UNIVERSITY OF COLORADO LAW REVIEW

Volume 84/Issue 2/Spring 2013

UNIVERSITY OF COLORADO LAW REVIEW (U.S.P.S. 651-080, ISSN 0041-9516)
Published quarterly by the University of Colorado Law Review,
320-D Wolf Law Building, 401 UCB, Boulder, CO 80309-0401.

Periodicals postage paid at Boulder, Colorado,
and at additional mailing offices.

POSTMASTER: Please send address changes to University of Colorado
Law Review, 320-D Wolf Law Building, 401 UCB,
Boulder, CO 80309-0401.

An association of students, sponsored by the
University of Colorado Law School.

Published as the ROCKY MOUNTAIN LAW REVIEW from 1928 to 1962.

Subscriptions

Current subscription prices: domestic and Canada, $37.00 per volume; foreign, $40.00 per volume; single issues, $15.00; symposium issues, $20.00. Colorado subscribers must pay sales tax in addition to the purchase price. Contact the Office Manager for the correct payment information before remitting a check.

Subscriptions are entered for an entire volume only and are payable in advance. A check should accompany an order. All subscriptions must be renewed on a yearly basis. Unless a claim for non-receipt of an issue is made within six months after the mailing date, that issue will not be supplied free of charge. Back issues are available.

All subscription correspondence should be addressed to the University of Colorado Law Review, 320-D Wolf Law Building, 401 UCB, Boulder, CO 80309-0401. We may be reached by telephone, 303-492-6145; fax, 303-735-0169; or email, cololrev@colorado.edu. The *Law Review* web page is located at http://www.colorado.edu/law/lawreview/.

Manuscripts

The *Law Review* welcomes the submission of unsolicited manuscripts. The *Law Review* uses ExpressO, an electronic submission service run by the Berkeley Electronic Press, which can be reached at http://www.bepress.com. If you are not affiliated with a university, you may submit your article through bepress.com directly. The *Law Review* does not accept direct submissions by mail or e-mail. Manuscripts should be double-spaced and no longer than 75 pages. Citations should conform to *The Bluebook: A Uniform System of Citation* (19th ed. 2010).

Cite as: 84 U. COLO. L. REV. __ (2013).

UNIVERSITY OF
COLORADO LAW REVIEW

Volume 84, Issue 2 *2013*

THE UNIVERSITY OF COLORADO LAW SCHOOL

FACULTY, 2012–2013

Deans

PHILIP J. WEISER, *Dean, Charles Inglis Thompson Professor of Law, and Faculty Director and Founder of the Silicon Flatirons Center for Law.* B.A., Swarthmore College; J.D., New York University.

KRISTEN A. CARPENTER, *Associate Dean for Faculty Development and Associate Professor of Law.* B.A., Dartmouth College; J.D., Harvard University.

HELEN L. NORTON, *Associate Dean for Academic Affairs and Associate Professor of Law.* B.A., Stanford University; J.D., University of California, Berkeley.

AHMED A. WHITE, *Associate Dean for Research and Professor of Law.* B.A., Southern University and A&M College; J.D., Yale University.

WHITING LEARY, *Senior Assistant Dean for Students.* B.A., Williams College; J.D., University of Colorado.

KRISTINE M. JACKSON, *Assistant Dean for Admissions and Financial Aid.* B.S., University of North Carolina; J.D., George Mason University.

TODD ROGERS, *Assistant Dean for Career Development.* B.S., Trinity University; J.D., University of Texas.

Emeritus Faculty

NORMAN F. AARONSON, *Clinical Professor Emeritus, Legal Aid and Defender Program*. A.B., Brandeis University; J.D., Boston University.

HOMER H. CLARK, JR., *Professor Emeritus*. A.B., LL.D., Amherst College; LL.B., LL.M., Harvard University.

JAMES N. CORBRIDGE, JR., *Professor Emeritus*. A.B., Brown University; LL.B., Yale University.

TED J. FIFLIS, *Professor Emeritus.* B.S., Northwestern University; LL.B., Harvard University.

H. PATRICK FURMAN, *Clinical Professor Emeritus, Legal Aid and Defender Program, and Director of Clinical Programs*. B.A., J.D., University of Colorado.

DAVID S. HILL, *Professor Emeritus.* B.S., J.D., University of Nebraska.

J. DENNIS HYNES, *Professor Emeritus.* B.A., LL.B., University of Colorado.

HOWARD C. KLEMME, *Professor Emeritus.* B.A., LL.B., University of Colorado; LL.M., Yale University.

WILLIAM T. PIZZI, *Professor Emeritus.* A.B., Holy Cross College; J.D. Harvard University; M.A. University of Massachusetts.

PETER N. SIMON, *Professor Emeritus.* B.S., M.D., University of Wisconsin; J.D., University of California, Berkeley.

NORTON L. STEUBEN, *Professor Emeritus.* A.B., J.D., University of Michigan.

ARTHUR H. TRAVERS, JR., *Professor Emeritus.* B.A., Grinnell College; LL.B., Harvard University.

MICHAEL J. WAGGONER, *Professor Emeritus, A.B., Stanford University; LL.B. Harvard University*

Tenured and Tenure-Track Faculty

J. BRAD BERNTHAL, *Associate Professor of Law, Faculty Director of the Silicon Flatirons Entrepreneurship Initiative, and Director of LL.M Program in Entrepreneurial Law.* B.A., University of Kansas; J.D., University of Colorado.

FREDERIC BLOOM, *Associate Professor of Law.* B.A. Washington University in St. Louis; J.D., Stanford University.

WILLIAM BOYD, *Associate Professor of Law and Director of the Governor's Climate and Forests Task Force Project*. B.A., University of North Carolina, Chapel Hill; J.D., Stanford University; Ph.D., University of California, Berkeley.

HAROLD H. BRUFF, *Nicholas Rosenbaum Professor of Law*. B.A., Williams College; J.D., Harvard University.

EMILY M. CALHOUN, *Professor of Law.* B.A., M.A., Texas Tech University; J.D., University of Texas.

PAUL F. CAMPOS, *Professor of Law.* A.B., M.A., J.D., University of Michigan.

DEBORAH J. CANTRELL, *Associate Professor of Law and Director of Clinical Programs.* B.A., Smith College; M.A., University of California, Los Angeles; J.D., University of Southern California.

MING CHEN, *Associate Professor of Law.* B.A., Harvard University; J.D., New York University; Ph.D., University of California, Berkley.

RICHARD B. COLLINS, *Professor of Law.* B.A., Yale College; LL.B., Harvard University.

JUSTIN DESAUTELS-STEIN, *Associate Professor of Law*. B.A., University of North Carolina, Ashville; J.D., University of North Carolina, Chapel Hill; LL.M., Harvard University.

MIRANDA P. FLEISCHER, *Professor of Law.* B.A., Duke University; J.D., University of Chicago; LL.M. New York University.

VICTOR FLEISCHER, *Associate Professor of Law.* B.A., J.D., University of Chicago.

WAYNE M. GAZUR, *Professor of Law.* B.S., University of Wyoming; J.D., University of Colorado; LL.M., University of Denver.

ERIK GERDING, *Associate Professor of Law.* A.B., Duke University; J.D., Harvard University.

AYA GRUBER, *Professor of Law.* B.A., University of California at Berkeley; J.D., Harvard University.

LAKSHMAN D. GURUSWAMY, *Nicholas Doman Professor of International Environmental Law.* LL.B., Sri Lanka; Ph.D., University of Durham, U.K.

MELISSA HART, *Associate Professor of Law and Director of the Byron R. White Center for the Study of American Constitutional Law.* B.A., Harvard-Radcliffe College; J.D., Harvard University.

JENNIFER S. HENDRICKS, *Associate Professor of Law and Co-Director of the Juvenile and Family Law Program.* B.A., Swarthmore College, J.D., Harvard University.

PETER HUANG, *Professor of Law and DeMuth Chair.* A.B., Princeton University; S.M., Harvard University; J.D., Stanford University; Ph.D., Harvard University.

SARAH A. KRAKOFF, *Professor of Law and Wolf Nichol Fellow.* B.A., Yale University; LL.B, University of California, Berkeley.

MARK J. LOEWENSTEIN, *Monfort Professor of Commercial Law*. A.B., J.D., University of Illinois.

ALEXIA BRUNET MARKS, *Associate Professor of Law.* B.A., Colgate University; M.S., Purdue University; Ph.D., Purdue University; J.D., Northwestern University.

DAYNA BOWEN MATTHEW, *Professor of Law.* A.B., Harvard-Radcliffe College; J.D., University of Virginia.

SCOTT A. MOSS, *Associate Professor of Law.* B.A., M.A., Stanford University; J.D., Harvard University.

CHRISTOPHER B. MUELLER, *Henry S. Lindsley Professor of Procedure and Advocacy*. A.B., Haverford College; J.D., University of California, Berkeley.

ROBERT F. NAGEL, *Ira C. Rothgerber Professor of Constitutional Law*. B.A., Swarthmore College; J.D., Yale University.

SUSAN NEVELOW MART, *Associate Professor and Director of the Law Library*. B.A., University of California, Santa Cruz; J.D., Boalt Hall; M.L.I.S., San Jose State University.

PAUL OHM, *Associate Professor of Law, Faculty Director of the Silicon Flatirons Information Technology and Intellectual Property Initiative, and Faculty Director of LL.M Program in Technology and Intellectual Property Law*. B.S./B.A., Yale University; J.D., University of California, Los Angeles.

SCOTT R. PEPPET, *Professor of Law*. B.A., Cornell University; J.D., Harvard University.

CAROLYN B. RAMSEY, *Professor of Law*. B.A., University of California, Irvine; A.M., J.D., Stanford University.

PIERRE J. SCHLAG, *University's Distinguished Professor and Byron White Professor of Constitutional Law*. B.A., Yale University; J.D., University of California, Los Angeles.

AMY J. SCHMITZ, *Professor of Law*. B.A., Drake University; J.D., University of Minnesota.

ANDREW SCHWARTZ, *Associate Professor of Law*. Sc.B., Brown University; J.D., Columbia University.

ANNA SPAIN, *Associate Professor of Law*. B.A., Denison University; J.D., Harvard University.

MARK SQUILLACE, *Professor of Law and Director of the Natural Resources Law Center*. B.S., Michigan State University; J.D., University of Utah.

HARRY SURDEN, *Associate Professor of Law*. B.A., Cornell University; J.D., Stanford University.

MARIANNE WESSON, *Professor of Law and Schaden Chair in Experiential Learning*. A.B., Vassar College; J.D., University of Texas.

CHARLES F. WILKINSON, *University's Distinguished Professor and Moses Lasky Professor of Law*. B.A., Denison University; LL.B., Stanford University.

Clinical Faculty

NORMAN F. AARONSON, *Clinical Professor Emeritus, Legal Aid and Defender Program*. A.B., Brandeis University; J.D., Boston University.

DEBORAH J. CANTRELL, *Associate Professor of Law and Director of Clinical Programs*. B.A., Smith College; M.A., University of California, Los Angeles; J.D., University of Southern California.

VIOLETA CHAPIN, *Associate Clinical Professor of Law*. B.A., Columbia College; J.D., New York University.

ANN ENGLAND, *Clinical Professor, Legal Aid and Defender Program*. B.A., University of Michigan; J.D., University of Denver.

COLENE ROBINSON, *Clinical Professor, Juvenile and Family Law*. B.A., Valparaiso University; J.D., Loyola University School of Law, Chicago.

MICHAEL SOULES, *Clinical Associate Professor*. B.A., University of Michigan; M.S., University of California, Berkley; J.D., Yale University.

Legal Writing and Appellate Advocacy Faculty

AMY BAUER, *Legal Writing Professor*. B.A., Duke University; J.D., William & Mary School of Law.

AL CANNER, *Legal Writing Professor*. B.A., Brandeis University; J.D., University of Colorado.

AMY GRIFFIN, *Legal Writing Professor and Student Legal Writing Engagement Coordinator.* B.A. Boston College; J.D. University of California, Berkeley.

DEREK H. KIERNAN-JOHNSON, *Legal Writing Professor*. A.B., Princeton University; J.D., University of Michigan.

NATALIE MACK, *Legal Writing Professor*. B.S., University of South Carolina; J.D., University of Colorado.

CORIE ROSEN, *Legal Writing Professor*. B.A., University of California, Berkeley; J.D., University of California, Los Angeles, School of Law.

GABRIELLE M. STAFFORD, *Legal Writing Professor*. B.A., University of Pennsylvania; J.D., Boston University.

TODD M. STAFFORD, *Legal Writing Professor*. B.A., Southern Methodist University; J.D., Duke University.

Law Library Faculty

ERIK BECK, *Digital Librarian. Digital Services Librarian.* B.A., University of Wisconsin; M.S.I.S., University of Texas.

GEORGIA K. BRISCOE, *Associate Director and Head of Technical Services*. B.S., Washington State University; M.A., University of San Diego; M.L.S., University of Michigan.

YUMIN JIANG, *Technical Services Librarian.* M.S., University of Illinois, Urbana-Champaign; M.A., University of Wisconsin.

ROBERT LINZ, *Head of Public Services and Associate Director of Law Library.* B.A., Wake Forest University; J.D., University of Florida; M.L.I.S., Florida State University.

ALAN PANNELL, *Reference Librarian*. B.A., University of Oklahoma; J.D., Western New England College; M.A. University of Arizona.

KAREN SELDEN, *Catalog Librarian.* B.S., Pennsylvania State University; M.L.S., Simmons College.

JANE E. THOMPSON, *Head of Faculty Services.* B.A., University of Missouri; M.A., J.D., University of Denver.

ABOUT THE CONTRIBUTORS

ANDREW GUTHRIE FERGUSON, *Jury Instructions as Constitutional Education,* is an assistant professor of law at the David A. Clarke School of Law at the University of the District of Columbia. He teaches and writes in the area of criminal law, criminal procedure, and evidence. He is the author of Why Jury Duty Matters: A Citizen's Guide to Constitutional Action (NYU Press 2013). Prior to joining the law faculty, Professor Ferguson worked as a supervising attorney at the Public Defender Service for the District of Columbia. In addition to participating as lead counsel in numerous jury trials, he argued cases before the District of Columbia Court of Appeals. Before joining the Public Defender Service, Professor Ferguson was awarded the E. Barrett Prettyman Fellowship at the Georgetown Law Center's Criminal Justice Clinic. In 2004 he received a L.L.M. from the Georgetown Law Center (Masters in Advocacy). He received his J.D. summa cum laude from the University of Pennsylvania Law School. After law school, he clerked for the Honorable Chief Judge Carolyn Dineen King of the United States Court of Appeals for the Fifth Circuit.

MARK J. LOEWENSTEIN*, Imputation, The Adverse Interest Exception, and the Curious Case of the Restatement (Third) of Agency,* teaches courses in agency, business associations, and securities law at the University of Colorado School of Law. Professor Loewenstein's research interests are in agency law, corporate law, and securities litigation.

JASON P. NANCE, *Random, Suspicionless Searches of Students' Belongings: A Legal, Empirical, and Normative Analysis,* teaches courses in education law, remedies, and torts at the University of Florida Levin College of Law. Professor Nance's research interests are education law, empirical legal studies, and the legal profession.

ASHLEY N. BECK, Indiana v. Edwards*: The Prospect of a Heightened Competency Standard for Pro Se Defendants,* is a Juris Doctor candidate at the University of Colorado Law

School and an Associate Editor for the *University of Colorado Law Review*. Ms. Beck holds a B.A. in Political Science and Spanish from the University of Portland where she graduated maxima cum laude. Prior to law school, Ms. Beck served as a legislative intern for a Colorado Senator in Washington, D.C. and taught at a bilingual school in Spain for two years. During law school, Ms. Beck worked as a Research Assistant for Professors Pierre Schlag and Carolyn Ramsey, and interned for the Denver District Court for the Honorable Anne M. Mansfield and for the Denver District Attorney's Office. Ms. Beck also served as the Executive Chair for the Moot Court Division of Barristers' Council and was a member of the University of Colorado Law School's national moot court team.

MARTIN J. ESTEVAO, *The Litigation Financing Industry: Regulation to Protect and Inform Consumers*, is a law student at the University of Colorado Law School and an associate editor for the University of Colorado Law Review.

HOLLY V. FRANSON, *The Rise of the Transgender Child: Overcoming Societal Stigma, Institutional Discrimination, and Individual Bias to Enact and Enforce Nondiscriminatory Dress Code Policies,* is a Juris Doctor candidate at the University of Colorado Law School and an Associate Editor for the *University of Colorado Law Review*. Ms. Franson grew up in Milwaukee and received a B.A. in Literary Studies and Political Science from Beloit College. During law school, she worked at a law firm specializing in employment law and will continue there after graduation.

FOREWORD

The *University of Colorado Law Review* is a general interest journal, and as such, we publish articles from a wide variety of legal fields on topics we consider important to today's changing world.

Professor Andrew Ferguson, in *Jury Instructions as Constitutional Education*, addresses constitutional illiteracy in the United States and proposes that one solution to the problem would be to add information about the jury's constitutional role to jury instructions that are used daily by ordinary citizens. As an example of how this could be done in practice, Professor Ferguson's article includes a set of model jury instructions that could be used for his suggested purpose.

Next, in *Imputation, the Adverse Interest Exception, and the Curious Case of the Restatement (Third) of Agency*, Professor Mark Loewenstein discusses how the most recent edition of the Restatement of Agency impacts the adverse interest exception, a doctrine that limits the imputation of knowledge from an agent to a principal in the event the agent was acting adversely to the principal's interests.

Professor Jason Nance addresses school safety measures as they apply to students' constitutional rights in his article, *Random, Suspicionless Searches of Students, Belongings: A Legal, Empirical, and Normative Analysis*. Professor Nance provides a unique analysis of both the Supreme Court's Fourth Amendment jurisprudence and statistics on school crime and safety from the U.S. Department of Education. Based on this analysis, he ultimately concludes that schools are performing unconstitutional searches of students.

The *University of Colorado Law Review* also publishes casenotes and comments written each year by our members. Student author Ashley Beck examines *Indiana v. Edwards*, a recent Supreme Court decision that created a class of "gray-area defendants" who might be competent to stand trial while not being competent to proceed *pro se*. The court failed to establish a standard for determining whether a defendant is competent to proceed *pro se*, and Ms. Beck provides a possible solution in her article, Indiana v. Edwards*: The Prospect of a Heightened Competency Standard for* Pro Se *Defendants*.

Martin Estevao addresses the lack of existing regulation in the litigation financing industry in his article, *The Litigation Financing Industry: Regulation to Protect and Inform Consumers*. Mr. Estevao argues that states can regulate the industry to protect consumers while not shutting the industry down entirely by excessively regulating.

Finally, Holly Franson explores the existing legal framework for transgender individuals who encounter discriminatory dress code policies in her article, *The Rise of the Transgender Child: Overcoming Societal Stigma, Institutional Discrimination, and Individual Bias to Enact and Enforce Nondiscriminatory Dress Code Policies*. Ms. Franson provides guidance to schools and school districts regarding how to adopt nondiscriminatory dress code policies and avoid potential lawsuits.

JESSICA J. SMITH
Editor-in-Chief

UNIVERSITY OF
COLORADO LAW REVIEW

Volume 84, Issue 2 *2013*

CONTENTS

ARTICLES

CASENOTES AND COMMENTS

UNIVERSITY OF
COLORADO LAW REVIEW
Volume 84, Issue 2 *2013*

JURY INSTRUCTIONS AS CONSTITUTIONAL EDUCATION

ANDREW GUTHRIE FERGUSON*

Juries are central to the constitutional structure of America. This Article articulates a theory of the jury as a "constitutional teaching moment," establishing a historical and theoretical basis for reclaiming the educative value of jury service. This Article addresses the fundamental question of why, despite an unquestioned acceptance of a constitutional role of the jury, our criminal justice system does not explain this role to jurors on jury duty. This Article seeks to answer the question of how we can educate jurors about the jury's constitutional role, while at the same time exploring the larger theoretical concerns with using the jury to renew civic engagement. Tracing the theme of the jury as a place of constitutional education from the Founding to the modern Supreme Court, this Article argues that this constitutional awareness was central to the jury's reputation and status in society. This Article concludes that reclaiming this sense of constitutional awareness through jury service will strengthen the jury as an institution, as a decision-maker, and as a creator of democratic citizens. This Article offers sample jury instructions to begin this project of constitutional awareness suitable for trial courts to adopt and implement.

* Assistant Professor of Law, David A. Clarke School of Law, University of the District of Columbia; 2004 LLM Georgetown University Law School, 2000 JD University of Pennsylvania Law School. The author would like to thank Alissa Starzak, Judge Gregory Mize, Dean Shelley Broderick and Professors John Gastil, Edgar Cahn, Louis Virelli, Crisarla Houston, Susan Waysdorf, Laurie Morin, Louise Howells, Robert Burgdorf, Keith Blair, and John Terzano. Brandon Q. White provided invaluable research assistance.

INTRODUCTION

> *Among the most vigorous productions of the American pen, may be justly enumerated the various charges, delivered by the Judges of the United States, at the opening of their respective courts. In these useful addresses to the jury, we not only discern sound legal information, conveyed in a style at once popular and condensed, but much political and constitutional knowledge.*[1]

Every day, in courtrooms all across America, the same dramatic scene takes place: a jury foreperson stands and reads the verdict in a criminal case. Citizens nod in assent as a jury verdict determines liberty, guilt, or even death. Facts have been found and a decision rendered. Jurors have fulfilled their civic duty, justice has been negotiated into a final decision, and another case has been processed by the criminal justice system. The jury system has worked as designed. Or has it?

If you stopped those jurors on the way out of the courtroom and asked them why they had been given such an outsized power, how many citizens would be able to point to the constitutional underpinnings of the jury system? How many would know why the right to a jury trial is the only right included in both the original Constitution and the Bill of Rights?[2] How many would know that the "right to a jury" was considered equal to the "right to vote" at the time of the Founding?[3] How many would know that the jury was constitutionally designed to keep judicial power in the hands of the people and to teach the skills necessary for participatory

1. *Incidents at Home*, 7 FARMERS WKLY. MUSEUM 324 (1799).
2. U.S. CONST. art. III; U.S. CONST. amends. VI, VII.
3. "Were I called upon to decide, whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislative. The execution of the laws is more important than the making them." Letter from Thomas Jefferson to Monsieur Arnold L'Abbé, (July 19, 1789), *in* 3 THE WRITINGS OF THOMAS JEFFERSON, at 82 (H. A. Washington ed., 1854).

democracy?[4] As a matter of historical fact, such an understanding about the constitutional role of the jury is uncontested.[5] As a matter of legal theory, acknowledged in court opinions and scholarly articles, this constitutional role has been well-established.[6] Yet, rarely at any point in the formal legal process of a criminal trial does anyone bother to explain this role to the jury. No one explains the constitutional principles that are embedded in the jury trial process. No one explains the constitutional role of a participatory institution that emphasizes fairness, equality, deliberation, structural accountability, and civic virtue. The jury is left out of understanding its connection to the Constitution.[7]

The result of this omission is a gap in awareness about the role of the jury in a constitutional system. This gap not only betrays the historic importance of the jury in America, but weakens the jury system.[8] Central to the strength of the jury, its reputation in society, and its role in fostering the democratic skills of citizenship is an understanding that the jury plays a foundational role in the constitutional structure of government.[9]

This Article addresses this lack of constitutional

4. *See* WILLIAM L. DWYER, IN THE HANDS OF THE PEOPLE: THE TRIAL JURY'S ORIGINS, TRIUMPHS, TROUBLES, AND FUTURE IN AMERICAN DEMOCRACY 152–53 (Thomas Dunne Books, St. Martin's Press 2002).

5. *See e.g.*, Albert Alschuler & Andrew Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870 (1994); Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1170 (1995); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 54 (2003).

6. *See generally* United States v. Booker, 543 U.S. 220 (2005); Ring v. Arizona, 536 U.S. 584 (2002); Apprendi v. New Jersey, 530 U.S. 466 (2000). *See also* Akhil Reed Amar, *The Bill of Rights as a Constitution,* 100 YALE L.J. 1131, 1190 (1991) [hereinafter Amar, *The Bill of Rights*]; Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 207 n.26 (1995) [hereinafter Amar, *Jury Service*].

7. *See* Susan Carol Losh, Adina W. Wasserman & Michael A. Wasserman, *Reluctant Jurors*, 83 JUDICATURE 304, 310 (2000) ("Jury duty is unfamiliar territory for most. Our youth are taught about other civic duties, most notably the vote, and public service advertising about voting is pervasive. Meanwhile, information about jury duty is confined to fiction, sensationalist trials, personal experience, or second-hand data.").

8. *See infra* Part II.C.

9. Blakely v. Washington, 542 U.S. 296, 305–06 (2004) ("[The right to a jury trial] is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.").

awareness in the context of criminal jury trials—why the larger educative and constitutional role of the jury is never explained to the jury. It seeks to answer the question of how we can educate jurors both about the jury's constitutional role and the constitutional principles animating the jury experience. In addition, it explores the larger theoretical concerns with using the jury to renew civic engagement. Its proposal is straightforward and easy to implement—use jury instructions to educate jurors about the Constitution.[10] Symbolically and practically, the jury instructions proposed in this Article take the first step in remedying the lack of constitutional awareness by identifying the constitutional lessons of jury service. Most importantly, this constitutional education will have four positive effects on juries today: (1) constitutionally-educated jurors will improve baseline constitutional literacy for citizens; (2) constitutionally-educated jurors will improve the jury's reputation in society; (3) constitutionally-educated jurors will strengthen democratic practice outside of jury service including voting and other civic activities; and (4) constitutionally-educated jurors will improve jury deliberations while on jury duty.

This Article begins with the assumption that, theoretically and practically, the modern jury has been circumscribed to the functional role of finding the facts and applying the facts to the law.[11] With minor exception, the jury is instructed "to determine what the facts are in this case."[12] While there is little doubt that this role should be a central role—there are lives and liberty at stake—it need not be the only role. Jury duty also serves an educative function. Jurors participate as

10. *See infra* Part IV.

11. *See* United States v. Gaudin, 515 U.S. 506, 514 (1995) ("[T]he constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence."); Shannon v. United States, 512 U.S. 573, 579 (1994) ("The jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged."); *see also* Chris Kemmitt, *Function Over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body*, 40 U. MICH. J.L. REFORM 93, 112 (2006) ("The party line typically hewn to by modern American courts is that the jury exists merely to find facts: juries make factual determinations and judges sentence, end of story.").

12. *See, e.g.*, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA 60 (Barbara E. Bergman ed., 4th rev. ed. 2008) ("Your function, as the jury, is to determine what the facts are in this case. You are the sole judges of the facts . . . . [Y]ou alone decide what weight, if any, to give to that evidence [presented during the trial]. You alone decide the credibility or believability of the witnesses.").

constitutional pupils.[13] Jurors learn rules of fairness,[14] study modes of deliberation,[15] practice principles of equality,[16] tolerate different views, act as forces of political accountability,[17] and fulfill their historic role as a bulwark against government overreaching.[18] These are constitutional roles and constitutional values, yet this other constitutional function of the jury is not explained to jurors participating in the process.

This Article suggests that the current jury process fails to educate the jury about the constitutional role of the jury in society. It suggests that by reworking jury instructions, we can remedy this omission without interfering with the fact-finding process. At the same time, we can improve the deliberative process, and equally importantly, improve the democratic, participatory status of the juror-citizen in society. Finally, this Article offers proposed jury instructions that can be added in every state and federal court to accomplish the goal of educating the jury about the constitutional role of the jury. The purpose is not to distract jurors from deciding the case before them, but to put their decisional role in a larger democratic and

13. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 285 (Vintage Books 1990) (1835) ("The jury contributes most powerfully to form the judgement and to increase the natural intelligence of a people, and this is, in my opinion, its greatest advantage. It may be regarded as a gratuitous public school ever open, in which every juror learns to exercise his rights . . . .").

14. The rules can include procedural rules, evidentiary rules, and constitutional rules (such as confrontation and compulsory process). *See generally* U.S. CONST. amend. VI. In many ways the entire trial is a lesson on how to structure a fair adversarial process.

15. Alan Hirsh, *Direct Democracy and Civic Maturation*, 29 HASTINGS CONST. L.Q. 185, 188–89 (2002) ("The Framers regarded deliberation as the *sine qua non* of lawmaking. In the very first sentence of The Federalist Papers, Alexander Hamilton reminded people that they were called upon not merely to vote but to '*deliberate* on a new Constitution.'" (quoting THE FEDERALIST NO. 1 (Alexander Hamilton))).

16. Local 36 of Int'l Fishermen & Allied Workers of Am. v. United States, 177 F.2d 320, 340 (9th Cir. 1949) ("The jury of criminal cases is the epitome of democracy in our modern state . . . . Our democracy is founded upon the proposition of equality of each citizen to each other as far as political rights are concerned.").

17. David S. Willis, Note, *Juror Privacy: The Compromise Between Judicial Discretion and the First Amendment*, 37 SUFFOLK U. L. REV. 1195 (2004) ("The functional importance of an identifiable jury is as essential today as it was in early colonial society, for it ensures that judgment is rendered by members of the community who are ultimately accountable to the accused.").

18. *See* Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (quoting 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873)); Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 396 (1999).

constitutional framework.

Why constitutional education? This Article arises within the larger context of the renewed debate about the level of constitutional literacy in America. Leading bar journals,[19] Supreme Court justices,[20] scholars,[21] and mainstream media outlets[22] have raised an alarm about the decreasing level of civic awareness of citizens today.[23] These are the same citizens deciding the liberty of defendants or the fortunes of litigants. This constitutional ignorance threatens democratic institutions and has helped undermine the jury's reputation.[24] While similar concerns about juror competence have been raised throughout history,[25] today's renewed conversation opens a space for proposals to address the lack of constitutional awareness.[26] Obviously, brief jury instructions cannot replace a complete civics or legal education; however, the constitutional lessons within jury service can be made transparent and

19. The ABA Journal decried the woeful state of "civics" knowledge among the American public. *See* Mark Hansen, *Flunking Civics: Why America's Kids Know So Little*, ABA JOURNAL, May 1, 2011, http://www.abajournal.com/magazine/article/civics/.

20. C. Ronald Baird, *Each of Us Has a Role to Play in Improving Civic Literacy*, 62 J. MO. B. 298, 299 (2006) ("Former U.S. Supreme Court Justice Sandra Day O'Connor has been appointed as an honorary co-chair to the Commission on Civic Education and Separation of Powers. She has warned that a lack of knowledge about the distinct roles of the three branches of government can have very real world consequences."); Sam D. Elliot, *Educating the Public*, 46 TENN. B.J. 3 (2010) ("In August 2009, retiring Justice David Souter addressed the opening assembly of the American Bar Association's annual meeting in Chicago, sounding an alarm relative to the general public's lack of understanding of our system of government. Souter noted the sad reality that a 'majority of the public is unaware of the structure of government,' and fails to understand the notion of separation of powers, which itself threatens the judicial independence that we as lawyers deem critical to the continued viability of constitutional government.").

21. Eric Lane, *Are We Still Americans?*, 36 HOFSTRA L. REV. 13, 15 (2007).

22. *See infra* note 176.

23. Lane, *supra* note 21, at 15 ("[F]rom the 1960s onward civic education has been declining and by the 1980s had nearly vanished.").

24. *See infra* Part III.

25. Daniel D. Blinka, *"This Germ of Rottedness": Federal Trials in the New Republic, 1789–1807*, 36 CREIGHTON L. REV. 135, 139 (2003) ("St. George Tucker, one of Virginia's (and the nation's) leading lawyers and judges, lamented the sad decline of trial by jury. The problem rested, Tucker thought, squarely with the types of men who sat on juries." (citation omitted)); *see also id.* ("Courts habitually impaneled juries consisting largely of 'idle loiterers' who were 'unfit' to decide the cases presented to them. Often times juries were stacked with parties' friends or neighbors, which permitted 'friendship' or 'dislikes' to exert an 'imperceptible influence' on the outcome.").

26. As a general matter, the reaction to juror incompetence has been to restrict juror power, rather than uplift jurors in terms of providing education or guidance. *See infra* Part II.A.

relevant to jurors. The constitutional principles of democratic participation, equality of opportunity, due process/fairness, respecting diversity, and balanced and accountable government are directly connected with the constitutional role of the jury.[27] By identifying those constitutional principles and creating the space to practice and reflect on those principles, jury instructions can enrich the jury experience, both during deliberations and after court is over.

Why jury instructions? Jury instructions provide the official decisional framework for jurors. Jury instructions are not just rules, but a framing mechanism for how the jury should approach the process of decision-making. Jury instructions establish principles of law, burdens of proof, standards to weigh evidence, and a structural framework for decision.[28] Read by the court, jury instructions have the stamp of legitimacy and authority. Jury instructions educate the jury, and they should educate the jury *about the jury*. Jury instructions also offer a focused moment of constitutional connection. At that moment, jurors are ready to listen and learn about the law and the legal system. While the entire trial process involves a participatory and educative experience, it is at the moment of instruction that jurors are formally taught about their responsibilities, role, and the system's expectation of them.[29]

Part I of this Article explores the theme of the jury as a "teaching moment." From early in our history, Americans have believed that juries existed not simply to decide cases, but to be a classroom to teach constitutional values and the skills of citizenship.[30] Echoes of the idea that the jury is a "free public school" for democracy can be traced from the Founding to the current Supreme Court.[31] The mythologized ideal was that well-educated, civic-minded citizens would enter the

27. *See* ANDREW GUTHRIE FERGUSON, WHY JURY DUTY MATTERS: A CITIZEN'S GUIDE TO CONSTITUTIONAL ACTION (forthcoming 2013).

28. *See* John P. Cronan*, Is Any of this Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 AM. CRIM. L. REV. 1187, 1193–94 (2002) (describing the purposes of instructions).

29. Of course, some judges inform jurors about their important role in the system. Some judges, recognizing the lack of systemic education, purposely take it upon themselves to educate jurors about the history of the jury in America. These informal mechanisms are important but insufficient to convey the important role of the jury. *See also infra* Part III (further discussing the teaching moment of jury instructions).

30. *See infra* Part III.

31. *Id.*

democratic space of the jury and share and develop that accumulated constitutional understanding.

Part II of this Article contrasts that idealized version of the jury to the modern image of the jury. This section examines how the role of the jury has shifted over two centuries. The jury has gone from an almost co-equal branch of government with the power to decide the law, to a more cabined institution that is limited in constitutional power and focused on simply "finding the facts."[32] This familiar history has been well considered by other scholars,[33] so the focus here is on how these changes in responsibility affect the educative impact of jury service. As will be discussed, today's jury is more democratic and diverse[34] and yet less knowledgeable about constitutional matters.[35] These factors are neither causal, nor necessarily negative, as juries may well perform better today than at any other time in our history.[36] At the same time, these changes point to a need to reevaluate the educative role of the jury experience to remedy the limitations in constitutional awareness.

Part III of this Article examines why constitutional

---

32. *Id.*; Amar, *Jury Service*, *supra* note 6, at 220–21 ("'The trial by jury is . . . more necessary than representatives in the legislature; for those usurpations, which silently undermine the spirit of liberty, under the sanction of law, are more dangerous than direct and open legislative attacks . . . .'" (quoting *Essays by a Farmer (IV)*, *in* 5 THE COMPLETE ANTI-FEDERALIST 36, 38 (Herbert V. Storing ed., 1981)); Barkow, *supra* note 5, at 56 ("The Maryland Farmer, an Anti-Federalist, described the jury as '*the democratic branch of the judiciary power*—more necessary than representatives in the legislature.'" (quoting another source)).

33. *See, e.g.*, Barkow, *supra* note 5, at 57; Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 591 (1939); Kemmitt, *supra* note 11, at 103; Jon P. McClanahan, *The 'True' Right to Trial By Jury: The Founders' Formulation and Its Demise*, 111 W. VA. L. REV. 791, 799 (2009); Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury:* Sparf and Hansen v. United States *Reconsidered*, 46 AM. J. LEGAL HIST. 353, 354 (2004); Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 441 (1996).

34. *See* Jeffrey S. Brand, *The Supreme Court, Equal Protection, and Jury Selection: Denying that Race Still Matters*, 1994 WIS. L. REV. 511, 610 (1994); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 13–32 (1990); Lisa Lee Mancini Harden, *The End of the Peremptory Challenge? The Implications of* J.E.B. v. Alabama ex rel. T.B. *for Jury Selection in Alabama*, 47 ALA. L. REV. 243, 247–57 (1995).

35. Smith, *supra* note 33, at 459 ("Jurors in early English and American juries were on average more experienced in trial practice than modern jurors because of the large number of trials for which they were impaneled and previous experience they often had serving on juries.").

36. *See infra* Part II.

education matters to the jury today. This Article argues that ensuring a sustained level of constitutional awareness about the jury will improve both the jury experience and jury deliberations.[37] In addition, this education will counteract some of the negative media portrayals of the jury and jury service.[38] Most fundamentally, this Article suggests that constitutional and civic education through jury instructions will reopen the door to the public schoolhouse, opening up a national dialogue about the intersection of criminal justice institutions and civic engagement. Jury service may well present an untapped method to teach citizens how to think critically, deliberate respectfully, understand the political process, appreciate history, and cultivate public virtue.

Part IV describes how jury instructions in criminal cases can be modified to encourage constitutional awareness about the role of juries. This section traces how jurors experience jury service, including the informational inputs that can shape their understanding about their role as jurors. It shows how jury instructions, over other proposed mechanisms, provide the most effective way to educate jurors. This section also explores what these jury instructions might look like in criminal cases. Taking language and principles directly from Supreme Court cases, these proposed instructions form the basis of suggested constitutional jury instructions.

Part V addresses the potential arguments against this proposal. As with any proposed change in the existing jury process, there are concerns about inefficiency, improper influence, and a general inertia against change. These concerns, however, do not outweigh the merits of the proposal.

I. THE FOUNDING JURY IDEAL

Juries play a central and almost mythic role in American history.[39] Juries represent democracy in action—ordinary

37. *See infra* Part III.

38. *Id.*

39. Amar, *The Bill of Rights*, *supra* note 6 ("If we seek a paradigmatic image underlying the Bill of Rights, we cannot go far wrong in picking the jury. Not only was it featured in three separate amendments (the Fifth, Sixth, and Seventh), but its *absence* strongly influenced the judge-restricting doctrines underlying three other amendments (the First, Fourth, and Eighth). So too, the double jeopardy clause, which makes no explicit mention of juries, should be understood to safeguard not simply the individual defendant's interest in avoiding vexation, but also the integrity of the initial petit jury's judgment (much like the Seventh

citizens coming together to solve difficult problems affecting their local community.[40] The pedigree of the jury as a legitimate forum for dispute resolution dates back to the original Jamestown Colony.[41] Jury trials arrived along with the earliest American settlers[42] and were soon enshrined in the governing structures of each of the Thirteen Colonies.[43] Trial by jury was considered such an important natural right that a restriction on the use of jury trials during the colonial period helped ignite the American Revolution.[44] Among the British outrages justifying a call to revolution, the Declaration of Independence complained of the deprivation "*of the benefit of Trial by Jury*."[45] After independence, jury trials for criminal cases were protected in every state constitution.[46] The protection of criminal juries was enshrined in Article III of the original Constitution and the Sixth Amendment to the United States Constitution,[47] making it the only right protected in both the original Constitution and the Bill of Rights.[48] Juries

---

Amendment's rule against 're-examin[ation]' of the civil jury's verdict). The due process clause also implicated the jury, for its core meaning was to require lawful indictment or presentment (thus triggering the Fifth Amendment grand jury clause).").

40. Nancy S. Marder, *Juries, Justice, & Multiculturalism*, 75 S. CAL. L. REV. 659, 661–62 (2002); *see also* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 114 (1986); NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 66, 80 (Prometheus Books 2007).

41. *See* Barkow, *supra* note 5, at 51 n.73 ("The only existing recorded law from the first five years of the Plymouth Colony, for example, is a list of criminal offenses and a provision for jury trials in all criminal cases."); Jack Pope, *The Jury*, 39 TEX. L. REV. 426, 445 (1961) (recognizing that the jury trial came over with the colonists of the Massachusetts Bay Colony in 1641).

42. Alschuler & Deiss, *supra* note 5, at 870 n.15; *Developments in the Law: The Civil Jury*, 110 HARV. L. REV. 1408, 1468 (1997).

43. Smith, *supra* note 33, at 423–24 ("All of the thirteen original states retained the institution of civil jury trial through express constitutional provision, by statute, or through judicial practice."); *see also* Pope, *supra* note 41, at 446 (stating that all states used jury trials before the Declaration of Independence).

44. Barkow, *supra* note 5, at 53 ("Among the jury-related events leading to the American Revolution, some of the greatest instigators were the various Acts of Parliament that deprived colonists of their right to jury trial. For instance, although the Stamp Act earned its infamy as an instance of taxation without representation, colonists were also outraged that violators of the Act were to be tried in admiralty courts in London, thereby depriving them of a local jury.").

45. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

46. Alschuler & Deiss, *supra* note 5, at 869–70; *see also* Lisa Litwiller, *Has the Supreme Court Sounded the Death Knell for Jury Assessed Punitive Damages? A Critical Re-Examination of the American Jury*, 36 U.S.F. L. REV. 411, 415 (2002) (discussing the early history of the civil jury).

47. U.S. CONST. art. III, § 3; U.S. CONST. amend. VI.

48. Alschuler & Deiss, *supra* note 5, at 870 ("The right to jury trial in criminal cases was among the few guarantees of individual rights enumerated in the

were central to both Federalist and Anti-Federalist positions in the era immediately following the birth of the new government.[49] In fact, some Founding commentators held the jury in higher esteem than other institutions of democratic representation.[50]

The reason for this almost universal respect for the criminal jury was partly due to history and partly due to the institution's resonance with other core values of the era.[51] Certainly, a few well-publicized jury verdicts helped sway public opinion to view juries as guardians of liberty during a time of British oppression.[52] But, more fundamentally in the early days of the republic, juries were considered democratic, accountable, local institutions[53] organized around principles of public virtue[54] and common sense[55]—all values that fit the

---

Constitution of 1789, and it was the only guarantee to appear in both the original document and the Bill of Rights.").

49. *See* THE FEDERALIST NO. 83 (Alexander Hamilton). As is well known, the Federalists supported the establishment of a stronger centralized federal government. This push towards a more robust federal power necessitated a strong defense of the federal Constitution. In contrast, the Anti-Federalists raised concerns with the increased federal power and demanded a Bill of Rights to limit what was perceived as encroaching central power.

50. Barkow, *supra* note 5, at 54 ("'For Americans after the Revolution, as well as before, the right to trial by jury was probably the most valued of all civil rights.'" (quoting WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETT'S SOCIETY, 1760–1830, at 96 (1991)).

51. This was an era marked by calls for liberty, renewed civic sacrifice, new governing orders, and a collective coming together to form a new country.

52. William R. Glendon, *The Trial of John Peter Zenger*, 68 N.Y. ST. B. J. 48, 49 (1996); *see also* Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (quoting 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873)); Harrington, *supra* note 18, at 396.

53. Kemmitt, *supra* note 11, at 105 ("John Taylor of Caroline, a leading constitutional theorist of the early Republic, likened the jury to the 'lower judicial bench' in a bicameral judiciary. The Maryland Farmer echoed Taylor, describing the jury as 'the democratic branch of the judiciary power,' and the anti-Federalist John Hampden extended the metaphor, explaining that trial by jury was 'the democratical balance in the Judiciary power.'" (citations omitted)); Kory A. Langhoder, Comment, *Unaccountable at the Founding: The Originalist Case for Anonymous Juries*, 115 YALE L.J. 1823, 1825 (2006) ("[V]enire persons in the Founding era were local, drawn from relatively intimate communities.").

54. *See* Kathryn Abrams, *Law's Republicanism*, 97 YALE L.J. 1591, 1599–1602 (1988); Richard A. Epstein, *Modern Republicanism—Or the Flight From Substance*, 97 YALE L.J. 1633, 1636–39 (1988); Michael A. Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, 97 YALE L.J. 1651, 1652 (1988); Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 750–51 (1992); Linda R. Hirshman, *The Virtue of Liberality in American Communal Life*, 88 MICH. L. REV. 983, 988–98 (1990); Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29

democratic experiment called America.

This section traces one aspect of the jury ideal that existed at the time of the Founding: the intersection of legal and constitutional education and the jury. It begins by looking at the ideal of the citizen-juror—part myth, part reality—but an image of the juror as a participatory, educated citizen that helped establish its power in early America. It then looks at the explicit theme of the jury as a "public school" traced through the writings of Anti-Federalist thinkers and observers like Alexis de Tocqueville. Finally, it explores how these themes have continued through the modern day, such that one can observe the creation of a uniquely American "constitutional awareness" centered around the role of the jury.

Scholars have well canvassed the complex history of juries in America.[56] This Article demonstrates, at least in the ideal, that jury service was intended as a mechanism to enhance constitutional and legal understanding. Further, this ideal of a constitutionally aware jury was intertwined with the power and status of the early jury. Jurors were powerful and respected because of their constitutional connection. Jurors' knowledge about their constitutional role informed the process and deliberations in a way that strengthened the institution.

A. The Ideal of the Constitutionally Educated Citizen-Juror

The American faith in juries must be understood in the context of the "ideal" American juror.[57] While the institution

WM. & MARY L. REV. 57, 67 (1987); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1503–04 (1988); Burt Neuborne, *Ghosts in the Attic: Idealized Pluralism, Community and Hate Speech*, 27 HARV. C.R.-C.L. L. REV. 371, 371–77 (1992); H. Jefferson Powell, *Reviving Republicanism*, 97 YALE L.J. 1703, 1707 (1988); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 548–50 (1986); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1564–65 (1988).

55. Barkow, *supra* note 5, at 59 ("The purpose of the jury was to inject the common-sense views of the community into a criminal proceeding to ensure that an individual would not lose her liberty if it would be contrary to the community's sense of fundamental law and equity.").

56. *See supra* notes 5–6, 41 and accopanying text.

57. As will be discussed, this ideal juror was not, in fact, the person who always sat on the jury, as wealth and privilege could also offer avenues to escape jury service. Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796–1996*, 94 MICH. L. REV. 2673, 2678 (1996) ("Early in the nineteenth century, jury avoidance was a continual nuisance for courts."); *id.* at 2683 ("Fining those who failed to obey summonses appeared to be a universal response to jury dodging throughout the colonial period, and in the early 1800s statutes in most states authorized fines ranging from one dollar to $250.").

represents a successful and surprisingly durable mechanism for decision-making, much of the reverence for American juries emerged from the ideal of the citizen-juror.[58] Ordinary, faceless, self-sacrificing, but identifiably a participatory citizen, such an individual represented a common democratic connection.[59] The fact that such an ideal juror never fully existed does not change the fact that the perception of the ideal had direct effects. The citizen-juror ideal justified an unprecedented grant of power to juries to decide the law.[60] It legitimized verdicts that ran counter to legislative and executive branch decisions.[61] It localized judicial power to unaccountable and unelected citizens.[62] It also allowed an ever-changing jury population to evolve an identity to match the developing country.[63]

---

58. Gene Schaerr & Jed Brinton, *Business and Jury Trials: The Framers' Vision Versus Modern Reality*, 71 OHIO ST. L.J. 1055, 1055 (2010) ("During the Founding Period, the right to jury trial enjoyed a level of esteem bordering on religious reverence. As one delegate to Virginia's convention considering ratification of the federal Constitution put it, that right was generally regarded as an 'inestimable privilege, the most important which freemen can enjoy[.]'" (alteration in original) (quoting *Journal Notes of the Virginia Ratification Convention Proceedings (June 24, 1788)*, *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1494 (John P. Kaminski & Gaspare J. Saladino eds., 1993))).

59. *See* Hon. B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1238 (1993).

60. Middlebrooks, *supra* note 33, at 354 (stating that "'the juries [are] our judges of all fact, and of the law when they choose it.'" (alteration in original) (quoting *Letter from Thomas Jefferson to Samuel Kercheval*, 1816, *in* 3 PAPERS OF THOMAS JEFFERSON 282–83 (1951))).

61. Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 55 (2011) ("The ability to decide matters of law allowed for greater jury independence; it entitled the people lawfully to take action opposing the policy preferences of the executive or the judiciary.").

62. Green v. United States, 356 U.S. 165, 215 (1958) (Black, J., dissenting) ("In the words of Chief Justice Cooley: 'The law has established this tribunal because it is believed that, from its numbers, the mode of their selection, and the fact that jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common sense view of a set of circumstances, involving both act and intent, than any single man, however pure, wise and eminent he may be. This is the theory of the law; and as applied to criminal accusations, it is eminently wise, and favorable alike to liberty and to justice.'" (quoting People v. Garbutt, 17 Mich. 9, 27 (1868))), *overruled on other grounds by* Bloom v. Illinois, 391 U.S. 194 (1968).

63. The revolutionary ideal of noble colonial jurors standing up to tyrannical British authorities invokes qualities of bravery, principle, independence, and intelligence. These were precisely the qualities envisioned for the new nation. Similarly, the post-Revolutionary states trying to establish order, stability, and prosperity looked for jurors who would embody those same characteristics of

Pulling apart this image, it should be noted that at least in the ideal, the early American juror shared certain characteristics. All jurors were male, as only males had the right to vote.[64] Jurors were men of property, having some ownership interest in the community.[65] Jurors were white, mirroring the franchise requirements of most states.[66] Almost all jurors also had to be established enough in the community to be chosen by the jury selection officer[67] (usually a federal marshal or state court official).[68] While plainly inadequate in terms of diversity or democratic equality, this homogenous jury pool of white, male, established property owners did share another important characteristic—the jurors were by-and-large educated about civic and constitutional matters.[69] This

economically established leaders of the community.

64. Kurt M. Saunders, *Race and Representation in Jury Service Selection*, 36 DUQ. L. REV. 49, 54 (1997) ("At the time of the Revolutionary War, jury service was restricted to white male property holders . . . .").

65. *Id.*

66. Alschuler & Deiss, *supra* note 5, at 878 ("The Federal Judiciary Act of 1789 left the determination of juror qualifications in the federal courts to the states, and state qualifications for jury service frequently matched those for voting."); Andrew G. Deiss, Comment, *Negotiating Justice: The Criminal Trial Jury in a Pluralist America*, 3 U. CHI. L. SCH. ROUNDTABLE 323, 344 (1996) ("The fact that during the early years of the Republic, juries were comprised almost solely of white male property holders undoubtedly increased the chance for consensus in the jury box.").

67. Amar, *Jury Service*, *supra* note 6, at 207 n.26 ("Under a key man system, citizens of good reputation in the community (the 'key' men) recommend persons to fill the jury venire."); Daniel D. Blinka, *Trial By Jury on the Eve of Revolution: The Virginia Experience*, 71 UMKC L. REV. 529, 563 (2003) ("[The early court] may have swept in its share of idlers and miscreants, but it more naturally attracted men actively involved in local social and economic life.").

68. It has to be remembered that unlike today, those eligible to serve on juries were not necessarily the people who did serve. It was not the random selection of today, but more controlled. "Instead, public officials called selectmen, supervisors, trustees, or 'sheriffs of the parish' exercised what Tocqueville called 'very extensive and very arbitrary' powers in summoning jurors." Alschuler & Deiss, *supra* note 5, at 879–80 (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 359–60 (Alfred A. Knopf ed. 1945) (1835)).

69. United States v. Polizzi, 549 F. Supp. 2d 308, 408 (E.D.N.Y. 2008) ("Goebel's seminal work demonstrate[s] that the vicinage and property requirements for jurors—that they be local "freeholders," responsible men having some stake in the community—assumed the jury's knowledge of the law and awareness of its power to control penalties."), *vacated and remanded on other grounds by* United States v. Polouizzi, 564 F.3d 142 (2009); Smith, *supra* note 33, at 432 ("Selection procedures were often devised to ensure that better-qualified individuals were impaneled on juries."); *see also* Polizzi, 549 F. Supp. 2d at 409 ("The English statutes had long set for petit jurors a high property qualification. This policy, which rested upon the presumed higher responsibility and intelligence of propertied persons, had found expression in a series of statutes going back to the fifteenth century.").

education derived from a combination of life experience, formal schooling, and an understanding that a juror had a creative role in developing the law.

In the very early days of the United States, jurors were aware of constitutional issues because most had lived through the framing of the United States Constitution.[70] Colonial "subjects" became American "citizens"—an identity symbolized by jury participation.[71] Early jurors were a generation that had personally experienced the American Revolution, the Articles of Confederation, and the Ratification debates about forming a new government.[72] The constitutional debate alone took years.[73] These national discussions in newspapers and journals involved elected leaders and regular citizens in a public debate about constitutional principles.[74] Even after ratification, issues of federal power, states' rights, and individual freedoms reverberated through many of the early political contests.[75]

Jurors, thus, as early citizens, brought to jury service an awareness of the Constitution and the legal system.[76] As John Adams stated, "The general rules of law and common regulations of society, under which ordinary transactions arrange themselves, are well enough known to regular jurors. The great principles of the constitution are intimately

70. Historically, one of the most central issues of the day was the War of Independence and the forming of a new national government.

71. *See* Robert Mark Savage, Where Subjects were Citizens: The Emergence of a Republican Language and Polity in Colonial American Law Court Culture, 1750–1776, at 24 (2011) (unpublished Ph.D. dissertation, Columbia University), *available at* http://academiccommons.columbia.edu/catalog/ac:131400.

72. *See e.g.*, GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 614–15 (Univ. of North Carolina Press 1998) (1969).

73. The United States Constitution was signed in 1787 and the Bill of Rights in 1791.

74. *See generally* THE FEDERALIST PAPERS; THE ANTI-FEDERALIST PAPERS.

75. *See, e.g.*, AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 237 (2005); DAVID MCCULLOUGH, JOHN ADAMS 65 (2001).

76. James Madison stated, "'The people who are the authors of this blessing [the Constitution], must also be its guardians.'" 14 THE PAPERS OF JAMES MADISON 218 (Robert A. Rutland et al. eds., 1983); *see also* MICHAEL G. KAMMEN, A MACHINE THAT WOULD GO ON OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 77 (1986) (stating that it took almost a generation for the first books about the Constitution to be written: "For a full generation after 1789, few books or pamphlets about the Constitution appeared. The earliest ones of any consequence were first published between 1823 and 1826, such as John Taylor of Caroline's *New Views of the Constitution of the United States* (1823) and Thomas Cooper's *On the Constitution of the United States, and the Questions that Have Arisen Under It* (1826) . . . ."); Andrew E. Taslitz, *Slaves No More!: The Implications of the Informed Citizen Ideal for Discovery Before Fourth Amendment Suppression Hearings*, 15 GA. ST. U. L. REV. 709, 727 n.100 (1999).

known."[77] Although not all jurors could claim Adams's level of formal education, many jurors were among the more educated of the society.[78] As Douglas Smith noted, "Not only were [early] jurors more experienced with trial practice than modern jurors, but they were also, unlike modern jurors, among the better-educated members of society."[79] In fact, many juries in colonial America consisted of individuals who had actually served in other branches of government[80] or were of the station to become elected officials.[81]

In practice, this higher level of education did not merely correlate with more learned jurors, but with jurors more educated about the role of the jury in society.[82] Jurors understood that the common law in America was still

77. Middlebrooks, *supra* note 33, at 374 (quoting Sparf v. United States, 156 U.S. 51, 143–44 (1895)); United States v. Polizzi, 549 F. Supp. 2d 308, 407 (E.D.N.Y. 2008) ("It is not strange that jurors should, in the second half of the eighteenth century, know details of criminal law and punishment—matters of punishment of which many of our present jurors do not know and are deliberately kept from knowing. Criminal law then was much simpler than today . . . ."), *vacated and remanded on other grounds by* United States v. Polouizzi, 564 F.3d 142 (2009).

78. Smith, *supra* note 33, at 460 ("While it is true that not all property holders necessarily were more educated than the average citizen (and the same might be said of women), on average, property holders could be expected to have the requisite wealth and leisure time necessary to obtain a greater amount of education.").

79. *Id*. at 459–60.

80. Grand jurors in Virginia were generally men of high social standing. Brent Tarter & Wythe Holt, *The Apparent Political Selection of Federal Grand Juries in Virginia, 1789–1901*, 49 AM. J. LEGAL HIST. 257, 263 (2007) ("Full biographical details are not available for all of the grand jurors, but it is evident that the grand jury members were on the whole more respectable than representative. Every grand jury included several men who were or recently had been members of Virginia's General Assembly or of Congress, and more than a few served prominently in one or the other legislative body or as governor after they were on the grand jury.").

81. Savage, *supra* note 71, at 61 ("[T]he evidence suggests that jury service frequently was a steppingstone to further social and political responsibility, beginning in the early public lives of these men."); *see also id.* at 62 ("Many of Topsfield's [Massachusetts] political and social leaders from the late 1740s to the end of the 1770s learned early civic responsibility through jury service in the inferior and superior courts of Massachusetts."); *id.* at 66–67 ("But the records of Topsfield do suggest that jury duty was a steppingstone toward a future of public responsibility and civic service. Of some eighty-six Topsfield jurors studied between 1748 and 1778, including some sixty-eight who were landowners enumerated in the Topsfield property allocations list of 1754, nearly all of them appear to have entered into law court culture at an early stage in their civic lives, as jurors.").

82. Smith, *supra* note 33, at 434 ("[I]t was common for states to maintain requirements that individuals serving as jurors be well-informed and intelligent.").

developing and that they had a role in that development.[83] Jurors were to be interpreters of the law, as well as decision-makers about the facts of a case.[84] To interpret the law meant to understand the law. While quite different from the role of the jury today, this idea of jurors judging law and fact had wide support among leading jury proponents. Thomas Jefferson,[85] John Adams,[86] Alexander Hamilton,[87] John Jay,[88] John Marshall,[89] and James Wilson[90] all are recorded as supporting a more participatory ideal of the jury role in interpreting the law.

Legal historians point to several reasons for this power of juries to judge the law. First, the common law tradition had

83. *See* Amar, *Jury Service*, *supra* note 6, at 219.

84. Middlebrooks, *supra* note 33, at 388; *see The Changing Role of the Jury in the Nineteenth Century,* 74 YALE L.J. 170, 189–91 (1964) [hereinafter *The Changing Role of the Jury*].

85. Middlebrooks, *supra* note 33, 354 ("If the question before [the magistrates] be a question of law only, they decide on it themselves; but if it be of fact, or of fact and law combined, it must be referred to a jury. In the latter case of a combination of law and fact, it is usual for the jurors to decide the fact and to refer the law arising on it to the decision of the judges. But this diversion of the subject lies with their discretion only. And if the question relate to any point of public liberty, or if it be one of those in which the judges may be suspected of bias, the jury undertake to decide both law and fact." (alteration in original) (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA QUERY XIV 1782 (1984))).

86. Middlebrooks, *supra* note 33, at 374 ("Whenever a general verdict is found, it assuredly determines both the fact and the law. It was never yet disputed or doubted that a general verdict, given under the direction of the court in point of law, was a legal determination of the issue. Therefore, the jury has a power of deciding an issue upon a general verdict. And if they have, is it not an absurdity to suppose that the law would oblige them to find a verdict according to the direction of the court, against their own opinion, judgment, and conscience?" (quoting Sparf v. United States, 156 U.S. 51, 143 (1895))).

87. Middlebrooks, *supra* note 33, at 375 ("[I]t is not only the province of the jury, in all criminal cases, to judge of the intent with which the act was done, as being parcel of the fact; they are also authorized to judge of the law as connected with the fact." (alteration in original) (quoting People v. Croswell, 3 Johns. Cas. 337, 355 (N.Y. Sup. Ct. 1804))).

88. *See* Georgia v. Brailsford, 3 U.S. 1 (1794).

89. Jon P. McClanahan, *The 'True' Right to Trial By Jury: The Founders' Formulation and Its Demise*, 111 W. VA. L. REV. 791, 816 (2009) ("In the treason trial of Aaron Burr in 1807, Chief Justice Marshall declared in his jury instructions that '[t]he jury have now heard the opinions of the court on the law of the case. They will apply that law to the facts and will find a verdict of guilty or not guilty as their own consciences may direct.'") (alteration in original).

90. Middlebrooks, *supra* note 33, at 377–78 ("[Justice] Wilson concluded by remarking 'that the jury, in a general verdict must decide both law and fact, but this did not authorize them to decide it as they pleased: they were as much bound to decide by law as the judges; the responsibility was equal upon both.'" (quoting Justice Wilson's jury charge in Henfield's Case, 11 F. Cas. 1099 (1793))).

long tasked jurors with reflecting on the merits of the law.[91] Second, American legal systems were new, and so it made sense that juries would interpret the law to fit the developing sense of American justice.[92] Third, not all judges were actually lawyers, giving similarly situated citizen-jurors more claim to decide the legal issues presented.[93] Fourth, the codification process of criminal law had not developed, making legal determinations more of a case-by-case process.[94] Fifth, the influence of natural law philosophy allowed for more flexibility to ground legal determinations on moral principles.[95] Finally, jurors had vastly greater powers to determine the sentencing of convicted defendants—an equitable power that empowered them to make the law match the appropriate punishment.[96] No matter the justification, the result of this power was to entrust jurors with a greater responsibility to direct and shape the criminal justice system.

The argument that derives from this historical record is that in order for jurors to interpret the law, jurors also had to understand their role in the constitutional system.[97] This Article argues that one of the direct consequences of allowing juror interpretation was to force jurors to think about why they were able to interpret the law. To be a moral force in the community,[98] jurors had to think about how the jury fit into that community. To be a legitimate arbiter, citizens had to see the jury as rooted in a larger constitutional system. This, in turn, led to reflection on the participatory roots of the institution, the process of democratic deliberation, the

91. *Id.* at 389 (citing SHANNON C. STIMSON, THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL 59 (1990)).

92. El-Haj, *supra* note 61, at 54 ("Moreover, the 'law' was much less certain than it is today. Written judicial opinions were infrequent and official reporters were uncommon at the Founding and through the early republic.").

93. Alschuler & Deiss, *supra* note 5, at 905.

94. *See* Middlebrooks, *supra* note 33, at 409 (citing MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860 (1975)).

95. *The Changing Role of the Jury*, *supra* note 84, at 172 ("Since natural law was thought to be accessible to the ordinary man, the theory invited each juror to inquire for himself whether a particular rule of law was consonant with principles of higher law.").

96. Kemmitt, *supra* note 11, at 111–12.

97. Middlebrooks, *supra* note 33, at 389 ("[Adams's, Jefferson's, Hamilton's, and Wilson's] political and legal defense of an expanded jury role reflected a more basic and positive sense of men's capabilities as knowers of law and of their own and the public interest.").

98. United States v. Kandirakis, 441 F. Supp. 2d 282, 314 (D. Mass. 2006) ("The mere fact that a *jury* reached a particular decision lends moral force to that decision—much more than if it were reached solely by a judge.").

importance of treating all citizens alike, and ultimately the fair accounting of a verdict. The process of jury service thus became a process of reflecting on and practicing foundational constitutional principles.[99]

Part of the educative effect of early juries also involved sharing this constitutional knowledge during jury service.[100] Jurors who were not traditionally educated were required to engage in this process with jurors who had more formal education.[101] As one scholar noted, "the courthouse doors swung both ways. Jurors brought their common knowledge and left instructed. Having witnessed the court's activities, they imparted the lessons learned to their community."[102] Jury service exposed ordinary citizens to other jurors who might have been taught constitutional principles through formal or informal education.

Importantly, this interchange meant that jury service became a space for discussion of constitutional principles. The jury allowed constitutionally aware citizens to interact and teach other citizens in a forum that encouraged discussion about the Constitution. Juries were not only a democratic space, but an educative space for constitutional principles to be learned, reflected upon, and practiced.[103]

Viewing juries as a space for ordinary citizens to learn and reflect about legal principles, including their own role in the justice system, goes a long way to explain the jury's centrality to a developing democratic identity.[104] At a minimum, the

99. Middlebrooks, *supra* note 33, at 389 ("The American Revolution was not only about widening participation in the making of laws 'but also about widening the space for reflective judgment about laws once made.'" (quoting STIMSON, *supra* note 91, at 59)).

100. Taslitz, *supra* note 76, at 732 ("Jury service teaches citizens their rights and duties, while requiring their active participation in Government.").

101. Amar, *The Bill of Rights*, *supra* note 6, at 1186 ("The jury was also to be informed by judges—most obviously in the judges' charges . . . . Like the church and the militia, the jury was in part an intermediate association designed to educate and socialize its members into virtuous thinking and conduct.").

102. Blinka, *supra* note 67, at 562.

103. John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 284 (1978) ("[J]uries were laden with veterans, who needed less instructing."); Smith, *supra* note 33, at 459 ("[E]arly English and American juries were on average more experienced in trial practice than modern jurors because of the large number of trials for which they were impaneled and previous experience they often had serving on juries.").

104. Savage, *supra* note 71, at 69–70 ("Yet in Virginia as in Massachusetts, jury service was also a typical preparation for higher public service. . . . Jury service often was the first step toward larger social and political responsibility, giving men immediate authority over the lives and property of others, within the

above summary demonstrates that the level of civic and constitutional understanding of jurors may have contributed to the positive reputation of the institution of the jury.

B. The Jury as "Public School"

The theme of the "jury as a public school" established to teach the lessons required for democratic self-rule can be traced from the Founding Era to the present day. This section briefly outlines the landscape of this historical argument, looking at early writings around the ratification debates of the Constitution, at the observations of Alexis de Tocqueville a generational later, and then at how modern courts have embraced the same theme.

1. Federalists/Anti-Federalists

The insight that the American jury could provide a teaching moment for constitutional discovery was recognized in parallel with its establishment as a constitutional right.[105] In the Constitutional Convention, the central role of the jury was one of the few issues adopted without significant disagreement.[106] Immediately after the Constitution was ratified without a civil jury right or a local criminal jury right, the Anti-Federalists initiated a national debate to establish a right to a civil jury trial, as well as a public and local criminal jury trial.[107] During the initial ratification debates, Anti-Federalists focused on the lack of jury protections in the constitutional text.[108] While the primary concern of Anti-

---

colonial law court culture. And there is every reason to suspect that colonial Americans were willing to trust the courts precisely because they were willing to trust fellow citizen-jurors—their neighbors in the local community—who would be hearing their cause.").

105. McClanahan, *supra* note 33, at 807 ("[S]ervice on a jury enables jurors to learn more about their legal rights, ultimately teaching them to function more effectively as citizens in a democratic society.").

106. THE FEDERALIST NO. 83 (Alexander Hamilton) ("The friends and adversaries of the plan of the [Constitutional] convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them, it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.").

107. *See* Edith G. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 292 (1966); Stephan Landsman, *The Civil Jury in America: Scenes From an Unappreciated History*, 44 HASTINGS L. J. 579, 598 (1993).

108. Robert L. Jones, *Finishing a Friendly Argument: The Jury and the*

Federalist writers involved the lack of a civil jury trial,[109] Anti-Federalist advocates also directly linked the institution of the jury to education.[110] It was through juries that citizens were expected to learn about public affairs and law.[111] As the Anti-Federalist author "Federal Farmer" wrote, "Their situation, as jurors and representatives, enables them to acquire information and knowledge in the affairs and government of the society; and to come forward, in turn, as the centinels [sic] and guardians of each other."[112] Jurors were to acquire constitutional knowledge to protect the rights of other citizens.

Acquiring knowledge was necessary because not all jurors had the requisite legal education before jury service to decide the cases.[113] It was in jury service that the transfer of constitutional knowledge took place.[114] Further, because juries were entitled to interpret the law, this transfer of knowledge was necessary to legitimize the decisions in the eyes of the community.[115]

The Anti-Federalists also recognized the importance of educating the populace about constitutional values through formal declarations and practice.[116] Anti-Federalist theory maintained that foundational principles must be taught and

---

Historical Origins of Diversity Jurisdiction, 82 N.Y.U. L. Rev. 997, 1046–47 (2007).

109. *See generally id.*

110. *See* Letter from the Federal Farmer, No. 4 (Oct. 12, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST, at 245–51 (Herbert J. Storing ed., 1981); Letter from the Federal Farmer, No. 6 (Dec. 25, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 110, at 256–64.

111. *See* Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 451 (2006).

112. Letter from the Federal Farmer, No. 4 (Oct. 12, 1787), *supra* note 110, at 250.

113. Letter from the Federal Farmer, No. 15 (Jan. 18, 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 110, at 350 ("[T]he freemen of a country are not always minutely skilled in the laws, but they have common sense in its purity, which seldom or never errs in making and applying laws to the condition of the people, or in determining judicial causes, when stated to them by the parties.").

114. *Id.* ("[The jury] and the democratic branch in the legislature, . . . are the means by which the people are let into the knowledge of public affairs . . . ."); McClanahan, *supra* note 33, at 807.

115. Amar, *Jury Service*, *supra* note 6, at 219; *see, e.g.*, Letters from the Federal Farmer, No. 15 (Jan. 18, 1788), *supra* note 113, at 315 ("It is true, the laws are made by the legislature; but the judges *and juries* in their interpretations, and in directing the execution of them, have a very extensive influence for preserving or destroying liberty, and for changing the nature of the government.") (emphasis added).

116. *See* Amar, *Jury Service*, *supra* note 6, at 219.

experienced in order to enter the consciousness of the country.[117] Federal Farmer asked:

> What is the usefulness of a [political or religious] truth in theory, unless it exists constantly in the minds of the people, and has their assent: — we discern certain rights [like] the trial by jury which the people . . . of America of course believe to be sacred, and essential to their political happiness. . . . [T]his belief . . . is the result of ideas at first suggested to them by a few able men, and of subsequent experience . . . it is the effect of education, a series of notions impressed upon the minds of the people by examples, precepts and declarations.[118]

In other words, principles like the importance of the jury must be taught because formal declarations were necessary to educate citizens about the underlying constitutional foundations.[119] Further, these principles "must be impressed upon the minds of the people" through a formalized process (like perhaps modern jury instructions) that reminds, declares, and serves as an example of the sacredness and relevance of constitutional principles.[120]

2. Alexis de Tocqueville

If the Anti-Federalists sketched the outline of the jury as an educational space, Alexis de Tocqueville, famed observer of American society, painted the full vision.[121] Traveling in America in the 1830s, Tocqueville studied political and cultural institutions, including the jury.[122] He documented the role these developing institutions had on American society, culture, and government.[123]

Tocqueville recognized explicitly that the American jury

---

117. *See* Letter from the Federal Farmer, No. 16 (Jan. 20, 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 110, at 196–203.

118. *Id.*

119. How these principles apply to the modern jury will be addressed in the next Part. *See infra* Part II.

120. Letter from the Federal Farmer, No. 16 (Jan. 20, 1788), *supra* note 113, at 196–203.

121. Amar, *The Bill of Rights*, *supra* note 6, at 1187.

122. TOCQUEVILLE, *supra* note 13, at 285.

123. Bruce Frohnen, *Tocqueville's Law: Integrative Jurisprudence in the American Context*, 39 AM. J. JURIS. 241, 241–43 (1994).

acted as a school to educate citizens about constitutional rights, governing law, and decision-making, and, thus, encouraged citizens to develop the skills and knowledge needed for democratic government.[124]

> The jury contributes most powerfully to form the judgement and to increase the natural intelligence of a people, and this is, in my opinion, its greatest advantage. It may be regarded as a gratuitous public school ever open, in which every juror learns to exercise his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes practically acquainted with the laws of his country, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even the passions of the parties.[125]

The "jury as public school" concept posits that it is on jury duty that the skills of citizenship get taught.[126] Judgment, natural intelligence, and substantive legal rights are all practiced with fellow citizens.[127] In addition, the public school idea accepts that the educative value of jury service involves imparting knowledge to ordinary citizens.[128] Again, this insight had been presumed by the Founding generation simply due to the reality of who could serve as jurors.[129]

Tocqueville saw that juries "exercise a powerful influence upon the national character."[130] Juries in practice develop the skills and values of citizenship in a constitutional democracy. Tocqueville explicitly recognized that juries improved public virtue, equality,[131] deliberative judgment,[132] practical

124. TOCQUEVILLE, *supra* note 13, at 285.

125. *Id.*

126. Philip C. Kissam, *Alexis de Tocqueville and American Constitutional Law: On Democracy the Majority Will, Individual Rights, Federalism, Religion, Civic Associations, and Originalist Constitutional Theory*, 59 ME. L. REV. 35, 44 (2007); Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 480–81 (1997) (citing TOCQUEVILLE, *supra* note 13, at 284–85).

127. Amar, *The Bill of Rights*, *supra* note 6, at 1161.

128. *Id.* at 1187 ("In Tocqueville's memorable phrase, 'the jury, which is the most energetic means of making the people rule, is also the most efficacious means of teaching it how to rule well.'" (quoting TOCQUEVILLE, *supra* note 13, at 297)).

129. *See supra* notes 64–69 and accompanying text.

130. TOCQUEVILLE, *supra* note 13, at 284.

131. *Id.* ("It teaches [people] to practice equity; every [person] learns to judge his [or her] neighbor as he [or she] would [ ] be judged.").

intelligence,[133] and raised the status of the jury as a "political" institution through this development.[134] He concluded that in terms of developing civically aware citizens, juries, and thus jury service, were one of "the most efficacious means" for the education of the people which society can employ.[135]

3. Continuing Echoes of the Jury as a Constitutional Classroom

The metaphor of the jury as a public school did not end in the 1830s. Modern courts still recognize that juries serve an educational role.[136] Court opinions recognize that this education is a constitutional one, emphasizing constitutional principles of democratic participation,[137] fairness,[138] equality,[139] civic responsibility,[140] deliberation,[141] and the

132. *Id.* ("The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged, and with the notion of right.").

133. *Id.* at 285 ("I think that the practical intelligence and political good sense of the Americans are mainly attributable to the long use which they have made of the jury in civil causes.").

134. *Id.* at 282–83 ("Now the institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority. The institution of the jury consequently invests the people, or that class of citizens, with the direction of society.").

135. *Id.* at 287.

136. Gannett Co. v. State, 571 A.2d 735, 762 (Del. 1989) (Walsh, J., dissenting) ("The jury represents the public, bringing the public's values and common sense to bear upon the problems of justice. In turn, the institution of the jury educates the public and heightens the civic awareness of each citizen."); Kim Forde-Mazuri, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 351, 364 (1999) ("Trial judges have long recognized the educational importance of jury service, taking the opportunity to teach the jurors about the responsibility of civic virtue and self-government.").

137. Balzac v. Porto Rico, 258 U.S. 298, 310 (1922) ("The jury system postulates a conscious duty of participation in the machinery of justice . . . . One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being a part of the judicial system of the country can prevent its arbitrary use or abuse.").

138. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 501 (1993) (O'Connor, J., dissenting) (acknowledging the jury as the "traditional guarantor of fairness."); *In re* Acushnet River & New Bedford Harbor Proceedings re Alleged, 712 F. Supp. 994, 1005 (D. Mass. 1989) ("It is through the rule of law that liberty flourishes. Yet, 'there can be no universal respect for the law unless all Americans feel that it is *their* law.' . . . Through the jury, the citizenry takes part in the execution of the nation's laws, and in that way each can rightly claim that the law partly belongs to her." (quoting Irving R. Kaufman, *A Fair Jury—The Essence of Justice*, 51 JUDICATURE 88, 91 (1967))).

