fees to the prevailing party. Our participants were not lawyers, so they were not likely aware of this requirement for recovering attorneys' fees. Perhaps because the *fair* condition explicitly spells out recovery of attorneys' fees in this situation, which the other two conditions did not, responses differed according to the remedies clause that participants were given by a statistically significant amount, $F(2,174) = 14.15, MSE = 3.12, p < .01$.[82] Responses of participants who were given the *fair* clause (mean = 4.8, slightly above "somewhat likely") differed from the responses of

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79. *See supra* note 78.

80. *See supra* note 63.

81. *See, e.g.*, Timberland Forest Prods., Inc. v. Franks, No. SD 31898, 2013 WL 941828, at *5 (Mo. Ct. App. Mar. 12, 2013); Shelton v. Ritz Carlton Hotel Co., 550 F. Supp. 2d 74, 82 (D.C. Cir. 2008); Taylor v. Pekins Ins. Co., 899 N.E.2d 251, 256 (Ill. 2008).

82. *See supra* note 65.

participants who were given the *clearly unfair* clause (mean = 3.2, slightly below "somewhat likely"), *t(115) = 5.37, p < .01*, and the responses of participants who were given the *vaguely unfair* clause (mean = 3.5, slightly below "somewhat likely"), *t(110) = 3.93, p < .01*. The responses of participants who were given the *clearly unfair* and the *vaguely unfair* clauses did not differ from each other, *t(123) = 0.92, p > .05*.[83] Despite these statistically significant differences, the participants who received the *clearly* and *vaguely unfair* clauses were unduly optimistic, and the participants who received the *fair* clause were unduly pessimistic once we consider the normative answers. Participants who were given the *fair* remedies clause were not statistically less likely (38.5%) to believe there were portions of the remedies clause that would prevent them from recovering attorneys' fees for handling the litigation than participants who were given the *clearly unfair* remedies clause (49.2%) or participants who were given the *vaguely unfair* remedies clause, *48.3%,* $\chi^2(2,177) = 1.59, p > .05$. Over 70.8% who were given the *clearly unfair* clause, and 76.3% who were given the *vaguely unfair* clause incorrectly believed there were no laws of remedies that would prevent them from recovering on this issue, while 23.1% of participants who were given the *fair* clause incorrectly believed there were laws of remedies that would prevent them from recovering on this issue (*participants' responses did not differ according to the remedies clause they received,* $\chi^2(2,176) = 0.73, p > .05$).[84] These results reflect a material misunderstanding of the law relating to recovery of attorney's fees in an action to enforce the contract.

(3) Recovery of the $400 paid for the inspection and $450 for the appraisal report and credit check to obtain the loan (examples of reliance damages):

On the question of recovering the $400 paid for the inspection and the $450 for the appraisal report and credit check to obtain the loan, the normative answer should have been a "7" among participants who were given the *fair* remedies clause, a "1.5" among those given the *clearly unfair* remedies clause, and a "2" among those given the *vaguely unfair* remedies clause for the reasons previously explained in the summary of the law of contract remedies. Responses differed according to the remedies clauses that participants were given by amounts that are considered marginally significant, F*(2,174) = 2.64, MSE = 3.56, p = .07*.[85] Participants who were given the *fair* remedies clause rated their likelihood of recovering the monies higher than participants who were given the *clearly unfair* remedies clause (mean = 4.7 for the fair clause versus mean = 3.9 for the clearly unfair clause) and participants who were given the vaguely unfair remedies clause (mean = 4.0); however, the amounts that failed to reach statistical significance once error control was taken into consideration were *t(115) = 2.24, p > .017* for the difference between the fair and *clearly unfair* conditions and *t(110) = 1.81, p > .017* for the difference between the *fair* and the *vaguely unfair* conditions. The difference between the *clearly unfair* and the *vaguely unfair*

83. *See supra* note 78.
84. *See supra* note 63.
85. *See supra* note 65.

clauses also failed to reach statistical significance, $t(123) = 0.23, p > .05$.[86] These differences suggest that while some participants understood that the *unfair* remedies clauses would prevent them from recovering on this issue, many did not.

Further evidence that many participants did not understand how the unfair remedies clauses would prevent them from recovering the $400 paid for the inspection and the $450 for the appraisal report and credit check comes from their answers to the "yes" or "no" question of whether there were any portions of the remedies clause that would prevent this recovery. The differences in responses between participants given the different remedies clauses did not reach statistical significance, $\chi^2 (2,177) = 1.16, p > .05$.[87] Of the participants given the *fair* remedies clause, 36.5% incorrectly thought that the remedies clause would prevent them from recovering these expenses, and 53.8% of the participants in the *clearly unfair* and 60% of the participants in the *vaguely unfair* remedies clause mistakenly thought that their remedies clauses would not prevent them from recovering these expenses. This lack of understanding of the impact of the exculpation/limitation of liability clause language is much higher than predicted and contrary to assumptions made by courts on consumer understanding of such clauses.[88]

(4) Recovery of the $10,000 for the difference between the fair market value of the home and the purchase price (the expectation/benefit of bargain damages):

On the question of whether participants believed that they could recover the $10,000 for the difference between the fair market value of the home and the purchase price, the normative answer should have been a "7" among participants who were given the *fair* remedies clause (since it reserved all rights and remedies under the law which would include this type of expectation damages), a "1" among those given the *clearly unfair* remedies clause (since this clause clearly limited the buyer's remedy to return of the earnest money), and a "1.5" among those given the *vaguely unfair* remedies clause (since this clause was not as clearly limiting of the buyer's remedy for a seller breach to return of the earnest money). Contrary to these normative answers, responses did not differ according to the remedies clause that participants were given, $F(2,174) = 1.64, MSE = 3.35, p > .05$.[89] That is, the average rating of 3.37 for the fair clause, 3.32 for the clearly unfair clause, and 2.82 for the vaguely unfair clause were not different by statistically significant amounts. The average ratings on this question were also lower than the average ratings on the question regarding recovering the $400 paid for the inspection and the $450 for the appraisal report and credit check, suggesting that participants were generally skeptical that they could recover such a large amount or that $10,000 even represented a true loss. Indeed, some of the qualitative responses reflected a sense that this type of recovery was

86. *See supra* note 78.

87. *See supra* note 63.

88. Goodwin v. Hole No. 4, LLC, No. 2:06-cv-00679, 2007 WL 2221066, at *8-9 (D. Utah July 31, 2007).

89. *See supra* note 65.

inappropriate. Some of the responses included: "not really money I'm out, never owned the house in full," "seems not solid, by that I mean that it's hard to award buyer with theorized money," and "the seller does not have to reimburse the buyer for offering a good deal." These responses reflect a lack of understanding of benefit of the bargain/expectation type damages, which is a less obvious "loss" than out-of-pocket expenses related to performing under the contract. This result underscores the importance of a home-buyer being represented by an attorney at the contract formation stage, for attorney approval of the contract condition so that they may negotiate for a "fair" remedies clause, and an attorney to advise the buyer of the recoveries she may be entitled to after a breach. In addition, participants also did not understand how the *unfair* remedies clauses would prevent them from recovering the $10,000 for the difference between the *fair* market value of the home and the purchase price as evidenced by their answers to the "yes" or "no" question of whether the remedies clause would prevent them from recovering on this issue. Although 50% of participants given the fair remedies clause incorrectly thought their remedies clause would prevent them from recovering on this issue, over 60% given the *clearly unfair* clause and 55% given the *vaguely unfair* clause thought the clause prevented recovery. These between-group differences were not statistically significant, $\chi^2(2,177) = 1.17, p > .05$.[90]

(5) Recovery of the $1,000 to obtain a new loan at the same rate (although rates have risen) to close on the purchase of a home (an example of consequential damages):

On the question of whether participants believed they could recover the $1000 to obtain a new loan at the same rate (although rates had risen), the normative answer should have been a "7" among participants who were given the *fair* remedies clause (because the contract clause reserved all rights and remedies which would include consequential damages),[91] a "1" among those given the *clearly unfair* remedies clause (because this clause clearly limited liability for the seller's breach to return of the earnest money), and a "1.5" among those given the *vaguely unfair* remedies clause (because this clause less clearly limited the liability to return of the earnest money in the event of the seller's breach). However, the 3.62 rating by participants who were given the *fair* clause was not statistically significantly higher than the 3.12 rating by participants who were given the *clearly unfair* clause or the 3.08 rating by participants who were given the *vaguely unfair* clause by a statistically significant amount, $F(2,174) = 1.44, MSE = 3.34, p > .05$.[92] In addition, answers to the "yes" or "no" question of whether the remedies clause would prevent them from recovering on this issue

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90. *See supra* note 63.

91. This type of loss naturally arises from the breach due to the resulting delay in closing on the loan for another property as a result. It would be awarded as consequential damages if a court determines the breaching party should have reasonably anticipated this type of loss under the circumstances (such as the presence of a financing contingency in the contract) and provided the non-breaching party shows she had taken reasonable steps to avoid this loss.

92. *See supra* note 65.

did not differ depending upon the remedies clause, $\chi^2(2,177) = 0.58, p > .05$.[93] The 51.9% of participants who thought that the *fair* clause might prevent this did not statistically differ from the 58.5% who thought that the *clearly unfair* clause might prevent it or the 53.3% who thought that the *vaguely unfair* clause might prevent it. Similar to the results on recovery of benefit of bargain/expectation damages, the percentage of participants who thought they could recover this consequential damage, even in the *fair condition*, is much lower than for the out-of-pocket type reliance damages, reflecting a lack of consumer awareness of the appropriateness of recovering consequential damages as a loss.

j. Participants were also asked about their likelihood of success in a lawsuit to force the Seller to sell the home to them at the contracted-for purchase price (the remedy of "specific performance").—Participants answered this question on a 7-point scale with "1" representing "not at all likely," "4" representing "somewhat likely," and "7" representing "very likely." Normative answers were "7" given the *fair* clause (since this clause reserved all rights and remedies under the law which would include the right to specific performance), "1.5" given the *clearly unfair* clause (a very low likelihood because of the clear language that says return of the earnest money is the Seller's sole liability in the event of Seller's breach, but as discussed in Part II, there is the possibility of a court refusing to enforce this clause if there is a showing that the seller engaged in a strategic default),[94] and "2" given the *vaguely unfair* clause (since this clause also limited liability of the seller to return of the earnest money but was not as clear this would include the circumstance of a seller breach of contract). Contrary to these normative answers, the 4.27 average rating among participants who were given the *fair* clause was not higher than the 4.5 rating among those given the *clearly unfair* clause or the 4.3 rating among those given the *vaguely unfair* clause, $F(2,173) = 0.30, MSE = 3.21, p > .05$.[95] These results demonstrate not only that the participants who were given unfair clauses were overly optimistic, but also, it appears, these participants had no idea how the wording of the clause would undermine their attempt to force the seller to sell the home to them. In the other direction, but equally wrong, the participants in the *fair* condition were unduly pessimistic on their chances of obtaining specific performance and appeared to fail to understand that the words "free to pursue any legal remedies at law or *in equity*" means an action for specific performance. There could, however, have been factors other than the remedies clause that could have affected participants' responses.

To focus participants' attention on the remedies clause in particular, participants were asked a "yes" or "no" question whether they thought any portions of the remedies clause might prevent them from forcing the Seller to sell

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93. *See supra* note 63.

94. It is difficult to quantify the likelihood of enforcement in the *clearly* and *vaguely unfair* clauses since there is a difference of opinion among the jurisdictions. Courts in Florida are unlikely to enforce the clauses, while courts in other jurisdictions are more likely to enforce it, unless, in some jurisdictions, there is a showing of "bad faith" as defined by that court. *See infra* Part III.

95. *See supra* note 65.

the home to them at the contracted purchase price. The normative responses were "no" given the *fair* clause and "yes" given the *clearly unfair* and *vaguely unfair* clauses; however, 26.9% of participants given the fair clause incorrectly said "yes," while only 35.9% correctly said "yes" given the *clearly unfair* clause and 31.7% correctly said "yes" given the *vaguely unfair* clause. The responses did not even differ between the groups by a statistically significant amount, $\chi^2(2,177) = 2.20, p > .05$.[96] The fact that 64.1% in the clearly unfair condition and 68.3% in the *vaguely unfair* condition failed to realize the exculpation/limitation-of-remedies clause would prevent them from obtaining the important remedy of specific performance underscores the lack of consumer understanding of such exculpation/limitation-of-remedies clauses, even when clearly focusing on the words in answering questions.

k. Participants were asked to circle the portions of the remedies clause that might prevent them from forcing the Seller in a lawsuit to sell the home to them at the contracted-for purchase price.—Of those given the *fair* clause where nothing prevented them from doing so, (twenty participants out of fifty-two; 38.5%), incorrectly circled something. In the *clearly unfair* clause, the words "limited to" in the sentence "Seller's liability in the event of Seller's breach of the contract shall be limited to the return of Buyer's earnest money" was the key portion. Likewise, in the *vaguely unfair* clause, the words "limited to" in the sentence "Seller's shall be limited to the return of Buyer's earnest money" was the key portion. Only a minority of those given the *clearly unfair* clause (thirteen participants out of sixty-five; 20.0%) correctly circled those words in the sentence. Even fewer (five participants out of fifty-seven; 8.8%), however, correctly circled those words given the *vaguely unfair* clause. This difference between the *clearly unfair* and *vaguely unfair* clauses was not statistically significant but would be considered marginal, $\chi^2(1,N = 122) = 3.04, p = .08$.[97]

l. Participants were asked how likely it was that a court of law would uphold the remedies clause in the contract they signed.—Participants based their answers on the 7-point scale, with 1 representing "not at all likely," "4" representing "somewhat likely," and "7" representing "very likely." The normative answers were "7" given the *fair* clause (because this clause is mutual and reserves all rights under the law), "5.0" given the *clearly unfair* clause (which, although very unfair, is still somewhat likely to be enforced since, as discussed in Part III, based on a review of reported decisions, it appears that most courts have enforced this type of exculpation/limitation of liability clause, although Florida courts have found such clauses to create illusory agreements and have consequently not enforced this type of clause), and 4.5 given the *vaguely unfair* clause (because this clause is not as clear that it covers seller's breach, a court might rule it does not limit remedies in such a circumstance). The alternative remedies clauses affected responses, $F(2,174) = 3.03, MSE = 2.02, p = .05$.[98] Average likelihood ratings given the *clearly unfair* clause (mean = 5.1)

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96. *See supra* note 63.

97. *See supra* note 63.

98. *See supra* note 65.

were lower than the ratings given the *fair* clause (mean = 5.8) by a statistically significant amount, $t(115) = 2.57, p < .05$, but not lower by a statistically significant amount than ratings given the *vaguely unfair* clause *(mean = 5.5)*, $t(123) = 1.14, p > .05$.[99] These responses were about correct for the *unfair* clauses because the case law on this issue is mixed, but too low for the *fair* clause. Before being encouraged by the participants' "correct" rating in the *unfair* and *clearly unfair* conditions, it should be noted that based on their answers to prior questions, they did not understand the impact of these clauses on what they could or could not recover.

m. Participants were asked how fair they thought the remedies clause was to the buyer.—Answers were based on a 7-point scale with "1" representing "not at all fair," "4" representing "somewhat fair," and "7" representing "very fair." The type of clause affected the fairness ratings, $F(2,174) = 3.98, MSE = 1.04, p < .05$.[100] Average fairness ratings were higher (mean = 4.44) by a statistically significant amount given the *fair* clause, but the ratings given the *clearly unfair* clause (mean = 3.98) did not differ by a statistically significant amount from the ratings given the *vaguely unfair* clause (mean = 3.95). Given the dramatic difference in fairness of the *fair condition* clause (normative answer was 7) as contrasted with the *clearly unfair* and *vaguely unfair* clauses (normative answer was 1), the fact that the averages hovered in the middle range is further evidence that participants did not understand or appreciate the impact of the language used in the contracts on what rights they would otherwise have had. While some of the participants were able to judge the fairness of the clauses, many could not.

III. A REVIEW AND CRITIQUE OF JUDICIAL TREATMENT OF "RETURN OF EARNEST MONEY AS BUYER'S SOLE REMEDY" CLAUSES IN HOME PURCHASE CONTRACTS

Based on a review of reported appellate court decisions, courts have enforced contracts clauses that provide that the buyer's sole remedy for the seller's default is return of the buyer's earnest money when this limitation-of-remedy is clearly provided for in the contract,[101] with the notable exception of courts in Florida.[102]

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99. *See supra* note 78.

100. *See supra* note 65.