139. *See* J.E.B. v. Alabama, 511 U.S. 127, 145–46 (1994).

structural power of the jury.[142] As one court observed:

> Perhaps what impressed de Tocqueville most about the jury system was the role which jury service plays in educating and enlightening those citizens selected as jurors and, through them, the citizenry as a whole . . . The lessons taught by this process are essentially those of fairness, equal treatment, and impartiality—the fundamental notions on which our democracy is based . . . When viewed in this light, jury service can be seen as an educational process which builds a greater sense of community and fills our citizens with a spirit of personal involvement in and commitment to their society. It educates our citizens and at the same time strengthens the entire social fabric.[143]

Echoing this theme, the Supreme Court in *Powers v. Ohio* directly linked jury service to political participation, reasoning:

> Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people . . . . It "affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law." . . . . Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.[144]

---

140. State v. Allen, 653 N.E.2d 1173, 1177 (N.Y. 1995) (describing jury service as "a privilege and duty of citizenship").

141. Forde-Mazuri, *supra* note 136, at 364 ("Through deliberation with jurors from different groups or classes, jurors on representative panels learn to work together toward the shared goal of determining guilt or innocence in accordance with law and the community's sense of justice.").

142. Anderson v. Miller, 346 F.3d 315, 325 (2d Cir. 2003) ("For the Framers . . . the criminal jury was much more than an incorruptible fact finder. It was also, and more fundamentally, a political institution embodying popular sovereignty and republican self-government. Through jury service, citizens would learn their rights and duties, and actively participate in the governance of society." (quoting AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 121–22 (1997))); United States v. Kandirakis, 441 F. Supp. 2d 282, 314 (D. Mass. 2006) ("The criminal jury is not simply a machine into which we insert data and out of which come 'facts' for judges' use in legal rulings. It is also—and more importantly—an independent source of power in our constitutional system.");

143. Mitchell v. Superior Court (People), 729 P.2d 212, 230 (Cal. 1987), *vacated on other grounds by* Mitchell v. Superior Court (People), 49 Cal. 3d 1230 (1989).

144. 499 U.S. 400, 407 (1991) (quoting Duncan v. Louisiana, 391 U.S. 145, 187 (1968) (Harlan, J., dissenting)).

Courts have recognized that the jury system "provides an opportunity for lay citizens to become both pupils of and participants in our legal and political system."[145] Like any school, the learning process is not simply one of receiving information, but learning to apply it to real problems and situations. So conceived by these courts, the jury plays an educational role that encourages constitutional awareness.

C. Creation of Constitutional Awareness

The ideal of the jury as a space for constitutional education had significant effects on its reputation and power in American society. As stated, it justified a level of autonomy that equaled the other branches of government.[146] It also symbolized a linkage between ordinary citizens, educated citizens, and government that strengthened the legitimacy of the institution.[147] This shared constitutional knowledge of the jury's role and its connection to constitutional principles elevated the institution of the jury in society.[148]

The ideal also had effects on the self-awareness of the jury. Primarily, this Article argues that this constitutional education meant that jurors understood their role and connection to the constitutional principles of jury service. As will be discussed in the next section, this constitutional awareness has been stunted in modern juries and needs to be examined. Before moving to that next section, however, it is necessary to develop a working definition of "constitutional awareness" for jurors.

---

145. United States v. Ibanga, 454 F. Supp. 2d 532, 541 (E.D. Va. 2006) ("The jury as an institution not only guards against judicial despotism, but also provides an opportunity for lay citizens to become both pupils of and participants in our legal and political system."), *vacated on other grounds by* United States v. Ibanga, 271 F. App'x. 298 (4th Cir. 2008); *see also* Gannett Co. v. De Pasquale, 443 U.S. 368, 428–29 (1979) (recognizing the public interest in "the manner in which criminal justice is administered"); Amar, *The Bill of Rights*, *supra* note 6, at 1190.

146. *See* Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1846 (1997).

147. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 94–95 (1998).

148. Of course, as will be discussed in the next section, those white, male, propertied citizens were only a small subset of the potential American citizenry and the reality of justice for non-white, male, property owners was starkly inadequate. *See, e.g.*, Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1145 (1993); James Forman Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 916 (2004); Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1096 (1995).

While necessarily an over-generalization about early jury service, the ideal of constitutional awareness can be summarized as having six interrelated parts. First, juries understood that they were part of the constitutional structure.[149] Juries were expected to hold the legal system accountable as well as the individual defendant or parties to a legal action.[150] Second, juries understood that their role was participatory.[151] In explicit terms, the Founding generation saw juries as the participatory equivalent of democratic voting.[152] Third, juries embodied egalitarian principles.[153] Within the obviously undiverse reality of the times, juries promoted equality in voting (one person, one vote), equality in opinion, and equality in status.[154] Fourth, rules of due process promoted fairness and protections against arbitrary government actions.[155] Fifth, the jury was expected to deliberate to a decision.[156] Deliberation was a prized

149. *See supra* note 9 and accompanying text.

150. *See supra* note 53 and accompanying text.

151. *See supra* note 4 and accompanying text.

152. Amar, *Jury Service*, *supra* note 6, at 218 ("Jury service was understood at the time of the founding by leaders on all sides of the ratification debate as one of the fundamental prerequisites to majoritarian self-government."); *see also* Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 916–17 (1998) (arguing that "the architects of the Reconstruction Amendments linked voting and jury service textually, conceptually, and historically and that these two should therefore be seen as part of a package of political rights and should be treated similarly for many constitutional purposes").

153. As Tocqueville noted, "The jury system as it is understood in America appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage." *See* TOCQUEVILLE, *supra* note 13, at 282–83; Joe S. Cecil, Valerie P. Hans & Elizabeth C. Wiggins, *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 728 (1991) ("Lay participation in debates concerning public policies is a touchstone of a democracy. The Constitution enshrines this value not only by providing for a system of elected representatives, but also by recognizing the right to trial by jury.").

154. Gretchen Ritter, *Jury Service and Women's Citizenship Before and After the Nineteenth Amendment*, 20 L. & HIST. REV. 479, 481 (2002) ("In the United States, jury service is historically tied to voting. In most states, a common qualification for jury service was the status of elector—that is, a citizen with the right to vote. This also fit with the nineteenth-century woman rights movement's conception of citizenship. As equal voting citizens, women would obtain all of the rights and privileges of other first class citizens, including the right to serve on a jury.").

155. *See* Duncan v. Louisiana, 391 U.S. 145, 155–56 (1968) (detailing how juries protect against arbitrary or unfair prosecutions).

156. Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 701 (2001); Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions*, 6 S. CAL. INTERDISC. L.J. 1, 40 (1997).

constitutional value that included the ability to reason, to communicate with others, and to debate and decide.[157] Finally, jurors recognized their educative role.[158] Their identity as citizen emerged from the lessons of jury service. Jurors saw themselves as democratic citizens educated to make decisions in a constitutional system.

From the perspective of a judge or jury scholar, an awareness of these concepts is unexceptional. Yet, strikingly, today's jurors are neither instructed about these foundational principles, nor the jury's constitutional role in practicing those principles. Worse, modern jurors cannot, like their historical counterparts, be assumed to know about these principles from formal education or life experience. This gap in modern constitutional awareness is the subject of the next section.

II. THE JURY "IDEAL" TODAY

The ideal jury may never have existed, and it certainly does not exist today. Courts have stripped juries of the historic power to decide the law and have limited their role through jury instructions.[159] Juries today are problem-solvers and fact-finders that are asked to play a discrete task in the larger workings of the criminal justice system.[160] This shift in power has been well canvassed by others, so this Article will not retread this history of jury diminution.[161] Instead, this section focuses on how this power transfer has included a shift in the educative role of the jury and on the impact this has had on the public perception of the jury. More precisely, this section asks

157. REID HASTIE ET AL., INSIDE THE JURY 45–58 (The Lawbook Exchange, Ltd. 1983); Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 DEL. L. REV. 2, 23 (2001).

158. Amar, *The Bill of Rights*, *supra* note 6, at 1186 ("The jury was also to be informed by judges—most obviously in the judges' charges . . . . Like the church and the militia, the jury was in part an intermediate association designed to educate and socialize its members into virtuous thinking and conduct.").

159. *See* Sparf v. United States, 156 U.S. 51, 90–91 (1895); Middlebrooks, *supra* note 33, at 334–35; *The Changing Role of the Jury*, *supra* note 84, at 189–91.

160. *See supra* text accompanying note 9 (describing "role of the jury" instruction).

161. *See, e.g.*, Blinka, *supra* note 25, at 179–81; McClanahan, *supra* note 33, at 813–16; Smith, *supra* note 33, at 447–49. Of course, the role of the jury has made a limited resurgence in terms of deciding all of the facts in criminal cases. *See, e.g.*, United States v. Booker, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004); Ring v. Arizona, 536 U.S. 584 (2002); Apprendi v. New Jersey, 530 U.S. 466 (2000).

whether, compared to the jurors of the Founding era, today's jurors are more or less educated about the constitutional role of the jury, and whether that difference has had any effect.

At the outset, it is necessary to state that, empirically, there is no definitive answer to this question as it relates to jurors. There have been no national research studies to evaluate constitutional literacy among jurors. As will be discussed, while national studies on constitutional literacy have yielded disappointing results in terms of substantive knowledge, none of these reports can be directly tied to those on jury service.[162] Further, there is no necessary correlation between an unimpressive understanding of basic civics and competent jury verdicts. In fact, due to mandatory public schooling, the increased diversity of the jury pool, and the general increase in information in a digital age, today's jury may well be more educated about many subjects (even if not foundational constitutional principles) compared to a founding-era jury.

This section does not seek to judge the relative merits of juries in different eras, but rather, to point out how the different compositions and different roles reveal a gap in constitutional awareness. Today's jury is more diverse and more democratic, but did not experience the same lessons of constitutional formation (and cannot be assumed to bring to jury service the same level of constitutional knowledge).[163] In addition, today's jury is called on to perform a different role with more limitations than earlier juries. The result is that the naturally arising space created for constitutional discussion and reflection no longer exists in its traditional form. Whether because of or in spite of these changes, society's image of the jury no longer rises to a level of reverence and, on occasion, invites disappointment and outrage.[164] The question raised is whether this modern jury can be improved with an additional focus on educating jurors about their constitutional role while on jury duty.

A. Democracy, Diversity, and Juror Education

In practice today, the jury represents the full diversity of

162. *See infra* Part II.A.

163. *See infra* notes 169–83 and accompanying text.

164. *See, e.g.*, Steven L. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U.L. REV. 190, 191–92 (1990).

American citizenship.[165] *De jure* and *de facto* barriers to jury service based on race,[166] gender,[167] and class[168] have been

165. This statement necessarily must be qualified by the reality that certain segments of the population are not represented on jury service. Felons and individuals without a fixed address are two obvious groups regularly excluded from jury summons.

166. *See* Julius L. Chambers, *Thurgood Marshall's Legacy*, 44 STAN. L. REV. 1249 (1992); James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 900–02 (2004); Mark V. Tushnet, *The Jurisprudence of Thurgood Marshall*, 1996 U. ILL. L. REV. 1129 (1996). With the enactment of The Jury Selection and Service Act of 1968, Congress eliminated racial discrimination in federal jury trials. *See* JEFFREY ABRAMSON, WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 99–100 (2001). By mandating a random selection method for jurors, this Act and the state equivalents have dramatically widened and diversified the jury pool. *See* Strauder v. West Virginia, 100 U.S. 303, 306 (1880); Shari Seidman Diamond, *Beyond Fantasy and Nightmare: A Portrait of the Jury*, 54 BUFF. L. REV. 717, 733 (2006) ("The modern American jury is the product of a multi-stage selection process that typically begins with a list of potentially eligible jurors drawn from voter registration lists and often supplemented by individuals holding drivers' licenses in the general geographic area where the court sits. If the list has not been recently updated, it becomes less representative of the population from which it is drawn.").

167. The battle for gender equality in jury service began before the Women's Suffrage Movement and lasted well past the passage of the Nineteenth Amendment. *See* JoEllen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA WOMEN'S L.J. 103, 126–38 (1994); Ritter, *supra* note 154, at 497–500; Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 968–76 (2002). It was not until 1975 that the Supreme Court invalidated gender discrimination in jury selection. Taylor v. Louisiana, 419 U.S. 522 (1975). In *Taylor*, the Court recognized that women could not be excluded from jury venires, invalidating the few state laws that still had antiquated jury exemption procedures on the books. *See id.* at 537–38. Today the ideal of racial and gender diversity in the jury venire is constitutionally required by the Fourteenth Amendment's equal protection clause. *See* Jeffrey S. Brand, *The Supreme Court, Equal Protection, and Jury Selection: Denying that Race Still Matters*, 1994 WIS. L. REV. 511, 518 (1994); Harden, *supra* note 34, at 247–57.

168. The movement toward diversity has also meant a rejection of property requirements and other class based considerations for jury service. *See* Nancy Gertner, *Juries and Originalism: Giving "Intelligible Content" To the Right To A Jury Trial*, 71 OHIO ST. L.J. 935, 939–40 (2010). State by state, the requirement of property ownership has been repealed. *See* Deiss, *supra* note 66, at 350. The Supreme Court has also rejected class-based criteria, such as laws that precluded non-salaried workers from serving on a jury. Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946). ("[R]ecognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system."). The result of federal, state, and judicial intervention is a representative cross-section ideal that strives for a diverse jury venire. Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy*, 6 PSYCHOL. PUB. POL'Y & L. 788, 792 (2000) ("[W]ith the increased representativeness of the jury pool and the growing prevalence of one-day/one-trial systems of jury service, America has gone a great distance toward full representativeness of the venire in the past few decades.").

broken down over two hundred years.

This expansion of jury access to mirror all eligible citizens has had a tremendously positive effect on the legitimacy of the jury system and has improved its everyday operations.[169] Jurors are now more diverse, bringing different life experiences and skills into the jury room.[170] Jury decisions incorporate these new perspectives.[171] Jury deliberations and verdicts can be said to more appropriately reflect community sentiment.[172]

At the same time, diversity has also resulted in a more educationally diverse jury pool.[173] An educationally diverse jury pool has not necessarily meant more or better educated jurors. In fact, one consequence of expanding the jury pool has been to lower the average education level of the average jury. Further, statistical studies show that a greater percentage of highly educated jurors are struck during jury selection, making the resulting jury on average less educated than the overall venire.[174]

This Article focuses on one component of that educational reality—constitutional knowledge. The national statistics on constitutional literacy in America should raise concerns in the

169. Samuel R. Sommers & Pheobe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1022 (2003).

170. Kenneth S. Klein, *Unpacking the Jury Box*, 47 HASTINGS L.J. 1325, 1326–28 (1996).

171. Valerie P. Hans & Neil Vidmar, *The Verdict on Juries*, 91 JUDICATURE 226, 227 (2008) ("One of the most dramatic and important changes over the last half century is the increasing diversity of the American jury. Heterogeneous juries have an edge in fact finding, especially when the matters at issue incorporate social norms and judgments, as jury trials often do.").

172. *See* Sommers & Ellsworth, *supra* note 169, at 1024 ("According to an informational explanation, the nature of the informational exchange in the jury room (i.e., the content of the discussion during deliberations) varies with the race of the jurors involved. For example, racial composition might influence the breadth of information considered by juries. Jurors of different races not only tend to enter deliberations with different verdict preferences, but they may also bring to the jury room different personal experiences, social perspectives, and concrete knowledge. Therefore, racially heterogeneous juries might be exposed to a wider range of viewpoints and interpretations than jurors on homogeneous juries.")

173. Due to the fair cross-section requirement, juries are more educationally diverse. Friedland, *supra* note 164, at 193 ("[J]uries are composed of people from every walk of life, color, creed, and, perhaps most importantly, every level of intelligence and education."); Honorable J. Scott Vowell, *Alabama Pattern Jury Instructions: Instructing Juries in Plain Language*, 29 AM. J. TRIAL ADVOC. 137, 141 (2005) (commenting on the wide variance in formal education in jurors).

174. Albert W. Alschusler, *Explaining the Public Wariness of Juries*, 48 DEPAUL L. REV. 407, 408 (1998) (explaining "the public who serve as jurors are less educated than the norm").

jury context. Study after study[175] and article after article[176] have exposed a fundamental ignorance about basic constitutional principles.[177] Citizens do not know that there are three branches of government,[178] how many Justices serve on the Supreme Court,[179] what protections the Bill of Rights contains,[180] and are ignorant of the substance of basic

175. *See infra* note 176 and accompanying text.

176. LARRY J. SABATO, A MORE PERFECT CONSTITUTION: 23 PROPOSALS TO REVITALIZE OUR CONSTITUTION AND MAKE AMERICA A FAIRER COUNTRY 223 (2007); Brian Braiker, *Dunce-Cap Nation*, NEWSWEEK, Sept. 4, 2007, http://www.thedailybeast.com/newsweek/2007/09/04/dunce-cap-nation.html; Eric Lane, *Saving Democracy With Civic Literacy in America 101*, UTNE READER, (Jan.–Feb. 2009), *http*://www.utne.com/Politics/America-101-Civic-Literacy-Saving-Constitutional-Democracy.aspx; Julia Preston, *New Test Asks: What Does 'American' Mean?*, N.Y. TIMES, (Sept. 28, 2007), www.nytimes.com/2007/09/28/washington/28citizen.html; Andrew Romano, *How Dumb Are We?*, NEWSWEEK, (Mar. 20, 2011), http://www.thedailybeast.com/newsweek/2011/03/20/how-dumb-are-we.html.

177. Mary Sue Backus, *The Adversary System Is Dead; Long Live the Adversary System: The Trial Judge As the Great Equalizer in Criminal Trials*, 2008 MICH. ST. L. REV. 945, 988 (2008) ("There is no question that there is a gaping ignorance among the electorate as to the functioning of government in general, and the courts in particular. A variety of national studies indicate that American students know little about American history or concepts fundamental to our democracy. . . ."); Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 156 (1995) ("Among a group of seventy high school student leaders from all over the country, only seven had even *heard* of the *Federalist Papers*." (citing WILLIAM J. BENNETT, NAT'L ENDOWMENT FOR THE HUMANITIES, TO RECLAIM A LEGACY: A REPORT ON THE HUMANITIES IN HIGHER EDUCATION 21 (1984))).

178. Lane, *supra* note 176 ("Forty-one percent of respondents to the National Constitution Center survey were not aware that there were three branches of government, and 62 percent couldn't name them; 33 percent couldn't even name one.").

179. PENN, SCHOEN & BERLAND ASSOCS., C-SPAN SUPREME COURT SURVEY (July 9, 2009) (stating that 51 percent of respondents did not know or got wrong the number of justices on the Supreme Court); ANNENBERG PUB. POLICY CTR., PUBLIC UNDERSTANDING OF AND SUPPORT FOR THE COURTS: 2007 ANNENBERG PUBLIC POLICY CENTER JUDICIAL SURVEY RESULTS (2007) ("Only one in seven Americans (15 [percent]) can correctly name John Roberts as Chief Justice of the United States; 78 [percent] don't know. Two-thirds of Americans (66 [percent]) know at least one of the judges on the Fox television show American Idol. In a 2006 survey, less than one in ten (9 [percent]) could identify the Chief Justice.").

180. Michael Abramowicz, *Constitutional Circularity*, 49 UCLA L. REV. 1, 51 n.210 (2001) (discussing "a Roper poll asking Americans what the Bill of Rights was. Only 21 percent of Americans were correctly able to identify the Bill of Rights as part of the Constitution. Thirty-five percent claimed to have heard about it but could not identify it in any way, and 27 percent admitted that they had never heard of it. Four percent misidentified it but revealed that they had some idea about its content, while another 5 percent misidentified it while indicating no knowledge about its content, and 8 percent gave answers otherwise classified or no answers." (citation omitted)).

constitutional rights.[181] While citizens know what juries do, most do not know why the jury right was included in the Constitution.[182]

Compounding general constitutional illiteracy, civics classes have been stripped from high school curricula, limiting any formal opportunity to learn the subject.[183]

> Civics and current events courses were once common, even required, in American schools. But since the late 1960s, civic education in the country has declined. The main culprit in this sad tale is our educational system. Since the late 1960s, fewer and fewer schools require civics courses, and fewer include civic components in their American history courses.[184]

"More than half the states have no requirement for students to take a course—even for one semester—in American government."[185] While several national educational projects have been initiated by nonprofit organizations and larger civic foundations, these private efforts have not stopped the decline in mastery of American civics.[186] The unpleasant reality is that

---

181. FIRST AMENDMENT CTR., STATE OF THE FIRST AMENDMENT (2009) ("Thirty-nine percent of Americans could not name any of the freedoms in the First Amendment."); *see also Startling Lack of Constitutional Knowledge Revealed in First-Ever National Poll*, NAT'L CONSTITUTION CTR., http://ratify.constitutioncenter.org/CitizenAction/CivicResearchResults/NCCNationalPoll/index.shtml (last visited Sept. 6, 2012) (stating that "more than half polled do NOT know the number of US Senators . . . only 6 [percent] can name all four rights guaranteed by the First Amendment . . . 84 [percent] incorrectly believe that the Constitution states that 'all men are created equal'").

182. While this assertion lacks empirical support from studies or formal proof, from experience as a trial lawyer, I think it a fair assumption that the history of, and the reason for the jury is not widely known among the citizenry.

183. Lane, *supra* note 21, at 15–16 ("Various surveys have evidenced this decline. One in 1976 'found that civic competence diminished markedly from 1969 to 1976.' . . . . Another in 1988 found that civic knowledge had continued declining since 1976, and another in 2002 found 'that the nation's citizenry is woefully under-educated about the fundamentals of our American Democracy.'").

184. Lane, *supra* note 176.

185. Backus, *supra* note 177, at 988–89 (quoting Stephen Goldsmith, *The State of Our Civic Union*, *in* NATIONAL CONFERENCE ON CITIZENSHIP: REPORT ON THE 2005 ANNUAL CONFERENCE 7, 8, *available at* http://www.civicenterprises.net/MediaLibrary/Docs/national_conference_on_citizenship_2005.pdf).

186. There are many constitutional literacy projects that have been developed. For example, the Washington College of Law at American University developed the Marshall-Brennan Constitutional Literacy Project to teach constitutional law to high school students. Justice O'Connor developed an internet-based civics project entitled Icivics. The Center for Civic Education, the National Alliance for

juries today are composed of individuals who have less understanding about the constitutional role of juries than in the past because they have a weaker understanding of the Constitution.

While the national picture of constitutional illiteracy has been exposed, no one has seriously suggested altering the eligibility requirements of jurors.[187] Primarily, this reticence derives from the legitimate concern that any limitation on jury access would replicate the discriminatory practices that kept certain citizens off juries in the past.[188] Literacy tests, even tests involving constitutional knowledge were used as discriminatory screening mechanisms to restrict democratic participation.[189] Concerned about repeating the mistakes of the past, the decline of constitutional awareness by jurors has been left unaddressed by society.

The benefits of jury diversity plainly outweigh the costs to constitutional awareness.[190] Yet, if acknowledged as a result of

---

Civic Education, the Civic Missions of the Schools, the American Bar Association, the National Constitution Center in Philadelphia, and the National Archives in Washington D.C., are all actively involved in promoting civic knowledge and awareness.

187. The Supreme Court has recognized the tension of wanting a representative cross-section of jurors but also the need to retain a method for determining competence of those jurors. Glasser v. United States, 315 U.S. 60, 85–86 (1942) ("[T]he proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class. If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted.").

188. Because of concern with jury competence, "[s]election systems in several jurisdictions were overhauled in order to boost the education levels of jurors." King, *supra* note 57, at 2692 (responding to criticisms like those voiced in the article *The Unfit Juror*: "'America has long suffered from the false teaching that every citizen is the equal of every other citizen, and by right is entitled to perform any service or hold any office of the state.' Better care had to be taken, the author said, to 'screen out unfit jurors in order to improve the caliber of juries'" (quoting Albert S. Osborn, *The Unfit Juror*, 17 J. AM. JUDICATURE SOC'Y 113 (1933))).

189. *See* G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty,* 85 WASH. L. REV. 425, 444 (2010) (describing the requirement that voters recite the Preamble to the United States Constitution before being added to the voting rolls, and thus the jury venire).

190. One need not re-litigate the hard fought battles for equality to recognize that democratic diversity has improved society overall. A pluralistic America has resulted in numerous benefits beyond the jury sphere. *Cf.* Franklin Strier, *The*

the democratization of the jury (in an era of reduced basic civics education and constitutional understanding), this does not mean the problem should go unaddressed. Specifically, this Article proposes reclaiming the space for constitutional dialogue in a manner that raises the constitutional awareness of all jurors. As will be discussed later, this is what constitutionally focused jury instructions will accomplish.

B. The Role of the Fact Finder and Juror Education

By some accounts, the fact that jurors are less educated about constitutional issues matters less today than in the Founding era.[191] This is because the role of the juror has been significantly restricted.[192] Juries are no longer asked to interpret the law.[193] "Today, with a few notable exceptions, it is well-accepted that the judge instructs the law, and the jury determines the facts in evidence and applies the law as instructed."[194]

This change in role began in the nineteenth century[195] with several prominent judges arguing to restrict juries' traditional power to decide the law.[196] Judges were joined in

Educated Jury: A Proposal for Complex Litigation, 47 DEPAUL L. REV. 49, 59 (1997) (stating that some scholars have proposed a requirement of an educated jury for certain cases: "The major premise of the educated jury proposal is utility: All other factors being equal, the knowledge, discipline and cultivated intellect gained from a college education should render one better equipped to execute the juror's fact-finding and application-of-law tasks. This is not elitism; it is merely functionalism."); *id.* at 60 ("In sum, a predominantly college-educated jury, having superior capacity for understanding the relevant facts and law in complex cases, would render better informed and, thus, more just verdicts.").

191. As will be discussed in this section, because the responsibilities of the jury have been limited significantly, it can be argued that there is less need for educated jurors.

192. Jonathan Lahn, *The Demise of the Law-Finding Jury in America and the Birth of American Legal Science: History and Its Challenge for Contemporary Society*, 57 CLEV. ST. L. REV. 553, 556–59 (2009).

193. Harrington, *supra* note 18, at 435–37; Howe, *supra* note 33, at 583–84.

194. Judge Robert M. Young, *Using Social Science to Assess the Need for Jury Reform in South Carolina*, 52 S.C. L. REV. 135, 147 (2000) (recognizing that Georgia, Maryland, and Indiana have state law protections for jurors to decide the law, but they are in large measure ignored).

195. United States v. Battiste, 24 F. Cas. 1042, 1043 (C.C. D. Mass. 1835) (No. 14,545); McClanahan, *supra* note 33, at 820. Alschuler & Deiss, *supra* note 5, at 910; *The Changing Role of the Jury*, *supra* note 84, at 170 (tracing the shift of juries in the nineteenth century as including both a limitation on the jury to determine the law, but also a limitation on the judge to comment on the law).

196. R. J. Farley, *Instructions to Juries: Their Role in the Judicial Process*, 42 YALE L. J. 194, 202–03 (1932) (citing Justice Story as a vocal critic).

their critiques by prominent national figures who took aim at the jury,[197] describing jurors as "miserable wretches,"[198] "drifters on the tide of life's great activities,"[199] or "nondescripts of no character, weak and amenable to every breeze of emotion, however maudlin or irrelevant to the issue."[200] The Supreme Court formally stripped jurors of the right (if not the power) to decide the law in *Sparf v. United States*, declaring that the jury should no longer be instructed on their ability to interpret the law.[201] Jurors were fact finders, nothing more. State courts adopted this view, and it exists as the current understanding of the jury's role.[202]

Scholars have offered several justifications for this change in jury role. Some scholars have argued that the change resulted from judges and lawyers who sought more control over trial procedures.[203] Both the professionalism in the legal field and the increased institutionalization of the legal system led to increased demands to retain this newly developed power.[204] At

197. *See* Victoria A. Farrar-Myers & Jason B. Myers, *Echoes of the Founding: The Jury in Civil Cases as Conferrer of Legitimacy*, 54 SMU L. REV. 1857, 1881 (2001); Forde-Mazrui, *supra* note 136, at 354 ("Despite its crucial role, the jury is criticized as being inefficient, incompetent, confused, biased, and discriminatory.").

198. Alschuler & Deiss, *supra* note 5, at 881 ("In Kentucky in 1858, a critic described jurors as 'miserable wretches.'" (quoting EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE NINETEENTH-CENTURY AMERICAN SOUTH 113 (1984))).

199. A West Virginia Bar publication in 1896 asked: "What freeman ever dreamed in ancient days, and in the formative process of our inherited system, that his rights would be secured against the aggressions of the official class by a jury of hangers on, dependents, drifters on the tide of life's great activities, desirous of drawing as a prize the pittance allowed by law for such service." *The Federal Jury*, 3 W. VA. B. 11 (1896); Middlebrooks, *supra* note 33, at 411 n.281.

200. Phoebe C. Ellsworth, *Jury Reform at the End of the Century: Real Agreement, Real Changes*, 32 U. MICH. J.L. REFORM 213, 221 (1999); Thomas L. Fowler, *Filling the Box: Responding to Jury Duty Avoidance*, 23 N.C. CENT. L.J. 1, 3 (1997–1998) ("In 1803, the American edition of Blackstone's Commentaries reported that, after the first day or two, juries hearing civil lawsuits in the rural areas of Virginia were 'made up, generally, of idle loiterers about the court . . . the most unfit persons to decide upon the controversies of suitors.'" (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES 64 (St. George Tucker ed. 1803))).

201. Sparf v. United States, 156 U.S. 51, 90–91 (1895).

202. Alschuler & Deiss, *supra* note 5, at 910.

203. Smith, *supra* note 33, at 445 ("[O]ne must not forget that two powerful interest groups had a vested interest in seeing certain aspects of the jury's power curtailed. Both judges and lawyers would fill the vacuum left by the erosion in the jury's power.").

204. *See* Middlebrooks, *supra* note 33, at 355 ("Lawyers and judges eager to gain professional prestige and alliances with economically powerful commercial parties attempted to represent the law as an objective, neutral, and apolitical system.").

the same time, concerns with the level of competence of ordinary jurors grew, providing the justification for judges to assert more formal control.[205] In addition, legal institutions had to respond to a developing national economic system[206] that required stability and predictability.[207] Certainly in the civil context, economic interests favored the appearance of rationality that came from judges controlling the decisions of juries.[208] These economic pressures paralleled scholarly theories that prioritized legal formalism[209] and rejected the earlier influence of natural law.[210] Some scholars directly link a diminution in role to the democratized jury pool, arguing that increased jury diversity led to decreased jury power.[211] Others have blamed the complexity of legal claims that are outside the competence of most citizens.[212] No matter the cause for this diminished role, the result is the same—jurors now have a more limited role.

Current jury instructions contribute to the prevailing idea

---

205. Landsman, *supra* note 107, at 607 ("The judiciary came to believe that the jury was incapable of comprehending the new industrial reality. Judges also assumed that jurors were irremediably biased against corporate defendants. Based on these assumptions, judges sought to curtail the jury's authority.").

206. Economic development, which rebalanced the relationship between debtors and creditors, also led to a question of the role of the jury. Middlebrooks, *supra* note 33, at 408 (citation omitted).

207. *Id.* at 355 ("Economic shifts led to the need for certain and predictable rules of law.").

208. *See id.*

209. *See id.* at 410.

210. *See id.* at 408 (citation omitted).

211. Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Power of the Civil Jury*, 80 CORNELL L. REV. 325, 355 (1995); Nancy S. Marder, *Introduction to the Jury at a Crossroad: The American Experience*, 78 CHI.-KENT L. REV. 909, 923 (2003).

212. Alschuler & Deiss, *supra* note 5, at 916 ("Over the course of the nineteenth century, as American society grew more diverse and jury membership more inclusive (and as the legal issues presented to the courts grew more complicated), the belief that jurors' consciences would yield sound, shared, consistent answers to legal questions undoubtedly faded."); Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1359 (1979) (concluding that jurors did not understand the jury instructions); Friedland, *supra* note 164, at 191 ("In the highly publicized criminal fraud, racketeering, and tax case of former automaker John DeLorean, the jury apparently misinterpreted the court's instructions regarding the need for jury unanimity."); *id.* at 197 ("Jurors also have been unable to follow the instructions given to them by the court. Several studies have suggested that jurors do not understand either the specific words used in the instructions or the overall meaning, disabling the jurors from adequately applying those instructions to the evidence in a case."); *see also* Cecil, Hans & Wiggins, *supra* note 153, at 728.

that the role of the juror is limited.[213] Arising in the 1930s as a reaction to the new role of juries, these instructions create a framework for controlling jury decision-making.[214] Most standard jury instructions provide instruction on the "role of the jury."[215] In almost all cases, the role is limited to finding the facts.[216] For example, the instruction in New York State reads: "We are both judges in a very real sense. I am the judge of the law and you, Ladies and Gentlemen, are the judges of the facts. I now instruct you that each of you is bound to accept the law as I give it to you."[217] This narrowed responsibility is a direct consequence of the *Sparf* decision and subsequent

213. Marder, *supra* note 111, at 451; Judith L. Ritter, *Your Lips Are Moving . . . But the Words Aren't Clear: Dissecting the Presumption that Jurors Understand Instructions*, 69 MO. L. REV. 163, 164–65 (2004); Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1102–03 (2001) (discussing problems in comprehension).

214. Strier, *supra* note 190, at 52–53 (recognizing that the first standardized jury instructions were developed in 1938, by "a committee of California judges and lawyers [who] published the Book of Approved Jury Instructions."); Tiersma, *supra* note 213, at 1082–84 (history of jury instructions).

215. Each of the fifty states, the federal courts, and the District of Columbia have now established standard jury instructions. *See, e.g.*, ARK. SUP. CT. COMM. ON CRIMINAL JURY INSTRUCTIONS, ARKANSAS MODEL JURY INSTRUCTIONS—CRIMINAL AMCI 2d 101 ("It is your duty to determine the facts from the evidence produced in this trial. You are to apply the law as contained in these instructions to the facts and render your verdict upon the evidence and law."); JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTIONS 200 ("You must decide what the facts are. It is up to all of you, and you alone to decide what happened, based only on the evidence that has been presented to you in this trial. . . . You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions."); 5 CONN. PRAC., CRIMINAL JURY INSTRUCTIONS § 2.1 (4th ed.) ("To put it briefly, it is my duty to state to you the rules of law involved in the decision of this case and it is your duty to find the facts."); 2 GA. JURY INSTRUCTIONS—CRIMINAL **§** 0.01.00 ("The jury has a very important role. It is your duty to determine the facts of the case and to apply the law to those facts. I will instruct you on the laws that apply to this case, but you must determine the facts from the evidence."); 1 HAWAII STANDARD CRIMINAL JURY INSTRUCTIONS No. 3.01 (2011) ("You are the judges of the facts of this case. You will decide what facts were proved by the evidence. However, you must follow these instructions even if you disagree with them."); SUP. CT. COMM. ON JURY INSTRUCTIONS, ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL 1.01 (4th ed.) ("It is your duty to determine the facts and to determine them only from the evidence in this case. You are to apply the law to the facts and in this way decide the case."); 10 MINN. PRAC., JURY INSTRUCTION GUIDES—CRIMINAL CRIMJIG 3.01 (5th ed.) ("It is your duty to decide the questions of fact in this case. It is my duty to give you the rules of law you must apply in arriving at your verdict.").

216. *See generally supra* text accompanying note 215.

217. 1 HOWARD G. LEVENTHAL, CHARGES TO JURY & REQUESTS TO CHARGE IN CRIMINAL CASE IN N.Y. § 3:2.

interpretations.[218]

The result is to eliminate any need to reflect on the jury role. It was in determining the law that jurors were directly asked to give moral weight to the decision. Many juries, because the jurors were aware of the sentencing effects of their verdict, redefined the law in order to reach a particular outcome.[219] The latitude given meant that jurors would ask the questions: why are we here, what is justice, and what is our role in defining justice? By defining the role of the jury as merely a fact-finding enterprise, the instructions obviate any need to discuss the jury role in the constitutional system. A juror does not have to think about what a juror does; he or she just has to complete the task presented. A juror does not have to understand why the jury is tasked to take on this particular adjudicatory role. The jury need not discuss what values the jury system promotes. The organically arising opportunity to discuss the participatory system of jury service or the principles embedded in the system has been lost and little has been offered to replace it.

C. Reexamining the Jury Today and the Effect on Juror Education

Today's jury involves a different juror and a different role. Jury instructions restricting the role of the jury now mirror the limited role delineated by Supreme Court precedent.[220] The question remains whether this limited role affects the educational function of the jury. In other words, since we expect jurors to know less and to do less, does that change how jurors participate in the jury system and learn from the jury

218. There are a few states that allow some latitude in informing jurors about the jury's right to interpret the law. *See, e.g.*, ALASKA CRIMINAL PATTERN JURY INSTRUCTION 1.01 ("You have been selected as jurors in this case. Before you take the juror's oath, I want to remind you how serious and important it is to be a member of a jury. Trial by jury is a fundamental right. In a jury trial, the case is decided by citizens who are selected fairly, who are not biased, and who will try their best to give a fair verdict based on the evidence."); IND. PATTERN JURY INSTRUCTIONS CRIMINAL INSTRUCTION NO. 13.03 (2012) ("Under the Constitution of Indiana you have the right to determine both the law and the facts. The Court's instructions are your best source in determining the law."); MD. CONST. DECLARATION OF RIGHTS art. 23 ("In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.").

219. Kemmitt, *supra* note 11, at 101–02.

220. *See supra* Part II.B.

experience? More precisely, does this limited instruction, combined with a less constitutionally educated population, mean that jurors miss the important constitutional teaching moment of jury service?

The working hypothesis of this Article is that a lack of instruction on the constitutional principles behind the jury system and a less constitutionally literate population has led to a lack of contextual understanding of the role of the jury.[221] Jurors are not told that they are in the public schoolhouse for citizens. Jurors unfamiliar with Tocqueville's theories would not be aware of the constitutional lessons at play. Current jury instructions do not focus on teaching constitutional principles.[222] While jurors are instructed to deliberate, they are not instructed about why deliberation matters. Jurors are instructed on burdens of proof and beyond a reasonable doubt, but not the underlying idea of due process. *Voir dire*, rules of evidence, and procedural protections control the trial, but jurors are not taught about the constitutional roots of fairness. Rules enforcing constitutional equality govern jury selection, even vesting the right to serve on a jury as a "juror's right,"[223] but jurors are not told about this right. The entire experience is a participatory constitutional act—from summons to excusal—but the jury instructions never explain this reality.

This, in turn, has led to three interrelated problems. First, this ignorance weakens the institution of the jury, its reputation, its legitimacy, and the self-perception of the citizen-juror. Second, the lack of constitutional awareness disconnects the jury experience from the larger participatory, democratic structure. Third, this lack of constitutional reflection may, in fact, unnecessarily limit jury deliberations, or at least change those deliberations from those of the Founding jury ideal. This assessment of the modern jury is, of course, necessarily an overstatement; some jurors are surely aware of the constitutional role of the jury.[224] The point here is less a challenge to the citizens asked to serve and more that the legal system itself has not taken steps to acknowledge this

221. Cronan, *supra* note 28, at 1188 ("A growing mountain of empirical research is concluding, with shocking accord, that jurors retain alarmingly low comprehension of the most fundamental aspects of their roles.").

222. It is this omission that necessitates this article.

223. *See* Powers v. Ohio, 499 U.S. 400, 409 (1991).

224. Although, from an informal sampling of friends and family, even highly educated lawyers are unfamiliar with the constitutional roots of jury duty and the jury's foundational place in the founding era.

significant absence of constitutional education and diminished space for constitutional discussion during jury service.

In an effort to elevate today's ordinary jurors to meet the level of constitutional awareness of the Founding era, some minimal education through jury instructions should be implemented. In essence, the goal is to replace what had been an organically developed space for constitutional education with a more formal education. As will be discussed in the next two sections, the result will be an effort to raise the constitutional-awareness levels of all sitting jurors. This means figuring out a way to make jury instructions a means of constitutional education for citizens.

III. WHY CONSTITUTIONAL EDUCATION THROUGH JURY INSTRUCTIONS MATTERS

The fundamental questions are: (1) does constitutional awareness improve jury verdicts?; (2) does it improve democratic society?; and (3) are there other benefits to the legal system in ensuring constitutionally-educated jurors? This section answers these questions in the affirmative, arguing that basic understanding about the constitutional role of the jury improves basic constitutional literacy, jury deliberations, jury engagement, democratic engagement, and the reputation and legitimacy of the jury as an institution. In addition, it argues that while nothing can replace a strong civics or legal education, using the moment of jury service as a civic space to educate citizens is a positive first step.

Modern juries, just like their predecessors, still theoretically play the role of civic schoolhouse. Thus, the importance of understanding constitutional values does not diminish even as the role of the jury becomes narrowed. If, as has been demonstrated, jury participation can be a valuable teaching moment, then the court can use this still existing civic space to educate its citizens. The goal is to take the best of the educative qualities of the "ideal juror" and apply it to a democratized and diverse citizenry.

A. Constitutionally-Educated Jurors Will Improve Constitutional Awareness

At a pragmatic level, introducing a measure of constitutional education into the jury process will improve

baseline constitutional awareness. Formally instructing the jury about the constitutional principles underlying the jury process will highlight these lessons for the jury. Like an actual school, the jurors will experience a moment of instruction that will then require them to apply that knowledge to the task at hand. Just as jurors learn about the elements of crimes, jurors can also learn about the constitutional lineage and value of their current role.

While the next two Parts of this Article will examine how this jury education would work in practice, there is little doubt that direct instruction about the Constitution will remedy a measure of the constitutional illiteracy demonstrated in national surveys. Constitutional terms and definitions defining a new constitutional language will be provided to the jury. Attentive jurors would be given a basic overview of how constitutional principles are applied in the jury setting. Reflective jurors will ask themselves more searching questions about how these principles affect the world outside the jury room. Most importantly, the opportunity to discuss and debate these issues in the jury room will be presented through the instructions.

Such a modification, itself, should be considered a positive development. As a goal, it echoes the educational theories of Federal Farmer and Alexis de Tocqueville that jurors will learn during jury service and bring that legal understanding back to the community.[225] As a symbol, it flags that court systems think constitutional understanding is important for citizens. Direct learning reaffirms the notions that jurors are expected to be informed, reflective bodies. Direct instruction adds to a juror's basic civic knowledge.

To be clear, the gap in constitutional literacy is broad and deep.[226] Citizens may have only a limited knowledge of the history or theory behind the American legal system.[227] Jury instructions that simply alert jurors that they are participating within a constitutional structure or that deliberative decision-making is important to democracy cannot remedy the underlying educational deficiency. That said, identifying,

225. *See supra* Part I.

226. *See supra* Part II.

227. *See* Paul E. McGreal, *Review Essay of Louis Michael Seidman & Mark V. Tushnet, Remnants of Belief: Contemporary Constitutional Issues*, 30. IND. L. REV. 693, 707 (1997) ("The problem of public ignorance of text is compounded by public ignorance of the historical setting and meaning of the Constitution.").

highlighting, and providing a formal structure to examine the concepts with fellow citizens begins the process of constitutional awareness.[228] Providing a new vocabulary of constitutional terms or reminding citizens of the application of those terms, adds to a citizen's knowledge. Requiring citizens to reflect on those values while applying them will add an additional level of reflective learning.[229]

More importantly, the formal setting of a courtroom with an authoritative judge and a class of fellow citizens, makes otherwise theoretical lessons immediately relevant.[230] Jury service may be one of the few remaining spaces where the Constitution is directly applied by ordinary citizens.[231] Like many moments of forced concentration, this is a real "teaching moment" in which the student must understand and then apply the principles with real consequences. The same juror who might ignore a lecture on "constitutional values," might engage the same principles in the jury room.

Experience shows that jurors engage constitutional principles throughout their jury experience. The change proposed here is to make jurors aware of that experiential education as it happens. Naming, defining, and emphasizing the constitutional role of juries requires an intentionality of teaching constitutional principles at the moment they are most relevant to a citizen. This public education about constitutional principles can only serve to remind citizen-students about the

228. While one can envision other proposals to encourage civic participation and understanding in jury service—including discussion groups, seminars, book clubs, social media sites, virtual bulletin boards, etc.—the suggestion to use jury instructions is an easy way to implement the same goal of constitutional engagement. In addition, it will reach a broad and essentially captive audience.

229. Scholars who have studied reflective learning in law schools and through law school clinics offer relevant support for this argument. *See generally* Justine A. Dunlap & Peter A. Joy, *Reflection-in-Action: Designing New Clinical Teacher Training by Using Lessons Learned from New Clinicians*, 11 CLINICAL L. REV. 49 (2004); Richard K. Neumann, Jr., *Donald Schön, The Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 CLINICAL L. REV. 401 (2000).

230. The work of scholars that study "adult learning theory" may add support to this moment of education. *See generally* Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321 (1982); Susan L. Brooks & Robert G. Madden, *Epistemology and Ethics in Relationship-Centered Legal Education and Practice*, 56 N.Y.L. SCH. L. REV. 331, 358 (2011–2012) (citing the work of Jack Mezirow and Fran Quigley); Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37 (1995).

231. Other areas of direct constitutional action involve paying federal taxes and using the Federal Post Office. *See* U.S. CONST. art. 1, § 8.

importance of the underlying subject matter.[232]

B. Constitutionally-Educated Jurors Will Improve the Jury's Reputation

Beyond formally teaching the juror about the constitutional role of the jury, the process of educating through jury instructions will have positive collateral effects. Importantly, it may counteract the negative (if false) impression of jurors as ignorant or incompetent.[233] Again, while decision-making by juries has been vindicated by scholars and researchers as being generally competent and accurate, it is not always perceived as such.[234] Even if juries tend to get it right,[235] jurors are not seen as getting it right.[236]

---

232. McGreal, *supra* note 227, at 713 ("By removing the Constitution from public debate and lawmaking, constitutional illiteracy threatens the vitality of the Constitution itself.").

233. Cecil, Hans & Wiggins, *supra* note 153, at 745 ("My aim has simply been to show how an institution run by amateurs, directed and organized by ordinary people, using their common sense, and following formal rules can perform its duty in a consistently responsible manner; how it can stand above popular prejudice and deliver verdicts that experts steeped and trained in the law respect." (citing RITA J. SIMON, THE JURY: ITS ROLE IN AMERICAN SOCIETY 147 (1980))) (summarizing studies). These studies responded to criticisms of others. *See* Cecil, Hans & Wiggins, *supra* note 153, at 733 ("Chief Justice Warren Burger of the United States Supreme Court led the critics, suggesting that jurors lack the abilities required to deal with the complex issues often presented in federal civil trials.").

234. *See* Hans & Vidmar, *supra* note 171, at 227 ("Furthermore, in systematic studies spanning five decades, we find that judges agree with jury verdicts in most cases.").

235. Leigh Buchanan Blenen, *The Appearance of Justice: Juries, Judges, and the Media Transcript*, 86 J. CRIM. L. & CRIMINOLOGY 1096, 1114 (1996) (quoting Judge LaDoris Cordell, who stated: "I have been talking to the jurors at the end of the case, with permission of counsel. They know the issues fairly well. They are fairly sophisticated in terms of who gave a good presentation. They understand the games being played by lawyers, and they really do want to do what's fair and just. Are they hampered sometimes by rules of evidence? Yes. Have they been affected by some of the rhetoric concerning product liability law, tort law? Is there a dislike of lawyers? Yes. But in the end their verdicts, I think, are sound"); Honorable J. Scott Vowell, *Alabama Pattern Jury Instructions: Instructing Juries in Plain Language*, 29 AM. J. TRIAL ADVOC. 137, 151 (2005) ("Those of us who try cases and work with jurors in the Alabama courts are regularly amazed at the collective wisdom shown by our juries. The jury system in Alabama works, and it works very well.").

236. *See* Michael J. Saks, *Public Opinion About the Civil Jury: Can Reality Be Found in the Illusions*, 48 DEPAUL L. REV. 221, 235 (1998) ("Why do judges think so much more highly of juries than the public at large does? Perhaps it results from judges having the advantage of comparing their own judgments about a case with the verdict returned by the jury. When they find the juries' verdicts usually

This perception problem can be improved by court-directed public education. Much of the criticism of the modern jury centers on legitimacy.[237] Jury verdicts are deemed illegitimate because of criticisms of the jurors, not the institution of the jury.[238] Jurors are accused of being ignorant, swayed by emotion, racial hostilities or sympathies, confusion, or charismatic lawyers.[239] Tasked to find the facts and apply the law to the facts, jurors are seen to be manipulated by the "show" of trial.[240] While inaccurate, this stereotype is not illogical.[241] Why would we consider jurors as competent as judges, when jurors, as opposed to judges, often have no formal education or training?[242] Why would we think of jurors as educated when there are no education requirements? In addition, the stereotype feeds from the narrative that jurors are merely fact finders, reduced to deciding which side tells a better story, rather than making a moral and legal judgment.

Infusing constitutional principles in jury instructions serves two purposes to counteract a reputation of ignorance or incompetence. First, as mentioned, jury instructions literally

---

are the same as, or not unreasonably different from, their own, they find validation not only in their own thinking about the cases, but in the jury as well. We might wonder what the public would think of the jury if it could observe them as judges have the opportunity to observe them.").

237. *See* Cecil, Hans & Wiggins, *supra* note 153, at 728; Ellsworth & Reifman, *supra* note 168, at 789–90 ("Solid, grey statistics, however reliable, are hardly likely to capture the public imagination, particularly when they show no major changes. A vivid example, an egregious verdict, the true-life story of a stubborn irrational juror: These attract our attention, enliven our conversations as we hear and repeat them again and again, and ultimately shape our attitudes."); Saks, *supra* note 236, at 233.

238. Strier, *supra* note 190, at 55 (listing studies of jury misunderstanding in complex cases).

239. Even the Supreme Court has weighed in on this concern. *See* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 473 (1993) (O'Connor, J., dissenting) ("Arbitrariness, caprice, passion, bias, and even malice can replace reasoned judgment and law as the basis for jury decisionmaking.").

240. Blenen, *supra* note 235, at 1113 (quoting Judge LaDoris Cordell, who stated: "A jury trial really, I think, is no different today than a sporting event. Attorneys are the combatants, judges are inadequate referees. The jurors are passive spectators, and the half time show is filled with hired gun experts and trial consultants"); Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1121, 1129 (2001).

241. Kimberly A. Moore, *Judges, Juries, and Patent Cases—An Empirical Peek Inside The Black Box*, 99 MICH. L. REV. 365, 368, 397 (2000).

242. Young, *supra* note 194, at 139 ("That a sophisticated people would leave decisions affecting fortune, honor and life to a fixed number of individuals, selected at random, without regard to intelligence, experience or education would seem to defy rational explanation. The reasons lie in history." (quoting LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY vii (1973))).

counteract the lack of education by educating.[243] Second, jury instructions ground jury decisions in constitutional terms.[244] As the concern with jury outcomes is, in part, an appearance problem, adding a constitutional gloss to the decisions will help to legitimize the jury verdict. Potential critics will see jurors as constitutional actors playing a constitutional role, not ordinary citizens. Jury verdicts will be constitutional acts, not merely factual determinations.

This change will also have an internal effect, as jurors will see themselves as constitutional actors. Such an elevated role comes directly from the recognition that deciding the facts in the case is a constitutional act, not merely an adjudicatory decision. This does not change the fundamental task, but only puts it in the appropriate historical and constitutional context. Jurors will learn and appreciate their own role as contributing to a constitutional system of government. Then, as jurors go back to society as ordinary citizens, they will bring with them this improved vision of the jury. Again, the lessons learned inside the jury room will be taken outside, improving the overall reputation of the institution.

This constitutional awareness might also change the way potential jurors view jury service.[245] Since its inception, citizens have tried to avoid jury duty based on perceptions of inconvenience or simply out of fear or apathy.[246] Adding a constitutional overlay and an educational enrichment component might change that perception. Again, while jurors who serve on juries usually leave with positive feelings about

243. Sherry, *supra* note 176, at 132 ("[A]n education for republican citizenship, however, is very different from the right to an education for its own sake or for the benefit of the individual.").

244. *See infra* Part IV; Todd E. Pettys, *The Myth of the Written Constitution*, 84 NOTRE DAME L. REV. 991, 1042–44 (2009) (describing the unifying myth created by America's constitutional identity).

245. Even Justice Souter, an ardent supporter of juries, acknowledged that for citizens "[j]ury duty is usually unsought and sometimes resisted, and it may be as difficult for one juror suddenly to face the findings that can send another human being to prison, as it is for another to hold out conscientiously for acquittal." Old Chief v. United States, 519 U.S. 172, 187 (1997).

246. Local 36 of Int'l. Fishermen & Allied Workers of Am. v. United States, 177 F.2d 320, 340 (9th Cir. 1949) ("Even in the time of Bracton . . . [j]ury duty was regarded as oppressive. As today, the rich and powerful received exemptions from service, and the very poor were often let off because of their situation. The conscience of democracy and the greater education of the members of the body politic in the necessities of government has neither been sufficient to overcome the feeling nor to prevent the results." (footnotes omitted)).

the experience,[247] it has not changed the overall negative perception about this civic duty. Rebranding jury service as constitutional service might improve that perception about jury duty.[248]

As a final matter, a reinvigorated jury tradition will improve the overall reputation of the judiciary. As an independent judiciary has recently been under assault from some quarters, putting "we the people" back into the legal decision-making process will add to democratic legitimacy. Jurors will see that they are part of that independent judiciary, as a matter of constitutional structure. In many ways, this responds to concerns of judges and justices that constitutional ignorance will weaken the role of the judiciary in society.[249]

C. Constitutionally-Educated Jurors Will Strengthen Democratic Practice

Constitutionally educated jurors will also strengthen democratic practice.[250] As seen in the earlier discussion, this is

247. Marder, *supra* note 211, at 909 n.2 ("People who serve on juries may grumble about the inconvenience but they end up surprisingly satisfied with the experience, a nationwide survey says. More than 80 [percent] said they came away with a favorable view of their service, according to the survey of 8,468 jurors by the National Center for State Courts." (quoting Stephanie Simon & Amy Dockser Marcus, *Jurors Don't Mind Duty, Survey Finds*, WALL ST. J., July 31, 1991, at B3)); Richard Seltzer, *The Vanishing Juror: Why Are There Not Enough Available Jurors?*, 20 JUST. SYS. J. 203, 213 (1999) ("Jurors who answered our exit interviews in United States District Court had a very favorable opinion of their jury service experience. They thought highly of the courthouse staff, had a favorable rating of the waiting room and other facilities, and found the overall jury experience to be worthwhile. Over 80 percent said they would be happy to serve again."). *But see* Losh, Wasserman & Wasserman, *supra* note 7, at 306 ("Many attitudes were grim: less than one-third of those surveyed agreed that they enjoyed jury duty, were glad to be called, or anticipated service." (quoting Herbert M. Kritzer & John Voelker, *Familiarity Breeds Respect: How Wisconsin Citizens View Their Courts*, 81 JUDICATURE 58, 59 (1998))).

248. *See* Erin York Cornwell & Valerie P. Hans, *Representation Through Participation: A Multilevel Analysis of Jury Deliberations*, 45 LAW & SOC'Y REV. 667, 669 (2011) ("Satisfying jury experiences also increase confidence in the jury system and the legal system as a whole.").

249. Justice Sandra Day O'Connor has stated, "I think the biggest challenge we face today in our judicial government is the lack of understanding of the public of the role of courts in our country." Amanda Cohen, *Sandra Day O'Connor Discusses Civics Education*, INDEP. FLA. ALLIGATOR, Sept. 13, 2011, http://www.alligator.org/news/campus/article_efadad00-ddc7-11e0-b3c7001cc4c03286.html.

250. Sherry, *supra* note 176, at 132 ("The core of the claim that education is necessary to citizenship must instead be that education is necessary to the thoughtful or responsible exercise of citizenship rights.").

the core message of Federal Farmer and Tocqueville.[251] The two-way street of jury service means that jurors who are educated about the rights, responsibilities, and skills of citizenship will make better democratic citizens.[252]

In recent years, this theoretical argument has been supported by scholarly research. In an ambitious and groundbreaking study, researchers from the Jury and Democracy Project set out to test whether jury service could improve civic engagement and democratic practice.[253] In a lengthy study involving surveys, questionnaires, and indepth interviews, these researchers followed actual jurors through the jury service process.[254] The study concluded that "[p]articipating in the jury process can be an invigorating experience for jurors that changes their understanding of themselves and their sense of political power and broader civic responsibilities."[255] More specifically, the researchers looked at whether jury service could affect future voting participation, under the theory that one act of civic participation might influence other acts of civic participation.[256] The researchers found that "having a conclusive deliberative experience in a criminal trial was a statistically significant influence on post-service voting."[257] In other words, jurors who participated in successful criminal jury deliberations were more likely to be engaged democratic voters in the next election. These statistics also showed, although in a less direct fashion, that jury service could affect other civic responsibilities and participation levels in their communities, especially for those who had only a

251. *See supra* Part II.B.1–2.

252. Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 766 (2010) ("The jury is generally acknowledged as a critical part of democratic government. The creation of jury-like systems in new democracies illustrates how important the incorporation of citizens into legal decision making can be to polities seeking democratic legitimacy. This is because of a sound belief that citizen participation in lawmaking promotes democracy."); Hirsh, *supra* note 15, at 209 ("One oft-stated goal of democracy is the growth of individuals. Hence, the double meaning of 'self-government': in the course of participating in public affairs, individuals become more complete people (or 'selves') with richer lives. The converse is equally true: if self-government promotes better, more mature selves, so too the latter makes effective self-government possible.").

253. JOHN GASTIL ET AL., THE JURY AND DEMOCRACY 4 (2010).

254. *Id.* at 5.

255. *Id.* at 4; *see also* John Gastil & Michael Xenos, *Of Attitudes and Engagement: Clarifying the Reciprocal Relationship Between Civic Attitudes and Political Participation*, 60 J. COMM. 318, 333 (2010).

256. GASTIL ET AL., *supra* note 253, at 35.

257. *Id.*; Hans & Vidmar, *supra* note 171, at 226–27.

previously weak commitment to civic engagement.[258]

The researchers went further to tie the educational value of jury service directly to traditional civics education. "For previously infrequent voters, the effect of deliberating on a criminal jury is comparable to the civic boost a high-school student gets from taking a mandatory civics course for a semester . . . Thus, the civic lessons gleaned from jury service compare quite favorably with more familiar means of instruction and experiential learning."[259] The researchers concluded that Tocqueville's insights still applied to the modern American and that jury service can positively affect the development of democratic values.[260] This study provides empirical support to the argument that jury service can serve an educative role.[261] It also provides support for a renewed emphasis on civic knowledge and public service as a means to strengthen self-government.[262]

If, as has been demonstrated, engaged jurors positively correlate with engaged citizenship, courts should be encouraging new ways to educate and engage jurors.[263] The public school for democracy is not meant simply to make "smarter" students while in school but to create citizens that can act intelligently in society. Jury service is a key moment of constitutional connection—it can and should be one of constitutional education.

---

258. GASTIL ET AL., *supra* note 253, at 48; *see also* Appleman, *supra* note 252, at 768.

259. GASTIL ET AL., *supra* note 253, at 46.

260. *Id.*

261. Hans & Vidmar, *supra* note 171, at 230 ("Jury service itself educates the public about the law and the legal system and produces more positive views of the courts.").

262. *See* Hirsh, *supra* note 15, at 209 ("Unless citizens develop sufficient knowledge, independence, and public-spiritedness, they cannot handle the responsibilities of self-government.").

263. In prior eras, the government tried to instill a measure of formal constitutional literacy. The earliest example was in February 1847 when the United States began its first official attempt to educate citizens about the Constitution en mass. MICHAEL G. KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 80 (1986). On that date, Congress purchased two thousand copies of William Hickey's *The Constitution of the United States, With an Alphabetical Analysis*. *Id.* The Congress eventually bought about 22,000 copies to distribute. *Id.* More recently the late Senator Robert Byrd instituted a federally mandated Constitution Day on September 17. *See* 36 U.S.C. § 106 (2004).

D. Constitutionally-Educated Jurors Will Improve Jury Deliberations

Constitutional education through jury instructions will have a significant impact on jury deliberations. Instructions on the role of the jury connected to principles of democratic participation, equality of opportunity, due process/fairness, popular sovereignty, and respecting diversity of ideas will provide a context for decision-making that elevates the role of the juror. This elevation will create the potential for more reflective deliberations in the jury room.[264]

For example, as will be demonstrated in the next section, a jury instruction on the importance of civic participation will have several direct effects. First, it will empower jurors.[265] Most jurors enter jury service unfamiliar with the legal system or what that system expects from them.[266] This ignorance invites a sense of disempowerment. Most jurors are not lawyers and have not studied the history of jury service in America. Providing contextual support for their individual decision will give jurors more confidence in rising to the challenge of deliberations. This information links jurors to a history of similar jury decisions, validates their role as more than an ordinary citizen, and provides a constitutional justification for why they (as ordinary citizens) have been given such an outsized power.

Second, awareness of the constitutional power shifts the focus of the decision away from the individual and toward the community. Jurors are proxies for the community, and instructions can place that idea in the consciousness of the jurors.[267] As jurors see themselves like legislators, elected

---

264. To be clear, this does not mean that the decisions of any particular jury will be more or less accurate. Jury decisions are too individualized for that assessment.

265. *Cf.* Cornwell & Hans, *supra* note 248 at 690 (showing that education correlates with participation rates in jurors).

266. *See* Hon. Gail Hagerty, *Instructing the Jury? Watch Your Language!* 70 N.D. L. REV. 1007, 1017 (1994) ("The trial judge should . . . prepare and deliver instructions which are readily understood by individuals unfamiliar with the legal system." (citing AM. BAR ASS'N, STANDARDS RELATING TO JUROR USE AND MANAGEMENT 16, 141 (1993))).

267. As jurors must search for justice, largely undefined, this discussion of contested narratives in a popular tribunal has the opportunity to expose jurors to the power of these smaller democratic institutions. Susan Waysdorf, *Popular Tribunals, Legal Storytelling, and the Pursuit of a Just Law*, 2 YALE J.L. & LIBR. 67, 72 (1991).

leaders, or even judges, this process highlights the deliberations as an important part of the administration of government.[268] This transformation mirrors the process Tocqueville observed in early jurors:

> The jury teaches every man not to recoil before the responsibility of his own actions, and impresses him with that manly confidence without which political virtue cannot exist. It invests each citizen with a kind of magistracy, it makes them all feel the duties which they are bound to discharge towards society, and the part which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society.[269]

In addition, educative jury instructions will deepen deliberations.[270] An often reoccurring finding in studies of jury deliberations is that diversity of ideas lengthens and enriches such deliberations.[271] Jury instructions, offering both a direct comment on the value of diverse opinions, as well as adding a layer of constitutional context to the decision-making process, will likewise add to deliberations.

Finally, some studies have shown a positive correlation between educated jurors and more engaged jury deliberations.[272] Others have shown a connection with more

---

268. *See* Appleman, *supra* note 252, at 767 ("Jury service is the primary way that this country incorporates its citizens into the legal process, whether in grand juries or petit juries. Although surface complaints about the inconvenience of jury service are common, posttrial surveys of jurors who have actually served have shown that jury service seems to produce more public support for both the courts and the legal system.").

269. TOCQUEVILLE, *supra* note 13, at 284–85.

270. *See* Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 70 (2001) ("[A] number of studies have shown that, at the least, a correlation exists between jurors' educational levels and their ability *to understand legal instructions*."); *see, e.g.*, AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 58–59 (1982); VALERIE P. HANS & ANDREA J. APPEL, THE JURY ON TRIAL, IN A HANDBOOK OF JURY RESEARCH § 18.04a, 53 (Walter F. Abbott & John Batt eds., 1999).

271. *See* VIDMAR & HANS, *supra* note 10, at 74–76.

272. *See* Strier, *supra* note 190, at 72 ("[S]tudies found that better educated jurors participated more actively during jury deliberation, and also gave more attention to procedural matters than did the lesser educated."); *id.* at 60 ("In sum, a predominantly college-educated jury, having superior capacity for understanding the relevant facts and law in complex cases, would render better informed and, thus, more just verdicts.").

educated jurors and accurate results.[273] While there are no existing studies on the effect of constitutionally educative jury instructions, the theory that additional information inputs will encourage reflection and turn otherwise passive citizens into active learners seems a logical result.[274]

The conclusion is that such constitutional education will improve the quality of deliberations. "Quality" here must be understood in the context of process, not result. Quality deliberations involve all of the previously discussed virtues, an elevated purpose, an empowered decision-maker, a contextual focus, deliberative depth, and personal engagement, but also something else that is unique to the role of a juror. Quality deliberations involve a transformative process whereby jurors see themselves not as individuals expressing personal, subjective preferences, but as a single, objective decision-maker speaking with one community voice.

Constitutional jury instructions remind jurors that they are undergoing that transformative process within an established system. Just as a trial judge puts aside personal feelings to rule on the evidence and the law, so must a jury recognize that its role is not simply to give an opinion on the evidence, but to evaluate the evidence within a system of burdens of proof, elements, and factual determinations. They are not merely fact-finders, but fact-finders within a larger constitutional structure. Their roles as individual citizens are different from their roles as jurors. Constitutional jury instructions remind jurors of that shift, increasing the weight of responsibility, objectivity, and seriousness in which to take deliberations. In short, jurors should know that theirs is a constitutional responsibility and should act with a purposefulness that respects that founding charter. Such a reminder can only serve to improve the process and quality of jury service.

273. Amiram Elwork, James J. Alfini & Bruce Sales, *Toward Understandable Jury Instructions*, 65 JUDICATURE 432, 440 (1982) (finding that jurors with higher educational levels were more likely to answer questions correctly); *accord* Friedland, *supra* note 164, at 195–96 ("[I]f juries were composed of specially qualified individuals or groups—for example, those selected on different grounds, such as intelligence—a jury decision arguably would be more accurate.").

274. Friedland, *supra* note 164, at 209 ("An active jury model also is supported by educational studies on learning and performance, which suggest that active learners are more effective than passive ones.").

IV. CONSTITUTIONAL EDUCATION THROUGH JURY INSTRUCTIONS

Jury instructions can teach constitutional principles with minimal disruption to the jury process. Constitutional jury instructions can be incorporated into the standard pre-trial instructions and the standard pre-deliberation instructions. Primarily, the instructions will provide a constitutional context for the jury's role in a criminal case.[275] As will be demonstrated below, these types of instructions can be crafted using language from Supreme Court opinions without distortion or distraction to the other standard instructions. The goal is to provide a formal and direct instruction on the constitutional principles that justify the jury process and the juror's role in that process.

A. Why Jury Instructions?

Before addressing the proposed instructions, it is necessary to defend the choice of jury instructions as opposed to other mechanisms of jury education. After all, if the overall goal is to educate jurors, there are other "teaching moments" during the jury process. Most court systems now include some introductory speech,[276] video,[277] or handbook[278] about the jury process. Many judges contribute informal commentary thanking jurors for their service to the jury system.[279] Almost all jurisdictions allow jurors to bring in reading material to jury service that could include information about the jury.[280]

275. The focus of this article is applying new jury instructions to criminal trials, but the lessons are equally relevant for civil cases.

276. Many judges have created their own informal discussion of the jury process to introduce jurors to the *voir dire* process.

277. *See Jury Selection, Trial and Deliberations: Resource Guide*, NAT'L CTR. FOR STATE COURTS (Sept. 8, 2012), http://www.ncsc.org/Topics/Jury/Jury-Selection-Trial-and-Deliberations/Resource-Guide.aspx (listing links to jury duty orientation videos). State jury duty orientation videos are also accessible on the internet. *Id.*

278. *E.g.*, ADMIN. OFFICE OF THE U.S. COURTS, HB100, HANDBOOK FOR TRIAL JURORS SERVING IN THE UNITED STATES COURTS (2003).

279. *See* GASTIL ET AL., *supra* note 253, at 109 (observing that many judges provide brief words of thanks and remind jurors of their importance); Mary R. Rose*, A Dutiful Voice: Justice in the Distribution of Jury Service*, 39 LAW & SOC'Y REV. 601, 604–05 (2005) ("Often, the judge's opening comments to the panel assembled included reminders about the importance of a working jury system. Throughout questioning, outright appeals to a sense of duty were commonplace.").

280. A juror could always bring a book on jury duty or on the history of jury service.

With these other educational avenues available, why choose jury instructions?

First, jury instructions are official and formal. In fact, jury instructions are the only official statement of the law the jury receives.[281] A judge formally reads the instructions.[282] They are usually written down in black and white.[283] Jurors, like students, are provided the text to master their assignment. Jurors can read the instructions and think about them in a deliberative manner. Jury instructions, thus, are formally packaged and come with the weight and authority of the court. This legitimacy is only strengthened by the fact that jurors have sworn an oath to follow the instructions.[284]

Second, jury instructions provide the framework for decision making.[285] If one of the goals of educating jurors is to have them see their role within the constitutional structure, then the constitutional context needs to be explained. Jury instructions set out the framework at a time where there are no other guideposts for decision.[286] While trial lawyers and judges understand the legal issues in a case, jurors do not have the experience, training, or perspective about the case to be able to think about the evidence without these governing rules. Thus, jury instructions present the only formalized declaration of the legal context of the jury's decision.

From a teaching perspective, jury instructions provide two advantages. Jury instructions are presented in a way that mirrors traditional teaching moments.[287] At the time of jury

281. It is during jury instructions that the judge, as opposed to the parties, explains the legal principles upon which a decision must be brought.

282. Marder, *supra* note 111, at 491 (describing how jury instructions are typically presented).

283. See HON. GREGORY E. MIZE, PAULA L. HANNAFORD-AGOR & NICOLE L. WATERS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 31 (2007), for the most recent State-of-the-States survey concluding that 68 percent of jurisdictions surveyed provided written instructions to the jury. *See generally* Peter M. Tiersma, *Communicating with Juries: How to Draft More Understandable Jury Instructions,* 10 SCRIBES J. OF LEGAL WRITING 1 (2005–2006), *reprinted in* NAT'L CTR. FOR ST. CTS. (2006).

284. 6 WASH. PRAC., WASH. PATTERN JURY INSTR. CIV. WPI 6.01 (2012).

285. *See* Diamond, *supra* note 166, at 749 ("Simulations, post-trial interviews with real jurors, and the analysis of jury behavior during deliberations in real trials show that jurors see themselves as obligated to apply the law, and that they spend a significant portion of their time during deliberations discussing the law.").

286. *See id.* at 752. ("Jury instructions rarely receive the attention from the parties and their lawyers that is consistent with the attention that the instructions receive from the jury.").

287. One traditional teaching format is the lecture. *See* Cynthia G. Hawkins-León, *The Socratic Method-Problem Method Dichotomy: The Debate Over*

instructions, jurors really are students, listening to the judge lecture them about the law. In addition, final jury instructions lead right into jury deliberations, providing a moment of active learning in which jurors must apply the instructions to the facts at hand.[288] Studies have shown that active learning techniques improve legal comprehension.[289]

Finally, jury instructions present a moment of intense focus in the trial. Trials tend to follow disjointed story lines, with witnesses providing a patchwork of information. During trial, jurors may not know which facts are important or how to evaluate the evidence. The finality of jury instructions and closing arguments provide the moment of closure and reflection. Jurors, thus, tend to pay most attention to the final rules over other parts of the trial that may or may not turn out to be important.[290] It is here that the contextual role of the jury—an institution infused with constitutional principles—can be effectively explained.

B. Constitutional Jury Instructions: Examples and Explanation

Jury instructions that promote constitutional understanding about the jury can take a variety of forms. Depending on the jurisdiction, particular constitutional lessons might be emphasized or particular language used. For purposes of demonstrating the possibilities, this Article emphasizes five constitutional principles centered on the jury role, using excerpts from Supreme Court cases to create the

Teaching Method Continues, 1998 B.Y.U. EDUC. & L.J. 1, 4 (1998) (describing different teaching methods focused on legal education).

288. *See* Hans & Vidmar, *supra* note 171, at 229 ("The American Bar Association adopted a revised set of Principles for Juries and Jury Trials (2005) that includes active jury reforms. Although many judges have not yet adopted them, active jury reforms are based on cognitive and educational research that shows the well-documented benefits of active and interactive learning."). *See generally* AM. B. ASS'N, PRINCIPLES FOR JURIES AND JURY TRIALS (August 2005).

289. *See* Robin A. Boyle, *Employing Active-Learning Techniques and Metacognition in Law Schools: Shifting Energy From Professor to Student*, 81 U. DET. MERCY L. REV. 1, 3–4 (2003); *see also* Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 102 (2002); Alan M. Lerner, *Law & Lawyering in the Work Place: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solver*, 32 AKRON L. REV. 107, 116 (1999).

290. Studies have shown that pre-instruction and continued instruction directly improves juror comprehension. *See* Dann, *supra* note 59; *see also* Neil P. Cohen, *The Timing of Jury Instructions*, 67 TENN. L. REV. 681, 690–91 (2000).

sample jury instructions. These values include encouraging democratic participation, ensuring due process/fairness, promoting diversity of ideas, establishing equality of opportunity, and protecting structural checks and balances.[291] The constitutional values here are not exclusive, but represent what courts and litigants might choose to cover in an effort to educate citizens about the constitutional role of the jury. The instructions are merely examples to show that such a constitutional lesson plan can be developed from existing case law.[292] By linking constitutional lessons to the role of the jury through instructions, the goal is to raise the level of constitutional awareness without distorting the fact-finding process.

1. Lesson One: Democratic Participation and the Jury

The Constitution begins with the words "We the People."[293] In its most inclusive form, it invites the people to join in the creation and maintenance of government. Democratic political theory recognizes that the power of a constitutional republic comes from the people.[294] Voting, becoming an elected official, or serving as a juror are foundational acts of political participation.[295]

The principle of participation should thus be conveyed to jurors on jury duty. Their role is a participatory one—mirroring the other participatory requirements in a democracy. A jury

291. Liberty would also be a constitutional principle that could be taught through jury instructions. Juries were considered the bulwark of liberty. *See* Meghan J. Ryan, *The Missing Jury: The Neglected Role of Juries in Eighth Amendment Punishments Clause Determinations*, 64 FLA. L. REV. 549, 578 (2012). Many of the rights-protecting provisions in the Constitution and the Bill of Rights were focused on protecting individual liberty. *See* Rebecca L. Brown, *Accountability, Liberty, and the Constitution,* 98 COLUM. L. REV. 531, 536, 552 (1998). Despite its centrality, however, a specific focus on liberty might have some unintended consequences that could distort the fact-finding process if the concept was equated with the defendant's freedom.

292. In fact, because the language comes directly from Supreme Court cases, adopters of this proposal may wish to simplify the language to make it more easily understandable for jurors.

293. U.S. CONST. pmbl.

294. *See* THE FEDERALIST NO. 22, at 146 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (declaring that a "fundamental maxim of republican government . . . requires that the sense of the majority should prevail"); *see also* THE FEDERALIST NO. 58, at 361 (James Madison) (Clinton Rossiter ed., 1961) (proclaiming majority rule "the fundamental principle of free government").

295. *See* Amar, *Jury Service*, *supra* note 6, at 244–45.

instruction reflecting this value would include an acknowledgment of the opportunity to contribute as a citizen. Jury duty is not only a civic duty, but a constitutional duty.[296] A sample instruction inspired from the Supreme Court's language in *Powers v. Ohio* would read:

> Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life. Our constitutional jury system postulates a conscious duty of participation in the machinery of justice. It is the opportunity for you as an ordinary citizen to participate in the administration of justice—an opportunity that has been recognized as one of the principal justifications for retaining the jury system under our Constitution. Your service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people. Your service provides a valuable opportunity to participate in the process of government, an experience that fosters a respect for law.[297]

This instruction could be added to the "role of the jury" instruction or be a stand-alone instruction.[298] It would convey the real place of jurors as democratic, constitutional actors in the legal system.[299]

2. Lesson Two: Due Process and the Jury

The principle of due process and fair treatment can be observed throughout the Constitution.[300] Guarantees of due

296. *See* FERGUSON, *supra* note 27, at 7.