101. *See* Markowitz v. Ne. Land Co., 906 F.2d 100, 102-10 (3d Cir. 1990) (ruling that, under Pennsylvania law, the contract clause limiting the buyer's remedy to return of his earnest money plus interest, which the contract clearly stated was the sole remedy in the event of seller default, is enforceable, and, thus, the seller was not obligated to complete construction within two years of the contract date, causing the contract to be subject to the Interstate Land Sales Full Disclosure Act); Goodwin v. Hole No. 4, LLC, No. 2:06-cv-00679, 2007 WL 2221066, at *2, *6, *8-9 (D. Utah July 311, 2007); Hunter v. Wilshire Credit Corp., 927 So. 2d 810, 814-15 (Ala. 2005) (enforcing limitation of buyer's remedy for seller's breach to return of earnest money; however, buyer did not raise—and court did not address—issue of unconscionability or illusory promise—rather it focused on which of two contracts controlled); O'Shield v. Lakeside Bank, 781 N.E.2d 1114, 1116, 1119 (Ill. App. Ct. 2002) (enforcing limitation of buyer's remedy upon seller's breach to return of buyer's

In some of these cases, the buyer failed to timely raise—or raise at all—the argument that the clause might be unconscionable, unreasonable or create an illusory agreement, and, consequently, the court did not address these issues when enforcing the limitation-of-remedy clause.[103] But courts in Utah and Washington[104] did address arguments raised by buyers that such clauses were unconscionable, against public policy, unfair or unreasonable, and concluded in these cases that the clauses were enforceable, even awarding attorneys' fees to the defaulting seller when the buyer sought to obtain additional remedies.[105] In addition, some courts that would generally enforce this type of limitation-of-remedy clause have articulated a narrow exception to its enforcement if the seller's default was in "bad faith" or if the seller had engaged in fraud or deceptive acts.[106] Some courts have defined this "bad faith" exception to be the

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earnest money; however, buyer's only challenge was that it was a liquidated damages clause and, thus, should allow specific performance in the alternative—an argument the court rejected; court did not address any other challenges to its enforcement); Claiborne v. Wilson, 572 So. 2d 1197, 1198, 1200-01 (La. Ct. App. 1990) (enforcing limitation of remedy clause for seller's breach to return of buyer's earnest money; buyer claimed she was coerced into agreement to extend the closing date but did not raise other claims to challenge the limitation of remedy clause, and the court did not address other claims); Lespinasse v. Fed. Nat'l Mortg. Ass'n, 2003 N.Y. Misc. LEXIS 795 (N.Y. Civ. Ct. May 22, 2003) (contract contained limitation of remedy for seller breach to return of the earnest money and court enforced this when the seller breached by selling the real property to a third party for more than the contract price with the buyer; court stated it would enforce the limitation-of-remedy clause absent a waiver); Simpson Dev. Corp. v. Herrmann, 583 A.2d 90, 92-93 (Vt. 1990) (enforcing the limitation of remedy clause, noting that the buyer failed to raise proper objections to it in a timely fashion and looking to the plain meaning of the provision); Torgerson v. One Lincoln Tower, L.L.C., 210 P.3d 318, 322-24 (Wash. 2009) (en banc) (finding the provision limiting the remedies was not unconscionable).

102. *See, e.g.*, Sperling v. Davie, 41 So. 2d 318 (Fla. 1949); Developers of Solamar, LLC v. Weinhauer, 18 So. 3d 13 (Fla. Dist. Ct. App. 2009); Idevco, Inc. v. Hobaugh, 571 So. 2d 488 (Fla. Dist. Ct. App. 1990); Terraces of Boca Assocs. v. Gladstein, 543 So. 2d 1303 (Fla. Dist. Ct. App. 1989); Port Largo Club, Inc. v. Warren, 476 So. 2d 1330 (Fla. Dist. Ct. App. 1985); Ocean Dunes of Hutchinson Island Dev. Corp. v. Colangelo, 463 So. 2d 437 (Fla. Dist. Ct. App. 1985); Greenstein v. Greenbrook, Ltd., 413 So. 2d 842 (Fla. Dist. Ct. App. 1982).

103. *See Markowitz*, 906 F.2d at 104-06; *Hunter*, 929 So. 2d at 810; *O'Shield*, 781 N.E.2d at 1119; *Claiborne*, 572 So. 2d at 1201; *Lespinasse*, Index No. 216T5N at *4; *Herrmann*, 583 A.2d at 92-93.

104. *See Goodwin*, 2007 WL 2221066, at *8-9; *Torgerson*, 210 P.3d at 322-24.

105. *See Goodwin*, 2007 WL 2221066, at *8-9; *Torgerson*, 210 P.3d at 325-26.

106. *See* Hassanally v. Manning Ridell, L.L.C., Nos. B171993, B173319, 2006 WL 410700, at *4-6, *10 (Cal. Ct. App. Feb. 23, 2006) (stating in dicta that limitation of liability clauses are long recognized in California and enforceable unless unconscionable or against public policy; court stated the clause was enforceable, but because of fraud on the part of the seller, the court permitted the buyer to recover tort damages notwithstanding the contract language); Tanglewood Land Co. v. Byrd, 261 S.E.2d 655, 656-57, 660-61 (N.C. 1980) (in responding to the buyer's claim that the limitation-of-remedy clause in the contract made it illusory and unenforceable, the court stated that

situation where the defaulting party has represented she has title to the property to be sold when she knows she does not, or when she has taken steps to impede her title after the purchase contract has been signed.[107] For example, the court in *Kooloian v. Suburban Land Co.*,[108] ruled that it would not enforce a contract provision that limited the buyer's remedy to the return of his earnest money for the seller's inability to convey good title because the seller had contracted to sell certain real estate to a purchaser when the seller had already sold the real estate to someone else.[109] The court therefore affirmed the trial court's awarding damages to the buyer for loss of bargain in that case.[110] Courts in a long line of cases have granted reduced damages for non-willful failures to convey good title but full damages for willful failures due to a recognition that there are many possible causes for title to not be marketable that are not the seller's fault.[111] But there is a split of authority on this with some still allowing benefit of the bargain damages.[112] In addition, some courts rule that a buyer of real estate is not prevented from recovering her out-of-pocket expenses when a party breaches for failing to convey title in good faith.[113] But this Article does not focus on a seller who breaches because she, in good faith, was unable to convey marketable title. Instead, this Article focuses on situations where the defaulting seller has used the limitation of the buyer's remedies clause in order to strategically default (i.e., cancel any deal when the property appreciates in value or the seller discovers the property is worth more than the contract price) or situations involving a breach for other reasons beneficial to the seller (such as increased costs to perform

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under Virginia law (the choice of law in the contract), notwithstanding the language in the contract, if a seller has acted in bad faith in originally undertaking to convey title, or has voluntarily disabled [himself] from making such a conveyance," then the limitation-of-remedy clause is inoperative, and the buyer is still entitled to sue for specific performance or benefit of the bargain damages); Kooloian v. Suburban Land Co., 873 A.2d 95, 100 (R.I. 2005) ("This Court consistently has held that in the absence of 'fraud, bad faith, illegality, misconduct, or any other factor that might alter the legal relationship of these parties,' damages for the breach of a contract to purchase real estate are limited in accordance with the terms of the contract." (quoting Chapman v. Vendresca, 426 A.2d 262, 264 (R.I. 1981))).

107. *See Kooloian*, 873 A.2d at 99-100.

108. *Id*. at 95.

109. *Id*. at 99-100.

110. *Id.* at 100.

111. *See* 11 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 60.11, at 688-92 & 691 nn.13-14 (rev. ed. 2005).

112. *See, e.g.*, Donovan v. Bachstadt, 453 A.2d 160, 165 (N.J. 1982) (purchaser entitled to benefit of the bargain damages where vendor breaches executory contract to convey real property regardless of vender's good faith); Smith v. Warr, 564 P.2d 771, 777 (Utah 1977) ("[B]enefit-of-the bargain damages are to be awarded for breach, . . . regardless of the good faith of the party in breach. . . ." Recovery is not limited to actual pocket expenses merely because breach was in good, rather than bad faith.).

113. *See, e.g.*, Brown v. Yacht Club of Couer d'Alene, Ltd., 722 P.2d 1062, 1067 (Idaho Ct. App. 1986) (awarding out-of-pocket expenses for vendor's inability to deliver marketable title).

beyond what the seller anticipated).[114]

The court in *Goodwin v. Hole No. 4 LLC* exemplifies the approach of enforcing contract clauses that expressly provide for a limitation of remedy; the *Goodwin* court narrowly interprets what is procedural and substantive unconscionability, while potentially providing a "bad faith" exception to enforcement of the clause if it is shown that the seller exercised it because the property appreciated in value.[115] Because the court in *Goodwin* engaged in mental gymnastics and faulty common assumptions to justify enforcing a highly unfair contract limitation clause against a consumer who was likely deceived into entering into the purchase contract, we engage in a thorough analysis of the details of this decision.

In *Goodwin*, the buyer agreed to buy, and the seller agreed to build and sell to the buyer, a home adjacent to a golf course.[116] The contract provided that if the buyer defaulted, the seller could elect either to retain the earnest money as liquidated damages or pursue specific performance instead.[117] However, if the seller defaulted, buyer's sole and exclusive remedy was to receive a return of buyer's earnest money, plus 10% interest on the earnest money from the date of deposit.[118] The buyers argued that they thought the limitation-of-remedy clause was only intended for unintentional defaults by the seller, and they could still sue for specific performance if the seller intentionally defaulted.[119] The court ruled that there was no ambiguity on intent regarding when this clause would apply based on the clear limitation-of-remedies language in the contract and were dismissive of the buyers' claim that they misunderstood the limitation of remedy clause, noting that the entire contract had been explained to the buyers by the broker.[120] The court also ruled that a letter the buyer received from the broker about locking in the price of the unit by signing the contract did not create ambiguity relating to the limitation-of-remedy clause in the contract.[121] Although the court acknowledged "that Utah courts endeavor to construe contracts so as not to grant one of the parties an absolute and arbitrary right to terminate a contract," the court found that the limitation of remedies clause did not do this because the seller would still have to return to the buyer the earnest money they paid, plus interest, and because the buyers also had a right to terminate the contract if they failed to obtain financing or if they disapproved certain disclosures.[122] The court also rejected the buyers' argument that the limitation-of-remedies clause was an unenforceable liquidated damages clause because the

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114. Goodwin v. Hole No. 4, L.L.C., No. 2:06-cv-00679, 2007 WL 2221066, at *10-11 (D. Utah July 31, 2007).

115. *Id*. at *11-13.

116. *Id.* at *1.

117. *Id.* at *2.

118. *Id*.

119. *Id.* at *3, *6.

120. *Id*. at *7-8.

121. *Id*.

122. *Id*. (internal quotation marks omitted).

clause simply provided for a return of earnest money rather than an agreed upon measure of damages.[123] The court also rejected the buyers' argument that the seller breached Utah's implied covenant of good faith and fair dealing because "this [implied] covenant cannot create rights and duties inconsistent with express contractual terms."[124] In this instance, because the parties had bargained for the limitation-of-remedy clause, "it would be unjustified for [the buyers] to expect more than . . . the return of their earnest money plus ten percent. The parties contracted specifically for the purpose of allowing [the seller] to use [this contract provision] as an escape valve."[125]

The court also ruled that there was no evidence of substantive unconscionability or that the seller had engaged in a deceptive act or practice.[126] The court noted the heavy burden and very demanding test required for a finding that certain terms of a contract are substantively unconscionable: "the terms must be so one-sided as to oppress an innocent party. The situation must be conscience-shocking or 'one in which no decent, fair-minded person would view the results without being possessed of a profound sense of injustice.'"[127] The court further noted that even if the court were to find the clause "to be wholly unreasonable, this would not alone establish substantive[] unconscionability."[128] The court added that there was no indication that the clause left "a harsh or unreasonable effect on the Goodwins" since they had the remedy of return of their earnest money plus 10% interest, and the buyers could have bargained for a different remedies provision but instead agreed to the provision as written.[129] The buyer also argued that the clause violated the Utah Consumer Sales Practices Act ("UCSPA") because the clause allowed the seller to "pick its deal"; if property appreciated in value between when the contract was signed and closing, the seller could terminate without incurring liability for damages and sell to someone else for more, and if the property stayed the same or depreciated in value, the seller could close with the buyer at the contracted for purchase price.[130] The court emphasized that the seller had a legitimate reason for this limitation-of-buyer remedy clause for the buyer: the seller had difficulty estimating the costs to perform the construction of the home due to the location of the home on a hilltop and, thus, needed this limitation of remedy to extricate itself from the contract should the construction costs exceed the purchase price.[131] The court noted there was no evidence that the seller used the limitation-of-remedy clause to get out of the deal in order to sell to another party for a higher price—i.e., if the clause were used by the seller to "pick its deal" based on appreciation or

123. *Id*.
124. *Id.* at *9.
125. *Id*.
126. *Id*. at *10.
127. *Id*. (internal quotation marks and footnote omitted).
128. *Id*.
129. *Id.*
130. *Id.* at *11.
131. *Id*. at *6.

depreciation of the value of the property.[132] The court seemed to imply that such deal-picking could be the basis for finding that a seller took advantage of another party in violation of the UCSPA: "Because there is no evidence [the seller] actually used [the return of earnest money and interest penalty] to take advantage of any party, the [buyers'] argument fails to support any inference of bad faith."[133]

The court also ruled that there was no evidence of procedural unconscionability.[134] The court noted six relevant factors for a finding of procedural unconscionability, which focus on the manner in which the parties entered into the contract and whether it led to the complaining party having no meaningful choice:

> (1) whether each party had a reasonable opportunity to understand the terms and conditions of the agreement; (2) whether there was a lack of opportunity for meaningful negotiation; (3) whether the agreement was printed on a duplicate or boilerplate form drafted solely by the party in the strongest bargaining position; (4) whether the terms of the agreement were explained to the weaker party; (5) whether the aggrieved party had a meaningful choice or instead felt compelled to accept the terms of the agreement; and (6) whether the stronger party employed deceptive practices to obscure key contractual provisions.[135]

In applying these factors to the facts of the case, the court stated that the buyers' strongest argument for finding procedural unconscionability was that the contract differed from the state's approved form of purchase and sale agreement, which stated in bold-face type at the top of the contract that such form was required by Utah law.[136] The court stated that this might have caused the buyers not to have a "reasonable opportunity to understand the terms," or that the seller had "employed deceptive practices to obscure key contractual provisions."[137] However, the court stated there was no evidence that the seller was the stronger party in the bargain because a broker represented the buyers.[138] In addition, the court noted that the broker had told the buyers that the contract "had been modified, flagging the specific modified provisions," including the clause limiting the buyer's remedy in the event of the seller's failure to perform.[139] The court presumed that the broker had also "reviewed each of the terms of the [the real estate purchase contract] with the [buyers]."[140] The court also rejected a finding of procedural unconscionability based on the letter from the broker to the

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132. *Id.* at *11.
133. *Id.*
134. *Id.* at *11-12.
135. *Id.* at *11.
136. *Id.* at *12.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*

buyers stating that the buyers could lock in the purchase price by entering into the contract. The court ruled there was no indication that the seller had reason to know the buyers were relying on that letter to think they were locking in the purchase price since the express terms in the purchase contract superseded other previous agreements.[141] The court ruled that this contract language made any such reliance on the letter "unreasonable."[142] Finally, the court noted that there may not have even been a conflict with the letter; if the seller had not exercised its right to terminate by returning the earnest money and 10% interest, the buyers could have purchased the unit for the contracted for purchase price, hence, locking in the purchase price amount.[143]

There are many problems with the *Goodwin* court's reasoning and application of laws to the facts in the case**.** The first area of critique relates to the "facts" that the court relied upon in interpreting the parties' intent relating to the limitation of remedies clause. The court accepted the seller's allegations that the broker "summarized the terms of the [contract]" and in a later telephone conversation "explained all of the [contract]'s provisions to the Goodwins."[144] We find these "facts" to be highly implausible. The real estate purchase contract at issue was based on the Utah state form purchase contract, which is six pages long and single-spaced.[145] It would take at least twenty minutes to simply look at each of the words in the contract, let alone take time to stop and try to think about the impact of these words and which options in the form contract to choose. The amount of time it takes to fully comprehend the contract would also have to include the time it takes to explain what rights the parties would have absent these contract terms and how the terms change these rights. To make it all concrete, the explainer would have to provide examples of scenarios of how problems could arise, how those problems would be resolved if the contract were silent, and how the express contract terms would resolve these problems. The first author of this Article devotes at least fifteen to twenty hours of class time in her law school real estate transactions courses to review the laws that relate to the terms of typical home purchase contracts, review various typical scenarios of issues that can arise, and consider how different contract terms can affect the rights and obligations of the parties under these scenarios. She spends at least three hours on contract remedies clauses and remedies laws, generally, since these areas of the law are highly complicated. It is unlikely that real estate brokers are trained at the same level as attorneys on all of these laws and how the contract terms can affect the rights of the parties. It is also unlikely that a broker could impart all of this explanation to a buyer when "reviewing" the contract terms with the buyer.

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141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at *2.

145. UTAH REAL ESTATE COMM'N & OFFICE OF UTAH AT ATTORNEY GEN., REAL ESTATE PURCHASE CONTRACT (effective Aug. 27, 2008) [hereinafter REAL ESTATE PURCHASE CONTRACT], *available at* http://realestate.utah.gov/forms/REPC_2008.pdf.

Furthermore, the buyer's assertion that they lacked an understanding of the meaning of the "clear" language (clear at least to any good lawyer) in the contract that limited their remedies in the event of the seller's breach[146] rings as authentic in light of the results of our Remedies Experiment reported in Part II. Adding to the buyer's difficulty in understanding the limitation of remedies clause here is the fact that the clause does not expressly spell out that failure to keep the construction costs within the seller's estimate is a basis for the seller to terminate the contract. The purchaser was probably completely unaware of this risk and did not think of this possibility when reading that portion of the contract.[147] If the main or sole purpose of the broad termination clause was to address the possibility of construction costs exceeding estimates, then why not specify this in the contract, as the contract narrowly specifies the buyer's right to terminate with no liability if the buyer fails to obtain financing?[148] Perhaps the seller did not want the buyer to be aware of the risk of locking in purchase price.

The court's assertion that the parties had "bargained" for the limitation-of-remedy clause in the contract[149] is also highly questionable. The buyers signed the contract, and the contract contained the limitation-of-remedies clause, but this does not necessarily mean that both parties had "bargained" for this term, or, as the court concluded, that the parties had done so to allow the seller to escape liability in the event of high construction costs. Clearly the seller, who reduced the full range of remedies from that provided in the standard form contract,[150] intended it, but there is no evidence that the buyer intended this change or had "bargained" for this result. In general, when a seller is a professional developer, and the buyer is a consumer/home buyer, the seller provides the contract form and the parties typically only negotiate or customize the purchase price, closing date, and amount and interest rate of the loan.[151] It appears that the majority of

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146. *Goodwin*, 2007 WL 2221066 at *3, *6.

147. *Id.* at *6, *11.

148. *Id.* at *8.

149. *Id.*

150. *See* REAL ESTATE PURCHASE CONTRACT, *supra* note 145. Brokers were required to use the statutory standard form contract, but the parties could modify. The form provided for, at the buyer's election, one of the following remedies: (a) cancellation of the contract and, in addition to return of the buyer's earnest money, a sum equal to the earnest money deposit; (b) sue the seller to specifically enforce the contract; or (c) accept a return of the earnest money and pursue any other remedies available under the law. *Id.* ¶ 16.2.

151. *See infra* note 267 and accompanying text (discussing cases in which courts found that brokers can fill in the blanks of form purchase agreements); *see also* Smith v. Boyd, 553 A.2d 131, 135 (R.I. 1989) ("We note that as the written contract was to be drawn up by the realtors, the parties and their realtors had to discuss what was to be stated in the written agreement. The purchase-and-sales-agreement form is a standardized document, but nevertheless a real estate agent must fill in the blanks. To fill in the blanks, the appropriate information must be discussed by the parties and their agents."); Gustafson v. V.C. Taylor & Sons, Inc., 35 N.E.2d 435, 437 (Ohio 1941) (describing the blanks that get filled in as "the supplying of simple, factual material such as the date, the price, the name of the purchaser, the location of the property, the date of giving possession and the

home buyers in the United States do not have an attorney representing them in the negotiation of the terms of the purchase contracts,[152] and most likely only skim the lengthy purchase agreements they sign; as reflected in our Remedies Experiment, those buyers who carefully read and analyze the typical limitation-of-remedies clauses do not understand what rights they are giving up when agreeing to this clause. In general, the court's statement that the parties could have bargained for a different remedy clause, while technically true, is not reflective of the reality of the experience of home purchase transactions for the vast majority of home purchasers.[153]

Courts need to engage in this fiction because buyers could otherwise argue that they failed to read or understand any term of the contract that they later regret, thus, eroding the goal of certainty of contract.[154] Although courts may need, in the typical case, to engage in this fiction, they should be aware that it is, in fact, a fiction; in cases where the terms are very unreasonable and one-sided, courts should keep this fiction in mind. In this case, that fiction is further buttressed by the fact that the letter from the broker discussing a set purchase price induced the buyer to enter into the contract—the very opposite of what they in fact accomplished when they signed this contract due to the wording of the limitation-of-remedy clause.[155] The broker, who allegedly "explained all of the [contract's] provisions" to the buyers, likely did not fully inform the buyers that this limitation-of-remedies clause could permit the seller to terminate the deal for any reason, nor did the seller likely expressly disclose to the buyer that the seller could cancel the deal if the construction costs exceeded the seller's estimates.[156] Because the seller could terminate the contract under this clause for any reason with little consequence, this clause eroded the buyer's basic goal of entering into the contract to lock in a specific purchase price for the property.

Perhaps if the court had better understood that few consumers understand the remedy clauses when they read them—as evidenced by the Remedies Experiment in Part II—and how little information the broker likely explained to them—compared with what a good attorney would—the court might not have

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duration of the offer requires ordinary intelligence rather than the skill peculiar to one trained and experienced in the law."). This supports the likelihood that other than those blanks, the parties to a contract are unlikely to discuss and negotiate other points in the contract, especially if the buyer does not hire an attorney to review the contract.

152. *See infra* note 267 and accompanying text (noting that many states permit brokers to fill in form purchase contracts and do not require an attorney to represent the home buyer with the contract formation); Braunstein & Genn, *supra* note 10, at 471 (stating at least 59% of the home buyers in their Ohio study were not represented by an attorney).

153. As Justice Holmes famously noted, "The life of the law has not been logic; it has been experience." O.W. HOLMES, JR., THE COMMON LAW 1 (1881).

154. *See* Howard Gensier, *The Competitive Market Model of Contracts*, 99 COM. L.J. 384, 388 (1994) (discussing the need for certainty in contracting).

155. Goodwin v. Hole No. 4, LLC, No. 2:06-cv-00679, 2007 WL 2221066, at *2, *8 (D. Utah July 31, 2007).

156. *Id.* at *2.

concluded that the buyer had bargained for this limitation-of-remedy or was unjustified in expecting more than what was expressly provided by the limited remedy.[157] The buyers asserted that they thought they could sue for specific performance.[158] They thought that the clause limiting their remedy only related to defaults that the seller could not avoid—i.e., if the seller did not have good title to the real estate through no fault of their own.[159] Although the language in the clause seems clear to attorneys, the results from the Remedies Experiment indicate that many consumers do not really understand how this type of clause affects their rights when the seller defaults and that buyers tend to have a high expectation of their right to force a defaulting seller to specifically perform the contract.[160] Also, because the seller reserved the right to demand specific performance upon the buyer's default this may have caused the buyers to assume they would have similar rights.[161]

The *Goodwin* case also underscores the very narrow band of protection that is afforded to consumers/home buyers when they enter into form contracts prepared by sophisticated developers. As the court noted, "[W]holly unreasonable" terms that "severely limit[] their legal remedies while providing advantages to [the seller]" do not establish substantive unconscionability, as there is a high burden for a contract term to be considered unconscionable.[162]

Although this Article critiques the *Goodwin* court's articulation of the unconscionability test, as applied to consumer-business transactions, most courts have adopted this test.[163] Regardless, the court's dicta in *Goodwin* that there was no indication that the clause harshly or unreasonably impacted the buyers because they could pursue the refund of their earnest money as a remedy, plus 10% interest; such rationale reflects the failure of courts to recall and place appropriate emphasis on the default rights a buyer is ordinarily entitled to if a contract were silent on this issue.[164] The law provides buyers of real estate a right to compel the seller to sell to the buyer at the contracted purchase price ("specific performance") because real estate is considered to be unique; this right is the essence of what has been bargained for in the contract.[165] Thus, by limiting the buyers here to the return of their own money, the limitation-of-remedies clause takes away this critical right of specific performance. In addition, if the buyer can show that the fair market value of the property exceeds the contract price, the buyer can, instead, sue for this difference as "expectation interest"

157. *Id.* at *8.

158. *Id.* at *2.

159. *Id.* at *3, *6-7.

160. Remedies Experiment, *supra* note 8.

161. *Goodwin*, 2007 WL 2221066, at *2; *see also* ROBERT B. CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION 17-56 (rev. ed. 2007) (discussing reciprocity effects and expectations).

162. *Goodwin*, 2007 WL 2221066, at *10.

163. *See* RICHARD A. LORD, WILLISTON ON CONTRACTS § 18:10 (4th ed. 2012).

164. *Goodwin*, 2007 WL 2221066, at *2, *10.

165. *See* 81A C.J.S. *Specific Performance* § 55 (2013).

damages instead of seeking specific performance.[166] This right was also taken away under the limitation-of-remedies clause—an important remedy if the seller's title to the real estate is seriously impaired. The buyers in *Goodwin* did not appear to present evidence on the fair market value of the property they had contracted to purchase because specific performance does not require this evidence, as opposed to expectation damages.[167] This does not mean that the limitation-of-remedies clause did not have a profound negative impact on the buyer's rights as a consequence of the seller's failure to perform under the contract. In addition to what is lost by the limitation clause, the court over-emphasized the buyer's remaining contractual remedies.[168] However, the remedy of returning of the buyer's own earnest money arguably provides no real "contractual" remedy at all. If a buyer deposits money with a seller or a third party—unless that money were in the nature of consideration for an option to purchase or a gift to the seller—either as security for the buyer's performance or to apply to the purchase price, when the buyer has performed and the seller fails to close, the money is the buyer's and the seller is indebted to the buyer for the amount deposited with the seller.[169] This obligation to repay the earnest money exists without a clause in the contract calling for his return of money as the buyer's sole "contract remedy" or the seller will be unjustly enriched.[170] The only true added remedy in the *Goodwin* case was requiring the seller to provide interest on the earnest money at 10% if that rate exceeded market rates at the time.[171]

The court's conclusion that there was no evidence of bad faith in the case is also problematic.[172] As previously noted, the contract remedies language failed to expressly address the situation of construction costs exceeding the purchase price.[173] If this were the sole or main purpose for the limitation-of-remedies clause in the event the seller failed to close, then the contract clause should have expressly been limited to this or other intended scenarios. This change is necessary to put the buyers on better notice that their deal is conditioned upon the construction costs not exceeding the seller's estimates and would act similarly to a contract explicitly conditioning the closing upon the buyer's ability to obtain

166. RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981).

167. *Goodwin*, 2007 WL 2221066, at *7-8; RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981).

168. *Goodwin*, 2007 WL 22221066, at *10.

169. Although the return of this money is also covered under the contractual remedy of restitution, it has been construed as in the nature of recovering a debt owed to the purchaser when it was given to the purchaser to be applied to the purchase price. Kopis v. Savage, 498 N.E.2d 1266, 1270 (Ind. Ct. App. 1986). *See also* STOEBUCK & WHITMAN, *supra* note 44, § 10.4, at 734 ("[T]he buyer who seeks a refund of earnest money is arguably not relying on contract rights, but is merely asking relief from the seller's unjust enrichment.").

170. STOEBUCK & WHITMAN, *supra* note 44, § 10.4, at 734.

171. *Goodwin*, 2007 WL 2221066, at *6.

172. *Id.* at *9, *11.

173. *Id.* at *2-3.

financing. Such a change contrasts with a broadly worded termination right that implicitly encompasses a contemplated risk. By creating the broad-based right to terminate without liability, the seller reserves the right to make any number of post hoc justifications for terminating as a defense to the buyer's argument about whether the seller terminated in order to take advantage of a better offer. The limitation-of-remedies clause is also problematic because it does not include a bad faith exception.[174] This failure may evidence an intention by the seller to reserve the right to use the clause in an opportunistic fashion—to terminate if the fair market value of the property has gone up. The *Goodwin* court could have ruled that the clause, since not so expressly limited, created an illusory agreement—as courts in Florida have.[175]

The *Goodwin* court only briefly applied some of the facts of the case to the law relating to procedural unconscionability.[176] The court focused on the seller's change of the Utah approved form of contract as a basis for the buyers to argue that they did not have a reasonable opportunity to understand the terms of the contact or to argue that the seller engaged in deceptive acts.[177] The court was correct to point out that the broker informed the buyer that the standard form had been revised, but as previously noted, the court placed too much reliance on the broker's ability—and perhaps desire—to inform the buyers of the legal consequences of these changes relevant to the remedies issue.[178] In addition, the court placed far too much weight on the fact that the buyers received "representation" from the broker and, thus, might have been the "stronger party in the bargain."[179] To the contrary, it is highly likely that the seller/developer here was represented by an attorney. This attorney would likely have advised the seller on how to revise the standard form purchase contract to better cover the seller's interests, as contrasted with how the broker "helped" the buyer here. A real estate developer, whose business includes routinely entering into purchase contracts and who undoubtedly had legal counsel relating to the development, is clearly a more sophisticated party than a buyer who may have never before entered into a purchase contract and who apparently did not have the benefit of a lawyer's advice at the time the buyers entered into the contract. Hence, the court misapplied the "stronger party" factor in analyzing the procedural unconscionability claim.[180] Finally, as previously noted, the court did not place adequate weight on the impact of the broker's letter to the buyers which stated the buyers should enter into a contract to lock in the purchase price.[181] The court wrongly concluded that the buyers did not "reasonabl[y]" rely on the letter

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174. *Id.* at *9, *11.

175. *See, e.g.*, Port Largo Club, Inc. v. Warren, 476 So. 2d 1330, 1333 (Fla. Dist. Ct. App. 1985).

176. *Goodwin*, 2007 WL 2221066, at *10-12.

177. *Id.* at *11-12.

178. *Id.* at *12.

179. *Id.*

180. *Id.*

181. *Id.* at *8, *12.

because the contract contained terms stating that the contract superseded any and all other previous agreements.[182] In another law review article, we demonstrated the unfairness of this type of conclusion in light of the psychological realities of consumers' likely comprehension of contract terms, and basing a fraud or deceptive practices act claim on such a presumption creates a license to deceive.[183] Perhaps the weakest point of the court's analysis of the procedural unconscionability claim was the court's conclusion that there may not have been a conflict between the contract terms and the letter because if the seller had not exercised its right to terminate, the buyers could have purchased the unit for the contracted-for purchase price.[184] If the termination right had been very narrow in scope there might be some validity to this statement. But because the contract clause broadly provided the seller with a right of termination, that right contradicts the lock-in statement promised in the letter.

A final critique of the *Goodwin* decision is whether courts should require evidence of "bad faith"—defined by the court as the seller using the limitation-of-remedy clause to "pick its deal" based on property valuation or better offers—to rule that the type of limitation-of-remedy clause in *Goodwin* is unenforceable.[185] Courts, arguably, should refuse to enforce a limitation of buyer remedies, when the seller is provided very adequate remedies to address their losses, even if the seller is not trying to use the clause to "pick its deal."[186] The buyer will, in a typical deal, suffer a loss of out-of-pocket expenses and, in some cases, loss of expectation damages or consequential damages when the seller fails to close and terminates the contract, regardless of whether the failure to close is in bad faith. Loss of the right to specific performance is a major waiver of a right and, as noted earlier, courts should not enforce when the buyer has waived other remedies, while the seller retains important remedies.

The Washington Supreme Court in *Torgerson v. One Lincoln Tower, LLC*,[187] also ruled that a contract clause clearly limiting the buyer's remedy to return of her own earnest money, while the seller's remedy was retention of the earnest money, was enforceable and not unconscionable.[188] The special and unique facts in *Torgerson*, however, better justify this ruling than in *Goodwin*. In addressing the procedural unconscionability claim, the *Torgerson* court noted that the purchasers were real estate brokers who were marketing the sales of units in the building[189] and that they negotiated for certain changes to the form contract regarding the interior finish, color schemes, and due dates and amount for the

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182. *Id.*

183. Debra Pogrund Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Psychological Realities,* 5 N.Y.U. J. L. & BUS. 617, 707-10 (2009).

184. *Goodwin*, 2007 WL 2221066, at *12.

185. *Id.* at *11.

186. *Id.*

187. 210 P.3d 318 (Wash. 2009) (en banc).

188. *Id*. at 320, 324-25.

189. *Id*. at 323.

earnest money deposit.[190] In addressing the substantive unconscionability claim, the court emphasized the very low security deposit paid by the buyers/brokers and that the buyer would pay the bulk of their security deposit seven days before closing or even at the closing.[191] The court inferred from these facts that these buyers agreed to the extreme limitation of their remedies in exchange for the low initial security deposits and had better opportunities to negotiate the contract than typical home buyers.[192] Although not expressly noted by the court, it would also be fair to infer that these buyers/brokers were far more familiar with the terms of the developer's form contract and more likely to have a sense of the remedies the buyers were giving up. The amount they initially deposited was only $5000 for each unit.[193] The court assumed, perhaps correctly, that the brokers agreed to the extreme limitation-of-remedy for the seller's breach in exchange for the buyers'/brokers' low initial deposit—$5000—as earnest money.[194] The normal earnest money deposited to estimate a seller's damages for a buyer's breach is in the range of 5-10% of the purchase price, and here the $5000 deposit is only 1.5% of the $332,220 purchase price for one buyer/broker and 0.37% of the $1,318,000 purchase price for the other buyer/broker.[195] The brokers also, however, pledged the commissions they would have earned at closing as part of their security deposit, thus, respectively increasing the deposits to 5% and 10% of these purchase prices.[196] Assuming that the commissions were only for this deal, although the case is not clear on this point,[197] the court would be correct to point out that the very small amount of money the buyers deposited—the rest of the deposit apparently not being payable until closing of this deal) justified them having very limited remedies upon the seller's default.[198] But if the assignment was of commissions owed to these brokers for other deals, then this was valuable consideration and much more within the normal range (although not being paid up front, as is typical), and there would be a substantial imbalance in remedies.

Notwithstanding the appropriateness of the result in *Torgerson*—i.e., the court was upholding a true bargain made between sophisticated parties—the case

190. *Id.* Some contracts, those created later, only limited buyers from obtaining consequential damages or punitive damages. *Id*. at 321.

191. *Id*. at 323.

192. *Id*.

193. *Id.* The court does not clarify whether the commission relates to the sale of these two units or other units they acted as brokers on. If it is for other units that they would be owed a commission on, then the earnest money adding up to 5% of the purchase price for one broker/buyer, and 10% for the other broker/buyer, is in fact a significant sum of money, and the argument that there was no substantive unconscionability under the facts of this case is less strong.