297. *See* 499 U.S. 400, 402, 407 (1991).

298. *See* Blakely v. Washington, 542 U.S. 296, 305–06 (2004) ("[The right to a jury trial] is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.").

299. Cornwell & Hans, *supra* note 248, at 668 ("High levels of participation may be especially beneficial for jury fact-finding when jurors are drawn from all segments of the community. Full participation by jurors from diverse backgrounds allows the jury to draw on personal experiences, social perspectives, and knowledge that differ across individuals and social groups. Diverse juries may engage in wider-ranging deliberations that include topics and considerations that might be missed, or even avoided by, less diverse juries.").

300. *See* David Jenkins, *From Unwritten to Written: Transformation in the British Common-Law Constitution*, 36 VAND. J. TRANSNAT'L L. 863, 911 (2003)

process are explicitly included in the Fifth and Fourteenth Amendments.[301] Echoes of fair treatment emerge from the founding document as checks on government power. Prohibitions against *ex post facto* laws,[302] bills of attainder,[303] and the protection of *habeas corpus*[304] restrict potential abusive governmental acts. The protections of the Sixth Amendment, including the right to counsel, confrontation, and compulsory process, protect individuals from government abuse of the criminal justice system.[305]

This principle of fairness and due process should be conveyed to the jury. After all, it is the jury that must practice the principles of fairness in evaluating the evidence and reaching a verdict. Jurors undertake the role of arbiters of fairness by holding the parties to their respective burdens of proof.[306] Recognizing this important role, this instruction explains the role of the jury:

> Our constitutional system of justice entrusts jurors—ordinary citizens who need not have any training in the law—with profoundly important determinations . . . . Our abiding faith in the jury system is founded on longstanding tradition reflected in constitutional text, and is supported by sound considerations of justice and democratic theory. The jury system long has been a guarantor of fairness, a bulwark against tyranny, and a source of civic values.[307]

This instruction might be included in the "role of the juror" instruction or exist as a separate stand-alone instruction. One study found that even simple instructions at the beginning of jury service had a real impact on jurors' understanding of the

("Canada and the United States are good examples of definitive constitutional arrangements in the common-law tradition, as their constitutions establish strictly enforceable procedural requirements in the making of law, its application according to the rule of law, and substantive limits grounded in federalism and a bill of rights."); *see also* Marbury v. Madison, 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men.").

301. U.S. CONST. amends. V, XIV.

302. U.S. CONST. art. I, § 9.

303. *Id.*

304. *Id.*

305. U.S. CONST. amend. VI.

306. *See In re* Winship, 397 U.S. 358, 361–62 (1970).

307. *See* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 473 (1993) (citations omitted).

importance of due process.[308] The author of the study concluded that jurors, "especially those serving for the first time, seemed to develop some greater depth of understanding and appreciation of the due process principles which they applied during their service."[309]

3. Lesson Three: Diversity of Views and the Jury

America is a nation created out of the diversity of ideas and religious faiths. The First Amendment speaks to a freedom from government imposed ideas[310] and the explicit openness to practice one's religious faith.[311] Tolerance is an unstated value in the constitutional order. Tolerance of religious faiths, dissenting voices, and new ideas was a driving principle behind the creation of America.[312] The Tenth Amendment allows States to experiment with new ways of doing things.[313] The acceptance of hung juries and even the unanimity requirement encourages tolerance of differing views within the jury room.[314] Jurors, as citizens, must learn to tolerate and engage with the conflict that arises from different cultural, religious, and political faiths.

Jurors should be made aware that the jury system embraces this enforced tolerance. By design, people of different backgrounds are compelled to work together to resolve a difficult legal problem.[315] The value is not only the end result, but the process of encouraging tolerance among diverse opinions. A juror's role is one of required engagement with

308. A doctoral student at the University of California-Berkeley, Paula Consolini, conducted a survey at a San Francisco courthouse to determine the civic effect of jury service. GASTIL ET AL., *supra* note 253, at 129 ("Consolini found that most trial jurors and even some of those who did not become empanelled 'reported greater depth of appreciation of general procedural rights like the right to an attorney and the presumption of innocence.'").

309. *Id*.

310. *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

311. U.S. CONST. amend. I.

312. *See* Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. REV. 455, 513–15 (1991); Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1424–27 (1990); Martha Nussbaum, *Living Together: The Roots of Respect*, 2008 U. ILL. L. REV. 1623, 1636–37 (2008).

313. U.S. CONST. amend. X.

314. Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 719 (1971).

315. *See* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1285–86 (2000).

diverse viewpoints. A jury's role is to embody that democratic diversity of America. A jury instruction that captures this ideal of tolerance and recognition of civility comes from *Peters v. Kiff*:

> Our Constitution requires that the jury venire you came from represents a cross-section of the community. Each identifiable segment of the community brings to the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. A jury includes diverse perspectives on human events that may have unsuspected importance in any case that may be presented.[316] You should respect and keep an open mind during deliberations recognizing that the diversity of opinion is a goal of the jury system. [317]

This instruction could be included during the instructions that explain how juries should deliberate or how to begin their deliberations.

4. Lesson Four: Equality of Opportunity and the Jury

The constitutional principle of democratic equality remains a core value in America. Similar to the principle of tolerance, equality involves the explicit recognition that each citizen is equally able to contribute to democracy.[318] One person, one vote,[319] a republican form of government,[320] rejections of titles of nobility,[321] and the Thirteenth,[322] Fourteenth,[323] Fifteenth,[324] Nineteenth,[325] and Twenty-Sixth Amendments[326]

316. *Id.*
317. Peters v. Kiff, 407 U.S. 493, 501 (1972).
318. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 138–40 (1994); Alschuler & Deiss, *supra* note 5, at 879; Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 117–23 (2003).
319. Reynolds v. Sims, 377 U.S. 533, 558 (1964) ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.") (quoting Gray v. Sanders, 372 U.S. 368, 379–80 (1963)).
320. U.S. CONST. art. IV, § 4.
321. U.S. CONST. art. I, § 9.
322. U.S. CONST. amend. XIII.
323. U.S. CONST. amend. XIV.
324. U.S. CONST. amend. XV.
325. U.S. CONST. amend. XIX.

are all examples of the principle of constitutional equality.

As one judge has written, "[t]he jury achieves symbolically what cannot be achieved practically—the presence of the entire populace at every trial."[327] The Supreme Court has been diligent in policing the equal opportunity to serve on juries, prohibiting racial and gender discrimination in criminal and civil cases,[328] by both the prosecutor and the defense.[329] In the third-party standing context, the Supreme Court has located the constitutional right to jury participation as the juror's right.[330] Yet, no citizen who shows up for jury service is told that the right to serve on a jury is the juror's constitutional right.[331]

To convey a part of that important constitutional value of equal opportunity, the jury should be instructed about the importance of equal access to jury service. A jury instruction like the following excerpt derived from *J.E.B. v. Alabama*[332] provides an example:

> Under our Constitution, equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. It not only furthers the goals of the jury system, it reaffirms the promise of equality under the law—that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy.[333]

This instruction could be given at the beginning of the trial or again during the role-of-the-jury portion of the instructions.

---

326. U.S. CONST. amend. XXVI.

327. United States v. Kandirakis, 441 F. Supp. 2d 282, 314 (D. Mass. 2006) (quoting P. DIPERNA, JURIES ON TRIAL 21 (1984)).

328. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 138–40 (1994); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991); Batson v. Kentucky, 476 U.S. 79, 82 (1986).

329. *See* Powers v. Ohio, 499 U.S. 400, 409 (1991); *see also* Georgia v. McCollum, 505 U.S. 42, 55–56 (1992).

330. *See Powers*, 499 U.S. at 409.

331. Technically this "right" to serve on a jury is an unenforceable right relating to third-party standing. *See* J. David Hittner & Eric J.R. Nichols, *Jury Selection in Federal Civil Litigation: General Procedures, New Rules, and the Arrival of* Batson, 23 TEX. TECH. L. REV. 407, 460 (1992); *see, e.g.*, Marder, *supra* note 148, at 1116.

332. 511 U.S. at 127.

333. *Id.* at 145–46.

5. Lesson Five: Popular Sovereignty, Checks and Balances, and the Jury

The Constitution is a document of structural accountability. It holds the government accountable to the people.[334] It creates a government framework of interrelated checks and balances,[335] with a bicameral legislature,[336] three branches of government,[337] and judicial review.[338] As a document of enumerated powers, it reserves all other power to the people and the States.[339] With the Bill of Rights, it consciously protects certain fundamental liberties.[340] The Tenth Amendment explicitly enshrines the principle of federalism in the constitutional structure.[341] In intricate detail, the drafters of the Constitution created a system of interrelated powers governing spending, taxes, the military, appointments, and government authority.[342]

The jury is part of that system of accountability, playing the role both as a check on the judiciary, as well as a check on the collective power of the three branches of government.[343] In the criminal context, jurors also hold individuals accountable for the crimes they are accused of committing against society.[344] As one judge wrote, "The very essence of the jury's function is its role as spokesman for the community conscience in determining whether or not blame can be imposed."[345] Jurors should thus be informed of this structural role.[346] One

334. Rebecca L. Brown, *Accountability, Liberty, and the Constitution,* 98 COLUM. L. REV. 531, 552 (1998).

335. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 574 (1995).

336. U.S. CONST. art. I.

337. U.S. CONST. arts. I–III.

338. Marbury v. Madison, 5 U.S. 137, 174–75 (1803).

339. U.S. CONST. amends. IX, X.

340. U.S. CONST. amends. I–X.

341. U.S. CONST. amend. X.

342. *See* U.S. CONST. art. I, § 8.

343. Douglas A. Berman, *Making the Framers' Case, and a Modern Case, for Jury Involvement in Habeas Adjudication*, 71 OHIO ST. L.J. 887, 892 (2010) ("The Framers regarded jury rights as a critical component of the Constitution's checks-and-balances protection of individual freedom against potential excesses of other governmental actors: on both federal and state levels, the jury was to ensure that legislatures, prosecutors, and judges could not conspire to convict and harshly punish politically unpopular defendants.").

344. Barkow, *supra* note 5, at 64–65.

345. *Id.* at 122.

346. Berman, *supra* note 343, at 893 ("In short, the Framers were eager to create a permanent role for juries in the very framework of America's new system of government. The Constitution's text was intended to make certain that the

suggestion of an instruction on constitutional accountability, deriving from Justice Scalia's opinion in *Blakely v. Washington*, could read:

> Under our Constitution, the right to a jury trial is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.[347]

Again, this instruction would probably fit best within the juror-role instruction.

6. Other Areas of Instruction

The sample instructions above provide examples of how jury instructions can be used to instill constitutional lessons about the jury role without harm to the existing jury process. The instructions are short, relevant, and provide the basics of a contextual understanding that jurors have had in the past and, for the purposes of constitutional competency, should have in the future. Importantly, the sample instructions try not to distract from the other instructions that are equally important for jurors to decide the case before them.

There is no reason why instructions modeled on the ones suggested in this Article cannot be crafted from existing appellate law in different jurisdictions and modified or expanded as needed. In the appendix to this Article, a suggested instruction incorporating the language of all of the aforementioned instructions, but simplified, is produced. For those who accept the need to educate about the Constitution through jury instructions, these proposed instructions are the floor—not the ceiling—of possible subject areas. One could even go beyond language taken directly from Supreme Court or appellate court cases, and bring in other language from scholars, Framers, or observers like Alexis de Tocqueville about the jury.

---

citizenry could and would serve as an essential check on the exercise of the powers of government officials in criminal cases.").

347. *See* Blakely v. Washington, 542 U.S. 296, 305–06 (2004).

V. CONCERNS

A cluster of concerns can be raised about modifying jury instructions to increase awareness about the constitutional role of the jury. These concerns range from the theoretical to the practical. A few representative concerns will be addressed in turn.

A. Theoretical Objections

As a theoretical matter, one might challenge the idea of using jury service, as opposed to other methods of non-jury service education, to teach constitutional lessons. One could easily imagine other educational mechanisms that focus on the role of the jury. Potential jurors could be required to take a class on civics and constitutional knowledge before serving. Schools could remedy the absence by reinstituting civics classes.[348] On-line videos or websites could be created with the information necessary for citizen-jurors. Without denigrating those ideas, the current reality is that, in general, society does not consider jury service as requiring additional education, and thus none of these options appears to have much support.

The argument for education through jury instructions rests on the simple fact that it is during jury duty that constitutional knowledge is the most relevant. To jurors serving on jury duty, the Constitution is a central organizing principle of their civic role and responsibilities.[349] Jurors are present and practicing in a constitutional role. If they have not had prior instruction, this is the moment in which the instruction will be most meaningful. Thus, it offers the most appropriate moment for instruction.

B. Instructions will be Ineffectual

A more fundamental concern might be raised that jury instructions as a whole do not educate jurors in the regular course of practice and, thus, should not be presumed to educate about the jury's constitutional role.[350] As Judge Learned Hand commented, "It is exceedingly doubtful whether a succession of abstract propositions of law, pronounced staccato, has any

348. *See supra* note 183 and accompanying text.
349. *See* FERGUSON, *supra* note 27, at 7.
350. *See supra* note 283 and accompanying text.

effect but to give [jurors] a dazed sense of being called upon to apply some esoteric mental processes, beyond the scope of their daily experience. . . ."[351] A legitimate objection can be raised about whether adding constitutional principles to the long list of instructions will add any value.

In some respects, this objection challenges the value of jury instructions in general—an objection rebutted by scholars who have studied the value of carefully written jury instructions.[352] In addition, it runs contrary to the governing presumption understood by courts that juries follow and understand jury instructions.[353] In other respects, the objection has merit. Brief instructions cannot claim to be a complete answer to a widespread societal problem, especially when we cannot be certain that jurors comprehend these instructions as written.

The strongest response to this objection involves clarifying the goal of these new instructions as not attempting to teach substantive knowledge but to encourage discussion. The instructions, so conceived, are meant to flag the role of the jury as a discussion point for deliberations. The instructions do not teach the elements of the Constitution, like one would instruct on the elements of a crime, but offer a reminder to place the discussion in its constitutional context. In this way, it matters less that jury instructions might be largely ineffectual in conveying the substantive law contained in the written text, as long as they are acknowledged and reflected upon in the deliberations.

In other words, if adequately understood, these instructions will improve the status and practice of the jury. However, even if imperfectly understood, there will still be some added value in their inclusion. Further, if the impact on the instructions extends beyond the jury and into the larger practice of a participatory democratic system, the education may have greater impact.

---

351. United States v. Cohen, 145 F.2d 82, 93 (2d Cir. 1944).

352. *See* Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 96 (1988); Jamison Wilcox, *The Craft of Drafting Plain-Language Jury Instructions: A Study of a Sample Pattern Instruction on Obscenity*, 59 TEMP. L. Q. 1159, 1182–84 (1986).

353. United States v. Johnson, 587 F.3d 625, 631 (4th Cir. 2009) ("We presume that juries follow such [jury] instructions.") (citing Richardson v. Marsh, 481 U.S. 200, 206 (1987)); s*ee also* Ritter, *supra* note 213, at 164–65.

C. Inefficiency

From a pragmatic position, judges may object to additional instructions as being a waste of time in an already crowded trial docket. From an informal poll of trial judges, the oral recitation of jury instructions ranks among judges' least favorite job responsibilities.[354] Usually, a court's recitation of criminal jury instructions can take between twenty and forty-five minutes, depending on the complexity of the case and the speed of the judge. Any additional instructions, no matter their value or merit, may rightly be objected to as an unnecessary burden on the court's time and energy.

While conceding that the proposed instructions will tax judges' time, I would submit that, on balance, the information provided outweighs the additional moments of instruction. The value must be considered not just in the benefits to that particular jury or its deliberations, but also that the point of the instructions is to elevate the institution of the jury after jury service is over and to democratic practice at large. The expectation is that the process of reflective deliberation and consideration of the jury role will encourage jurors—who are also potential future jurors—to have a positive image of the institution of the jury. A positive conception of future jury service and an improved image of the jury will benefit judges and court systems in the long run.[355]

D. Improper Influence

Some might object that the proposed instructions are in tension with the Supreme Court's decision in *Sparf*, limiting the role of the jury, and the clear jury instructions detailing the fact-finding role of the jury.[356] More pointedly, the argument would be that these instructions provide jurors with the ability to nullify cases based on a conception of the constitutional role of the jury. Arguments for and against a jury's historic, moral, and legal right to nullify have been presented by other scholars.[357] It is not the argument presented here. In fact,

354. The author bases this assertion on his nine years practicing as a trial lawyer before judges in the District of Columbia Superior Court.

355. GASTIL ET AL., *supra* note 279, at 131–33 (finding that informational sources including orientation at the beginning of jury service improves the learning experience for jurors on second or returning trips to jury duty).

356. *See* discussion *supra* Part II.B.

357. *See* Paul Butler, *Racially Based Jury Nullification: Black Power in the*

arguably the constitutional principle most historically tied to the history of the jury—"liberty"—has been consciously omitted to preclude any suggestion of jury nullification.[358] While one could craft jury instructions positing the liberty-protecting role of the jury as independent of the judicial branch, and in opposition to the executive branch, on balance, these instructions might do more to distract the jury than educate it. For that reason, this Article avoids contested constitutional principles that might lead to objections that they interfere with the current practice of jury instruction.

This objection highlights, however, how minimally disruptive these proposed instructions would be to the current practice. The instructions focus on the juror's role in the jury system, separate from the juror's decision-making responsibilities. Focusing on the importance of citizen participation, fairness, equality, diversity of ideas, and popular sovereignty should not change how the jurors will vote. These ideas will, however, change how jurors see themselves in the process. Moreover, as has been discussed earlier, these new instructions change how jurors see the jury institution after jury service is over.

E. Inertia

The final concern recognizes that the history of improving jury instructions has been one of slow progress and frustration. For decades, judges and jury scholars have been arguing that jury instructions need to be improved to make the instructions understandable.[359] The "plain language" movement has produced studies and reports documenting the difficulty in lawyer-crafted instructions.[360] State panels have been enacted

---

Criminal Justice System, 105 YALE L.J. 677, 701–02 (1995); *see also* Lawrence W. Crispo et al., *Jury Nullification: Law Versus Anarchy*, 31 LOY. L.A. L. REV. 1 (1997); David A. Pepper, *Nullifying History: Modern Day Misuse of the Right to Decide the Law*, 50 CASE W. RES. L. REV. 599, 612–13 (2000).

358. *See* 1 INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 9 (2000) (inaugural address by George Washington) ("[T]he preservation of the sacred fire of liberty and the destiny of the republican model of government are justly considered . . . deeply, . . . finally, staked on the experiment entrusted to the hands of the American people.").

359. *See generally* AM. BAR ASS'N, PRINCIPLES FOR JURIES AND JURY TRIALS (2005); Tiersma, *supra* note 283. *See also* Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 96 (1988).

360. VICKI L. SMITH, HOW JURORS MAKE DECISIONS: THE VALUE OF TRIAL

to improve the process, but progress has been slow.[361] This natural inertia potentially impedes the adoption of any proposed changes, including those in this Article.

Three arguments respond to this reality. First, while the history of modifying trial practice (and more particularly, jury instructions) has been slow, it has not been nonexistent.[362] Advocates for jury reform have managed great success in changing the practice of jury selection, conducting *voir dire*, and instructing the jury on certain issues.[363] In addition, courts have embraced pilot programs of jury innovation.[364] Accordingly, certain modifications can take root and grow.

Second, the proposed instructions suggested in this Article derive directly from Supreme Court cases and are, thus, not objectionable in terms of language or substance. One difficulty in changing jury instructions is that defense lawyers, prosecutors, and judges may have different views on the relative merits of the changes based on tactical considerations. As can be observed in the suggestions, the proposed instructions avoid contested issues and terminology. Third, the goal of improving the jury experience (and the constitutional awareness of citizens in a democracy) is shared by all the parties in the courtroom. While the courts have the most interest in creating engaged and reflective citizen-jurors, the prosecution and defenders are also dependent on good juries. In addition, jurors live in a democracy that benefits from constitutionally literate, democratic citizens. While it is likely that none of the institutional players has an overriding interest to change the system, neither should they have any objection to such a proposed change.

CONCLUSION

Every year millions of Americans participate in jury

INNOVATIONS, IN JURY TRIAL INNOVATIONS 5 (G. Thomas Munsterman et al. eds., 1997).

361. *See* Tiersma, *supra* note 213, at 1099.

362. *See* G. Thomas Munsterman, *A Brief History of State Jury Reform Efforts*, 79 JUDICATURE 216, 217 (1996); *see also* MIZE, HANNAFORD-AGOR & WATERS, *supra* note 283, at 2.

363. *See* Gregory E. Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room*, 3 CT. REV. 10, 10–15 (1999); *see also* Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1857 (2001).

364. *See* Dunn, *supra* note 59, at 1232.

service.[365] Juries still play an important constitutional role in America. The proposed jury instructions are suggestions for one way to begin the education process about that role. As one court commented:

> Tocqueville was firmly convinced that 'the practical intelligence and political good sense of the Americans' were primarily the result of our long history of using the jury system . . . . A citizen learns about our judicial system by serving on a jury one day, and the next day he or she returns to the community to share that educational experience with others. In this manner, the benefits of the jury system are spread throughout the society and "the spirit of the judges," to use de Tocqueville's phrase, is communicated "to the minds of all the citizens."[366]

There is no reason why courts cannot assist in ensuring that these benefits and this spirit continue by explicitly embracing the constitutional lessons of jury service.

365. *See* MIZE, HANNAFORD-AGOR & WATERS, *supra* note 283, at 2 (stating that NCSC statistics estimate that there were 148,558 state jury trials, 5,940 federal jury trials, with 1,526,520 citizens impaneled.).

366. Mitchell v. Superior Court (People), 729 P.2d 212, 230 (Cal. 1987), *vacated on other grounds by* Mitchell v. Superior Court (People), 49 Cal. 3d 1230 (1989).

APPENDIX 1

MODEL JURY INSTRUCTION[367]

Our constitutional system of justice entrusts jurors—ordinary citizens who need not have any training in the law—with profoundly important determinations. Our faith in the jury system is founded on longstanding tradition reflected in constitutional text, and is supported by sound considerations of justice and democratic theory.

The jury system long has been a guarantor of fairness, a bulwark against tyranny, and a source of civic values. The right to a jury trial is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as voting ensures the people's ultimate control in the legislative and executive branches, a jury trial is meant to ensure their control in the judiciary.

Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life. Under our Constitution, equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. Our Constitution requires that the jury pool you came from represent a cross-section of the community. This constitutional requirement not only furthers the goals of the jury system, it reaffirms the promise of equality under the law—that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy.

Our jury system postulates a conscious duty of participation in the machinery of justice. Being on a jury provides the opportunity for you as an ordinary citizen to participate in the administration of justice—an opportunity that has been recognized as one of the principal justifications for retaining the jury system under our Constitution. Your service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people. Your service provides a valuable opportunity to participate in a process of government, an experience that we hope fosters a respect for law.

---

367. The sample instruction is derived from the language of the Supreme Court cases discussed in Part IV with only minor editing of the language. The citations can be found in that section corresponding to the appropriate quotation.

IMPUTATION, THE ADVERSE INTEREST EXCEPTION, AND THE CURIOUS CASE OF THE RESTATEMENT (THIRD) OF AGENCY

MARK J. LOEWENSTEIN*

The imputation doctrine in the common law of agency provides that knowledge of an agent acquired in the course of the agency relationship is imputed to the principal. An important exception to the imputation doctrine, known as the adverse interest exception, provides that knowledge is not imputed if it is acquired by the agent in a course of conduct that is entirely adverse to the principal. These doctrines play an important role in sorting out liability when senior management of a corporation engages in a financial fraud that harms the company. Typically, new management is brought in and it sues the company's outside service providers (auditors, attorneys, and investment bankers), alleging that their negligence (or, in some cases, intentional wrongdoing) was a proximate cause of the fraud's success. The defense invokes the imputation doctrine—senior management's knowledge of the fraud should be imputed to the company—and in pari delicto*. The plaintiff responds that the adverse interest exception makes imputation inappropriate and, therefore,* in pari delicto *is inapplicable. At this point, the issue is joined and, historically, the outside service providers have prevailed. This settled law may have been altered by the recently adopted Restatement (Third) of Agency. This article explores the history of imputation and the adverse interest exception, the evolution and stance of the Restatement (Third) of Agency as it relates to these issues, and how various policy considerations should inform the legal doctrines at issue.*

---

* Monfort Professor of Law, University of Colorado Law School. The author thanks Joanna Arch, Dan Kleinberger, Peter Huang, Evan Berquist, Amy Schmitz, Victor Fleischer, Bob Nagel, Deborah Cantrell, Brad Bernthal, Andrew Schwartz, Helen Norton, William Boyd, Mike Waggoner, and members of the Business Law Colloquium at the University of Colorado Law School for their helpful comments and suggestions, and Casey Lekahal and Jeffrey Domash for their research assistance. The author served as an expert consultant to a national accounting firm in an arbitration action brought against it by a corporation whose officers had falsified the corporation's accounting records and financial statements.

INTRODUCTION

Among the most enduring concepts in the law of agency is that an agent's knowledge gained in the course of an agency relationship is imputed to the principal.[1] This simple concept

1. Restatement (Third) of Agency Section 5.03 (2006) reads:
For purposes of determining a principal's legal relations with a third party, notice of a fact that an agent knows or has reason to know is

facilitates the ability of persons—individuals and especially entities—to conduct their business through agents, because third parties dealing with the agent can assume that information given to, or otherwise acquired by, the agent in the course of the agency relationship binds the principal, even if the agent in fact fails to disclose the information to the principal.[2] When the principal is an entity, the third party has no choice but to deal with an agent and would not do so if the agent's knowledge were not automatically imputed to the principal.[3] This much is uncontroversial in the law of agency, but there is an exception to this concept that is controversial: the adverse interest exception. As articulated in the Restatement (Third) of Agency, this exception states that "notice of a fact that an agent knows or has reason to know is not imputed to the principal if the agent acts adversely to the principal in a transaction or matter, intending to act solely for the agent's own purposes or those of another person. . . ."[4]

This exception to imputation was one of the most

---

imputed to the principal if knowledge of the fact is material to the agent's duties to the principal, unless the agent
(a) acts adversely to the principal as stated in § 5.04, or
(b) is subject to a duty to another not to disclose the fact to the principal.

Id. The rationale for the rule has been variously stated, but seems to rest on the idea that the principal has the ability to monitor the agent and to create incentives for properly handling information. *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 5.04, cmt. b (2006).

2. RESTATEMENT (THIRD) OF AGENCY, § 5.03, cmt. b (2006).

3. Thus, the reason for the imputation rule "is to avoid the injustice which would result if the principal could have an agent conduct business for him and at the same time shield himself from the consequences which would ensue from knowledge of conditions or notice of the rights and interests of others had the principal transacted his own business in person." First Ala. Bank v. First State Ins. Co., 899 F.2d 1045, 1061 (11th Cir. 1990).

4. RESTATEMENT (THIRD) OF AGENCY § 5.04 (2006). The full section reads:
Section 5.04 An Agent Who Acts Adversely to a Principal
For purposes of determining a principal's legal relations with a third party, notice of a fact that an agent knows or has reason to know is not imputed to the principal if the agent acts adversely to the principal in a transaction or matter, intending to act solely for the agent's own purposes or those of another person. Nevertheless, notice is imputed
(a) when necessary to protect the rights of a third party who dealt with the principal in good faith; or
(b) when the principal has ratified or knowingly retained a benefit from the agent's action.

Id. A third party who deals with a principal through an agent, knowing or having reason to know that the agent acts adversely to the principal, does not deal in good faith for this purpose. There are important qualifications to this principle, discussed in detail in sections II and III, *infra*.

important[5] and vigorously debated topics during the course of the adoption of the Restatement (Third) of Agency by the American Law Institute ("ALI" or "Institute").[6] At the core of the debate was a concern about the future of litigation involving accounting frauds committed by senior corporate management.[7] After the discovery of these frauds, the wrongdoers typically are fired by the board of directors, and new management (or a trustee in bankruptcy) for the corporation seeks to recover its losses from the corporation's outside professional service providers—lawyers, accountants, and investment bankers, among others.[8] The claims vary, but generally amount to claims for professional malpractice, breach of fiduciary duty, fraud, etc.[9] The outside service providers typically assert an *in pari delicto* defense,[10] arguing that

5. In the course of the discussion of section 5.04 during the 2002 annual meeting, the President of the ALI, Michael Traynor, noted the importance of the section and cautioned the membership: "There is a concern that we not act precipitously today to try to solve problems that have momentous consequence to the economy of our country." 79 A.L.I. PROC. 134 (2002). Another member, in the course of recommending that the section be reconsidered by the Reporter and consultative group, said that "this is an issue that has a great public moment. It has implications to all our financial-markets investors across the country. . . ." *Remarks of R. James George, Jr.*, 79 A.L.I. PROC. 135 (2002).

6. The matter was considered at the annual meetings held on May 13, 2002, May 14, 2003, and May 17, 2005.

7. *See, e.g.*, 79 A.L.I. PROC. 114–142 (2002).

8. *See, e.g.*, *In re* The Bennett Funding Grp., Inc., 336 F.3d 94 (2nd Cir. 2003) (claim by trustee in bankruptcy against accountants and attorneys); *In re* Nat'l Century Fin. Enter., Inc., 783 F. Supp. 2d 1003 (S.D. Ohio 2011) (claim by trustee against investment bank); Adelphia Recovery Trust v. Bank of Am., N.A., 2010 WL 3452374 (S.D.N.Y. Sept. 1, 2010) (claim by trustee against banks).

9. *E.g.*, Cenco Inc. v. Seidman & Seidman, 686 F.2d 449, 453–4 (7th Cir. 1982). In *Cenco*, the court noted that the various claims asserted against an auditor amount to "a single form of wrongdoing under different names."

10. Literally, "in equal fault." The phrase is part of a longer Latin phrase, i*n pari delicto est condition defendintis*, which has been translated as, "where both parties are equally in the wrong, the position of the defendant is the stronger." BLACK'S LAW DICTIONARY 1838 (9th ed. 2009). In the prototypical case considered in this article, where a corporation sues its auditors who failed to discover or disclose the fraud of the corporation's managers, the corporation is always at least as culpable as the auditor. In *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299 (1985), the Court considered whether the clients of a corrupt stockbroker, who convinced the plaintiffs that he was disclosing valuable inside information to them, could maintain an action against the broker (and his employer) when the information turned out to be bogus. The defendant set up the defense of *in pari delicto*. The Court held that defense was inapplicable under these circumstances because, among other reasons, the public would benefit if this sort of wrongdoing was exposed. There is no comparable public benefit if the auditors are precluded from raising the defense; their wrongdoing will be exposed by others who have been harmed by their negligent or intentional misconduct.

knowledge of the accounting fraud should be imputed to the corporation because, of course, it was known to the corporation's agents who committed the fraud. Since the corporation knew of the fraud that caused its losses, the *in pari delicto* doctrine operates to preclude the suit by one wrongdoer, the corporation, against another alleged wrongdoer, the negligent or even corrupt outside service provider, so long as the culpability of the corporate plaintiff is at least as great as the culpability of the defendant outside service provider.[11]

The force of the imputation doctrine and its limited adverse interest exception are bolstered by an equally well-entrenched doctrine of agency law: the doctrine of *respondeat superior*.[12] Under this doctrine, a principal is liable to a third party who suffers injury as a result of the wrongdoing of an agent that occurred within the scope of the agent's employment, including losses resulting from fraudulent acts of the agent.[13] The exception to *respondeat superior* is similar to

---

Some courts have held that *in pari delicto* is a standing issue: a corporation does not have standing to bring a claim against its auditors if the corporation was at least equally at fault. Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 117–20 (2d Cir. 1991). Most courts reject this approach and treat *in pari delicto* as an affirmative defense. *See*, *e.g.,* In re Amerco Derivative Litig., 252 P.3d 681, 694 (Nev. 2011) and cases collected there.

11. *See supra* note 10 and accompanying text.

12. RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006) ("An employer is subject to liability for torts committed by employees while acting within the scope of their employment.").

13. Typical is the language from *In re Innovative Communication Corp.*, 2011 WL 3439291, at *28 (Bankr. D.V.I. Aug. 5, 2011):

> The fraud of an officer of a corporation can be imputed to the corporation in certain circumstances:
> when the officer's fraudulent conduct was (1) in the course of his employment, and (2) for the benefit of the corporation. This is true even if the officer's conduct was unauthorized, effected for his own benefit but clothed with apparent authority of the corporation, or contrary to instructions. The underlying reason is that a corporation can speak and act only through its agents and so must be accountable for any acts committed by one of its agents within his actual or apparent scope of authority and while transacting corporate business.

Courts have sometimes appeared to have gone further, holding an employer liable for an employee's fraud "even where the fraud was committed strictly for the agent's own benefit and the principal's detriment." Pacific Mut. Life Ins. Co. v. Haslip, 553 So.2d 537, 541 (Ala. 1989) (quoting with approval from the trial court's opinion). In *Haslip*, an insurance company's agent purported to sell a health insurance policy that, in fact, was not offered by the company. The agent pocketed the premium, but the court held the company liable nonetheless. The touchstone was the fact that the agent actually was an employee, represented himself as such and used the company's facilities and resources. The case, and many others like it, demonstrates that courts will protect innocent third parties injured by the fraudulent acts of an agent who either is, or appears to be, acting

the adverse interest exception to imputation, although phrased somewhat differently: if the agent acted outside of the scope of employment and intended to further no interest of the principal, the principal is not liable for the agent's actions.[14] The parallelism between the imputation doctrine and *respondeat superior* is palpable[15] and has been recognized in numerous cases.[16] The court in *In re Mifflin Chemical Corp.*,[17] noted the relationship in the context of a case in which the employees of Mifflin sold denatured alcohol to bootleggers during Prohibition, contrary to Mifflin's instructions, but increasing Mifflin's sales and their commissions (their likely

within the scope of his authority. This principle was captured succinctly in Restatement (Second) of Agency Section 261 (1958): "A principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud."

14. *E.g.*, Gov't Employees Ins. Co. v. United States, 678 F. Supp. 454, 456 (D.N.J. 1988) ("Dunne's conduct was not actuated by a purpose to serve the master"); Johnson v. Evers, 238 N.W.2d 474 (Neb. 1976) (motorist was off duty and performing no service for employer at time of accident, and his negligence could thus not be imputed to employer under doctrine of *respondeat superior*); Miller v. Reiman-Wuerth Co., 598 P.2d 20, 24 (Wyo. 1979) ("Grandpre's conduct at the time of the collision was not actuated in any part by a purpose to serve appellee"); Henderson v. Prof'l Coatings Corp., 819 P.2d 84, 89 (Haw. 1991) ("[t]here was no intention to act in the employer's interest, nor was there any direct benefit to the employer'").

15. The first Restatement of Agency recognized this in the comment explaining the "meaning of 'acting adversely,'" where the Reporter wrote: "The mere fact that the agent's primary interests are not coincident with those of the principal does not prevent the latter from being affected by the knowledge of the agent if the agent is acting for the principal's interests. The rule as stated herein [the adverse interest exception to the imputation rule] is substantially similar to the rule . . . [relating to acting outside of the within scope of employment in relation to *respondeat superior*]. . . ." RESTATEMENT (FIRST) OF AGENCY § 282, comment 1b. A typical conflation of *respondeat superior* and imputation of knowledge is evident in *In re Rent-Way Sec. Litig.*, 209 F. Supp. 2d 493, 522 (W.D. Pa. 2002), where the court wrote that "the fraud of an officer . . . is imputable to the corporation when the officer . . . commits the fraud: (1) in the scope of his employment, and (2) for the corporation's benefit."

16. *E.g.*, Official Comm. of Unsecured Creditors of Allegheny Health, Educ. & Research Found. v. PricewaterhouseCoopers, LLP, No. 07-1397, 2008 WL 3895559 (3d Cir. July 1, 2008) ("If the agent intended to serve the principal, the fraud is imputed; if, however, the agent intended only to serve himself, the fraud is not imputed . . . Moreover, this approach is familiar in Pennsylvania law, as it is the approach followed in *respondeat superior* cases."); Battenfeld of Am. Holding Co., Inc. v. Baird, Kurtz & Dobson, 60 F. Supp. 2d 1189, 1215 (D. Kan. 1999) (The court refers to the *respondeat superior* exception when an employee acts adversely to the corporation in a similar context to the adverse interest exception; the actions of the AMC employees in making false entries into AMC's books is not imputed to AMC.).

17. 123 F.2d 311, 315–16 (3d Cir. 1941).

motive). The government sued for the higher taxes due and Mifflin defended on the basis that it did not know of the illegal sale.[18] Moreover, Mifflin argued, since the employees were acting adversely to Mifflin, their knowledge should not be imputed to Mifflin. The court assumed that the employees did not tell their superiors of the illegal sale, and that the employees engaged in conduct prohibited by Mifflin, but concluded that Mifflin nonetheless was bound by their knowledge.[19] The court tied the adverse interest exception to the doctrine of *respondeat superior*:

> One need not talk about actual knowledge by Mifflin or a presumption that the employer knows everything that the employee knows. It has been conceded that these employees were violating instructions and that they concealed from their superiors in the Mifflin organization the knowledge of their activities in promoting illegal diversion of the alcohol. That does not, on principles of agency, *ipso facto* relieve the employer of liability. Responsibility of an employer for things his agent does is not imposed on the basis of knowledge in fact, but under the general rule of *respondeat superior*. No reliance need be made on any fictional attributing of knowledge to Mifflin. The employers are responsible for the knowledge of the facts had by their agents in doing the very business for which they were employed.[20]

In the accounting fraud cases mentioned above, a simple application of the imputation or *respondeat superior* doctrine devastates the plaintiff's case, compelling the plaintiff to seek to avoid imputation and *respondeat superior*.[21] Traditionally, the adverse interest exception was the doctrine of choice. Plaintiffs argued that the corrupt officers were acting in their own interests, either because the corrupt officers benefited directly from the fraud or because discovery of the fraud was inevitable and, when it is discovered, the corporation would suffer.[22]

The vast majority of the reported cases involving suits by

18. *Id.*
19. *Id.*
20. *Id.* at 316.
21. *In re* Mifflin Chem. Corp., 123 F.2d 311, 315–16 (3d Cir. 1941).
22. *In re* The Bennett Funding Grp., Inc., 336 F.3d 94, 100 (2d Cir. 2003).

the corporation (whether directly, derivatively, or by a trustee in bankruptcy) against its outside service providers tended to focus more on imputation/adverse interest exception than on the parallel doctrine of *respondeat superior*/scope of employment.[23] Not surprisingly, when the ALI took up the issue of the liability of outside service providers for the accounting frauds of corporate management, it did so in the context of imputation rather than *respondeat superior*.

When this matter was before the ALI in the early 2000s as it considered the Restatement (Third) of Agency, the accounting scandals that came to light at the turn of the twenty-first century—Enron, Adelphia, Tyco, Health South, and others—were fresh in the minds of the members of the ALI, and shaped the debates on the floor of the ALI annual meetings that considered the relevant sections.[24] More importantly, some members of the ALI seemed to have a personal stake in the outcome.[25] A broad adverse interest exception, that is, one that precluded imputation in more cases, would allow more lawsuits against outside professional service providers—often with deep pockets—to proceed. The stakes were high when section 5.04 of the Restatement, as well as its comments and illustrations, came to the floor of the ALI in 2002, 2003, and 2005.

Thus, a segment of the ALI may have seen the Restatement project as an opportunity to tweak the law in order to make it more amenable to claims by companies against their outside service providers. If so, they would have to expand the doctrine that precludes imputation—the adverse

23. Aside from cases involving an outside service provider, *respondeat superior* seems to be the predominant doctrine to deal with a principal's liability for its agent's fraudulent conduct. *See* RESTATEMENT (SECOND) OF AGENCY § 282 cmt. a (1958) ("If, however, an agent fails to reveal [a] fact in order to accomplish some fraud of his own antagonistic to the interests of the principal, the principal is not bound, for the same reason that no liability is imposed upon a master for the tort of a servant acting entirely for his own purposes. . . .").

24. Enron alone was mentioned three times in the 2002 proceedings, 79 A.L.I. PROC. at xi, 125, 145 (2002), three times in the 2003 proceedings, 80 A.L.I. PROC. at 16, 259, 337 (2003), four times in the 2004 proceedings, 81 A.L.I. PROC. at 318, 320, 350, 394 (2004), and seven times in the 2005 proceedings, 82 A.L.I. PROC. at 174, 175, 177, 219, 222, 230, 238 (2004). *See generally* Anup Agrawal and Sahiba Chadha, *Corporate Governance and Accounting Scandals*, 48 J.L. & ECON. 371 (2005) (analyzing the relationship between corporate governance and the likelihood of an accounting scandal).

25. *See, e.g.*, 79 A.L.I. PROC. 121 (2002), where ALI member Gerald K. Smith, in the course of commenting on section 5.04, acknowledged, "I am a trustee in a case where some of these types of issues are surfaced [sic], and I am the client."

interest exception to imputation. This would be a logical strategy, because the adverse interest exception historically was the doctrine that litigators employed to avoid imputation.[26] As it turned out, however, precedent around the adverse interest exception was deep and consistent. In short, it would be difficult to restate and broaden the adverse interest exception. Instead, the proponents of a broad adverse interest exception to imputation may have stumbled upon another tactic: narrow the imputation doctrine directly without reference to the motivations of the corrupt agent. In this they succeeded, perhaps.

This article tells the story of these debates and their outcomes. Of course, imputation and the adverse interest exception apply in a myriad of different situations,[27] but because of the importance of auditor (and other outside service provider) liability, and the interest of the ALI membership in that issue, this article focuses primarily on the Restatement (Third) of Agency as it relates to the liability of auditors in the context of management accounting fraud.

Part II reviews the precedent that informed the Reporter's initial draft of section 5.04, which I believe accurately restated the law. Part III considers the debate and the changes to section 5.04, including changes to the comments and illustrations. This Part concludes that those who sought to narrow the circumstances under which imputation is recognized had some success in their efforts, but, in the end, the articulation of the adverse interest exception in the Restatement (Third) misstated and muddled the law. Part IV considers how public policy should have informed the outcome of the debate, especially using insights from psychology research, economic analysis, and robust notions of contractual freedom. This Part concludes that the Reporter's original draft stated the law consistently with sound public policy. Part V

26. *See In re* The Bennett Funding Grp., Inc., 336 F.3d at 100.

27. *E.g.*, Am. Bank Ctr. v. Wiest, 793 N.W.2d 172, 175–180 (N.D. 2010) (affirming rescission of a loan made to Wiest because the fraud of the loan officer was imputed to the bank, holding that the adverse interest exception did not apply because the loan officer was not acting solely out of his own interest); Martin Marietta Corp. v. Gould, Inc., 70 F.3d 768, 774 (4th Cir. 1995) (finding that employees of the seller were completely adverse to the purchaser in the context of a sale of a corporate division); Mancuso v. Douglas Elliman LLC, 808 F.Supp.2d 606, 630 (S.D.N.Y. 2011) (finding that the adverse interest exception did not apply to the discriminatory practices of a real estate salesperson so that the acts would be imputed to the real estate brokerage firm).

concludes with some thoughts about the ALI and how the Restatement (Third) of Agency might affect the Institute's influence in the future.

I. THE LAW UNDERPINNING THE ADVERSE INTEREST EXCEPTION

The adverse interest exception is a narrow exception to the broad doctrine of imputation, as I demonstrate in the first section below. I then consider two important qualifications to the adverse interest exception. The first involves claims made not by the principal itself against a third party, but rather by a court-appointed successor, who often is successful in avoiding imputation. The second involves the "sole actor" doctrine, which applies when the agent dominates the principal. Under these narrow circumstances, the courts have held that the adverse interest exception is inapplicable and imputation should be recognized. Neither doctrine, however, has much relevance to the typical management fraud case that is the central concern of this article.

A. The Adverse Interest Exception and its Rationale

The adverse interest exception operates to rebut the presumption of imputation if the agent acts adversely to the principal and solely for the agent's own purposes or the purposes of a third party.[28] The Restatement (Third) of Agency Section 5.04 suggests an element of intent, requiring that the agent must have *intended* to act solely for the agent's own purposes or those of another person.[29] The adverse interest exception thus gives rise to some interpretative issues: what are the meanings of "solely," "adverse," and "intent"?

The case law and commentary to section 5.04 do not examine these terms as independent criteria that must be satisfied. Rather, the three concepts merge in the analysis.

28. RESTATEMENT (THIRD) OF AGENCY § 5.04 (2006).

29. *E.g.*, *In re* Wedtech Securities Litigation, 138 B.R. 5, 9 (S.D.N.Y. 1992) ("The New York courts have found that '[t]o come within the exception, the agent must have totally abandoned his principal's interests and be acting entirely for his own or another's purposes. It cannot be invoked merely because he has a conflict of interest or because he is not acting primarily for his principal.' As we stated in our earlier opinion, '[t]he relevant issue is short term benefit or detriment to the corporation, not any detriment to the corporation resulting from the unmasking of the fraud.'" (citations omitted)).

With respect to "solely," for instance, courts have explored how actions *primarily* motivated by the agent's personal interests should be characterized.[30] The overwhelming precedent that informed the Restatement (Third) of Agency took a rather orthodox view of the term "solely," concluding that *any* benefit to the principal from the agent's misconduct—regardless of the agent's underlying motivations—precluded the application of the adverse interest exception.[31] At the same time, case law supported the view that if an agent was motivated to serve the principal's interest, the adverse interest exception could not apply even if the agent did not, in fact, benefit the principal.[32] Put differently, if the principal benefited, regardless of the agent's motives, or if the agent was motivated to benefit the principal, regardless of the outcome of the agent's conduct, the agent was not acting adversely.[33] It appears, then, that the

30. *Id.* While the Restatement (Third) of Agency does not address this directly, the Restatement (Second) did. In comment c to section 282, the drafters wrote: "The mere fact that the agent's primary interests are not coincident with those of the principal does not prevent the latter from being affected by the knowledge of the agent if the agent is acting for the principal's interests."

31. *E.g.*, Official Comm. of Unsecured Creditors of Allegheny Health, Educ. and Research Found. v. PricewaterhouseCoopers, LLP, 607 F.3d 346, 351 (3d Cir. 2010) (applying "traditional, liberal test for corporate benefit"); Baena v. KPMG, 453 F.3d 1, 7–8 (1st Cir. 2006) ("A fraud by top management to overstate earnings, and so facilitate stock sales or acquisitions, is not in the long-term interest of the company; but, like price-fixing, it profits the company in the first instance and the company is still civilly and criminally liable . . . Nor does it matter that the implicated managers also may have seen benefits to themselves—that alone does not make their interests adverse") (applying Massachusetts law); *In re* Amerco Derivative Litig., 252 P.3d 681, 695 (Nev. 2011) ("If the agent's wrongdoing benefits the corporation in any way, the [adverse interest] exception does not apply."); Kirschner v. KPMG LLP, 938 N.E.2d 941, 952 (N.Y. 2010) (insider's misconduct must "benefit[ ] only himself or a third party"); Cobalt Multifamily Investors I, LLC v. Shapiro, 2008 WL 833237, at *4 (S.D.N.Y. 2008) (adverse interest exception inapplicable if the principal realized "at least some financial benefit" from the fraud); Bullmore v. Ernst & Young Cayman Islands, 861 N.Y.S.2d 578, 582 (N.Y. Sup. Ct. 2008) (same). The commentary to section 5.04 notes that in many cases a determination of the "solely" issue is made without examining the agent's motives and focuses instead on "whether the principal benefited through the agent's actions." RESTATEMENT (THIRD) OF AGENCY § 5.04 cmt. c (2006). *But see* Bankr. Servs. v. Ernst & Young (*In re* CBI Holding Co.), 529 F.3d 432 (2d Cir. 2008) (some benefit to corporation was not sufficient to overcome the adverse interest exception where managers did not intend to benefit corporation).

32. *E.g.*, Baena v. KPMG, 453 F.3d 1, 8 (1st Cir. 2006) (applying Massachusetts law) ("'Adverse interest' in the context of imputation means that the manager is motivated by a desire to serve himself or a third party, and not the company, the classic example being looting").

33. Some cases, however, do require a showing of the agent's motive if the benefit to the principal was "not inconsistent with an abandonment [by corrupt

"intent," "solely," and "adverse" requirements are satisfied only if the agent was motivated by personal purposes and the principal did not in fact benefit from the agent's conduct.

The ALI's commentary to section 5.04 notes as well that an agent's motive is irrelevant, despite the fact that the black-letter refers to an agent's "intent," which does suggest motive.[34] The commentary posits a case in which a company's chief financial officer misleads the company's auditor and the company is subsequently sued by a person who entered into a transaction with the company relying on the false financial statements.[35] The company is liable to the plaintiff and the comment says that the motive of the CFO, though unspecified in the illustration, is irrelevant.[36]

The rationale that emerges from the Restatement (Third) of Agency to support the adverse interest exception is best understood in light of the rationale that supports the basic imputation doctrine. The drafters of the Restatement (Third) offered two rationales for imputation. First, an agent has a duty to its principal to disclose information material to the agent's responsibilities.[37] Second, a "more comprehensive justification" is that the doctrine "creates strong incentives for principals to design and implement effective systems through which agents handle and report information."[38] This second justification reduces a principal's incentives to use agents to avoid the legal consequences of knowing information that the principal would prefer not to know.[39] An exception to imputation, then, should arise when the agent is not acting in a capacity that requires disclosure (i.e., disclosure would not be within the scope of the agent's responsibilities) or the "agent" is not really acting as such (the adverse interest exception).[40]

---

management] of the corporation's interest." *In re* Crazy Eddie Sec. Litig., 802 F.Supp. 804, 818 (E.D.N.Y. 1992).

34. RESTATEMENT (THIRD) OF AGENCY, § 5.04 illus. 4–5 (2006).

35. *Id.*

36. *Id.* But this illustration is a bit misleading; the company's liability arises as a result of *respondeat superior*, so imputation and the adverse interest exception are both irrelevant. *See, e.g.*, *In re* Crazy Eddie Sec. Litig., 802 F.Supp. 804, 818 (E.D.N.Y. 1992) (principal "is liable for its agents' fraud 'though the agent acts solely to benefit himself, if the agent acts with apparent authority.'").

37. RESTATEMENT (THIRD) OF AGENCY § 5.03, cmt. b (2006).

38. *Id.*

39. *Id.*

40. There is a third possibility, which is not germane to the inquiry of this article. The nature of the agency relationship may be such that, for public policy reasons, principals should be shielded from information known to their agents. This last situation might arise in a firm that must restrict the flow of information

The drafters of the Restatement (Third) did not provide as robust a justification for the adverse interest exception as they did for the underlying imputation doctrine. The comments to section 5.04 focus on when the adverse interest exception should not be invoked as opposed to why it may be invoked at all. The justifications for the imputation doctrine, however, point in the direction of a simple justification for the adverse interest exception: it makes no sense to charge a person with the actions or knowledge of someone purporting to act as the person's agent if the purported agent was not acting at all on that person's behalf.[41]

A leading case, decided by the Seventh Circuit Court of Appeals in 1982 and cited in the Reporter's Notes to section 5.04, adopts this narrower view of the adverse interest exception, without ever mentioning the doctrine or, indeed, the Restatement of Agency. The case, *Cenco Inc. v. Seidman & Seidman*,[42] also provided a cogent rationale for imputation and the *in pari delicto* defense. The case involved fraud by upper-level corporate management, primarily by overstating the value of inventories.[43] This overstatement increased the value of the company, which resulted in higher stock price and lower borrowing costs.[44] The district court and the court of appeals agreed that the knowledge of the corrupt officers was the knowledge of the company;[45] thus, *in pari delicto* provided a defense for the auditors, who were alleged to have been complicit in the fraud.[46]

The appellate court analyzed the appropriateness of imputation and *in pari delicto* in the context of the objectives of tort liability generally—compensating victims of wrongdoing

---

from one department to another. For instance, an investment bank that provides advice to a company contemplating a financing might prohibit the transference of that information to its trading department. If, in fact, there is no disclosure from the banking department to the trading department, the trading department should not be subject to a claim of trading on such information, despite the imputation doctrine. Under these circumstances, imputation would be inappropriate.

41. Of course, if a third party dealt with the purported agent reasonably believing, based on conduct of the "principal," that the purported agent was in fact an agent and was acting on behalf of the "principal," then the "principal" may be liable to the third party on grounds such as estoppel. *See* RESTATEMENT (THIRD) OF AGENCY § 2.05 (2006).

42. 686 F.2d 449 (7th Cir. 1982).

43. *Id.* at 451.

44. *Id.*

45. *Id.* at 454.

46. *Id*.

and deterring future wrongdoing.[47] As to the former, the court noted that any recovery on behalf of Cenco would benefit its current shareholders, some of whom acquired stock after disclosure of the fraud and others of whom may themselves have committed the fraud.[48] Neither of these groups, the court concluded, were victims of the fraud.[49] As to the shareholders who acquired Cenco shares during the perpetration of the fraud, they had a securities fraud claim directly against the auditors, which coincidentally, was settled just as the trial on Cenco's claim against the auditors began.[50] As to these shareholders, the court concluded that if Cenco succeeded in recovering from the auditor, they would receive a "double recovery."[51]

As to the second objective, deterring wrongdoing, the court concluded that the board of directors of Cenco was in a better position to monitor the conduct of corporate management than the auditor.[52] The court noted that if the auditor were held liable, the board's "incentives to hire honest managers and monitor their behavior will be reduced."[53] The court said the shareholders of Cenco bore some of the fault for the fraud because the directors that they elected—their "delegates"—were "slipshod in their oversight."[54] Finally, the court noted that if Cenco could divorce itself from its corrupt managers, then the auditor should be able to divorce itself from members and employees of the firm who suspected fraud but did not act on their suspicions.[55]

While traditional tort objectives dominated the court's analysis, the court did consider the relevance of the adverse interest exception, albeit not under that rubric.[56] The analysis

47. *Id.* at 455.
48. *Id.* at 456.
49. *Id.* at 455.
50. *Id.* at 451.
51. *Id.* at 457.
52. *Id.* at 455–56. The notion that a principal bears responsibility for monitoring its agents who conspire with third parties has been affirmed in subsequent circuit cases. *See, e.g.*, Banco Indus. de Venezuela v. Credit Suisse, 99 F.3d 1045, 1051 (11th Cir. 1996) ("[T]he bank must increase its own vigilance and supervision to prevent being made a victim by the culpability of its own responsible officers. In this case the principal employee at fault was the executive vice president of [the bank], and the bank cannot avoid the consequences for his fraudulent actions within the scope of his unsupervised duties.").
53. *Cenco*, 686 F.2d at 455.
54. *Id.* at 456.
55. *Id.*
56. *Id.* at 454–55.

of the adverse interest exception arose in the context of considering an earlier English case in which the auditors were held liable to an audit client for negligently failing to discover that the company's manager had misrepresented the company's profits.[57] This misrepresentation caused the company to pay dividends and bonuses to which the manager otherwise would not have been entitled.[58] The court distinguished this case from *Cenco* on the basis that the manager "was stealing from, not for, the company."[59] This pithy distinction, of course, captured the essence of the adverse interest exception. Stealing *from* the company fell within the exception, while stealing *for* it did not. Left unexplained in the court's opinion was why that distinction should make a difference, but the first objective of tort law does provide an answer. If the manager was stealing from the company, the company was the victim and, other things being equal, should be compensated from those whose negligence caused the loss.

B. Corporate Plaintiff Versus Trustee in Bankruptcy or State Liquidator

Many suits against auditors and other outside service providers are initiated by a trustee in bankruptcy or state-appointed liquidator, who succeeds to any claims that the bankrupt company may have had and, presumably, is subject to the same defenses that might have been asserted against the company.[60] Nevertheless, the fact that the plaintiff is the

57. *Id.* at 454 (citing Leeds Estate, Bldg. & Inv. Co. v. Shepherd, 36 Ch.D. 787, 802, 809 (1887)).

58. *Id.* at 454–55.

59. *Id.* at 455.

60. Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145, 1150 (11th Cir. 2006) ("If a claim . . . would have been subject to the defense of *in pari delicto* at the commencement of the bankruptcy, then the same claim, when asserted by the trustee, is subject to the same affirmative defense."); Grassmueck v. Am. Shorthorn Ass'n, 402 F.3d 833, 836 (8th Cir. 2005) ("[T]he equitable defense of *in pari delicto* is available in an action by a bankruptcy trustee against another party if the defense could have been raised against the debtor."); Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., 267 F.3d 340, 358 (3d Cir. 2001) (noting that no courts have ruled that *in pari delicto* defense does not apply to a trustee in the bankruptcy context); *In re* Advanced RISC Corp., 324 B.R. 10, 15 (D. Mass. 2005) ("In short, although the statute does not explicitly state that the bankruptcy trustee is bound by all defenses to which the debtor was subject, that premise is necessarily implied by the Bankruptcy Code and is confirmed by case law and the legislative history."); *In re* Scott Acquisition Corp., 364 B.R. 562, 570 (Bankr. D. Del. 2007) ("The plain language of the [bankruptcy] statute and the legislative history clearly suggests that if a claim

trustee or liquidator, instead of the company itself, has caused some courts to view these cases differently.

Schacht v. Brown,[61] for instance, which is discussed in the Reporter's Notes to section 5.04, involved a claim by a State Director of Insurance, acting as the liquidator of an insolvent insurer, against the insurer's outside auditors and others.[62] The outside service provider defendants sought to "estop" the director from pursuing a claim against them, citing the *Cenco* decision, which was decided by a different panel of the same court.[63] The essence of this estoppel claim was, of course, just *in pari delicto* by another name. The Reporter characterized *Schacht* as a case that "may" have "modified" the analysis in *Cenco*.[64] Hardly. In fact, the *Schacht* court carefully distinguished *Cenco*. It rejected the defendants' reliance on estoppel, writing that the Director's claim was based on the federal RICO statute,[65] so federal policies must be brought "to bear."[66] In other words, state common law doctrines such as imputation and the adverse interest exception may not necessarily be determinative in a federal RICO claim.

Second, and more relevant for present purposes, the *Schacht* court distinguished *Cenco* on its facts because the conduct of the allegedly corrupt officers in the *Schacht* case could "in no way" be described as beneficial to the company.[67] Rather, the insurer was "fraudulently continued in business past its point of insolvency and systematically looted of its most profitable . . . business."[68] The court suggested that this case, unlike *Cenco*, was one in which the corrupt officers were stealing from the corporation rather than for it.[69] Finally, the court applied the traditional tort analysis of compensation and deterrence, and concluded that due to the deep insolvency of the insurer, recovery would not benefit its shareholders and there was no evidence of the existence of shareholders capable

---

by a debtor is barred by an *in pari delicto* defense, that same claim brought by a trustee is similarly barred.").

61. 711 F.2d 1343 (7th Cir. 1983).

62. *Id.*

63. *Id.* at 1346–47. This case was decided by Judges Cummings, Wood, and Hoffman (Senior District Judge) while *Cenco* was decided by Judges Bauer, Wood, and Posner.

64. RESTATEMENT (THIRD) OF AGENCY § 5.04 note c (2006).

65. 18 U.S.C. § 1962 (2006).

66. *Schacht*, 711 F.2d at 1347.

67. *Id.* at 1347–48.

68. *Id.* at 1348.

69. *Id.*

of monitoring the insurer's behavior.[70] In short, the *Schacht* court went to great lengths to distinguish and preserve *Cenco*.

The most that can be said of *Schacht*'s effect on the adverse interest exception is that, after that case, the adverse interest exception will be satisfied if a principal is insolvent at the time that the agents act adversely to it, and the consequence of their conduct is to deepen that insolvency. Some courts have recognized a cause of action in tort for liquidators against outside service providers based on the concept that the company's deepening insolvency harms creditors.[71] This application of the adverse interest exception in situations similar to *Schacht* has been followed by a few courts,[72] but rejected by others.[73] In any case, it is a narrow qualification to

70. *Id.* at 1348–49.

71. *See generally* Douglas R. Richmond, Rebecca Lamberth & Ambreen Delawalla, *Lawyer Liability and the Vortex of Deepening Insolvency*, 51 ST. LOUIS U. L.J. 127 (2006) (analyzing the liability of lawyers on a tort claim based on prolonging the insolvency of a client).

72. *E.g.*, Fehribach v. Ernst & Young LLP, 493 F.3d 905, 908 (7th Cir. 2007) (noting that the deepening insolvency theory could be invoked in a case where management is in cahoots with an auditor or other outsider and concealed the corporation's perilous state, which if disclosed earlier would have enabled the corporation to survive in reorganized form); Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., 267 F.3d 340, 349 (3d Cir. 2001) ("[T]he Pennsylvania Supreme Court would determine that 'deepening insolvency' may give rise to a cognizable injury."); Hannover Corp. of Am. v. Beckner, 211 B.R. 849, 854 (M.D. La. 1997) ("[A]ggravation of insolvency or prolonging the life of an insolvent business has been considered to constitute injury to the corporation."); Allard v. Arthur Andersen & Co. (USA), 924 F. Supp. 488, 494 (S.D.N.Y. 1996) ("Because courts have permitted recovery under the 'deepening insolvency' theory, [Arthur Anderson] is not entitled to summary judgment as to whatever portion of the claim for relief represents damages flowing from indebtedness to trade creditors."); *In re* Latin Inv. Corp., 168 B.R. 1, 5 (Bankr. D.D.C. 1993) (holding that damages inflicted in perpetuating the debtor's existence past the point of insolvency in order to loot is compensable); NCP Litig. Trust v. KPMG LLP, 901 A.2d 871, 888 (N.J. 2006) ("[W]e find that inflating a corporation's revenues and enabling a corporation to continue in business 'past the point of insolvency' cannot be considered a benefit to the corporation.").

73. *E.g.*, *In re* CitX Corp., 448 F.3d 672, 677 (3d Cir. 2006) (holding that purported harm to corporation in the form of deepening insolvency was not a valid theory of damages supporting professional malpractice claim asserted against corporation's accounting firm and its partner under Pennsylvania law); Florida Dep't of Ins. v. Chase Bank of Texas Nat'l Ass'n, 274 F.3d 924, 935 (5th Cir. 2001) ("There do not appear to be any reported Texas cases recognizing 'deepening insolvency.' "); Askanase v. Fatjo, No. Civ. A.H–91–3140, 1996 WL 33373364, at *28 (S.D. Tex. Apr. 1, 1996) ("The shareholders, who comprise LivingWell could not be damaged by additional losses incurred after the point of insolvency because they had already lost their equity interest in the company. The Court is unpersuaded by the plaintiffs' 'deepening insolvency theory.'"); Coroles v. Sabey, 79 P.3d 974, 983 (Utah Ct. App. 2003) (rejecting "deepening insolvency" as a theory of damages because shareholders rather than the corporation suffer harm).

the adverse interest exception and, in effect, ignores the motive for the fraudulent conduct of the corrupt agents and focuses exclusively on the lack of benefit to the principal. The facts of *Schacht* suggest that it might be a case that is within the traditional analysis because the corrupt officers may not have been motivated to further the insurer's interest and, under the deepening insolvency rationale, the insolvent insurer did not benefit from their conduct.

C. Equitable Limitations on Imputation

One recent case, which post-dated the Restatement (Third) of Agency but did not rely on it, recognized an exception to imputation and *in pari delicto* based on what the court characterized as "principles of fairness and equity."[74] *NPC Litigation Trust v. KPMG LLP*,[75] a 2006 opinion of the New Jersey Supreme Court, allowed a litigation trust, acting as a corporation's successor-in-interest, to maintain a negligence action against the corporation's outside auditor.[76] The court expressly rejected *Cenco* and held that "the imputation doctrine does not bar corporate shareholders from recovering through a litigation trust against an auditor who was negligent within the scope of its engagement by failing to uncover or report the fraud of corporate officers and directors."[77] The court reasoned that imputation was intended to protect innocent third parties who dealt with a principal through an agent and were defrauded by that agent.[78] As the auditor was not the victim of

---

For a summary of each state's law on the issue, see Leo R. Beus, *Proximate Cause, Foreseeability, and Deepening Insolvency in Accountants' Liability Litigation*, ALI-ABA BUS. L. COURSE MATERIALS J. 31, 31–34 (2009).

74. NCP Litig. Trust v. KPMG LLP, 901 A.2d 871, 887 (N.J. 2006), *remanded sub nom* NCP Litig. Trust v. KPMG, 934 A.2d 132 (N.J. Super. Ct. Law Div. 2007).

75. *Id.* at 871.

76. *Id.* at 873.

77. *Id.* With regard to *Cenco*, and the rationale of that court that a recovery by the corporation might benefit wrongdoers and reduce the incentive to monitor corporate management, the court said that if some shareholders are guilty of wrongdoing they can be excluded from the "class" and that it is unrealistic to expect any but the largest shareholders to engage in any monitoring of the corporation. As to those shareholders, they, too, can be precluded from recovery according to the *NPC* court. The court may be mistaken with this observation because the action was not a class action. Instead, the litigation trustee merely stepped into the shoes of the corporation and the recovery, if any, would presumably go into the corporate treasury, not directly to the shareholders.

78. *Id.* at 882.

a fraud and, if negligent, was not innocent, there was no reason, in the court's view, "to stretch [the imputation doctrine] to its breaking point."[79]

A careful reading of *NCP*, however, suggests that it may be more properly characterized as just another deepening insolvency case. First, the *NCP* court cited *Schacht* and seemed to indicate that *NCP* was a case in which the actions of the corrupt officers resulted in deepening insolvency.[80] Second, in remanding the case to the superior court, the New Jersey Supreme Court instructed the lower court to determine whether the alleged negligence of the auditor was the proximate cause of the corporation's losses.[81] On remand, the superior court analyzed the loss question solely under the theory of deepening insolvency, concluding that if the corrupt officers caused the corporation to continue beyond the time that it otherwise would have declared bankruptcy, such action would constitute harm to the corporation.[82] This analysis implicitly rejects the importance of identifying the motivation of the corrupt officers and embraces the idea that the actions of the corrupt officers could not have been in the corporation's interest if the only consequence of their conduct was to deepen the corporation's insolvency.[83]

This narrow reading of the *NCP* litigation, of course, avoids engaging the court's fairness analysis, but that analysis is (as is often the case) devoid of persuasive force. Why is it more fair to allow the corporation to selectively disclaim the knowledge (and conduct) of its own officers acting in the corporate interest, than it is to allow a third party to insist that the corporation be bound by such knowledge? Why is it fairer that a corporation's outside service providers should be liable for the losses caused by corrupt corporate officers than the corporation's shareholders? A vigorous dissent in the opinion also relied on a fairness analysis:

> Basic principles of fairness and common sense demand that

79. *Id.*
80. *Id.* at 888.
81. *Id.* at 890.
82. NCP Litig. Trust v. KPMG, 945 A.2d 132, 143 (N.J. Super. Ct. Law Div. 2007). The Superior Court was instructed to determine whether the alleged negligence of the auditor was the proximate cause of the harm to the corporation and, to make this determination, the court first had to conclude that deepening insolvency is a harm to the corporation.
83. *Id.* at 143.

> when, as here, one who already has knowledge of a fraud, either directly or by imputation, and later seeks relief from a third party because of reasonable reliance on the third party's failure to expose the fraud, that claim must be rejected. It has long been the law in New Jersey that '[o]ne who engages in fraud . . . may not urge that one's victim should have been more circumspect or astute.'[84]

One can, of course, choose either side and, in the end, the rejection of imputation should rest on firmer grounds. Interestingly, the *NCP* court never grappled with the *in pari delicto* defense and so never broached the question as to why it was "fair" to favor one wrongdoer (ironically, the one who committed a fraud) over another (in this case, a merely negligent wrongdoer) in litigation between them.[85] Whether there was imputation or not, the corporation is clearly responsible for the actions of its corrupt officers and so the court, in essence, undermined *respondeat superior* and the doctrine of constructive notice.[86]

Some other courts have employed *NCP*-style logic to hold that when the beneficiaries of the recovery are not the shareholders, imputation of the knowledge of the corrupt managers to plaintiff (typically the creditors) is not appropriate.[87] An example is *Comeau v. Rupp*,[88] an action by the FDIC against the auditors of a failed savings and loan association. The court observed that any recovery would inure to the benefit of the public, represented by the FDIC, and not to the shareholders of the association, thus distinguishing this case from *Cenco*.[89] By contrast, the FDIC and the compensated

84. *NCP*, 901 A.2d at 898 (LaVecchia, J., dissenting).

85. *See, e.g.*, *id.* at 897 (LaVecchia, J., dissenting) ("[T]he imputation defense traditionally has provided an important bulwark against corporate abuse by requiring that corporations, like individuals, bear responsibility for their statements and actions.").

86. *Id.* at 897 (LaVecchia, J., dissenting).

87. *E.g.*, Welt v. Sirmans, 3 F. Supp. 2d 1396, 1402–03 (S.D. Fla. 1997) (distinguishing claim brought by innocent creditors from claim of shareholders); *In re* Jack Greenberg, Inc., 240 B.R. 486, 506 (Bankr. E.D. Pa. 1999) (articulating the same point as the court in *Welt*); *but see In re* Meridian Asset Mgmt., Inc., 296 B.R. 243, 256 (Bankr. N.D. Fla. 2003) (rejecting the holding of the *Welt* court because the trustee only has the authority to bring claims belonging to the bankrupt corporation, not those of its creditors).

88. 810 F. Supp. 1127 (D. Kan. 1992).

89. *Id.* at 1142. Recall that *Cenco* court expressed the view that imputation was proper because *Cenco* shareholders would otherwise benefit from a recovery and they were not blameless in the wrongdoing—they could have selected better

party (the public) are innocent of any wrongdoing, direct or imputed. Thus, the court concluded that imputing the wrongdoing of the association's principals to the FDIC "would defeat rather than further the tort principle of compensating the victim, while doing nothing either to deter culpable parties . . . or to encourage the shareholders to employ more trustworthy corporate managers."[90]

This view has merit as a matter of tort policy, but is really beside the point insofar as the imputation doctrine is concerned. The claims of the FDIC or any successor-in-interest derive from the predecessor entity. If a claim is based on a contract of the entity, for instance, logic dictates that the successor-in-interest is subject to any defenses that the defendant could have imposed to a claim by the entity, including, for instance, fraud by the entity's officers. It makes no sense to allow the successor to avoid a claim of fraud in the inducement on the basis that the successor (and those who it represents) is innocent of the fraud. In essence, a claim against auditors for negligence is a breach of contract claim, as the relationship only exists because of the underlying contract.[91] Put differently, the auditor's duty of care arises only because the parties are in privity of contract. The auditor should not be put in a worse position because its counter-party's losses were so great as to require the appointment of a receiver or liquidator, while if that counter-party had avoided bankruptcy or receivership, the auditor could raise imputation and the *in*

agents and engaged in more meaningful monitoring.

90. *Id.*

91. Consider in this regard the economic loss rule, which, subject to certain exceptions, prohibits a person from recovering tort damages from another if the loss is economic in nature and the relationship of the parties arises from a contract between them. *See*, *e.g.*, Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc., 891 So. 2d 532, 536 (Fla. 2004) ("The economic loss rule is a judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses."); Prospect High Income Fund v. Grant Thornton, LLP, 203 S.W.3d 602, 609 (Tex. App. 2006), *rev'd on other grounds*, Grant Thornton LLP v. Prospect High Income Fund, 314 S.W.3d (Tex. 2010) (holding that economic loss rule barred a negligence claim of hedge funds against the outside auditor of the LLC that sold bonds to hedge funds because the funds only suffered alleged economic damages); Hotels of Key Largo, Inc. v. RHI Hotels, Inc., 694 So. 2d 74 (Fla. Dist. Ct. App. 1997) ("Hotel franchisees brought action against franchisor, alleging that franchisees were fraudulently induced into entering licensing agreement and that franchisor breached implied duty of good faith and fair dealing and violated state Franchise Act. . . . The [court] held that under economic loss doctrine, franchisees were limited to pursuing their rights in contract.").

pari delicto defense.[92]

D. The Sole Actor Exception

No discussion of the adverse interest exception would be complete without considering the sole actor exception—yes, an exception to an exception. Under this doctrine, imputation is proper *even if* the agent was acting in a manner totally adverse to its principal if the agent was, in effect, the sole person who could act on behalf of the principal or completely dominated others who could act on behalf of the principal.[93] The theory behind this exception is that "the sole agent has no one to whom he can impart his knowledge, or from whom he can conceal it, and that the corporation must bear the responsibility for allowing an agent to act without accountability."[94] The sole actor doctrine, of course, reflects the underlying philosophy of imputation and emphasizes its narrow scope: the principal is responsible for the acts and knowledge of its agents even, in some cases, if the agent is acting adversely to the principal.

E. Summary

In short, then, the adverse interest exception is a narrow exception to imputation. After holding, typically, that "the agent's actions must be completely and totally adverse to the corporation to invoke the exception,"[95] a recent opinion went on to observe that "[r]equiring total abandonment of the corporation's interest renders the exception very narrow."[96]

---

92. *In re* Wedtech Sec. Litig., 138 B.R. 5, 8–9 (Bankr. S.D.N.Y. 1992): "[T]he general principle [is] that '[t]he trustee succeeds only to such rights as the bankrupt possessed; and the trustee is subject to all claims and defenses which might have been asserted against the bankrupt but for the filing of the petition.'" *Bank of Marin v. England*, 385 U.S. 99, 101, 87 S.Ct. 274, 276, 17 L.Ed.2d 197 (1966); *see also* 11 U.S.C. § 541 (1988) ("Where, as in the present case, a trustee is asserting claims that belonged to the bankrupt company before its petition, not to the creditors, this general rule applies. We find that plaintiff remains subject to the imputation defense.").

93. *E.g.*, *In re* Pers. and Bus. Ins. Agency, 334 F.3d 239, 242–43 (3d Cir. 2003); *In re* Mediators, Inc., 105 F.3d 822, 827 (2d Cir. 1997); *In re* Nat'l Century Fin. Enters., Inc., 783 F. Supp. 2d 1003, 1017 (S.D. Ohio 2011); *In re* Innovative Commun. Corp., No. BR 07-30012, 2011 WL 3439291, at *28–29 (Bankr. D.V.I. Aug. 5, 2011); *In re* Amerco Derivative Litig., 252 P.3d 681, 695 (Nev. 2011).

94. *In re* Personal and Bus. Ins. Agency, 334 F.3d at 243.

95. *In re* Amerco Derivative Litig., 252 P.3d at 695.

96. *Id.*

The primary qualification—the sole actor doctrine—is equally well established and narrow. Moreover, for present purposes, the facts that support it are not present in the garden-variety fraud cases that concerned the ALI membership.[97] A second qualification, the deepening insolvency doctrine, is not universally accepted by the courts and, in any event, is irrelevant to many cases where the corrupt managers do not bankrupt the company.[98] Thus, those seeking to narrow the imputation doctrine needed a different approach. The next section describes their success in finding one.

II. IMPUTATION AND THE ALI'S DEBATES

The ALI's approach to Restatements is fairly well regularized and prescribed. This approach limits what the Institute can do in a Restatement and gives its users confidence in the final product. It is important to understand the ALI's approach to the preparation of a Restatement in order to fully appreciate the criticisms of section 5.04 in this article. After describing how the American Law Institute is organized and operates, this Part provides a short history of section 5.04 from the first draft, in 2001, to its final approval in 2005. Interestingly, the principal changes were not so much in the black-letter provision as in the commentary that followed. This Part concludes with a legal analysis of section 5.04 using the sort of logic that a court might employ in seeking to understand the breadth of the adverse interest exception.