194. *Id.*

195. *Id.*

196. *Id.* at 324.

197. The court stated, "[T]he Buyers negotiated to pay the rest of the deposits in commissions from their work as agents for the condominium development, and that money was due only seven days prior to closing or at closing." *Id*. at 323.

198. *Id.* at 323-24.

has some problematic dicta. First, although the court noted that under Washington law, a clause that unilaterally and severely limits the remedies of one side is substantively unconscionable for denying any meaningful remedy,[199] the court declined to rule on whether the doctrine of unconscionability applies to real estate transactions in the State of Washington.[200] In addition, even when the court analyzed whether the contract remedy clause was unconscionable, its statement—"both sides are limited to the retention or return of deposits in case of breach"[201]—seemed to imply that this was a remedy that was mutually beneficial to the non-breaching party and detrimental to the non-breaching party. The court continued, "To be sure, the deposits come out of Buyers' pockets; but at $5,000 the promise of real estate commissions payable upon closing, the deposits are not so insignificant a sum as to foreclose legal action."[202] It is true that the non-defaulting buyer here will want his $5000 deposit back, but that is still only a return of the buyer's own money, as is the return of the commission for work done on other deals. The buyer would be receiving a meaningful remedy here with the return of the commissions he pledged to the seller only if the commission for *this* closing was due to the buyer/broker even upon seller's breach of this contract.

A second category of dicta that is problematic in the *Torgerson* case relates to its treatment of possible UCC remedies protections. The court stated that just because case law in the state has adopted UCC law on the disclaimer of the warranty of habitability for construction contracts, it does not mean that this court would extend UCC remedy protections to real estate contracts.[203] Nevertheless, the court addressed remedies laws "[u]nder the UCC, indicating that under the UCC, general remedies may be available where 'circumstances cause an exclusive or limited remedy to fail of its essential purpose.'"[204] The court noted that commentary for this section of the UCC states that parties are free to shape their remedies, and reasonable agreements limiting them are to be given effect."[205] Although the court refused to extend UCC remedial provisions to this real estate transaction, it proceeded to conclude that the remedies clause here would satisfy the UCC test.[206] The court stated, "[s]ince Buyers get their deposits back, along with certain sums paid for improvements on the units, they are not left without 'a fair quantum of remedy' as is the concern of the UCC in a goods context."[207] This interpretation of the UCC remedial provisions is highly problematic since it provides that the grant of only rescission/restitution to the non-breaching party and potentially much greater remedies to the other breaching

199. *Id*.
200. *Id*. at 324.
201. *Id*. at 323.
202. *Id*.
203. *Id*. at 325.
204. *Id.* (quoting WASH. REV. CODE § 62A.2-719 (2013)).
205. *Id*.
206. *Id.*
207. *Id.* (citation omitted).

party is still "a fair quantum of remedy."[208] The court failed to limit this dicta to the setting where the other party is also severely limited in its remedies or if the other party who has waived contractual remedy rights has been given other valuable consideration for their waiver.

Finally, the *Torgerson* court's reasoning in its ruling that the contract remedies clause did not violate public policy is also flawed.[209] The buyer correctly pointed out that limiting the buyer's sole remedy for the seller's default to a refund of the buyer's earnest money, or other sums paid by the buyer, encourages sellers to engage in more strategic defaults, and enforcement of such a clause would therefore "be injurious to the public."[210] In response, the court stated, "[T]he remedies limitations can cause either these Buyers or Sellers to bear the risk of the other party's breach, depending on changes in the housing market. . . . '[T]his agreed upon allocation of risk, which limits liability for both parties, does not violate public policy.'"[211] Again, the court treats the limitation-of-remedies clauses as being comparable, but the buyer would have to experience a loss greater than at least $5000 plus transactions costs, to benefit from a strategic default, while the seller would only have to lose $1, plus transaction costs, to benefit from a strategic default.[212]

Courts in Florida have taken a different approach and have embraced the argument that a clause that limits the home purchaser to the remedy of return of the buyer's earnest money upon seller's default creates an illusory contract, permitting the seller "to breach with impunity."[213] Thus, the court in *Port Largo Club, Inc. v. Warren*, held that this type of clause was unenforceable and would permit the buyer to obtain the remedy of specific performance[214] or benefit of the bargain damages,[215] notwithstanding the limitation-of-remedy clause in the contract, when the seller breached the contract. The court stated that "[p]ersons may limit their liability by contract, but such provisions must be reasonable to be enforced."[216] Because the court noted that this type of clause "renders the seller's obligation wholly illusory and would permit him to breach with impunity," the court concluded that "'such provisions are antithetical to the concept of fair dealing in the marketplace and will not be enforced by courts of

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208. *Id.*

209. *Id.*

210. *Id.*

211. *Id*. (citation omitted).

212. *Id.* at 323.

213. *See, e.g.*, Port Largo Club, Inc. v. Warren, 476 So. 2d 1330, 1333 (Fla. Dist. Ct. App. 1985).

214. The court did not actually award a remedy of specific performance but instead remanded the cause for a new trial to determine damages. *Id.* at 1334.

215. *Id.* at 1333. The buyer did not obtain the benefit of the bargain damages in this case because the buyer failed to provide evidence of the difference between the fair market value of the property on the date of the breach compared with the contract price. *Id.* at 1334.

216. *Id.* at 1333.

law.'"[217] The court also stated that to obtain benefit of the bargain damages, the breaching party must have breached in bad faith, which the court initially defined as the opposite of good faith and later seemed to define as being without any "reasonable justification."[218] The court noted that the time-share units under contract had increased substantially in value, and because the seller failed to provide reasonable justification for the failure to complete the closing, the court deemed this failure to close was lacking good faith.[219]

The Florida Court of Appeals in *Blue Lakes Apartments, Ltd. v. George Gowing, Inc.*,[220] similarly ruled that although parties to a contract may agree to limit their respective remedies and that the remedies still available to each party need not be the same, the "contractual provisions . . . must be reasonable to be enforced."[221] The court ruled that a contract clause limiting for the buyer's sole remedy to the return of the buyer's earnest money, while the seller's sole remedy is limited to retention of the earnest money, constituted a "heads-I-win, tails-you-lose approach to defaults . . . so rapaciously skewed as to be patently unreasonable."[222] The court also characterized this type of limitation-of-remedies clause as a subversion of contract that "permit[s] one party to breach with impunity, [causing] the seller's obligations to become wholly illusory, while the buyers' are quite real" (the buyer had deposited 10% of the purchase price as its security deposit in this case).[223] The appellate court affirmed the trial court's award of benefit of the bargain damages and did not require a showing of bad faith.[224] In support of its similar conclusion that this type of limitation-of-remedies clause creates an illusory contract, the Florida court in *Ocean Dunes of Hutchinson Island Development Corp. v. Colangelo*,[225] noted that the "return of one's own money hardly constitutes damages in any meaningful sense."[226] The court in *Ocean Dunes* therefore ruled that "the contract provide[d] no reasonable remedy for its breach," and affirmed the trial court's ordering the equitable remedy of specific performance for the buyer.[227]

The court in *Idevco, Inc. v. Hobaugh*,[228] also ruled that when the buyer's sole

217. *Id*. (quoting Blue Lakes Apartments, Ltd. v. George Gowing, Inc., 464 So. 2d 705 (Fla. Dist. Ct. App. 1985)).

218. *Id*. at 1333-34.

219. *Id.* at 1334.

220. 464 So. 2d 705 (Fla. Dist. Ct. App. 1985).

221. *Id.* at 709.

222. *Id*.

223. *Id*. (internal quotation marks omitted).

224. *Id.* The court did mention that the seller had sold the property to a third party but noted this in the context of answering why the trial court did not award specific performance. *Id.* The court also mentioned the purchase price of the property in a sale to a third party in the context of affirming the trial court's calculation of benefit of the bargain damages. *Id*.

225. 463 So. 2d 437 (Fla. Dist. Ct. App. 1985).

226. *Id.* at 439.

227. *Id*. at 440.

228. 571 So. 2d 488 (Fla. Dist. Ct. App. 1990).

remedy is return of her earnest money, and the seller's sole remedy is retention of the buyer's earnest money, there is a lack of mutuality of obligation, and the limitation-of-remedies clause was therefore void.[229] However, in *Idevco*, it was the buyer who was in breach of contract—not the seller.[230] Consequently, the court affirmed the trial court's order that the seller return the buyer's earnest money deposit, but noted that "when a default provision of a purchase agreement is invalid . . . the nondefaulting [party (here the seller)] is entitled to prove and recover actual damages."[231] The court in *Hackett v. J.R.L. Development, Inc.*[232] also ruled that the buyer in default would not lose his earnest money under a similar contract remedies limitation clause because the clause was invalid for lack of mutuality of obligation.[233] The seller could still recover its actual damages from the breach by properly pleading and proving actual damages.[234] The trial court concluded that the remedy was reasonable because the buyer would also be entitled, under other portions of the contract, to the interest generated from the security deposit in the event of the seller's default (similar to the Utah District court's ruling in *Goodwin*).[235] The appellate court disagreed because "[t]he interest [wa]s earned on the buyers' money; thus, the seller ha[d] no real obligation."[236] The court in *Terraces of Boca Associates v. Gladstein*[237] also ruled that a similar contract limitation-of-remedies clause was invalid and unenforceable due to the "unreasonable disparity in remedy alternatives available to [the] seller and buyers," and, therefore, the buyers in breach were entitled to the return of their deposit.[238] The court did not address whether a seller could recover actual damages when a buyer is in breach, but the contract remedies clause invalidly attempts to grant to the seller the option to return the earnest money or sue instead for actual damages.[239]

In light of these Florida cases, it appears that a clause limiting the buyer's sole remedy to return of its earnest money but allowing the seller the remedy of retention of the buyer's earnest money, will not be enforced under Florida law.

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229. *Id*. at 489-90.

230. *Id.* at 490.

231. *Id*.

232. 566 So. 2d 601 (Fla. Dist. Ct. App. 1990).

233. *Id.* at 603.

234. *Id*.

235. *Id.*

236. *Id*.

237. 543 So. 2d 1303 (Fla. Dist. Ct. App. 1989).

238. *Id.* at 1304. The limitation-of-remedies clause in this case was even more unfair than the paradigm clause since the remedies limitation not only limited the buyers' sole remedy to return of its earnest money, it also granted the seller the right to choose between retaining the earnest money as liquidated damages or pursuing actual damages or equitable remedies, which is considered an invalid option in some states, causing the seller to forfeit the right to make the election. *Id*. at 1303.

239. *Id.*; *see also* Catholic Charities of the Archdiocese of Chi. v. Thorpe, 741 N.E.2d 651, 657-58 (Ill. App. Ct. 2000); Grossinger Motorcorp, Inc. v. Am. Nat'l Bank & Trust Co., 607 N.E.2d 1337, 1346 (Ill. App. Ct. 1993).

However, there are two Florida cases that may have taken a less protective approach. The court in *Greenstein v. Greenbrook, Ltd.*[240] enforced a limitation-of-remedies clause that prohibited both parties from bringing a claim of specific performance for the other party's breach, ruling that it was mutual and reasonable.[241] Although the court focused on the portion of the remedies clause that provided for the mutual agreement relating to specific performance, the clause also stated that the buyer's "full and complete settlement of all claims against Seller" in the event of the seller's default was "a full refund of all monies . . . paid to Seller" by the buyer.[242] Further, the seller's remedy was retaining the monies paid by the buyer as liquidated damages.[243] The court failed to address this fact except in a footnote where it stated that it had "not decided whether [the buyer] in an action for damages upon Seller's default, would be limited to the return of his deposit, where Seller's default was shown to be in bad faith."[244] However, the court then cited a prior Florida case that allowed recovery beyond the return of the buyer's earnest money when there was a finding of bad faith on the seller's part.[245] Although unclear, this court may have indicated it would enforce this type of limitation of liability clause except upon a showing of bad faith. Indeed, in the *Port Largo Club* case, in the same district, the court ruled three years later that in order to obtain benefit of the bargain damages, there must be a showing of bad faith.[246]

The second Florida case with a less protective approach was *Developers of Solamar, LLC v. Weinhauer*.[247] The contract in *Solamar* included an exception to the limitation of the buyer's remedies in the event of the seller's willful breach of the contract.[248] In light of this, the court concluded that this default clause did not "fail for lack of mutuality" of obligation in that the buyer could seek his actual damages if the seller had willfully failed to perform.[249] "As such, [the seller] could not have breached the terms of the contract 'with impunity.'"[250] While this is accurate, an argument could still be made, as raised earlier, that whether the seller breached for a cause beyond its control or with impunity, the buyer's losses exist in both situations. Thus, if the seller has reserved more meaningful remedies for a buyer default, a court might find that the buyer's lack of remedy creates an unreasonable limitation of liability or unconscionable due to the imbalanced contractual rights among the parties.

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240. 413 So. 2d 842 (Fla. Dist. Ct. App. 1982).

241. *Id*. at 843-44.

242. *Id.* at 843 n.1.

243. *Id*. at 843-44 & 843 n.1.

244. *Id.* at 844 n.4.

245. *Id.*; *see also* Sperling v. Davie, 41 So. 2d 318 (Fla. 1949).

246. *Greenstein*, 413 So. 2d at 844 n.4; Port Largo Club, Inc. v. Warren, 476 So. 2d 1330, 1333-34 (Fla. Dist. Ct. App. 1985).

247. 18 So. 3d 13 (Fla. Dist. Ct. App. 2009).

248. *Id.* at 15.

249. *Id.* at 16.

250. *Id*. (quoting Hackett v. J.R.L. Dev., Inc., 566 So. 2d 601, 603 (Fla. Dist. Ct. App. 1990)).

It should be noted that other states have also embraced the concept that an illusory promise can render a contract or clause in a contract to be unenforceable, albeit in different factual contexts.[251] The court in *Reeves v. Memorial Terrace, Ltd.*[252] addressed illusory promises involving a contract with terms that made the buyer's promise to purchase land illusory.[253] In *Reeves*, the court noted that for a contract to be enforceable, it "must be supported by valid consideration, *i.e.*, mutuality of obligation," which "can consist of an exchange of promises."[254]

> However, if a promise fails to actually bind a party because he retains the option to terminate the transaction in lieu of performing it, then the promise is illusory and is not valid consideration. Therefore, when illusory promises are all that support a purported bilateral contract, there is no contract.[255]

Although there is no direct power to terminate the agreement at any time in our paradigm situation, this Article argues that when the sale remedy upon breach is merely the refund of the buyer's earnest money, the seller has created a power to terminate the agreement at any time, thereby making the seller's promises of performance illusory.

In summary, Florida, more than other states, protects home buyers from grossly unfair limitation-of-remedies clauses for two reasons. The first is the different legal standard Florida applies to limitation-of-liability clauses than other jurisdictions. Florida courts will not enforce limitation-of-remedies clauses when they are shown to be "unreasonable," while other courts require the much higher standard of "unconscionable" for such clauses to be unenforceable.[256] Second, Florida courts better recognize the "non-remedy" nature of the "remedy" of returning to the non-breaching party its own money and find contracts that provide this as the sole remedy to be illusory in nature.[257] This thereby permits the courts to refrain from enforcing the clause. Viewing such clauses as creating an illusory agreement has also enabled Florida courts to refrain from enforcing the clause when the buyer has breached and also to relegate the seller to a remedy

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251. *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 77 cmt. a (1981) ("*Illusory promises.* Words of promise which by their terms make performance entirely optional with the 'promisor' do not constitute a promise."). *See id.* illus. 2 ("A promises B to act as B's agent for three years from a future date on certain terms; B agrees that A may so act, but reserves the power to terminate the agreement at any time. B's agreement is not consideration, since it involves no promise by him.").

252. Reeves v. Memorial Terrace, Ltd., No. 14-02-0633-CV, 2004 WL 2933807 (Tex. App. Ct. Dec. 21, 2004).

253. *Id.* at *1-2.

254. *Id*. at *1.

255. *Id.* (internal citation omitted).

256. *See, e.g.*, Goodwin v. Hole No. 4, LLC, No. 2:06-cv-00679, 2007 WL 2221066, at *10-12 (D. Utah July 31, 2007); Port Largo Club, Inc. v. Warren, 476 So. 2d 1330, 1333 (Fla. Dist. Ct. App. 1985).

257. *Warren*, 476 So. 2d at 1333.

of actual damages rather than liquidated damages when the liquidated damages amount was higher.[258]

In light of the results from the two empirical studies described in Part I and the Remedies Experiment detailed in Part II, the approach of requiring that limitation-of-remedies clauses be reasonable in order to be enforceable makes much more sense than the approach of applying the very difficult to meet unconscionability test. The unconscionability test makes sense when there has been a true bargain between parties who understood the terms of the contract. When this has not occurred, courts still engage in this fiction of analyzing unconscionability in order to further the goal of creating certainty of contracts and to encourage parties to refrain from entering into contracts when they do not understand what they are agreeing to.[259] But in light of the widespread use of highly unfair limitation-of-remedies clauses evidenced in the two empirical studies, the likely lack of bargaining over such clauses in light of the profound lack of consumer understanding of them, as evidenced in the Remedies Experiment (with participants being overly optimistic that they still had remedies available to them notwithstanding clear language to the contrary—clear at least to a lawyer),[260] it is imperative that courts take this reality into account and apply the Florida approach or other protective approaches described in Part IV.

IV. LEGAL REFORMS TO ADDRESS THE PROBLEM OF DYSFUNCTIONAL CONTRACTS

This Article proposes four law reforms to reduce the problem of "dysfunctional contracts."[261]

A. Modify the Unauthorized Practice of Law Rules

Entering into a contract to purchase a home is the single largest and most important transaction that most consumers will enter into,[262] and such contracts typically cover, in a highly technical fashion, a myriad of legal issues that can arise both before and after the closing.[263] Yet many states do not require an attorney to represent homebuyers for the purpose of reviewing and proposing

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258. *See, e.g.*, Hackett v. J.R.L. Dev., Inc., 566 So. 2d 601 (Fla. Dist. Ct. App. 1990); Idevco, Inc. v. Hobaugh, 571 So. 2d 488 (Fla. Dist. Ct. App. 1990).

259. *See, e.g.*, Morales v. Sun Contractors, Inc., 541 F.3d 218, 221-23 (3d Cir. 2008); Shelton v. Ritz Carlton Hotel Co., 550 F. Supp. 2d 74, 80-81 (D.D.C. 2008).

260. Remedies Experiment, *supra* note 8.

261. By "dysfunctional contracts" we mean contracts where the professional seller's form limits the seller's liability for its breach of the contract to return of the buyer's earnest money and reserves to the seller far more significant rights in the event of the buyer's default, such as retention of this earnest money.

262. *See* Braunstein & Genn, *supra* note 10, at 470 n.4 (stating that 132 of the homebuyers surveyed in the Columbus area "said that their house was the most valuable asset they owned").

263. Debra Pogrund Stark, *Navigating Residential Attorney Approvals: Finding a Better Judicial North Star,* 39 J. MARSHALL L. REV. 171, 178-85 (2006).

changes to the form contract to protect the buyer's expectations and goals,[264] as is more commonly done in Illinois and a few other states.[265] One important reason[266] for the prevailing practice of home buyers' reliance on brokers for assistance, rather than lawyers, is that, in many states, the rules on the unauthorized practice of law permit brokers to fill in standard form purchase and sale contracts without the assistance of an attorney.[267] It is thus customary for

264. See *infra* note 267 and accompanying text for examples of states that permit brokers to fill in form purchase contracts. When brokers are permitted to fill in form purchase contracts—a task which is arguably incident to their role in helping to bring the buyer and seller together—it is in the broker's interest to not have an attorney review and approve the contract because the attorney may raise points that delay the deal or even cause the deal to not go through. Consequently, brokers are not likely to encourage the buyer to hire an attorney at this stage, unless the brokers would incur liability for failing to do so. Based on data collected in an empirical study in Columbus, Ohio 59% of homebuyers interviewed indicated that they did not hire an attorney to represent them. Braunstein & Genn, *supra* note 10, at 471.

265. *See* Stark, *supra* note 263, at 188 n.39 (noting eleven states where there is case law on the use of attorney approval clauses in residential deals).

266. Another important reason is that some attorneys fail to properly review the purchase agreement with the buyer as they should, causing home buyers to justifiably not see any value in spending the money to hire an attorney. The homebuyers in the empirical study in Columbus, Ohio, provided two main reasons for choosing not to hire an attorney: (i) the costs for the attorney (with some expressing it would be "a waste of money") and (ii) because "other person[s] in the transaction performed the role of, or obviated the need for, a lawyer." Braunstein & Genn, *supra* note 10, at 472.

267. *See* Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 312 P.2d 998, 401-02, 421-22 (Colo. 1957) (en banc) (holding it would be "unrealistic and impractical" for lawyers to have to complete all real estate sales transactions); Pope Cnty. Bar Ass'n v. Suggs, 624 S.W.2d 828, 830-31 (Ark. 1981) (holding that the preparation of real estate purchase contracts are so "indigenous to the practice of law that it would be illogical to say they are not. But we can also say, as a majority of other jurisdictions have done, that it is in the public interest to permit the limited, outside use of standard, printed forms in the manner stipulated by the chancellor and we so hold."); The Fla. Bar v. Irizarry, 268 So. 2d 377, 379 (Fla. 1972) ("[W]e have limited the permissible scope of activities of real estate brokers to preliminary negotiations and preparation of the contract."); Cardinal v. Merrill Lynch Realty/Burnet, Inc., 433 N.W.2d 864, 866-67 (Minn. 1988) ("The provisions of [the Minnesota statute] shall not prohibit . . . any one, acting as broker for the parties or agent of one the parties to a sale . . . of . . . property . . . from drawing or assisting in drawing, with or without charge, papers incident to the sale."); Hulse v. Criger, 247 S.W.2d 855, 861 (Mo. 1952) ("[W]hen acting as broker, a realtor may use an earnest money contract form for the protection of either party against unreasonable withdrawal from the transaction, provided that such earnest money contract form, as well as any other standard legal forms used by the broker in transacting such business, shall first have been approved and promulgated for such use by the bar association and the real estate board in the locality where the forms are to be used."); Calvert v. K. Hovnanian at Galloway, VI, Inc., 607 A.2d 156, 160 (N.J. 1992) ("The Bar Association and the Association of Realtors finally agreed to a settlement that permitted licensed realtors receiving commissions for the sale of residential real estate to prepare the contracts for those sales provided that each contract contain a

real estate brokers to use the standard form contract prepared by the developer, fill in the blanks of the form contract, such as the purchase price, loan numbers, and closing date, but not provide legal advice on the contract.[268] Some courts have permitted this due to a failure to appreciate the important rights that can be eradicated through a contract that a well-trained attorney would identify and address but a broker would not.[269] But some courts, such as the Supreme Court of New Jersey, have expressed an appreciation for the important rights and obligations that a real estate purchase agreement creates but concluded that, since there is no evidence of how the public is, in fact, harmed when not represented by an attorney,[270] the court would not prevent brokers from assisting home buyers

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clause making the contract subject to review by an attorney for the buyer or seller at either party's option within three business days after execution."); *In re* Duncan & Hill Realty, Inc. v. Dep't of State, 62 A.D.2d 690, 696 (N.Y. App. Div. 1978) ("As long as real estate brokers and agents have not held themselves out to be attorneys at law, have confined their actions to serving their clients in relation to the specific transaction (such as drawing a contract of sale) in which the broker has a financial interest for payment of his services, and have made no charge for these incidental services, such acts have been held by our courts to be proper and not to constitute the unlawful practice of law."); Or. State Bar v. Sec. Escrows, Inc., 377 P.2d 334, 340 (Or. 1962) (finding that an exception from the injunction is "the filling-in of blanks under the direction of a customer upon a form or forms selected by a customer. If the customer does not know what forms to use or how to direct their completion, then he needs legal advice. If the customer does know what he wants and how he wants it done, he needs only a scribener"); *see also* Creditors' Serv. Corp. v. Cummings, 190 A. 2, 12-13 (R.I. 1937); Bar Ass'n of Tenn., Inc. v. Union Planters Title Guar. Co., 326 S.W.2d 767, 779 (Tenn. Ct. App. 1959); Perkins v. CTX Mortgage Co., 969 P.2d 93, 99 (Wash. 1999) (en banc).

268. *See, e.g.*, Pope Cnty. Bar Ass'n v. Suggs, 624 S.W.2d 828, 829 (Ark. 1981) ("[T]he broker shall not give advice or opinions as to the legal rights of the parties, as to the legal effects of instruments to accomplish specific purposes or as to the validity of title to real estate."); State *ex rel*. Wright v. Barlow, 268 N.W. 95, 96 (Neb. 1936) (permitting a non-lawyer to draft documents—acting "merely as an amanuensis"—but who does not provide advice "or counsel as to the legal effect and validity of [legal] instruments").

269. *See* Chi. Bar Ass'n v. Quinlan & Tyson, Inc., 214 N.E.2d 771, 773-74 (Ill. 1966) (distinguishing filling in blanks on a deed or other documents that "affect titles to real estate [which] have many points to consider" with filling in blanks ("such as the date, price, name of the purchaser, location of the property, date of giving possession and duration of the offer") or making "appropriate deletions . . . to conform to the facts" in a purchase and sale contract that "is customarily used in the community" since such services "require no more than ordinary business intellingence [sic] and do not require the skill peculiar to one trained and experienced in the law"). It is hard to understand why the court understood how "the mere filling in of the blanks" can be more complicated than it appears in a deed affecting title, but not in a contract form that affects the parties rights and obligations between each other. *Id.* at 774.

270. *See In re* Opinion No. 26 of the Comm., 654 A.2d 1344, 1345-46, 1359 (N.J. 1995) (per curiam). The court also noted the cost savings to the homebuyer when the broker fills in the form contract as contrasted with the buyer paying to have an attorney do so. *Id.* at 1360.

in the use of a form purchase contract.[271] Two prior studies, one by a special master at the direction of the Supreme Court of New Jersey,[272] and the other by Professor Joyce Palomar, who focused on the impact of an attorney at the conveyance stage rather than at the contracting stage,[273] failed to show how having non-attorneys assist buyers in their home purchase transactions negatively impacts the public. These studies and the lack of a showing of public harm has led, in part, to the Federal Trade Commission and the Department of Justice taking the position that allowing laypersons to perform tasks involved in residential real estate transactions is unlikely to increase the risk of harm for consumers and should be permitted.[274] Consequently, the results from the Remedies Experiment[275] and the Condo Contracts Study[276] are important contributions for the question of public harm and the rules relating to the unauthorized practice of law.

Based on the results from the Remedies Experiment, it is clear that most consumers, even if they carefully read the limitation-of-remedies clause in the contracts presented to them, will not understand what rights they have waived[277] and will not know to bargain for revision of the clause or to bargain to add an attorneys' fees clause to the contract. One way to address this major problem is to change the unauthorized practice of law ("UPL") rules to prohibit brokers from filling in the blanks of a purchase and sale agreement, which should lead more buyers to seek out an attorney to assist them with this task. State law could require these forms to state at the top that "this legal document will have a major impact on the buyer's rights and obligations," and "the buyer should consult with an attorney before signing the agreement." States could go even further and require that prospective home buyers hire an attorney to review and advise them on the purchase and sale agreement before the buyer can be bound by the agreement (such as requiring an attorney review/approval clause). In light of the results from our Attorney Survey, which reflects, among other things, that in 1-10% of the deals a major dispute arises between the parties after the contract is signed and that the contract language is likely to have an essential impact on the rights and obligations of the parties relevant to this dispute, empirical evidence

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271. *Id*. at 1361-62. Furthermore, when attorneys fail to spot problems with how a transaction is structured and documented and fail to negotiate for changes to reduce these problems, or fail to inform their client of these problems, their clients justifiably see no added value in hiring an attorney and only see the added costs in doing so.

272. *In re Opinion No. 26 of the Comm.*, 654 A.2d at 1351.

273. Joyce Palomar, *The War Between Attorneys and Lay Conveyancers—Empirical Evidence Says "Cease Fire!,"* 31 CONN. L. REV. 423, 520 (1999).

274. Ann M. Burkhart, *Real Estate Practice in the Twenty-First Century*, 72 MO. L. REV. 1031, 1062-66 (2007).

275. *See* Remedies Experiment, *supra* note 8. *See infra* Part II.B.

276. *See* Condo Contracts Study, *supra* note 1.

277. Remedies Experiment, *supra* note 8. Indeed, as noted in Part II, many participants appear not to recognize the possibility of recovering benefit of the bargain/expectation damages or consequential damages and expressed skepticism that this is a recoverable loss. *Id.*

now supports the proposition that homebuyers clearly are harmed when not represented by a well-trained attorney.[278] We therefore propose a companion rule to the change in the UPL laws that would mandate use of an attorney by a home purchaser. The UPL rules should also require that only attorneys who have undergone special training and additional licensing for this type of representation can represent buyers of homes related to this area of practice. This would better ensure that home purchasers receive real value if they are required to hire an attorney to protect their interests.

B. Enact Legislation That Prohibits Remedies Clauses That Limit Buyers' Remedies to Return of Earnest Money and Create Safe Harbor Rules Based on Mutuality of Remedy and True Bargaining

Unfortunately, even if assisted by very able counsel, such attorneys might not be successful in negotiating for revisions to the typical limitation-of-remedies clauses used by developers, especially if it happens to be a seller's market.[279] Thus, even with a reform of the UPL rules, state legislators should consider legislation that prohibits the one-sided type remedy clauses focused on in this Article. The question then arises of what would be an acceptable limitation-of-remedies clause under the statute, i.e., examples of "safe harbors." For example, is it adequate protection to enforce limitation-of-remedies clauses but create a "bad faith" exception to enforcement when the developer is breaching to take advantage of property appreciation? We do not think so for reasons articulated earlier. What if the limitation-of-remedies clause awards the buyer her out-of-pocket expenses, but at a very low or nominal figure? Should that be enforceable? It is difficult to anticipate and address each possible scenario that can arise and a goal, other than protecting buyers, is to create rules that are both clear in scope and permit true bargaining to occur. To accomplish this, laws could create safe harbors based upon the concept of mutuality—meaning if the remedies clause is truly mutual then it would be considered a safe harbor. An example would be mutual liquidating damages clauses (seller retains 5% of the purchase price if buyer breaches, and buyer is entitled to 5% of the purchase price if seller breaches), or mutual rights to specific performance, provided the seller can provide marketable title, or reserving to both parties all rights and remedies available at law or in equity. We advocate creating legislation that prohibits the type of limitation-of-remedies clause focused on in this Article—where the buyer's sole remedy is return of the buyer's earnest money, even with interest on it—but also creates safe harbors based on specific examples of acceptable mutual remedies. A court would judge the enforceability of any limitation-of-remedies clause that does not fit within the parameters of what is expressly prohibited or expressly permitted as a safe harbor under a test that

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278. Attorney Survey, *supra* note 20.

279. *See id.* Only 35% of the attorneys in the Attorney Survey rated themselves as successful in negotiating highly problematic or highly unfair terms in a professional seller's purchase contract form greater than 50% of the time.

determines the reasonableness of the limitation-of-remedies clause under the circumstances (the Florida approach). Major factors in this determination could be whether the buyer truly bargained over the clause, whether the buyer had an attorney representing her, and whether the buyer had a true choice between accepting a limitation-of-remedies that is not mutual in exchange for other valuable consideration (such as a reduction in the purchase price) or the right to decline this other valuable consideration and enjoy a mutual limitation-of-remedies clause instead.

C. Replace Substantive Unconscionability Test With a "Reasonable Limitation of Remedy" Test in the Home Purchase Context

Although legislation is preferable to pure judicial response to the problem of dysfunctional contracts because of legislation's ability to more clearly and comprehensively address the problem than the judiciary, courts need to better protect home purchasers from highly unfair limitation-of-remedies clauses if legislatures fail to enact protections. Courts should replace the near impossible to meet test of substantive unconscionability with the test of whether the limitation-of-remedies clause, under the circumstances, is "reasonable." Courts could look to factors such as mutuality and true bargaining, articulated above, in determining whether the clause is reasonable. All courts already engage in a test of reasonableness in enforcing liquidated damages clauses, so applying a reasonableness test in the context of limitations of remedies would not be unprecedented, as Florida courts already apply this approach to limitation-of-remedies clauses.

D. Enact Legislation Requiring Attorney's Fees to the Buyer When She Is the Prevailing Party in Enforcing Her Rights in the Context of a Home Purchase Agreement

The reform of requiring attorneys' fees to the buyer when the prevailing party in a lawsuit to enforce the home purchase agreement is critical because without it, even if the home buyer would have a valid claim for meaningful damages against a breaching seller, the buyer will unlikely be able to afford litigating the claim. This is because the costs of proving one's case in litigation are typically very high.[280] As noted in Part II, 71% of the participants in the clearly unfair condition and 76% in the *vaguely unfair* condition mistakenly believed there were no laws of remedies that would prevent their recovering of attorneys' fees for handling the litigation to enforce the contract.[281] They did not realize that this right must be in the contract or in a statute for them to recover. Yet, as noted in Part I, only 14% of the contracts in the Condo Contracts Study contained an attorneys' fees provision to the prevailing party in the event of a lawsuit to enforce the agreement.[282] This Article also recommends enacting

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280. *See* O'CONNELL, *supra* note 17.

281. Remedies Experiment, *supra* note 8.

282. Condo Contracts Study, *supra* note 1.

legislation that would prohibit the developer/seller from being able to recover attorney's fees as a result from defending a lawsuit brought by the buyer, unless the court rules the buyer's suit to be frivolous; prior research reflects that fewer consumers will bring meritorious claims if their contract contains a provision permitting the recovery of attorney's fees to the prevailing party.[283] In light of the foregoing, states should enact legislation to require that this type of clause be added to the form purchase agreements to ensure that all buyers will have this right and will realize they have this right if a dispute arises.