A. The Procedures of the ALI: A Long and Winding Road

The ALI was formed in 1923 to "promote the clarification and simplification of the law."[99] To that end, one of the principal projects of the ALI is the production of restatements of the law, and many such restatements have been published in

97. Some courts have narrowed the sole actor doctrine, holding that if there was any "innocent decision-maker" who could have thwarted the wrongdoing, the doctrine does not apply (with the result that imputation does apply). *In re* 1031 Tax Group, LLC, 420 B.R. 178, 202–03 (Bankr. S.D.N.Y. 2009). *But see, e.g.*, Baena v. KPMG LLP, 453 F.3d 1, 8–9 (1st Cir. 2006) (existence of innocent decision-makers is irrelevant).

98. *See* discussion, *supra* notes 67–73.

99. AMERICAN LAW INSTITUTE, CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 1 (2005) [hereinafter HANDBOOK].

the ALI's long history.[100] The ALI strives for a consistent look and feel in its restatements as well as an accurate presentation of the law.[101] To that end, the Institute recently published a "Handbook" to guide those responsible for producing the restatements and those who review their work.[102] The Handbook painstakingly describes the process of preparing a restatement and explains its purpose:

> Restatements are addressed to courts and others applying existing law. Restatements aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might plausibly be stated by a court. Restatement black-letter formulations assume the stance of describing the law as it is.[103]

After the ALI's Council,[104] which is the governing body of the ALI, determines that a new restatement is a timely project for the ALI to undertake, it appoints a reporter (the "Reporter") for that restatement. The ALI's Director, in consultation with the Reporter, then appoints an advisory group (the "Advisers") to assist the Reporter in the heavy lifting of preparing the restatement.[105]

The initial drafts (called "Tentative Drafts") of a restatement are prepared by the Reporter with the assistance of the Advisers and are circulated to a larger group of ALI members who have volunteered to serve on a "Member Consultative Group."[106] Comments from this group are considered by the Reporter and Advisers in preparing a draft for consideration by the ALI Council (the "Council Draft").[107]

---

100. The ALI has published more than thirty restatements of the law. For a complete list, see Harry G. Kyriakodis, *Past and Present ALI Projects*, AM. LAW INST., http://www.ali.org/doc/past_present_ALIprojects.pdf (last visited Sept. 7, 2012).

101. HANDBOOK, *supra* note 99, at 2.

102. *See id.*

103. *Id*. at 4.

104. According to the bylaws of the ALI, the Council is elected by the members of the ALI at its annual meeting. *Bylaws*, AM. LAW. INST., http://www.ali.org/index.cfm?fuseaction=
about.bylaws (last visited Sept. 7, 2012). Most members of the ALI are also elected annually after being nominated by a nominating committee. *Id.*

105. HANDBOOK, *supra* note 99, at 15

106. See the ALI's web site, which describes the "drafting cycle." *Drafting Cycle*, AM. LAW INST., http://www.ali.org/index.cfm?fuseaction=projects.drafting (last visited Sept. 7, 2012).

107. HANDBOOK, *supra* note 99, at 16.

Council action may require that this process be repeated one or more times before the Council deems the Reporter's work ready for consideration by the broader ALI membership at the ALI's annual meeting.[108] When this occurs, the membership is provided with a "Discussion Draft" of the restatement.[109] The Reporter typically appears before the assembled membership of the ALI and proceeds through the Discussion Draft section-by-section, explaining what has been done and why.[110] The membership has an opportunity to discuss the sections and propose amendments to the draft, including changes to the comments and illustrations.[111]

Typically, each Tentative Draft, Council Draft, and Discussion Draft deals with only a portion of what will be the full restatement. As a result, the process of preparing a restatement typically extends over several years, with the Restatement (Third) of Agency taking about ten years between initiation and final approval by the membership in 2006.[112] The project culminates in a proposed final draft submitted to the membership for approval after thorough vetting by the Advisers, Members Consultative Group, and Council. The Handbook indicates that although the membership votes on the various Tentative Drafts and one or more Proposed Final Drafts, ultimately the Council has the final word on the contents of the restatement.[113]

The restatement itself includes a black-letter statement of the law, commentary and illustrations (in the form of hypothetical situations) explaining the black-letter statements, along with the notes of the Reporter. All aspects of the restatement are subject to the review process described above, and the Handbook states that the final product is that of the ALI, not the Reporter or any of the groups that assisted in its

108. *Id.* at 17. With the election of twenty-seven new members on January 26, 2012, the ALI's membership stood at 4338 members. The Executive Council of the ALI approves members based on nominations and supporting statements from current members of the Institute. The membership consists of practicing lawyers, members of the judiciary, and academics. Of the most recently elected members, roughly one-half were practicing lawyers, a third academics, and the balance judges. For more information, see the ALI bylaws, available at *See* http://www.ali.org/doc/Council-Rules-5-21-12.pdf (last visited Oct. 5, 2012).

109. *Id.* at 18.

110. *Id.*

111. *See id.* at 14–19 (detailing the "drafting cycle").

112. RESTATEMENT (THIRD) OF AGENCY (2006).

113. HANDBOOK, *supra* note 99, at 18.

preparation.[114]

A key question—perhaps *the* key question—in the preparation of a restatement is the extent to which a black-letter provision may deviate from a fair reading of the law and state the law as the ALI believes it should be. The Handbook recognizes this tension[115] and provides a wonderfully murky answer to it. On the one hand, the Handbook states that the black-letter statements should be "attentive to and respectful of precedent" and drafted with the "precision of statutory language."[116] On the other hand, a restatement ought not to reflect precedent "that is inappropriate or inconsistent with the law as a whole."[117] Such precedent should, instead, cause the Institute "to propose the better rule and provide the rationale for choosing it."[118] In addition, restatements may anticipate the direction of the law and express that development "in a manner consistent with previously established principles."[119] Somewhat contrary to these observations, the Handbook also directs that "improvements wrought by Restatements are necessarily modest and incremental, seamless extensions of the law as it presently exists."[120] The remainder of this Part considers whether the restatement of the doctrine of imputation and the adverse interest exception, as set forth in section 5.04 of the Restatement (Third) of Agency, are consistent with the principles expressed in the Handbook.

B. History of Section 5.04: Getting the Exception that Mattered

The Reporter[121] of the Restatement (Third) of Agency first

114. *Id.* at 2.

115. "This definition [of a restatement] neatly captures the central tension between the two impulses at the heart of the Restatement process from the beginning, the impulse to recapitulate the law as it presently exists and the impulse to reformulate, thereby rendering it clearer and more coherent while subtly transforming it in the process." *Id.* at 4.

116. *Id.* at 5.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* The Handbook continues: "The American Law Institute has limited competence and no special authority to make major innovations in matters of public policy. Its authority derives rather from its competence in drafting precise and internally consistent articulations of law." *Id.*

121. The Reporter for the Restatement (Third) of Agency was Professor Deborah DeMott of the Duke University Law School, a respected scholar of agency law.

presented a draft of section 5.04 to the Council of the ALI at its meeting on December 5, 2001. That draft, which apparently was approved by the Council without changes, was submitted to the membership of the ALI as Tentative Draft No. 3 for consideration at its 2002 annual meeting:

> Section 5.04 An Agent Who Acts Adversely to a Principal
>
> (1) Notice is not imputed to a principal of a fact that an agent knows or has reason to know if the agent acts adversely to the principal in the transaction or matter without the principal's knowledge, unless
>
> (a) the agent deals with a third party who does not know or have reason to know that the agent acts adversely to the principal and who reasonably believes the agent to be authorized so to deal; or
>
> (b) the principal knowingly retains a benefit from action taken by the agent that the principal would not otherwise have received.
>
> (2) For purposes of this Chapter, an agent acts adversely to a principal if the agent acts in the transaction or matter without any intention of benefiting the principal by the action taken.[122]

This draft accurately reflected the law and was amply supported by the precedent cited in the Reporter's Notes.[123]

---

122. RESTATEMENT (THIRD) OF AGENCY § 5.04 (Tenative Draft No. 4, 2003).

123. The Reporter cited three cases involving financial fraud by corporate management where the courts held that the fraud should be imputed to the corporation: Cenco Inc. v. Seidman & Seidman, 686 F.2d 449 (7th Cir. 1982); Mid-Continent Paper Converters, Inc. v. Brady, Ware & Schoenfeld, Inc., 715 N.E.2d 906, 909 (Ind. Ct. App. 1999); Seidman & Seidman v. Gee, 625 So. 2d 1, 3 (Fla. Dist. Ct. App. 1992). As examples of cases that do not impute the fraud to the corporation, the Reporter cited *Schacht v. Brown*, 711 F.2d 1343 (7th Cir. 1983), and a few other cases which, like *Schacht*, turn on the "deepening insolvency" rationale. Also cited were a few cases in which the courts held that the auditor could be liable to the corporation if the plaintiff could prove that the auditor was "independently at fault," meaning that management's deceptions were not the cause of the auditor's failure. RESTATEMENT (THIRD) OF AGENCY § 5.04 note c (2006). In short, then, the Reporter's Notes do not establish a case for reversing *Cenco* and that line of authority. There are also numerous other cases consistent with *Cenco*, *e.g.*, Brown v. Deloitte & Touche LLP, No. 98 Civ. 6054 JSM, 1999 WL 269901, at *2 (S.D.N.Y. May 4, 1999) (stating that "whatever damages [the accountant's] alleged negligence may have caused the debtors, the damages are the result of a financial transaction debtor management implemented itself."); Miller v. Ernst & Young, 938 S.W.2d 313, 316 (Mo. Ct. App. 1997) (holding that "fraudulent conduct [of the manager of the corporation's most financially

The draft included this illustration ("Illustration 3"), which generated considerable discussion on section 5.04 at the 2002 meeting:

> 3. A, the chief executive officer of P Corporation, believes that P Corporation will benefit if its shares sell at a higher price as opposed to a lower price. Acting on this belief, A withholds material adverse information from T, P Corporation's auditor. As a consequence, T certifies materially inaccurate financial statements for P Corporation. P Corporation sues T for negligence and professional malpractice in certifying the financial statements. P Corporation is charged with notice of the material adverse information known to A and withheld from T.[124]

Illustration 3, of course, captures the garden-variety management fraud that is the concern of this article and, because P Corporation is charged with notice of the information known to A, T could presumably defend P's complaint by pleading the *in pari delicto* defense.

Prior to asking the Reporter to deliver some preliminary remarks on section 5.04, the President of the ALI, Michael Traynor, reiterated an admonition given earlier by the ALI's Executive Director, Lance Liebman, about "the importance of leaving clients at the door in the deliberations of our assembly."[125] Thus, the membership heard not once, but twice, that they were to consider the draft without regard to how the Restatement might affect their clients (and, perhaps, themselves). It was thus obvious to all present that the leadership of the ALI was aware that some "special interests" might seek to influence the debates and ultimate outcome. Indeed, that proved to be the case.

Immediately after the Reporter completed her preliminary remarks on section 5.04, Mr. Gerald K. Smith of Arizona moved to add an amendment to Illustration 3.[126] He disclosed that he

---

important division] is attributable to [the corporation] and precludes plaintiffs, who stand in the shoes of [the corporation], from recovering from [the accountants] for the alleged negligence of [the accountants].").

124. RESTATEMENT (THIRD) OF AGENCY § 5.04 illus. 3 (Tenative Draft No. 4, 2003).

125. *Discussion of Restatement of the Law Third, Agency*, 79 A.L.I. PROC. 119 (2002) [hereinafter *2002 Proceedings*].

126. *Id.* at 121.

was a trustee in bankruptcy and that Illustration 3 would preclude a trustee from pursuing certain claims on behalf of the bankruptcy estate because the trustee would be subject to the same imputation of knowledge as the bankrupt corporation.[127] Mr. Smith then yielded the floor to his lawyer, Leo R. Beus of Arizona,[128] who proceeded to argue that Illustration 3 was not an accurate representation of the law because auditors are public watchdogs and the illustration is at odds with generally accepted auditing standards ("GAAS").[129] Mr. Beus cited no authority for this latter proposition, which is unsurprising as no auditing standard is in conflict with Illustration 3. The generally accepted auditing standards describe what an auditor is to do,[130] not whether information is imputed from a corporate employee to his or her employer. Mr. Beus characterized Illustration 3 as "an attempt to impute information when there is supposed to also be total independence."[131] But the imputation at issue is from the agents (the corrupt officers) to the corporation, not from the corporation to the auditors, or vice versa. In short, Mr. Beus simply failed to address the question that section 5.04 addresses; that is, if the auditor has been misled by the

127. This is so because the trustee "stands in the shoes" of the debtor for purposes of pursuing claims that the debtor might have had. Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1154 (3d Cir. 1989). *See generally* Henry S. Bryans, *Claims Against Lawyers by Bankruptcy Trustees—A First Course in the In Pari Delicto Defense*, 66 BUS. LAW. 587, 595 (2012).

128. *2002 Proceedings*, *supra* note 125, at 122. Mr. Beus was not a member of the ALI when he spoke at the proceedings and was listed as a guest in the proceedings. *See id.* at xl.

129. *Id.* at 122.

130. Generally Accepted Auditing Standards consist of three "general standards," three "standards of field work," and three "standards of reporting." For instance, the standards of field work provide:

> 1. The auditor must adequately plan the work and must properly supervise any assistants.
>
> 2. The auditor must obtain a sufficient understanding of the entity and its environment, including its internal control, to assess the risk of material misstatement of the financial statements whether due to error or fraud, and to design the nature, timing, and extent of further audit procedures.
>
> 3. The auditor must obtain sufficient appropriate audit evidence by performing audit procedures to afford a reasonable basis for an opinion regarding the financial statements under audit.

See CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Auditing Standards No. 1, § 150 (Am. Inst. of Certified Pub. Accountants 1972), *available at* http://www.aicpa.org/research/standards/auditattest/downloadabledocuments/au-00150.pdf.

131. *2002 Proceedings*, *supra* note 125, at 122.

company (albeit through its corrupt employees), should the *company* (or the trustee in bankruptcy pursuing claims of the company) be able to pursue a claim against the auditor. GAAS does not address this question, nor could it. GAAS is a set of "best practices" for auditors to follow and does not delineate causes of action against auditors who fall short of those best practices.[132]

In any case, Mr. Smith moved that section 5.04 be amended to add an exception to imputation when "the totality of the circumstances would otherwise render it inequitable to impute such notice."[133] Such an amendment, if accepted, would have made imputation subject to a case-by-case determination, virtually assuring that a plaintiff would be able to resist an auditor's motion for summary judgment. Mr. Smith also moved that Illustration 3 be replaced with a new illustration that would deny imputation under circumstances similar to those set forth in the original illustration.[134] His motions generated considerable discussion, with the bulk of the comments favoring some modification to section 5.04. Remarkably, few comments referred to applicable precedent, with most alluding

132. *See* CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, *supra* note 130.

133. *2002 Proceedings*, *supra* note 125, at 123.

134. This is the text of the proposed amendment:

> A, the chief executive officer of P Corporation, intending to artificially prolong the existence of P Corporation past the point of its insolvency, fraudulently misrepresents its financial condition to T, P Corporation's auditor. One or more of the top-level decision makers or board members of P Corporation, which is otherwise a legitimate, bona fide enterprise, is unaware of A's misrepresentations. T subsequently certifies materially inaccurate financial statements for P Corporation. As a result of these misrepresentations, loans are secured and additional stock is issued, allowing P Corporation to continue in operation, and allowing A to continue in his well-compensated position and avoid civil and/or criminal charges being brought against him, while burdening P Corporation with additional debt and creditor claims which it cannot satisfy. P Corporation is not charged with notice of A's misrepresentations to T.

Appendix 3: Text of Proposed Amendments Submitted at 2002 Annual Meeting, 79 A.L.I. PROC. 746 (2002). In addition to a different outcome, this illustration differs from the original illustration in that it is cast as a case of "deepening insolvency," meaning that the effect of the officer's misrepresentation was to cause the corporation to become deeper in debt, more insolvent. *See supra* notes 67–73 and accompanying text. This situation leaves open the argument that the corporation did not benefit from the misrepresentation; it was insolvent before and became only more so after. But even in this illustration, the company may have benefited. It may have acquired additional time to resolve its financial difficulties and may have created the possibility of acquiring additional financing which would have been unavailable if accurate financial statements had been disclosed.

instead to the policy implications of the section[135] or suggesting changes regarding the language of the black letter, comments, and Illustration 3. After extended discussion, the membership voted to table the amendments, with the understanding that the matter would be reconsidered at a future annual meeting.[136]

The matter came before the membership again in 2003 and the proposed draft of section 5.04[137] made two important substantive changes to the draft presented the preceding year. First, the 2003 version added a new concept: a third party could not assert that an agent's knowledge should be imputed to the principal unless the third party acted in *good faith*, and a third party cannot act in good faith if it knows or has reason to know that the agent was acting adversely to the principal.[138] This change had the potential to undercut the *in pari delicto* defense for outside service providers, depending on how the courts would interpret "good faith." This is discussed below. The second important change related to when an agent's interests are "adverse" to those of the principal. Under the 2002 version, an agent acts adversely to the principal if the agent acts "without any intention of benefiting the principal by the action taken."[139] This was deleted from the 2003 version, thus opening the door to the argument that an agent who acts both to benefit himself and the principal may be acting adverse

---

135. *See, e.g.*, *2002 Proceedings*, *supra* note 125, at 142 (remarks of Judge Howard H. Kestin, who urged the membership in reconsidering the section that "the public interest must be taken primarily into account"); *Remarks of Michael Traynor*, *supra* note 5.

136. *2002 Proceedings*, *supra* note 125, at 144.

137. RESTATEMENT (THIRD) OF AGENCY § 5.04 (Tentative Draft No. 4, 2003). The draft presented to the 2003 annual meeting provided:

> Section 5.04 An Agent Who Acts Adversely to a Principal
>
> For purposes of determining a principal's legal relations with third parties, notice is not imputed to the principal of a fact that an agent knows or has reason to know if the agent acts adversely to the principal in a transaction or matter for the agent's own purposes or those of another person. However, notice is imputed
>
> (a) when necessary to protect the rights of a third party who dealt with the principal in good faith; or
>
> (b) when the principal has ratified or retained benefit from the agent's action.
>
> A third party who deals with a principal through an agent, knowing or having reason to know that the agent acts adversely to the principal, does not deal in good faith for this purpose.

Id.

138. *Id.*

139. RESTATEMENT (THIRD) OF AGENCY § 5.04 (Tentative Draft No. 3, 2002).

to the principal for purposes of the imputation doctrine.

More significant than either of these textual changes, however, at least with respect to auditor liability, was their treatment in the commentary. New Illustration 5 set out facts similar to Illustration 3 in the 2002 draft (a corrupt manager deceives the firm's auditors), but reached the exact opposite conclusion.[140] Illustration 5 concluded, in essence, that an auditor who *negligently* fails to detect management fraud does not act "in good faith" and may not assert, as a defense to the principal's claim against it, that the officer's knowledge of the company's true financial situation should be imputed to the principal.[141] Thus, with just a minor and, some might say technical, change to section 5.04, the drafters reversed the outcome of a critical interpretation of the imputation doctrine and illustrated that reversal with a hypothetical that ran contrary to most reported appellate decisions. Moreover, this reversal ran contrary to the apparent position of the Restatement (Second).

Although the Restatement (Second) did not explicitly discuss the good faith, or lack thereof, of third parties, such as auditors dealing with agents, the drafters did include a telling illustration accompanying section 282 (which sets forth the adverse interest exception).[142] Illustration 7 under section 282 suggests that the drafters of the Restatement (Second) of Agency would have reached a conclusion contrary to that reached by the drafters of the Restatement (Third). The Illustration provides:

---

140. RESTATEMENT (THIRD) OF AGENCY § 5.04 illus. 5 (2006).

141. RESTATEMENT (THIRD) OF AGENCY § 5.04 illus. 5 (Tentative Draft No. 4, 2003).

142. Restatement (Second) of Agency Section 282 (1959) states:

> (1) A principal is not affected by the knowledge of an agent in a transaction in which the agent secretly is acting adversely to the principal and entirely for his own or another's purposes, except as stated in Subsection (2).
>
> (2) The principal is affected by the knowledge of an agent who acts adversely to the principal:
>
> (a) if the failure of the agent to act upon or to reveal the information results in a violation of a contractual or relational duty of the principal to a person harmed thereby;
>
> (b) if the agent enters into negotiations within the scope of his powers and the person with whom he deals reasonably believes him to be authorized to conduct the transaction; or
>
> (c) if, before he has changed his position, the principal knowingly retains a benefit through the act of the agent which otherwise he would not have received.

> A is authorized by P to sell P's horse and to represent it as it is. A, intending to keep the proceeds from the sale and intending also to defraud the purchaser, sells the horse to T, representing the horse to be sound, although knowing the horse to be unsound. A absconds with the proceeds. P is bound by A's knowledge that the horse is unsound.[143]

The drafters concluded that P is bound in this illustration because A appeared to T to be acting in P's interests, and T's expectations are to be protected. Note that T's good faith is not an issue here; that is, the drafters of this illustration did not add to the facts that T was not negligent in determining whether the horse was sound or not. Under the Restatement (Third), however, T would not be able to impute A's knowledge to P if T were negligent, because then T would not have been acting "in good faith," at least if Illustration 5 is faithful to the black letter of section 5.04. These two facts—the lack of any discussion in Restatement (Second) that the good faith of the third party is relevant to the imputation doctrine and an illustration that suggests it is not—leads to the conclusion that section 5.04 is a departure from the Restatement (Second). There is no hint in the commentary to the Restatement (Third) section 5.04 of this departure, which is troubling because of the significance of the change.[144]

---

143. RESTATEMENT (SECOND) OF AGENCY § 282 cmt. f, illus. 7 (1959).

144. The non-imputation idea added to section 5.04, that the agent's knowledge is not imputed to the principal if the third party did not act in good faith, would have a startling impact if it applied to the sole actor cases. For example, if Smith, who was engaged in a pattern of looting the corporation, deceived the auditors, under the traditional analysis of the adverse interest exception, the corporation could maintain a malpractice action against the auditors and would not be saddled with Smith's knowledge of his own wrongdoing, but if Smith dominated the board, it would be so burdened (assuming, again, the traditional notion of the sole actor doctrine applied). If, however, the "good faith" exception applies, and assuming auditor negligence, the corporation could maintain an action against the auditor when the sole actor exception applies. This somewhat startling result points out the weakness of the good faith exception as a doctrinal matter, one not dealt with in the Restatement (Third) of Agency. Indeed, the sole actor doctrine is referred to only one time in the Restatement (Third). Comment d to section 5.04 states the doctrine and provides a garden-variety illustration of it. The Restatement includes no mention of the possibility that a third party may be negligent and the principal dominated by a single agent. The case of *Ash v. Georgia-Pacific Corp.*, 957 F.2d 432, 436 (7th Cir. 1992), sheds some light on the issue. In this case, the CEO of the company defrauded the company with the aid of a third party. When the company subsequently sued the third party, it defended on the theory of imputation and the sole actor doctrine. The court rejected the defense, noting its inapplicability when the third party participated

Mr. Smith, who kicked off the discussion at the 2002 meeting, did not attend the 2003 meeting, but sent a message to the Institute endorsing the draft presented at the meeting and indicating that he withdrew his tabled amendments.[145] This announcement may have affected the debate over the draft, which was subdued in comparison to the prior year's debate. Much of the discussion centered on whether the presence or absence of imputation should be a "defense" to the underlying claim or otherwise be outcome determinative in litigation.[146] There appeared to be a consensus that agency law merely provides rules relating to imputation; other bodies of law (tort, contract, etc.) set forth what consequences flow from imputation.[147] The Reporter certainly was of that view.[148] The more fundamental problem—whether the negligence of the third party who dealt with an agent should preclude imputation—received scant attention. The issue that so engrossed the 2002 annual meeting seemed to have largely disappeared. Ironically, while the straightforward restatement of the law drew considerable consternation at the 2002 meeting, an innovative restatement modifying the existing law (at least as embodied in Illustration 5) went unnoticed.

Section 5.04 came before the ALI membership a third and final time at the 2005 annual meeting. This draft became the final version of section 5.04:

> Section 5.04: An Agent Who Acts Adversely to a Principal
>
> For purposes of determining a principal's legal relations with a third party, notice of a fact that an agent knows or has reason to know is not imputed to the principal if the agent acts adversely to the principal in a transaction or matter, intending to act solely for the agent's own purposes or those of another person. Nevertheless, notice is imputed
>
> (a) when necessary to protect the rights of a third party

in the fraud. The court made clear, however, that if the third party were innocent—meaning it was not an active participant in the fraud—it could prevail on the issue of imputation. It is here that the Restatement (Third) of Agency breaks new ground, essentially equating a negligent third party to an active co-conspirator in a fraud.

145. *Continuation of Discussion of Restatement of the Law Third, Agency*, 80 A.L.I. PROC. 323 (2003) [hereinafter *2003 Proceedings*].

146. *Id*. at 323–38.

147. *Id*. at 325.

148. *Id.*

> who dealt with the principal in good faith; or
> (b) when the principal has ratified or knowingly retained a benefit from the agent's action.
> A third party who deals with a principal through an agent, knowing or having reason to know that the agent acts adversely to the principal, does not deal in good faith for this purpose.

This final version made some minor language changes from the preceding versions and the text was reordered slightly. There was, however, one significant substantive change. This text reincorporated the concept, which was in the first draft presented to the ALI membership, that an agent acts adversely if the agent intends "to act *solely* for the agent's own purposes or those of another person."[149] Thus, the final draft reinstated a narrow adverse interest exception.

This time Mr. Smith was in attendance and was a vocal participant in the meeting, immediately objecting to the inclusion of the word "solely" and moving that the phrase "intending to act solely" be deleted.[150] He again disclosed his involvement in bankruptcy litigation and stated the basis for his motion: "I am concerned that we prejudice the claims against professionals that may exist, and I am very serious about that. I think these drafts have the real possibility of doing that."[151] After some debate on the motion, it was voted upon and failed. Shortly thereafter, it was moved and seconded that, subject to minor modifications, the Restatement (Third) of Agency be approved. It was, and the work was published shortly thereafter.[152] Given the new language on good faith and, particularly, Illustration 5, it is unclear why Mr. Smith was displeased with the final draft. Perhaps he feared that the illustration did not carry as much weight as necessary. In any event, his motion highlights the conventional wisdom that the adverse interest exception was the key to avoiding imputation.[153]

In any case, questions as to the meaning and possible impact of the ALI's work remain. How is section 5.04 to be

149. RESTATEMENT (THIRD) OF AGENCY § 5.04 (Tentative Draft No. 6, 2005) (emphasis added).

150. *Discussion of Restatement of the Law Third, Agency*, 82 A.L.I. PROC. 184, 219 (2005) [hereinafter *2005 Proceedings*].

151. *Id.* at 218.

152. The publication date of the Restatement (Third) of Agency is 2006.

153. *E.g.*, *In re* Mifflin Chem. Corp., 123 F.2d 311, 315–16 (3d Cir. 1941).

read? Is Illustration 5 consistent with the black-letter rule of section 5.04? Finally, how has section 5.04 been received by the courts since its publication? These questions are discussed below. The important observation at this point is that while Mr. Smith failed to narrow the adverse interest exception, his ultimate goal—narrowing the imputation doctrine—was somehow achieved with the good faith limitation.

C. Parsing Section 5.04: A Challenge in Interpretation

The various iterations of section 5.04, as noted above, were the subject of considerable debate because, in the view of some members, the drafters failed to dramatically change the law. In particular, many members of the ALI were concerned that the proposed drafts failed to address the concern that then gripped the legal profession, if not the nation: Who would be called to account for the seemingly endless stream of corporate scandals then dominating the news? Where were the traditional gatekeepers—the lawyers, accountants, and investment bankers—and to what extent should they bear responsibility for their failure to discover and stop the frauds? The press was filled with stories of complicit auditors, willfully blind lawyers, and the like, who could have made a difference.[154] While these

154. *E.g.*, Daniel Kadlic, *Enron: Who's Accountable?*, TIME (Jan. 13, 2002), http://www.time.com/time/magazine/article/0,9171,1001636,00.html#ixzz1oMO7NQuH ("Just four days before Enron disclosed a stunning $618 million loss for the third quarter—its first public disclosure of its financial woes—workers who audited the company's books for Arthur Andersen, the big accounting firm, received an extraordinary instruction from one of the company's lawyers. Congressional investigators tell Time that the Oct. 12 memo directed workers to destroy all audit material, except for the most basic 'work papers.' And that's what they did, over a period of several weeks. As a result, FBI investigators, congressional probers and workers suing the company for lost retirement savings will be denied thousands of e-mails and other electronic and paper files that could have helped illuminate the actions and motivations of Enron executives."); Barnaby J. Feder, *TURMOIL AT WORLDCOM: THE AUDITOR; Team Leader For Andersen Had Years Of Experience*, N.Y. TIMES (June 29, 2009), http://www.nytimes.com/ 2002/06/29/business/turmoil-at-worldcom-the-auditor-team-leader-for-andersen-had-years-of-expertise.html (Melvin Dick, who worked for Arthur Andersen, had extensive experience in the complex telecommunications industry coupled with an army of auditors, yet this was not enough to spot the crude accounting fraud of Worldcom which included classifying operating expenses as long-term capital investments); *Former Global Crossing exec to sue company*, USA TODAY (Feb. 20, 2002), http://www.usatoday.com/life/cyber/invest/2002/02/21/globalcrossing.htm (Global Crossing, saddled with debt from building its massive network, allegedly entered into deals to swap capacity on other companies' networks using instruments called indefeasible rights of use (IRU). Global Crossing recorded the price paid for such transactions as a capital

outside professional service providers certainly faced liability and penalties in various forums and to various claimants, the traditional law of agency, combined with the *in pari delicto* doctrine, seemed to preclude one class of claimants—the companies ultimately guilty of financial frauds—from suing their outside professional service providers. That reality was not far from the debates of the ALI when it considered the relevant sections of the Restatement (Third) of Agency and sought a change in the adverse interest exception to imputation.

Despite this pressure to adapt the adverse interest exception in favor of greater accountability for gatekeepers, a fair reading of the final version of section 5.04, even with the new "good faith" provision, is that it made no substantive change from the first draft. The first sentence of section 5.04, as adopted, states a narrow exception to the broad rule of imputation set forth in section 5.03: no imputation if the agent acts "solely for the agent's own purposes. . . ."[155] The next sentence states two exceptions; that is, two circumstances when the knowledge of such an agent (for simplicity, an "adverse agent") is imputed to the principal.[156] The one of most concern for present purposes is that there will be imputation "when necessary to protect the rights of a third party who dealt with the principal in good faith."[157] The last sentence then provides the critical gloss that a third party who has "reason to know that the agent acts adversely . . . does not deal in good faith."[158] Read together, the first and second sentences suggest that the "good faith" exception applies *only if* there has been a determination that, in fact, the agent is an adverse agent. Indeed, in addressing the annual meeting, the Reporter characterized the paragraphs (a) and (b) of section 5.04 as an exception to an exception[159] and the comment to section 5.04 does likewise.[160] Thus, in the typical corporate fraud case,

---

expense amortized over a few years, but recorded IRU income as revenue, immediately boosting earnings. Roy Olofson, a former vice president of finance at Global Crossing, initially voiced concerns about the company's financial practices in meetings with auditor Arthur Andersen & Co. Olofson was concerned that the company was using aggressive, accounting methods to boost its revenues, yet Arthur Andersen took no action in response to this claim).

155. RESTATEMENT (THIRD) OF AGENCY § 5.04 (2006).

156. *Id.*

157. *Id.*

158. *Id.*

159. *2005 Proceedings*, *supra* note 150, at 217

160. RESTATEMENT (THIRD) OF AGENCY § 5.04 cmt. b (2006) ("The adverse

where corrupt managers are far from acting "solely" for their own purposes, the good faith, or lack thereof, of third parties who dealt with those corrupt agents is irrelevant. This is not only the logical reading of section 5.04, but is one consistent with the overwhelming precedent on the subject.

There is another structural reason why this reading is correct. Section 5.04 deals with an exception to the broad rule of imputation when an agent acts adversely to the principal. A reading that concluded that imputation would be improper merely because the third party had reason to know that the agent was acting adversely would more properly be characterized as an exception to imputation and set forth in section 5.03, not an exception to the adverse interest exception.[161] Moreover, paragraph (b), which sets forth another circumstance in which the adverse interest exception does not preclude imputation (the principal knowingly retained a benefit from the agent's action), only makes sense if there has been a prior determination that an agent has acted adversely, a point made clear by the comments to section 5.04[162] and illustration 9:

> 9. P retains A as manager of P's investment portfolio. A purchases securities issued by S Corporation for P's account from T at a bargain price, falsely representing to T that S Corporation has lost the account of its major customer. A does this because A wishes to damage T, a competitor of A's. P learns of the purchase and refuses to return the securities to T after T learns that A's statement about S Corporation was false. In a claim by T against P, notice is imputed to P of the true facts known to A.[163]

In this illustration, A is acting adversely because A's sole motive is to injure A's competitor, T, thereby furthering A's interests. Nevertheless, notice is imputed to P because P

interest exception is subject to two exclusions or exceptions.").

161. *See, e.g.*, NCP Litig. Trust v. KPMG LLP, 901 A.2d 871, 883 n.2 (N.J. 2006) (negligence of auditor is both an exception to imputation and a basis for estoppel).

162. RESTATEMENT (THIRD) OF AGENCY § 5.04 cmt. d (2006) ("The adverse-interest exception serves to shield a principal against imputation of notice of facts known to an agent who acts adversely to the principal. The [adverse interest] exception should not serve as a sword that enables a principal knowingly to retain the benefits of its agent's wrongdoing.").

163. RESTATEMENT (THIRD) OF AGENCY § 5.04 cmt. d, illus. 9 (2006).

retained the benefit of A's action. Thus, if the two exceptions to the adverse interest exception are to be read consistently with one another, paragraph (a) must apply only when the agent acts adversely within the meaning of the section. Bearing in mind the admonition in the Handbook that "Restatements are expected to aspire toward the precision of statutory language,"[164] this sort of parsing is entirely appropriate.

This, then, brings us to a consideration of Illustration 5 to section 5.04. As noted above, it posits a situation in which the chief financial officer ("CFO") of a corporation withholds material financial information from the company's auditor, who had reason to know that the CFO withheld the information.[165] Nonetheless, the auditor certified the inaccurate financial statements. When sued by the company for losses it suffered as a result of the inaccurate financial statements, the Illustration says that the auditor may not assert as a defense that the CFO's knowledge should be imputed to the company, because the auditor did not act "in good faith."[166] This can be squared with the black letter of section 5.04 only if one assumes that the CFO was acting adversely to the company. The Illustration does not say that; indeed, it does not indicate why the CFO withheld the information. If, however, one assumes that the CFO was not acting adversely within the meaning of section 5.04, then this would be an illustration of an exception to imputation, not an exception to the adverse interest exception. To rationalize the inclusion of this Illustration in section 5.04 and preserve a logical reading of the section, it is fair to assume that the CFO was otherwise an adverse agent.

One final observation about section 5.04 relates to the use of the term "good faith" and the importation of a fault standard to determine the appropriateness of imputation or applying the adverse interest exception. Although this modification to section 5.04 generated no discussion from the ALI membership, it probably should have for at least two reasons. First, the good faith exception converted section 5.04 from a rule about imputation to a substantive rule of liability. This is so because it ties imputation not to the knowledge of the agent and the circumstances of the agency relationship, but rather to actions of the third party who dealt with the agent. If, for instance, two outside service providers dealt with a corporation through the

164. HANDBOOK, *supra* note 99, at 5.
165. RESTATEMENT (THIRD) OF AGENCY § 5.04 cmt. c, illus. 5 (2006).
166. *Id.*

corporation's executive officers and one was negligent (say, the auditor) and the other was not (say, the company's outside attorney), the officers' knowledge of the fraud would be imputed to the company in a suit against the attorney, but not against the auditor.[167] This suggests that the issue is not imputation, but fault. Thus, *in pari delicto* is no longer the operative defense for the outside service provider and the focus has shifted from the knowledge of the corporation to the conduct of the outside service provider. In effect, then, imputation is irrelevant, as is the adverse interest exception.

Second, and perhaps more importantly, the limitation incorporates a startling use of the concept of good faith, which typically refers to the motivations with which a person discharges that person's duties.[168] Consider the application of the good faith doctrine in the context of director conduct. Under Delaware law, conduct motivated by "subjective bad intent" and conduct that amounts to "a conscious disregard for one's responsibilities" constitutes bad faith.[169] Obviously, such conduct is a sharp departure from merely negligent conduct. Indeed, the motivational element in determining an actor's good faith or bad faith is absent from the commentary on section 5.04 despite the fact that the case law on good faith is often dependent on that element.[170] Another common

167. A similar point was made by a member of the ALI at the 2003 annual meeting. *2003 Proceedings*, *supra* note 145, at 324.

168. For a discussion of the meaning of "good faith" in the context of the duty of fiduciaries of business organizations to act in good faith, *see* Mark J. Loewenstein, *The Diverging Meaning of Good Faith*, 34 DEL. J. CORP. L. 433 (2009).

169. *In re* Walt Disney Co. Derivative Litig. (*Disney V*), 906 A.2d 27, 66 (Del. 2006).

170. In the Disney litigation in Delaware, the Delaware Supreme Court and Chancery Court issued a total of five formal opinions, in the course of which the concept of good faith received careful scrutiny of the courts. In *In re Walt Disney Co. Derivative Litig.* (*Disney IV*), 907 A.2d 693, 755 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006) (emphasis omitted) Chancellor Chandler's opinion, after trial, identified the sources of acting in bad faith: "greed, 'hatred, lust, envy, revenge, . . . shame or pride.'" *Disney IV*, 907 A.2d at 754 (quoting Guttman v. Huang, 823 A.2d 492, 506 (Del. Ch. 2003)). This, of course, is a list of motives or mental states underlying an action. Interestingly, the Chancellor added that "sloth" might be added to the list "if it constitutes a systematic or sustained shirking of duty." *Id.* Sloth is generally not thought of as a motivation; indeed, it is the absence of motivation. Including sloth, however, highlights the problem with the good faith doctrine because sloth, or a systematic shirking of duty, really describes a lack of care. So, the Chancellor effectively defined an extreme lack of care as bad faith behavior. For a case discussing the duty of good faith of a general partner in a limited partnership, see *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199 (Del. 1993). In that case, Desert Equities, a limited partner, sued the general partner alleging that it acted in bad faith in exercising

formulation of good faith arises in the context of contracting. The doctrine of good faith protects one contracting party from the opportunistic behavior of the other party to the contract.[171] This seems to have less of a direct bearing on the concept of good faith employed in section 5.04, but it is clear that this concept, too, turns on intentional conduct and the motivation for that conduct.

The commentary to section 5.04 on this issue is brief,[172] which is noteworthy, as noted above, inasmuch as the adverse interest exception contained in Restatement (Second) of Agency Section 282 included no such concept.[173] The drafters of Restatement (Third) explained that the good faith exception was justified by a notion of risk assessment: Is it appropriate to impose on the principal the risk of nondisclosure by the agent if the third party colluded with the agent? The drafters concluded, simply, that it was not: "[T]he third party should not benefit from imputing the agent's knowledge to the principal when the third party itself acted wrongfully or otherwise in bad faith."[174] But why not ask if it is appropriate to impose on the principal the risk that a third party dealing with the principal through an agent will negligently fail to discover that the agent acted in a way that harms the principal's interests? That is, more precisely, the issue in Illustration 5 and the accounting fraud cases which are the focus of this article. The answer would seem to be that this is a risk that the principal should bear. The principal, after all, selected the agents (its corporate officers) and was in the best

---

its authority under the partnership agreement to exclude Desert from participating in investments of the partnership. *Id.* at 1202. Desert alleged that the general partner did this in retaliation for Desert's act of filing a suit against affiliates of the general partner in a different limited partnership. *Id.* The court, in allowing the case to go to the finder of fact, stated that "a claim of bad faith hinges on a party's tortious state of mind." *Id.* at 1208. It quoted as follows from *Black's Law Dictionary* in support of its conclusion that bad faith is a state of mind:

> [The] term "bad faith" is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.

Id. (quoting BLACK'S LAW DICTIONARY 337 (5th ed. 1983)).

171. *See* Anthony's Pier Four, Inc. v. HBC Assocs., 583 N.E.2d 806, 821 (Mass. 1991); Warner v. Konover, 553 A.2d 1138, 1141 (Conn. 1989).

172. *See* RESTATEMENT (THIRD) OF AGENCY § 5.04 cmt. b (2006).

173. *See supra* notes 142–144 and accompanying text.

174. RESTATEMENT (THIRD) OF AGENCY § 5.04 cmt. c (2006).

position to monitor their conduct, which is the rationale that supports imputation in the first instance.[175] The negligence of the third party who dealt with the agent should not change that because the principal is responsible for the agent's conduct, even fraudulent conduct, and that responsibility should not be extinguished because a third party was negligent in failing to discover it. Under traditional principles of tort law, a tort victim's negligent conduct does not diminish the liability of a tortfeasor who acted intentionally.[176]

Finally, consider section 5.04 in light of the principles articulated in the Handbook. If, in fact, the good faith exception was intended as an exception to imputation and not merely as a modification of the adverse interest exception, then it surely represents a departure from the weight of authority on imputation. Neither the commentary to the section nor the Reporter's notes set out why existing precedent was "inappropriate or inconsistent with the law as a whole."[177] Moreover, and again with reference to the Handbook, under this reading, section 5.04 marks a sharp departure from existing precedent, not an "incremental, seamless extension of the law as it presently exists,"[178] and the commentary to section 5.04 does not "provide the rationale for choosing" to depart from existing precedent.[179] In short, section 5.04—at least Illustration 5 thereto—appears to represent a stealth attempt to significantly alter the imputation doctrine as it existed for many, many years with no acknowledgment that such an alteration was taking place or why. It also represents a sharp departure from the standards that the ALI announced would guide the preparation of a restatement of the law.

---

175. The drafters of Restatement (Third) of Agency said as much in comment b to section 5.04: "A principal's opportunity to monitor an agent and create incentives for the proper handling of information warrant imputing an agent's knowledge to the principal even when the agent has breached duties of disclosure to the principal."

176. *E.g.,* Bradley v. Appalachian Power Co., 256 S.E.2d 879, 887 (W. Va. 1979) ("In the case of an intentional tort, contributory negligence is not a defense."); Stone v. Rudolph, 32 S.E.2d 742, 744 (W. Va. 1944) ("In a negligence action, growing out of the operation of an automobile, the defense of contributory negligence or assumption of risk on the part of a plaintiff is not available to a defendant who is guilty of wanton and willful conduct, which operates to injure the plaintiff."); White v. Gill, 309 So.2d 744 (La. Ct. App. 1975) (holding that contributory negligence is not a defense to intentional torts).

177. HANDBOOK, *supra* note 99, at 5.

178. *Id.*

179. *Id.*

D. Summing Up

Given Illustration 5, it seems fair to conclude (despite my careful parsing in section C above and the Reporter's off-handed remarks on the subject) that the drafters added the good faith concept to section 5.04 not as an exception to the adverse interest exception but as an exception to imputation. It ended up in section 5.04 because the adverse interest exception traditionally has been the critical exception to imputation and when attempts to broaden it failed, members of the ALI took a different tack. Instead of focusing on the agent's conduct and motivation, focus shifted to the third party's standard of care. The adverse interest exception thus remained a very narrow exception to imputation, but a much more promising exception arose as an alternative. Regardless of whether the new good faith exception was an accurate restatement of the law, it is appropriate to consider whether sound policy rationales support it. This is the focus of the next Part.

III. PUBLIC POLICY AND THE ADVERSE INTEREST EXCEPTION

After considering the rationale that the ALI provided for its statement of the imputation doctrine and the adverse interest exception, this Part considers several interdisciplinary considerations of the adverse interest exception: a law and economics analysis, traditional logic, literature from cognitive psychology, jurisprudential considerations, and the merits of private ordering.

A. The ALI's Rationale

The official comments to section 5.04 do not provide a rationale to support the good faith exception. Comments b and c simply assert:

> If the third party colludes with the agent against the principal or otherwise knows or has reason to know that the agent is acting adversely to the principal, the third party should not expect that the agent will fulfill duties of disclosure owed to the principal . . . . A principal should not be held to assume the risk that an agent may act wrongfully in dealing with a third party who colludes with the agent in action that is adverse to the principal. That is, the third

> party should not benefit from imputing the agent's knowledge to the principal when the third party itself acted wrongfully or otherwise in bad faith.[180]

Two observations about this assertion are in order. First, Comment b states the strongest case for recognizing a good faith exception to imputation, i.e., when the third party "colludes" with the agent.[181] Note how the Comment refers to collusion and negligence in the first quoted sentence, but only to collusion in the second. But collusion, which would fit any definition of bad faith, is conduct quite distinct from negligence, which would not. There is almost a bit of sleight of hand in Comment b, as it seeks to equate the two concepts.

Second, Comment c seems to be grounded on some notion of fairness; that it is unfair to saddle the principal with the agent's knowledge when the third party acted wrongfully (in some sense). But why is that unfair? Is it not unfair to permit the principal to avoid the knowledge of its own agents and distance itself from their actions, including their knowing deception of the auditors? Perhaps a stronger case can be stated when the auditors knowingly colluded with the corrupt officers, but the comments to the section suggest a much broader exception and, of course, *in pari delicto* is not limited to mere negligence—one conspirator cannot, under that doctrine, maintain an action against a co-conspirator. Thus, one must look beyond the ALI for a justification for the good faith concept.

B. Other Policy Considerations: Reaching Beyond the ALI

Though not specifically identified or discussed in the Restatement (Third) of Agency, there are a number of policy considerations that either support or challenge the new approach to the adverse interest exception as reflected in section 5.04.

180. RESTATEMENT (THIRD) OF AGENCY § 5.04 cmt. b–c (2006).
181. RESTATEMENT (THIRD) OF AGENCY § 5.04 cmt. b (2006).

1. Economic Analysis

a. Imputation is More Efficient

Judge Posner, in *Cenco*, offers a simple economic justification: If imputation is denied, "incentives to hire honest managers and monitor their behavior will be reduced."[182] Judge Posner implicitly considers the board of directors, and even the shareholders, as being potentially more efficient monitors than the auditors and this may be true, in some cases. As a practical matter, however, in most cases it is not.[183] As to the shareholders, for instance, they are ill suited and not adequately incentivized to monitor corporate management except, perhaps, in a closely held corporation where a shareholder owns a significant portion of the corporation's stock. Such shareholders, however, are typically managers themselves, so they are already active monitors and if they fail to detect the fraud, they bear the consequences. Moreover, such companies are hardly the concern of section 5.04.

As to directors, however, the matter is more complicated. Directors are charged with overseeing management and may be held liable to the shareholders (via a derivative action) for failing to detect the fraudulent conduct of those managers, at least if the board acts with conscious disregard of its oversight duties.[184] This conscious disregard standard is a fairly difficult for one plaintiff to meet, however, and obviously does not provide a sufficient incentive, standing alone, to motivate close monitoring. Reputational concerns provide additional

182. Cenco v. Seidman & Seidman, 686 F.2d 449, 455 (7th Cir. 1982).

183. *E.g.*, NCP Litig. Trust v. KPMG LLP, 901 A.2d 871, 886 (N.J. 2006) ("the nature of today's corporations makes it increasingly unlikely that shareholders of large corporations have the ability to effectively monitor the actions of corporate officials"); A.C. Pritchard, O'Melveny Meyers v. FDIC*: Imputation of Fraud and Optimal Monitoring*, 4 SUP. CT. ECON. REV. 179, 197 (1995) (noting that shareholders are not realistically in any position to monitor their managers' conduct toward third parties, and shareholders might well be willing to pay higher fees to accountants and lawyers who help ferret out fraud by the corporation); Official Comm. of Unsecured Creditors of Allegheny Health Educ. & Research Found. v. Price Waterhouse Coopers, LLP, 989 A.2d 313, 332 (Pa. 2010) ("Pennsylvania law does not accord with *Cenco* in terms of the degree to which the decision, in an auditor-liability context, prioritizes the policy of incentivizing internal corporate monitoring over the objectives of the traditional schemes governing liability in contract and in tort, including fair compensation and deterrence of wrongdoing.").

184. *See* Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362 (Del. 2006); *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).

motivation, as does incentive compensation for directors. But even these added incentives may not be sufficient to motivate the kind of oversight that would ferret out a carefully conceived and executed fraud. Under these circumstances, directors may argue that they looked to the auditors—indeed, implicitly delegated to them—the task of assuring the absence of fraud. This position, which often reverberates in the litigation against negligent auditors,[185] reduces the issue to one of contract interpretation and is considered in more depth below.

Another consideration is the extent to which holding auditors liable for their negligence reduces management's incentive to carefully prepare the company's financial statements and oversee lower-level employees.[186] Note in this regard that accounting frauds, or at least the unauthorized diversion of corporate funds, may be, and often are, perpetrated by lower-level employees.[187] If management is overly dependent on the company's auditors, these frauds may go undetected for long periods of time, even if the auditors are not negligent. This loss will be borne by the company (or its fidelity insurer). Thus, limiting a company's ability to seek indemnification from auditors for senior management fraud would have the salutary effect of incentivizing the board to implement more rigorous anti-corruption policies within the company.

b. Imputation Depends on the Principal's Solvency or Insolvency

Adam Pritchard has argued that imputing management fraud to the corporation is justifiable when the corporation is

185. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).

186. This point was made by Justice Rivera-Soto, who dissented in the NCP case. Justice Rivera-Soto quoted from amici briefs filed by the American Institute of Certified Public Accountants and the New Jersey Society of Certified Public Accountants: "In addition to causing a misallocation of liability, allowing a company's management to shift the consequences of its own executive's fraud to its accountants where the auditor is not alleged to have assisted in that fraud may diminish management's incentive to exercise due care in its own responsibilities." NCP Litig. Trust, 901 A.2d at 904 (Rivera-Soto, J., dissenting).

187. Frauds committed by, for instance, bookkeepers, are common. *See, e.g.*, Claire Galofaro, *Bookkeeper pleads guilty to bank fraud, identity theft*, BRISTOL HERALD COURIER (Va.), 2010 WLNR 23333988 (Nov. 23, 2010); *Ex-bookkeeper in Detroit district gets prison term for fraud*, AM. SCH. & UNIV., 2011 WLNR 16707568 (Aug. 23, 2011).

solvent, but not when it becomes insolvent.[188] His analysis depends on two premises: first, that shareholders prefer risk while creditors do not; and second, that fraudulent conduct cannot easily be differentiated from nonfraudulent conduct.[189] From these premises, he reasons that while solvent, the shareholders prefer that outside monitors, such as accountants and lawyers, be able to impute the fraud of management to the corporation, because then the outside monitors will escape liability for failing to detect fraud and, at the same time, management will not be deterred from engaging in risky behavior that benefits the corporation.[190] Because normal risky behavior or management negligence is sometimes difficult to distinguish from fraud, outside monitors will not be deterred from serving as they will be able to avoid the tort consequences of their negligence should they be sued by the corporation.

On the other hand, when the corporation is insolvent, the creditors become, essentially, the owners or residual claimants of the corporation. Creditors want no part of risky decisions, whether marginally legal or not, so in comparison to shareholders, prefer closer monitoring.[191] Because these "owners" expect closer monitoring, the outside professionals should not be able to avoid liability for their negligence. In these circumstances, management's knowledge of fraud would not be imputed to the corporation and a creditor's suit (on behalf of the corporation) against the outside professionals would not be subject to the *in pari delicto* defense.

Pritchard argues that not allowing outside professionals to escape liability for negligence when serving solvent corporations

> would make it very difficult for speculative—but nonetheless wholly legitimate—enterprises to find the legal and accounting services needed to effect wealth-maximizing transactions. . . . Enlisting professionals to ferret out 'fraud' in solvent corporations would likely price such risky opportunities out of the market, thus discouraging investment in enterprises that prove most lucrative to

188. A. C. Pritchard, O'Melveny Meyers v. FDIC*: Imputation of Fraud and Optimal Monitoring*, 4 SUP. CT. ECON. REV. 179 (1995).

189. *Id*. at 181–83.

190. *Id*. at 197.

191. *Id*. at 194–95.

investors in the long run."[192]

On the other hand, if outside professionals advising or auditing insolvent entities cannot use the imputation doctrine to avoid liability for their negligence, they will be more diligent and advise the board of directors when they suspect fraudulent activity.[193] In short, then, Pritchard would alter the Restatement doctrine so that imputation occurs when the residual claimants prefer it and not when they do not. This would be economically efficient because the parties ultimately bearing the loss (the shareholders for solvent corporations and creditors for insolvent ones) prefer that level of monitoring and are willing to bear the respective costs.

Pritchard's economic analysis is unconvincing, in part, because he assumes that the rule of imputation protects outside professionals from their negligence. In fact, the only time that imputation achieves that result is when management engages in fraud and actively deceives the outside professionals. In most instances, the outside professional is liable for negligence. If, for instance, an auditor fails to comply with generally accepted auditing standards and, as a result, fails to detect an error in a client's account, the auditor will be liable in an action brought by the audit client.[194] Similarly, lawyers are liable to their clients for their negligent advice.[195] Fraud is different because the entity, through its management, is actively misleading the outside professional, and it is that conduct which precludes imputation. By conflating negligent failure to detect management fraud with negligent professional

192. *Id.* at 198–99.

193. *Id.* at 195.

194. *E.g.*, Cereal Byproducts Co. v. Hall, 132 N.E.2d 27, 29 (Ill. App. Ct. 1956) (holding where an auditor accepted a list of accounts and did not make any effort to confirm they were accurately prepared, the auditor was found liable for "inexcusable negligence"); Maryland Cas. Co. v. Cook, 35 F. Supp. 160, 166 (E.D. Mich. 1940) ("For the failure to perform this audit engagement in accordance with the terms of this contract as a reasonably prudent and careful auditor would and because of such negligence, this defendant auditor, Jonathon Cook, must respond in damages."); NCP Litig. Trust v. KPMG, 945 A.2d 132, 144–45 (N.J. Super. Ct. Law Div. 2007) ("Auditors engaged to conduct their audits in accordance with GAAS, as KPMG was here, have a duty to exercise due care in obtaining reasonable assurances that the company's financial statements are free of material misstatements. If the auditor fails to exercise such care, it shall be made answerable for such failure.").

195. *See, e.g.*, Dixon Ticonderoga Co. v. Estate of O'Connor, 248 F.3d 151 (3d Cir. 2001); Collins v. Missouri Bar Plan, 157 S.W.3d 726 (Mo. Ct. App. 2005); Fiedler v. Adams, 466 N.W.2d 39 (Minn. Ct. App. 1991).

services in other contexts, Pritchard creates a false dichotomy. Surely a shareholder does not want his company to forgo all claims for professional malpractice in order to encourage management to take risks.

Pritchard goes astray in this regard because his second premise is false—fraud, except perhaps at the margin, *is* different from nonfraudulent conduct. He argues that "[r]isky decisions, proved wrong ex post, are easily transformed into allegations of fraud by enterprising plaintiffs' attorneys."[196] Perhaps, but withstanding a motion to dismiss on the pleadings (as occurred in the sole case that he cited[197]) is a far cry from garden-variety management fraud that is the concern of section 5.04. If the inquiry is shareholder preference, it seems counterintuitive and implausible that, ex ante, shareholders would likely prefer a rule that incentivizes outside professionals to turn a blind eye to fraud, believing that a counter rule would result in too-close monitoring and management's avoidance of value-maximizing investments. Thus, to the extent that Pritchard would accommodate the preferences of the residual claimants—be they creditors or shareholders—the rule would likely be the same in both instances: no imputation. If this were the rule, however, it may prompt a different engagement letter, one that absolves the outside service provider from negligence in the event of management fraud but preserves liability in all other instances of negligence. In other words, Pritchard looks at only one-half of the bargaining process and does so (in my opinion) improperly. He assumes that whatever the residual claimant would prefer should be the rule, but the outside service provider has a large stake in the rule as well, and its preferences will be the opposite. The goal of default rules—which is really all that Pritchard is suggesting—is to mimic what the parties would agree upon, and, in fact, inasmuch as auditors and their clients bargain against a default rule that allows imputation in the event of management fraud, his rule would require additional bargaining, relieving auditors and other outside service providers from liability for their negligence if management is guilty of fraud.

196. Pritchard, *supra* note 188, at 198.

197. *Id.* (citing *In re* Apple Computer Sec. Litig. v. Vennard, 886 F.2d 1109 (9th Cir. 1989)).

2. Logic and Consistency

The new good faith exception, at least as reflected in Illustration 5, has embedded within it a conundrum: if a principal (a corporation) is not bound by its agent's (a corrupt officer) knowledge because the third party (an employee of the auditor) was negligent, shouldn't the third party be able to avoid liability on the same basis? In the accounting frauds that are the subject of this paper, the third party is typically some form of business entity. If an employee of the accounting firm negligently fails to discover a fraud committed by a client of the firm, or worse, colludes with the corrupt managers of that client, shouldn't the accounting firm be able to distance itself from its employee's knowledge when sued by the client?[198] The accounting firm can turn the tables on its former client, arguing that the employee was "acting adverse" to the accounting firm. At the very least, the client was negligent in failing to realize that the employee of the accounting firm was acting adverse to her employer. Both the Reporter[199] and *Cenco*[200] court noted this dilemma, but only the *Cenco* court's decision was consistent with taking the dilemma seriously. Put simply, the good faith exception is illogical. If logic (and consistency) is a positive value, the good faith exception is not

198. If the auditor colludes with corrupt management, the audit firm should be able to invoke the adverse interest exception. The good faith exception to imputation, however, would seem to be its strongest when the auditor colludes, for how could that be good faith? The drafters of section 5.04 apparently did not consider the possibility that the greater the bad faith of the third party, the stronger the case for the third party to invoke the adverse interest exception. So, ironically, under the logic of section 5.04, the good faith exception would only (or usually) apply when the third party is negligent.

199. In response to a comment from the floor at the ALI's annual meeting in 2002, the Reporter (Professor DeMott) made this point as well:

> If the auditor in Illustration 3 is organized as a firm of some sort is this defense [the adverse interest exception] available to that firm as well? Could that firm, for example, say, 'The guilty knowledge of the auditor who actually had the engagement should not be imputed to us, the firm, because look at the terrible impact that . . . auditor's behavior has had on our welfare. It would not be fair to us, the firm, to hold us accountable in this lawsuit brought by, for example, the company, or its representative, to hold us accountable for the bad conduct of our agent, i.e., the individual auditor on the account.'

2002 Proceedings, *supra* note 125 at 129.

200. "But if Cenco may be divorced from its corrupt managers, so may Seidman from the members and employees of the firm who suspected the fraud. If Seidman failed to police its people, Cenco failed as or more dramatically to police its own." Cenco Inc. v. Seidman & Seidman, 686 F.2d 449, 456 (7th Cir. 1982).

justifiable.

A related concern is that if the corporation recovers from its auditors, the shareholders at the time of recovery receive the benefit. Aside from the problem that some of these shareholders may have been complicit in the fraud or have benefited in some way from it, for other shareholders the recovery will be an undeserved windfall. Assuming the recovery is many years after the fraud has been discovered, many of the shareholders at the time of recovery will have purchased their shares after the fraud occurred and was revealed. The company's financial statements will have been restated to accurately reflect the results of operations and the company's assets and liabilities. Presumably, then, the share price at which they purchased their interest in the company will reflect the costs of the fraud, including the losses the company incurred in having to restate its financial statements, reputational harm, etc.—all the losses that the company then seeks to recover from the auditors. Post-fraud purchasers of shares, therefore, will have bought the stock at a price that reflects the costs of the fraud and then recovered those losses from the auditors. The real victims of the fraud, in addition to those who purchased shares on the basis of misleading financial statements, are pre-fraud shareholders who saw the value of their shares plummet as a result of the disclosure of the fraud and then sold their shares. They would not benefit from any recovery,[201] although investors who bought shares after the fraud would. Put differently, to a large extent allowing recovery against the auditors would compensate the wrong people.

3. Cognitive Biases, Auditor Liability, and Imputation

A number of widely-recognized biases or heuristics may affect the way we think about auditor liability: the hindsight bias, confirmation bias, and the affect heuristic, to name just three. Each is considered below.

Those determining whether auditors have breached their

201. Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co., 417 U.S. 703 (1974) (holding that the corporation could not maintain an action against former shareholders for law violations that occurred before the acquisition of the corporation by new shareholders because price paid by new shareholders reflected the wrongdoing).

duty of care make that determination in hindsight and suffer, of course, from a hindsight bias.[202] Massive accounting frauds seem so obvious in retrospect that a fact finder considering auditor fault—whether negligence or something worse—inevitably finds against the auditor. This cognitive bias may be a concern in any negligence action, but cognitive biases play an additional role in accounting fraud cases because the auditors themselves are subject to a number of cognitive biases, most of which emanate from the fact that accounting frauds are relatively rare.[203] When a fraud is uncovered—and particularly when it has occurred in a publicly held company—publicity, SEC investigations, civil suits, criminal investigations, and other consequences occur. But most people are not fraudsters, and an auditor may spend a career never having been retained to audit a company that engaged in fraudulent accounting. An auditor, like most people, may be reluctant to suspect that someone with whom he or she may have worked for a number of years and likes and admires is engaged in a fraud and is committed to deceiving the auditor.

The distance that most auditors have from accounting frauds and the tendency to trust those with whom the auditor has a working relationship gives rise to the "confirmation bias," which is the tendency that one has to seek out and overvalue evidence that supports one's beliefs and to ignore or devalue evidence that is inconsistent with such beliefs.[204] Faced with anomalous or suspicious data, an auditor might search out additional data that explains away the anomaly or suspicion. Whether suspecting fraud or not, the auditor might approach

202. Baruch Fischhoff, *For Those Condemned to Study the Past: Heuristics and Biases in Hindsight*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 335, 341 (Daniel Kahneman et al. eds.,1982):

> In hindsight, people consistently exaggerate what could have been anticipated in foresight. They not only tend to view what has happened as having been inevitable but also to view it as having appeared "relatively inevitable" before it happened. People believe that others should have been able to anticipate events much better than was actually the case.

203. *See, e.g.*, Len Boselovic, *Fraud is More Common than You Think*, PITTSBURGH POST-GAZETTE (June 6, 2010), www.post-gazette.com/pg/10157/1063315-435.stm#ixzz1opIjiYJT (1,843 cases in 106 countries as reported by certified fraud examiners who responded to the association's online survey, providing information on cases they investigated between January 2008 and October 2009. Financial statement reporting fraud represented 4.8 percent of the total number of frauds).

204. *See generally* Joshua Klayman, *Varieties of Confirmation Bias*, 32 PSYCHOL. LEARNING & MOTIVATION 385 (1995).

corporate managers, who, if part of the fraud, have the opportunity to deceive the auditor with fabricated explanations and documentation. This explanation confirms the auditor's bias that the client is not engaged in a fraud and causes the auditor to discount the contrary data.[205]

Another bias that might affect auditor competence is overconfidence. Experimentation has shown that professionals tend to be overconfident in their judgments within their areas of expertise.[206] Moreover, there appears not to be a correlation between confidence and accuracy.[207] Thus, an auditor predisposed to believe that the corporate managers are truthful will exhibit a high degree of confidence in the audit and, perhaps, not see the need for further inquiry that might otherwise have disclosed the truth.

Other less well-known heuristics might also help explain why auditors tend to fail to uncover management fraud. For instance, the social psychologist Robert Zajonc has demonstrated that "mere repeated exposure of [an] individual to a stimulus is a sufficient condition for the enhancement of his attitude toward it."[208] An individual auditor for an accounting firm may work closely with corporate management on audits and throughout the year. The many contacts with

---

205. A related phenomenon has been described as "motivated skepticism." This describes situations in which individuals are relatively uncritical about information and argumentation that does not support the individual's preferred outcome. Experimentation demonstrates that when confronted by information that is inconsistent with a preferred outcome, people tend to deny both the facts and the implications of those facts. *See generally* Peter H. Ditto & David F. Lopez, *Motivated Skepticism: Use of Differential Decision Criteria for Preferred and Nonpreferred Conclusions*, 63 J. PERSONALITY & SOC. PSYCHOL. 568 (1992). Other research confirms a supporting hypothesis: people evaluate the probability of an event by "availability"—the ease with which relevant instances come to mind. *See generally* Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 163 (1973).

206. *See* J. EDWARD RUSSO & PAUL J. H. SCHOEMAKER, WINNING DECISIONS: GETTING IT RIGHT THE FIRST TIME 79–80 (2002).

207. *See* Scott L. Plous & Philip G. Zimbardo, *How Social Science Can Reduce Terrorism*, CHRON. OF HIGHER EDUC. (Sept. 10, 2004), http://chronicle.com/article/How-Social-Science-Can-Reduce/22815.

208. Robert B. Zajonc, *Attitudinal Effects of Mere Exposure*, 9 J. PERSONALITY AND SOC. PSYCHOL. 1, 1 (1968); *see also* Robert F. Bornstein, *Exposure and Affect: Overview and Meta-Analysis of Research, 1968-1987*, 106 PSYCHOL. BULL. 265, 265 (1989). Somewhat relatedly, if one dislikes another person, repeated exposure can reinforce that dislike whereas if one feels neutral toward another person, repeated exposure—that is, increased familiarity—will increase feelings of liking. *See generally* Walter C. Swap, *Interpersonal Attraction and Repeated Exposure to Rewarders and Punishers*, 3 PERSONALITY & SOC. PSYCHOL. BULL. 248, 248–51 (1977).

management may result in a positive and trusting relationship.[209] Related to this phenomenon is something that psychologists refer to as the "affect heuristic," which suggests that affect—the way a person feels about a situation or another person—influences that person's judgment.[210] Thus, one study demonstrated that when a person has a favorable feeling toward a risky activity, that person tends to underestimate the risk of the activity.[211] In fact, the study concluded that this tendency explained the "often observed inverse relationship between judgments of risk and benefit."[212] Applying this research to auditor behavior suggests that an auditor who has a positive feeling about a client or an audit may underestimate the risk that the client is seeking to deceive the auditor.

These (and perhaps other) cognitive biases might be characterized as excuses for auditor failure, and one might argue that auditors should recognize and overcome these biases. For instance the confirmation bias may be overcome, or at least moderated, if auditors are expressly instructed to consider seriously that the opposite of what they believe may be true.[213] Thus, arguably, these heuristics ought to provide no basis to avoid auditor liability. But the answer to this may be that auditors are not retained to ferret out fraud; if they were, no heuristic should provide an excuse. Audit clients could contract for a "fraud audit," but in the absence of such an agreement, the law should recognize the relative infrequency of management fraud and the difficulty of uncovering it. After all, in the typical management fraud case, the fraudsters design their fraud specifically to deceive the auditors. That intentional deception, combined with the biases that limit the ability of the auditor to uncover the fraud and the hindsight bias of the fact finder asked to determine whether an auditor was negligent,

209. Daniel Kahneman has characterized Zajonc's findings as a "profoundly important biological fact," reasoning that humans (as well as other animals) become comfortable and trusting when repeatedly exposed to the same stimulus if no negative consequences occur after the exposure. "Such a stimulus will eventually become a safety signal, and safety is good." DANIEL KAHNEMAN, THINKING, FAST AND SLOW 67 (2011).

210. *Id.* at 103, 139.

211. Melissa L. Finucane et al., *The Affect Heuristic in Judgments of Risks and Benefits*, 13 J. BEHAV. DECISION MAKING 1, 9–13 (2000); KAHNEMAN, *supra* note 207, at 103.

212. Finucane et al., *supra* note 209, at 3.

213. *See generally* Charles G. Lord, Mark R. Lepper & Elizabeth Preston, *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCHOL. 1231 (1984).

all argue in favor of retaining the traditional broad rule of imputation, the narrow adverse interest exception, and the *in pari delicto* defense. A contrary rule should be left to private contracting or legislative action.

4. The Distributional Problem

Auditors who negligently certify a company's financial statements are exposed to liability to investors and creditors on theories of negligent misrepresentation, fraud, and aiding and abetting a fraud under both federal and state law.[214] Although auditor liability under Rule 10b-5 of the Securities and Exchange Act of 1934 has been limited by Supreme Court cases[215] and the Private Securities Litigation Reform Act of 1995,[216] common law and state securities law claims pose significant risk for negligent auditors and other outside service providers.[217] This means, of course, that if the "guilty" corporation recovers on a claim against the outside service provider, the ability of other claimants, injured by the same fraud, to recover against that service provider may be impaired or even eliminated. As a matter of public policy, it may be preferable to limit the ability of corrupt corporations to recover from negligent third parties they deceived so as to preserve the resources of those third parties for other claimants damaged by the same negligent acts.

---

214. *E.g.*, Anixter v. Home-Stake Prod. Co., 77 F.3d 1215, 1218 (10th Cir. 1996) (shareholders successfully brought a federal claim of aiding and abetting a fraud against Home-Stake Production Company); Amorosa v. Ernst & Young LLP, 672 F. Supp. 2d 493, 495–96 (S.D.N.Y. 2009) (stockholder brought action against auditor, alleging that the auditor engaged in fraud in violation of federal and state law); Nutmeg Sec., Ltd. v. McGladrey & Pullen, 112 Cal. Rptr. 2d 657, 664 (Ct. App. 2001) (McGladrey, the auditor, was found liable to Nutmeg Securities under the theory of negligent misrepresentation).

215. Among other things, plaintiff must prove that the auditor was the "maker" of the misleading statement, Janus Capital Grp., Inc. v. First Derivative Traders, 131 S.Ct. 2296, 2301 (2011), and acted with "scienter" (an intent to deceive), Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976).

216. Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.).

217. *E.g.*, auditors face liability for negligent misrepresentation if, among other things, the plaintiff can prove actual reliance. *In re* Sunpoint Sec., Inc., 377 B.R. 513, 561 (Bankr. E.D. Tex. 2007), *aff'd*, Richardson v. Cheshier & Fuller, L.L.P., No. 6:07-CV-256, 2008 WL 5122122 (E.D. Tex. Dec 3, 2008).

5. Imputation is an Easier Rule to Administer

The traditional analysis of a claim by a corporation against its auditors for failure to discover fraud by senior management, well represented by the *Cenco* analysis, has the virtue of simplicity and clarity. The *Cenco* court assumed that some shareholders would realize the benefit of double recovery if the corporation were successful,[218] and some shareholders, who may themselves have been fraudsters, would benefit (albeit indirectly) if the corporation were to recover.[219] The *NCP* majority, responding to this possibility, asserted that "we should not punish the many for the faults of the few[,]"[220] and went on to suggest that "imputation may be asserted against those shareholders who engaged in the fraud, . . . those who, by way of their role in the company, should have been aware of the fraud[,] . . . [and those] shareholders [who], by virtue of their ownership of a large portion of stock, have the ability to conduct oversight of the firm's operations."[221] Justice Rivera-Soto, dissenting in *NCP*, took issue with this suggestion:

> One is entirely at a loss to understand how the majority's construct can be applied. For example, if a corporation has 1,000 shareholders, must the trial court hold 1,000 separate mini-trials to determine whether each specific shareholder is barred from recovery because he either "engaged in the fraud[,] . . . should have been aware of the fraud[, or who], by virtue of their ownership of a large portion of stock, ha[d] the ability to conduct oversight of the firm's operations[?]" What if the corporation has not 1,000 shareholders, but 5,000,000? Assuming, as one must, that plaintiffs in this new construct still have the burden of proving their entitlement to recovery, must each plaintiff appear and prove himself free of taint? Will the majority ultimately conclude that, contrary to basic tenets of our jurisprudence, the burden should fall on the party asserting the imputation bar to prove it? If so, how can they, given that the proofs of complicity will lie solely with the plaintiffs and are readily susceptible to spoliation? In the end, the parsing-out required by the majority's notion of who can

218. Cenco Inc. v. Seidman & Seidman, 686 F.2d 449, 455 (7th Cir. 1982).
219. *Id.*
220. NCP Litig. Trust v. KPMG LLP, 901 A.2d 871, 885 (N.J. 2006).
221. *Id.* at 886.

> recover under what circumstances is patently impracticable.[222]

Under a *Cenco* approach, by contrast, the court need only determine whether the corrupt managers were committing a fraud on behalf of the company (regardless of their motives and regardless of whether the company benefited) or whether the managers were, in fact, defrauding the company. This difference, of course, describes when the adverse interest exception may be invoked and is relatively straight-forward. From a prudential perspective, then, the good faith exception is not preferable.

Finally, it is worth noting that the corporation is not without a remedy: it has a cause of action against its managers.[223] The corporate employer may be able to insure against the risk of accounting fraud with a fidelity bond and, of course, can engage in more meaningful monitoring.[224] Moreover, if the rule of imputation did not apply, the auditors would essentially become insurers for management fraud if they are simply negligent. Vice Chancellor Strine of the Delaware Chancery Court noted this in *In re American International Group, Inc.*[225] The Vice Chancellor expressed misgivings about the traditional imputation rule (which, however, he recognized was the operable principle because New

---

222. *Id.* at 905 (Rivera-Soto, J., dissenting). Justice Rivera-Soto also observed:

> Finally, it must be recognized that the majority effects a fundamental transformation of the imputation defense. As a result of the majority's construct, the imputation defense ceases to be a defense to liability and becomes, instead, an item in mitigation of damages. Thus, instead of providing a bulwark against claims by vicarious wrongdoers, the now-transformed imputation defense is relegated to the piecemeal diminution of the damages alleged. Having put an untimely end to the imputation defense, the least the majority can do is to give it a proper burial instead of sentencing it to some jurisprudential limbo.

Id.

223. *See, e.g.*, *In re* HealthSouth Corp. S'holders Litig., 845 A.2d 1096 (Del. Ch. 2003).

224. The typical fidelity bond provides protection from losses resulting from "dishonest or fraudulent acts" that cause loss to the insured. *See, e.g.*, Federal Deposit Ins. Corp. v. Nat'l Sur. Corp., 281 N.W.2d 816, 819 (Iowa 1979) ("The terms 'dishonest' and 'fraudulent' as used in fidelity bonds have a broad meaning. They include acts which show a 'want of integrity' or 'breach of trust.'"). *See also* Arlington Trust Co. v. Hawkeye-Security Ins. Co., 301 F. Supp. 854, 857–58 (E.D. Va. 1969). They also include acts in disregard of an employer's interest, which are likely to subject the employer to loss. First Nat'l Bank of Sikeston v. Transamerica Ins. Co., 514 F.2d 981, 987 (8th Cir. 1975).

225. 965 A.2d 763, 828 n.246 (Del. Ch. 2009).

York law applied), but that, perhaps, there were better alternatives. He wrote:

> A more thoughtful tact, based on the use of heightened pleading standards (e.g., particularized fact pleading), standards of liability (e.g. gross negligence), proof (e.g. clear and convincing evidence), and measures designed to address liability (perhaps capping liability at some multiple of audit fees plus interest and clearly giving negligent audit firms full indemnification rights against any insider who acted with scienter) would be more directly responsive. As a second best, the [New York] rule could just be explained as grounded in the notion that immunity for auditors is, in the view of New York policymakers, the best way to address an imperfect world.[226]

6. Private Ordering: A Sensible Default Rule

A final, and in my view preferable, alternative would be to leave the matter to private ordering. Corporate audits are undertaken pursuant to a written engagement letter between highly sophisticated parties. Given the overwhelming precedent that preceded the preparation of the Restatement (Third) of Agency, it is fair to presume that the parties to such an engagement letter understood that the default rule on auditor liability was represented by cases such as *Cenco*. Indeed, the typical engagement letter places on the audit client the responsibility for implementing procedures to detect fraud.[227] Indeed, the dissent in *NCP* embraced the alternative

---

226. *Id*. at 830 n.246.