CONCLUSION

The results from the Condo Contract Study reflect that the vast majority of form contracts used by condominium developers in the jurisdiction examined contain a limitation-of-remedies clause that is completely one-sided, patently unreasonable, and that causes the seller's obligations under the contract to be illusory in nature unless "saved" with an implied "bad faith" exception.[284] Yet based on a review of relevant case law, it appears that many courts will still enforce this type of clause when it is clearly provided for and, therefore, presumably bargained for.[285] But in order to bargain for a contract term, one must at least understand it. Consequently, this Article examined how well laypersons in fact understand this prevalent type of limitation-of-remedies clause by assigning one group to a *fair* remedies clause condition (where both parties have reserved all rights and remedies under the law in the event of a breach), a second group to a *clearly unfair* remedies clause (where the buyer's sole remedy in the event of seller's breach is return of the buyer's own earnest money and the seller's remedy, in the event of the buyer's breach, is retention of that earnest money), and a third group to a *vaguely unfair* remedies clause (where the buyer's sole remedy is limited to return of buyer's earnest money but the clause does not expressly state this occurs in the case of the seller's breach). The results of this Remedies Experiment reflected a profound misunderstanding of the impact of the two *unfair* remedies clauses with, for example, 64% in the *clearly unfair* condition and 68% in the *vaguely unfair* condition mistakenly believing they could still seek specific performance if the seller breached the contract, and 54% in the *clearly unfair* condition and 60% in the *vaguely unfair* condition mistakenly believing that they could recover certain out-of-pocket expenses in the event of the seller's breach. These results, and the others detailed in Part II, demonstrate that courts truly engage in a fiction when they presume that consumers understand clearly worded limitation-of-remedies clauses (clear at least to attorneys and judges) and, therefore, conclude that the judiciary should enforce these clauses because they have been bargained for. In light of this reality, we argue that home purchasers need greater protections than they

283. Debra Pogrund Stark & Jessica M. Choplin, *Does Fraud Pay? An Empirical Analysis of Attorneys Fees Provisions in Consumer Fraud Statutes*, 56 CLEV. ST. L. REV. 483, 508-09 (2008).

284. See *supra* Part III for a discussion of case law.

285. *Id*.

currently enjoy and identify four areas of legal reform to better protect such home purchasers: (i) revise the unauthorized practice of law rules to mandate attorney review and approval of home purchase contracts, further requiring such attorneys to be specially trained and licensed for this type of representation, (ii) enact legislation that prohibits remedies clauses that limit buyers' remedies to return of earnest money and create safe harbor rules based on mutuality of remedy and true bargaining in the home purchase contract, (iii) replace the substantive unconscionability test with a "reasonable limitation of remedy" test in the home purchase context for limitation-of-remedies clauses, and (iv) enact legislation requiring attorneys' fees to the buyer when the prevailing party in the context of enforcing rights in a home purchase agreement.

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NOTE

STATUTORY TORT CAPS: WHAT STATES SHOULD DO WHEN AVAILABLE FUNDS SEEM INADEQUATE

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INTRODUCTION

Clouds were rolling in as concert attendees were anxiously awaiting the band, Sugarland, to start its performance on stage.[1] There was a big gust of wind and an upward swing of the stage tarp ceiling.[2] Screams of horror filled the air as the crowd instantaneously turned to run away, but it was too late.[3] Seven died and forty were severely injured from one of the worst disasters in Indiana's history.[4] Attendees fortunate enough to be in the stands stood in horror as those on the ground ran to lift the massive staging off those who had been crushed underneath. The next days and weeks held funerals, long hospital stays, and forever-changed lives for the concert goers. When talk of litigation began, attorneys questioned the adequacy of the tort funds available from the State.[5]

Section 34-13-3-4 of the Indiana Code provides that the maximum combined aggregate liability for the State of Indiana is $700,000 for one person and $5 million for claims resulting out of one incident or occurrence.[6] At least thirty-three states possess similar statutes limiting claimants' recovery.[7]

Although in most instances of state liability the tort allowance provided by statute is sufficient, extreme instances sometimes arise in which the tort cap is

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1. *Stage Collapse at Fairgrounds Kills 5, Injures More Than 40*, FOX 59 (Aug. 13, 2011), http://www.fox59.com/2011/08/13/stage-collapse-at-fairgrounds-kills-5-injures-more-than-40/#axzz2uj8cRIQP.
2. *Id*.
3. *Id*.
4. Tim Evans & Heather Gillers, *Ind. Lawmaker: $5M Not Enough for Stage Collapse Victims*, USA TODAY (Sept. 2, 2011), http://usatoday30.usatoday.com/news/nation/story/2011-09-02/Ind-lawmaker-5M-not-enough-for-stage-collapse-victims/50243594/1.
5. *Id.*
6. *See* IND. CODE § 34-13-3-4(a) (2013).
7. Evans & Gillers, *supra* note 4.

challenged. As a result, states have occasionally waived the statutory damage cap, providing compensation in excess of that cap.[8] Once before, in Indiana, an agreement was made to provide compensation from state funds in excess of the statutory limit after an Indiana Fun Park train crash paralyzed four-year-old Emily Hunt.[9] The State paid Emily $1.5 million from the tort claims fund, which was more than three times the per person limit at that time.[10] In another instance, a bill created a victims' compensation fund that totaled more than $36 million after a bridge collapsed in Minnesota, killing thirteen and injuring more than one hundred others.[11] The statutory tort cap at the time was $1 million for a single incident.[12] Currently, Minnesota's statute caps the state's tort liability at $500,000 per individual or $1.5 million per occurrence.[13]

Instances such as the Indiana State Fair stage collapse and previous waivers of limited state liability leave the question open regarding what to do in the face of catastrophic events, when the available funds simply do not seem like enough compensation for the victims. Part I of this Note describes the history of government tort liability and the events that led to the creation of state statutory tort caps. Part II examines state tort liability caps in general and provides a survey of existing tort liability caps. Part III explores alternative approaches to waiving statutory tort caps, allowing for greater recovery in low probability catastrophic situations. Lastly, Part IV discusses two proposals: one for state legislatures to create a statutory exception in order to prepare for future catastrophic events and one advocating for the implementation of no fault compensation funds after the catastrophic event occurs.

I. HISTORY OF TORT CAPS

Historically, the government was immune from liability under the doctrine of sovereign immunity, but this doctrine has been largely abandoned over the last half-century.[14] The law of governmental liability developed through the Federal Tort Claims Act ("FTCA"), which allows claimants to recover against the federal government,[15] and at the state level through individual state tort claims acts,

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8. *See generally id.* (discussing Minnesota's and Indiana's waiver of their respective tort damage caps).

9. *Id.*

10. *Id.*

11. Barbara L. Jones, *Victims' Fund Won't End I-35W Bridge Litigation*, 12 MINN. LAW., May 12, 2008, at 1, *available at* http://www.rkmc.com/~/media/PDFs/Victims fund wont end i35w bridge litigation.pdf; *NTSB: Design Flaw Led to Minnesota Bridge Collapse,* CNN.COM (Nov. 15, 2008, 4:43 AM), www.cnn.com/2008/US/11/14/bridge.collapse/.

12. Jones, *supra* note 11, at 2.

13. MINN. STAT. § 3.736 subdiv. 4(a)-(g) (2013).

14. Lauren K. Robel, *Sovereignty and Democracy: The States' Obligations to Their Citizens Under Federal Statutory Law*, 78 IND. L. J. 543, 544-45, 553 (2003).

15. 28 U.S.C. § 2674 (2006).

which provide for recovery against the state.[16] Although these state tort claim acts provide for recovery against the state, they also place restrictions on the claimant's ability to recover.[17] Caps on tort recovery are one such restriction.

A. Sovereign Immunity

Prior to the creation of tort claims acts, the doctrine of sovereign immunity controlled. The doctrine of sovereign immunity dates back to early common law when dictatorships were prevalent, and "[t]he King [could] do no wrong."[18] Under the doctrine of sovereign immunity, the government or governmental unit is immune from liability to private plaintiffs.[19] Rooted in historical pretenses, "[e]arly sovereign immunity decisions relied on little more than English common-law precedent and brief discussions of the indignity of hauling a state into court, bolstered . . . by citations to Blackstone's explanation of the doctrine of sovereign immunity as rooted in the sixteenth-century prerogatives of the English Crown."[20] The federal government has recognized the need for state sovereign immunity as to provide the states with "the dignity that is consistent with their status as sovereign entities."[21]

The common law doctrine of sovereign immunity has been upheld since the eighteenth century.[22] The strong policy in favor of the doctrine is derived from "combined discussions of history and sovereignty with concerns that damage awards might unduly shift state priorities, moving state funding from public goods—education or road repair, for instance—to private plaintiffs."[23] However, this strong policy in favor of the doctrine of sovereign immunity has gradually been abrogated by state governments, resulting in statutes that allow claimants to recover against the government, thus essentially waiving the government's right to sovereign immunity.

As states transitioned away from the doctrine of sovereign immunity, state

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16. *See, e.g.*, DEL. CODE ANN. tit. 10, § 4013 (2013); IDAHO CODE ANN. § 6-926 (2013); IND. CODE § 34-13-3-4 (2013); LA. REV. STAT. ANN. § 13:5106 (2013); MINN. STAT. § 466.04 subdiv. 1 (2013); NEV. REV. STAT. § 41.035(1) (2013); N.H. REV. STAT. ANN. § 541-B:14 (2013); N.M. STAT. ANN. § 41-4-19(A)-(B) (2013); 42 PA. CONS. STAT. § 8553 (2013); R.I. GEN. LAWS § 9-31-2 (2013); TENN. CODE ANN. §§ 29-20-311, 29-20-404(a) (2013); UTAH CODE ANN. § 63G-7-604(1) (West 2013); VA. CODE ANN. § 8.01-195.3 (2013).

17. See *supra* note 16 for a list of statutes that cap the state's tort liability.

18. Robel, *supra* note 14, at 553.

19. *Id.* at 544-45.

20. *Id.* at 549 (footnote omitted).

21. *Id.* at 546-47 (quoting Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002)).

22. *See generally* Hans v. Louisiana, 134 U.S. 1 (1890) (illustrating the long standing doctrine of sovereign immunity) *superseded by constitutional amendment*, U.S. CONST. Amend. XI, *as recognized in* Pennhurst State Sch. Hosp. v. Halderman, 465 U.S. 89 (1984); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (same); Edelman v. Jordan, 415 U.S. 651 (1974) (same).

23. Robel, *supra* note 14, at 546.

supreme court justices led the reform by urging state governments "to work through the delicate problems of balancing state accountability with fiscal responsibility," which resulted in legislative reform allowing for governmental tort liability.[24] The states' response to waive governmental immunity became a moral reaction to provide for its citizens in the face of injuries caused by the government.[25] There are three main explanations that state judiciaries and legislators provided for moving away from sovereign immunity, which include the following:

> First, courts . . . viewed the underlying theory of complete sovereign immunity as distasteful and anachronistic in a democracy. Second, courts and legislatures were influenced by the growth of the modern administrative state and the extension of governmental activities into broad new areas of government-citizen interaction, with the corresponding increase in possibilities for citizen injury. Third, states were influenced by the insights of tort reform scholarship, with its views about fault, risk, and loss-spreading.[26]

Accordingly, in addition to the doctrine of sovereign immunity stemming from seemingly ancient, hierarchical times, the current democratic form of state government does not blend well with the idea that the state is above its citizens or that it should not have to answer to them.[27]

B. Federal Tort Claims Act

One of the first steps towards the abrogation of the doctrine of sovereign immunity came from the federal government with the inception of the FTCA.[28] The FTCA only applies to liability of the federal government, but it is important to review, as it provides a waiver of sovereign immunity and the first efforts at tort reform. The FTCA waives sovereign immunity in suits for "personal injury . . . caused by the negligent or wrongful act or omission of any [Government] employee . . . while acting within the scope of his office or employment."[29] The FTCA was enacted in 1946, and provides in part: "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."[30] States followed the example set by the federal government by passing their own tort claim acts, which this Note will discuss in a later

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24. *Id.* at 552.
25. *Id.* at 545.
26. *Id.* at 553.
27. *Id.* at 554.
28. 28 U.S.C. § 2674 (2006).
29. *Id*. § 1346(b)(1), *amended by* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.
30. *Id*. § 2674.

section.[31]

C. Leading to Tort Reform

Although the FTCA and the subsequent state tort claim acts provide for possible recovery against the government, these statutes also place restrictions, such as liability caps, on that recovery. These restrictions, and tort reform in general, largely stem from the insurance crisis of the 1980s.[32] During the 1980s, insurance companies were realizing losses and raised their premiums as a result.[33] To compensate for increased premiums, some businesses raised their prices.[34] "This inability of businesses and municipalities to obtain reasonably priced insurance is commonly known as the insurance crisis."[35] In addition to responding to the insurance crisis, "state legislatures also were responding to scholarship indicating that the tort system failed to achieve its objectives [of deterrence and compensation]."[36] Lastly, a distrust of juries that seemed to be producing larger awards against "deep-pocket" defendants, and the inconsistency of awards, also led to tort reform.[37] These issues spurred tort reform in general, that of which state tort caps were just one portion.

II. State Tort Liability Caps

The following section provides an overview of state tort caps and specifically provides detail into state tort cap treatment in Indiana, as well as other states that provide for varying degrees of compensation. Because the common law rule is government immunity through the doctrine of sovereign immunity,[38] any statute that provides for recovery against the state is effectively a waiver of that immunity. The state tort claim acts generally allow entities to recover against the government, but the statutory state tort caps place a limit on the amount parties are able to recover. At least thirty-three states have some type of damage cap.[39] There are various types of damages that states cap: non-economic damages, punitive damages, recovery in products liability cases, and medical malpractice cases. However, this Note addresses only the caps that states place on the amount of compensatory damages that parties may recover from actions against governmental entities.

At least thirteen states have a cap on the amount of compensatory damages

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31. *See infra* Part III.

32. Nancy L. Manzer, Note, *1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability*, 73 CORNELL L. REV. 628, 629 (1988).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 628.

37. *Id.* at 631.

38. *See supra* Part I.

39. Evans & Gillers, *supra* note 4.

that can be recovered against the government.[40] These statutory caps vary greatly both in amount and under what circumstances recoveries are capped. For instance, some states do not have both a single incident and per person cap.[41] Additionally, the per person and total incident caps vary in amount—some are as small as $300 thousand[42] and some are as large as $5 million.[43] Lastly, some statutes provide exceptions or additional clauses in the language that would provide for greater awards than the stated amount.[44]

A. Advantages of Tort Liability Caps

There are many reasons for the inception of state tort caps. Managing the fiscal integrity of the government and not misallocating funds is a forefront reason. For instance, an object of the Indiana Tort Claims Act is to protect the fiscal integrity of governmental entities by limiting their liability for tort claims resulting from the actions of their public employees.[45] The fact that recoveries in tort against the government are funded by taxpayers' dollars makes tort claim caps a necessity.

Even in light of this important societal purpose, caps on damages, whether for medical malpractice, government liability, or otherwise, are challenged for constitutionality on several different constitutional grounds.[46] Some argue that tort caps violate the plaintiff's constitutional rights of due process, equal protection, or right to trial by jury.[47] However, challenges of these constitutional rights fall under the rational basis review standard, and it is easy to establish a rational basis.[48] An argument that the purpose of the statute is to protect the fiscal integrity of the governmental entity is likely to survive a rational basis review, as a reviewing court could reasonably find the statute to be rationally related to a legitimate governmental interest. Thus, many challenges for unconstitutionality have failed, further promoting the use of state tort caps. This is one reason why

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40. *See, e.g.*, DEL. CODE ANN. tit. 10, § 4013 (2013); IDAHO CODE ANN. § 6-926 (2013); IND. CODE § 34-13-3-4 (2013); LA. REV. STAT. ANN. § 13:5106 (2013); MINN. STAT. § 466.04 subdiv. 1 (2013); NEV. REV. STAT. § 41.035(1) (2013); N.H. REV. STAT. ANN. § 541-B:14 (2013); N.M. STAT. ANN. § 41-4-19(A)-(B) (2013); 42 PA. CONS. STAT. § 8553 (2013); R.I. GEN. LAWS § 9-31-2 (2013); TENN. CODE ANN. §§ 29-20-311, 29-20-404(a) (2013); UTAH CODE ANN. § 63G-7-604(1) (West 2013); VA. CODE ANN. § 8.01-195.3 (2013).

41. *See* NEV. REV. STAT. § 41.035(1) (2013); 42 PA. CONS. STAT. § 8553(b) (2013); VA. CODE ANN. § 8.01-195.3 (2013).

42. *See* DEL. CODE ANN. tit. 10 § 4013(a) (2013).

43. *See* IND. CODE § 34-13-3-4(a)(2) (2013).

44. *See infra* Part III.

45. *See* Baker v. Schafer, 922 F. Supp. 171, 172 (S.D. Ind. 1996).

46. DAMAGES IN TORT ACTIONS § 3.06 (2011).

47. *Id.*

48. *See generally* Davis v. Omitowoju, 883 F.2d 1155 (3d Cir. 1989) (discussing the rational basis standard, which requires a slight correlation between the goal of the tort cap and the means to achieve the goal).

current challenges to Indiana law likely will fail.

B. Negative Aspects of Tort Liability Caps

Although there are several reasons that support the need for state statutory tort caps, there are also many reasons to oppose these caps on damages. For one, courts have found in certain instances, statutory tort caps to be unconstitutional. In a medical malpractice case, a Virginia federal district court found that the damage cap violated the plaintiff's Seventh Amendment right to trial by jury, because one of the most important functions of a jury is to establish damage amounts.[49] Some states take this even further by deeming statutory tort caps expressly unconstitutional and prohibit any law to limit the damages for injury or death.[50]

Some states argue that statutory tort caps result in a failure to deter tortfeasors from engaging in negligent conduct. "Misconduct occurs not because the actors are unaware of standards-it occurs because all too often, the consequences of misconduct are known, predictable, and easily passed along to consumers, patients, and the public."[51] Caps allow entities to engage in riskier behavior and lower their level of care because the entities no longer face unlimited liability that would deter risky behavior.[52] "Statutory caps operate to distort the price tortfeasors must pay to engage in negligent conduct [and] such caps will result in inefficient judicial outcomes."[53]

The following section will take a closer look at the statutory caps of three states that provide for varying degrees of recovery and the states' treatment of the statutes.