227. *See, e.g.*, North American Professional Liability Insurance Agency, LLC, *Sample Letters: Sample Audit Engagement Wording*, ENGAGEMENT LETTERS FOR THE ACCOUNTING PROFESSION, http://www.naplia.com/resources/engagement%20letters/Example%20Audit%20engagement%200109.DOC:

> You are responsible for the design and implementation of programs and controls to prevent and detect fraud, and for informing us about all known or suspected fraud affecting the Company involving (a) management (b) employees who have significant roles in internal control, and (c) others where the fraud could have a material effect on the financial statements. You are also responsible for informing us of your knowledge of any allegations of fraud or suspected fraud affecting the Company received in communications from employees, former employees, regulators, or others. In addition, you are responsible for identifying and ensuring that the entity complies with applicable laws and regulations.

of private ordering.[228]

Private ordering may, however, be problematic in one respect: corrupt managers may have the responsibility of negotiating the terms of the engagement letter with the auditors and, in a supreme act of hubris, may decline to shift the fraud burden to the auditors. In publicly held companies this should not be a significant issue. Under Sarbanes-Oxley, publicly held companies are required to have an audit committee of the board of directors that consists solely of independent directors and, among other things, the audit committee is responsible for engaging the audit firm and overseeing its work on the audit.[229]

Relieving auditors from liability to their audit client for failing to detect and report management accounting fraud does not mean that the auditors are exempt from liability or that their incentives to exercise care are reduced. As noted above, they may be liable to certain third parties who relied on the negligently certified financial statements,[230] they may suffer reputational harm, and they are subject to discipline by the SEC,[231] the Public Company Accounting Oversight Board,[232] and state agencies that regulate the accounting profession. On the other hand, if auditors are liable to the audit clients, under the circumstances suggested by the Restatement (Third) of

---

228. NCP Litig. Trust v. KPMG LLP, 901 A.2d 871, 902 (N.J. 2006) (Rivera-Soto, J., dissenting):

> These were sophisticated, experienced and knowledgeable parties: if what [the company] wanted was a guarantee that its financial statements as prepared by its selected corporate agents were entirely without blemish, it should have bargained for, and paid for, appropriate agreed-upon procedures engagements instead of seeking to reform its examination or audit engagement agreement through litigation.

229. Sarbanes-Oxley Act of 2002 § 301.

230. For instance, recently it was reported that the accounting firm of Grobstein Horwath & Co. LLP contributed $2.5 million to a $10 million class action securities fraud settlement involving financial statements issued by Syntax-Brillian Corp. Andrew Johnson, *Lawsuit vs. Syntax-Brillian Settled for $10 Million*, ARIZ. REPUBLIC (Feb. 14, 2010), http://www.azcentral.com/arizonarepublic/business/articles/2010/02/14/20100214biz-syntax0214.html.

231. *See, e.g.*, SEC v. Chiu, 2:12-CV-00200 (D.Ariz. 2012), *available at* http://www.sec.gov/litigation/complaints/2012/comp22243.pdf, where the SEC accused the former auditor of Syntax-Brillian Corp. of aiding and abetting a securities fraud by knowingly concealing the client's overstatement of revenue.

232. *See, e.g.*, Ernst & Young LLP, PCAOB Rel. No. 105-2012-001 (Feb. 8, 2012) *available at* http://pcaobus.org/Enforcement/Decisions/Documents/Ernst_Young.pdf, in which the PCAOB imposed a $2.0 million fine on Ernst & Young LLP for violations for PCAOB rules and auditing standards.

Agency, it will have the effect of increasing litigation against auditors, increasing professional liability insurance premiums, increasing audit fees and, consequently, increasing the cost of goods and services provided by those clients to the market. At the extreme, opening up this area of liability may have the effect of further reducing the number of auditors and making the audit function less available to smaller companies. This seems too high a price to pay to shift the risk of management fraud from the employers of the fraudsters to outside professionals.[233]

CONCLUDING THOUGHTS

Section 5.04 of the Restatement (Third) of Agency is neither clear in its meaning nor accurate in its restatement of the law. Perhaps for that reason, it has not been persuasive authority in the courts. Of the six cases that cited the Restatement (Third) in auditor liability cases,[234] only one cited and relied upon the good faith concept in ruling against an auditor.[235] In one case, the court held that the adverse interest exception applied because the corrupt officers acted entirely in their own self-interests in misappropriating customer assets.[236] The remaining four cases followed prior precedent and held in favor of the defendant auditor.[237] Other cases against auditors that did not cite the Restatement (Third) of Agency Section 5.04 have overwhelmingly followed prior precedent.[238] Finally,

233. *See NCP Litig. Trust,* 901 A.2d at 904 (Rivera-Soto, J., dissenting).

234. These cases were collected by the ALI and are through April, 2011.

235. Official Comm. of Unsecured Creditors of Allegheny Health Educ. & Research Found. v. Price Waterhouse Coopers, LLP, 989 A.2d 269, 313, 319, 321, 324, 338 (Pa. 2010). Note that in this case the auditor was alleged to have colluded with the corrupt managers. *Id*. at 305–06. The court affirmed the doctrine that a negligent auditor may invoke imputation and held that an auditor who colluded with corrupt management may not. *Id.*

236. *In re* Sunpoint Sec., Inc., 377 B.R. 513, 563 (Bankr. E.D. Tex. 2007).

237. *In re* Parmalat Sec. Litig., 659 F.Supp.2d 504, 519, 523 (S.D.N.Y. 2009) *aff'd in part, vacated in part*, Parmalat Capital Fin. Ltd. v. Bank of Am. Corp., 412 F. App'x 325 (2d Cir. 2011); Kirschner v. KPMG LLP, 938 N.E.2d 941, 953 (N.Y. 2010; *In re* American Int'l Grp., Inc., Consol. Derivative Litig., 976 A.2d 872, 891 (Del.Ch. 2009); Grede v. McGladrey & Pullen LLP, 421 B.R. 879, 886 (N.D. Ill. 2009).

238. *See, e.g.*, USACM Liquidating Trust v. Deloitte & Touche LLP, 764 F. Supp. 2d 1210 (D. Nev. 2011) (trust's claims against outside auditor were barred by *in pari delicto* doctrine); *In re* Nat'l Century Fin. Enters., Inc., 783 F.Supp.2d 1003 (S.D. Ohio 2011) (trustee's claim against financial services provider dismissed under *in pari delicto*); *In re* Verilink Corp., 405 B.R. 356 (N.D. Ala. 2009); *In re* Amerco Derivative Litig., 252 P.3d 681 (Nev. 2011). *But see, e.g.*,

NCP, which might be considered a leading post-Restatement case because it was decided by an important commercial state (New Jersey) and gave rise to long and forceful judicial opinions, did not cite or rely upon the Restatement. Moreover, the audit client in that case was a bankrupt corporation and, as noted above, the case may simply be one of deepening insolvency, although the court did paint with a broad brush in denying imputation and the *in pari delicto* defense.[239]

Because the ALI seems to have sought to alter the law with the good faith exception and did not explain this modification in the comments, the persuasive force of section 5.04 is in jeopardy and that, in turn, may cast a bit of pall on the whole Restatement. While it is surely an overstatement to suggest that the ALI's credibility has been tainted because of the enormous goodwill that the Institute has built up over the years, the evolution of section 5.04 should be of concern to the Institute going forward and it may reflect a problem without an obvious solution. The ALI faced a similar "special interest" lobbying effort when the Principles of Corporate Governance were considered by the membership. Lawyers representing publicly held corporations appeared to have the interest of their clients in mind when certain provisions of the Principles were under discussion and then, as with section 5.04, the membership was admonished by the leadership of the ALI to "leave their clients at the door." The effectiveness of that admonishment is hard to measure.

When such controversial topics arise in the course of a

Bechtle v. Master, Sidlow & Associates, P.A., 766 F. Supp. 2d 547, 544 (E.D. Pa. 2011) (relying on Pennsylvania law, the court refused to dismiss case against auditor on the basis of imputation and *in pari delicto* because, among other reasons, the auditor may not have acted in good faith, despite the lack of allegations that the auditor colluded with the corrupt officers. The opinion implies that something less than collusion may be lack of good faith precluding imputation). The holding in *Bechtle* seems to be contrary to an earlier advisory opinion of the Pennsylvania Supreme Court to the Third Circuit Court of Appeals. The state court advised the federal court that a negligent auditor could raise an imputation/*in pari delicto* defense against a claim by a creditors committee, writing: "On balance, we believe the best course is for Pennsylvania common law to continue to recognize the availability of the *in pari delicto* defense (upon appropriate and sufficient pleadings and proffers), via the necessary imputation, in the negligent-auditor context." *Allegheny Health Educ. & Research Found.*, 989 A.2d at 335 (Pa. 2010).

239. The court noted that the corporation could not have benefited from the fraud committed by its officers because "enabling the corporation to continue in business 'past the point of insolvency' cannot be considered a benefit to the corporation." *NCP Litig. Trust*, 901 A.2d at 888 (citing *Schacht*, 711 F.2d 1343 (7th Cir. 1983)).

Restatement or other ALI project, and a "partisan" debate occurs, the ALI might consider including in the Reporter's Notes, or perhaps elsewhere, some indication that the section met with controversy and the nature of that controversy. Users of the ALI's final product would then have fuller information about the section in question and judges might take that disclosure into account when weighing the persuasiveness of the section. In the case of section 5.04, an indication that the outcome of Illustration 5 represents a reversal from an illustration in an earlier draft of the Restatement may be of some use to those depending on the section for guidance.

The membership of the ALI includes many of the leading scholars and practitioners of American law. Partially for that reason, its many projects carry considerable influence on the application and development of that law. The ALI must continue to strive to maintain its objectivity and credibility, avoiding even the appearance that partisan influences affect its work. When it is impossible to assure that, however, the next best alternative is to disclose the nature of the debates and the amendments that occurred as a result.

RANDOM, SUSPICIONLESS SEARCHES OF STUDENTS' BELONGINGS: A LEGAL, EMPIRICAL, AND NORMATIVE ANALYSIS

JASON P. NANCE*

This Article provides a legal, empirical, and normative analysis of an intrusive search practice used by public school officials to prevent school crime: random, suspicionless searches of students' belongings. First, it argues that these searches are not permitted under the Fourth Amendment unless schools have particularized evidence of a substance abuse or weapons problem. Second, it provides a normative evaluation of strict security measures in schools, especially when they are applied disproportionately to minority students. Third, drawing on recent restricted data from the U.S. Department of Education's School Survey on Crime and Safety, this Article provides empirical findings that raise concerns that some public schools may be conducting unconstitutional searches of students' belongings. In addition, it shows that these potentially unconstitutional searches are more likely to take place in schools with higher minority populations than in schools with lower minority populations, even after taking into account school officials'

* Assistant Professor of Law, University of Florida Levin College of Law. J.D., University of Pennsylvania Law School; Ph.D., M.A., Educational Administration, The Ohio State University. I would like to thank the following individuals for the helpful feedback and assistance they provided for this article: Ian Ayers, Scott Bauries, Derek Black, David Caudill, Philip T.K. Daniel, Michelle Dempsey, Jamison Fargo, Paul Gugliuzza, Jeff Harrison, Michael Heise, Berta Hernandez-Truyol, Catherine Kim, Shani King, Aaron Kupchik, Catherine Lanctot, Lyrissa Lidsky, Tom Lin, Wayne Logan, Helen Marks, Amy Mashburn, Bill Page, Penelope Pether, Ted Ruger, Sharon Rush, Katheryn Russell-Brown, Tuan Samahon, Chris Slobogin, R. Daniel Sokol, John Stinneford, Catherine Struve, Walter Taggart, Tess Wilkinson-Ryan, and Michael Wolf. I also appreciate the helpful comments provided by faculty members during presentations of earlier drafts of this Article at Florida State University College of Law, University of Florida Levin College of Law, University of Minnesota Law School, and Villanova University School of Law, and by conference participants at the 2011 Conference on Empirical Legal Studies at Northwestern University School of Law and the 2011 meeting of the Canadian Law and Economics Association at the University of Toronto Faculty of Law. I received outstanding research assistance from Olga Balderas and Mariko Shitama. Finally, I would like to thank the U.S. Department of Education for providing access to the restricted-use versions of the School Survey on Crime and Safety.

perceptions of the levels of crime where students live and where the school is located. Finally, this Article argues that the Supreme Court should resolve any ambiguity in its jurisprudence by expressly requiring school officials to have particularized, objective evidence of a substance abuse or weapons problem before permitting schools to perform these intrusive searches.

INTRODUCTION

Everyone agrees that our public schools should be free from violence, crime, and drugs.[1] While school crime has declined in recent years,[2] recent statistics demonstrate that violence and substance abuse continue to trouble public schools. During the 2009–2010 school year, thirty-three students, staff, and others died in a school-associated violent event.[3] In 2009, 8 percent of students in grades nine through twelve reported being threatened or injured with a weapon on school property at least one time.[4] Also in 2009, 23 percent of students in grades nine through twelve said that drugs were offered, sold, or given to them.[5]

Naturally, school officials are concerned about violence and substance abuse in their schools and have implemented various measures to address these problems. For example, some schools support worthwhile efforts such as implementing curricula and instruction programs aimed at preventing violence, providing mentors to students, and creating other programs that promote a sense of community and social integration among students.[6] Other schools, however, perform

1. *See, e.g.*, SIMON ROBERTS ET AL., NAT'L CTR. FOR EDUC. STAT., U.S. DEP'T OF EDUC., BUREAU OF JUSTICE STAT., U.S. DEP'T OF JUSTICE, INDICATORS OF SCHOOL CRIME AND SAFETY: 2011, at iii (2012) [hereinafter INDICATORS OF SCHOOL CRIME AND SAFETY], *available at* http://nces.ed.gov/pubs2012/2012002.pdf.

2. *See id.* at 10 (stating that from 2009 to 2010, "the violent victimization rate for students ages 12–18 at school declined from 20 per 1,000 students to 14 per 1,000 students"); *id.* at 60 (stating that between 1993 and 2009, "the percentage [of students who reported] carrying a weapon on school property declined from 12 percent to 6 percent"); *id.* at v ("The percentage of students in grades 9–12 who reported that drugs were offered, sold, or given to them decreased from 32 percent in 1995 to 23 percent in 2009."). There is no clear consensus on the reasons for the decline. *See* LISA SNELL, SCHOOL VIOLENCE AND NO CHILD LEFT BEHIND: BEST PRACTICES TO KEEP KIDS SAFE 2 (Jan. 2005), http://reason.org/files/70a1152cc03e81af5e7e3f2f073fdce3.pdf (explaining that it is difficult to measure the effectiveness of many anti-violence programs because they have been imperfectly monitored or evaluated and because school violence is influenced by so many variables).

3. *See* INDICATORS OF SCHOOL CRIME AND SAFETY, *supra* note 1, at iii.

4. *Id.* at iv.

5. *Id.* at v.

6. *See, e.g.*, SAMANTHA NEIMAN & MONICA R. HILL, NAT'L CTR. FOR EDUC. STAT., U.S. DEP'T OF EDUC., CRIME, VIOLENCE, DISCIPLINE, AND SAFETY IN U.S.

random, suspicionless searches on students to prevent students from bringing drugs and weapons on campus.[7] These searches include random drug testing, dog sniffs, metal detector checks, and searches through students' belongings.[8] Recent data from the U.S. Department of Education show that the use of these strict security measures in public schools is not uncommon.[9]

The use of these search tactics raises important questions regarding students' civil rights under the Fourth Amendment. While several articles discuss students' Fourth Amendment rights in school settings,[10] this Article provides a legal, empirical, and normative analysis of a particularly intrusive type of search practice: random, suspicionless searches of students' belongings. This Article first argues that, consistent with Supreme Court precedent and a recent Eighth Circuit decision, random, suspicionless searches of students' belongings are not permitted under the Fourth Amendment unless certain conditions are present.[11] Specifically, in order to justify performing suspicionless, intrusive searches on the

---

PUBLIC SCHOOLS 15 (2011), http://nces.ed.gov/pubs2011/2011320.pdf (reporting the percentages of public schools that use various violence prevention programs).

7. INDICATORS OF SCHOOL CRIME AND SAFETY, *supra* note 1, at 83 (showing the percentages of schools that employ certain search methods).

8. *Id.*

9. *See infra* Table 1.

10. *See, e.g.*, Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 104–05 (1996) (praising the Supreme Court's decision permitting suspicionless drug testing in schools); Barry C. Feld, T.L.O *and* Redding's *Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 MISS. L.J. 847, 851 (2011) (criticizing the Supreme Court for departing from traditional Fourth Amendment analysis in the school context); Martin R. Gardner, *Student Privacy in the Wake of* T.L.O.*: An Appeal for an Individualized Suspicion Requirement for Valid Searches and Seizures in Public Schools*, 22 GA. L. REV. 897, 898 (1988) (urging courts to require a finding of individualized suspicion before permitting school officials to search students); Wayne R. LaFave, *Computers, Urinals, and the Fourth Amendment: Confessions of a Patron Saint*, 94 MICH. L. REV. 2553, 2588 (1996) (identifying numerous harms from the Supreme Court's decision to permit suspicionless drug testing); Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1669–72 (1986) (arguing that relaxing traditional Fourth Amendment analysis in the school setting illustrates "the dilemma involved in trying to convey constitutional values to our youth through an institution which itself places less value on the particulars of some of these constitutional values"); Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 298–301 (2011) (discussing students' reduced expectation of privacy in school settings); James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1424–26 (2000) (defending the Supreme Court's Fourth Amendment analysis in schools on the grounds of necessity).

11. *See infra* Section I.

general student population,[12] the Fourth Amendment requires that a school official have particularized evidence demonstrating that the school has a substance abuse or weapons problem, unless the school official reasonably believes that students are in immediate danger.[13] Conversely, if the school official offers nothing more than "generalized concerns about the existence of weapons and drugs in [her] school[]," she is not entitled to conduct such searches.[14]

Second, this Article argues that the above standard is not only legally sound, but it is also more consistent with good educational policy and practice because it limits the authority of school officials to conduct random, suspicionless, intrusive searches absent extenuating circumstances.[15] Research demonstrates that strict security measures deteriorate the learning climate by engendering alienation, mistrust, and resistance among students, instead of building a positive climate based on mutual respect, support, community, and collective responsibility.[16] In fact, empirical studies cast doubt on whether strict security measures effectively reduce school crime,[17] and many researchers argue that implementing such

12. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 337–38 (1985) ("A search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy.").

13. Doe *ex rel.* Doe v. Little Rock Sch. Dist., 380 F.3d 349, 355–56 (8th Cir. 2004); *see also* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 662 (1995); B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1266–68 (9th Cir. 1999); *see also infra* Section I.E.

14. *Little Rock*, 380 F.3d at 356.

15. *See infra* Section II.

16. AARON KUPCHIK, HOMEROOM SECURITY: SCHOOL DISCIPLINE IN AN AGE OF FEAR 7, 15–18 (2010) (explaining that student misbehavior is likely to increase rather than decrease when students perceive they are treated unfairly and with disrespect); *see* Randall R. Beger, *The "Worst of Both Worlds:" School Security and the Disappearing Fourth Amendment Rights of Students*, 28 CRIM. JUST. REV. 336, 340 (2003) (citing several studies demonstrating that "aggressive security measures produce alienation and mistrust among students"); Michael Easterbrook, *Taking Aim at Violence*, 32 PSYCHOL. TODAY 52, 56 (1999) (providing evidence that strict security measures alienate students); Pedro Noguera, *Preventing and Producing Violence: A Critical Analysis of Responses to School Violence*, 65 HARV. EDUC. REV. 189, 190–91 (1995) (arguing that a "get tough" approach does not create a safe environment because coercive measures create mistrust and resistance among the student body).

17. *See* THE ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 8 (2005) (explaining that while strict security measures "produce a perception of safety, there is little or no evidence that they create safer learning environments or change disruptive behaviors"), http://www.advancementproject.org/page/-/resources/FINALEOLrep.pdf; John Blosnich & Robert Bossarte, *Low-Level Violence in Schools: Is There an*

measures *increases* misbehavior and crime.[18] Rather than relying on coercive measures, research demonstrates that there are alternative, more effective methods for reducing school crime that maintain students' dignity, do not degrade the learning environment, and teach students to value their constitutional rights.[19]

Third, this Article presents an empirical analysis that seeks to identify how many schools use this intrusive search practice and the conditions under which they do so.[20] The data for this analysis came from two restricted-use datasets from the School Survey on Crime and Safety (SSOCS), primary sources of public school data that the U.S. Department of Education made available in 2010 and 2011 to qualifying researchers.[21] Each of the SSOCS databases is a collection of

---

Association Between School Safety Measures and Peer Victimization? 81 J. SCH. HEALTH 107, 107 (2011) (concluding that school security measures did not reduce violent behaviors related to bullying); Abigail Hankin, Marci Hertz & Thomas Simon, *Impacts of Metal Detector Use in Schools: Insights from 15 Years of Research*, 81 J. SCH. HEALTH 100, 105 (2011) (concluding that there is insufficient evidence to demonstrate whether metal detectors reduce school violence), http://www.edweek.org/media/hankin-02security.pdf; Richard E. Redding & Sarah M. Shalf, *The Legal Context of School Violence: The Effectiveness of Federal, State, and Local Law Enforcement Efforts to Reduce Gun Violence in Schools*, 23 LAW & POL'Y 297, 319–20 (2001) ("It is hard to find anything better than anecdotal evidence" to demonstrate that strict security measures such as metal detectors and guards reduce violence in schools.).

18. *See* Beger, *supra* note 16, at 340; Easterbrook, *supra* note 16, at 56; Clifford H. Edwards, *Student Violence and the Moral Dimensions of Education*, 38 PSYCHOL. SCH. 249, 250 (2001) ("[I]ntrusive strategies are likely to undermine the trust needed to build cooperative school communities capable of really preventing violence."); Matthew J. Mayer & Peter E. Leone, *A Structural Analysis of School Violence and Disruption: Implications for Creating Safer Schools*, 22 EDUC. & TREATMENT OF CHILDREN 333, 350, 352 (1999) (finding that student disorder and victimization were higher in schools using strict security measures than in schools that did not use such measures); KUPCHIK, *supra* note 16, at 15–18 (explaining that student misbehavior is likely to increase rather than decrease when students perceive they are treated unfairly and with disrespect).

19. *See* David C. Anderson, *Curriculum, Culture, and Community: The Challenge of School Violence*, 24 CRIME & JUST. 317, 341, 343–46 (1998) (maintaining that humanistic approaches to discipline more effectively reduce school crime than coercive measures); *see also infra* Section II.

20. *See infra* Section III.

21. *See* NAT'L CTR. FOR EDUC. STAT., *Restricted Use Data Licenses*, http://nces.ed.gov/statprog/instruct.asp (last visited Sept. 29, 2012). NCES defines "restricted-access" data as data that contains "individually identifiable information that are confidential and protected by law. This information is not publicly released." NAT'L CTR. FOR EDUC. STAT., *Statistical Standard Program: Getting Started,* http://nces.ed.gov/statprog/instruct_gettingstarted.asp (last visited Sept. 29, 2012). The restricted-use data "have a higher level of detail in the data compared to public-use data files." *Id.* NCES provides restricted-use datasets

survey responses on crime and safety from over 2,500 public school principals throughout the United States.[22]

The results of this empirical analysis raise concerns that many public schools may be conducting searches that are either (1) unconstitutional under current precedent or (2) inconsistent with good educational policy. Specifically, the SSOCS data suggest that during the 2009–2010 school year, approximately seventy secondary schools in the sample and an estimated 1,932 secondary schools throughout the United States conducted suspicionless searches of students' belongings without reporting any incidents relating to using, possessing, or distributing weapons, alcohol, or drugs.[23] Furthermore, the estimated number of schools that conducted suspicionless searches of students' belongings sharply climbs for schools that report only a minor problem with drugs, alcohol, or weapons.[24]

Although these preliminary findings signal that some schools may be violating students' Fourth Amendment rights, more research is needed to draw clearer conclusions. As explained more fully below, the primary survey question on which this analysis is based—whether "it was a practice in the principal's school to . . . [p]erform one or more random sweeps for contraband (e.g., drugs or weapons), but not including dog sniffs"—is somewhat ambiguous.[25] That question does not

---

to certain researchers in qualified organizations. *Id.* In order to qualify, "an organization must provide a justification for access to the restricted-use data, submit the required legal documents, agree to keep the data safe from unauthorized disclosures at all times, and to participate fully in unannounced, unscheduled inspections of the researcher's office to ensure compliance with the terms of the License and the Security Plan form." *Id.*; *see also* NAT'L CTR. FOR EDUC. STAT., *Applying for a Restricted-use Data License*, http://nces.ed.gov/statprog/instruct_apply.asp?type=rl (last visited Sept. 29, 2012).

22. NEIMAN & HILL, *supra* note 6, at 1; SALLY A. RUDDY ET AL., 2007–2008 SCHOOL SURVEY ON CRIME AND SAFETY: SURVEY DOCUMENTATION FOR PUBLIC-USE DATA FILE USERS 1 (2010), http://nces.ed.gov/ pubs2010/2010307.pdf.

23. *See infra* Section III.D, Figures 1 & 2. This is an increase from the 2007–2008 school year, where approximately sixty secondary schools in the sample and an estimate of 1,645 secondary schools throughout the United States conducted random, suspicionless searches of students' belongings without reporting any incidents relating to using, possessing, or distributing weapons, alcohol, or drugs.

24. *See infra* Section III.D, Figures 1 & 2.

25. *See* NAT'L CTR. FOR EDUC. STAT., SCHOOL SURVEY ON CRIME AND SAFETY PRINCIPAL QUESTIONNAIRE: 2009–2010 SCHOOL YEAR 5 [hereinafter 2009–2010 SSOCS QUESTIONNAIRE], http://nces.ed.gov/surveys/ssocs/pdf/SSOCS_2010_ Questionnaire.pdf (last visited Sept. 28, 2012); NAT'L CTR. FOR EDUC. STAT., SCHOOL SURVEY ON CRIME AND SAFETY PRINCIPAL QUESTIONNAIRE: 2007–2008 SCHOOL YEAR 5 [hereinafter 2007–2008 SSOCS QUESTIONNAIRE], *available at* http://nces.ed.gov/surveys/ssocs/pdf/SSOCS_2008_ Questionnaire.pdf (last visited Sept. 28, 2012).

allow researchers to precisely ascertain (a) the nature of the "random sweeps"; (b) the conditions under which school officials performed the searches; (c) whether the "contraband" searched for was something other than weapons or drugs, such as stolen money; or (d) whether school officials conducted the search on the general student body or on a subset of students that had a lower expectation of privacy.[26] Nevertheless, these preliminary findings demonstrate the need to conduct more research in order to probe more deeply into the types of searches school officials perform and why they perform them.

Additionally, and more disturbingly, the analysis suggests that during the 2007–2008 and 2009–2010 school years, schools with higher minority student populations were more likely than schools with lower minority populations to perform these searches without reporting any incidents relating to weapons, alcohol, or drugs.[27] These findings hold true even when taking into account school officials' perceptions of the levels of crime where students live and where the school is located.[28] The fact that minority students are more often subject to intrusive searches without apparent justification raises serious concerns that schools are perpetuating racial inequalities.[29] Such practices also incorrectly teach students that white students are privileged, leading to increased racial tensions and an undesirable society that harms people of all races.[30] Furthermore, even absent Fourth Amendment violations, the fact that many schools perform suspicionless searches without

26. *See also infra* Section III.A–D.

27. *See infra* Section III.E & Table 2.

28. *See infra* Section III.E & Table 2. These results also may raise legal issues under the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. That analysis is beyond the scope of this Article, but will be the subject of future research projects.

29. *See* AARON KUPCHIK & GEOFF K. WARD, REPRODUCING SOCIAL INEQUALITY THROUGH SCHOOL SECURITY: EFFECTS OF RACE AND CLASS ON SCHOOL SECURITY MEASURES 7, http://www.edweek.org/media/kupchikward-02security.pdf (last visited Sept. 29, 2012) (describing how strict security measures condition minorities to accept intensive surveillance by the government and limit their future opportunities for success); *see also infra* Section II.B.

30. *See* Sharon Elizabeth Rush, *Sharing Space: Why Racial Goodwill Isn't Enough*, 32 CONN. L. REV. 1, 20–39 (1999) (describing how persistent racial inequalities feed minorities' skepticism of white society's commitment to racial equality, which leads to racial tension, anger, and a society that is undesirable to all races); Sharon Elizabeth Rush, *The Heart of Equal Protection: Education and Race*, 23 N.Y.U. REV. L. & SOC. CHANGE 1, 33, 42 (1997) (explaining that children learn about race relations from us, and adults should be especially cautious not to teach minorities that they are racially inferior or teach white children that they are racially superior).

reporting a single incident relating to weapons, drugs, or alcohol during the school year raises pedagogical concerns, especially because there are more effective ways to prevent school crime that do not harm the learning environment.[31]

Finally, this Article recommends that the Supreme Court and other federal circuit courts follow the Eighth Circuit's lead by requiring school officials to provide concrete evidence of a serious substance abuse or weapons problem before permitting schools to engage in intrusive search practices.[32] In addition, it urges school officials and policymakers to consider alternative, more effective means for reducing school violence and drug abuse rather than resorting to coercive methods that rely on punishment and fear.

This Article proceeds in four sections. Section I evaluates the constitutionality of suspicionless searches in public schools and concludes that such searches violate the Fourth Amendment unless school officials have particularized evidence of a substance abuse or weapons problem in their schools. Section II provides a normative evaluation of strict security measures and concludes that such measures are inconsistent with good educational policy and practice, particularly when applied disproportionally to minority students. Section III presents an empirical analysis of two restrictive-use datasets from the Department of Education. After evaluating the empirical results against the legal framework presented in Section I, it concludes that the empirical findings raise concerns that some public schools may be conducting unconstitutional searches. Section III also presents empirical results suggesting that these potentially unconstitutional searches are more likely to take place in schools with higher minority populations than in schools with lower minority populations, raising additional concerns. Section IV discusses the implications of the empirical findings against the legal and normative analyses. It also argues that the Supreme Court should resolve any ambiguity in its jurisprudence by requiring school officials to have particularized evidence of a serious substance abuse or weapons problem before permitting schools to engage in intrusive search practices. This Article concludes by providing a roadmap to conduct further research on these important issues.

---

31. *See infra* Section II.A.
32. *See infra* Section IV.

I. THE FOUNDATIONAL CASES FOR EVALUATING THE CONSTITUTIONALITY OF PERFORMING RANDOM, SUSPICIONLESS SEARCHES OF STUDENTS' BELONGINGS

While students do not relinquish their Fourth Amendment rights upon entering the schoolhouse doors,[33] the Supreme Court balances students' rights of privacy against the states' interests in providing a safe and orderly school environment.[34] In recent years, the Court has determined that the Fourth Amendment permits school officials to randomly drug test student athletes and students involved in extracurricular activities.[35] The Court justified those searches because it determined that (1) students involved in athletics or extracurricular activities have decreased privacy expectations, (2) drug tests are "minimally intrusive," and (3) school officials have an important government interest in deterring drug use and preserving order in schools.[36] These rulings no doubt have emboldened school officials to perform other types of random, suspicionless searches at school.[37] However, school officials' scope of authority under the Fourth Amendment to conduct random, suspicionless searches of students' belongings remains unsettled. This section discusses the foundational cases for evaluating the constitutionality of random, suspicionless searches of students' belongings. In sum, it argues that these searches are not permitted under the Fourth Amendment absent particularized evidence of a weapons or substance abuse problem.

A. New Jersey v. T.L.O.

In *New Jersey v. T.L.O.*, the Supreme Court addressed the competing interests of students' privacy rights under the Fourth Amendment and the interests of states in creating a

33. *See* New Jersey v. T.L.O., 469 U.S. 325, 333–34 (1985); Bd. of Educ. of Ind. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 828 (2002).

34. *T.L.O.*, 469 U.S. at 337–43; *see also* Dupre, *supra* note 10, at 86–93; Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 872–73 (2012); Levin, *supra* note 10, at 1648–49 (1986); Ryan, *supra* note 10, at 1360–63.

35. *See Earls*, 536 U.S. at 838 (permitting random, suspicionless drug testing on students involved in extracurricular activities); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664–65 (permitting random, suspicionless drug testing on student athletes).

36. *Earls*, 536 U.S. at 830–38; *Vernonia*, 515 U.S. at 654–66.

37. *See infra* Section III.C, Table 1.

safe and orderly environment conducive to learning in public schools.[38] In *T.L.O.*, a New Jersey high school teacher spotted fourteen-year-old T.L.O. and another student smoking in the bathroom.[39] The teacher escorted the two girls to the principal's office and met with Vice Principal Theodore Choplick.[40] Upon questioning, T.L.O.'s companion admitted that she had been smoking, but T.L.O. denied the accusations.[41] Mr. Choplick brought T.L.O. into his private office and examined the contents of her purse.[42] He found in her purse a pack of cigarettes.[43] When he reached into the purse to remove the cigarettes, he noticed a package of cigarette rolling papers, so he proceeded to search the purse more thoroughly to uncover other evidence of drug use.[44] Mr. Choplick found marijuana, a pipe, a number of empty plastic bags, a substantial quantity of money, an index card containing a list of students who owed T.L.O. money, and two letters suggesting that T.L.O. was dealing marijuana.[45] Mr. Choplick notified T.L.O's mother and turned the evidence over to the

38. *T.L.O.*, 469 U.S. 325. Before this case, a number of courts did not take a middle position, but gave full force to one interest over the other. *See id.* at 333 n.2. For example, some courts invoked the *in loco parentis* doctrine, concluding that the Fourth Amendment did not apply to in-school searches because school officials acted in the place of parents during school hours and, thus, did not act as an arm of the government. *See id.*; D.R.C. v. State, 646 P.2d 252 (Alaska Ct. App. 1982); *In re* Thomas G., 90 Cal. Rptr. 361 (Cal. Dist. Ct. App. 1970); R.C.M. v. State, 660 S.W.2d 552 (Tex. App. 1983). The Supreme Court in *T.L.O.* expressly rejected this reasoning, holding that "[i]n carrying out searches and other disciplinary functions . . . school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment." *T.L.O.*, 469 U.S. at 336–37. Other courts held that the Fourth Amendment applied in full force to searches conducted by school officials, at least under certain circumstances, requiring such officials to meet the probable cause standard. *See* M. v. Anker, 607 F.2d 588, 589 (2d Cir. 1979); State v. Mora, 307 So.2d 317, 323 (La. 1975), *vacated*, 423 U.S. 809 (1975). And still other courts found a middle ground, concluding that the Fourth Amendment applied to searches conducted by public school officials, but the special needs of the government to maintain an appropriate learning environment warranted a standard less exacting than probable cause. *See T.L.O.*, 469 U.S. at 333 n.2; Bilbrey v. Brown, 738 F.2d 1462 (9th Cir. 1984); Horton v. Goose Creek Ind. Sch. Dist., 690 F.2d 470 (5th Cir. 1982); Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y 1977). *See generally* JAMES A. RAPP, EDUCATION LAW § 9.08(3)(b) (2012) (describing the state of the law prior to *T.L.O.*).

39. *T.L.O.*, 469 U.S. at 328.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

police.[46] T.L.O. eventually confessed that she had been selling marijuana at the high school, and on the basis of that confession and the evidence seized by Mr. Choplick, the State brought delinquency charges against her in juvenile court.[47] T.L.O. moved to suppress the evidence, arguing that the search of her purse violated the Fourth Amendment,[48] but the Supreme Court disagreed.[49]

The Court evaluated the constitutionality of the search by balancing T.L.O's expectation of privacy against the school's need to maintain an orderly environment.[50] The Court first explained that students have legitimate expectations of privacy in the personal items they bring to school.[51] The court reasoned that a "search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy."[52] According to the Court, "schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds."[53] At the same time, the Court recognized the school officials' interest in maintaining an orderly school environment conducive to learning, particularly in light of the fact that "drug use and violent crime in the schools have become major social problems."[54]

To strike a balance between the school's need to maintain an orderly environment and students' legitimate expectation of privacy, the Court held that school officials are not required to obtain a warrant before searching a student, and a school official's level of suspicion need not rise to the level of "probable cause."[55] Rather, the constitutionality of a search of a student's belongings depends on its reasonableness under the

46. *Id.*
47. *Id.* at 329.
48. *Id.*
49. *Id.* at 333.
50. *Id.* at 337.
51. *Id.* at 337–39.
52. *Id.* at 337–38.
53. *Id.* at 339.
54. *Id.* (citing U.S. DEP'T OF HEALTH, EDUC. & WELFARE, NAT'L INST. OF EDUC., VIOLENT SCHOOLS—THE SAFE SCHOOL STUDY REPORT TO CONGRESS (1977)).
55. *Id.* at 340–41.

circumstances.[56] According to the Court, the determination of "reasonableness" involves a two-fold inquiry: (1) whether "the . . . action was justified at its inception;" and (2) "whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'"[57] A search is "justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school," and a search is "permissible in scope" when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[58] Using this framework, the Court concluded that the search was constitutional.[59] Mr. Choplick had a reasonable suspicion that T.L.O.'s purse contained cigarettes, and once he observed a package of rolling papers upon removing the cigarettes, he was justified to extend his search to the rest of the contents of the purse.[60]

T.L.O. has been criticized for not expressly requiring school officials to have an individualized suspicion to conduct valid searches.[61] Nevertheless, the Court still recognized that students enjoy the protections offered by the Fourth Amendment in schools and have an expectation of privacy in the belongings they bring to school.[62] As the Court acknowledged, to hold otherwise would equate the Fourth Amendment rights of schoolchildren with those of prisoners, who "retain no legitimate expectations of privacy in their cells."[63] The Court explained that the "prisoner and the

56. *Id.* at 341.

57. *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)). The Court recently upheld this two-fold inquiry in *Safford Unified School District #1 v. Redding*, 557 U.S. 370 (2009). In *Safford*, the Court found that a strip search ordered by school administrators on a 13-year-old girl to uncover forbidden prescription and over-the-counter drugs was unconstitutional, but held that the official was entitled to qualified immunity from liability. *Id.*

58. *T.L.O.*, 469 U.S. at 342 (internal quotation marks omitted).

59. *Id.* at 347.

60. *Id.* at 343–48.

61. *See* Gardner, *supra* note 10, at 924 (finding that *T.L.O.* portended a "gloomy future for student privacy" by not expressly requiring individualized suspicion to conduct searches of students).

62. *T.L.O.*, 469 U.S. at 337–38 ("A search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy.").

63. *Id.* at 338.

schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration. We are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment."[64] In subsequent decisions, however, students' Fourth Amendment rights continued to be tested.

B. Vernonia School District 47J v. Acton

Ten years after *T.L.O.*, in *Vernonia School District 47J v. Acton*,[65] the Court determined that individualized suspicion is not necessary to conduct what it deemed as "minimally intrusive" searches of students when certain conditions are present.[66] Evaluating the constitutionality of a random drug testing program on student athletes, the Court balanced three factors: (1) "the scope of the legitimate expectation of privacy at issue"; (2) the "character of the intrusion that is complained of"; and (3) the "nature and immediacy of the governmental concern at issue . . . , and the efficacy of this means for meeting it."[67]

In *Vernonia*, the Vernonia School District claimed that teachers and administrators "observed a sharp increase in drug use" in the mid-to-late 1980s.[68] In particular, students "began to speak out about their attraction to the drug culture and boast that there was nothing the school could do about it."[69] Not only did student athletes participate in drug use, but also the district court concluded that they were the "leaders of the drug culture."[70] The district court explained:

> [A] large segment of the student body, particularly those involved in inter-scholastic athletics, was in a state of

64. *Id.* at 338–39 (citations omitted) (quoting Ingraham v. Wright, 430 U.S. 651, 669 (1971)); *see also* Doe *ex rel.* v. Little Rock Sch. Dist., 380 F.3d 349, 353 (8th Cir. 2004) ("Unlike prisoners, who 'retain no legitimate expectations of privacy in their cells' after having been convicted and incarcerated . . . public school students have traditionally been treated as presumptively responsible persons entitled to some modicum of privacy in their personal belongings, at least to the extent that recognition of such privacy interests does not unduly burden the maintenance of security and order in schools.") (citations omitted).

65. 515 U.S. 646 (1995).

66. *Id.* at 653.

67. *Id.* at 646, 658, 660.

68. *Id.* at 648.

69. *Id.*

70. *Id.* at 649.

> rebellion. Disciplinary actions had reached 'epidemic proportions.' The coincidence of an almost three-fold increase in classroom disruptions and disciplinary reports along with the staff's direct observations of students using drugs or glamorizing drug and alcohol use led the administration to the inescapable conclusion that the rebellion was being fueled by alcohol and drug abuse as well as the students' misperceptions about the drug culture.[71]

School officials decided to implement a student athlete drug testing program.[72] Students wishing to participate in interscholastic sports and their parents were required to sign a drug testing consent form.[73] Under the program, all student athletes would be tested at the beginning of the season.[74] Additionally, each week of the season, a student, under the supervision of two adults, would randomly select several students for drug testing.[75] In the fall of 1991, James Acton signed up to play football, but he was denied participation because he and his parents refused to sign the drug testing consent form.[76] The Actons filed suit, claiming that Vernonia's drug testing program violated the Fourth Amendment, but the Court disagreed.[77]

The Court recognized that the school search approved in *T.L.O.* was based on individualized suspicion of wrongdoing. Nevertheless, over a scathing dissent by Justice O'Connor,[78] the Court held that the Fourth Amendment did not impose that

---

71. *Id.* (quoting Vernonia Sch. Dist. 47J v. Acton, 796 F. Supp. 1354, 1357 (D. Or. 1992)).

72. *Id.* at 649–50.

73. *Id.* at 650.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 651–52.

78. *Id.* at 653. Justice O'Connor was highly critical of the Court's decision to dispense with the individualized suspicion requirement. She reasoned, "[N]owhere is it *less* clear that an individualized suspicion requirement would be ineffectual than in the school context. In most schools, the entire pool of potential search targets—students—is under constant supervision by teachers and administrators and coaches, be it in classrooms, hallways, or locker rooms . . . ." *Id.* at 678 (O'Connor, J., dissenting) (emphasis in original). She further reasoned, "The great irony of this case is that most (though not all) of the evidence the District introduced to justify its suspicionless drug testing program consisted of first- or second-hand stories of particular, identifiable students acting in ways that plainly gave rise to reasonable suspicion of in-school drug use—and thus that would have justified a drug-related search under our *T.L.O.* decision." *Id.* at 678–79 (O'Connor, J., dissenting).

requirement.[79] Under its new framework, the Court first considered "the nature of the privacy interest upon which the search . . . intrudes."[80] While acknowledging that children "assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate,'"[81] the Court explained that students' constitutional rights, including those under the Fourth Amendment, are diminished in light of the schools' custodial and tutelary responsibilities.[82] Next, the Court explained that privacy expectations for student athletes are even further diminished because: (1) "there is an element of communal undress inherent in athletic participation[;]"[83] and (2) by choosing to participate in school athletics, students "voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally."[84]

Second, the Court considered the intrusiveness of collecting and evaluating student urine samples.[85] The Court first reasoned that the conditions imposed by Vernonia's drug testing policy imposed only a negligible degree of intrusion because the conditions were almost identical to conditions commonly encountered in public restrooms.[86] Male students "produce[d] samples at a urinal along a wall" and "remain[ed] fully clothed and [were] only observed from behind, if at all."

---

79. *Id.* at 653 ("The school search we approved in *T.L.O.* while not based on probable cause, *was* based on individualized *suspicion* of wrongdoing. As we explicitly acknowledged, however, 'the Fourth Amendment imposes no irreducible requirement of such suspicion.'") (quoting New Jersey v. T.L.O., 469 U.S. 325, 342 n.8 (1985)) (emphasis in original).

80. *Id.* at 654.

81. *Id.* at 655–56 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

82. *Id.* at 656 (citing Goss v. Lopez, 419 U.S. 565, 581–82 (1975)) (holding that students' due process rights are diminished in schools); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding that students' First Amendment rights to express themselves in school newspapers are diminished); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (concluding that students' First Amendment rights to express themselves on school property are diminished); *see also* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656 (1995) ("Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children.").

83. *Vernonia*, 515 U.S. at 657 (internal quotations marks omitted). For example, school athletes are required to suit up, shower, and change in the public locker rooms that lack privacy accommodations. *Id.*

84. *Id.* For example, students must take a preseason physical exam, acquire insurance coverage, maintain a minimum grade point average, and comply with certain rules established by the coaches of the athletic program. *Id.*

85. *Id.* at 658.

86. *Id.*

Female students "produce[d] samples in an enclosed stall, with a female monitor standing outside listening only for sounds of tampering."[87] The Court next concluded that information disclosed from the urinalyses was an insignificant invasion of privacy.[88] It reasoned that the purpose of the test was only to look for drugs, "not for whether the student is, for example, epileptic, pregnant, or diabetic."[89] In addition, the Court took into account the fact that the test results were disclosed only to a limited number of school authorities, not to law enforcement officers.[90]

Third, the Court considered "the nature and immediacy of the governmental concern at issue . . . , and the efficacy of this means for meeting it."[91] The Court held that the nature of Vernonia's concern—to deter student drug use—was "important . . . indeed, perhaps compelling."[92] According to the Court, the physical, psychological, and addictive effects of drugs are particularly severe to school-aged children, who are still maturing, and the risks of immediate harm to school athletes are particularly high.[93] Moreover, "the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted."[94] The Court also found that Vernonia's concern was immediate. "[A] large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion, disciplinary actions had reached epidemic proportions, and the rebellion was being fueled by alcohol and drug abuse as well as by the students' misperceptions about the drug culture."[95] Regarding efficacy, the Court held that it was "self-evident that a drug problem largely fueled by the 'role model' effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs."[96]

Vernonia demonstrates that a school's random, suspicionless search practice will be upheld when the students

87. *Id.* at 658.
88. *Id.* at 658–60.
89. *Id*. at 658.
90. *Id*.
91. *Id.* at 660.
92. *Id.* at 661.
93. *Id.* at 661–62.
94. *Id.* at 662.
95. *Id.* at 662–63 (internal quotation marked omitted).
96. *Id.* at 663.

subject to the searches have diminished privacy expectations, the searches are relatively unobtrusive, and the school is experiencing severe problems with student crime.[97] Further, the Court's insistence that Vernonia demonstrate an immediate need to randomly drug test student athletes should not be disregarded. The Court left open the possibility that a *mere concern* that students are bringing drugs and weapons to school, without proof, would not justify searches considered to be highly intrusive, such as searching through students' belongings. This is especially true when intrusive searches are performed on students who have greater expectations of privacy than student athletes.[98]

C. Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls

In *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*,[99] the Court arguably limited students' Fourth Amendment rights even further. The Court held that a school district did not need to show that it had an identifiable drug abuse problem as a condition to randomly drug test students involved in extracurricular activities.[100]

In *Earls*, the Pottawatomie County School District implemented a policy that required middle and high school students to consent to random drug testing in order to be eligible to participate in extracurricular activities.[101] Two students and their parents brought an action against Pottawatomie, challenging the drug testing policy as violating their rights under the Fourth Amendment.[102] The students argued that Pottawatomie failed to identify a special need for implementing its random drug testing program because it had

97. Though the Court did not address searches for weapons, lower courts have logically concluded that deterring the use of weapons in schools also is an important government interest. *See, e.g.*, Herrera v. Santa Fe Pub. Schs., 792 F. Supp. 2d 1174, 1194–95 (D.N.M. 2011) (acknowledging that deterring students from bringing weapons to a school event is a legitimate government interest).

98. *Id.* at 657.

99. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822 (2002).

100. *Id.* at 836 (citing Earls *ex rel.* Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., 242 F.3d 1264, 1278 (10th Cir. 2001), *rev'd*, 536 U.S. 822 (2002)).

101. *Id.* at 826.

102. *Id.* at 826–27.

not demonstrated a proven drug problem at the school.[103]

The district court granted summary judgment for Pottawatomie, noting that although Pottawatomie did "not show a drug problem of epidemic proportions," the district had a history of drug abuse problems starting in 1970 that presented "legitimate cause for concern."[104] The Tenth Circuit reversed, determining that Pottawatomie's random drug testing policy was unconstitutional because Pottawatomie had failed to demonstrate that there was an identifiable drug abuse problem among students participating in extracurricular activities.[105] The United States Supreme Court reversed the Tenth Circuit in a 5–4 decision.[106]

Justice Thomas's majority opinion largely mirrored Justice Scalia's majority opinion in *Vernonia*, balancing the same three factors.[107] First, the Court held that students' rights to privacy are necessarily diminished in light of the school's custodial responsibility,[108] and students who participate in extracurricular activities already voluntarily submit to various intrusions of privacy associated with the respective activities.[109] Next, the Court explained that because the conditions imposed by the district's drug testing policy were nearly identical to those in *Vernonia*, there was "negligible intrusion" on the students' rights to privacy.[110]

Regarding the nature of Pottawatomie's concerns, the Court, as in *Vernonia*, considered the need to prevent student drug use to be "important."[111] The Court noted that "the nationwide drug epidemic makes the war against drugs a pressing concern in every school."[112] With respect to immediacy, the Court concluded that Pottawatomie "presented specific evidence of drug use."[113] For example, teachers

103. *Id.* at 827.

104. Earls *ex rel.* Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., 115 F. Supp. 2d 1281, 1287 (W.D. Okla. 2000), *rev'd*, 242 F.3d 1264 (10th Cir. 2001), *rev'd*, 536 U.S. 822 (2002).

105. *Earls*, 242 F.3d at 1278.

106. *Earls*, 536 U.S. at 824–25.

107. *Id.* at 830–38.

108. *Id.* at 830–31 ("A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety.").

109. *Id.* at 831–32.

110. *Id.* at 832–34.

111. *Id.* at 834.

112. *Id.*

113. *Id.*

testified that they observed students who appeared to be under the influence of drugs and teachers heard students speaking openly about drugs. Additionally, a drug-sniffing dog found marijuana near a school parking lot, police officers found drugs or drug paraphernalia in a student's car, and the school board president received calls by members of the community to discuss the "drug situation."[114] However, the Court held that it was unnecessary for the district to identify a drug abuse problem before imposing a suspicionless drug testing policy, although "[a] demonstrated problem of drug abuse . . . [did] shore up . . . [the] special need for a suspicionless general search program."[115] According to the Court, "it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use."[116]

Justice Thomas's statements might lead one to conclude that it is not necessary for schools to present particularized evidence of a substance abuse or weapons problem before performing suspicionless searches on students.[117] However, *Earls* did not address the standard that schools must meet in order to conduct searches considered to be "highly intrusive," such as searches of students' belongings.[118] Additionally, *Earls*

114. *Id.* at 834–35.

115. *Id.* at 835–36 (internal quotation marks omitted).

116. *Id.* at 836.

117. Indeed, at least one state court and two other state court judges in concurring and dissenting opinions have so concluded in the context of evaluating school drug-testing policies. *See* Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ., 826 A.2d 624, 662 (N.J. 2003) (LaVecchia, J., dissenting) ("In addressing the 'immediacy' of the government's concerns, the Court accepted the school district's generalized assertion that 'the nationwide drug epidemic makes the war against drugs a pressing concern in every school.' The Court eschewed any requirement that a particularized degree of drug problem be demonstrated in the schools notwithstanding that seven years earlier the Court relied on such findings in its decision in *Vernonia*.") (quoting *Earls*, 536 U.S. at 834); Theodore v. Del. Valley Sch. Dist., 836 A.2d 76, 88 (Pa. 2003) ("Although there are references in the *Earls* litigation to record evidence of drug use at the schools involved, a close reading of Justice Thomas's opinion suggests that the Court would have upheld the policy regardless."); York v. Wahkiakum Sch. Dist. No. 200, 178 P.3d 995, 1009 (Wash. 2008) (Madsen, J., concurring) ("Rather than requiring that a school demonstrate an actual problem with student drug abuse, the Court essentially took judicial notice of the issue, observing that the 'war against drugs' is a 'pressing concern' in every school.") (citations omitted).

118. *See* New Jersey v. T.L.O., 469 U.S. 325, 337–38 (1985) ("A search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy."); Doe *ex rel.* Doe v. Little Rock Sch. Dist., 380

did not address circumstances under which all students—not just athletes or those involved in other extracurricular activities—were potentially subject to these searches. Indeed, in a concurring opinion, Justice Breyer emphasized that the district's drug testing program was justified because it did not subject the entire school to testing.[119] Rather, the program "preserve[d] an option for the conscientious objector" to withdraw from his or her participation in extracurricular activities—an option less severe than expulsion from school.[120] Finally, *Earls* did not address a situation where school officials conducted searches of students' belongings without presenting any evidence at all of a substance abuse or weapons problem.[121] These open questions would be addressed by the Eighth Circuit a short time later.

D. Doe v. Little Rock School District

Two years after *Earls*, in *Doe v. Little Rock School District,* the Eighth Circuit evaluated a school district's practice of conducting random, suspicionless searches of students' belongings.[122] The Eighth Circuit is the only federal circuit court to directly address this issue.[123] It held that these searches were unreasonable because Little Rock School District could provide no more than "generalized concerns about the existence of weapons and drugs in schools."[124]

In *Little Rock*, as part of Little Rock's routine practice of subjecting students to random, suspicionless searches, Jane Doe and her classmates were ordered to leave their classroom after removing everything from their pockets and putting all of their belongings, including their backpacks and purses, on

F.3d 349, 354–55 (8th Cir. 2004) (holding that a search through a student's belongings is "highly intrusive").

119. *Earls*, 536 U.S. at 841 (Breyer, J., concurring). Justice Breyer's concurrence was necessary to reach a 5–4 majority. *See id.* at 842.

120. *Id.*

121. *See* Robert M. Bloom, *The Story of* Pottawatomie County v. Lindsay Earls*: Drug Testing in the Public Schools*, *in* EDUCATION LAW STORIES 337, 356–57 (Michael A. Olivas & Ronna Greff Schneider eds., 2008) (explaining that *Earls* was not clear regarding how much of a drug problem a school must have to justify suspicionless drug testing because the Court did justify the district's drug testing program, at least to some extent, on the district's drug problem).

122. 380 F.3d 349.

123. A handful of district and state courts have also addressed this issue with mixed results. Outside of the California state appellate courts, they have generally followed the reasoning set forth in *Little Rock*. See *infra* note 144.

124. *Little Rock*, 380 F.3d at 356.

their desks.[125] While the students waited outside the classroom in the hallway, school officials scanned students' bodies with metal detectors and then searched, by hand, through the items that the students left behind.[126] During this search, a school official discovered marijuana in a container in Ms. Doe's purse.[127] Ms. Doe brought a class action, claiming that Little Rock's suspicionless search practices violated the students' Fourth Amendment rights.[128]

The Eighth Circuit applied the framework developed in *Vernonia* and *Earls* to evaluate the constitutionality of Little Rock's search practice. First, the court examined the scope of students' expectation of privacy, acknowledging that public school students have lesser expectations of privacy than adults because of the government's responsibilities "'as guardian and tutor of children entrusted to its care.'"[129] Nevertheless, the court recognized that students have a legitimate need to bring personal items into schools, where they are required to spend much of their time under compulsory attendance laws.[130] The court reasoned that unlike prisoners who have no legitimate expectation of privacy in their cells, "public school students have traditionally been treated as presumptively responsible persons entitled to some modicum of privacy in their personal belongings, at least to the extent that recognition of such privacy interests does not unduly burden the maintenance of security and order in schools."[131] Furthermore, while the court recognized that drug use and school violence have become major social problems nationwide, it held that the situation had not yet reached the point where students in schools have no legitimate expectations of privacy at all.[132]

In connection with students' expectation of privacy, the court also highlighted the difference between conducting suspicionless searches on certain segments of the student population, such as student athletes or those involved in extracurricular activities, and conducting those searches on

125. *Id.* at 351.

126. Doe *ex rel.* Doe v. Little Rock Sch. Dist., No. 4:99CV00386, 2003 U.S. Dist. LEXIS 26439, at *4 (E.D. Ark. Sept. 3, 2003).

127. *Little Rock*, 380 F.3d at 351.

128. *Id.*

129. *Id.* at 353 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995)).

130. *Id.*

131. *Id.*

132. *Id.*

public school students generally.[133] For example, the court pointed out that students participating in athletics and extracurricular activities "choose to participate in a 'closely regulated industry,' in that both groups voluntarily subject themselves to 'intrusions upon normal rights and privileges, including privacy.'"[134] The court reasoned that by choosing to participate in athletics or extracurricular activities, students "waive certain privacy expectations that they would otherwise have as students in exchange for the privilege of participating in the activity."[135] In contrast, general students have not made a "voluntary tradeoff of some of their privacy interests in exchange for a benefit or privilege."[136]

Second, the court considered the intrusiveness of the search, concluding that searching through students' belongings was "highly intrusive."[137] The court explained that students bring to school items of a personal or private nature in their pockets and bags and "must surely feel uncomfortable or embarrassed when officials decide to rifle through their personal belongings."[138] Thus, any expectations of privacy interest retained by students were "wholly obliterated" by Little Rock's search practices, because all of the students' belongings may be searched at any time without notice, individualized suspicion, or limits.[139]

Third, the court considered the nature and immediacy of the school officials' concerns. While the court acknowledged that Little Rock's concern to protect the safety and welfare of its students was "important enough," it held that Little Rock had not demonstrated that its concerns were immediate.[140] Specifically, Little Rock had failed to put anything in the record "regarding the magnitude of any problems with weapons or drugs that it ha[d] actually experienced."[141] The court

133. *Id.* at 354.

134. *Id.* (quoting *Vernonia*, 515 U.S. at 657); Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 831–32 (2002)).

135. *Little Rock*, 380 F.3d at 354.

136. *Id.*

137. *Id.*

138. *Id.* at 355.

139. *Id.*

140. *Id.* at 355–56.

141. *Id.* at 356. The court noted that in both *Vernonia* and *Earls*, the school districts provided particularized evidence to "shore up" their immediacy concerns. *Id.* (citing Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 835 (2002); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 662–63 (1995)).

emphasized that generalized concerns about the existence of drugs and weapons were insufficient.[142] All school officials have an interest in minimizing the effects of drugs and weapons in their schools, but having a "mere apprehension" of drugs and weapons does not entitle school officials to conduct suspicionless, full-scale searches of students' personal belongings.[143] Thus, under the test set forth by the Supreme Court, Little Rock's practice of searching through students' belongings to prevent them from bringing drugs and weapons to schools was struck down as unconstitutional.[144]

142. *Id.* In making this determination, the court distinguished *Thompson v. Carthage School District*, 87 F.3d 979, 982–83 (8th Cir. 1996). There, the Eighth Circuit upheld a blanket search similar to the searches conducted in *Little Rock* where school officials had received information that the students' safety was in jeopardy, causing an immediate need for blanket, intrusive searches. Specifically, there were "fresh cuts" on the seats of a school bus, and students reported that there was a gun at school that morning. *Thompson*, 87 F.3d at 982.

143. *Little Rock*, 380 F.3d at 356.

144. *Id.* at 356–57. A number of district and state courts also have addressed this issue and, outside of the California state courts, they have followed the general reasoning found in *Little Rock*. For example, in *Hough v. Shakopee Public School*, 608 F. Supp. 2d 1087, 1109 (D. Minn. 2009), the court held that searches through students' backpacks and purses attending a public special needs school were unconstitutional because the school could not establish that such intrusive searches were needed to maintain a safe and orderly classroom environment. In *Herrera v. Santa Fe Pub. Sch.*, 792 F. Supp. 2d 1174, 1197 (D.N.M. 2011), the court upheld the search through the belongings of a student attending a school prom because, similar to students participating in athletics or extra-curricular activities, students choosing to participate in the school prom have a more limited expectation of privacy than students who are compelled to attend school. In *In re F.B.,* 726 A.2d 361, 367 (Pa. 1999), the Pennsylvania Supreme Court determined that a random, suspicionless search of a student's belongings was constitutional in light of the "alarming trend of the increased violence" in the Philadelphia School District, and given this alarming trend there was an immediate need to take such precautionary measures. However, in *In re Joshua E.*, No. B171643, 2004 WL 2914984, at *5 (Cal. Ct. App. Dec. 17, 2004), the California state appellate court held that a random, suspicionless search of a student's backpack was constitutional in light of the school's compelling interest to keep weapons off campus. There, the court did not discuss whether the school had particularized evidence of a drug or weapon problem, perhaps because the student did not bring this challenge or because it was obvious that the school experienced such issues. *See id.* In *In re Daniel A.*, No. B232404, 2012 WL 2126539, at *4 (Cal. Ct. App. June 13, 2012) (quoting *In re* Randy G., 28 P.3d 239, 245 (Cal. 2001)), the California appellate court held that the school's practice of searching students' backpacks in randomly selected classrooms did not violate the Fourth Amendment because, although the school had failed to put forth evidence demonstrating a drug or weapons problem, the government's interest in maintaining a safe and drug-free campus was of the "highest order."

E. A Brief Legal Summary of the Foundational Cases

The Supreme Court has not directly determined the circumstances under which schools may perform suspicionless searches of students' personal belongings. Nevertheless, an analysis of *T.L.O.*, *Vernonia*, *Earls*, and *Little Rock* leads to the conclusion that schools should have particularized evidence of a substance abuse or weapons problem to justify performing these intrusive searches, unless the school official reasonably believes that students are in immediate danger.[145]

As set forth in *Vernonia* and *Earls*, the framework for evaluating suspicionless searches conducted by school officials requires the balancing of three factors: (1) the students' legitimate expectations of privacy; (2) the intrusiveness of the search; and (3) the nature and immediacy of the school's concern.[146] While students have a lesser expectation of privacy than adults, they nonetheless retain an expectation of privacy

145. In most cases where courts have upheld intrusive, suspicionless searches as constitutional without particularization, the aspect of "danger" was present. For example, in *Thompson*, 87 F.3d at 982–83, the Eighth Circuit upheld a school-wide search where school officials had received information that their students were in danger. There, a school bus driver informed the principal "that there were fresh cuts on seats of her bus." *Id.* at 980. Fearing that a student was carrying a knife on school grounds, the school principal initiated a search of all male students in grades six to twelve. *Id.* The Eighth Circuit upheld the constitutionality of that search, concluding that the broad search for the knife was reasonable given the immediate, pressing concerns for students' safety. *Id.* at 982–83. Similarly, in *Brousseau v. Town of Westerly*, 11 F. Supp. 2d 177, 180 (D.R.I. 1998), the court upheld a broad, sweeping search in an effort to locate a 13.5- inch-long knife that was missing from the school cafeteria. When a cafeteria worker informed the assistant principal that the knife was missing, the assistant principal and the lunchroom workers conducted pat-downs on all the students present in the cafeteria. *Id.* The court, employing the framework discussed in *Vernonia* and *Earls*, concluded that the "school officials had ample reason to be concerned about the safety and welfare of the children entrusted to their care," and, under these circumstances, it could not "be disputed that immediate action was required . . . given the magnitude and immediacy of the potential threat." *Id.* at 182. *See also In re* Freddy A., No. B192555, 2007 WL 1139955, at *4–5 (Cal. Ct. App. Apr. 18, 2007) (concluding that a random search of student was constitutional where there was a student riot on campus two days earlier, and the school had received a tip that someone may have had a knife on campus); *In re* Isaiah B. v. State, 500 N.W.2d 637, 644 (Wis. 1993) (upholding search of student's coat inside his locker where large, heavy object was felt inside the coat after several incidents involving guns on campus lead administration to conduct search of all lockers).

146. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 646 (1995); Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 830, 832, 834 (2002).

in the personal items they bring to school.[147] And while students' expectations of privacy must be balanced against the state's need to maintain an orderly learning environment, as explained in *T.L.O.* and *Little Rock*, drug use and school violence have not become "so dire that students in the schools may claim no legitimate expectations of privacy" at all.[148]

In addition, legitimate expectations of privacy are higher for students in the general population than for students engaged in athletics or extracurricular activities.[149] Students who compete in those activities voluntarily subject themselves to "intrusions upon normal rights and privileges, including privacy," and thereby waive certain privacy expectations that students otherwise enjoy.[150] In contrast, students who are required to attend schools under compulsory attendance laws make no such waiver.[151] Further, students who fail or refuse to participate in a school-wide drug testing program are subject to suspension or expulsion from school—consequences that are much more severe than being excluded from participating in school athletics or extracurricular activities.[152]

147. *See* New Jersey v. T.L.O., 469 U.S. 325, 339 (1985) ("[S]choolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds."); *id.* at 337–38 ("A search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy."); *Vernonia*, 515 U.S. at 655–56 (acknowledging that "children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate,'" students' constitutional rights, including those under the Fourth Amendment, are diminished to "what is appropriate for children in school") (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)); Doe *ex rel.* Doe v. Little Rock Sch. Dist., 380 F.3d 349, 353 (8th Cir. 2004) ("[P]ublic school students have traditionally been treated as presumptively responsible persons entitled to some modicum of privacy in their personal belongings, at least to the extent that recognition of such privacy interests does not unduly burden the maintenance of security and order in schools."); *see also In re* Adam, 697 N.E.2d 1100, 1108 (Ohio Ct. App. 1997) ("Indeed, one cannot envision any rule which minimizes the value of our Constitutional freedoms in the minds of our youth more dramatically than a statute proclaiming that juveniles have no right to privacy in their personal possessions.").

148. *T.L.O.*, 469 U.S. at 338; *Little Rock*, 380 F.3d at 353.

149. *See Vernonia*, 515 U.S. at 656–57; *Little Rock*, 380 F.3d at 354; *see also Earls*, 536 U.S. at 841 (Breyer, J., concurring) (emphasizing that the school district's drug testing program was justified because it did not subject the entire school to drug testing).

150. *Vernonia*, 515 U.S. at 657; *Little Rock*, 380 F.3d at 354.

151. *See Little Rock*, 380 F.3d at 354.

152. *See Earls*, 536 U.S. at 841 (Breyer, J., concurring) (explaining that exclusion from extracurricular activities for refusing to be tested is serious but less severe than expulsion from school); *see also* Bloom, *supra* note 121, at 356

Regarding the character of the intrusion, searches of students' personal belongings are "highly intrusive," more so than random drug tests, metal detectors, or dog sniffs.[153] Drug tests, according to *Vernonia* and *Earls*, are relatively unobtrusive because the circumstances of those searches are almost identical to conditions commonly encountered in public restrooms.[154] Metal detectors or dog sniffs, according to *Little Rock*, are less intrusive because they do not involve rummaging through students' personal belongings by hand.[155] Conversely,

(arguing that the "costlier consequences of an all-student drug testing policy . . . add weight to the privacy intrusion side of the scale" because of the heightened penalties for failing a drug test).

153. *See T.L.O.*, 469 U.S. at 337–38 ("A search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy."); *Little Rock*, 380 F.3d at 355 (holding that students' privacy interests in their personal belongings brought to school are "wholly obliterated" when school officials search through students' bags, purses, or items in their pockets); Hough v. Shakopee Pub. Sch., 608 F. Supp. 2d 1087, 1105 (D. Minn. 2009) (determining searches through students' backpacks and purses were "extraordinarily intrusive"); *see also In re* F.B., 726 A.2d 361, 368 (Pa. 1999) (Flaherty, C.J., concurring) ("When one is forced to empty his pockets and to have his coat and baggage searched, the intrusion is anything but minimal.").

154. *See* Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 832–33 (2002); *Vernonia*, 515 U.S. at 658.

155. *See Little Rock*, 380 F.3d at 355 ("Full-scale searches that involve people rummaging through personal belongings concealed within a container are manifestly more intrusive than searches effected by using metal detectors or dogs."); *see also In re* F.B., 726 A.2d at 366 (holding that the intrusion imposed by a search by means of a metal scanner was minimal because "[t]he actual character of the intrusion suffered by the students during the search is no greater than that regularly experienced by millions of people as they pass through an airport" or in government buildings); *In re* Latasha W., 70 Cal. Rptr. 2d 886, 887 (Cal. Ct. App. 1998) (determining that searches conducted using a hand-held metal detector were minimally intrusive); Florida v. J.A., 679 So. 2d 316, 320 (Fl. Dist. Ct. App. 1996) (same); Illinois v. Pruitt, 662 N.E.2d 540, 545 (Ill. App. Ct. 1996) (same); People v. Dukes, 580 N.Y.S.2d 850, 852 (N.Y. Crim. Ct. 1992) (same). In fact, several courts have held that dog sniffs of property do not constitute searches at all. *See* Illinois v. Caballes, 543 U.S. 405, 409–10 (2005) (holding that a dog sniff of property did not implicate legitimate privacy interests under the Fourth Amendment); Doran v. Contoocook Valley Sch. Dist., 616 F. Supp. 2d 184, 192 (D.N.H. 2009) (holding that a dog sniff of property of student did not amount to an illegal search under the Fourth Amendment). However, the evaluation of dog sniffs of students' person has caused a sharp division among the courts. *Compare* Doe v. Renfrow, 475 F. Supp. 1012, 1022 (N.D. Ind. 1979) (holding that random, suspicionless dog sniffs on students in their classrooms was not unconstitutional because dog sniffs did not constitute a search under the Fourth Amendment), *aff'd in part and rev'd in part on other grounds*, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981), *with* B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1267 (9th Cir. 1999) (reasoning that because "the body and its odors are highly personal," dog sniffs on a person's body may be "highly intrusive" and holding that random, suspicionless dog sniffs of a student was unreasonable

any privacy interests students have in personal belongings brought to school "are wholly obliterated" by suspicionless searches of students' bags and purses. This is because such searches can be done "at any time without notice, individualized suspicion, or any apparent limit to the extensiveness of the search."[156]

Therefore, if school officials conduct suspicionless searches of students' belongings from the general student body, school officials must have more than "generalized concerns about the existence of weapons and drugs in [their] schools."[157] Rather, school officials must have particularized evidence to "shore up" their assertions of a special need to conduct those searches.[158]

II. A NORMATIVE EVALUATION OF SUSPICIONLESS SEARCH PRACTICES

Keeping students safe and drug-free is a very important goal and, to be sure, a high priority for all school officials. As school officials are under pressure to tangibly demonstrate that they are taking measures to reduce school crime and maintain

---

without particularized evidence of a drug problem in the school), *and* Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 473 (5th Cir. 1982) (holding that sniffing of students by drug-detecting dogs constituted searches under the Fourth Amendment and were unreasonable in light of no individualized suspicion), *cert. denied*, 463 U.S. 1207 (1983), *and* Jones v. Latexo Indep. Sch. Dist., 499 F. Supp. 223, 235 (E.D. Tex. 1980) (holding that random, suspicionless dog sniffs on general student population were unconstitutional searches under the Fourth Amendment), *and* Commonwealth v. Martin, 626 A.2d 556, 560 (Pa. 1993) (holding that dog sniffs on persons required probable cause that the search of a would produce contraband rather than reasonable suspicion).

156. *Little Rock*, 380 F.3d at 355.

157. *Id.* at 356; s*ee also* B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1268 (9th Cir. 1999) (holding that because "the record here does not disclose that there was any drug crisis or even a drug problem at Quincy High," the suspicionless searches of students were not justified under the Fourth Amendment); Hough v. Shakopee Pub. Sch., 608 F. Supp. 2d 1087, 1109 (D. Minn. 2009) (concluding that intrusive suspicionless searches through students' belongings for the purpose of removing distractions and dangerous items was unconstitutional); *cf.* Gardner, *supra* note 10, at 941 ("The cases departing from the individualized suspicion requirement share certain common features. In each instance, the courts perceive the unparticularized search to be minimally intrusive and necessary to achieve important governmental interests.").

158. *Little Rock*, 380 F.3d at 356. Some scholars have gone even further, arguing that "[s]earches of a student's person or belongings such as backpacks or purses require reasonable suspicion of a violation of a crime or school rules, and such searches probably also require individualized suspicion." CATHERINE Y. KIM, DANIEL J. LOSEN & DAMON T. HEWITT, THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 115 (2010).

discipline and order, it is no surprise that they have resorted to strict security measures.[159] But absent extenuating circumstances, there are sound educational policy reasons for limiting the authority of school officials to conduct random, suspicionless searches of students' belongings. This section first discusses the negative consequences of relying on strict security measures to prevent school crime. Next, it discusses the particularly harmful consequences of disproportionately applying strict security measures to minority students.

A. Strict Security Measures Are Inconsistent with Students' Best Interests

Educational scholars, sociologists, and psychologists agree that strict security measures have several harmful effects on students. For example, aside from the obvious drawbacks of creating distractions and taking away instructional time, implementing strict security measures deteriorates the learning environment by alienating students and generating mistrust. Establishing trust between educators and students is vital for creating a healthy climate conducive to learning.[160] Yet, according to Paul Hirschfield, implementing strict security measures sends a negative message to students that educators are suspicious of students, which "sour[s] students' attitudes toward school and school authorities and undermin[es] a positive, respectful academic environment."[161] Indeed, strict security measures produce formidable barriers between students and their schools and are "a frequent cause of disunity

159. *See* Torin Monahan & Rodolfo D. Torres, *Introduction* to SCHOOLS UNDER SURVEILLANCE: CULTURES OF CONTROL IN PUBLIC EDUCATION 2–3 (Torin Monahan & Rodolfo D. Torres eds., 2010) (reporting that even though school violence is in decline, "the threat of 'another Columbine' (or Virginia Tech, and so on) haunts the social imaginary, leading parents, policy makers, and others to the sober conclusion that any security measure is worth whatever trade-offs are involved in order to ensure safety").

160. *See* Roger D. Goddard, Megan Tschannen-Moran & Wayne K. Hoy, *A Multilevel Examination of the Distribution and Effects of Teacher Trust in Students and Parents in Urban Elementary Schools*, 102 THE ELEMENTARY SCH. J. 3, 3–4 (2001) (explaining that trusting in others is an important element to the learning process); Megan Tschannen-Moran & Wayne K. Hoy, *A Multidisciplinary Analysis of the Nature, Meaning, and Measurement of Trust*, 70 REV. OF EDUC. RES. 547, 547 (2000) (same).

161. Paul Hirschfield, *School Surveillance in America*, *in* SCHOOLS UNDER SURVEILLANCE: CULTURES OF CONTROL IN PUBLIC EDUCATION 38, 46 (Torin Monahan & Rodolfo D. Torres eds., 2010).

or discord within the school community."[162] Martin Gardner explains, "In a very real sense, each and every student stands accused, has become a 'suspect,' in generalized school searches, especially given the special relationship of trust which supposedly exists between student and teacher."[163] Gardner posits that searches that take place in schools are much different than searches in other environments, such as airports. He reasons:

> Surely a student even indirectly accused by his teacher as a possible thief or drug user suffers a greater indignity and loss of self-esteem by being subjected to a generalized search than does an airline passenger passing through a metal detector or a driver [through] a checkpoint. Far from 'morally neutral,' school searches are instead particularly rife with moral overtones.[164]

Jen Weiss reports that after interviewing students subject to such security measures, she found that these measures caused students to "feel consistently watched [and] to distrust, hide from, and avoid authority figures."[165] She concludes that instead of feeling a greater sense of safety at school, students felt disillusioned and scared.[166] She reports that "[s]tudents in these schools experience, firsthand, what it is to be monitored, contained, and harassed, all in the name of safety and protection."[167] She further reports that such measures "caused students to be less inclined to speak out or organize in response to issues that bother them."[168] She maintains that strict security measures are "counterproductive to safety[,] . . . foment violence" in some cases, "negatively impact a school's culture and reputation, and contribute to the loss of good teachers and good students."[169] Many leading scholars agree with her conclusions.[170]

---

162. *Id.*
163. Gardner, *supra* note 10, at 943.
164. *Id.*
165. Jen Weiss, *Scan This, in* SCHOOLS UNDER SURVEILLANCE: CULTURES OF CONTROL IN PUBLIC EDUCATION 213, 227 (Torin Monahan & Rodolfo D. Torres eds., 2010).
166. *Id.* at 213.
167. *Id.*
168. *Id.* at 227.
169. *Id.* at 213, 227.
170. *See supra* note 16 and accompanying text.

In addition, strict security measures are part and parcel of an overall exclusionary ethos designed to push low-performing and disruptive students out of schools to make more resources available to students who school officials believe have a better chance to succeed.[171] Under zero-tolerance policies, when school officials discover students carrying contraband, students are suspended, expelled, and sometimes arrested.[172] The result is that many students spend more time away from school or are funneled into the juvenile justice system.[173] Scholars Catherine Kim, Daniel Losen, and Damon Hewitt describe the detrimental impact arrests and law enforcement referrals have on students and on the public generally. They report:

> [An arrest] nearly doubles the odds of dropping out of school and, if coupled with a court appearance, nearly quadruples the odds of dropout; lowers standardized-test scores; reduces future employment prospects; and increases the likelihood of future interaction with the criminal justice system. These arrests and referrals also have a negative impact on the larger community. Classmates who witness a child being arrested for a minor infraction may develop negative views or distrust of law enforcement. Juvenile-court dockets and detention centers become crowded with cases that could be handled more efficiently and more effectively by school principals. And the community pays the costs associated with an increase in dropouts, crime, and unemployment, and, in extreme cases, the incarceration of children.[174]

This exclusionary ethos stands in stark contrast to an inclusionary ethos, the aim of which is to grant low performing, disruptive, or misguided students extra attention and

171. Hirschfield, *supra* note 161, at 45.

172. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 328 (1985) (using marijuana found in school search to prosecute student); Doe *ex rel.* Doe v. Little Rock Sch. Dist., 380 F.3d 349, 351 (8th Cir. 2004) (using marijuana found in search to prosecute student); Hough v. Shakoppe Pub. Sch., 608 F. Supp. 2d 1087, 1093–96 (D. Minn. 2009) (using marijuana, a lighter, and weapons found in school search to prosecute students); *In re* F.B., 726 A.2d 361, 363 (using knife found in school search to prosecute student in juvenile proceeding); s*ee also* KIM ET AL., *supra* note 158, at 112 ("Evidence seized in the course of school searches and statements made during school interrogations may be used against students in court proceedings.").

173. KIM ET AL., *supra* note 158, at 112–13.

174. *Id.* at 113.

resources to meet their needs.[175]

Strict security measures also skew students' mindsets about constitutional values and the role of government in their lives, causing students to discount important constitutional rights. As Betsy Levin explains, schools play a critical role in helping students learn skills and values that enable them to exercise the responsibilities of citizenship and benefit from participation in a free economy.[176] Those values include the right to privacy.[177] If schools do not honor students' constitutional rights, schools cannot effectively teach students about those rights.[178] This principle has been observed by the

175. *See* Hirschfield, *supra* note 161, at 45.

176. Levin, *supra* note 10, at 1648; *see also T.L.O.*, 469 U.S. at 373 (Stevens, J., dissenting) ("Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry.").

177. Levin, *supra* note 10, at 1648.

178. Justice Brennan stated it this way: "Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms." Doe v. Renfrow, 451 U.S. 1022, 1027–28 (1981) (Brennan, J., dissenting from denial of certiorari); *see also id.* at 1027 ("We do not know what class petitioner was attending when the police and dogs burst in [and sniffed her], but the lesson the school authorities taught her that day will undoubtedly make a greater impression than the one her teacher had hoped to convey.") (Brennan, J., dissenting from denial of certiorari); *In re* Adam, 697 N.E.2d 1100, 1108 (Ohio Ct. App. 1997) ("It is hypocritical for a teacher to lecture on the grandeur of the United States Constitution in the morning and violate its basic tenets in the afternoon."); Donald L. Beci, *School Violence: Protecting Our Children and the Fourth Amendment*, 41 CATH. U. L. REV. 817, 833 (1992) ("Students learn about the liberty, privacy, and security guaranteed by the Fourth Amendment more through actions than words. Consequently, students are more likely to learn how to resolve conflicts between personal liberty and public safety from witnessing bookbag searches than from passively completing their reading assignments."); Feld, *supra* note 10, at 953 ("Schools are the incubators of future citizens, and school officials convey moral lessons by their actions. Providing young people with real Fourth Amendment protection and meaningful enforcement mechanisms will better socialize them to participate effectively in a democratic society as adults."); Martin R. Gardner, *Strip Searching Students: The Supreme Court's Latest Failure to Articulate a "Sufficiently Clear" Statement of Fourth Amendment Law*, 80 MISS. L.J. 955, 997 (2011) ("Teaching students to obey society's laws is surely a fundamental aspect of their learning the meaning of good citizenship."); Roger J.R. Levesque, *The Right to Education in the United States: Beyond the Limits of the Lore and Lure of Law*, 4 ANN. SURV. INT'L & COMP. L. 205, 247–48 (1997) ("Students do not benefit from learning that safety requires intrusive policing under authoritarian and arbitrarily enforced rules."); Levin, *supra* note 10, at 1649 ("[I]f the educational institution is wholly undemocratic, students are likely to get mixed signals with regard to the democratic values needed to function as citizens in our society: The way in which school administrators operate schools may have a more powerful influence on students than the lessons in their civics textbooks."); Samantha Elizabeth Shutler, *Random, Suspicionless Drug Testing of High School Athletes*, 86 J. CRIM. L. & CRIMINOLOGY 1265, 1302–03 (1996) ("In

Supreme Court as early as 1943 when it stated: "That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[179] Furthermore, school officials' treatment of students in schools socializes students to tolerate and expect similar treatment by government officials outside of schools.[180] If students encounter drug sniffing dogs, metal detector checks, frisks, and authorities rummaging through their personal belongings on a regular basis, these practices will seem normal to them.[181] The citizenry now may have divergent views regarding individual privacy rights and the role the government should play in our personal lives, but as the rising generation becomes more accustomed to more intrusive invasions, it is possible that those healthy debates may shift towards greater acceptance of strict security measures or disappear altogether.[182]

Finally, many studies cast doubt on whether strict security measures effectively reduce school crime.[183] Even strong supporters of security measures readily concede that such measures cannot prevent shootings or other acts of violence in schools.[184] In fact, many researchers conclude that implementing strict security measures *increases* student behavioral issues and crime by alienating students instead of forging a school climate based on collective responsibility and mutual respect.[185]

---

order to preserve Constitutional reverence among a youth that is rapidly losing respect for many of the traditional underpinnings of our society, courts must not assist in eroding what little respect remains for the Constitution and the rights it provides.").

179. *Barnette*, 319 U.S. at 637.

180. KUPCHIK, *supra* note 16, at 7.

181. *Id.*

182. *Id.*

183. *See supra* note 17 and accompanying text.

184. *See* NAT'L SCH. SAFETY & SEC. SERV., *Metal Detectors and School Safety*, http://www.schoolsecurity.org/trends/school_metal_detectors.html (last visited Sept. 22, 2012) ("There is no single strategy, or for that matter even a combination of strategies, that can provide 100% guarantee that there will not be a shooting or other act of violence at a school. School officials must therefore exercise caution to avoid overreaction, knee-jerk reactions and/or the temptation to throw up security equipment after a high-profile incident primarily for the purpose of appeasing parents and relieving parental, community and media pressures. Doing so may very well create a false sense of security that will backfire on school officials in the long haul.").

185. *See* KUPCHIK, *supra* note 16, at 15–18 (2011) (explaining that student

Rather than resorting to coercive methods that rely on punishment and fear, there are more effective measures to reduce school violence and drug abuse.[186] These methods include counseling, mentoring, and programs that help students become integrated in their neighborhoods and communities.[187] They also include mental health services; after-school programs; and programs that develop character, conflict resolution skills, and anger management.[188] For example, School-wide Positive Behavioral Interventions and Supports is a well-respected, data-driven program that defines, teaches and supports appropriate behavior to create strong learning environments for an entire district or school.[189] Its

misbehavior is likely to increase rather than decrease when students perceive they are treated with disrespect and unfairly); Anderson, *supra* note 19, at 343–46 (finding that coercive forms of punishment are less effective than humanistic forms of punishment); Beger, *supra* note 16, at 340 (citing several studies demonstrating that "aggressive security measures produce alienation and mistrust among students"); Easterbrook, *supra* note 16, at 56 (providing evidence that strict security measures alienates students); Edwards, *supra* note 18, at 250 ("[I]ntrusive strategies are likely to undermine the trust needed to build cooperative school communities capable of really preventing violence."); Mayer & Leone, *supra* note 18, at 352 (finding that student disorder and victimization were higher in schools using strict security measures than in schools that did not use such measures); Noguera, *supra* note 16, at 190–91 (1995) (arguing that a "get tough" approach does not create a safe environment because coercive measures creates mistrust and resistance among the student body).

186. *See* Noguera, *supra* note 16, at 206; s*ee also* DANIEL J. LOSEN & JONATHAN GILLESPIE, CTR. FOR CIV. RIGHTS REMEDIES AT THE CIV. RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL 43–45 (Aug. 2012), http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-ccrr-research/losen-gillespie-opportunity-suspended-ccrr-2012.pdf (describing several practices for improving student behavior and reducing student crime in schools that do not rely on coercion, punishment, or fear).

187. *See* Amanda Paulson, *Why School Violence Is Declining*, THE CHRISTIAN SCIENCE MONITOR (Dec. 6, 2004), *available at* http://www.csmonitor.com/2004/1206/p01s01-ussc.html (describing alternative methods schools have employed to decrease crime such as involving community members to develop students' character and ability to manage anger); Brian Wallace, *School Crime Declines Here*, LANCASTER ONLINE (Mar. 14, 2012), *available at* http://lancasteronline.com/article/local/605005_School-crime-declines-here.html (reporting that school violence declined because of programs that help students improve their behavior, develop conflict resolution skills, and improve their ability to have positive social interactions among all students).

188. Paulson, *supra* note 187; *see also* LOSEN & GILLESPIE, *supra* note 186, at 43–45.

189. *See* OSEP TECHNICAL ASSISTANCE CENTER ON POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS EFFECTIVE SCHOOL-WIDE INTERVENTIONS, *School-wide PBIS,* http://www.pbis.org/school/default.aspx (last visited on Oct. 4, 2012) (describing school-wide PBIS); *see also* LOSEN & GILLESPIE, *supra* note 186, at 43.

major components include identifying expected behaviors; teaching, modeling, and practicing those behaviors with students; praising appropriate behavior publicly and privately; and having clear consequences for targeted behavior.[190] This program has successfully improved behavior and reduced crime in all settings, including urban schools and in the juvenile justice system.[191] Other alternative measures include restorative justice programs.[192] The central concept of restorative justice programs is to help the offender repair the harm caused to victims and make communities whole.[193] Restorative justice programs "place responsibility on students themselves, using a collaborative response to wrongdoing."[194] Researchers maintain that these programs foster in students "a strong sense of community as well as a strong sense of safety."[195] Schools that have implemented these alternative programs can attest to their effectiveness.[196] For example, West Philadelphia High School, one of Pennsylvania's most dangerous schools, reported that the number of violent incidents decreased by 52 percent the year after implementing its restorative justice program.[197] The next year the number of violent incidents decreased again by 45 percent.[198] As Pedro Noguera explains, in schools that have effectively addressed student crime and violence, there "is a strong sense of community and collective responsibility. Such schools are seen by students as sacred territory, too special to be spoiled by crime and violence, and too important to risk one's being excluded."[199] The existence of these schools provides tangible evidence that there are more effective alternatives to combat

190. OSEP TECHNICAL ASSISTANCE CENTER ON POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS EFFECTIVE SCHOOL-WIDE INTERVENTIONS, *supra* note 189.

191. *See* OSEP TECHNICAL ASSISTANCE CENTER ON POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS EFFECTIVE SCHOOL-WIDE INTERVENTIONS, *Frequently Asked Questions*, http://www.pbis.org/school/primary_level/faqs.aspx (last visited on Oct. 4, 2012).

192. *See* LOSEN & GILLESPIE, *supra* note 186, at 44–45.

193. *Id.*

194. *See* Laura Mirsky, *SaferSanerSchools: Transforming School Culture with Restorative Practices*, RESTORATIVE PRACTICES E-FORUM 1 (May 20, 2003), http://www.iirp.edu/iirpWebsites/web/uploads/article_pdfs/ssspilots.pdf.

195. *Id.*

196. *See generally id. See also* LOSEN & GILLESPIE, *supra* note 186, at 44–45.

197. Laura Mirsky, *Building Safer, Saner Schools*, 69 EDUC. LEADERSHIP 45, 49 (2011).

198. *Id.*

199. Noguera, *supra* note 16, at 207.

violence and drugs than employing intrusive security measures.[200]

B. Strict Security Measures Disproportionately Applied to Minority Students Are Particularly Harmful

Empirical studies measuring the use of strict security measures in schools are scarce.[201] The few studies that exist suggest that strict security measures are applied disproportionately to schools with high minority populations. For example, in another empirical study, I found that schools with higher percentages of minority students were more likely to use certain combinations of strict security measures than other schools, even after taking into account school crime, neighborhood crime, and school disorder.[202] Similarly, Aaron Kupchik and Geoff Ward found that, after controlling for school crime, neighborhood crime, and school disorder, schools with larger proportions of minority students were more likely to use metal detectors than other schools.[203] The findings from these empirical studies are consistent with many ethnographers' experiences that directly observe schools.[204] For example, Torin Monahan and Rodolfo D. Torres explain:

> Perhaps not surprisingly, racial minorities are disproportionately subjected to contemporary surveillance and policing apparatuses . . . . [That is,] students in poorer inner-city schools are subjected to more invasive hand searches and metal-detector screenings, while students in more affluent schools tend to be monitored more discreetly with video surveillance cameras.[205]

---

200. *Id.*

201. *See* KUPCHIK & WARD, *supra* note 29, at 4.

202. *See* Jason P. Nance, *Students, Security, and Race* 27–32 (2013) (unpublished manuscript), *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2214202* (finding that the odds of using a combination of strict security measures that included metal detectors, surveillance cameras, random sweeps, locked gates, and law enforcement officers were greater in schools serving higher percentages of minority students than in other schools, even after taking into account school crime, neighborhood crime, and school disorder).

203. KUPCHIK & WARD, *supra* note 29, at 20–26; *see also* Hirschfield, *supra* note 161, at 40 (citing data that "urban schools composed largely of minority students made up 14 percent of the nation's middle and high schools yet represent 75 percent of the surveyed middle and high schools . . . that scan their students with metal detectors daily").

204. KUPCHIK & WARD, *supra* note 29, at 4, 20–26.

205. Monahan & Torres, *supra* note 159, at 2.

The disproportionate use of strict security measures to minority students is particularly harmful for at least two reasons. First, researchers observe that there already exist high levels of mistrust between minority students and educators.[206] Thus, strict security measures, especially those that appear to be applied unfairly, may negatively impact the educational environment at schools with high minority populations in a particularly severe manner.

Second, several leading social scientists and criminologists are concerned that the presence of strict security in minority schools perpetuates racial inequalities.[207] Loic Wacquant argues that poor inner-city schools have "deteriorated to the point where they operate in the manner of *institutions of confinement* whose primary mission is not to educate but to ensure 'custody and control.'"[208] As a result of this "custody and control" approach to education, low-income minorities often have very different educational experiences than affluent, white students.[209] For example, Aaron Kupchik and Geoff Ward argue that strict security measures sour minorities' attitudes towards the government and limit their future opportunities.[210] They write:

206. *See, e.g.*, Julia Bryan, *Fostering Educational Resilience and Achievement in Urban Schools Through School-Family Community Partnerships*, 8 PROF. SCH. COUNSELING 219, 222 (2005) ("Positive relationships between schools and families in many urban schools are infrequent because parents often do not trust the schools and school professionals in turn do not trust minority and low-income families and communities."); Constance Flanagan et al., *School and Community Climates and Civic Commitments: Patterns of Ethnic Minority and Majority Students*, 99 J. OF EDUC. PSYCHOL. 421, 423 (2007) (studies have shown that minority groups have reported "a lower sense of school belonging than . . . their European American peers."); Noguera, *supra* note 16, at 201 (describing the sentiment in many black communities that black children are being treated unfairly in schools); Susan Rosenbloom & Niobe Way, *Experiences of Discrimination among African American, Asian American, and Latino Adolescents in an Urban High School*, 35 YOUTH & SOC. 420, 434 (2004) ("When African American and Latino students were asked about their experiences with discrimination, they described hostile relationships with adults in positions of authority such as . . . teachers in school").

207. *See* KUPCHIK & WARD, *supra* note 29, at 3–10 (describing the negative effects of implementing strict security measures to minority students); *see also* Loic Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, *in* MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 189–90 (David Garland ed., 2001).

208. Wacquant, *supra* note 207, at 189–90.

209. *See* KUPCHIK & WARD, *supra* note 29, at 6–7.

210. *Id.* at 6.

> Marginalized youth are presumed to be young criminals and treated as such through exposure to criminal justice oriented practices (e.g., police surveillance and metal detectors), while youth with social, political and cultural capital are presumed to be well-behaved, treated as such, and empowered to be productive citizens. Furthermore, this disparity in school security can have profound consequences on students' social mobility, since suspension, expulsion and arrest each limit their future educational and employment prospects.[211]

Similarly, Paul Hirschfield argues that the resulting disproportionate use of strict security measures prepares urban minority students for certain positions in the postindustrial order, "whether as prisoners, soldiers, or service sector workers."[212] While conceding that the purpose of these measures may be laudable—to prevent contraband from entering schools—strict security measures stand as a "daily reminder of how little power students have over those in whom they entrust their futures and, in turn, how powerless their trusted guardians are to secure for the students a dignified, timely, and safe passage into school (and adulthood)."[213]

III. EMPIRICAL EVIDENCE SUGGESTS THAT SOME SCHOOLS MAY BE CONDUCTING UNCONSTITUTIONAL SEARCHES

The objective of this Article's empirical study was to identify the number of schools potentially performing unconstitutional searches of students' belongings and the demographics of those schools. First, this section describes the 2009–2010 and 2007–2008 SSOCS datasets used for the empirical analysis, including how schools were selected to participate in the study and the types of questions the survey asked.[214] Next, it provides a brief national snapshot of the types of searches schools perform.[215] Then, it provides a detailed analysis of the particular search practice of interest here, namely, searches of students' belongings.[216] In short, it

211. *Id.* at 7.
212. *See* Hirschfield, *supra* note 161, at 40.
213. *Id.* at 51.
214. *See infra* Sections III.A–B.
215. *See infra* Section III.C.
216. *See infra* Sections III.C–D.

determines that, although additional research is needed to draw clearer conclusions, the results of this analysis raise concerns that some schools may be violating students' civil rights by conducting suspicionless searches on students' belongings without having particularized evidence of a substance abuse or weapons problem.[217] Finally, it reports the demographics of schools that are performing those potentially unconstitutional searches.[218] The results of a binary logistic regression demonstrate that schools with higher minority populations are more likely to conduct these suspicionless searches than schools with lower minority populations.[219] These findings hold true even when taking into account school officials' perceptions of crime levels where students live and where the school is located.[220]

A. Data and Sample

Data for this study came from two restricted-use datasets: the SSOCS for the 2007–2008 school year and the SSOCS for the 2009–2010 school year. These are the two most recent databases available to researchers.[221] Both datasets were published by the U.S. Department of Education's National Center for Education Statistics (NCES).[222]

1. The SSOCS 2009–2010 Dataset

The data from the SSOCS 2009–2010 restricted-use dataset became available to researchers that met certain conditions in June 2011.[223] NCES used the 2007–2008 school

217. *See infra* Section III.D.
218. *See infra* Section III.E.
219. *Id.*
220. *Id.*
221. Although the restricted datasets are not available to the general public, *see supra* note 21, datasets that contain less sensitive data for the 2007–2008 school year are available for the general public. *See* NAT'L CTR. FOR EDUC. STAT., *Data Products*, http://nces.ed.gov/surveys/ssocs/data_products.asp (last visited Sept. 27, 2012).
222. *See* NAT'L CTR. FOR EDUC. STAT., *About Us,* http://nces.ed.gov/about/ (last visited Sept. 27, 2012) (The NCES "is the primary federal entity for collecting and analyzing data related to education in the United States and other nations.").
223. NCES defines "restricted-access" data as data that contains "individually identifiable information that are confidential and protected by law. This information is not publicly released." *See* NAT'L CTR. FOR EDUC. STAT., *Statistical Standard Program,* http://nces.ed.gov/statprog/instruct_gettingstarted.asp (last visited Mar. 7, 2012).

year Common Core of Data Public Elementary/Secondary School Universe File (CCD)[224]—the most complete list of public schools available—as a sampling frame[225] to generate schools to participate in the study.[226] After the sample frame was stratified, or subdivided into subsets to ensure that subgroups of interest would be adequately represented,[227] schools were randomly selected to participate in the study.[228] Of the approximately 3,480 public schools that were selected to participate,[229] approximately 2,650 public schools submitted usable questionnaires for a response rate of about 76 percent.[230] NCES collected the data from February 24, 2010 to June 11, 2010.[231]

---

224. The Common Core of Data "is an NCES annual census system that collects fiscal and non-fiscal data on all public schools, public school districts, and state education agencies in the United States." RUDDY ET AL., *supra* note 22, at 8; *see also* Helen M. Marks & Jason P. Nance, *Contexts of Accountability Under Systemic Reform: Implications for Principal Influence on Instruction and Supervision*, 43 EDUC. ADMIN. Q. 3, 10–11 (2007) (describing the Common Core of Data). The CCD includes regular schools, charter schools, and schools that have magnet programs in the United States. NAT'L CTR. FOR EDUC. STAT., 2009–2010 SCHOOL SURVEY ON CRIME AND SAFETY (SSOCS): RESTRICTED-USE DATA FILE USER MANUAL 8 (2011) [hereinafter 2009–2010 RESTRICTED-USE MANUAL] (on file with author). It excludes schools in the U.S. outlying areas, such as American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, the U.S. Virgin Islands, and Puerto Rico, as well as overseas Department of Defense schools, newly closed schools, home schools, Bureau of Indiana Education schools, non-regular schools, ungraded schools, and schools with a high grade of kindergarten or lower. *Id.*

225. A "sampling frame" is a list of units that could be selected for study. *See* RICHARD L. SCHEAFFER ET AL., ELEMENTARY SURVEY SAMPLING 43 (5th ed. 1996).

226. *See* 2009–2010 RESTRICTED-USE MANUAL, *supra* note 224, at 8.

227. *See id.* at 9–10. The sample was stratified by instructional level (e.g., elementary school, middle school, high school), locale (e.g., rural, suburban, urban), enrollment size, and region (e.g., Northeast, Midwest, South, and West). *Id.* The sample frame was also stratified by percent of combined student population as Black/African American, Hispanic/Latino, Asian, Native Hawaiian/Other Pacific Islander, or American Indian/Alaska Native. *Id.*

228. *Id.* at 10.

229. *Id.*

230. *Id.* at 1, 9–13. A response rate of 76 percent is very good. *See* EARL BABBIE, THE PRACTICE OF SOCIAL RESEARCH 256 (9th ed. 2001). A high response rate reduces bias in the data. *Id.* NCES notes that some schools were more likely than others to respond to the survey. For example, schools more likely to respond included rural schools, schools with fewer students, combined schools, or those with a low percent of combined Black/African American, Hispanic/Latino, Asian, Native Hawaiian/Other Pacific Islander, and American Indian/Alaska Native students. 2009–2010 RESTRICTED-USE MANUAL, *supra* note 224, at 9–10. While no category had a response rate lower than 69 percent, *see id.* at 13, using a sample weight to analyze the data helped ameliorate the effects of discrepancies in the response rates. *See id. at* 1.

231. 2009–2010 RESTRICTED-USE MANUAL, *supra* note 224, at 1.

2. The SSOCS 2007–2008 Restricted-Use Dataset

The data from the SSOCS 2007–2008 restricted-use dataset became available in June 2009 for researchers who met certain conditions.[232] NCES used the 2005–2006 CCD[233] as a sampling frame[234] to generate schools for the study.[235] After the sample frame was stratified,[236] schools were randomly selected to participate in the study.[237] Of the 3,484 public schools that were selected to participate in the study,[238] 2,560 public schools submitted usable questionnaires for a response rate of just over 77 percent.[239] NCES collected the data from February 25, 2008 to June 17, 2008.[240]

B. Research Instrument

The 2009–2010 and 2007–2008 SSOCS datasets provided a unique opportunity to view, on a national scale, the types of searches school officials perform. In both the 2009–2010 and 2007–2008 surveys, school principals were asked a number of questions relating to school security, the number of crime-related incidents occurring on school grounds, and school demographics.[241] For example, principals were asked if it was a practice in the principal's school to:

---

232. For a description of what constitutes "restricted-use" data, see *supra* note 21 and accompanying text.

233. *See supra* note 224 and accompanying text for a description of the CCD.

234. *See supra* note 225 for a definition of the term "sampling frame."

235. *See* NAT'L CTR. FOR EDUC. STAT., 2007–2008 SCHOOL SURVEY ON CRIME AND SAFETY (SSOCS): SURVEY DOCUMENTATION FOR RESTRICTED-USE DATA FILE USERS 8 (2009) [hereinafter 2007–2008 RESTRICTED-USE MANUAL] (on file with author).

236. *See id.* at 9. The sample was stratified by instructional level, locale, enrollment size, region, and student race. *Id.* at 9–11*; see also supra* note 223 and accompanying text.

237. 2007–2008 RESTRICTED-USE MANUAL, *supra* note 235, at 10.

238. *Id.*; *see also* 2007–2008 RESTRICTED-USE MANUAL, *supra* note 235, at 9.

239. *Id.* at 1, 9–11. A response rate of 77 percent is very good and reduced bias in the data. *See* BABBIE, *supra* note 230, at 256. Similar to the 2009–2010 SSOCS, some categories of schools were more likely than others to respond to the survey. *Id.* No category had a response rate lower than 67 percent, and using a sample weight helped ameliorate the effects of the discrepancies in the response rates. *Id.* at 11. *See also infra* note 222 and accompanying text.

240. 2007–2008 RESTRICTED-USE MANUAL, *supra* note 235, at 1.

241. *See* 2009–2010 SSOCS QUESTIONNAIRE, *supra* note 25; 2007–2008 SSOCS QUESTIONNAIRE, *supra* note 25.

- Require students to pass through metal detectors each day;
- Perform one or more random metal detector checks on students;
- Use one or more random dog sniffs to check for drugs;
- Require drug tests for athletes;
- Require drug testing for students in extracurricular activities other than athletics;
- Require drug testing for any other students; and
- Perform one or more random sweeps for contraband (e.g., drugs or weapons), but not including dog sniffs.[242]

In addition, school principals were asked to report the number of incidents that occurred at school during the school year relating to:

- Robbery with a weapon;
- Physical attack or fight with a weapon;
- Threats of physical attack or fight with a weapon;
- Possession of a firearm or explosive device;
- Possession of a knife or sharp object;
- Distribution, possession, or use of illegal drugs;
- Inappropriate distribution, possession, or use of prescription drugs; and
- Distribution, possession, or use of alcohol.[243]

C. Overall Descriptive Data

Table 1 presents the descriptive data for secondary schools' search practices in both the 2009–2010 and 2007–2008 school years. It includes estimates of how many schools nationwide performed random metal detector checks, used random dog sniffs to checks for drugs,[244] required students to undergo drug

242. 2009–2010 SSOCS QUESTIONNAIRE, *supra* note 25, at 5; 2007–2008 SSOCS QUESTIONNAIRE, *supra* note 25, at 5. Each answer required a yes or no answer. *Id.*

243. 2009–2010 SSOCS QUESTIONNAIRE, *supra* note 25, at 11; 2007–2008 SSOCS QUESTIONNAIRE, *supra* note 25. Unlike the 2009–2010 SSOCS QUESTIONNAIRE, the 2007–2008 SSOCS QUESTIONNAIRE did not ask principals to report the number of incidents relating to the "inappropriate distribution, possession, or use of prescription drugs." *See id.*

244. Some courts have concluded that dog sniffs on items such as backpacks and purses, as opposed to the students themselves, are not considered searches

testing, required students to pass through metal detectors each day, and performed random sweeps for contraband. It presents the raw sample numbers and percentages,[245] as well as the population estimates based on a sample weight provided by the NCES.[246]

TABLE 1: Descriptive Data for Search Practices in Public Secondary Schools in 2009–2010 and 2007–2008[247]

Search Practice	2009–2010		2007-2008	
Required students to pass through metal detectors each day.	60 **1060**	(3.0%) **(3.1%)**	60 **855**	(3.1%) **(2.5%)**
Performed one or more random metal detector checks on students.	210 **3340**	(10.7%) **(9.9%)**	220 **3313**	(11.3%) **(9.8%)**
Used one or more random dog sniffs to check for drugs.	1020 **16,979**	(52.0%) **(50.2%)**	970 **16,043**	(50.0%) **(47.4%)**
Performed one or more random sweeps for contraband (e.g., drugs or weapons), but not including dog sniffs.	450 **8204**	(23.0%) **(24.2%)**	460 **7843**	(23.7%) **(23.2%)**
Required drug testing for athletes.	250 **4325**	(12.8%) **(12.8%)**	240 **4444**	(12.5%) **(13.1%)**
Required drug testing for students in extra-curricular activities other than athletics.	170 **3215**	(8.7%) **(9.5%)**	150 **2978**	(7.7%) **(8.8%)**
Required drug testing for any other students.	140 **2261**	(7.1%) **(6.7%)**	120 **2153**	(6.2%) **(6.4%)**

The descriptive data show that use of strict security

under the Fourth Amendment. *See supra* note 148.

245. Pursuant to the guidelines for presenting results from the restricted-use databases, I rounded sample numbers to the nearest ten. U.S. DEP'T. OF EDUC., RESTRICTED-USE DATA PROCEDURES MANUAL 20 (2011), http://nces.ed.gov/pubs96/96860rev.pdf.

246. Sample weights compensate for unequal probabilities of selection, minimizes bias associated with responding and non-responding schools, reduces sampling error, and calibrates the data to known population characteristics to produce optimal national estimates. *See* 2009–2010 RESTRICTED-USE MANUAL, *supra* note 224, at 13; 2007–2008 RESTRICTED USE MANUAL, *supra* note 235, at 13 (describing the specific weighting procedures employed); *see also* U.N. Group of Experts Meeting to Review the Draft Handbook on Designing of Household Sample Surveys, Dec. 3, 2003–Dec. 5, 2003, U.N. Doc. ESA/STAT/AC.91/5, at 5–3 (Nov. 3, 2003) (prepared by Ibrahim S. Yansaneh), http://unstats.un.org/unsd/demographic/meetings/egm/Sampling_1203/ docs/no_5.pdf.

247. N = 1960 for the 2009–2010 SSOCS; N=1940 for the 2007-2008 SSOCS. The results are reported as raw numbers (rounded to the nearest ten); percentages are in parentheses; weighted results are reported in bold. Weighted results provide an estimate of the total number of schools in the United States that have listed the search practice.

measures in secondary schools is not uncommon. During the 2009–2010 school year, over 10 percent of public secondary schools performed one or more random metal detector checks on students; approximately 52 percent used one or more random dog sniffs to check for drugs; and many schools required drug testing for either athletes, students in extracurricular activities, or any other students.[248] There were only slight changes in the number of schools conducting these searches from 2007–2008 to 2009–2010.[249]

Important for the purposes of this study, approximately 23 percent of secondary schools in both school years performed "one or more random sweeps for contraband (e.g., drugs or weapons), but not including dog sniffs."[250] It is not entirely clear how school officials interpreted this question, and NCES should consider revising this question in future questionnaires to avoid ambiguity.[251] School officials could have interpreted "random sweeps for contraband" to mean searches through students' belongings, especially because this is the only method school administrators have to search for drugs without using drug sniffing dogs.[252] Indeed, the number of cases reporting that school officials routinely search through students' belongings demonstrate that this search practice is not at all uncommon.[253]

248. *See supra* Table 1.

249. *See supra* Table 1.

250. *See supra* Table 1.

251. *See infra* Section IV.C.

252. *See* 2009–2010 SSOCS QUESTIONNAIRE, *supra* note 25, at 5; 2007–2008 SSOCS QUESTIONNAIRE, *supra* note 25, at 5. While it is possible that some of these principals may have reported that their schools performed "random sweeps for contraband" when only scanning students' personal belongings using a hand wand, that assumption is undermined by the fact that a separate question already exists addressing whether school officials "perform[ed] one or more random metal detector checks on students." 2009–2010 SSOCS QUESTIONNAIRE, *supra* note 25, at 5; 2007–2008 SSOCS QUESTIONNAIRE, *supra* note 25, at 5.

253. *See, e.g.*, Doe *ex rel.* Doe v. Little Rock Sch. Dist., 380 F.3d 349, 351–53 (8th Cir. 2004) (explaining that school officials had a practice of selecting a classroom at will, ordering students to remove everything from their pockets and place their backpacks and purses on the desks in front of them, marching them out into the hallway, scanning students' bodies with metal detectors to ensure that nothing metal was leaving the classroom, and searching through by hand students' belongings left behind); Hough v. Shakoppe Pub. Sch., 608 F. Supp. 2d 1087, 1103–04 (D. Minn. 2009) (explaining that school had a daily search practice of asking students to remove their shoes and socks, turn down the waistband of their pants, empty their pockets, turn over their backpacks and purses to be searched, and sometimes submit to a pat down); Herrera v. Santa Fe Pub. Sch., 792 F. Supp. 2d 1174, 1179–80 (D.N.M. 2011) (describing search tactics at the entrance of a prom where a security officer touched female students' arms and

Alternatively, school officials could have interpreted "random sweeps for contraband" to imply random locker searches. In *T.L.O.*, the Supreme Court declined to address whether students have a legitimate expectation of privacy in their lockers,[254] and there is no consensus among lower federal and state courts regarding this issue.[255] Nevertheless, as many courts have recognized, there is no logical legal rationale supporting the assertion that students should lose their expectation of privacy in their personal belongings simply because they place them in their lockers.[256] Thus, potential

stomachs; cupped and shook students' breasts; lifted their dresses to mid-thigh level and touched legs; took their shoes, shook them, and hit them on the table; passed a wand around students; then dumped the contents of their purses on a table to look for contraband); *In re* Wilson P., No. B196854, 2008 WL 521149 (Cal. Ct. App. Feb. 28, 2008) (explaining that school official searched through students' pant pockets stored in a gym locker); *In re* Joshua E., No. B171643, 2004 WL 2914984 (Cal. Ct. App. Dec. 17, 2004) (describing that school official conducted random, suspicionless searches of students and their belongings in three designated classrooms); *In re* T.A.S., 713 S.E.2d 211, 212 (N.C. App. Ct. 2011) (describing that to enter school, "students must pass through a metal detector, at which time their book bags, purses, and coats are also searched); *In re* F.B., 726 A.2d 361, 368 (Pa. 1999) (describing school district's practice of conducting random, suspicionless search of a student's belongings).

254. *See* New Jersey v. T.L.O., 469 U.S. 325, 336 n.5 (1985) ("We do not address the question, not presented by this case, whether a schoolchild has a legitimate expectation of privacy in lockers, desks, or other school property provided for the storage of school supplies.").

255. For example, many courts have affirmatively held that students retain an expectation of privacy in their lockers. *See, e.g.*, State v. Jones, 666 N.W.2d 142, 146 (Iowa 2003) (holding that students have a reasonable expectation of privacy in their school lockers); Commonwealth v. Snyder, 597 N.E.2d 1363, 1366 (Mass. 1992) (same); S.C. v. State, 583 So. 2d 188, 191 (Miss. 1991) (same); Commonwealth v. Cass, 666 A.2d 313, 315–17 (Pa. Super. Ct. 1995) (same); State v. Joseph T., 336 S.E.2d 728, 736–37 (W. Va. 1985) (same); But other courts have held that students have no reasonable expectation of privacy in their lockers. *See In re* Patrick Y., 746 A.2d 405, 408 (Md. 2000) (holding that student had no reasonable expectation of privacy in locker in light of state statute stating that lockers are school property); *In re* Isaiah B., 500 N.W.2d 637, 667–68 (Wis. 1993) (same). For a more extended discussion on the disagreement among courts regarding whether students possess an expectation of privacy in their lockers, see Feld, *supra* note 10, at 933–37; KIM ET AL., *supra* note 158, at 115–17.

256. *See In re* Adam, 697 N.E.2d 1100, 1107 (Ohio Ct. App. 1997) (explaining that "a student does not lose his expectation of privacy in a coat or book bag merely because the student places these objects in his locker"); *Cass*, 666 A.2d at 317 (stating that "a student's expectation of privacy in a jacket or purse was not lost merely because the student placed the jacket or purse in his or her locker."); *In re* Dumas, 505 A.2d 984, 985–86 (Pa. Super. Ct. 1986) (applying the reasoning of *T.L.O.* and refusing to uphold search of a student's jacket inside of his locker because the student retained a reasonable expectation of privacy within his jacket, stating, "We are unable to conclude that a student would have an expectation of privacy in a purse or jacket which the student takes to school but would lose that expectation of privacy merely by placing the purse or jacket in [a]

locker searches that include searching through students' personal belongings stored inside a locker such as book bags, purses, jackets, folders, or gym bags, arguably also should be deemed as highly intrusive. While more research is needed to precisely measure how many schools are searching through students' belongings, either through more carefully crafted questionnaires or through personal observations, these preliminary results suggest that many schools could be performing these intrusive searches, which, as explained above, are justified only under appropriate circumstances.[257]

D. Random Sweeps for Contraband Disaggregated by Particularized Evidence of a Substance Abuse or Weapons Problem

Random, suspicionless searches of students' personal belongings are considered to be highly intrusive and are justified under the Fourth Amendment only when certain conditions are present.[258] Under the current legal framework, school officials must have particularized evidence of a substance abuse or weapons problem in their schools to justify conducting these searches, unless a school official reasonably believes that students are in immediate danger.[259]

In both the 2009–2010 and 2007–2008 SSOCS, principals were asked to report the total number of incidents that occurred at school during the school year relating to robbery with a weapon; physical attack or fight with a weapon; threats of physical attack or fight with a weapon; possession of a firearm or explosive device; possession of a knife or sharp object; distribution, possession, or use of illegal drugs; inappropriate distribution, possession, or use of prescription drugs; and distribution, possession, or use of alcohol.[260] The

school locker provided to the student for storage of personal items"); *c.f.* MINN. STAT. ANN. § 121A.72 (West 2008) ("The personal possessions of students within a school locker may be searched only when school authorities have a reasonable suspicion that the search will uncover evidence of a violation of law or school rules."); *see also* KIM ET AL., *supra* note 158, at 116 ("[E]ven in jurisdictions where students are held to have no privacy interest in lockers, it does not follow that items stores *inside* lockers, such as book bags and coats, may automatically be searched just because the locker itself is subject to search.").

257. *See supra* Section I.E.

258. *See id*.

259. *See id*.

260. *See* 2009–2010 SSOCS QUESTIONNAIRE, *supra* note 25, at 11; 2007–2008 SSOCS QUESTIONNAIRE, *supra* note 25, at 5. Unlike the 2009–2010 SSOCS

number of incidents relating to students' use or possession of weapons, alcohol, or drugs is an indicator of the ability of school officials to provide particularized evidence of a drug, alcohol, or weapons problem in their schools.

Of course, the number of incidents relating to students' use or possession of weapons, alcohol, or drugs is by no means a perfect indicator for at least three reasons. First, although school officials are assured that their individual answers for the SSOCS will not be publicly disclosed,[261] it is possible that some school officials may have underreported the number of incidents relating to drugs, alcohol, and weapons. This may be because they do not have an accurate reporting system[262] or because it may be advantageous to underreport those incidents pursuant to certain state or federal reporting requirements.[263] Second, the reported number of incidents relating to drugs, alcohol, or weapons does not take into account other observations that possibly could be used by school officials to establish a drug or weapons problem such as observing a marijuana cigarette or a beer can in the school parking lot or overhearing students talk about drug use.[264] Third, principals were asked to report the total number of incidents that occurred at school during the school year, not prior years. Although the Supreme Court has not addressed this issue, school officials possibly could establish an immediate need to conduct these searches based on a substance abuse or weapons problem during prior school years.

On the other hand, this data may overestimate the ability

QUESTIONNAIRE, the 2007–2008 SSOCS QUESTIONNAIRE did not ask principals to report the number of incidents relating to the "inappropriate distribution, possession, or use of prescription drugs." *See id.*

261. *See* NAT'L CTR. FOR EDUC. STAT., 2007–2008 SCHOOL SURVEY ON CRIME AND SAFETY (SSOCS): SURVEY DOCUMENTATION FOR PUBLIC-USE DATA FILE USERS B-2 (2010) (assuring principals that their answers are "protected under the Education Sciences Reform Act of 2002," meaning that the answers "may only be used for statistical purposes and may not be disclosed, or used, in identifiable form for any other purpose, except as provided for in the Patriot Act").

262. *See* SNELL, *supra* note 2, at 24 (describing some school districts' problems with data collection); *see also* NAT'L SCH. SAFETY & SEC. SERV., *School Crime Reporting and School Crime Underreporting*, http://www.schoolsecurity.org/trends/school_crime_reporting.html (last visited on Sept. 28, 2012).

263. *See* SNELL, *supra* note 2, at 22–23 (describing the political complexities schools and states face when reporting violent incidents pursuant to No Child Left Behind); *see also* NAT'L SCH. SAFETY & SEC. SERV., *School Crime Reporting and School Crime Underreporting*, *supra* note 262 (arguing that school administrators underreport school crime for political or image purposes).

264. *See* Bd. of Educ. of Ind. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 854–55 (2002).

of school officials to establish a substance abuse or weapons problem. My own analysis of the restricted SSOCS databases shows that many incidents cited by principals relating to drugs, alcohol, or weapons were not reported to the police, indicating that perhaps some of these incidents were not serious. For example, the restricted data from the 2009–2010 SSOCS show that 790 secondary schools in the sample reported at least one incident relating to alcohol, but only 600 of those schools reported at least one incident relating to alcohol to the police.[265] Similarly, 680 secondary schools reported at least one incident relating to the unauthorized use of prescription drugs, but only 580 of those schools reported at least one incident relating to the unauthorized use of prescription drugs to the police. In another example, 1020 secondary schools in the sample reported at least one incident relating to a knife or sharp object, but only 830 of those schools reported at least one incident relating to a knife or sharp object to the police. While principals may not be reporting incidents to the police in order to avoid adverse attention from the media or community or to avoid involving students in the juvenile justice system, as explained above, an alternative explanation is that some of these incidents may not have been serious, such as the recovery of a scout pocketknife, scissors, plastic butter knives, or harmless over-the-counter medication.[266] Less serious incidents, of course, would make it more difficult for schools to show that they have a substance abuse or weapons problem.[267]

Figure 1 presents data from 2009–2010 and 2007–2008

265. Pursuant to the guidelines for presenting results from the restricted-use databases, raw numbers have been rounded to the nearest ten. U.S. DEPT. OF EDUC., RESTRICTED-USE DATA PROCEDURES MANUAL, *supra* note 245, at 20.

266. *See* Mary Nash-Wood, *Are School Zero-Tolerance Policies Too Harsh?* USA TODAY (Dec. 4, 2011), *available at* http://usatoday30.usatoday.com/news/nation/story/2011-12-04/zero-tolerance-policy/51632100/1 (reporting that a student was severely disciplined for giving her friend a single Midol pill); *Zero Tolerance: States 'Add a Little Common Sense'*, EDUC. REP., June 2009, *available at* http://www.eagleforum.org/educate/2009/june09/zero-tolerance-states.html (reporting that a student was arrested for bringing a plastic butter knife to school); *id.* (reporting that an honors student was punished for a small cutting implement used to sharpen her pencil).

267. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 662–63 (determining that Vernonia's concern was immediate in light of the "large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion," that disciplinary actions had reached "epidemic proportions," and that "the rebellion was being fueled by alcohol and drug abuse as well as by the students' misperceptions about the drug culture") (quoting Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354, 1357 (D. Ore. 1992)).

regarding schools that conducted random sweeps for contraband disaggregated by the number of reported incidents relating to drugs, alcohol, or weapons. The table is divided into six categories of schools that have conducted random sweeps for contraband: those reporting no incidents relating to drugs, alcohol, or weapons; one or fewer instances; two or fewer; three or fewer; four or fewer; and five or fewer. I present the data in this manner because it is not clear how much evidence schools need to provide to demonstrate that they have a substance abuse or weapons problem. For example, suppose the only evidence schools can produce to substantiate a drug problem is the recovery of one marijuana cigarette from one student. Or suppose the only incident relating to alcohol is identifying one student at a football game who had been drinking. Or what if the only evidence of a weapons problem is the recovery of a pocket knife? Such particularized evidence may not be sufficient to establish an immediate need to conduct suspicionless searches of students' belongings.[268]

Figure 1: Schools in Sample

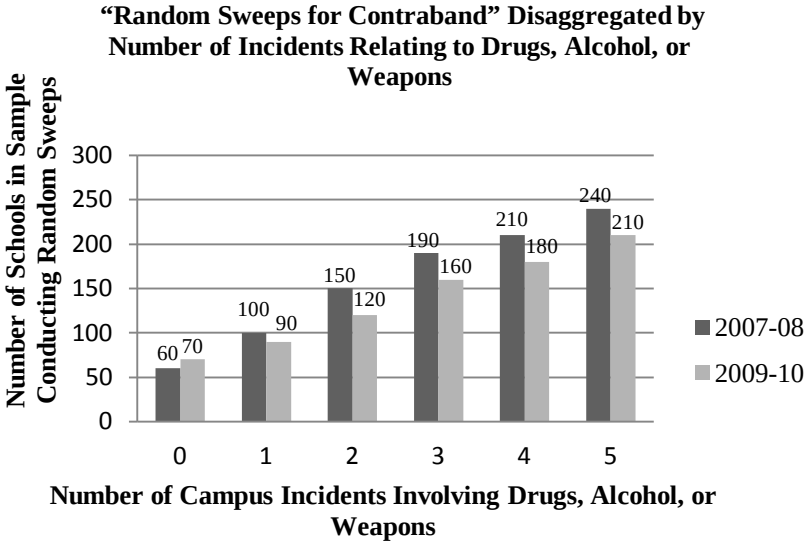

Figure 1 demonstrates that approximately seventy schools in the 2009–2010 sample and approximately sixty schools in the 2007–2008 sample conducted random sweeps for contraband without reporting any incidents relating to drugs,

268. *See supra* note 267.

alcohol, or weapons during the school year. That number climbs to ninety and one hundred, respectively, for schools that reported one or fewer instances of drugs, alcohol, or weapons, and to 120 and 150, respectively, for schools that reported two or fewer incidents. The number of schools that may have searched students' belongings or persons steadily increased as schools reported more incidents, topping out at 210 and 240, respectively, for schools that reported five or fewer instances of drugs, alcohol, or weapons.

Figure 2: Estimate of Schools Nationally

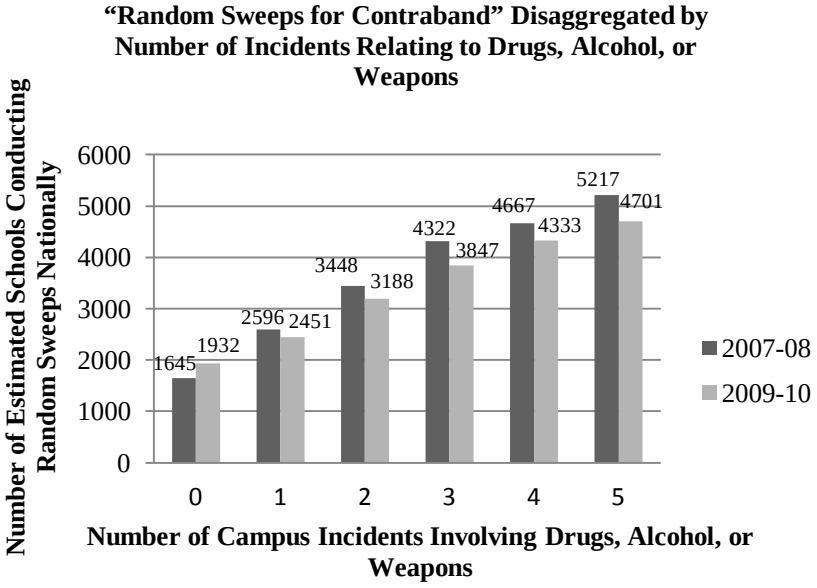

Figure 2 provides an estimate of the number of schools nationally that conducted random sweeps for contraband disaggregated by the number of incidents involving drugs, alcohol, or weapons.[269] These findings raise concerns that some schools may be conducting unconstitutional searches, but additional study is needed to draw clearer conclusions because of the interpretative limitations of the data. As explained above, researchers must not only craft better questions to measure whether schools conduct searches on students' belongings, but they must also seek to identify the conditions

269. Estimates were created from the sample weights provided by NCES. 2009–2010 RESTRICTED-USE MANUAL, *supra* note 224, at 13; 2007–2008 RESTRICTED USE MANUAL, *supra* note 235, at 13.

under which schools conduct such searches. For example, it is possible that school officials performed a random sweep in response to a legitimate concern that caused school officials to believe that students were in immediate danger, such as receiving a bomb threat or information from a credible informant that an unknown student had a dangerous weapon.[270] In addition, school officials could have performed random sweeps to uncover stolen money or instruments used to deface school property. Or, perhaps school officials conducted these searches on a subset of the student population that had a reduced expectation of privacy such as athletes or students involved in extracurricular activities.[271] Under these circumstances, it may have been appropriate for school officials to conduct suspicionless searches on students' belongings even where there had been no prior incidents relating to weapons, drugs, or other contraband.[272] Nevertheless, despite these ambiguities, these preliminary empirical results raise concerns that some schools may be violating students' Fourth Amendment rights, warranting further research on these issues. Further, even if these searches are not unconstitutional, the fact that many schools perform suspicionless searches without reporting any incidents relating to weapons, drugs, or alcohol raises serious pedagogical concerns.[273]

270. *See, e.g.*, Thompson *ex rel.* Lea v. Carthage Sch. Dist., 87 F.3d 979, 982–83 (8th Cir. 1996) (upholding school-wide search where a bus driver informed the principal that there were "fresh cuts on seats of her bus"); Koontz *ex rel.* Sorenson v. Dustin, No. 5:09–cv–147–Oc–10GRJ, 2010 WL 3788870, at *6 (M.D. Fla. Sept. 24, 2010) (holding that search of students' backpacks after rumor of a bomb inside the school bus did not violate the Fourth Amendment); Brousseau *ex rel.* Brousseau v. Town of Westerly *ex rel.* Perri, 11 F. Supp. 2d 177 (D.R.I. 1998) (upholding search of all students in cafeteria when a cafeteria worker informed a school official that a 13½ inch-long knife was missing from the school cafeteria).

271. To be clear, the Supreme Court has not addressed whether the Fourth Amendment permits school officials to conduct intrusive searches on athletes, such as searching through their belongings in a gym bag. However, *Vernonia* and *Earls* suggest that whether these searches are justified is a closer question than if such searches were performed on students from the general student body. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995); Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 831–32 (2002).

272. *See, e.g.*, *supra* note 144 and accompanying text.

273. *See infra* Section IV.

E. Predictors for Schools That Conduct Random Sweeps With No Particularized Evidence of a Substance Abuse or Weapons Problem

The SSOCS data also provide insight regarding the demographics of secondary schools that conduct random sweeps without reporting any incidents relating to drugs, alcohol, or weapons. To examine those demographics, I conducted a binary logistic regression analysis[274] where the dependent variable was whether schools "perform[ed] one or more random sweeps for contraband (e.g., drugs or weapons), but not including dog sniffs."[275] The independent variables included factors that possibly influenced school officials to conduct random sweeps, such as how principals perceived the level of crime where their students lived,[276] how principals perceived the level of crime where their school is located,[277] the

274. Binary logistic regression is a method for examining the relationship between independent variables and a binary dependent variable. *See* THE MEASUREMENT GRP., *Logistic Regression*, http://www.themeasurementgroup.com/datamining/definitions/logistic_regression.htm (last visited Sept. 28, 2012); *see generally* JOSEPH F. HAIR, JR., ET AL., MULTIVARIATE DATA ANALYSIS 276–81 (5th ed. 1998) (providing an overview of logistic regression analysis). Logistic regression is similar to linear regression except that the dependent variable is binary and the influence of the independent variables on the dependent variables is assessed by odds-ratios. *See* THE MEASUREMENT GRP., *supra*; *see generally* Raymond E. Wright, *Logistic Regression*, *in* READING AND UNDERSTANDING MULTIVARIATE STATISTICS 217–44 (Laurence G. Grimm & Paul R. Yarnold eds., 1995) (discussing the similarities between logistic regression and linear regression). To make a stronger inference about the population from which the sample was drawn, I used a sample weight for the logistic regression. *See supra* note 235. I adjusted the sample weight created by NCES by dividing it by its mean to create a mean weight of one. This is a recommended procedure when employing logistic regression analysis using SPSS. *See* Marks & Nance, *supra* note 224, at 14; Patty Glynn, *Adjusting or Normalizing Weights "On the Fly" in SPSS*, U. OF WASH., http://staff.washington.edu/glynn/adjspss.pdf (last updated July 8, 2004).

275. *See* 2009–2010 SSOCS QUESTIONNAIRE, *supra* note 25, at 5; 2007–2008 SSOCS QUESTIONNAIRE, *supra* note 25, at 5.

276. Principals were asked to "describe the crime level in the area(s) in which your students live." *See* 2009–2010 SSOCS QUESTIONNAIRE, *supra* note 25, at 17; 2007–2008 SSOCS QUESTIONNAIRE, *supra* note 25, at 17. The possible responses included "high level of crime," "moderate level of crime," "low level of crime," and "[s]tudents come from areas with very different levels of crime." *See* 2009–2010 SSOCS QUESTIONNAIRE, *supra* note 25, at 17; 2007–2008 SSOCS QUESTIONNAIRE, *supra* note 25, at 17. I merged these four categories into two categories: "low level of crime" and "moderate, high, or mixed levels of crime." I dummy-coded these variables, using "low level of crime" as the reference variable.

277. Principals were asked to "describe the crime level in the area where your school is located." The possible responses included "high level of crime," "moderate level of crime," and "low level of crime." *See* 2009–2010 SSOCS QUESTIONNAIRE,

racial composition of the student population,[278] school level,[279] school enrollment size,[280] school location,[281] region of the country,[282] and the number of students eligible for free and reduced student lunch.[283] The independent variables also included whether juvenile justice agencies were involved in the school's efforts to promote school safety and drug-free

supra note 25, at 17; 2007–2008 SSOCS QUESTIONNAIRE, *supra* note 25, at 17. I merged these three categories into two categories: "low level of crime" and "moderate or high level of crime." I dummy-coded "moderate or high level of crime," using "low level of crime" as the reference variable.

278. NCES categorized schools as having a white student population of more than 95 percent, more than 80 to 95 percent, more than 50 to 80 percent, or 50 percent or less. *See* 2009–2010 RESTRICTED-USE MANUAL, *supra* note 224, at 29; 2007–2008 RESTRICTED-USE MANUAL, *supra* note 235, at 43. Racial data for the 2009–2010 SSOCS came from the 2007–2008 CCD school data file. *See* 2009–2010 RESTRICTED-USE MANUAL, *supra* note 224, at 29. Racial data for the 2007–2008 SSOCS came from the 2005-06 CCD school data file. *See* 2007–2008 RESTRICTED-USE MANUAL, *supra* note 235, at 43. Although there was a two-year difference, it is highly unlikely that over that period a school would have shifted into a new racial category. A major racial shift in the student population for a school over a two-year period would require an extraordinary event such as a desegregation court order. I dummy-coded these variables, using "50 percent or less white enrollment" as the reference variable.

279. NCES categorized secondary schools as a middle school, high school, or combined school. *See* 2009–2010 RESTRICTED-USE MANUAL, *supra* note 224, at 28; 2007–2008 RESTRICTED-USE MANUAL, *supra* note 235, at 46. I dummy-coded these variables, using "high school" as the reference group.

280. NCES categorized schools as having fewer than 300 students, between 300–499 students, between 500–999 students, or 1,000 or more students. *See* 2009–2010 RESTRICTED-USE MANUAL, *supra* note 224, at 28; 2007–2008 RESTRICTED-USE MANUAL, *supra* note 235, at 47. I dummy-coded these variables, using "less than 300 students" as the reference group.

281. NCES categorized schools as being located in a city, suburb, town, or rural area. *See* 2009–2010 RESTRICTED-USE MANUAL, *supra* note 224, at 28–29; 2007–2008 RESTRICTED-USE MANUAL, *supra* note 235, at 47. I dummy-coded these variables, using "rural" as the reference group.

282. NCES categorized schools as being located in a western, midwestern, northeastern, or southern state. *See* 2009–2010 RESTRICTED-USE MANUAL, *supra* note 224, at 25; 2007–2008 RESTRICTED-USE MANUAL, *supra* note 235, at 47. I dummy-coded these variables, using "southern state" as a reference group.

283. Free and reduced lunch is a common proxy for student poverty. *See, e.g.*, NAT'L CTR. FOR EDUC. STAT., *Concentration of Students Eligible for Free-or Reduced-Price Lunch*, http://nces.ed.gov/programs/coe/indicator_pcp.asp (last visited Oct. 12, 2012) ("The percentage of students eligible for the free or reduced-price lunch (FRPL) program provides a proxy measure for the concentration of low-income students within a school."). Here, the categories for this variable include: 0 to 20 percent of the student population eligible for free or reduced lunch; over 21 percent to 50 percent of the student population eligible for free or reduced lunch; and over 50 percent of the student population eligible for free or reduced lunch. *See* 2009–2010 RESTRICTED-USE MANUAL, *supra* note 224, at C-63; 2007–2008 RESTRICTED-USE MANUAL, *supra* note 235, at H-4. I dummy-coded these variables, using "over 50 percent" as the reference group.

schools,[284] and if the school had a security guard, security personnel, or law enforcement officer present at the school at least once a week.[285] I present the results of the binary logistic regression in Table 2.

TABLE 2: Factors Predicting Whether Public Secondary Schools Conducted "Random Sweeps for Contraband"[286]

	2009–2010			2007–2008		
Item	***Beta***	***p***	***Exp(B)***	**Beta**	**P**	**Exp(B)**
Percent of minority students[287]						
Between 0 – 5%	-1.01	.07*	.37	-1.28	.04**	.28
Between 5 – 20%	-1.39	.00**	.25	-.76	.21	.47
Between 20-50%	-2.05	.00**	.13	.28	.58	1.32
School enrollment size[288]						
Between 300-499	-.66	.07*	.52	-.40	.34	.67
Between 500-999	-.75	.08*	.47	-.30	.52	.74
Over 1000	-1.09	.28	.34	.65	.47	1.92
School Level[289]						
Middle school	-.72	.05**	.48	-.68	.14	.51
Combined school	-.75	.06**	.47	.60	.21	1.82

[Table continued on next page]

284. Principals responded "yes" or "no" to this question. *See* 2009–2010 SSOCS QUESTIONNAIRE, *supra* note 25, at 7; 2007–2008 SSOCS QUESTIONNAIRE, *supra* note 25, at 7. I dummy-coded this variable, making the reference category "no."

285. Principals responded "yes" or "no" to this question. *See* 2009-2010 SSOCS QUESTIONNAIRE, *supra* note 25, at 8; 2007-2008 SSOCS QUESTIONNAIRE, *supra* note 25, at 8. I dummy coded this variable, making the reference category "no."

286. *b* is the coefficient for the independent variables. "The coefficient for the [independent] variable estimates the change in the dependent variable for any one-unit increase in the independent variable." Wright, *supra* note 274, at 22. *p* is the probability that *b* coefficient is zero. *See id.* at 227. Exp(B) is the odds ratio, which represents the change in the odds of principals conducting random sweeps for a one-unit increase in the predictor. *Id.* at 223. With respect to categorical variables, it represents the change in the odds of principals conducting random sweeps when that condition is present. *Id.* at 233.

287. Schools with a minority population of 50 percent or higher is the variable against which each of the subcategories is compared.

288. "Schools having less than three hundred students" is the variable against which each of the subcategories is compared.

289. High school is the variable against which each of the subcategories is compared.

Urbanicity[290]						
Urban	-1.40	.02**	.25	-2.00	.00**	.13
Suburban	-1.36	.03**	.26	-1.18	.05**	.31
Town	-.23	.58	.80	-.44	.35	.64
Percent eligible for free and reduced lunch[291]						
Between 0-20%	-.54	.32	.58	-1.17	.07*	.31
Between 21-50%	-.07	.84	.93	-.09	.82	.91
[Table continued on next page] **Region of country**[292]	[Table continued on next page]					
Western state	-1.24	.02**	.29	-1.50	.01**	.22
Northeastern state	-1.32	.02**	.27	.57	.30	1.78
Midwestern state	-.46	.20	.63	.03	.94	1.03
High, moderate, or mixed crime rates where students reside	-.02	.97	.98	.82	.07*	2.27
High or moderate crime rates where school is located	-.30	.60	.74	.81	.17	2.25
Juvenile justice agency involved	.44	.14	1.56	.91	.01**	2.48
Law enforcement officer on campus	.22	.50	1.25	.74	.05**	2.10

**p < .05; * p < .10 (approaching significance)

A few key predictors emerged from the analysis. First, the data show that the odds of conducting random sweeps without reporting any incidents relating to substance abuse or weapons were greater for schools with higher minority populations than for schools with lower minority populations. Specifically, the odds for schools with minority populations of over 50 percent were more than 2.7 times greater in 2009–2010, and more than 3.6 times greater in 2007–2008, than for schools with minority populations of between 0 and 5 percent.[293] This holds true even when taking into account other factors that may influence

290. Rural schools are the variable against which each of the subcategories is compared.

291. Schools having more than 50 percent of its students eligible for free or reduced lunch is the variable against which each of the subcategories is compared.

292. Southern states are the variable against which each of the subcategories is compared.

293. *See infra* Table 2. Because the coefficients are negative, the probabilities are found by dividing one by the odds ratio (Exp(B)). *See* MICHAEL H. KATZ, MULTIVARIABLE ANALYSIS: A PRACTICAL GUIDE FOR CLINICIANS 130 (1999) (explaining procedure for computing the odds ratio for a negative coefficient).

school officials to conduct these searches, such as their perceptions of the crime levels where students reside and where the school is located, the percent of students eligible for free and reduced lunch, school level, school enrollment size, and school location.[294] In 2009–2010, the odds of conducting these searches were four times greater for schools with minority populations of over 50 percent than for schools with minority populations between 5 and 20 percent.[295] Also in 2009–2010, the odds were 7.7 times greater for schools with minority populations of over 50 percent than for schools with minority populations between 20 and 50 percent.[296] More research is needed to discover the reasons behind the different results across school years and why, in 2009–2010, the greatest odds emerged from comparing schools with minority populations of 20 and 50 percent to schools with over 50 percent. Nevertheless, the general finding that emerged from this analysis is clear: the odds of conducting random sweeps without reporting any incidents relating to substance abuse or weapons were greater for schools with higher percentages of minority students than for schools with lower percentages of minority students.

Second, in both 2009–2010 and 2007–2008, the odds for conducting these searches without reporting any incidents relating to substance abuse or weapons were over three times greater in rural schools than in urban schools or suburban schools.[297] Third, the data indicate that these searches primarily occurred in schools located in the south.[298] In both 2009–2010 and 2007–2008, the odds were over three times greater in schools located in southern states than in schools

294. This is done by statistically controlling for the effects of these other variables. *See* Philip B. Stark, *Glossary of Statistical Terms*, UNIV. OF CAL. BERKELEY, DEP'T OF STAT., http://statistics.berkeley.edu/~stark/SticiGui/Text/gloss.htm#c (last modified Mar. 19, 2012) ("To control for a variable is to try to separate its effect from the treatment effect, so it will not confound with the treatment. There are many methods that try to control for variables. Some are based on matching individuals between treatment and control; others use assumptions about the nature of the effects of the variables to try to model the effect mathematically, for example, using regression.").

295. *See supra* Table 2. Because the Beta weights are negative, the probabilities are found by dividing 1 by Exp(B). *See* KATZ, *supra* note 293, at 130.

296. *See supra* Table 2. Because the Beta weights are negative, the probabilities are found by dividing 1 by Exp(B). *See* KATZ, *supra* note 293, at 130.

297. *See supra* Table 2. Because the Beta weights are negative, the probabilities are found by dividing 1 by Exp(B). *See* KATZ, *supra* note 293, at 130.

298. *See supra* Table 2. Because the Beta weights are negative, the probabilities are found by dividing 1 by Exp(B). *See* KATZ, *supra* note 293, at 130.

located in western states.[299] Likewise, in 2009–2010, the odds were over three times greater in schools located in southern states than in schools located in northeastern states.[300]

Other variables were significant in either 2009–2010 or 2007–2008, but not across both school years. For example, in 2007–2008, the odds for conducting these searches were over three times greater for schools having over 50 percent of their students qualify for free or reduced lunch than for schools having between 0 and 20 percent qualify for free or reduced lunch.[301] In 2007–2008, the odds were over two times greater in schools that involved juvenile justice agencies in the school's efforts to promote safe and drug-free schools than in schools that did not involve those agencies.[302] Also in 2007–2008, the odds were over two times greater in schools that had a security guard, security personnel, or sworn law enforcement officer present at their schools at least once a week than in schools that did not.[303] In 2009–2010, the odds were over two times greater in high schools than in middle or combined schools.[304] Also in 2009–2010, the odds were greater in schools with smaller student populations than in schools with mid-size student populations.[305] More research must be conducted to determine why these factors were not significant in both school years and whether they will be significant in the future.

IV. DISCUSSION OF FINDINGS AND RECOMMENDATIONS

This section discusses the implications of the empirical findings against the legal and normative analyses set forth in Sections I and II. It then provides recommendations based on the empirical findings. It concludes by providing a roadmap for further research projects on these issues.

299. *See supra* Table 2. Because the Beta weights are negative, the probabilities are found by dividing 1 by Exp(B). *See* KATZ, *supra* note 293, at 130.

300. *See supra* Table 2. Because the Beta weights are negative, the probabilities are found by dividing 1 by Exp(B). *See* KATZ, *supra* note 293, at 130.

301. *See supra* Table 2. Because the Beta weights are negative, the probabilities are found by dividing 1 by Exp(B). *See* KATZ, *supra* note 293, at 130.

302. *See supra* Table 2.

303. *See supra* Table 2. Because the Beta weights are negative, the probabilities are found by dividing 1 by Exp(B). *See* KATZ, *supra* note 293, at 130.

304. *See supra* Table 2.

305. *See id.*

A. Discussion of Findings

An analysis of the SSOCS data raises concerns that some school officials may be violating students' civil rights by conducting suspicionless searches of students' personal belongings without having particularized evidence of a substance abuse or weapons problem. If constitutional violations are indeed taking place, schools are undermining one of the missions of educational institutions, which is to transmit common values that enable students to exercise the responsibilities of citizenship and benefit from participation in a free economy.[306] As Justice Brennan reasoned, "[s]chools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms."[307] Moreover, if such violations are taking place, they put schools at risk of costly, time-consuming lawsuits.

But even if these searches are permissible under the current Fourth Amendment jurisprudence, they appear to be inconsistent with students' best interests. The empirical analysis indicates that many schools in the sample, and hundreds across the country, performed random sweeps for contraband during the school year even though they did not report a single incident relating to weapons, drugs, or alcohol during the school year.[308] As explained above,[309] education and sociology experts maintain that using strict security measures sends a powerful, adversarial message to students that they

306. Levin, *supra* note 10, at 1649; *see also* New Jersey v. T.L.O., 469 U.S. 325, 373–74 (1985) (Stevens, J., dissenting) ("Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry."). As Betsy Levin observes, what the mission of schools should be and which values they should transmit has been the subject of much debate. *See* Levin, *supra* note 10, at 1649 ("The mission of schools as transmitters of social, moral, and political values makes it inevitable that disputes will arise over which values are to be inculcated and who is authorized to make these decisions. There is no consensus, for example, on whether schools should emphasize a common language, history, and culture promoting assimilationist and national norms, or emphasize pluralism and diversity."). For a thorough discussion of two competing missions of schools, see Dupre, *supra* note 10, at 64–69.

307. Doe v. Renfrow, 451 U.S. 1022, 1027–28 (1981) (Brennan, J., dissenting); *see also id.* at 1027 ("We do not know what class petitioner was attending when the police and dogs burst in [and sniffed her], but the lesson the school authorities taught her that day will undoubtedly make a greater impression than the one her teacher had hoped to convey.").

308. *See supra* Section III.D., Figure 2.

309. *See supra* Section II.

are suspect and are not to be trusted.[310] It sours students' attitudes, alienates students, creates discord and disunity, invades students' privacy that is necessary for a healthy self-esteem, and undermines a positive, healthy learning environment that can be very difficult to achieve in schools.[311] In addition, there may be a real danger that some schools are socializing students to tolerate and expect this type of treatment by government officials.[312]

The analysis also demonstrates that the odds for conducting these potentially unconstitutional searches are greater in schools with higher minority populations than in schools with lower minority populations, even after taking into account school officials' perceptions of the level of crime where students live and where the school is located.[313] This finding is consistent with other empirical studies that show that minority students more often are subject to strict security measures resembling prison-like conditions than white students.[314] The concerns associated with this finding are threefold.

First, this finding supports the theory that the primary mission of minority schools is not to educate, but to ensure custody and control.[315] This is demonstrated by the fact that schools with higher minority populations appear to be more willing to perform random sweeps than schools serving primarily white students, even in an educational environment that appears to be less hampered by school crime.[316] Second, as explained above,[317] such criminal-justice oriented practices perpetuate racial inequalities by conditioning minority students to expect intense surveillance by government authorities and limiting their future opportunities if they are arrested.[318] Third, applying strict security measures disproportionately to racial minorities teaches harmful lessons to both minorities and white students, sending the socially disturbing message to all students that white students are

310. *See* Gardner, *supra* note 10, at 943.
311. *See* Hirschfield, *supra* note 161, at 46; *see also* Weiss, *supra* note 165, at 213, 227.
312. *See* KUPCHIK & WARD, *supra* note 29, at 3–10.
313. *See supra* Section III.E.
314. *See* Nance, *supra* note 202, at 27–33; *see also* KUPCHIK & WARD, *supra* note 29, at 20–26.
315. *See* Wacquant, *supra* note 207, at 189–90.
316. *See supra* Section III.E.
317. *See supra* Section II.B.
318. *See* KUPCHIK & WARD, *supra* note 29, at 6–7.

privileged, that white students have greater rights to privacy, and that minorities are suspect and cannot be trusted. Not only do such messages alienate minority students from schools, promote disengagement from the community, and generate apathy towards the government and society,[319] but they also cause minorities to be skeptical about white society's desire for racial equality.[320] Such skepticism feeds a cycle of racial tensions and anger that leads to an undesirable world for people of all races to live in.[321] As Sharon Rush explained, "[o]ur children are watching us. They learn about race and race relations from us. As adults, we must be careful not to promote a vision of social reality that teaches non-white children that they are racially inferior *or* that teaches white children that they are racially superior."[322]

Further, the analysis indicates that schools that perform these searches without reporting any incidents relating to drugs or weapons tend to be small, rural schools located in the south.[323] This finding, at first glance, may appear surprising to some because many observe that strict security practices typically take place in inner-city schools.[324] Indeed, another empirical study I conducted indicates that large, urban schools are more likely to implement intense security measures that simulate prison-like conditions than other schools.[325] However, the focus in this Article is schools that reported no incidents relating to drugs, alcohol, or weapons during the school year, which is an uncommon occurrence for large, inner-city schools. But despite the different focuses, it is worth emphasizing that the results from both studies point to the same unfortunate fact: minorities more often are subject to strict security

319. *Id.* at 4 (explaining that students subject to strict security measures may become adults "who do not participate in mainstream political processes and are apathetic towards government policies and institutions, having experienced civic alienation or exclusion as part of their early educational experience").

320. *See* Sharon Elizabeth Rush, *Sharing Space: Why Racial Goodwill Isn't Enough*, 32 CONN. L. REV. 1, 20–21 (1999) (describing how minorities are skeptical about the white society's commitment to racial equality based on the realities of the world they view).

321. *See, e.g.*, *id.* at 31–39.

322. Sharon Elizabeth Rush, *The Heart of Equal Protection: Education and Race*, 23 N.Y.U. REV. L. & SOC. CHANGE 1, 33, 42 (1997).

323. *See supra* Section III.E.

324. *See* Wacquant, *supra* note 207, at 82. (arguing that poor inner-city schools have a carceral atmosphere to ensure custody and control); *see also* Hirschfield, *supra* note 161, at 40 (positing that intensive surveillance of urban minority students conditions students to be prisoners, soldiers, or service sector workers).

325. *See* Nance, *supra* note 202, at 27–33.

measures than white students in many types of environments.

The larger question, however, remains unanswered, which is *why* small, rural schools located in the South more often perform these intrusive measures without reporting any incidents relating to weapons or substance abuse. It is possible that school officials use security measures as a shortcut for addressing the real problem schools face: how to deal with troubled students who commit violent acts, are disorderly, or who promote substance abuse. Of course, these problems are difficult to address and require the assistance of mental health experts, counselors, behaviorists, and support from parents and the community. But, unfortunately, such costly resources are not always available to school officials, especially to those who work in small, rural schools with small budgets. Nevertheless, although the reasons small, southern, rural schools with high minority populations rely more on strict security measures are unclear, the results suggest that these schools may need targeted training and more resources to provide better educational experiences for students. And if additional training and resources do not promote needed changes, students and their parents from these areas may need help seeking legal redress to protect their rights.

B. Recommendations

School security measures and their implications involve complex, sensitive issues that should be addressed by state and federal legislatures, courts, school boards, school administrators, teachers, students, parents, business leaders, and members of the community. Based on these preliminary findings, this Article makes three primary recommendations to these constituencies.

First, this Article recommends that courts take a more assertive role in establishing a baseline standard for school officials to follow when deciding whether to engage in intrusive search practices. Although the current legal framework indicates that school officials should not be permitted to search students' belongings absent a serious substance abuse or weapons problem, the Supreme Court and all of the federal circuit courts, except the Eighth Circuit, have not yet directly addressed this issue. Accordingly, this Article urges courts around the country, and especially the Supreme Court, to follow the Eighth Circuit's lead and expressly require school

officials to provide concrete evidence of a serious substance abuse or weapons problem before permitting schools to engage in intrusive search practices and provide students with appropriate relief when schools do not. Courts generally are reluctant to interfere with school officials' day-to-day administrative practices,[326] but they must set appropriate boundaries to protect students' Fourth Amendment rights, particularly in a setting where students are learning the contours of their civil rights and are forming views of themselves, their communities, and their place in society. Too often courts refuse to hold schools accountable for performing intrusive searches without having sufficient justification for doing so.[327] This recommendation applies equally to state courts as well as federal courts. In fact, independent of how the Supreme Court decides this issue, states can interpret principles from their own constitutions to provide students with greater privacy rights than what students currently enjoy under the U.S. Constitution.[328]

Second, stronger court intervention cannot be the only means to rectify these issues, especially if the number of suits brought by parents of aggrieved students remains low.[329] State legislatures should consider requiring state and local boards of education to employ an education ombudsman[330] to act as an

326. *See, e.g.*, Bd. of Educ. v. Earls, 536 U.S. 822, 830 (2002) (holding that students' Fourth Amendment rights are abridged because the Court cannot disregard schools' custodial and tutelary responsibilities).