C. Indiana—The Greatest Amount

The Indiana General Assembly has enacted the Indiana Tort Claims Act, which permits tort claims to be brought against governmental entities or public employees.[54] Part of the Tort Claims Act limits the aggregate liability and also provides a list of liability exceptions. Indiana Code section 34-13-3-4 provides for the maximum "combined aggregate liability" as follows:

> (a) The combined aggregate of all governmental entities and of all public employees, acting within the scope of their employment . . . (1) for injury

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49. *See* Boyd v. Bulala, 672 F. Supp. 915, 922 (W.D. Va. 1987).

50. *See*, *e.g.,* ARIZ. CONST. art. II, § 31; KY. CONST. pt. 1, § 54.

51. Andrew F. Popper, *Capping Incentives, Capping Innovation, Courting Disaster: The Gulf Oil Spill and Arbitrary Limits on Civil Liability*, 60 DEPAUL L. REV. 975, 978 (2011) (discussing caps in general, including those on private parties).

52. *Id.* at 995-96.

53. *Id.* at 1004 (alternation in original) (quoting Kevin S. Marshall & Patrick Fitzgerald, *Punitive Damages and the Supreme Court's Reasonable Relationship Test: Ignoring the Economics of Deterrence*, 19 ST. JOHN'S J. LEGAL COMMENT. 237, 258 (2005)).

54. IND. CODE § 34-13-3-3 (2013).

> to or death of one (1) person in any one (1) occurrence: . . . (C) Seven hundred thousand dollars ($700,000) for a cause of action that accrues on or after January 1, 2008; and (2) for injury to or death of all persons in that occurrence, five million dollars ($5,000,000).[55]

In addition to providing the maximum combined aggregate liability, the Indiana Tort Claims Act provides a list of governmental immunities. The list of governmental immunities denotes instances in which the government or governmental employees cannot be recovered against, even in the face of negligence or some other wrongdoing.[56] Indiana Code section 34-13-3-3 provides for twenty-four government immunities, ranging from situations where the loss results from "[t]he natural condition of unimproved property," to "[t]he act or omission of anyone other than the governmental entity or the governmental entity's employee" (third-party cause).[57]

Existing case law in Indiana supports the Indiana Tort Claims Act and the limiting of funds recovered against the government in general. As stated in the case law, an object of the Indiana Tort Claims Act is to protect the fiscal integrity of governmental entities by limiting their liability for tort claims resulting from the actions of their public employees.[58] The Indiana Tort Claims Act was the legislature's response to *Campbell v. State*,[59] a case that abolished sovereign immunity in Indiana for most purposes.[60] Additionally, in an Indiana Appellate Court case, *Gibson v. Gary Housing Authority*,[61] the statutory damage cap was upheld to conform with the Indiana Tort Claims Act when the plaintiff's damages awarded by the district court were reduced to $300 thousand from $2 million.

While Indiana generally adheres to the statutory tort caps in place, there have been instances in which the legislature waived the tort cap in order to provide a claimant with greater compensation than statutorily allowed.[62] In 1997, Indiana provided compensation greater than the statutory amount when Emily Hunter was left paralyzed after a train crash at the Indiana Fun Park.[63] Then Governor Frank O'Bannon made an agreement with four-year-old Emily Hunt's parents to cover her medical care and long-term care, which amounted to a payout in excess of

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55. *Id.* § 34-13-3-4(a).

56. *Id.* § 34-13-3-3.

57. *Id*. § 34-13-3-3(1), (10).

58. *See* Baker v. Schafer, 922 F. Supp. 171, 172 (S.D. Ind. 1996).

59. 284 N.E.2d 733, 736-37 (Ind. 1972), *superseded by statute*, IND. CODE § 34-13-3, as *recognized in* Gary Cmty. Sch. Corp. v. Roach-Walker, 917 N.E.2d 1224 (Ind. 2009).

60. *See* Cantrell v. Morris, 849 N.E.2d 488, 495 (Ind. 2006); Brownsburg Cmty. Sch. Corp. v. Natare Corp., 824 N.E.2d 336, 345 (Ind. 2005); King v. Ne. Sec., Inc., 790 N.E.2d 474, 478 (Ind. 2003).

61. 754 F.2d 205, 207-08 (7th Cir. 1985).

62. Evans & Gillers, *supra* note 4 (discussing Minnesota's waiver of a $1 million liability cap for an occurrence).

63. *Id.*

$1.5 million.[64] More recently, in the face of the State Fair tragedy, Indiana's tort cap has once again been called into question.[65]

In the case of the Indiana State Fair incident, the State hired Kenneth Feinberg (famous for his role as Special Master in the 9/11 Compensation Fund) to divide the funds of the $5 million statutory limit.[66] Although Indiana is adhering to the statutory damage limits,[67] there is also a State Fair Commission fund that is comprised of private gifts and donations that are also being dispersed to victims.[68] Feinberg was instrumental in setting guidelines for this fund as well, which provides lump payments to victims depending on criteria.[69]

D. Minnesota—Catastrophe Exception

Like Indiana, Minnesota imposes a statutory limit on the amount of damages that can be recovered against the government.[70] However, the Minnesota statute does not provide for as great of a recovery as the Indiana statute:

> (a) Liability of any municipality on any claim . . . shall not exceed: . . . (3) $500,000 when the claim is one for death by wrongful act or omission and $500,000 to any claimant in any other case, for claims arising on or after July 1, 2009 . . . (7) $1,500,000 for any number of claims arising out of a single occurrence, for claims arising on or after July 1, 2009.[71]

Treatment of these statutory limits under Minnesota case law is positive, and the limits have been found constitutional; they "have a legitimate purpose of maintaining a municipality's fiscal integrity."[72]

In the face of catastrophe, however, the Minnesota legislature did not limit damages to the statutory amount. On August 1, 2007, a Minneapolis Interstate Highway 35W bridge collapsed into the Mississippi River, killing thirteen people and injuring more than one hundred others.[73] The Minnesota legislature refers to this incident as a "catastrophe of historic proportions" as the bridge was the third

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64. *Id.*

65. *Id.*

66. John Tuohy, *28 Share $964K from Fair Relief Fund*, INDIANAPOLIS STAR, Nov. 22, 2011, at B1.

67. Since the time this Note was written, Indiana passed one-time legislation providing an additional $6 million in compensation for the victims. *See* Michael Boren, *Expert: Compensation Was Fair*, INDIANAPOLIS STAR, Sept. 12, 2012, at B1.

68. *Id.*

69. *Id.*

70. *See* MINN. STAT. § 466.04 subdiv. 1(a) (2013).

71. *Id.* § 466.04 subdiv. 1 (a)(3), (7).

72. *See In re* Marie Ave. Natural Gas Explosion, No. C5-98-2040, 1999 WL 417345, at *4 (Minn. Ct. App. June 22, 1999).

73. Evans & Gillers, *supra* note 4.

busiest in the state and carried more than 140,000 cars every day.[74] At the time of the incident, Minnesota law would have capped the government's liability at $1 million for the entire incident.[75]

Due to the catastrophic proportions of the event, the Minnesota legislature enacted a statutory compensation fund for victims.[76] The language of the fund expressly denied that its creation was an admission of liability, but stated that it "further[ed] the public interest by providing a remedy for survivors while avoiding the uncertainty and expense of potentially complex and protracted litigation to resolve the issue of the liability of the state, a municipality, or their employees for damages incurred by survivors."[77] The compensation fund waived the $1 million per incident recovery limitation, but it maintained the per person limitation of $400,000.[78]

Although both Indiana and Minnesota provide for possible recovery of a substantial amount of funds in their statutory damage caps, some states do not provide for the possibility of such large sums.

E. Delaware—Insurance Policy Exception

When compared to other states that have statutory compensatory damage limits, Delaware's compensatory damage cap statute provides for a comparatively small amount in recovery.[79] Under Delaware law, if the governmental entity did not purchase liability insurance, then the total aggregate amount recoverable for all claims arising out of a single occurrence is $300,000.[80] In comparison to the Indiana statute that provides for up to $5 million in recovery from a single occurrence, the amount allowed under the Delaware statute is nominal. In fact, under the Indiana statute, a single individual can recover up to $700 thousand, which is greater than the allowance for aggregate claims from an entire occurrence in Delaware.

The Delaware statute does, however, provide an exception that allows for greater recovery; if the governmental entity at fault had purchased an insurance policy, the victims would be able to recover to the extent of the insurance policy

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74. MINN. STAT. § 3.7391 subdiv. 1 (2013).

75. Evans & Gillers, *supra* note 4.

76. Mike Steenson & Joseph Michael Sayler, *The Legacy of the 9/11 Fund and the Minnesota I-35W Bridge-Collapse Fund: Creating a Template for Compensating Victims of Future Mass-Tort Catastrophes*, 35 WM. MITCHELL L. REV. 524, 526-27 (2009).

77. MINN. STAT. § 3.7391 subdiv. 2 (2013).

78. Steenson & Sayler, *supra* note 76, at 560.

79. *See* DEL. CODE ANN. tit. 10, § 4013 (a) (2013).

80. *See id.* (providing that "[i]n any action for damages permitted by this subchapter, the claim for and award of damages, including costs, against both a political subdivision and its employees, shall not exceed $300,000 for any and all claims arising out of a single occurrence, except insofar as the political subdivision elects to purchase liability insurance in excess of $300,000 in which event the limit of recovery shall not exceed the amount of the insurance coverage").

limits.[81] Neither Indiana nor Minnesota currently possess this statutory exception. The Delaware policy behind this provision was provided in Senate Bill 507, which explained the purpose for the insurance coverage amount exception:

> This act reflects the General Assembly's intention that an insurer should not benefit from the political subdivisions immunity where the latter has expended taxpayers' funds to purchase liability insurance coverage greater than $300,000. The maximum recovery in that latter situation would be to the extent of the insurance coverage available to the municipality and not the lower figure of $300,000. This exception would not affect the liability exposure of municipalities that have coverage of $300,000 or less.[82]

States have enacted varying types of statutory damage caps both in amount and in other conditions or exceptions. In light of these statutory damage caps, there are several ways that state legislatures could waive the caps if they determine a waiver is necessary in the face of a catastrophe.

III. Possible Approaches to Waiving Statutory Damage Caps

There are several ways that states can waive statutory damage caps in the face of a catastrophe. Although all of these options possess both positive and negative considerations, this Note proposes an approach that requires state legislature to maintain statutory damage cap amounts, but also provides for an insurance policy exception that would allow for greater recovery. The two most prominent approaches to waiving the statutory damage cap are as follows: (1) passing one-time legislation to create a no-fault compensation fund; and (2) creating new legislation outlining exceptions.

A. Option One: One-Time Legislation Creating a No-fault Compensation Fund

The creation of no-fault compensation funds has been the topic of much discussion since the creation of the 9/11 Compensation Fund, which was established to compensate victims of the 9/11 terrorist attacks.[83] This no-fault compensation structure involves the government providing a statutory structure to disperse funds to victims.[84] In return, the victims waive their right to recovery through tort litigation.[85] This type of compensation, which generally acts as a waiver to any statutory damage caps in place, possesses both positive and negative characteristics. This Note will look at three compensations funds: the

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81. *Id*.

82. White v. Town of Elsmere, No. Civ. A. 82C-JN-36, 1985 WL 635621, at *2 (Del. Super. Ct. Mar. 28, 1985).

83. *See generally* Steenson & Sayler, *supra* note 76, at 526, 530-59 (discussing the 9/11 Compensation Fund).

84. *Id*. at 551-52.

85. *Id*. at 530.

9/11 Compensation Fund, the I35W Bridge Collapse Compensation Fund, and the Indiana State Fair stage collapse compensation fund.

The most well-known compensation fund was created after the catastrophic events of the 9/11 terrorist attacks. Congress approved the 9/11 Compensation Fund less than eleven days after the attacks occurred.[86] The fund provided unlimited government funds to be dispersed to victims[87] at the discretion of the Special Master, Kenneth Feinberg.[88] In addition to the funds provided by the federal government, private donors contributed $3 billion to the fund.[89]

The 9/11 Compensation Fund, created to compensate the victims and their families of the 9/11 attacks, operated under the following goals: Provide "a national sense of unity and compassion, ultimately leading to the compensation of the victims of an unprecedented tragedy in our nation's history. [R]escue the . . . airline industry from financial ruin. [P]rovide[] an expedient means of compensating victims and reducing their inevitable legal fees."[90]

The Fund had to appeal to the victims and the nation as a whole by balancing adequate, timely compensation for the losses but also avoid creating "a financial free-for-all that would be unpopular with the taxpaying public."[91] Simply put, "it had to balance passion with prudence."[92] Feinberg "understood, despite the emotional and magnanimous underpinnings of the Fund, that he needed to appropriately exercise discretion in limiting the awards because, after all, taxpayers were footing the bill."[93]

The second example of a legislative compensation fund was created on the state level after the catastrophic Minnesota bridge collapse. The resulting fund was named the Minnesota Bridge Collapse Compensation Fund ("Bridge Fund") and was created to compensate victims of the I-35W bridge collapse that occurred on August 1, 2007.[94] The Bridge Fund was roughly modeled on the 9/11 Fund.[95] Financed by the state, the Bridge Fund subjected the recoverable damages to the (then) $400,000 per person cap.[96] It also could not be used to compensate those who suffered only emotional trauma as a result of the collapse, nor anyone not actually on the bridge, even if an economic loss was suffered.[97] The state government provided a total of $36.64 million as the overall limit to the fund, which included $24 million for settlement agreements and $12.64 million in

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86. *Id.* at 526.
87. *Id.* at 539.
88. *Id.* at 534-35.
89. Janet Cooper Alexander, *Procedural Design and Terror Victim Compensation*, 53 DEPAUL L. REV. 627, 678 (2003).
90. Steenson & Sayler, *supra* note 76, at 526 (footnotes omitted).
91. *Id.* at 533.
92. *Id.*
93. *Id.* at 535.
94. *Id.* at 527.
95. *Id.*
96. *Id.* at 564.
97. *Id*. at 568.

supplemental payments.[98]

The third example of a compensation fund occurred most recently with the Indiana State Fair stage collapse. After the incident, the State of Indiana asked Kenneth Feinberg, who was the Special Master in the 9/11 Compensation Fund, to help determine how to distribute the available $5 million to victims of the accident.[99] While this fund did not waive the statutory tort cap, the fund resembled the 9/11 Compensation Fund and the Bridge Fund in that it is a no-fault distribution and is being determined independent of litigation. There was also a compensation fund comprised of private charitable donations and gifts, of which Feinberg helped structure the disbursement of the funds.[100] The disbursements are made on a lump sum basis, based on degree of injury.[101]

Compensation funds such as the 9/11 Compensation Fund, the Minnesota Bridge Collapse Compensation Fund, and the Indiana State Fair compensation fund possess both pros and cons in their effectiveness of meeting the needs of the victims of these catastrophes and also adhering to the policy of protecting the governmental entity.

1. Advantages of Compensation Funds.—Compensation funds are effective waivers of statutory damage caps for several reasons. First, the distribution of compensation funds is efficient. It is likely that funds are dispersed more quickly than through litigation, and the legal fees associated with litigation can be avoided. Second, compensation funds provide for potentially greater compensation to victims than would be available under the existing statutory tort caps, if the pool of money in the fund exceeds the tort cap limit. Third, and possibly one of the greatest advantages of this type of waiver, is that victims are guaranteed a pay-out whereas in litigation they are not.[102] "[W]ithout the establishment of a government-backed compensation fund, every victim of these massive tragedies likely would have obtained little, if any, compensation [due to existing government immunities]."[103] Lastly, compensation funds save resources and the costs of massive litigation, including avoiding clogging the court system.

2. Disadvantages and Inequities of Compensation Funds.—Alternatively, although there are several advantages to compensation funds, there are also negative aspects. The creation of poor precedent is one of the greatest concerns surrounding the use of compensation funds. Once an exception is made to the existing statute, there runs a problem of defining when the next exception should occur. This subjective identification of "catastrophic events worthy of compensation" could create a slippery slope. Second, these compensation funds are generally funded by the governmental entity, which in turn means taxpayers' dollars. Not only is there policy against unlimited use of taxpayer dollars, but there is also a policy consideration in favor of maintaining the fiscal integrity of

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98. *Id.* at 591, 574; *see also* Jones, *supra* note 11.

99. Tuohy, *supra* note 66.

100. *Id.*

101. *Id.*

102. Steenson & Sayler, *supra* note 76, at 592.

103. *Id.*

the state. Third, these compensation funds can be highly inequitable; the compensation funds are not applied to every catastrophic event, leaving the victims of catastrophic events for which the government chooses not to create a compensation fund go uncompensated or are compensated less than others. Some historical instances of catastrophic events where victims were not compensated through a compensation fund or similar fund include the following: "the Oklahoma City bombings, the first W[orld] T[rade] C[enter] bombings, the U.S.S. Cole attack, and the bombings of the American embassies in Kenya and Tanzania."[104] This inequity between who the government compensates through special compensation funds and those that are compensated through existing statutory prescriptions, which may be nothing at all, could be avoided by either not creating compensation funds in any situation or, in the alternative, developing a statutory measure that dictates when victims are to be compensated through a compensation fund. A statutory standard would decrease the subjective nature of the current process.