327. *See* Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 379 (2009) (concluding that the school violated the Fourth Amendment by strip searching a student without sufficient justification, but denying relief because school official acted in good faith and did not violate a "clearly established" right); B.C. *ex rel.* Powers v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1266 (9th Cir. 1999) (denying relief for a suspicionless search because school official acted in good faith and did not violate a "clearly established" right); *see also* Feld, *supra* note 10, at 947–52 (describing the limited remedies available to students for constitutional violations).

328. *See* William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) ("[S]tate courts cannot rest when they have afforded their citizens the full protections of the Federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."); *see also* Bloom, *supra* note 121, at 356 (explaining that some states have interpreted their own laws to require particularized evidence of a drug problem before justifying random drug testing).

329. *See* Feld, *supra* note 10, at 950–52 (describing the impediments for bringing a civil suit to protect Fourth Amendment privacy rights).

330. An ombudsman is "a government official . . . appointed to receive and investigate complaints made by individuals against abuses or capricious acts of public officials." MERRIAM-WEBSTER DICTIONARY, *Definition of Ombudsman,*

independent intermediary to resolve these and other complaints that arise among families and school officials. Some state and local school boards already have educational ombudsmen in place to resolve problems between families and schools, which could be used as a model for other schools.[331] If an ombudsman were readily available to students and parents at no cost and would maintain confidences, the ombudsman could ameliorate many problems students face to protect their civil rights.

Third, school officials and policymakers should consider alternative, more effective means for reducing school violence and drug abuse than resorting to methods that rely on coercion, punishment, and fear. As explained above, programs that promote a strong sense of community and collective responsibility more effectively reduce school crime and do not degrade the learning environment.[332]

C. A Roadmap for Further Research

These preliminary empirical findings provide sufficient justification for conducting further research on these important issues. One obvious place to begin is to reformulate the series of questions posed in the SSOCS. The U.S. Department of Education (DOE) might be well served to solicit the help of attorneys who have expertise in education law or criminal procedure to craft questions to reduce or eliminate ambiguity in their surveys. For example, it would be helpful to include questions that specifically target whether school officials randomly search through students' belongings, their lockers, their belongings stored in their lockers, their automobiles, or perform pat-downs on students. The DOE might consider asking other questions pertaining to these searches, such as how often they conduct these searches, who conducts these searches (i.e., principals, teachers, security guards, or law enforcement officers), the conditions under which these searches are conducted, and why they are conducted. Armed with this additional information, the DOE would be better

available at http://www.merriam-webster.com/dictionary/ombudsman (last visited Sept. 29, 2012).

331. *See, e.g.*, WASH. ST. OFF. OF THE EDUC. OMBUDSMAN, *Welcome to the Office of the Education Ombudsman*, http://www.governor.wa.gov/oeo/ (last visited on Sept. 29, 2012); PORTLAND PUBLIC SCHOOLS, *School Concerns? Talk to our new Ombudsman* (Nov. 18, 2011), http://www.pps.k12.or.us/news/6711.htm.

332. *See supra* Section II.A.

equipped to recommend appropriate training programs for school officials that would improve the educational climate of schools and help schools avoid costly litigation.

In addition to reformulating the SSOCS, other studies might seek to identify the types of search practices school officials believe they can conduct under various conditions. Those studies could identify particular gaps in school administrators' knowledge of constitutional law and provide crucial information that school district officials and other experts need to properly educate and train school administrators.[333]

Further, additional studies should seek to identify why school officials implement strict security measures, particularly in schools with high minority populations. Important questions that remain unanswered include: (1) Are under-resourced schools using these measures as a shortcut to provide an orderly environment instead of helping students change their behavior in more positive ways? (2) Are school officials responding to political or community pressures? (3) Do school officials believe that strict security measures are the most effective measures to reduce school crime? And (4) do school officials have implicit biases against minority students?

Finally, studies are needed to assess the long-term impact on students, both minorities and whites, who are subject to strict security measures. Such studies are difficult and costly, but they are an integral part of the cost-benefit analysis that school officials and other policymakers perform when deciding whether to implement these measures.

CONCLUSION

This Article provides a legal, empirical, and normative analysis of random, suspicionless searches of students' belongings. It argues that random, suspicionless searches of students' belongings are not permitted under the Fourth Amendment unless certain conditions are present in the school.

---

333. *See* Earl J. Ogletree & Nancy Lewis, *School Law: A Survey of Educators*, 35 DEPAUL L. REV. 259, 274–79 (1986) (providing empirical evidence that educators' understanding of students' Fourth Amendment rights is deficient); Jacqueline A. Stefkovich & Mario S. Torres Jr., *The Demographics of Justice: Student Searches, Student Rights, and Administrator Practices*, 39 ED. ADMIN. Q. 259, 276 (2003) ("[A] number of studies relative to educators' knowledge of the law show that administrators and teachers are deficient in their understanding of school law in general.").

It also argues that strict security measures are harmful to the educational climate and to students, especially when applied disproportionately to minorities. In addition, it provides empirical data which raises concerns that: (1) some public schools may be violating students' civil rights by conducting suspicionless searches on students' belongings without valid justifications; and (2) schools with higher minority populations are more likely to conduct those potentially unconstitutional searches than schools with lower minority populations.

These analyses should cause courts to strongly consider following the lead of the Eighth Circuit and require school officials to provide evidence of a substance abuse or weapons problem before permitting schools to engage in an intrusive search. Nevertheless, the most effective reform will occur if school officials themselves voluntarily agree to refrain from using measures that coerce and punish students and, instead, adopt measures that promote collective responsibility and trust. Such actions are more consistent with students' best interests, will preserve a healthy learning environment in which all children can learn more effectively, and will help create a better society to live in for people of all races.

INDIANA V. EDWARDS: THE PROSPECT OF A HEIGHTENED COMPETENCY STANDARD FOR *PRO SE* DEFENDANTS

ASHLEY N. BECK*

The Sixth Amendment to the United States Constitution guarantees a criminal defendant both the right to the assistance of counsel and the right of self-representation. The right of self-representation is deeply ingrained in the Anglo-American system of justice, but so is the requirement that a criminal defendant be tried only if competent to stand trial. In Indiana v. Edwards*, the Supreme Court recognized a "gray area" of competency, noting that competency to stand trial with the assistance of counsel may not equate to competency to proceed* pro se*. In* Edwards*, the Court held that a trial court retains the discretion to appoint and does not violate a defendant's Sixth Amendment right when it appoints counsel over a "gray-area" defendant's objection. The Court, however, did not articulate a standard for assessing competency to proceed* pro se*. This Note demonstrates why a heightened competency standard is necessary and articulates a heightened standard for courts to apply when confronted with a defendant who wishes to proceed* pro se*, but may not be competent to do so.*

* Juris Doctor candidate, University of Colorado Law School, 2013. Many thanks to the Honorable Anne M. Mansfield for providing the inspiration for this Note and to the members of the University of Colorado Law Review for all their efforts and phenomenal work on Volume 84. Thanks also to my parents, Deb and Jim, for their relentless support and encouraging words.

INTRODUCTION

> "*No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court.*"[1]

Since our nation's inception, American criminal courts have strived to maintain a balance between safeguarding a defendant's autonomy and preserving a defendant's due process right to a fair trial. The Sixth Amendment expressly guarantees a criminal defendant the right to the assistance of counsel, and impliedly, protects the defendant's autonomy by affording him[†] the right of self-representation. Whether a defendant obtains counsel or exercises his right of self-representation, American criminal law has long recognized as fundamental to due process that a defendant may be tried only if he has sufficient mental capacity to stand trial.[2]

The Supreme Court first articulated a competency

1. Massey v. Moore, 348 U.S. 105, 108 (1954).

[†] The University of Colorado Law Review advocates the use of gender-neutral language. The author of this Note acknowledges that both men and women can be criminal defendants but has chosen to consistently refer to defendants with masculine pronouns, solely for purposes of clarity and readability. As used in this Note, masculine pronouns should be understood to refer generically to both male and female defendants.

2. The Due Process Clause of the Fifth and Fourteenth Amendments prohibits criminal prosecution of a defendant who is not competent to stand trial. *See* People v. Davis, No. 07CA1955, 2012 Colo. App. LEXIS 13, ¶ 1 (Colo. App. Jan. 5, 2012); *see also* Dusky v. United States, 362 U.S. 402, 402–03 (1960).

standard in *Dusky v. United States*, explaining that for a defendant to stand trial, he must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and have a "rational as well as factual understanding of the proceedings against him."[3] However, consider a defendant who suffers from an extreme speech impediment, who, although able to communicate with an attorney through written notes or non-verbal gestures, cannot communicate coherently to the judge or jury. Or, a defendant who suffers not from any defined mental illness or defect, but rather from obsessive impulses that significantly interfere with daily functioning. Or, a defendant whose behavior in and out of the courtroom is illogical, inexplicably bizarre, and exceptionally distracting. These defendants may be competent to stand trial under the standard articulated in *Dusky,* but are they competent to conduct their own trial *without the assistance of counsel*? Maybe not.

Mental competence is not a unitary concept, and different legal contexts require varying levels of competence.[4] The level of competence necessary to single-handedly execute one's own defense at trial is inherently much higher than that required of represented defendants.[5] Because the competency standard as articulated in *Dusky* only contemplates those defendants who are represented by counsel, it is inadequate as applied to *pro se*[6] defendants.

Nearly fifty years after *Dusky*, the Supreme Court decided *Indiana v. Edwards* and held that in some circumstances, such as when a defendant appears incompetent to proceed *pro se,* the trial court may impose unwanted counsel to assist the defendant.[7] In so holding, the *Edwards* Court acknowledged the existence of a "gray area" of mental competency between

3. *Dusky*, 362 U.S. at 402.

4. Brief for the Am. Psychiatric Ass'n and Am. Acad. of Psychiatry and the Law as Amici Curiae in Support of Neither Party at 18, Indiana v. Edwards, 554 U.S. 164 (2008) (No. 07-208) [hereinafter Brief for the Am. Psychiatric Ass'n].

5. *Id.* at 20.

6. *Pro se* is Latin for "for oneself; on one's own behalf." BLACK'S LAW DICTIONARY 1341 (9th ed. 2009). In the trial court setting, *pro se* usually refers to a defendant who is acting before the court without the assistance of counsel. *See id.*

7. Indiana v. Edwards, 554 U.S. 164, 167, 178 (2008) (holding that "[T]he Constitution permits [s]tates to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings themselves.").

"*Dusky*'s minimal constitutional requirement that measures a defendant's ability to stand trial [with the assistance of counsel] and a somewhat higher standard that measures mental fitness for another legal purpose."[8]

Justice Breyer's description in *Edwards* of this gray area of mental competency has highlighted the issue of the so-called "gray-area defendant,"[9] bringing to bear that the *Dusky* competency standard does not adequately account for defendants who are competent under *Dusky* and want to proceed *pro se*, but who are not competent to execute their own trial and defense without the assistance of counsel.[10] *Edwards* suggests that a competency standard more particularized and context-specific than the generic *Dusky* standard may be necessary to ensure fair and reliable adjudication.[11] Yet, while *Edwards* affirms that a trial court does not exceed its discretion by appointing unwanted counsel, it leaves unanswered the question of whether courts *should* adopt a heightened competency standard—in addition to the *Dusky* standard—for *pro se* defendants.

This Note addresses the inadequacy of the *Dusky* standard for assessing the competency of a defendant to proceed *pro se* in light of the Court's recent decision in *Edwards*. It seeks to answer the question of whether courts should adopt a heightened competency standard, and if so, what that standard should be. Part I provides a general overview of the policy and precedent supporting the right of self-representation. It considers the long-standing requirement that a defendant be competent in order to stand trial and explores the evolving relationship between the Sixth Amendment right of self-representation and the due process requirement that criminal defendants be competent to stand trial. Part II analyzes *Indiana v. Edwards* and the significance of the Court's holding that a trial court may deny a gray-area defendant's request to

8. *Id.* at 172–73.

9. As used in this Note, the term "gray-area defendant" refers to a defendant whose mental competency falls "between *Dusky*'s minimal constitutional requirement that measures a defendant's ability to stand trial and a somewhat higher standard that measures mental fitness for another legal purpose." *Id.*

10. *Id.* at 178. Studies estimate that a defendant's mental competency is an issue in about 20 percent of federal cases involving *pro se* defendants. *Id.*; *see, e.g.*, Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the* Pro Se *Felony Defendant*, 85 N.C. L. REV. 423, 428 (2007) (statistical analysis).

11. *See Edwards*, 554 U.S. at 174–75, 177–78.

proceed *pro se* and impose counsel.[12] Part III discusses how *Edwards* has opened the door for the establishment of a heightened competency standard and suggests what a trial court's competency inquiry should be. Ultimately, this Note argues that trial courts should adopt and implement this heightened competency standard to assess gray-area defendants who wish to proceed *pro se* by interpreting their respective states' due process clauses as requiring a heightened standard.

I. THE RELATIONSHIP BETWEEN THE RIGHT OF SELF-REPRESENTATION AND THE COMPETENCY REQUIREMENT

Anglo-American jurisprudence has long recognized a defendant's right to proceed *pro se*.[13] The right of self-representation affirms a defendant's autonomy and dignity, and enforces the defendant's role as master of his defense.[14] At times, however, a defendant's exercise of the right of self-representation raises due process and fair trial concerns.[15] Accordingly, the Supreme Court faces the challenge of maintaining a balance between preserving a defendant's autonomy and safeguarding the adversary system.

This Part traces the historical background and traditional understanding of the right of self-representation as a means to preserve a defendant's autonomy. It then explores the Court's shifting focus regarding the right of self-representation as its emphasis on the importance of preserving a defendant's autonomy gives way to greater concern over ensuring due process and a fair trial. Lastly, it examines the competency requirement and its application to *pro se* defendants.

A. The Right of Self-Representation as Fundamental to Defendant Autonomy

The Supreme Court has consistently recognized a defendant's right to represent himself,[16] noting that historical

12. *Id.* at 167.

13. S*ee, e.g.*, Faretta v. California, 422 U.S. 806, 812–13 (1975) (discussing the historical underpinnings of the right of self-representation).

14. *See, e.g.*, *id.* at 820.

15. *See, e.g.*, *id.* at 834–35; McKaskle v. Wiggins, 465 U.S. 168, 183–84 (1984).

16. *See, e.g.*, Adams v. United States *ex rel.* McCann, 317 U.S. 269, 275 (1943); *McKaskle*, 465 U.S. at 173; *Faretta*, 422 U.S. at 817.

practice,[17] wide-ranging statutory recognition of the right of self-representation,[18] and practical concerns regarding the dignity and autonomy of a defendant[19] all support a defendant's right to proceed *pro se*. Centuries of British, colonial, and American legal history suggest that the Framers of the Constitution "selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation."[20] Historically, under both British and colonial criminal jurisprudence, the right of self-representation was not only recognized, but was the general practice.[21] As Justice Jackson once observed, "the mere fact that a path is a beaten one is a persuasive reason for following it."[22] While self-representation may no longer be the general practice for criminal defendants, the Court continues to recognize the right of self-representation, as it has for centuries.

The Supreme Court first held in *Adams v. United States ex*

17. *Faretta*, 422 U.S. at 821–34.

18. The right of a criminal defendant to represent himself before a court of law has been protected by statute since the inception of the United States. Section 35 of the Judiciary Act of 1789 states in pertinent part that "in all courts of the United States, the parties may plead and manage their own causes personally or by assistance of such counsel or attorneys at law." Judiciary Act of 178 § 35, 1 Stat. 73, 92 (1789). The right of self-representation is currently codified in 28 U.S.C. § 1654 (2010), and in at least 37 state constitutions. *See* ALA. CONST. art. I, § 6; ARIZ. CONST. art. II, § 24; ARK. CONST. art. II, § 10; COLO. CONST. art. II, § 16; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 7; FLA. CONST. art. I, § 16; IDAHO CONST. art. I, § 13; ILL. CONST. art. I, § 8; IND. CONST. art. I, § 13; KAN. CONST. Bill of Rights, § 10; KY. CONST. Bill of Rights, § 11; LA. CONST. art. I, § 9; MASS. CONST., pt. 1, art. XII; ME. CONST. art. I, § 6; MISS. CONST. art. III, § 26; MO. CONST. art. I, § 18(a); MONT. CONST. art. II, § 24; NEB. CONST. art. I, § 11; NEV. CONST. art. I, § 8; N.H. CONST., pt. 1, art. XV; N.M. CONST. art. II, § 14; N.Y. CONST. art. I, § 6; N.D. CONST. art. I, § 12; OHIO CONST. art. I, § 10; OKLA. CONST. art. II, § 20; OR. CONST. art. I, § 11; PA. CONST. art. I, § 9; S.C. CONST. art. I, § 14; S.D. CONST. art. VI, § 7; TENN. CONST. art. I, § 9; TEX. CONST. art. I, § 10; UTAH CONST. art. I, § 12; VT. CONST. ch. 1, art. X; WASH. CONST. art. I, § 22; WIS. CONST. art. I, § 7; WYO. CONST. art. 1, §10.

19. The Supreme Court has noted that the right to defend oneself is innately personal because one's liberty is often at stake. *Faretta*, 422 U.S. at 819–20. Accordingly, the Court has remarked that it is proper to give the right to defend directly to the accused because it is "he who suffers the consequences if the defense fails," and not his lawyer or the state. *Id.* at 820.

20. *Id.* at 832.

21. *Id.* at 828.

22. Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution,* 45 COLUM. L. REV. 1, 26 (1945); *see also Faretta*, 422 U.S. at 817. *But see* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.").

rel McCann that the Sixth Amendment includes an implicit right for a defendant to dispense with a lawyer's assistance and proceed *pro se*.[23] The *Adams* Court explained that the Sixth Amendment right to the assistance of counsel embodies a correlative right to dispense with counsel's assistance.[24] The Court held that so long as a defendant "knows what he is doing and his choice is made with eyes open," he may waive his constitutional right to the assistance of counsel.[25] To hold otherwise, the Court stated, would inappropriately "deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice."[26]

Adams governed only cases brought in the federal courts, but the Supreme Court extended the affirmative right of self-representation to state courts in 1975 with its landmark decision in *Faretta v. California*.[27] In *Faretta,* the Court declared that the right to dispense with counsel inherent in the Sixth Amendment applied to the states through the Due Process Clause of the Fourteenth Amendment.[28] The Court relied on its reasoning in *Adams* and the text of the Sixth and Fourteenth Amendments to support its holding that a state may not "constitutionally hale a person into its criminal courts and there force a lawyer upon him."[29] "Although not stated in the [Sixth] Amendment in so many words," the Court declared, "the right of self-representation—to make one's own defense personally—is . . . necessarily implied by the structure of the Amendment."[30]

As evident in both *Adams* and *Faretta*, the Court historically understood the right of self-representation as a

23. Adams v. United States *ex rel* McCann, 317 U.S. 269, 279 (1943) (holding that the "Constitution does not force a lawyer upon a defendant.").

24. *Id. But cf.* Singer v. United States, 380 U.S. 24, 34–35 (1965) ("The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.").

25. *Adams*, 317 U.S. at 279. In discussing the validity of the defendant's waiver of counsel, the Court referred to the standard articulated in *Johnson v. Zerbst*, 304 U.S. 458 (1938) (holding that waiver of a constitutional right must be made competently and intelligently), and noted that "the short of the matter is that an accused, in the exercise of a free and intelligent choice . . . may competently and intelligently waive his Constitutional right to assistance of counsel." *Adams*, 317 U.S. at 275.

26. *Id.* at 280.

27. Faretta v. California, 422 U.S. 806, 807 (1975).

28. *Id.*

29. *Id.*

30. *Id.* at 819.

means of preserving a defendant's autonomy.[31] More recently, however, the Court shifted its focus to the potential adverse consequences that self-representation may have on a defendant's due process right to a fair trial. The next section explores some of the fair trial concerns raised by a defendant's exercise of his right of self-representation, and explains how the Court's concern over the fairness of the adjudicative process has begun to erode the Court's traditional focus on preserving defendant autonomy.

B. Fair Trial Concerns and the Right of Self-Representation

Although the right of self-representation preserves the dignity and autonomy of the accused, in many circumstances it raises concern as to a defendant's right to a fair trial.[32] Arguably, in the vast majority of criminal cases, a lawyer is necessary to ensure a fair trial.[33] As the *Faretta* dissent contended, "the spirit and logic of the Sixth Amendment are that every person accused of crime shall receive the fullest possible defense."[34] Even though concerns regarding the preservation of defendants' autonomy ultimately prevailed over fair trial concerns in *Faretta,* the Court shifted its focus in later decisions to ensuring a fair trial. This section explains the significance of *McKaskle v. Wiggins*,[35] a Supreme Court case that tempered the right of self-representation and echoed many of the fair trial concerns raised by the *Faretta* dissenters.

Whereas the *Faretta* Court emphasized the need to preserve a defendant's dignity and autonomy, the *McKaskle* Court emphasized and exhibited greater concern over a

---

31. *See, e.g.*, *id. Faretta* makes clear the view that self-representation in most cases will have negative consequences, but that a defendant's right of self-representation is upheld out of respect for individual dignity and autonomy. *See id.* at 834; United States v. Mendez-Sanchez, 563 F.3d 935, 945 (9th Cir. 2009).

32. *See Faretta*, 422 U.S. at 834. Dissenting from the decision, Chief Justice Burger wrote:

> [T]he trial judge is in the best position to determine whether the accused is capable of conducting his defense. True freedom of choice and society's interest in seeing that justice is achieved can be vindicated only if the trial court retains discretion to reject any attempted waiver of counsel and insist that the accused be tried according to the Constitution.

Id. at 840.

33. *Id.* at 834 (majority opinion).

34. *Id.* at 840 (Burger, C.J., dissenting).

35. 465 U.S. 168 (1984).

defendant's right to due process and a fair trial in justifying the imposition of standby counsel.[36] In *McKaskle*, the Court held that imposing standby counsel on the defendant, even over the defendant's objection, does not violate the defendant's right of self-representation.[37] The Court explained that a defendant's Sixth Amendment trial rights are not violated when a trial judge appoints standby counsel "to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals."[38] The imposition of standby counsel does not interfere with, but rather supports, the objectives of the Sixth Amendment "to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense."[39]

The *McKaskle* Court recognized that standby counsel can be not only beneficial to a defendant in assisting him in overcoming "routine procedural or evidentiary obstacles to the completion of some specific task,"[40] but also important to the adjudicative process, in that counsel may "relieve the judge of the need to explain and enforce basic rules of courtroom protocol."[41] In holding that the appointment of standby counsel does not violate a defendant's Sixth Amendment right, the *McKaskle* Court tempered the right of self-representation so as to safeguard the right to a fair trial and preserve standard courtroom protocol.[42] Thus, the focus of the Court moved away from preserving defendant autonomy and toward safeguarding due process and fair adjudication.

Nevertheless, the Court reiterated that a *pro se* defendant is entitled to maintain actual control over his case, and that standby counsel assisting a *pro se* defendant may not make, or

36. *Id.* at 177–78.

37. *Id.* at 184. In *Faretta*, the Court briefly addressed the matter of standby counsel in a footnote, noting that "a State may—even over objection by the accused—appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." 422 U.S. at 835 n.46.

38. *McKaskle*, 465 U.S. at 184.

39. *Id.* at 176–77.

40. *Id.* at 183.

41. *Id.* at 184.

42. *Id.* The Court noted that "participation by counsel to steer a defendant through the basic procedures of trial is permissible even in the unlikely event that it somewhat undermines the *pro se* defendant's appearance of control over his own defense." *Id.*

substantially interfere with, any significant tactical decisions regarding the defendant's case.[43] The Court explained that standby counsel's participation, to the extent practicable, should be outside the presence of the jury and should not "destroy the jury's perception that the defendant is representing himself."[44] Accordingly, *McKaskle* reaffirmed the holdings of *Adams* and *Faretta* by recognizing a defendant's Sixth Amendment right of self-representation. However, it tempered this right by holding that trial courts may exercise discretion and appoint standby counsel where necessary to achieve a fair trial and effective adjudication.[45]

McKaskle made clear that the right of self-representation is not absolute.[46] Although decided two decades prior to *Edwards*, it helped lay the foundation for the Court's declaration in *Edwards* that there are circumstances in which trial courts may impose unwanted counsel on a defendant. One such circumstance, according to *Edwards*, is when there is a question as to the defendant's competence to proceed *pro se*.[47] As the next section demonstrates, American jurisprudence has long required that a defendant be deemed competent in order to stand trial.[48] The following section explains the reasons for this requirement, explores the Court's standard for assessing a defendant's competence to stand trial as articulated in *Dusky v. United States*, and evaluates the *Dusky* standard's prior application to *pro se* defendants.

C. The Competency Requirement

Reliable adjudication rests largely on the participation of a competent defendant.[49] The requirement that a defendant be competent to stand trial is fundamental to our adversarial justice system.[50] American common law has long recognized that competence to participate in the adjudication of one's case

43. *Id.* at 178.
44. *Id.*
45. *Id.* at 184.
46. *Id.* at 178–79; *see also* Indiana v. Edwards, 554 U.S. 164, 171 (2008).
47. *See Edwards*, 554 U.S. at 167.
48. NORMAN G. POYTHRESS ET AL., ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES 39–40 (2002); *see also* R v. Pritchard, [1836] 173 Eng. Rep. 135 (P.C.) 135.
49. POYTHRESS ET AL., *supra* note 48, at 44.
50. *Id.* at 1; *see also* Drope v. Missouri, 420 U.S. 162, 171 (1975); *Pritchard*, 173 Eng. Rep. at 135.

is essential to a fair trial and due process.[51] The primary purpose of the competency requirement is to promote fairness in the criminal justice system.[52] Such a requirement helps preserve the dignity of the criminal process, and perhaps most importantly, "promote[s] the defendant's exercise of self-determination in making important decisions in his defense."[53]

While the competency requirement has existed in Anglo-American jurisprudence for centuries, the Supreme Court first articulated a competency standard in *Dusky v. United States*.[54] The *Dusky* competency standard contains a two-part analysis that first considers "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and second, "whether [the defendant] has a rational as well as factual understanding of the proceedings against him."[55] Under *Dusky,* the core conceptualization of competence to stand trial pertains to the defendant's ability "to understand the charges, the nature and purpose of criminal prosecution, [and] the roles of prosecutors, attorneys and judges."[56]

The Court has since explained that, "[I]t has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."[57] Although the question of a defendant's competency "is often a difficult one in which a wide range of manifestations and subtle

51. POYTHRESS ET AL., *supra* note 48, at 39. "At least since the [fourteenth] century, common-law courts have declined to proceed against criminal defendants who are 'incompetent' to be brought before the court for adjudication." *Id.*

52. *Id.* at 1.

53. *Id.* (citation omitted). Although *Dusky* is recognized as the first Supreme Court case to articulate an authoritative competency standard, it largely echoes the description of the elements of "fitness to stand trial" as articulated in *Pritchard*, 173 Eng. Rep. at 135 ("[W]hether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper [defense]—to know that he might challenge [jurors] to whom he may object—and to comprehend the details of the evidence. . . . It is not enough, that he may have a general capacity of communicating on ordinary matters.").

54. 362 U.S. 402 (1960).

55. *Id.* at 402. Since *Dusky,* nearly all fifty states have adopted statutes addressing adjudicative competency; while the statutes vary, the two prongs of *Dusky* largely remain consistent throughout. *See, e.g.*, COLO. REV. STAT. § 16-8.5-101(4) (2011).

56. POYTHRESS ET AL., *supra* note 48, at 8.

57. Drope v. Missouri, 420 U.S. 162, 171 (1975).

nuances are implicated,"[58] the prohibition against trying incompetent defendants is absolute and fundamental to the American adversary system.[59]

Even prior to the Court's articulation of the *Dusky* competency standard, the Court recognized that the question of competence raised due process concerns, especially for *pro se* defendants.[60] In *Massey v. Moore*, the Court suggested that a finding of competence to stand trial with the assistance of counsel would not necessarily equate to a finding of competence to stand trial *without* the assistance of counsel.[61]

In *Massey,* the Court declared that the Fourteenth Amendment requires that a defendant receive a fair trial.[62] The question before the *Massey* Court was whether the defendant, allegedly of unsound mind at the time of trial, was entitled to a hearing on the issue of competency.[63] After being tried without the assistance of counsel, convicted of robbery by assault, and sentenced to life imprisonment,[64] the defendant appealed his conviction on the grounds that "he was insane [at the time of trial] and unable to defend himself."[65] The Court held that in accordance with the Due Process Clause of the Fourteenth Amendment, the defendant was entitled to a

58. *Id.* at 180.

59. *Id.* at 171. The basis of the Court's observation originates with a passage in WILLIAM BLACKSTONE, COMMENTARIES 4:24 (1765–1769), in which Blackstone wrote:

> If a man in his sound memory commits a capital offense, and, before arraignment for it, he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he had pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defense? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed.

POYTHRESS ET AL., *supra* note 48, at 44.

60. *See* Massey v. Moore, 348 U.S. 105, 108 (1954).

61. *Id.* at 108. The Court remarked, "[O]ne might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel." *Id.*

62. *Id.* In pertinent part, the Fourteenth Amendment reads: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

63. *Massey*, 348 U.S. at 106.

64. The defendant suffered two previous convictions for other felonies, and accordingly, upon the robbery by assault conviction, the court imposed a compulsory life sentence in the Texas State Penitentiary. *See* Massey v. Moore, 205 F.2d 665, 665 (5th Cir. 1953), *rev'd*, 348 U.S. 105 (1954).

65. *Massey*, 348 U.S. at 106–07.

competency hearing.[66] The Court explained that "no trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court."[67]

Despite the Court's early awareness of the challenges faced by *pro se* defendants, it was not until thirty-nine years after *Massey* that the Supreme Court first applied the *Dusky* competency standard to a *pro se* defendant.[68] In *Godinez v. Moran*, the Court addressed whether the competency standard for pleading guilty or waiving the right to counsel was, or should be, higher than the *Dusky* competency standard for standing trial.[69] The Court began its analysis by noting that a criminal defendant may not be tried unless he is competent; and that under *Johnson v. Zerbst*,[70] a case setting forth the requirements for a valid waiver, he may not waive his right to the assistance of counsel unless he does so competently and intelligently.[71] Ultimately, the Court determined that the competency standard is the same regardless of whether a defendant is pleading guilty, waiving counsel, or going to trial.[72] It explained, "[I]f the *Dusky* standard is adequate for defendants who plead not guilty, it is necessarily adequate for those who plead guilty."[73]

The *Godinez* Court rejected the contention that waiver of constitutional rights (such as the Sixth Amendment right to counsel) requires a higher level of mental functioning than that required to stand trial.[74] The court of appeals reasoned:

> [W]hile a defendant is competent to stand trial if he has a rational and factual understanding of the proceedings and is capable of assisting his counsel, a defendant is competent to waive counsel or plead guilty only if he has the capacity for reasoned choice among the alternatives available to him.[75]

---

66. *Id.* at 108.
67. *Id.*
68. *See* Godinez v. Moran, 509 U.S. 389, 399–400 (1993).
69. *Id.* at 391.
70. 304 U.S. at 456.
71. *Godinez*, 509 U.S. at 396.
72. *Id.* at 399.
73. *Id.*
74. *Id.* at 394–402.
75. *Id.* at 394 (citations omitted). It is important to note that the Supreme Court addressed competency as it pertained to *waiving* counsel; it did not consider or address the competency standard in the context of self-representation.

The Supreme Court, not persuaded, explained "a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation."[76] Although rejecting the court of appeals's assertion that waiver necessitates a different standard of competence, the Court clarified that:

> A finding that a defendant is competent to stand trial . . . is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel. In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary. In this sense there *is* a "heightened" standard for pleading guilty and for waiving the right to counsel, but it is not a heightened standard of *competence.*[77]

Relying heavily on its rationale in *Faretta*, its landmark right of self-representation case, the *Godinez* Court reiterated that "the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself."[78] Nevertheless, in distinguishing between "the competence to waive the right" and "the competence to represent [oneself]," the Court left open the question of whether there *should* be a different competency standard to assess a defendant's competence to proceed *pro se.*

Until *Indiana v. Edwards*, the Court's jurisprudence consistently held that the *Dusky* competency standard was adequate to assess the competence of criminal defendants—those represented by counsel and *pro se* defendants alike—at the varying stages of the criminal process. But as the Supreme Court recognized in *Edwards*, it is sometimes hard to completely separate competence to stand trial from the ability to participate competently in one's own defense. In *Edwards,* the Court revisited its earlier competence jurisprudence, and explored the inadequacies of the *Dusky* competency standard.

---

76. *Id.* at 400.

77. *Id.* at 400–01 (citations omitted). *Godinez* left it to the individual states to develop procedures for determining whether a defendant's waiver of counsel is competent, knowing, and voluntary. *Id.* at 402; *see also* Brief for the Am. Psychiatric Ass'n, *supra* note 4, at *6.

78. *Godinez*, 509 U.S. at 399.

Part II of this Note examines in-depth the procedural history of *Edwards* and explains the Court's holding.

II. *INDIANA V. EDWARDS*: RECOGNIZING THE NEED FOR A NEW COMPETENCY STANDARD FOR THE *PRO SE* DEFENDANT

In 2008, the Supreme Court decided *Indiana v. Edwards*,[79] a case that pitted the right of self-representation against the due process and fair trial guarantees. In holding that the Constitution permits a state to limit a defendant's right of self-representation by imposing unwanted counsel, the *Edwards* Court emphasized that "the most basic of the Constitution's criminal law objectives [is] providing a fair trial."[80] This section traces the factual basis and holding of *Edwards*, and explains why the Court's prior competence jurisprudence proved inadequate in addressing the question of the appropriate standard necessary to ensure *pro se* defendants are in fact competent to execute their own defense.

In *Edwards*, the defendant was charged with attempted murder and a number of other charges in connection with a shooting at a department store.[81] Before trial, the defendant was the subject of three competency hearings over a period of three years, and two self-representation requests.[82] The defendant's first competency hearing occurred five months after his arrest at the request of his court-appointed counsel.[83] At the conclusion of the hearing, the trial court found the defendant incompetent to stand trial, and committed him to a state hospital for treatment.[84] Seven months after his commitment, doctors found that the defendant's condition had improved, and suggested that he was fit to stand trial.[85] A few months later, defense counsel requested a second competency evaluation.[86] After the second competency hearing, the trial court found the defendant competent to stand trial.[87] Seven

79. 554 U.S. 164 (2008).

80. *Id.* at 176–77.

81. *Id.* at 167. Specifically, the defendant faced four charges: attempted murder, battery with a deadly weapon, criminal recklessness, and theft. *Id.*

82. *Id.* at 167–69.

83. *Id.* at 167.

84. *Id.*

85. *Id.* at 168.

86. *Id.*

87. *Id.* The Court acknowledged that the defendant was "suffer[ing] from mental illness," but found that he was "competent to assist his attorneys in his defense and stand trial for the charged crimes." *Id.* (citation omitted).

months later, defense counsel requested a third psychiatric evaluation for the defendant.[88] At the end of the third hearing, the trial court found the defendant incompetent, and ordered his recommitment to the state hospital.[89]

Months later, the defendant's condition again improved and the trial court found him competent to stand trial.[90] Just before trial, the defendant requested permission to proceed *pro se* and moved for a continuance to allow him to sufficiently prepare to represent himself.[91] The court denied both requests, and the defendant went to trial with his court-appointed counsel.[92] The jury convicted the defendant on two of the four charges, but failed to reach a verdict on the charges of attempted murder and battery.[93] The State sought to retry the defendant on the attempted murder and battery charges.[94] Prior to the second trial, the defendant again requested permission to proceed *pro se*.[95] The court denied the defendant's request, finding that he was not "competent to defend himself."[96] The defendant went to trial with counsel, and the jury convicted him of the remaining counts.[97]

The defendant subsequently appealed his conviction, claiming that the court had unconstitutionally deprived him of his right of self-representation under *Faretta*.[98] The Indiana Court of Appeals agreed with the defendant, reversed the conviction, and ordered a new trial.[99] The Supreme Court of

88. *Id.* At the third hearing, defense counsel presented evidence showing that the defendant suffered from serious thinking difficulties and delusions that "[made] it impossible for him to cooperate with his attorney" and assist in his defense. *Id.* (citation omitted).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 168–69.

93. The defendant was convicted of criminal recklessness and theft. *Id.* at 169.

94. *Id.*

95. *Id.*

96. *Id.* In denying the defendant's request to proceed *pro se*, the trial court noted his lengthy record of psychiatric reports, his diagnosis of schizophrenia, and his inability to competently defend himself. *Id. But cf.* Faretta v. California, 422 U.S. 806, 836 (1975) (noting that a defendant's legal knowledge is not relevant to the determination of whether he is competent to waive his right to counsel); Godinez v. Moran, 509 U.S. 389, 399 (1993) (declaring that "[T]he competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself.").

97. *Edwards*, 554 U.S. at 169.

98. *Id.*

99. *Id.*

Indiana affirmed, citing both *Faretta* and *Godinez* in its decision.[100] Conversely, the United States Supreme Court held that its decisions in *Faretta* and *Godinez* did not, in fact, require the state to allow the defendant to represent himself, and accordingly, vacated the judgment of the Supreme Court of Indiana.[101]

The United States Supreme Court acknowledged that its jurisprudence, while helpful in framing the issue before the Court, was far from dispositive because the Court had never before explicitly considered the relationship between the mental competence standard and the right of self-representation.[102] The Court explained that even *Faretta*, its "foundational self-representation case," could not answer the question presented in *Edwards* because "it did not consider the problem of mental competency," and "*Faretta* itself and later cases . . . made clear that the right of self-representation is not absolute."[103]

The sole case in which the Court considered mental competence and self-representation together was *Godinez*.[104] However, *Godinez* proved to be of minimal assistance to the Court despite the fact that, like *Edwards, Godinez* involved "a mental condition that falls in a gray area between *Dusky's* minimal constitutional requirement that measures a defendant's ability to stand trial and a somewhat higher standard that measures mental fitness for another legal purpose."[105] The Court distinguished *Godinez* on two fundamental points. First, *Godinez* involved a defendant who

100. *Id.*

101. *Id.* at 179.

102. *Id.* at 169–70. The Court spoke explicitly of *Dusky v. United States*, 362 U.S. 402 (1960), and *Drope v. Missouri*, 420 U.S. 162 (1975), the two cases that set forth the Constitution's "mental competence" standard. *Id.* at 170.

103. *Edwards*, 554 U.S. at 170–71. In *Edwards*, the Court cited to *McKaskle v. Wiggins*, 465 U.S. 168, 178–79 (1984), noting that appointment of standby counsel over a *pro se* defendant's objection is permissible, and to *Faretta v. California,* 422 U.S. 806, 834–35 n.46 (1975), to explain that defendants do not have the right "to abuse the dignity of the courtroom," to avoid compliance "with relevant rules of procedural and substantive law," or to "engag[e] in serious and obstructionist misconduct." *Id.* at 171 (alteration in original).

104. *Edwards*, 554 U.S. at 171.

105. *Id.* at 172. The Court also noted, however, that there was a critical difference between the issue in *Godinez* and in *Edwards*. In *Godinez*, the higher standard sought to measure the defendant's ability to proceed on his own to enter a guilty plea; whereas in *Edwards*, "the higher standard seeks to measure the defendant's ability to conduct trial proceedings" and focuses explicitly on the defendant's ability to conduct his own defense. *Id.* at 173.

sought only to enter a guilty plea without counsel, and not to represent himself at trial.[106] Second, the trial court in *Godinez* sought to *permit* the defendant to represent himself, whereas in *Edwards*, the trial court sought to *deny* the defendant the right of self-representation.[107] Accordingly, the *Edwards* Court faced an open question as to what should be the proper standard for determining a *pro se* defendant's competence to conduct trial proceedings.[108]

In *Edwards,* the Court appears to have realized the impact that an improper or misguided determination of competence could have on a *pro se* defendant's right to a fair trial.[109] It cautioned against the use of a single mental competency standard to determine both whether a defendant represented by counsel could proceed to trial and whether a defendant who goes to trial must be permitted to represent himself.[110] The Court noted that there are many instances where "a right of self-representation at trial will not affirm the dignity of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel."[111] Quintessentially, *Edwards* suggests that fair adjudication is of greater concern and more fundamental to the adversary process than is the absolute preservation of a defendant's autonomy and dignity.[112]

The Court distinguished the issue presented in *Edwards* from prior cases by noting that its mental competence jurisprudence and the standard set forth in *Dusky* assume representation by counsel.[113] The Court remarked that "an instance in which a defendant who would choose to forego counsel at trial presents a very different set of circumstances" than an instance in which a defendant is represented by

106. *Id.*

107. *Id.*

108. *Id.* at 174; *see also* State v. Connor, 973 A.2d 627, 649 (Conn. 2009) (noting that the *Edwards* court "turned to the open question of the proper standard for determining a mentally ill defendant's competence to conduct trial proceedings").

109. 554 U.S. at 175.

110. *Id.* The Court explained that "[m]ental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways." *Id.*

111. *Id.* at 176 (quoting McKaskle v. Wiggins, 465 U.S. 168, 176–77 (1984)).

112. *Id.* at 177. It is important to note that *Edwards* did not overrule *Faretta*, or any of the other Sixth Amendment right of self-representation cases. Arguably, however, it did significantly weaken such cases.

113. *Id.* at 174.

counsel, and accordingly calls for a different standard.[114] *Edwards* makes clear "that the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so."[115] However, *Edwards* does not define what constitutes "mentally competent to conduct one's own defense." Thus, the appropriate standard for assessing the mental competence of *pro se* defendants remains ambiguous. Part III of this Note attempts to provide guidance to trial courts and articulate an appropriate standard for assessing a *pro se* defendant's competence to execute his own defense.

III. A HEIGHTENED COMPETENCY STANDARD FOR *PRO SE* DEFENDANTS

The issue of the gray-area defendant[116] raises doubt as to the adequacy of the *Dusky* competency standard when applied to *pro se* defendants. This is largely because a finding of competency to stand trial with the assistance of counsel does not necessarily equate to a finding that the defendant is competent to exercise the right of self-representation and to autonomously execute his own defense.[117] There can be little dispute that the criminal justice system can be confusing and difficult to navigate—especially for laypersons unfamiliar with criminal law and procedure. As the Court recognized and eloquently stated in a passage from *Powell v. Alabama*:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted

114. *Id.* at 174–75.

115. *Id.* at 177–78. It is worth clarifying that *Edwards* suggests that a trial court's inquiry into a defendant's competence to engage in self-representation be narrowly tailored to an assessment of *mental* competence. *Id.* at 178. *Edwards* does not grant a trial court unfettered discretion to conduct a searching inquiry into a defendant's ability to *successfully* represent himself before allowing him to proceed *pro se*, just to inquire into his competence to do so. *See* Jones v. Norman, 633 F.3d 661, 669 (8th Cir. 2011).

116. *See supra* text accompanying note 9.

117. *See* POYTHRESS ET AL., *supra* note 48, at 103–04.

> upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have [sic] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.[118]

When the right of self-representation is exercised by a defendant who lacks the competence and intellect to put on his own defense, the adversary system is no longer adversarial; it has failed.[119] The challenges of self-representation, if difficult for the average layperson, are certainly exacerbated for the gray-area defendant. There exists an inherent tension between a defendant's autonomy and the right of self-representation, on the one hand, and the due process right to a fair trial, on the other. The gray-area defendant exemplifies this tension—sufficiently competent to stand trial, but not to defend himself.

Using *Edwards* as guidance, this Part identifies the inadequacies of the *Dusky* competency standard as applied to *pro se* defendants, and in turn, attempts to articulate a more appropriate standard for assessing the competence of *pro se* defendants. Section A considers three practical reasons that strongly suggest the need for trial courts to adopt a heightened competency standard. Section B explains that because *Edwards* does not mandate trial courts to employ any particular test or adopt a heightened standard, trial courts retain discretion as to what standard to apply, if any. Accordingly, Section B articulates an appropriate standard that trial courts can employ to determine whether a defendant is competent to proceed *pro se*.

---

118. 287 U.S. 45, 69 (1932).

119. "[T]he accuracy of the factual determination of guilt becomes suspect when the accused lacks the effective opportunity to challenge it by his active involvement at the trial." Brief for the Am. Psychiatric Ass'n, *supra* note 4, at *13 (citing S. REP. NO. 98-225 at 232 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3414).

A. Practical Reasons Requiring a Heightened Standard

Currently, our system lacks adequate safeguards to ensure gray-area defendants are able to meaningfully participate in the adversarial process and receive fair trials. The gray-area defendant who wishes to exercise the right of self-representation presents a special case that warrants a particularized competency standard. This section explains that the competency standard, as articulated in *Dusky*, is inadequate as applied to *pro se* defendants because it only contemplates those defendants who are represented by counsel.

In *Edwards*, the Court recognized for the first time the predicament of the gray-area defendant. Although *Godinez* "reject[ed] the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the *Dusky* standard,"[120] *Godinez* did not address whether a higher competency standard should apply to *pro se* defendants.[121] Contrary to the general outlook expressed in *Godinez*, *Edwards* declared that "given the different capacities needed to proceed to trial without counsel, there is little reason to believe that [the] *Dusky* [competency standard] alone is sufficient."[122] In so holding, the Court recognized the possibility that there is a difference between a defendant's mental competence to stand trial with counsel and mental competence to proceed *pro se*.[123]

As a result of constitutional and statutory provisions prohibiting the adjudication of an incompetent defendant,[124] competency evaluations within both the state and federal systems are done routinely upon any indication of mental illness.[125] Accordingly, trial courts may deem it unnecessary to inquire into a defendant's competence to proceed *pro se* after they have already determined that the defendant is competent under *Dusky*[126] and that his waiver of the right to counsel was

120. Indiana v. Edwards, 554 U.S. 164, 172 (2008) (alteration in original) (quoting Godinez v. Moran, 509 U.S. 389, 398 (1993)).

121. *Edwards*, 554 U.S. at 174.

122. *Id.* at 177.

123. *Id.*

124. *See supra* text accompanying note 55; *see also* U.S. CONST. amend. XIV, § 1.

125. *See* Hashimoto, *supra* note 10, at 457 n.130 (citing Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921, 924 (1985) ("Virtually every criminal defendant who appears to be mentally ill at any time within the criminal trial process is examined for competency.")).

126. Dusky v. United States, 362 U.S. 402 (1960).

knowing, voluntary, and intelligent as required by *Zerbst*.[127] However, the failure to adopt a heightened competency standard to evaluate defendants who wish to proceed *pro se* and exhibit signs of mental illness or incompetence may cast serious doubt on the fairness of the defendant's trial.

In addition to fair trial concerns, a number of practical considerations encourage courts to adopt a heightened competency standard for defendants wishing to represent themselves. First, mental competence is not a unitary concept, and accordingly, warrants a more particularized, context-based standard.[128] Second, more extensive capabilities are required in order to effectuate self-representation than are needed to stand trial with counsel, and a competency determination should reflect the *pro se* defendant's heightened burden.[129] Third, a heightened competency standard is essential to ensure reliable adjudication and a fair trial.

First, because mental competence is not a unitary concept, trial courts should scrutinize more closely questions pertaining to a defendant's competency to proceed *pro se*. As the Court in *Edwards* noted, "there is little reason to believe that [the] *Dusky* [competency standard] alone is sufficient" to measure a defendant's competence to represent himself.[130] Generally, defendants are presumed to be competent unless and until their competency is challenged.[131] However, it is important to recognize that "[a]n individual can be competent for one purpose and not another."[132] For this reason, various legal competencies are generally treated as independent and discrete from one another.[133] An "adjudication of incompetence for one legal purpose usually does not render a person legally incompetent in another context."[134]

The ability of a defendant to comprehend and perform one set of tasks, such as those required to assist counsel, is not necessarily indicative of the ability of the defendant to perform

127. Johnson v. Zerbst, 304 U.S. 458, 468 (1938).

128. *See* Brief for the Am. Psychiatric Ass'n, *supra* note 4, at *18.

129. *Id.* at *20.

130. *See* Indiana v. Edwards, 554 U.S. 164, 177 (2008).

131. POYTHRESS ET AL., *supra* note 48, at 104. Studies suggest that attorneys have some doubt as to the mental capacity of their clients in approximately 8 to 15 percent of felony cases, but seek mental health evaluations in less than half of those cases. *Id.* at 37.

132. Brief for the Am. Psychiatric Ass'n, *supra* note 4, at *18; *see also* POYTHRESS ET AL., *supra* note 48, at 104.

133. POYTHRESS ET AL., *supra* note 48, at 104.

134. *Id.*

other tasks.[135] A defendant who is found competent to assist counsel may be incompetent to make specific decisions that arise regarding his defense.[136] Because competence is not a unitary concept, a heightened competence standard to assess *pro se* defendants would help to ensure that *pro se* defendants are competent not solely to stand trial, but to actively and meaningfully execute their own defenses.

Second, a heightened competency standard is warranted because self-representation requires a significantly higher level of competence and more extensive capabilities than those required of a represented defendant. Because the *Dusky* standard evaluates a defendant's competence only through his cognitive and communicative abilities to provide information to and interact with counsel, such a standard is inadequate for assessing the competence of a *pro se* defendant who must additionally be able to communicate coherently with all players in the criminal justice system and single-handedly create and control the organization of his own defense.[137]

A defendant represented by counsel need only be able to consult with his lawyer and have a rational and factual understanding of the criminal proceedings against him.[138] A represented defendant does not need to fully understand all of the elements of the crime with which he has been charged, nor does the defendant need to be competent to make proper evidentiary objections or identify weaknesses or strengths in the prosecution's case.[139] Additionally, a represented defendant does not need to be able to effectively communicate or engage

135. *Id.* at 47. For example, "[s]ome mentally disabled defendants who understand the process and their own situations are unable to assist counsel; and, conversely, a delusional defendant may be able to understand counsel's role and to relate relevant information" and thus effectively assist counsel in formulating a defense. *Id.*

136. *Id.*

137. *Id.* at 22. In a series of studies that examined attorney-client interactions, attorneys' perception of their clients' competency, and the defendant's decision-making prerogatives and participation in the defense, more than half of the defendants studied were considered "passive participants in the overall defense." *Id.* at 37. The studies also found that the prevalence of reported client passivity was substantially higher among clients whose competence was doubted by their representing attorneys. *Id.* Consequently, a represented defendant, who suffers from mental or cognitive impairments, but who is found competent to stand trial under *Dusky*, to a large extent need not exert himself or actively participate to avail himself of a viable defense—for counsel will serve as his advocate. His unrepresented counterpart, however, may not sit idly by, and must actively participate in his defense, for he has no other advocate than himself. *See id.* at 38.

138. *See* Dusky v. United States, 362 U.S. 402, 402–03 (1960).

139. *See* Brief for the Am. Psychiatric Ass'n, *supra* note 4, at *24.

with anyone other than defense counsel.

Conversely, a *pro se* defendant must be able to understand, substantively and procedurally, everything going on at trial so that he can construct a defense, an ability that goes far beyond that required of a represented defendant. When a defendant represents himself, he alone must have the cognitive and communicative abilities to effectuate a defense.[140] To put on a defense, a *pro se* defendant must be able to do more than merely understand, appreciate, and reason.[141] A *pro se* defendant must be able to effectuate such understanding by controlling the organization and content of his own defense, and do so throughout the trial by presenting and arguing motions and points of law before the court, participating in *voir dire*, questioning witnesses, and addressing the judge and jury at appropriate points.[142]

Moreover, a *pro se* defendant must possess written and oral communication skills and be able to convey relevant points to all the players in the trial.[143] A *pro se* defendant must be able to effectively communicate relevant matters to the judge, jury, opposing counsel, and witnesses. "From the jury's perspective, the message conveyed by the defense may depend as much on the messenger as on the message itself."[144] Therefore, if a jury perceives a *pro se* defendant as incompetent, any viable defense he presents may be of questionable credibility.

A defendant who suffers from "[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illness" may well be able to play the role of represented defendant, but such symptoms may impair the defendant's ability to play the significantly expanded role required for self-representation.[145]

Third, mental illnesses pose a genuine threat to reliable adjudication and to the constitutional right to a fair trial.[146] Accordingly, policy considerations support the adoption of a heightened competency standard not only to further the likelihood of a fair trial within the confines of the adversary

140. Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938).
141. *See, e.g.*, POYTHRESS ET AL., *supra* note 48, at 46–47.
142. McKaskle v. Wiggins, 465 U.S. 168, 174 (1984).
143. *See* Brief for the Am. Psychiatric Ass'n, *supra* note 4, at *23–24.
144. *McKaskle*, 465 U.S. at 179.
145. Brief for the Am. Psychiatric Ass'n, *supra* note 4, at *26.
146. POYTHRESS ET AL., *supra* note 48, at 40.

system, but also to preserve the dignity of the gray-area defendant.[147] As the *Edwards* Court noted, "the spectacle that could well result [from permitting a gray-area defendant to represent himself] . . . is at least as likely to prove humiliating as ennobling."[148] Thus, trial courts confronted with a gray-area defendant who seeks to proceed *pro se*, should inquire into the defendant's competence by evaluating his ability to carry out the basic tasks needed to present a defense, make decisions, weigh advantages and disadvantages, and communicate coherently with others.

B. Edwards: *A Matter of Discretion and a Chance for an Expanded Competency Inquiry*

Edwards held that the Constitution *permits* a state to force representation upon a defendant who falls within the so-called gray area of mental competence. It neither adopted nor advocated the adoption of any particularized competency test for *pro se* defendants.[149] The Court left open to the states the option and task of establishing a heightened competency standard, suggesting only that the competency inquiry need not be confined to an analysis under *Dusky*.[150] In doing so, the Court provided very little guidance as to what additional competency inquiry, if any, trial courts should employ.

---

147. Indiana v. Edwards, 554 U.S. 164, 176 (2008); People v. Davis, No. 07CA1955, 2012 Colo. App. LEXIS 13, at *16 (Colo. App. Jan. 5, 2012).

148. *Edwards*, 554 U.S. at 176. This is not to say that being denied the right of self-representation because one is deemed incompetent to proceed *pro se* may not be equally or even more humiliating than performing incompetently and poorly in trial. However, the Constitution requires that defendants receive due process and a fair trial, and prohibiting the gray-area defendant from proceeding *pro se* may be the only way to ensure such constitutional guarantees are met. *See* U.S. CONST. amend. XIV, § 1.

149. *Edwards*, 554 U.S. at 178. The *Edwards* Court declined to adopt Indiana's proposed standard. In its brief to the Supreme Court, the State of Indiana advocated that the Court adopt a "coherent-communication rule" that would permit the court to "deny a criminal defendant the right to represent himself at trial where the defendant cannot communicate coherently with the court or a jury." *Id.* (quoting Brief for Petitioner at 20, Indiana v. Edwards, 554 U.S. 164 (2008) (No. 07-208)). The State argued that the proposed rule was narrowly tailored and would "ensure that *pro se* defendants have the most basic skills necessary to effectuate their decision to try their own cases." Reply Brief for Petitioner at 9, *Edwards*, 554 U.S. 164 (No. 07-208). The rule would not have allowed a trial court to deny the right of self-representation to a defendant who happened to suffer a mental impairment of some kind, but who, nonetheless, was still able to communicate in a reliable and coherent manner. *Id.* at 13.

150. *Edwards*, 554 U.S. at 178.

Courts have long had a duty to ensure that the adjudication of a criminal defendant proceed only if the defendant is competent.[151] A trial court may *sua sponte* request a defendant to undergo a competency evaluation at any time after the commencement of a prosecution for an offense.[152] Pursuant to 18 U.S.C. § 4241(a), for example, a federal trial court *must* order a competency hearing "if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense."[153] Regardless of whether a defendant is represented by counsel or *pro se*, a trial court will generally order a competency evaluation where a defendant manifests any sign of mental illness.[154]

Where a trial court suspects that a defendant falls within the gray area of mental competency "between *Dusky's* minimal constitutional requirement . . . and a somewhat higher standard,"[155] the court ought to expand its competency inquiry. Consider, for example, a defendant who is deemed competent under *Dusky,* but who suffers from cognitive disabilities and is illiterate. Or imagine a defendant who, although able to communicate and understand the proceedings against him, suffers from delusions and exhibits extreme and bizarre behavior. Although likely competent under *Dusky*, such defendants would likely be incapable of adequately and competently executing their own defenses without the assistance of counsel.

Although *Edwards* does not *require* state trial courts to employ a particular test or adopt a heightened standard to determine a defendant's competence to represent himself,[156] it

151. *See, e.g.*, Dusky v. United States, 362 U.S. 402, 402 (1960).

152. 18 U.S.C. § 4241 (2006). In federal criminal prosecutions, 18 U.S.C. § 4241 protects a defendant's procedural due process rights. District courts possess the authority to order the psychiatric or physical examination of a defendant, as well as to order competency hearings. *Id.* The Due Process Clause of the Fourteenth Amendment provides a procedural right to a competency hearing in state prosecutions. *See* Pate v. Robinson, 383 U.S. 375, 384–85 (1966).

153. 18 U.S.C. § 4241 (2006). Note that even this federal statute couches the competency analysis in terms of the *Dusky* standard; the phrase "assist properly in his defense" implies that the defendant is in fact assisting in—not executing single-handedly—his defense.

154. *See* Hashimoto, *supra* note 10, at 428.

155. *Edwards*, 554 U.S. at 172.

156. *See* United States v. DeShazer, 554 F.3d 1281, 1290 (10th Cir. 2009)

does make clear that trial courts retain the discretion to do so. *Edwards* explains that judges are permitted "to take realistic account of [a] particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so."[157] The Court noted that trial judges are often in the best position to make "fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant."[158]

Accordingly, trial courts can, and should, engage in an additional competency inquiry. This Note proposes that courts adopt a three-part analysis to assess a defendant's competence to proceed *pro se* by evaluating: (1) whether the defendant is competent to stand trial under *Dusky*; (2) whether the defendant has voluntarily, knowingly, and intelligently waived the right to counsel under *Johnson v. Zerbst*;[159] and (3) whether the defendant is mentally competent to defend himself without the assistance of counsel.[160] The first two prongs of the suggested analysis are already mandated by law and have been employed by criminal trial courts for decades.[161] They warrant no further explanation. As *Edwards* just recently opened the door for trial courts to employ a third, additional prong, the following subsections will focus on, and further develop, this

(stating that *Edwards* "reaffirmed that a court may constitutionally permit a defendant to represent himself so long as he is competent to stand trial"); United States v. Turner, 644 F.3d 713, 724 (8th Cir. 2011) (citation omitted) (explaining "*Edwards* clarified that district court judges have discretion to force counsel upon the discrete set of defendants competent to stand trial but incompetent to represent themselves. It does not mandate two separate competency findings for every defendant who seeks to proceed pro se."); United States v. VanHoesen, No. 10-0713-cr, 2011 U.S. App. LEXIS 24557, at *8–9 (2d Cir. Dec. 9, 2011) (noting that "since [*Edwards*], of course, the issue [of determining competency] is a little bit different, and the issue is now whether or not you're capable of representing yourself."); People v. Davis, No. 07CA1955, 2012 Colo. App. LEXIS 13, at *2 (Colo. App. Jan. 5, 2012).

157. *Edwards*, 554 U.S. at 177–78.

158. *Id.* at 177. "[C]ompetence assessment and adjudication tends to be a low-visibility, highly discretionary feature of the criminal process, rarely coming to public attention, and rarely generating appealable error. . . . Operationally, the salient truth about the law of adjudicative competence is that asking the question is more important than getting the 'right' answer." POYTHRESS ET AL., *supra* note 48, at 42.

159. 304 U.S. 458, 465 (1938).

160. *See, e.g.*, *Edwards,* 554 U.S. at 177–78; *see also* POYTHRESS ET AL., *supra* note 48, at 40 (noting that "[t]he concept of adjudicative competence [under *Dusky*] conveys a fairly passive view of the defendant's role in criminal proceedings").

161. *See* Dusky v. United States, 362 U.S. 402, 402 (1960); *Zerbst*, 304 U.S. at 465.

inquiry.

In determining whether a defendant who seeks to proceed *pro se* at trial is mentally competent to do so, the trial court should consider: (1) the facts of the case and the record before the court; (2) the court's in-person interaction with the particular defendant;[162] and (3) the defendant's ability to "carry out the basic tasks needed to present his own defense without the help of counsel."[163] If the trial court finds that a defendant lacks the competence to advocate on his own behalf and conduct his defense without the assistance of counsel, the trial court has the discretion, under *Edwards*, to deny the defendant's request to proceed *pro se*.[164] Each of the aforementioned factors will be addressed in turn.

1. The Facts of the Case and Record

The determination of competence is fundamentally a normative judgment and one that is necessarily highly contextual.[165] When a court is faced with a defendant who has expressed a desire to proceed to trial *pro se*, the court's competency inquiry should start with a review of the record and an evaluation of the particular facts of the defendant's case.[166]

The court should consider whether the facts of the case or record indicate any prior medical or psychiatric examinations or any past diagnosis of mental illness or defect.[167] Where a

162. *See* United States v. Brown, No. 1:09-CR-30-GZS, 2009 U.S. Dist. LEXIS 130246, at *2 (D.N.H. June 2, 2009).

163. *See* United States v. Thompson, 587 F.3d 1165, 1172 (9th Cir. 2009) (quoting *Edwards,* 554 U.S. at 175–76).

164. *See Thompson*, 587 F.3d at 1171; People v. Davis, No. 07CA1955, 2012 Colo. App. LEXIS 13, at *14–15 (Colo. App. Jan. 5, 2012); People v. Wilson, No. 09CA1073, 2011 Colo. App. LEXIS 2172, at *15 (Colo. App. June 23, 2011). In the event the trial court deems the defendant incompetent to proceed *pro se*, the trial court has two options: (1) it may appoint standby counsel, McKaskle v. Wiggins, 465 U.S. 168, 170 (1984), or (2) it may appoint counsel to represent the defendant, *see Edwards*, 554 U.S. at 164.

165. POYTHRESS ET AL., *supra* note 48, at 41.

166. Note that a trial court's inquiry into the facts of the defendant's case should not entail an investigation into the facts as they pertain to the crime(s) for which the defendant is charged, but rather an inquiry into the more general facts demonstrative of the defendant's interaction with the criminal justice system and potentially relevant to the defendant's competence (i.e., the number of times the defendant has appeared before a criminal court, whether in connection to a prior case or the present case and whether the defendant was represented by counsel or proceeded *pro se* at the time of those appearances).

167. *See* United States v. Turner, 644 F.3d 713, 722–23 (8th Cir. 2011); United

defendant's record contains reference to psychiatric history, medical opinions, or notes regarding the defendant's competence to stand trial or his competence to proceed *pro se*, the court should consider such opinions with care.[168]

The court should also review the record to determine whether it has previously warned the defendant—and whether the defendant exhibits an understanding—of the dangers and disadvantages of self-representation.[169] Where a review of the documentary record demonstrates that a defendant has been warned of the dangers of self-representation yet has chosen to continue *pro se,* and where the record demonstrates that the defendant has made a substantial number of filings on the docket and submitted reasonable and substantively valid motions, the court may be inclined to find that the defendant rationally understands the process and is competent to conduct his own defense. Conversely, the court may be hesitant to presume competency where the defendant has not made any filings, or has made only nonsensical filings that indicate a lack of decisional competence,[170] and where the record is silent on whether the defendant has been warned about the dangers of self-representation.

Similarly, when review of the defendant's record shows that the defendant has had previous encounters with the law and the criminal adjudicative process, it may suggest that the defendant is at least versed in the procedural and substantive rules of criminal law.[171] While the defendant's prior court experience is by no means determinative of competency, when viewed in conjunction with other factors, it may help inform

States v. DeShazer, 554 F.3d 1281, 1286 (10th Cir. 2009).

168. *See Turner*, 644 F.3d at 721.

169. *See id.* at 722.

170. Understood under the Court's competence jurisprudence, decisional competence is "the capacity to: (1) understand information relevant to the specific decision at issue (understanding), (2) appreciate the significance of the decision as applied to one's own situation (appreciation), (3) think rationally (logically) about the alternative courses of action (reasoning), and (4) express a choice among alternatives (choice)." POYTHRESS ET AL., *supra* note 48, at 48.

171. *See* United States v. Brown, No. 1:09-CR-30-GZS, 2009 U.S. Dist. LEXIS 130246, at *2–3 (D.N.H. June 2, 2009). Note that a defendant's "technical legal knowledge" is not relevant to an assessment of his knowing exercise of his right to defend himself or of his competence to do so. *See* Faretta v. California, 422 U.S. 806, 836 (1975). However, in determining the defendant's competence to proceed *pro se*, the court may consider the nature and extent of the defendant's past interaction with the adjudicative process. If he has previously navigated the system without the assistance of counsel, that may perhaps demonstrate his understanding and competence to proceed *pro se* in the present matter.

the trial court's determinatio

2. The Court's Interaction with the Defendant

As *Edwards* made clear, a trial judge is often in the best position to evaluate a defendant and determine the defendant's competence to proceed *pro se*.[172] Because a trial judge usually has the opportunity to interact with and observe the defendant on numerous occasions and at various stages prior to trial, the trial court should use such opportunities to carefully examine the defendant with an eye toward assessing the defendant's competency.

In evaluating whether a defendant is competent to represent himself at trial, the court should consider its own observations of the defendant's behavior and demeanor in the courtroom.[173] The defendant's demeanor when appearing before the court may be indicative of the defendant's competency to represent himself.[174] Where the defendant's interactions with the court have been sporadic, inconsistent, or bizarre, or where his responses to court inquiries have been irrational and absurd, the trial court may be justified in doubting the defendant's competence to proceed *pro se* and, at minimum, in ordering a competency evaluation.[175]

However, where the trial court's interaction with and observation of the defendant suggest that the defendant has an active interest in proceeding *pro se*, and where his responses to court inquiries have been rational and suggest that the defendant has independently performed legal research, the defendant may be sufficiently competent to defend himself.[176]

172. Indiana v. Edwards, 554 U.S. 164, 177 (2008).

173. *See* United States v. DeShazer, 554 F.3d 1281 (10th Cir. 2009); *Turner,* 644 F.3d at 721; *see also* Griffin v. Lockhart, 935 F.2d 926, 930 (8th Cir. 1991).

174. *See, e.g.*, *DeShazer*, 554 F.3d at 1286; United States v. Berry, 565 F.3d 385, 387 (7th Cir. 2009); United States v. Thompson, 587 F.3d 1165, 1173 (9th Cir. 2009); Brooks v. McCaughtry, 380 F.3d 1009, 1011 (7th Cir. 2004); United States v. Saba, 837 F. Supp. 2d 702, 711 (W.D. Mich. 2011).

175. Bizarre behavior alone may not render the defendant incompetent to proceed *pro se*. However, it may, and perhaps properly should, cause the trial court to consider ordering a competency evaluation of the defendant. *See Berry*, 565 F.3d at 387.

176. *See* United States v. VanHoesen, No. 10-0713-cr, 2011 U.S. App. LEXIS 24557, at *8–9 (2d Cir. Dec. 9, 2011).

3. The Defendant's Ability to Present His Defense

After reviewing the record and critically observing the defendant, the court should be able to move on to a "totality" analysis and evaluate the defendant's ability to "carry out the basic tasks needed to present his defense in counsel's absence."[177] When presented with a defendant who, for one reason or another, the court deems incompetent to carry out even the most elementary tasks necessary to conduct a defense, the trial court should deny the defendant's request to proceed *pro se*. To grant the request under such circumstances would effectively deny the defendant a fair trial.

Here, the court should rely largely on its knowledge of the defendant's record and the court's observations of the defendant, in addition to any other pertinent information that may inform the court's judgment as to the defendant's ability to make rational decisions, weigh advantages and disadvantages, and communicate coherently.[178] A determination that the defendant is able to make decisions in a self-interested manner supports the presumption that the defendant is competent and able to carry out his own defense.[179] Similarly, the defendant's decision-making abilities may be apparent where the defendant is "able to articulate a defense strategy and [a] readiness to attempt it."[180] To find the defendant competent to proceed *pro se,* the court need not find the defendant's choice or strategy to be the "best legal approach," only that it is rational.[181] A determination that the defendant is stricken with delusional or irrational thoughts, however, should lead the court to some level of suspicion as to the defendant's competency to represent himself.

The ability to communicate coherently is one of the most basic and fundamental tasks required to present a defense.[182] To be able to defend himself, a *pro se* defendant must possess written communication capabilities, as he must: file motions; prepare and submit other written materials, such as proposed

177. *See* People v. Davis, No. 07CA1955, 2012 Colo. App. LEXIS 13, at *23 (Colo. App. Jan. 5, 2012).

178. *Saba*, 837 F. Supp. 2d at 710–11. Other pertinent information may include any clinical or psychiatric reports prepared to assist in evaluating the defendant's competency to proceed *pro se*. *Id.*

179. Brief for the Am. Psychiatric Ass'n, *supra* note 4, at *30.

180. *Saba*, 837 F. Supp. 2d at 709.

181. *Id.*

182. Brief for the Am. Psychiatric Ass'n, *supra* note 4, at *22.

jury instructions, evidentiary exhibits, and affidavits; and be able to read and understand written materials as provided.[183] In addition, the *pro se* defendant must have oral communication skills.[184] "The *pro se* defendant's speaking role commonly includes *voir dire*, opening statement, objections, cross-examination of prosecution witnesses, direct examination of defense witnesses, and closing argument."[185] Absent the capability to make rational decisions and communicate coherently, the court should be hesitant to find the defendant competent to proceed *pro se*.

Once the court has taken into consideration the facts and record of the defendant's case and the court's in-person interaction with the particular defendant, the court should be in a position to critically assess whether the defendant is able to carry out the basic tasks needed to present a defense without the help of counsel. Where the court finds, after this three-part analysis, that the defendant is not competent to represent himself, the court may, in its discretion, appoint counsel to assist the defendant.

CONCLUSION

The right of self-representation is deeply ingrained in the Anglo-American system of justice, but so is the requirement that a criminal defendant be tried only if competent to participate in the adjudication of his case. Neither should be tread on lightly.

The Supreme Court's holding in *Indiana v. Edwards* is not novel in the sense that American courts have historically recognized and adhered to the requirement that defendants be tried only if found competent to stand trial. *Edwards* is remarkable, however, in that it recognizes for the first time that competence to stand trial may not equate to competence to proceed *pro se*. The level of mental competence necessary to single-handedly execute one's own defense at trial is much higher than that required of represented defendants. *Edwards* provides courts with the authority and discretion to determine whether a particular defendant is competent not only to stand trial *with* the assistance of counsel, but also whether that defendant is competent to stand trial *without* the assistance of

183. *Id.* at *23.
184. *Id.* at *24.
185. *Id.*

counsel.

In many circumstances, the right of self-representation does not conflict with or impede due process. By and large, defendants who choose to represent themselves are able to competently and effectively exercise the right of self-representation, affirm their autonomy while retaining their dignity, and play the role of master of their own defense—and destiny. But a heightened competency standard is necessary to aid trial courts in determining which defendants fall within the gray area between the minimal level of competence as required under *Dusky* and the mental competence required to execute one's defense without the assistance of counsel.

The heightened competency standard proposed in this Note establishes a foundation that facilitates courts' recognition of gray-area defendants so that they are better able to determine when to appoint counsel to assist in a defendant's defense, and thereby preserve fairness in the adversary system and safeguard the gray-area defendant's due process rights. States should adopt and implement this heightened standard to assess those defendants who wish to proceed *pro se* by interpreting their respective state due process clauses to require the heightened standard.

THE LITIGATION FINANCING INDUSTRY: REGULATION TO PROTECT AND INFORM CONSUMERS

MARTIN J. ESTEVAO*

Litigation financing companies ("LFCs") provide nonrecourse cash advances to plaintiffs in exchange for a portion of their lawsuits' potential future proceeds. While this arrangement allows individuals to continue to litigate without having to accept unjust settlement offers, desperate consumers are often forced to pay inequitable interest rates for the cases they finance. Because there is no absolute obligation to repay the LFC, the industry manages to avoid regulation under state interest rate ceilings for consumer loans. The few existing litigation financing laws do not restrict the interest rates that LFCs may charge, and even if some courts are willing to strike down egregiously unfair litigation financing agreements on a case-by-case basis, existing regulation fails to sufficiently protect consumers. On the other hand, overly strict interest rate ceilings on litigation financing agreements may foreclose the practice altogether. In order to preserve the benefits of litigation financing while protecting those who are desperate enough to need it, this Comment prescribes measures that would prevent predatory behavior and ensure reasonable profits for LFCs. Express statutory restrictions would prevent LFCs from reaping unreasonable profits, especially for the financing of lawsuits that practically guarantee sufficient settlements. States should also develop an online litigation financing "marketplace" that would offer updated business information, interest rate data, and customer reviews for each LFC. With transparent access to the industry, this centralized resource would promote consumer choice, expand

* J.D. Candidate, 2013, University of Colorado Law School; B.A., Stanford University, 2008; Associate Editor, *University of Colorado Law Review*. The author thanks Professor Amy Schmitz and the members of the *University of Colorado Law Review* for their guidance and editing assistance. The author also thanks his partner, Carlin, for her everlasting love and support.

access to litigation financing, and organically stimulate market competition.

INTRODUCTION

Imagine the following scenario: During a cross-country haul, a truck driver for a major freight company dozes off and veers into oncoming traffic. To avoid a direct collision, an uninsured single mother swerves into the guardrail and sustains severe injuries. She undergoes intensive surgery and must spend several months bedridden before she can work again. Her attorney is experienced, but it may take years to collect adequate compensation in court. With sufficient resources, she and her family could endure prolonged litigation against this wealthy defendant, whose insurers may strategically delay the case.[1] However, without family support or credit lines to help pay for medical bills, mortgage payments, and day-to-day expenses, she feels compelled to accept the

1. Defendants may purposefully hinder the progress of litigation in order to force cash-strapped plaintiffs to accept reduced settlements. *See* Susan Lorde Martin, *Litigation Financing: Another Subprime Industry That Has a Place in the United States Market*, 53 VILL. L. REV. 83, 102 (2008) [hereinafter Martin, *Another Subprime Industry*].

company's unreasonably low settlement offer.[2] Until the advent of litigation financing, she may have had no other option.[3]

Today, dozens of litigation financing companies (LFCs) provide cash advances to injured plaintiffs to cover pressing bills and living expenses.[4] In exchange for financial support during the pendency of a plaintiff's claim, the LFC receives a portion of the lawsuit's potential future proceeds.[5] Such an arrangement allows individuals to continue to litigate without the fear that financial need will force them to accept inequitable settlement offers.[6] Unlike traditional loans, which typically require unconditional repayment of the principal plus interest, litigation financing agreements are "nonrecourse."[7] The plaintiff only repays the LFC with the proceeds of her lawsuit, and owes nothing in the event of an unfavorable judgment.[8] Because there is no absolute obligation to repay the LFC, the industry typically manages to avoid regulation under state interest rate ceilings for consumer loans.[9]

Notwithstanding the nonrecourse structure of litigation financing agreements, LFCs are able to charge unreasonable interest rates based upon exaggerated risk projections.[10] Even

2. *See id.*

3. Under the Model Rules of Professional Conduct, it is an ethical violation for a plaintiff's attorney to provide financial assistance to clients for living expenses. MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (2009).