Compensation funds also possess the opportunity for inequity when determining *who* is "worthy" of compensation. People are injured all of the time, for one reason or another, without being compensated for their injuries. Everyday life involves risk, and it does not seem that sensational circumstances surrounding an injury should warrant greater recovery than those injuries that occur in less sensational circumstances. "Highly tragic events tend to spur the emotions and hearts of society because thousands of innocent victims have died or been injured. Yet there are thousands of other victims that suffer similar fates but not in the same highly sensationalized manner."[105] Governmental immunities or other private party immunities also play a role in this disparity by completely barring some victims from recovery.

Even once it is determined that victims of a particular incident are going to be compensated under a compensation fund, there can be difficulties in defining who of the injured parties within the event should qualify or be compensated by the fund.[106] In the aftermath of the 9/11 attacks, the organizers of the compensation fund had to ascertain who should receive compensation. With a wide range of victims—from the business men and women who were at work in the towers when they collapsed, to firefighters who died rescuing people on scene, to those public officials who helped with the clean-up in the days after and developed illness from the debris and smoke—determining which, if not all, of the victims should receive compensation can pose a challenge. Is the firefighter who died a week after the attacks due to smoke inhalation any less worthy of compensation than the businessman who died immediately upon impact? Questions such as these can be very difficult to answer, and compensation funds run the risk of inequitable answers when such difficult choices have to be made.

Lastly, once it is determined which victims will be compensated, it must be determined what type of compensation those victims will receive and how each

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104. *Id.* at 541.

105. *Id.*

106. *Id.*

individual's compensation will be calculated. There are several options for forming this part of the compensation plan. The fund could compensate each victim equally regardless of the victim's unique circumstances and injuries, or the fund could calculate each victim's reward separately factoring in type of injury, personal circumstances such as income, and other means of recovery such as life insurance policies, etc.

When disbursing the 9/11 Fund, the Special Master was directed to take the individual circumstances of the victims into consideration, and this sometimes resulted in disparities in reward sizes between high income earners and lower income earners.[107] This disparity arose when calculating loss of income, as some of the 9/11 victims were very high earners, such as the businessmen, and some were very low wage earners.

However, for an opposite effect, if the collateral source doctrine is applied, those victims that had higher income are likely to receive less under the fund than low income earners. The collateral source doctrine holds that the amount of damages awarded is reduced by the amount already received from a collateral source—e.g., a life insurance policy, company benefits, or some other source of compensation.[108] This would most likely have a more adverse effect on the wealthier victims, as it is likely they had larger life insurance policies than those of lesser means. If the compensation plan provided a flat rate of compensation to all victims, and the collateral source doctrine applied, then those victims with large life insurance policies would likely receive little or no compensation from the government. Therefore, depending on what considerations the compensation plan makes, there is great chance for inequity between victims and their compensation under the plan.

In conclusion, no-fault compensation plans of this sort provide many positive aspects towards compensation, but the use of their sometimes unlimited funds provide for great inequities between recipients and those victims of less tragic events.

B. Option Two: Create New Legislation Outlining Exceptions

In the previous option of creating a compensation plan, the issue of victim compensation in the face of catastrophe was not addressed until post-disaster. An alternative approach is to anticipate the possibility of a catastrophic event and plan accordingly by creating statutory exceptions that provide for these types of low probability, high damage occurrences. Some states have already implemented this approach by creating statutory exceptions to caps on non-economic or punitive damages for severely injured claimants and other similar exceptions.

For example, Minnesota has an exception to the statutory cap of $500,000 and incident cap of $1.5 million that provides for "twice the limits . . . when the

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107. *Id.* at 551-52.
108. *Id.* at 529, 557.

claim arises out of the release or threatened release of a hazardous substance."[109] Minnesota also boasts a catastrophic event exception that was utilized during the Minnesota bridge collapse catastrophe.[110] Minnesota defined the bridge collapse as a catastrophic event for the reasons that it was a highly traveled bridge, the collapse resulted in numerous deaths and injuries, and the state had never, in its history, experienced a similar structure collapse.[111] However, the bridge collapse was identified as a catastrophic event after it occurred and the magnitude was realized. A fine-line exists when determining whether to label something as a catastrophe post-event because horrific incidents occur and the victims remain uncompensated all of the time. However, no statute could possibly define a catastrophic event sufficient enough to include the magnitude of events that might warrant a waiver of statutory liability limits.

Deciding whether to define an event in which citizens are injured as a catastrophic event requires an evaluation of the circumstances. The absence of specified statutory guidance as to what constitutes a catastrophe necessitates a subjective evaluation. Some of the most horrific events are so rare and so sensational that no one could foresee, or even imagine, their occurrence, making a statutory definition particularly troublesome. One might imagine then that the best approach to this type of solution would be to define what constitutes a catastrophic situation through the use of an objective standard. This standard could operate on the number of people injured, total damages, or some other objective figure. Although this may help identify when a waiver of the statutory tort cap is to be issued, there are still several other factors that would need to be considered, such as how far to exceed the statutory tort cap as well as if there are exceptions to the statutory standard.

A second possible statutory exception is that of an insurance policy limit. Although the government is self-insured, it is possible for governmental entities to purchase private insurance policies.[112] The insurance policy exception would apply in situations where the government has purchased an insurance policy that provides for coverage upon a claim for the event. Statutory insurance policy exceptions provide for recovery in excess of the tort cap, up to the amount of insurance policy limits. Idaho includes this statutory exception,[113] as does Delaware,[114] which was previously discussed. Under these existing statutes, the purchase of additional liability insurance is not mandatory, it simply provides for greater recovery if insurance was in fact purchased.

The insurance policy limit exception is a positive alternative, as it allows

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109. MINN. STAT. § 466.04 subdiv. 1 (a)(8) (2013).

110. *Id.* § 3.7391 subdiv. 1.

111. *Id.*

112. This is based on the assumption that Idaho and Delaware would not have statutory insurance policy limit exceptions if it were not possible for governmental entities to purchase private insurance policies. *See* Packard v. Joint Sch. Dist. No. 171, 661 P.2d 770, 775 (Idaho Ct. App. 1983) (discussing a school district's purchase of a liability insurance policy).

113. IDAHO CODE ANN. § 6-926(1) (2013).

114. DEL. CODE ANN. tit. 10, § 4013(a) (2013).

victims greater compensation in the face of statutory tort caps. Further, any public funds used to purchase these private insurance policies would be limited and definite. When victims recover funds under the insurance policy limit exception, then private dollars would pay for the funds exceeding those used to pay the premium. In other approaches, taxpayer dollars would pay for the funds exceeding the statutory cap. Therefore, purchasing an insurance policy would provide for greater recovery to victims, while at the same time limiting the use of taxpayer dollars. "Widespread insurance or insurance-like funds would enhance compensation in predictable disasters and minimize transaction costs."[115]

In addition to providing more funds, the purchase of insurance would promote the tort goal of deterrence. Increasing the costs up-front by requiring entities to purchase insurance can reduce unwanted risky behavior.[116] "Adopting the insurance model would eliminate the procedural and philosophical difficulties associated with the tort compensation model. The program would be more easily administered and would better reflect the equality principle."[117]

However, the statutory insurance exception does have its challenges. In the face of compulsory insurance, defining what events require the purchase of insurance can be challenging, as many of the great catastrophic events arguably are events that no one could have foreseen. "[E]vents of these sorts are so rare and the scope of the damage they cause so broad that ordinary insurance schemes and legal routines for resolving disputes do not fit the problems they pose."[118] It was impossible to have purchased insurance for specific events such as the Minnesota bridge collapse or the terrorist attacks because the government could not have foreseen the occurrence of those events. In those instances, there was no actual event scheduled that would have required or prompted the purchase of insurance, contrary to the Indiana State Fair, which was a scheduled event that could have prompted purchasing additional insurance.

Even when there is an actual event planned, such as the state fair, the burden of purchasing insurance seems large. In light of the numerous types of events that states sponsor—e.g., concerts, fairs, sporting events, conventions, government meetings, and others—a requirement that the government purchase insurance for each and every event seems burdensome and expensive. Therefore, considering the magnitude of events hosted by governmental entities, a compulsory insurance scheme on an individual event basis does not seem like a viable option.

However, governmental entities could purchase private insurance policies that are not event-specific policies, instead covering high-damage situations in general. This would eliminate the challenge of foreseeing all possible catastrophic situations by providing for both planned events and unforeseen circumstances. While it would not be necessary to pre-define each catastrophic

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115. Richard Lempert, *Low Probability/High Consequence Events: Dilemmas of Damage Compensation*, 58 DEPAUL L. REV. 357, 387 (2009).

116. *Id.*

117. Alexander, *supra* note 89, at 660.

118. Lempert, *supra* note 115, at 385.

event, there would still have to be some standard or procedure to define, after an event occurs, if the policy covers the disaster. While the recurring challenge of defining what catastrophes the policy would cover is applicable to this situation, statute could mandate using an objective standard—such as the number of people injured or the total amount of actual damages. For example, the policy could cover events where the total number of injured people exceeds ten people, hypothetically, and the total number of damages claimed exceeds $X. If an event met the statutory requirements, the victims would be allowed to recover beyond the statutory tort cap, up to the amount recited in the policy—not only providing for recovery in greater amount, but providing for recovery in private funds (subtracting insurance premiums paid by taxpayer dollars).

The statutory insurance policy exemption is a viable option since it avoids some of the definitional problems of other solutions and, at the same time, provides for greater compensation with a limited use of taxpayer funds. Overall, statutory exceptions would provide for a way to proactively face victim compensation. There are flaws with the option, including the challenges related to defining what events or catastrophes require statutory action or protection, but the insurance policy exception seems to overcome these challenges.

IV. Proposal For Legislative Action

In preparation for future catastrophes, this Note suggests that state legislatures should create a legislative insurance policy exception, and governmental units should purchase a private insurance policy. Additionally, when states encounter future catastrophes, this Note suggests state legislatures provide a no-fault compensation fund in the amount of the statutory tort cap limit, and also administer a fund to which private parties can make contributions.

A. Statutory Insurance Policy Exception

In preparation for compensation in future catastrophes, state legislatures should include an insurance policy exception to the existing tort cap legislature, allowing for recovery up to the amount of the insurance policy limit, even in excess of the tort cap limit. This type of exception would be similar to Delaware's existing statute that provides for total recovery out of a single event or instance up to $300,000 *or* insurance policy limits, whichever is greater.[119] Including an exception similar to this will allow for greater recovery when insurance has been purchased while also maintaining the state statutory tort cap if insurance has not been purchased. This Note suggests the addition of this exception because it is a way to objectively provide for greater recovery to victims in the face of catastrophe. It is objective because it does not require defining the word "catastrophe" or otherwise require the legislature to subjectively choose to provide greater relief in certain situations by waiving the statutory tort cap. Rather, if insurance has been purchased, victims can recover up to the policy limits. If it has not been purchased, the amount victims recover

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119. DEL. CODE ANN. tit. 10, § 4013(a) (2013).

will be at the state statutory cap limit.

This exception should, however, maintain the per person recovery at the statutory tort cap amount. Maintaining the per person recovery at the statutory tort cap amount is similar to the compensation scheme used in the Minnesota bridge collapse. In the Bridge Fund compensation scheme, the total incident tort cap was waived providing $36 million dollars to victims,[120] while still capping the per person recovery at the then $400 thousand per person statutory limit. Dissimilarly, the Minnesota Bridge Collapse funds dispersed in excess of the state tort cap were from state funds, whereas this proposal provides for excess funds to eminate from insurance proceeds under a government-purchased private insurance policy.

Including a legislative insurance policy limit exception allows for greater recovery without relying on taxpayer funds. It also provides an objective standard to determine when the compensation funds should exceed the statutory tort cap amount. In preparation for future catastrophic events, state legislatures should add this exception.

B. Purchase of Private Insurance Policies

Accordingly, to better prepare for future catastrophes, state governments should purchase private insurance policies to provide coverage when the damages claimed exceed the tort cap amount. Obtaining a private insurance policy that provides coverage in catastrophic situations would result in private monies funding the excess recovery rather than taxpayer dollars. Taxpayer funds would in all likelihood be used to pay the insurance premiums required in obtaining such a policy, but it would keep the use of taxpayer funds at a limited, ascertainable amount. Such a policy could read: when the total number of claiming victims multiplied by the per person cap exceeds the total incident tort cap, the insurance policy will cover the difference or up to a certain amount.

The purchase of a private insurance policy need not be mandatory, but is rather a suggested avenue to allow for greater recovery in these low-probability, high-consequence scenarios. The ability to predict an event so catastrophic in nature as to warrant recovery in excess of the statutory cap would be impossible; a general private insurance policy would eliminate the need to predict the occurrence of such an event and instead provide coverage after the event occurs. By maintaining the per person tort cap, the policy reasons behind statutory tort caps and limiting the use of taxpayer funds are upheld but can also provide victims with greater recovery.

C. No Fault Compensation Funds

The previous two proposals involve preparing for future catastrophic events, but the legislature can also take action after the occurrence of the catastrophic event. In the face of future catastrophes, states should provide compensation to victims up to the maximum statutory damage cap amount regardless of the

120. *See supra* notes 11-13 and accompanying text.

government's liability in the matter. By not requiring the victims to prove liability, the state is offering compensation to victims in a timelier manner than going through the typical litigation process to prove liability. This type of action by the state legislature is also very generous and altruistic, as these funds otherwise would not have to be dispersed until liability is proven.

This is similar to the no-fault compensation funds discussed in both the 9/11 Fund and the Minnesota Bridge Collapse Fund, but the legislature would cap this fund at the statutory amount, maintaining the purpose of the tort liability caps. This is what Indiana has done in the face of the State Fair stage collapse.[121] The state dispersed the $5 million available under the state tort cap without requiring any proof of liability.[122] Allowing victims to avoid the litigation process and recover automatically is a sympathetic way for the state to respond in the face of tragedy. Not only does this scheme promote public policy in favor of protecting taxpayer funds, but it also prevents setting bad precedent and avoids defining the gray line of what catastrophe is deserving of an exception to the existing law. It provides relief from the government and a sense of altruism when the government does not require proof of its liability before dispersing funds, and a sense of liability or accountability from the government if it seems at fault for the accident.

However, providing this avenue for recovery does require the state to define when an event is catastrophic enough to be worthy of such a no-fault scheme. In the ordinary course of days, recovery against the state should require fault. This no-fault scheme is only for instances where the state determines that victims are worthy or need compensation without withstanding the litigation process.

Each individual victim's injuries should proportionally determine compensation under this fund. A Special Master, such as Kenneth Feinberg, administering the fund can determine the exact calculations and appropriations. The Special Master would also be responsible for defining who qualifies to recover under the compensation plan. Depending on the specific circumstances of the catastrophic event, the group of victims eligible for recovery could be more or less difficult to define. While the subjective approach to determining the amount of funds and to whom the funds should be administered is not ideal, it would be very difficult to create a plan that would adequately accommodate all of the possible future catastrophes.

D. Encourage Private Fund

Lastly, this Note encourages the state legislature administering the compensation funds to establish and assist in the administration of a fund to which private individuals can contribute. Dispersed in addition to and separately from the government fund, it would be similar to the lump sum fund created by the Indiana State Fair Commission in light of the Indiana State Fair incident.

If the public feels compelled to give, they can give to this fund, providing for

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121. *See generally* Evans & Gillers, *supra* note 4 (discussing the Indiana $5 million payout).

122. *Id.*

an emotional reaction and allowing "patriotism" to work on its own. Regarding 9/11, "[a]s the massive outpouring of private charity demonstrated, the public wanted to take care of the victims, not only out of shock and pity but also as a show of collective unity and defiance."[123]

Keeping the disbursement of government funds at the statutory cap level is the forefront advantage of this type compensation scheme. The policy behind maintaining the statutory tort caps is well established as explored earlier in this Note. Not only does maintaining the statutory amount promote the integrity of government, it is also consistent with the fact that the government is already waiving its common law immunity.

When weighing the pros and cons of this solution, the pros largely outweigh the cons. By adopting approaches that have been used in the past, it is possible to adhere to public policy concerns while providing greater compensation to victims than the tort caps allow.

CONCLUSION

In the face of some of the most horrific and gut-wrenching experiences that one could ever imagine, placing a limit on the amount of possible recovery may seem inhumane. However, one must step back and examine the policy and historical pretenses that led to the enactment of these limits. Although there are strong arguments for a multitude of approaches, in the spirit of equity and the law, it is best to leave emotional reactions to the hands of the able public and keep the state at its statutory "promise." The State of Indiana responded well to the horrific stage collapse that injured and took the lives of so many. By not requiring the victims to prove fault, the victims were able to recover in a timelier manner and were guaranteed some form of payment. To better prepare for future catastrophes, the state should add an insurance policy limit exception to the existing statute and purchase an insurance policy to provide for greater recovery without relying on taxpayer funds. This approach would allow for adequate compensation for victims and the patriotic society we aspire to be.

123. Alexander, *supra* note 89, at 637-38.