4. LFCs commonly market the practice of litigation financing as "litigation funding," "legal funding," or "lawsuit funding." *See* Lauren J. Grous, *Causes of Action for Sale: The New Trend of Legal Gambling*, 61 U. MIAMI L. REV. 203, 205–06 (2006-2007). According to one large LFC, over 60 percent of the financing it provides to plaintiffs is used to prevent foreclosure or eviction actions. *Facts About ALFA*, AM. LEGAL FIN. ASS'N, http://www.americanlegalfin.com/FactsAboutALFA.asp (last visited Feb. 9, 2012).

5. Grous, *supra* note 4, at 204. While smaller LFCs generally focus on personal injury lawsuits, larger LFCs can finance a wide variety of different claims including product liability, worker's compensation, patent infringement, breach of contract, and even civil rights suits. *See Pre Settlement Lawsuit Funding*, OASIS LEGAL FIN., http://www.oasislegal.com/oasis_lawsuit_funding_case_types (last visited Feb. 10, 2012); *Eligible Cases*, LAWCASH, http://www.lawcash.net/html/case-types.html (last visited Feb. 10, 2012).

6. Courtney R. Barksdale, *All That Glitters Isn't Gold: Analyzing the Costs and Benefits of Litigation Finance*, 26 REV. LITIG. 707, 734–35 (2007).

7. Cynthia Bulan, *A Small Question in the Big Statute: Does Section 402 of Sarbanes-Oxley Prohibit Defense Advancements?*, 39 CREIGHTON L. REV. 357, 374–77 (2005–2006).

8. Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55, 55 (2004–2005) [hereinafter Martin, *The Wild West*].

9. Barksdale, *supra* note 6, at 723; Fausone v. U.S. Claims, Inc., 915 So. 2d 626, 630 (Fla. Dist. Ct. App. 2005).

10. Jason Lyon, *Revolution in Progress: Third-Party Funding of American*

where a plaintiff's case would almost certainly yield a definite and substantial settlement, an LFC can reap tremendous profits.[11] For example, a claim involving serious injuries and admitted wrongdoing practically ensures that the LFC will recover the principal plus significant interest. Finding that such arrangements virtually guarantee repayment to the LFC, some courts have voided or re-written individual litigation financing agreements as traditional loans subject to low interest rate ceilings.[12]

Within the past twenty years, litigation financing has developed from a fledgling practice into a prevalent, yet under-regulated, financial service.[13] The Rand Institute for Civil Justice described it as one of "the biggest and most influential trends in civil justice."[14] Despite industry growth and the unchecked potential for predatory LFC behavior, litigation financing remains completely unregulated in most states.[15] In the handful of states that have actually passed litigation financing laws, there are no caps on the interest rates that LFCs may charge.[16] Even if some courts are willing to strike down egregiously unfair litigation financing agreements on a case-by-case basis, existing regulation fails to sufficiently

---

Litigation, 58 UCLA L. REV. 571, 575 (2010–2011); *see also* Echeverria v. Estate of Lindner, No. 018666/2002, 2005 WL 1083704, at *8 (N.Y. App. Div. Mar. 2, 2005) ("[This] is a strict liability labor law case where the plaintiff is almost guaranteed to recover. There is low, if any risk. This is troubling considering the enormous profits that will be made from the rapidly accruing, extremely high interest rates they are charging.").

11. *See Echeverria*, 2005 WL 1083704, at *8.

12. *See id.*; Rancman v. Interim Settlement Funding Corp., 2001 Ohio App. LEXIS 4818, at *8 (Ohio Ct. App., Oct. 31, 2001); Lawsuit Fin., L.L.C. v. Curry, 683 N.W.2d 233, 239 (Mich. Ct. App. 2004). However, some courts acknowledge that the industry provides a benefit to consumers. *See, e.g.*, *Fausone*, 915 So. 2d at 630 ("A person who suffers a severe personal injury will often need money to care for herself and her family during the pendency of litigation. Lawsuits take time and come with few guarantees. Grocery stores and home mortgage lenders do not wait for payment merely because a person is unable to work due to an automobile accident or other injury.").

13. Martin, *Another Subprime Industry*, *supra* note 1, at 84–85. According to a recent *New York Times* article, LFCs advance a total of over $100 million per year to individual plaintiffs. Binyamin Appelbaum, *Lawsuit Loans Add New Risk for the Injured*, N.Y. TIMES (Jan. 16, 2011), http://www.nytimes.com/2011/01/17/business/17lawsuit.html?_r=3&emc=eta1 [hereinafter Appelbaum, *Lawsuit Loans*].

14. Laurel Terry, *Regulation Won't be Easy*, N.Y. TIMES (Nov. 15, 2010), http://www.nytimes.com/roomfordebate/2010/11/15/investing-in-someone-elses-lawsuit/regulating-the-industry-wont-be-easy.

15. Appelbaum, *Lawsuit Loans*, *supra* note 13.

16. *See*, *e.g.*, OHIO REV. CODE ANN. § 1349.55 (West 2008).

protect consumers.[17]

Conversely, some courts and regulators have imposed overly strict interest rate ceilings on litigation financing agreements. Most recently, the Denver District Court held that litigation financing agreements are loans subject to interest rate regulations under the state's usury laws.[18] While it is true that LFCs would be unable to set predatory rates if states regulated them as loans, cash-strapped plaintiffs would no longer have access to immediate funding if LFCs are "regulated out of business."[19] Due to the duration and unpredictability of litigation, steep operating costs, and absence of any interim payments, LFCs cannot finance lawsuits at traditional consumer loan rates.[20] If over-regulation cuts off access to litigation financing, cash-strapped plaintiffs will not have a fighting chance to keep their homes, provide for their families, and secure larger settlements from liable parties.[21]

In order to preserve the benefits of litigation financing while protecting those who are desperate enough to need it, this Comment prescribes measures that would prevent predatory behavior and ensure reasonable profits for LFCs. It is crucial for states to implement graduated interest rate ceilings for litigation financing agreements that are fairly

17. *See infra* Part II.

18. Oasis Legal Fin. Grp. v. Suthers, No. 10CV8380, at 6 (D. Colo. Sept. 28, 2011). This decision was the result of the Colorado Attorney General's counterclaim to a lawsuit filed by Illinois-based Oasis Legal Finance and Brooklyn-based LawCash, two of the most influential and profitable LFCs in the nation. The companies alleged that Colorado was impermissibly categorizing litigation financing agreements as loans under the state's Uniform Consumer Credit Code. Ali McNally, *Colorado AG Questions Legitimacy of Pre-Settlement Legal Financing Companies*, L. WEEK COLO. (Jan. 11, 2011), http://www.lawweekonline.com/2011/01/colorado-ag-questions-legitimacy-of-pre-settlement-legal-financing-companies/.

19. Martin, *The Wild West*, *supra* note 8, at 68 ("It would be bad policy and unfair to poor plaintiffs with good cases to regulate litigation financing firms out of business. . . . [V]ery restrictive anti-predatory lending laws that set low limits on interest rates may, instead of protecting subprime borrowers, actually disadvantage them further by reducing their options."). Indeed, the lawsuit prompted Oasis and LawCash to completely pull operations from Colorado rather than license themselves as state lenders subject to interest rate ceilings on consumer loans. *See* McNally, *supra* note 18.

20. Barksdale, *supra* note 6, at 710.

21. One commentator noted, "Although some funders have probably charged more than the risk they were undertaking required, emphasizing that aspect of the industry encourages onlookers to ignore the more important justice issue: how can poor plaintiffs collect what's owed them by wealthy defendants who wrongfully injured them?" Martin, *Another Subprime Industry*, *supra* note 1, at 84.

proportional to the LFC's risk.[22] Express statutory restrictions would prevent LFCs from reaping unreasonable profits, especially for the financing of lawsuits that practically guarantee sufficient settlements. In conjunction with equitable rate caps, states should also develop an online litigation financing "marketplace" that would offer updated business information, interest rate data, and customer reviews for each LFC. With transparent access to the industry, this centralized resource would promote consumer choice, expand access to litigation financing, and organically stimulate market competition.

Part I explains the typical litigation financing process, sheds light on the potential risks to consumers, and summarizes industry efforts to self-regulate LFC rates and standards of practice. Focusing on the putative risks assumed by the LFC in a litigation financing agreement, Part II examines the concept of "true contingencies" under traditional interpretations of usury law. Part II also discusses judicial decisions applying usury law to invalidate litigation financing agreements. Part III argues that existing regulations are either too lenient or too onerous. Concentrating on the recent Colorado decision, Part III first addresses overly aggressive efforts to regulate litigation financing agreements as traditional loans. Part III then outlines the watered-down state laws that legitimize the industry and provide some bedrock protections, but fail to actually restrict interest rates. Finally, Part IV recommends specific measures that states should adopt in order to protect and inform consumers, expand access to litigation financing, and stimulate market competition.

I. LFC BARGAINING AND LOBBYING POWER

An overview of the industry and the typical litigation financing process highlights the practice's current pitfalls. On top of deceptive marketing and burdensome applications, the consumer often has no meaningful options in the selection of an LFC. With no way to efficiently compare companies and rates, prices remain inflated and desperate consumers cannot make cost-effective judgments. The opaque nature of the practice is particularly distressing given its high cost, the plaintiff's

22. As discussed in Part IV, *infra*, an LFC's risk may be reasonably quantified through an objective analysis that considers individual case facts, the extent of the plaintiff's injuries, the defendant's resources, and several other factors.

urgent need for money, and the industry's vigorous opposition to regulation. Despite the benefit that LFCs provide, consumers will remain unfairly disadvantaged until states buck industry power and adopt measures to restrict rates and improve consumer choice. This Part addresses consumer perils in the LFC selection and application process, as well as the terms of the litigation financing agreement itself. This Part also describes the lobbying efforts of the American Legal Finance Association, which serves as the industry's trade association.

A. The Litigation Financing Process

The lack of meaningful choice in the litigation financing process disadvantages consumers, who are bombarded with advertisements with no means to effectively assess the options. Ratings and customer reviews are extremely rare, and consumers cannot efficiently access the interest rates that LFCs charge.[23] Most LFC websites do not publish their average rates or even advise consumers of the steep cost of litigation financing.[24] As a result, consumers are left to compare LFCs based only on the appearances and rhetoric of company websites. After seeing the same sugar-coated marketing pitches again and again, LFC websites appear almost indistinguishable.[25]

---

23. Very few LFCs publish approximate interest rates directly on their websites. *But see Rate Comparison for Lawsuit Loans*, FAIR RATE FUNDING, http://www.fairratefunding.com/pending-lawsuit-settlement-loans-litigation.html (last visited Feb. 10, 2010). Oasis phone representatives give approximate rate quotes based on the state where the caller is located, without any knowledge of the type of case or its specific facts. Oasis told this author during a phone call, for example, that he would have to repay $750 for a $500 advance after six months. The Oasis representative also noted that the company only communicates rate information over the phone.

24. Most LFCs do not explain the lack of published information on interest rates and fees. While Oasis does admit that litigation financing is "expensive," it does not provide its pricing information on its website "for competitive reasons." *Lawsuit Funding – What Does It Cost*, OASIS LEGAL FIN., http://www.oasislegal.com/legal_finance_services/lawsuit_funding_pricing (last visited Oct. 30, 2012). Oasis also discourages plaintiffs from signing on unless they "really have no other financial options." *The Benefits of Lawsuit Funding – Is It Right For You?*, OASIS LEGAL FIN., http://www.oasislegal.com/legal_finance_services/lawsuit_funding_benefits (last visited Oct. 14, 2012).

25. LFC websites typically employ short phrases in colored, bold, or capital letters,, such as "No Risk," "Cash in a Flash," "No Cost to Apply," or "Approval in as Little as 48 Hours." *See, e.g.*, *Frequently Asked Questions*, LEGAL FUNDS NOW, http://www.legalfundsnow.com/faq.htm (last visited Feb. 10, 2012); *Lawsuit Loan*

Consumers do not receive any precise information regarding interest rates, fees, and repayment schedules until their cases are approved for financing. To begin the process, a plaintiff submits basic information to the LFC about the nature of the claim, the types of injuries suffered, and the amount of cash needed.[26] The plaintiff must also authorize her attorney to release the attorney-client retainer agreement, proof of the defendant's insurance coverage, and complete case records to the LFC.[27] The LFC may then approve a certain amount of cash to advance to the plaintiff based on factors that determine the value and strength of her case, including the amount of damages; the severity and types of injuries; the defendant's level of culpability; the likelihood of a swift and favorable judgment; and the existence of any extra liens or medical bills that will ultimately have to be paid from the lawsuit's proceeds.[28] The application and case-review process for a single LFC, which may take days to complete and offers non-negotiable terms, can frustrate desperate consumers with an

Approvals, MY LEGAL ADVANCE, http://www.mylegaladvance.com (last visited July 1, 2012); ADDISON PRE-SETTLEMENT FUNDING, http://www.addisonpsf.com/lawsuit_loans.html (last visited July 1, 2012); GLOBAL FINANCING JUST., http://www.glofin.com/index.php (last visited July 1, 2012). Of course, all LFCs focus their advertising on the nonrecourse nature of litigation financing agreements, which they describe as "investments" or "purchases" that are always contingent on a favorable settlement or judgment—"If you lose your case, you owe LawCash nothing." *See Plaintiff Lawsuit Funding*, LAWCASH, http://www.lawcash.net/html/plaintiffs.html (last visited Feb. 10, 2012).

26. Some applications also inquire as to whether the plaintiff missed time from work, received litigation financing from another LFC, ever filed for bankruptcy, or has any outstanding liens against her or the case. LFCs may charge a separate application fee to be added to the final repayment amount in the event that the plaintiff is approved for financing. *See Apply for a LawCash Advance*, LAWCASH, http://www.lawcash.net/html/application.html (last visited Feb. 10, 2012).

27. *See id.*

28. *Approval Factors*, OASIS LEGAL FIN., http://www.oasislegal.com/legal_finance_services/lawsuit_funding_approval_factors (last visited Feb. 10, 2012). According to Oasis, it usually limits the cash advance to 15 percent of the projected case value, i.e., the total amount of proceeds that the LFC determines that the plaintiff should expect to recover through a settlement or award. Depending on the claim and the LFC's available resources, the cash-advance amount may range from several hundred to hundreds of thousands of dollars. *See Benefits of Lawsuit Funding*, OASIS LEGAL FIN., http://www.oasislegal.com/legal_finance_services/lawsuit_funding_benefits (last visited Feb. 10, 2012). LawCash states that it will only advance up to 10 percent of the projected case value "so that the monthly usage fees do not reduce your settlement too much." *Plaintiff FAQs*, LAWCASH, http://www.lawcash.net/html/plaintiff-faqs.html (last visited Mar. 18, 2012). This may sound beneficent at first, but smaller cash advances mitigate the LFC's losses as well.

urgent need for money.[29]

Following approval, the LFC sends the litigation financing agreement to the plaintiff to sign.[30] The agreement sets forth the essential terms of the transaction: the plaintiff only repays the LFC using the proceeds of her lawsuit, and in the event of an unfavorable judgment, the plaintiff owes nothing.[31] The agreement may also include a repayment schedule that reflects increasing "payoff" amounts based on how long it takes to resolve the claim.[32] For an example of a litigation financing agreement, see Figure 1 below.

Figure 1. A sample "Purchase Agreement" from Oasis.[33]

Purchaser:	Oasis Legal Finance, LLC (Oasis)
Seller:	Jerome Plaintiff
Purchase Price:	**$1,234.00**
Oasis Ownership Amount	
Payment Schedule	**Oasis Ownership Amount (Payoff Amount)**
August 24, 2010 to February 23, 2011	$1,851.00
February 24, 2011 to August 23, 2011	$2,036.10
August 24, 2011 to November 23, 2011	$2,776.50
November 24, 2011 to February 23, 2012	$3,085.00
February 24, 2012 to August 23, 2012	$3,393.50
August 24, 2012 to February 23, 2013	$4,010.50
February 24, 2013 and thereafter	$4,319.00
Fees Due at Repayment	
Case Servicing Fee every 6 months	$30.00
Subsequent Case Review for each additional funding	$20.00
Facsimile and Photocopying Costs per Funding	$25.00

Interest rates can vary according to the size of the cash advance and the facts of the particular lawsuit, and range from 2.5 percent to 15 percent, compounded monthly.[34] As shown in the example agreement above, LFCs may receive more than

29. *See, e.g.*, *Frequently Asked Questions*, OASIS LEGAL FIN., http://www.oasislegal.com/resources/frequently_asked_questions (last visited Feb. 10, 2012).

30. Grous, *supra* note 4, at 210. The litigation financing agreement may be titled "Purchase Agreement" or "Funding Agreement." As soon as the litigation financing agreement is signed and returned, the LFC wires the cash advance to the plaintiff, who gives nothing in return until and unless her lawsuit results in a settlement or award. The LFC usually reserves the plaintiff the option to apply for further financing before the resolution of the claim. *See id.*

31. Barksdale, *supra* note 6, at 713.

32. Under the few existing litigation financing laws, LFCs are obligated to include such repayment schedules. *See* OHIO REV. CODE ANN. § 1349.55 (2008); NEB. REV. STAT. § 35-3304 (2010); ME. REV. STAT. tit. 9-A, § 12-102 (2008).

33. The Colorado Attorney General used this sample Purchase Agreement in its case against Oasis. Oasis v. Suthers, No. 10CV8380 (Colo. Dist. Ct. Sept. 28, 2011).

34. Barksdale, *supra* note 6, at 710. As discussed in Part III.B, *infra*, some states prohibit monthly compounding and require a repayment schedule based on longer periods of time.

250 percent returns on their investments in plaintiffs' claims.[35] In some cases, the agreement may specify that the LFC is entitled to 100 percent of the proceeds in the event that the actual recovery is less than the scheduled payoff amount.[36] Some LFCs, on the other hand, state that attorney's fees must be paid before the LFC can collect from the proceeds.[37]

The benefit that LFCs provide is clear: without litigation financing to cover pressing bills and living expenses, negligent defendants may be able to force desperate plaintiffs to accept unjust settlement offers. Nevertheless, cash-strapped plaintiffs face considerable dangers in selecting an LFC and signing a litigation financing agreement. With no way to efficiently compare rates, consumers and their attorneys must spend hours delivering case documents and completing multiple applications in order to get the best deal.[38] Similarly, especially desperate consumers are likely to sign with the first LFC that agrees to finance their cases, even if significantly lower rates may be available elsewhere. These implications are especially worrisome where, as is the case in nearly all states, litigation financing is completely unregulated and there is no limit on the rates that LFCs may charge.[39] Even if most plaintiffs select large, relatively scrupulous companies, consumers are disadvantaged if only a handful of such LFCs dominate the industry and dictate national standards for litigation financing. In addition to actively opposing meaningful regulation, the existing LFC "oligopoly" may act to stifle competition and artificially inflate interest rates. The following section discusses the American Legal Finance Association (ALFA) and its powerful influence on the industry and lawmakers around the country.

---

35. Grous, *supra* note 4, at 211.

36. Fausone v. U.S. Claims, Inc., 915 So. 2d 626, 628 (Fla. Dist. Ct. App. 2005).

37. *See Frequently Asked Questions*, LAWCASH, http://www.lawcash.net/html/plaintiff-faqs.html (last visited Feb. 10, 2012).

38. Besides the fact that LFCs typically require plaintiffs to submit social security numbers, the application process is relatively intrusive and may even result in harassing behavior from companies that the plaintiff turns down. *See Complaint Review: Joe Simmons – PEACHTREE SETTLEMENT FUNDING*, RIPOFF REP., http://www.ripoffreport.com/cash-services/joe-simmons-peachtre/joe-simmons-peachtree-settleme-ez98b.htm (last visited Feb. 10, 2012).

39. *See* Appelbaum, *Lawsuit Loans*, *supra* note 13.

B. Industry Efforts to Self-Regulate Litigation Financing

ALFA serves as the litigation financing industry's national trade association and central lobbying power.[40] Established in 2004 and composed of twenty LFCs, the organization claims to be responsible for originating 90 percent of currently outstanding litigation financing agreements.[41] ALFA purports to "establish and maintain the highest ethical standards; . . . fair business practices; . . . [and] a legal and regulatory framework in individual states . . . that meet [sic] the needs and concerns of all parties."[42] Harvey Hirschfeld, ALFA's Chairman and a founder of LawCash, one of the largest LFCs in the country, characterizes litigation financing as "not for everyone, but it's there when you need it."[43] According to Hirschfeld, one of the association's main goals is to eliminate "companies in this industry [that are] charging very egregious agreements."[44] ALFA members pledge to not "intentionally advance . . . money in excess of the consumer's needs" or "over-fund a case in relation to [its] perceived value."[45]

Although ALFA's goals and practices are couched in terms of consumer interests, the association's main priority is to legitimize and self-regulate the $100 million industry.[46]

---

40. *See* AM. LEGAL FIN. ASS'N, http://www.americanlegalfin.com (last visited Feb. 10, 2012).

41. *Facts About ALFA*, *supra* note 4. The ALFA website does not provide any information on the investors, officers, or employees of its LFC members.

42. *Id.*

43. Appelbaum, *Lawsuit Loans*, *supra* note 13.

44. *LawCash in the News*, LAWCASH, http://www.lawcash.net/html/news.html (last visited Feb. 10, 2012). Of course, some would say that LawCash and other ALFA members charge egregious rates for many high-value, low-risk lawsuits. In addition, the association's opposition to interest rate caps arguably serves to foster, not eliminate, predatory LFC behavior.

45. *Industry Best Practices – ALFA's Code of Conduct*, AM. LEGAL FIN. ASS'N, http://www.americanlegalfin.com/IndustryBestPractices.asp (last visited Feb. 10, 2012). Such "consumer-focused" methods further the interests of ALFA and its members, as well. Advancing too much money and then demanding repayment amounts that deplete plaintiffs' entire settlements would result in lawsuits, bad press, and fewer customers.

46. Benjamin Hallman & Caitlin Ginley, *Betting on Justice: States are Battleground in Drive To Regulate Lawsuit Funding*, NAT'L L. REV. (Feb. 2, 2011), http://www.natlawreview.com/article/betting-justice-states-are-battleground-drive-to-regulate-lawsuit-funding. As Lisa A. Rickard, president of the Institute for Legal Reform, maintains, "[The LFCs] are coming in under the guise of accepting regulation when in fact what they are trying to do is to legalize lawsuit lending and to explicitly exempt themselves [from] consumer lending requirements." Binyamin Appelbaum, *Lobby Battle Over Loans for Lawsuits*, N.Y. TIMES (Mar. 9, 2011), http://www.nytimes.com/2011/03/10/business/10lawsuits.html?pagewanted

According to the National Institute on Money in State Politics, this powerful group of LFCs, including Oasis and LawCash, has made over $200,000 in campaign contributions to state politicians.[47] The Center for Public Integrity asserts that LFCs have spent millions on lobbying efforts over the last several years.[48] ALFA successfully opposed industry-restricting bills in Texas and Maryland, and defeated Illinois legislation that would have created the first specialized interest rate caps for litigation financing agreements in the country.[49] Currently, the industry is fighting a bill in Arkansas that would completely prohibit litigation financing, as well as a Rhode Island bill that expressly subjects litigation financing to its usury laws.[50] In some states, the organization has also influenced the passage of lax regulatory schemes that fail to control interest rates or improve consumer choice.[51]

Despite ALFA's opposition to effective regulation of litigation financing, states should adopt comprehensive measures that ensure that the industry operates fairly and transparently. In nearly all states there is no limit on the rates and fees that LFCs may charge. With no reasonable interest rate caps and no way to efficiently compare companies, even relatively scrupulous ALFA-affiliated LFCs can continue to collect inequitable returns. However, even in cases that are practically guaranteed to result in repayment, litigation financing agreements should not qualify as true loans subject to overly strict interest rates. Focusing on the concept of "true contingencies" under traditional interpretations of usury law, the next Part addresses the legal form of litigation financing agreements, as well as the putative risks that LFCs assume through these arrangements.

=all [hereinafter Appelbaum, *Lobby Battle*].

47. Hallman & Ginley, *supra* note 46. The National Institute on Money in State Politics is "the only nonpartisan, nonprofit organization revealing the influence of campaign money on state-level elections and public policy in all 50 states." *See Mission & History*, NAT'L INST. ON MONEY IN ST. POLS., http://www.followthemoney.org/Institute/index.phtml (last visited July 1, 2012).

48. Hallman & Ginley, *supra* note 46. The Center for Public Integrity is "one of the country's oldest and largest nonpartisan, nonprofit investigative news organizations." *See About The Center for Public Integrity*, THE CENTER FOR PUB. INTEGRITY, http://www.iwatchnews.org/about/ (last visited July 1, 2012).

49. *See* Hallman & Ginley, *supra* note 46; Alberto Bernabe, *Illinois Legislature Rejects Proposal to Regulate Litigation Financing Companies*, PROF'L RESPONSIBILITY BLOG (Jan. 14, 2011), http://bernabepr.blogspot.com/2011/01/illinois-legislature-rejects-proposal.html.

50. *See* Appelbaum, *Lobby Battle*, *supra* note 46.

51. *See infra* Part III.B.

II. USURY LAW, RISK, AND "TRUE CONTINGENCIES"

Usury is "the charging of an illegal rate of interest as a condition to lending money."[52] State usury statutes regulate interest rates and finance charges for loans.[53] Interest rate ceilings are set according to the type of transaction; the size of the loan; the duration of the loan; the amount and type of security; the type of borrower (persons, organizations, corporations, etc.); and the type of lender (persons, pawnshops, banks, etc.).[54] These factors relate to the amount of risk involved in a particular loan transaction, with higher rates assigned to higher-risk loans.[55] By imposing interest rate caps that restrict the amount of risk that a lender is financially able to accept, usury statutes make it extremely difficult for lenders to give credit to impoverished high-risk consumers with no collateral.[56] Even so, one of the main purposes of usury statutes is to set reasonable rate and fee restrictions in order to protect consumers against "unfair practices by some suppliers of consumer credit."[57] For example, Colorado's Uniform Consumer Credit Code (UCCC) sets a maximum annual interest rate limit of 45 percent for consumer loans.[58]

Under most states' usury laws, litigation financing agreements do not qualify as true loans because the LFC is denied repayment in the event of an unfavorable judgment or insufficient settlement.[59] Courts typically require the following elements for a transaction to be usurious: (1) an agreement to lend money; (2) *the borrower's absolute obligation to repay*; (3) a greater compensation for making the loan than is allowed

52. BLACK'S LAW DICTIONARY 1685 (9th ed. 2009).

53. Martin, *Another Subprime Industry*, *supra* note 1, at 87; *see also* COLO. REV. STAT. § 5-1-102 (2011).

54. George Steven Swan, *The Economics of Usury and the Litigation Funding Industry:* Rancman v. Interim Settlement Funding Corp., 28 OKLA. CITY U. L. REV. 753, 769 (2003).

55. *See id.* at 774.

56. *See id.* at 774–75.

57. COLO. REV. STAT. § 5-1-102(2)(d) (2011). Another express purpose of the UCCC is "to permit and encourage the development of fair and economically sound consumer credit practices." *Id.* § 5-1-102(2)(e).

58. *Id.* § 5-12-103(1). Colorado Attorney General John Suthers alleged that Oasis and LawCash charged interest rates that ranged "from approximately 60 [percent] to 200 [percent], and possibly higher." Defs.' Mot. Partial Summ. J. & Prelim. Inj. at 30, Oasis v. Suthers, No. 10CV8380 (Colo. Dist. Ct. Mar. 17, 2011).

59. *See* Mariel Rodak, *It's About Time: A Systems Thinking Analysis of the Litigation Finance Industry and its Effect on Settlement*, 155 U. PA. L. REV. 503, 512–13 (2006).

under a usury statute; and (4) an intention to take more for the loan of the money than the law allows.[60]

Since litigation financing agreements result in repayment to the LFC only if the plaintiff receives a sufficient settlement or award, the second element requiring an "absolute obligation to repay" is not satisfied.[61] LFCs have generally been able to avoid violations and active regulation under usury laws due to this nonrecourse nature of litigation financing.[62]

Without express state regulation of nonrecourse litigation financing agreements, LFCs set their own industry rates and practices. For traditional financing practices that rely on collateral and monthly payments to secure loans, competition alone may be sufficient to maintain reasonable interest rates. However, the litigation financing industry requires much more than a laissez-faire approach given the strength of the LFC oligopoly and the vulnerability of injured and cash-strapped plaintiffs.

Moreover, despite its nonrecourse form, a litigation financing agreement may actually be a usurious loan if the chances are exceedingly high that the plaintiff will have to repay the LFC.[63] In a litigation financing agreement, denial of repayment to the LFC is conditioned on the occurrence of the "contingency," i.e., an unfavorable judgment or insufficient settlement.[64] Under traditional interpretations of usury law, a

60. Martin, *The Wild West*, *supra* note 8, at 58–59 (emphasis added); Valliappan Ghirardo v. Antonioli, 883 P.2d 960, 965 (Cal. 1995); Holley v. Watts, 629 S.W.2d 694, 696 (Tex. 1982); Schauman v. Solmica Midwest, Inc., 168 N.W.2d 667, 669–70 (Minn. 1969); Valliappan v. Cruz, 917 So. 2d 257, 260 (Fla. Dist. Ct. App. 2005). Similarly, some courts state the second element as requiring "an understanding" that the money "must be" or "shall be" or "will be" repaid. *See* Liebergesell v. Evans, 613 P.2d 1170, 1174 (Wash. 1980); Swindell v. Fed. Nat'l Mortg. Ass'n, 409 S.E.2d 892, 895 (N.C. 1991).

61. Martin, *The Wild West*, *supra* note 8, at 59; *see also* RESTATEMENT (FIRST) OF CONTRACTS § 526 cmt. b (1932) (noting that an "essential element" of a usurious loan is that "the debt must be unconditionally repayable"); 9 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 20:18 (4th ed. 1993) (hereinafter WILLISTON) (stating that "under traditional usury statutes [that do not expressly encompass transactions other than loans], one of the requisites of a usurious loan is that it be absolutely, not contingently, repayable").

62. *See* Fausone v. U.S. Claims, Inc., 915 So. 2d 626, 630 (Fla. Dist. Ct. App. 2005); Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W.3d 87, 96–97 (Tex. App. 2006).

63. *See* Echeverria v. Estate of Lindner, No. 018666/2002, 2005 WL 1083704, at *8 (N.Y. Sup. Ct. Mar. 5, 2005).

64. *See* RESTATEMENT (FIRST) OF CONTRACTS § 527 (1932). If a litigation financing agreement's contingency does occur, i.e., the plaintiff loses her lawsuit

true contingency that entails significant risk to the lender distinguishes a genuine nonrecourse transaction from a loan.[65] In other words, the possibility of the occurrence of the contingency event must be more than hypothetical.[66] Thus, in a litigation financing agreement, an unfavorable judgment or insufficient settlement cannot be so unlikely that repayment to the LFC is practically ensured.[67] Otherwise, the litigation financing agreement is not a truly "hazardous investment" that warrants higher interest rates than traditional loans.[68]

In contrast, ALFA argues the industry's view that an LFC's assumed risk in a litigation financing agreement always warrants relatively high interest rates.[69] In terms of risk, lawsuits are unpredictable due to procedural errors, attorney mistakes, and unanticipated details that can alter the entire structure—and final payout—of the case.[70] If plaintiffs abandon their claims, lose their cases, or receive smaller settlements than originally anticipated, LFCs lose money. Comparing litigation financing to venture capital investment, an LFC executive observed, "[i]t's as if your buddy came up to you and said, 'I'm starting a business, I need $25,000—and, by the way, you may never get your money back.'"[71] Even assuming that the defendant's liability is clear, damages awards often vary unexpectedly, and there is no absolute

---

or receives an insufficient settlement, full or partial repayment is withheld. If the contingency does not occur and the plaintiff recovers a sufficient settlement or award, then the plaintiff must repay the LFC in the amount of the cash advance plus accrued interest.

65. *Id.*

66. *Id.*

67. *See Echeverria*, 2005 WL 1083704, at *8.

68. *See* WILLISTON, *supra* note 61, § 20:18 (noting that the policy behind the general exemption for nonrecourse transactions is based on the notion that when a lender "risks the principal with the chance of either getting a greater return than lawful interest or getting nothing if the contingent event fails to occur, there is no usury since the usury laws do not forbid the taking of business chances in the employment of money").

69. In addition to the risk of losing the cash advance in the event that the plaintiff's lawsuit is unsuccessful, ALFA claims that "the quality of service provided to both the client and the attorney, the actual risk involved in the expected repayment of the advance, the cost of capital used for the fundings, marketing and operating costs, and the length of time between funding a case to the repayment" are factors that necessitate higher rates for litigation financing agreements compared to traditional loans. *Frequently Asked Questions*, AM. LEGAL FIN. ASS'N, http://www.americanlegalfin.com/faq.asp (last visited Feb. 10, 2012).

70. *See* Barksdale, *supra* note 6, at 710.

71. *See* Appelbaum, *Lawsuit Loans*, *supra* note 13.

guarantee that the defendant will be able to satisfy a judgment when the lawsuit ends. Beyond the unpredictability of litigation, lawsuits can also take years to resolve. The lack of interim payments during the pendency of the plaintiff's claim—in addition to the absence of any secured collateral—increases the risk that the LFC will not see a profitable return on its investment.[72] An LFC must also have enough cash on hand to finance cases and cover steep operating costs: Teams of attorneys, underwriters, and insurance specialists must expertly and efficiently process hundreds of thousands of applications, many of which are presumably weak claims.[73] The industry argues that the combined value, costs, and risk of litigation financing justify higher interest rates than those allowed for traditional consumer loans.[74]

Even considering the practice's inherent risks and relatively high overhead costs, many litigation financing agreements do not require significantly higher rates than traditional consumer loans.[75] For cases that are very likely to result in a profitable return, LFCs still charge exorbitant rates based on exaggerated risk projections for repayments and losses.[76] For example, cases involving strict liability, admitted wrongdoing, and obvious gross negligence nearly ensure definite and sufficient settlements.[77] To the extent that other objective case factors are present, such as severe injuries, multiple eyewitnesses, and significant property damage, consumers deserve discounted rates. As one court opined:

> A person who is the victim of an accident should not be further victimized by loan companies charging interest rates that are higher than the risks associated with the

72. *See* Barksdale, *supra* note 6, at 710.

73. *See id.* at 729–30. ALFA claims that the average cost for an LFC to do business is 30 percent of the total financing it offers per year. *FAQs*, AM. LEGAL. FIN. ASS'N, http://www.americanlegalfin.com/alfasite2/faqs.asp (last visited Feb. 10, 2012). The association also states that the rates each LFC can charge largely depend on how the company can manage its marketing and operating costs. *Frequently Asked Questions*, *supra* note 69. Without LFC disclosures of business information, one can only assume that these operating costs are exclusively passed on to those plaintiffs that the LFC decides to finance, since LFCs do not charge application fees up front.

74. *Frequently Asked Questions*, *supra* note 69.

75. *See* Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615, 637–38 (2007).

76. *See id.*

77. *See id.* at 637.

> transaction . . . . [A] company that only loaned money when it was secured by high-grade personal injury claims would seem to be able to charge a lower interest rate than some of the rates described in this opinion, even when the arrangement is . . . nonrecourse.[78]

Whether or not extremely low-risk cases undermine the legitimacy of their nonrecourse form, litigation financing agreements should return profits that reasonably match the LFC's risk and added costs, even if this means that rates must exceed the current limits for consumer loans.[79]

Without industry regulation, LFCs will continue to reap unfair profits from consumers due to their expertise in risk reduction and bargaining advantage over desperate plaintiffs. In order to exclusively finance promising cases at the outset, LFCs reject approximately 70 percent of the applications they receive.[80] Among the selected cases that the LFC expects to turn a profit, LFCs can demand equally high rates for cases involving disparate levels of risk.[81] An LFC's "diversified portfolio" of pending claims also spreads some of the risks that are associated with each lawsuit as an individual claim.[82] Moreover, with no efficient way for consumers to compare companies and rates, competition is stymied and interest rates remain inflated. In defense, LFCs proclaim that they still lose money on five to twenty percent of the cases they finance.[83] Nevertheless, there is currently no way to confirm this data because LFCs are not required to disclose business and financial information.[84] This information must be made available so that regulators can cap interest rates based on the level of risk that LFCs actually face.

Some cases demonstrate that courts are willing to strike down unfair litigation financing agreements in a case-by-case manner.[85] In *Rancman v. Interim Settlement Funding Corp.*,

78. Fausone v. U.S. Claims, Inc., 915 So. 2d 626, 630 (Fla. Dist. Ct. App 2005).

79. From this point forward, the LFC's "risk" includes its operating costs.

80. Appelbaum, *Lawsuit Loans*, *supra* note 13. Out of 250,000 applications in recent years, Oasis stated that it had approved about 80,000. *Id.*

81. *Id.*

82. *See* George Steven Swan, *Economics and the Litigation Funding Industry: How Much Justice Can You Afford?*, 35 NEW ENG. L. REV. 805, 829–31 (2001).

83. Appelbaum, *Lawsuit Loans*, *supra* note 13.

84. *See* Martin, *Another Subprime Industry*, *supra* note 1, at 103.

85. Courts are less likely to override the express terms of litigation financing agreements when the parties are not individual plaintiffs, but sophisticated parties such as plaintiffs' attorneys. *See* Kelly, Grossman & Flanagan, LLP v.

the Ohio Court of Appeals found that a litigation financing agreement constituted a usurious loan because the associated risk was too low to qualify as a true contingency.[86] The court concluded that the LFC's contract was for a loan "because no real probability existed that non-payment would occur" based on the facts of the plaintiff's underlying case.[87] Trial testimony revealed that there was an extremely low level of risk of the plaintiff's non-recovery in light of several factors, including a skilled and experienced attorney; no apparent liability on the plaintiff's part; extensive property damage to the plaintiff's vehicle; "bright blood" injuries;[88] significant medical bills; and LFC access to jury verdict databases containing records of awards for comparable claims.[89] As the court reasoned, "[t]he payment of a sum is considered 'repayable absolutely' if non-payment of the amount is 'so improbable as to convince the court or jury that there was no real hazard.'"[90] Although it was the most hotly contested issue on the second appeal, the Ohio Supreme Court did not address the "threshold level of risk" necessary for a litigation financing agreement to constitute a contingency-based investment rather than a loan.[91] Instead, the court voided the litigation financing agreement on grounds that were later abrogated by statute.[92]

Similarly, in *Echeverria v. Estate of Lindner*, a New York trial court re-wrote a LawCash litigation financing agreement as a loan with a 16 percent annual interest rate, the highest

---

Quick Cash, Inc., No. 04283-2011, 2012 N.Y. Misc. 1460, at *13 (N.Y. Sup. Ct. Mar. 29, 2012) ("The Court finds that the language in the contracts was not ambiguous, and the intent of the parties is clear, as demonstrated by the plaintiffs' express acknowledgment, as sophisticated attorneys, in each contract that a nonrecourse agreement for a cash advance was entered into and not a loan.").

86. Rancman v. Interim Settlement Funding Corp., No. 20523, 2001 Ohio App. LEXIS 4818, at *8 (Ohio Ct. App. Oct. 31, 2001).

87. *Id.* at *8. In *Rancman*, the plaintiff, who ultimately recovered $100,000 from her personal injury suit against a drunk driver, filed suit against two LFCs for unfair, deceptive, or unconscionable practices. The litigation financing agreements that she entered into with the LFCs charged 280 percent and 180 percent annual interest, respectively. *Id.* at *2.

88. The court does not explain what this term means.

89. *Rancman*, 2001 Ohio App. LEXIS 4818, at *7–8.

90. *Id.* at *6 (citation omitted).

91. Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217, 219 (Ohio 2003).

92. *See id.* Due to the influence of ALFA lobbying efforts, the Ohio legislature passed a statute five years later that legitimizes, yet barely regulates, the litigation financing industry. *See* OHIO REV. CODE ANN. § 1349.55 (2008).

legal rate under state law.[93] While conceding that litigation financing agreements "do allow the plaintiffs to proceed with lawsuits that they ordinarily would not have the resources to bring," the court focused on the "very low probability that judgment would not be in favor of the plaintiff:"[94]

> The court finds that LawCash is lending money at usurious rates. Also, that it is ludicrous to consider this transaction anything else but a loan unless the court was to consider it legalized gambling. Is it a gamble to loan/invest money to a plaintiff in a[n] . . . action where there is *strict liability*? I think not . . . . [T]herefore, it is a loan, not an investment with great risk. If it is a loan, then the interest rate charged is usurious and the court could vitiate the agreement.[95]

Likewise, in *Lawsuit Financial, L.L.C. v. Curry*, the Michigan Court of Appeals voided a litigation financing agreement where the defendant in the underlying case had admitted to full liability to the extent of $27 million in damages.[96] Because the plaintiff was practically guaranteed a tremendous recovery, the court found that the litigation financing constituted a usurious loan.[97]

While some courts are willing to invalidate egregious litigation financing agreements, ad hoc court action is not sufficient to fully protect and inform consumers. Whether or not some cases practically guarantee repayment to the LFC, litigation financing agreements require separate regulatory regimes because they involve higher levels of risk and greater overhead costs than traditional loans. Even relatively low-risk suits like strict liability cases always hazard some possibility of a total or partial loss for the LFC, but they do deserve highly discounted rates that are fairly proportional to the LFC's risk. Once LFCs are required to disclose business and financial information, states can fairly cap interest rates according to an objective case-risk calculus. Graduated interest rate ceilings would fully protect consumers while ensuring that LFCs receive reasonable profits that allow them to stay in business. As Part III explains, such action is necessary because the few

93. 2005 N.Y. Misc. LEXIS 894, at *24 (N.Y. Sup. Ct. 2005).
94. *Id.* at *21-22.
95. *Id.* at *23–24 (emphasis added).
96. 683 N.W.2d 233, 239–40 (Mich. Ct. App. 2004).
97. *See id.* at 239.

existing forms of regulation do not adequately balance consumer interests.

III. EXISTING REGULATION OF LITIGATION FINANCING FAILS TO EMPOWER AND PROTECT CONSUMERS

Given the growing demand for litigation financing, it is dismaying that the industry is completely unregulated in most states. Some courts may be willing to strike down individual litigation financing agreements, but without comprehensive state regulation, LFCs are still able to set unreasonable rates. Several courts and state legislatures have attempted to control industry practices, but such efforts either "over-regulate" or "under-regulate" LFCs to the disadvantage of consumers. "Over-regulation" occurs where courts and regulators subject all litigation financing agreements to exceedingly strict rate restrictions under state usury laws. Conversely, "under-regulation" occurs where states create some information disclosure rules but fail to control interest rates or improve consumer choice.[98] Because "over-regulation" may cut off the availability of litigation financing and "under-regulation" allows LFCs to continue to charge unreasonable rates, neither measure adequately empowers and protects consumers. The following sections explore in greater detail the shortcomings and consequences of these regulatory schemes.

A. Over-Regulation: Equating Litigation Financing Agreements With Traditional Loans Hurts Consumers

Only a few courts and regulators have classified all litigation financing agreements as loans, regardless of risk. In addition to regulators in Maryland and Louisiana, courts in Colorado and North Carolina have concluded that LFCs issue usurious loans. As discussed, most litigation financing agreements require higher interest rates that are proportional to the LFC's risk. If exceedingly low interest rate caps severely limit access to litigation financing, desperate plaintiffs may not be able to save their homes, provide for their families, and fight

98. *See, e.g.*, OHIO REV. CODE ANN. § 1349.55 (2008); *see also* Hallman & Ginley, *supra* note 46 ("In recent years, the industry and its allies have focused most of their efforts on supporting bills . . . that would establish licensing and disclosure rules, but also block caps on the interest rates the lenders can charge.").

for more equitable settlements. As Jim Miller, an attorney representing Oasis and LawCash, stated in an interview, "[t]hese are people that sell part of their lawsuit because they have compelling needs . . . . They don't have access to the banks or relatives to loan them money. To take [access to litigation financing] out of the Colorado judicial system kills consumers."[99]

In 2010, Colorado Attorney General John Suthers filed a counterclaim against Oasis and LawCash for engaging in usurious lending under Colorado's usury law, the UCCC.[100] The Attorney General's office argued that pursuant to *State* ex rel. *Salazar v. The Cash Now Store, Inc.*, litigation financing agreements are loans regardless of their nonrecourse form.[101] In *Cash Now*, the Colorado Supreme Court held that immediate cash advances issued in exchange for an individual's future tax refunds are UCCC-covered loans.[102] These "tax-based" loans would typically be fifty to sixty percent smaller than the anticipated tax refunds, but were given under the condition that the consumer would owe the company nothing further unless the actual refund happened to be less than the anticipated refund.[103] Noting that "Colorado's UCCC is intended to be liberally construed to promote its underlying purposes and policies," the court reasoned that a loan does not require an unconditional obligation to repay the lender.[104] Instead, a loan is created whenever "a creditor creates debt by advancing money to the debtor."[105]

Under *Cash Now*, litigation financing agreements should be excluded from the UCCC's purview, not subjected to it. The court indicated that a true loan requires repayment to the

99. McNally, *supra* note 18.

100. The counterclaim was the result of a lawsuit filed by Oasis and LawCash seeking judgment against Colorado for impermissibly regulating them under the UCCC. *See id.* According to Suthers, Oasis and LawCash charged interest rates that ranged "from approximately 60 [percent] to 200 [percent], and possibly higher." *See* Defs.' Mot. Partial Summ. J. & Prelim. Inj., *supra* note 58, at 30. Colorado's UCCC, by contrast, allows a maximum interest rate of 45 percent for loans. COLO. REV. STAT. § 5-12-103(1).

101. *See* Defs.' Mot. Partial Summ. J. & Prelim. Inj., *supra* note 58, at 3.

102. State *ex rel.* Salazar v. The Cash Now Store, Inc., 31 P.3d 161, 167 (Colo. 2001).

103. *See id.*

104. *Id.* at 166 (referencing COLO. REV. STAT. § 5-1-102(2)(d), which states that one of the express purposes of Colorado's UCCC is to protect consumers against "unfair practices by some suppliers of consumer credit, having due regard for the interests of legitimate and scrupulous creditors").

105. *Cash Now*, 31 P.3d at 166.

lender whether or not the lender's interest in the transaction has value.[106] The tax-based advances were undoubtedly loans because the consumer was obligated to repay the lender the full amount owed *in all cases*.[107] If the tax refund turned out to be lower than anticipated, the borrower would still have to pay off the remaining debt with other cash or assets.[108] In contrast, nonrecourse litigation financing agreements result in a direct loss to the LFC in the event of an unfavorable judgment or insufficient settlement. Because the LFC can collect repayment only from the lawsuit's proceeds, a plaintiff's case may bear diminished value—if not an absolute loss—for the LFC.

Nevertheless, the Denver District Court agreed with the Attorney General that litigation financing agreements are loans subject to UCCC regulation.[109] In its order, the court did not give much weight to the nonrecourse nature of litigation financing, but instead applied *Cash Now*'s broad holding that a loan is created whenever a "creditor creates debt by advancing money to a debtor."[110] Without acknowledging the clear differences between litigation financing agreements and the tax-based loans, the court simply noted that *Cash Now* "clearly demonstrates the Supreme Court's intention that recourse is not a prerequisite to applying the term 'loan' under the UCCC."[111] The court admitted that "there is risk involved" in litigation financing due to "potential instances where the [LFCs] cannot . . . recover against the individual plaintiffs they have given funds to."[112] Despite the potential for over-regulation, the court held that the risk of loss to the LFC does not differentiate litigation financing from loans that impose an

106. *Id.* at 167 ("[E]ven the lender 'demonstrates that it does not view the refund as a chose in action because the borrower owes it a sum of money whether the refund . . . is valuable to [the lender] or not.'" (quoting Income Tax Buyers, Inc. v. Hamm, No. 91-CP-40-3193, 1992 WL 12092431 (S.C. Ct. C.P., Jan. 14, 1992)).

107. In most cases, where the actual refund was equal or greater to the anticipated refund, Cash Now would be repaid through the tax refund, while in the remaining cases where the actual refund happened to be less than the anticipated refund, the consumer was "required to pay Cash Now for the deficiency" in addition to the insufficient tax refund. *See id.* at 163–64.

108. *See id.*

109. The court declined to grant an injunction based on the pleadings alone. Oasis v. Suthers, No. 10CV8380, slip op. at 7 (Colo. Dist. Ct. Sept. 28, 2011). The decision is currently under appeal.

110. *See id.* at 5.

111. *See id.*

112. *See id.*at 5–6.

unconditional obligation to repay the lender.[113]

In addition to Colorado courts, courts and regulators in other states have applied usury law restrictions to litigation financing agreements. In response to an opinion request, Louisiana's Attorney General classified litigation financing as loans even though the obligation to repay the LFC "may be conditioned on an uncertain event."[114] Similarly, the Maryland Commissioner of Financial Regulation recently issued cease and desist orders against several LFCs for engaging in usurious lending.[115] In 2008, the North Carolina Court of Appeals held that litigation financing agreements are usurious transactions.[116] Although the court recognized that true loans impose an unconditional obligation to repay the lender, North Carolina's usury law expressly encompasses "advances" as well as loans.[117] Noting that advances under North Carolina law require merely an "expectation" of repayment, the court concluded that litigation financing agreements are subject to the statute's rate caps.[118]

According to these courts and regulators, basic consumer protection purposes should trump traditional interpretations of usury law. As Attorney General Suthers described litigation financing, "It looks like a loan and smells like a loan and we believe that these are, in fact, high-cost loans . . . . I can see a legitimate role for it, but that doesn't mean that they shouldn't be subject to regulation."[119] Suthers is correct to say that states should regulate LFCs, but from a practical standpoint that recognizes the benefit of litigation financing, usury laws are not the proper vehicles for industry control. While states must protect consumers against predatory lending, it is likely that overly strict rate caps impede access to litigation financing.

---

113. *See id.* at 6 ("While the [LFCs'] transactions . . . may be contingent upon receipt of proceeds by the plaintiff funded, or may never be collected due to abandonment or otherwise, the transactions create debt under the plain language of the UCCC and the definitions observed by the Court.").

114. *See* La. Op. Att'y Gen. No. 01-160, 2001 WL 1398739 (La.A.G. Oct. 11, 2001).

115. *See, e.g.*, *In re* Nat. Lawsuit Funding, LLC, No. CFR-FY2012-128, at 2 (Md. Comm'r of Fin. Reg., Jan. 1, 2012), *available at* http://www.dllr.state.md.us/finance/consumers/pdf/nationallawfundingc&d.pdf.

116. Odell v. Legal Bucks, LLC, 665 S.E.2d 767, 781 (N.C. Ct. App. 2008).

117. *Id.* at 776.

118. *See id.* at 777 (stating that while the LFC's "obligation to repay the principal was conditional on [the plaintiff's] recovery, [the LFC] certainly made the advance 'in expectation of reimbursement.'").

119. Appelbaum, *Lawsuit Loans*, *supra* note 13.

Rather than give the upper hand to negligent defendants, states should pass measures that protect consumers while leaving them free to pursue litigation financing at a fair price. Such a regulatory model would build on existing state regulations—described in the next section—that introduce some basic consumer protections but fail to restrict interest rates.

B. Under-Regulation: Weak Statutes Legitimize the Industry but Fail to Adequately Protect Consumers

In some states, the litigation financing industry has successfully negotiated the implementation of rules that create basic disclosure and pricing restrictions, but do not limit interest rates. In 2005, the newly-established ALFA forged a non-legislative "Assurance" with the New York Attorney General.[120] Under the Assurance, the nine original ALFA members promised to draft litigation financing agreements that disclose annual interest rates, itemize and describe any one-time fees, and include thirty-six-month "repayment schedules" broken down into six-month intervals.[121] The LFCs also pledged to allow consumers a five-day cooling off period to terminate the agreement, as well as to conspicuously advise consumers to consult legal representation prior to signing.[122]

Although this non-legislative measure established some information disclosure guidelines, it does not sufficiently protect consumers. Most conspicuously, it does nothing to control the dozens of LFCs that have financed lawsuits in the state; the Assurance only indirectly influences the practices of large ALFA-affiliated LFCs that were benefitted tremendously by the legitimizing effects of this agreement.[123] The Assurance

120. The agreement, entitled "Assurance of Discontinuance Pursuant to Executive Law §63(15)," *available at* http://www.americanlegalfin.com/alfasite2/documents/ALFAAgreementWithAttorneyGeneral.pdf, was entered into in order to address the Attorney General's concerns regarding LFC practices. *See* McLaughlin, *supra* note 75, at 654.

121. *See id.* The "repayment schedule" outlines the increasing time-based payoff amounts equal to principal plus accumulated interest. *See* the figure on p. 507, *supra.*

122. *See* Assurance of Discontinuance Pursuant to Executive Law § 63(15), Eliot Spitzer, Att'y Gen. of the State of New York; Bureau of Consumer Frauds and Protection, Feb. 17, 2005, *available at* http://www.americanlegalfin.com/alfasite2/documents/ALFAAgreementWithAttorneyGeneral.pdf

123. Because the Assurance implicitly validated the practice of litigation financing, the LFC signatories were virtually assured of the enforceability of their

also fails to restrict unjustifiably high interest rates for low-risk cases, and does nothing to improve the consumer's extremely limited ability to make educated, balanced choices in the selection of an LFC. In *Echeverria*, the New York Superior Court expressly criticized the Assurance for permitting the Attorney General to tacitly endorse litigation financing in its current form without the consent of the state legislature.[124]

Although the few existing litigation financing statutes are more broadly enforceable against LFCs than the New York Assurance, they too lack the force to fully protect consumers against predatory behavior. In 2007, ALFA worked with state legislators in Maine to pass a law that creates some price restrictions and addresses contract information disclosure, but does not mandate interest rate ceilings.[125] The statute, which represented the first state effort to legitimize and oversee the litigation financing industry, defines "legal funding" without characterizing the transactions as loans.[126] Like the New York Assurance, the statute requires litigation financing agreements to itemize all fees, specify the annual percentage fee or rate of return, set forth a forty-two-month long repayment plan divided into six-month increments, and give consumers a five-day period to void the contract.[127] In addition, it requires litigation financing agreements to include a statement from the plaintiff's attorney providing that he or she has reviewed the contract and discussed its terms with the client, including the repayment schedule.[128]

Besides the provisions relating to information disclosure, Maine's litigation financing statute also contains some pricing restrictions. The statute stipulates that LFCs may not charge additional interest payments after forty-two months, which ensures that ultimate repayment amounts will not balloon to unexpected proportions if claims take years to resolve.[129] The law also prohibits LFCs from assessing interest more

litigation financing agreements, and were protected from AG challenges in court as long as they complied with its terms.

124. Echeverria v. Estate of Lindner, No. 018666/2002, 2005 WL 1083704, at *7 (N.Y. Sup. Ct. 2005). New York's legislature has yet to address the issue of litigation financing, but ALFA persuaded legislators to introduce a watered-down litigation financing bill in 2011. *See* Appelbaum, *Lobby Battle*, *supra* note 46.

125. *See Facts About ALFA*, *supra* note 4; ME. REV. STAT. ANN. tit. 9-A, § 12-102 (2008).

126. ME. REV. STAT. ANN. tit. 9-A, § 12-102 (2008).

127. *Id.* § 12-104.

128. *Id.*

129. *See id.* § 12-105.

frequently than semi-annually.[130] Moreover, LFCs may no longer compute the annual percentage fee or rate of return on any amounts not "actually received and retained by a consumer" (e.g., one-time application, review, and brokering fees).[131]

A few months after Maine enacted this legislation, Ohio enacted a nearly identical law that abrogated the earlier *Rancman* ruling.[132] Nebraska's matching litigation financing statute, which limits the interest charges assessment period to thirty-six months and prohibits LFCs from paying commission to attorneys for case referrals, went into effect in 2010.[133] Since then, ALFA has introduced similar bills in at least five other states: Alabama, Indiana, Kentucky, New York, and Maryland.[134]

Although these laws represent a promising trend toward legitimizing litigation financing, they do not adequately shield consumers from predatory behavior. The under-regulation of the industry enables LFCs to reap excessive profits, especially from high-value, low-risk cases. States should pass comprehensive statutes that cap interest rates based on objective case-risk factors, as well as provide consumers an efficient way to compare LFCs. Part IV proposes specific measures to achieve these ends.

IV. PROPOSED REGULATIONS TO PROTECT AND INFORM CONSUMERS

Rather than under-regulate or over-regulate litigation financing, states should set reasonable interest rate ceilings and provide consumers with the ability to make informed choices when selecting an LFC. Combined with the bedrock protections already introduced by existing laws, graduated rate caps would ensure that LFCs receive profits that are proportional to their assumed risk. Additionally, a centralized LFC resource would empower and inform consumers through direct rate comparisons, LFC ratings and reviews, and other useful tools. This two-pronged regulatory approach would protect consumers from predatory behavior and stimulate

130. *Id.*
131. *Id.*
132. OHIO REV. CODE ANN. § 1349.55 (LexisNexis 2008).
133. NEB. REV. STAT. § 25-3303 to 3304 (2010).
134. Appelbaum, *Lobby Battle*, *supra* note 46.

industry competition.[135]

To determine interest rate ceilings that will bar profiteering but allow LFCs to remain in business, states must first require LFCs to disclose comprehensive business and financial data that reflect LFCs' true costs of doing business.[136] LFCs should be required to divulge information regarding outstanding debt; the number of litigation financing agreements entered into; the total amount of money advanced; the percentage of financed lawsuits that have yielded a profit; the total amount of profits; the amount of money advanced to plaintiffs that was lost; the average time it takes to receive any proceeds; and total business expenses.[137] Disclosures of these numbers would make it possible to assign reasonable rate caps based not only on case value and objective risk factors, but also the profitability, prevalence, and operating costs of litigation financing on a state-by-state basis.[138]

With access to industry data, states could establish fair interest rate caps for individual litigation financing agreements that are proportional to their respective case-risk. Combined with settlement and jury verdict databases, an objective factor analysis would create an approximate tiered system of risk valuation that categorizes cases across claims, fact patterns, types of plaintiffs, and jurisdictions. The graduated interest rate ceilings would correspond with the likelihood of a sufficient recovery for the plaintiff. The case-risk factors for personal injury cases should include, but not be limited to: strict liability; admitted wrongdoing; serious, debilitating, or disfiguring injuries; reckless or willful and wanton conduct; the potential for punitive damages; settlement offers; eyewitnesses; contributory negligence; substantial property damage; significant medical bills; the defendant's available resources; the jurisdiction; the type of claim; and the case's projected time line.[139] For each lawsuit, a complete analysis of these factors

135. *See* Barksdale, *supra* note 6, at 735–36.

136. *See* McLaughlin, *supra* note 75, at 658. States could collect the data during a licensing process; if the LFC refuses to comply, it would not be permitted to operate.

137. Martin, *Another Subprime Industry*, *supra* note 1, at 103.

138. *See id.*

139. The plaintiff's attorney would be required to attach a brief summary of all the relevant factors on the litigation financing agreement. This would discourage LFCs from manipulating factors in their risk analysis. As later explained, however, a competitive and transparent market would ensure that consumers get the best available rates and only do business with scrupulous LFCs.

would yield an interest rate ceiling that both protects consumers and fairly rewards the LFC.[140]

In conjunction with equitable rate restrictions, states should make LFC-specific information readily available in the form of an online "marketplace."[141] Ideally, this centralized consumer resource would expand access to litigation financing, increase market competition, and enable plaintiffs to efficiently and knowledgeably choose an LFC. To supply consumers with meaningful options in the pursuit of litigation financing, regulators could formulate a standardized LFC application to allow plaintiffs to apply to multiple LFCs through a single form. This tool would not only save significant time and effort, but would efficiently produce a set of competitive rates from a variety of LFCs. Because the consumer would be able to apply to many companies simultaneously, a standardized application would also increase access to litigation financing. For instance, even if most LFCs would reject a particular claim as too high-risk, a centralized marketplace could connect the plaintiff to a company that would be willing to finance the lawsuit.

The marketplace should also allow consumers to quickly compare companies and rates without having to disclose any information to LFCs. Up-to-date LFC profiles would publish the average rates that companies charge across claims and basic fact patterns.[142] Reviews and multi-factor ratings would guide plaintiffs to customer-friendly LFCs that charge reasonable rates. The marketplace would also provide rankings and search features to allow consumers to find the best rates for particular types of claims. Just because an LFC may offer

140. Such an analysis would be technically similar to the review that LFCs already perform. For example, each factor could be assigned a certain value or range of values according to their dollar amount or degree of influence on the outcome of the case. The larger the final sum value, the greater the probability of repayment to the LFC, and the lower the corresponding interest rate ceiling.

141. In addition to requiring LFC websites and advertisements to conspicuously point consumers to the marketplace, LFCs should pay a small tax to fund the creation and maintenance of the website. As for the creation and administration of the marketplace, federal efforts would perhaps be more effective to actually implement and maintain it; states could set statutory interest rate ceilings on their own, while the Consumer Financial Protection Bureau or another federal agency would control the online hub. It would also be possible for a single state or coalition of states to spearhead the project, with further states contributing funds and data at later points.

142. In addition to comprehensive interest rate data, each LFC profile would contain customer ratings; reviews; information regarding the company's size, profitability, and affiliates in the industry; the percentage of applications the LFC accepts; and the total number of accepted applications broken down by claim.

the lowest rates for personal injury lawsuits, for example, does not mean that it would be the optimal choice for worker's compensation claims. Discussion forums would serve as another means of support for consumers, who can direct questions and concerns to other plaintiffs, LFC representatives, or government officials. Finally, the marketplace should provide a calculator that generates estimated interest rate ceilings based on user-inputted facts and numbers for a particular case.

The marketplace would not only level the playing field between plaintiffs and LFCs, but would organically stimulate market competition as well. Because company-specific rates would be available to LFCs and consumers alike, companies would competitively lower rates and additional players would be encouraged to enter the market. In its facilitation of communication between plaintiffs and LFCs, a standardized application would also compel companies to directly compete for a consumer's business. As a result, interest rates would naturally decrease and access to litigation financing might even extend to consumers with higher-risk claims. Ultimately, plaintiffs with extremely low-risk lawsuits would enjoy very low rates, while those who were previously unable to secure litigation financing may be able to finally seek its benefits.

ALFA denies that LFC rates are unnecessarily high and claims that growing numbers of LFCs in the marketplace, in addition to its own self-regulatory presence, are already sufficient for competition to drive down the costs of litigation financing without government intervention.[143] However, the sheer number of LFCs will not effectively drive down rates unless consumers are able to efficiently compare LFCs. Without the capacity to efficiently ascertain their true options for litigation financing, desperate and cash-strapped consumers will probably not select the most cost-effective LFC. More importantly, if consumers cannot even locate the most cost-effective option, competition will not work to drive down interest rates.

CONCLUSION

In order to prevent predatory LFC behavior and still provide access to litigation financing, states must control this

143. *See Frequently Asked Questions*, *supra* note 69.

unique and beneficial practice through a multi-faceted approach. Existing litigation financing laws do not adequately shield consumers from unreasonable interest rates or provide them with clear options. On the other hand, given the associated risks and operating costs that LFCs face, access to litigation financing may become severely limited in states that regulate litigation financing agreements as traditional loans.[144] Rather than forfeit the benefits of litigation financing or give LFCs the power to charge unjustifiable rates, states should directly regulate the industry to protect and empower consumers. Equitable interest rate ceilings based on objective case-risk factors would prohibit LFCs from reaping unreasonable profits from desperate plaintiffs. In conjunction with a centralized LFC marketplace that promotes consumer choice, expands access to litigation financing, and stimulates competition, this legislative action would finally allow consumers to pursue litigation financing at a fair price.

144. *See* Martin, *The Wild West*, *supra* note 8, at 68.

THE RISE OF THE TRANSGENDER CHILD: OVERCOMING SOCIETAL STIGMA, INSTITUTIONAL DISCRIMINATION, AND INDIVIDUAL BIAS TO ENACT AND ENFORCE NONDISCRIMINATORY DRESS CODE POLICIES

HOLLY V. FRANSON*

School districts are often called upon to adapt school policies in response to changing student populations, and transgender students appear to be an emerging student population. Schools should adopt nondiscriminatory and inclusive dress code policies to accommodate transgender students. Recently, awareness and advocacy on behalf of children who can be classified as transgender have increased. Unfortunately, despite this increase in awareness and advocacy, transgender students continue to face unique obstacles in the school environment, including bullying, as a result of being transgender. Because the primary means through which transgender students express their identified genders is through their dress, schools should take affirmative steps to accommodate transgender students through their dress code policies.

---

* Juris Doctor candidate at the University of Colorado Law School and an Associate Editor for the *University of Colorado Law Review*. Ms. Franson grew up in Milwaukee and received a B.A. in Literary Studies and Political Science from Beloit College. During law school, she worked at a law firm specializing in employment law and will continue there after graduation. Ms. Franson first became interested in the rights of transgender individuals upon learning that in the context of employment discrimination claims brought under Title VII, courts have interpreted the term "sex" to exclude protections for transgender people.

INTRODUCTION

> *I was born twice: first, as a baby girl, on a remarkably smogless Detroit day in January of 1960; and then again, as a teenage boy, in an emergency room near Petoskey, Michigan, in August of 1974.*[1]

In the United States, awareness of the number of children who are identifying as transgender has increased, and a growing number of parents have accepted and even encouraged this gender self-identification.[2] This rise in awareness, coupled with a corresponding contingent of vocal parents, raises a host of legal questions related to the status of transgender children in the education system. For example, a parent attempting to enroll her biologically male child in school as a female when the child's birth certificate lists her sex as male may face opposition from the school district. A parent may also face difficulties in determining an appropriate response when a teacher or school administrator subjects his or her transgender

1. JEFFREY EUGENIDES, MIDDLESEX 1 (2002).

2. Julia Reischal, *See Tom Be Jane*, THE VILLAGE VOICE (May 30, 2006), http://www.villagevoice.com/2006-05-30/news/see-tom-be-jane/ ("[A] growing coalition of therapists, scientists, and activists disagree [that such children should be discouraged from identifying as the opposite genders] and refer to such children—even those as young as three years old—as transgendered, insisting that the child's new identification shouldn't be discouraged.").

child to intimidation and discrimination.

To date, only a few lawsuits have been filed asserting a right for transgender children to express their genders through their dress.[3] However, as the population of children identifying as transgender continues to gain exposure, parents may become more likely to consider legal action to enforce the rights of their transgender children. Because the primary method by which most transgender children express their identified genders[4] is through their dress,[5] school dress codes become ripe for legal challenges when they are applied to prohibit children from wearing clothing consistent with their identified genders. In order for school dress code policies to be nondiscriminatory, they cannot be enforced to limit a child from expressing his or her identified gender through clothing, accessories, makeup, or other visual expressions that the child and his or her parents determine are appropriate.[6] Enforcement also presents a problem for school districts, because teachers and school administrators charged with enforcing nondiscriminatory dress code policies may be influenced by their own prejudices and beliefs.

This Comment argues that given the apparent rise in children identifying as transgender, schools should adopt gender nondiscriminatory dress code policies to protect the rights of transgender students and avoid potential litigation. Part I frames the Comment by defining the term "transgender" as it will be used throughout this article. Part II addresses the recent increase in awareness of transgender children, including an apparent increase in familial support for transgender children. Part II touches upon the advancements in medical and psychological treatment options for children identifying as transgender. Part III discusses the challenges transgender children face because of their transgender status. Part IV

3. *See* Doe v. Bell, 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003); Complaint for Damages and Demand for Jury Trial, Youngblood v. Sch. Bd. of Hillsborough Cnty., No. 8:02-CV-1089-T-24MAP (M.D. Fla. June 19, 2002); Doe *ex rel.* Doe v. Yunits, No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000); *see also infra* Part IV.A.

4. "Identified gender" refers to a transgender child's chosen gender. The transgender child's identified gender is the opposite of his or her biological gender, which is the gender the child has been associated with since birth and is usually marked on the child's birth certificate.

5. Zenobia V. Harris, *Breaking the Dress Code: Protecting Transgender Students, Their Identities, and Their Rights*, 13 SCHOLAR 149, 155–56 (2010).

6. *See infra* Part IV.A.

examines three lawsuits brought on behalf of transgender youth challenging institutional dress code policies. Finally, Part V offers and discusses possible affirmative steps schools can take to enact nondiscriminatory dress code policies and avoid litigation.

I. DEFINING CATEGORIES OF INDIVIDUALS UNDER THE "TRANSGENDER UMBRELLA"

Before the recent increase in awareness of transgender children can be discussed, the term "transgender" must be defined and understood. Defining what it means to be transgender and who falls under the transgender umbrella, is difficult.[7] There is no accepted, concrete definition for the term "transgender."[8] Additionally, the transgender community itself has largely constructed the term "transgender," and people who identify as transgender make up a diverse community, thereby further complicating any concrete definition that might be offered.[9]

Scholars have defined the term "transgender" to include a wide range of people who do not conform to traditional gender norms and stereotypes.[10] Broadly speaking, the transgender umbrella includes "individuals of any age or sex whose appearance, personal characteristics, or behaviors differ from

---

7. Diana Elkind, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895, 897–98 (2007).

8. *See id.*

9. For a discussion of the creation of the term "transgender" by the transgender community, see Phyllis Randolph Frye, *The International Bill of Gender Rights vs. the Cider House Rules: Transgenders Struggle with the Courts Over What Clothing They are Allowed to Wear on the Job, Which Restroom They are Allowed to Use on the Job, Their Right to Marry, and the Very Definition of Their Sex*, 7 WM. & MARY J. WOMEN & L. 133, 153 (2000). Furthermore, the definition of what it means to be transgender is not static and has been evolving since its inception. *See* Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What is the "Plain Meaning" of "Sex" In Title VII of the Civil Rights Act of 1964?*, 18 TEMP. POL. & CIV. RTS. L. REV. 573, 581–90 (2009) (providing a comprehensive history of the definition and classifications under the transgender umbrella from the nineteenth century to present day); Ilana Gelfman, *Because of Intersex: Intersexuality, Title VII, and the Reality of Discrimination "Because of . . . [Perceived] Sex*," 34 N.Y.U. REV. L. & SOC. CHANGE 55, 62 (2010) ("[T]he definition of intersex is shifting and changing alongside the corresponding shifts and changes in societal definitions of 'male' and 'female.'").

10. *See* Barbara Fedders, *Coming out for Kids: Recognizing, Respecting, and Representing LGBTQ Youth*, 6 NEV. L. J. 774, 778 (2006).

stereotypes about how men and women are 'supposed' to be."[11] For example, Phyllis Randolph Frye conceptualizes two groups of people under the transgender umbrella: "part-time" transgender people and "full-time" transgender people.[12] Part-time transgender people include those whom society labels as a "cross-dresser, transvestite, effeminate male, masculine female, [or] drag queen."[13] Full-time transgender people include those in the process of transitioning to their identified genders and those who have completed the transition process.[14] The transition process may involve people living their everyday lives as their identified genders, undergoing hormone therapy, or going through sex reassignment surgery.[15]

The term transgender is further complicated when it is applied to children.[16] Unlike adults, children cannot consent to undergo full gender transition.[17] Typically, transgender youths are able to express their identified genders primarily by wearing clothing and accessories society associates with their identified genders.[18] Though this expression is significantly less dramatic than full biological gender transitions, many parents may still fear that their children will be ostracized, harassed, or otherwise negatively affected as a result of wearing clothing or engaging in play associated with their identified, rather than biological, genders.[19] Additionally, parents, as well as the numerous specialists and professionals who are often involved in children's lives, may prefer to avoid labeling a child as "transgender" or "gender variant," knowing

11. Amanda Raflo, *Evolving Protection for Transgender Employees Under Title VII's Sex Discrimination Prohibition: A New Era Where Gender is More Than Chromosomes*, 2 CHARLOTTE L. REV. 217, 221–22 (2010) (quoting Jameson Green, *Introduction* to PAISLEY CURRAH & SHANNON MINTER, TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS 1 (Pol'y Inst. of the Natl. Gay & Lesbian Task Force 2000), *available at* http://www.thetaskforce.org/downloads/reports/reports/TransgenderEquality.pdf).

12. *See* Frye, *supra* note 9, at 155–59.

13. *Id.* at 155–58. In her explanation of part-time transgender individuals, Frye adds that a defining characteristic of the individuals in this category is that they "do not wish to totally or permanently change their full-time gender presentation." *Id.* at 157. Thus, she adds the term "gender variant" to classify these individuals. *Id.*

14. *Id.* at 158–59.

15. For a brief overview of the transition process, see Brittany Ems, *Preparing the Workplace for Transition: A Solution to Employment Discrimination Based on Gender Identity*, 54 ST. LOUIS U. L.J. 1329, 1333–34 (2010).

16. Harris, *supra* note 5, 162–63 (2010).

17. *Id.*

18. *Id.* at 163.

19. *See* Reischal, *supra* note 2.

that the child may later decide that he or she no longer identifies with that label.[20] This preference also indicates a concern that a transgender child will face negative consequences for living as his or her identified gender, even if the child later returns to living as his or her biological gender.[21]

The term transgender has been broadly interpreted and includes a diverse group of gender variant people, including children. Accordingly, as used in this Comment, the term transgender has a broad definition. As discussed herein, transgender children include those who tell their parents they want to undergo the transition process. Additionally, transgender children include those who insist on wearing clothing and accessories of their nonbiological genders, as well as those who exhibit other gender-nonconforming behavior.

II. THE RISE OF AWARENESS OF THE TRANSGENDER CHILD

The precise number of transgender children in the United States is unclear.[22] Various international studies have estimated that the rate of people, including children and adults, who are transgender is somewhere between one in one thousand and one in thirty thousand.[23] Further muddling the estimate of the number of transgender children, "[s]ome gender specialists estimate that [one] in [five hundred] children is significantly gender nonconforming[24] or transgender."[25] In contrast, a previous "study based on statistics of postoperative transsexual men put the number at [one] in [twenty thousand]."[26] The significant variations in studies indicate that

20. *See* Bedford Hope, *Disco-Ball Dresses and Spandex*, SLATE MAG., Aug. 2, 2010, http://www.slate.com/articles/double_x/doublex/2010/08/discoball_dresses_and_spandex.html. (parent-author noting "many of us have learned to accept ambiguity, 'holding all options open,' as some supportive therapists say. Many of us attempt to avoid labels for something that may or may not fade away in a year—or 10.").

21. *See id.*

22. Madison Park, *Transgender Kids: Painful Quest to be Who They Are*, CNN (Sept. 27, 2011), http://www.cnn.com/2011/09/27/health/transgender-kids/index.html ("[R]obust data and studies about transgender children are rare.").

23. *Id.*

24. The term "gender nonconforming" is encompassed in the term "transgender" as it is used in this Comment.

25. *Frequently Asked Questions*, GENDER SPECTRUM, http://www.genderspectrum.org/child-family/faq (last visited Nov. 16, 2011).

26. *Id.*

"at present, it is impossible to determine the actual number of transgender or gender diverse children in the [United States]."[27]

As discussed below, despite the uncertainty over the exact number of transgender children in the United States, it appears that the visibility of transgender children is rising.[28] Accompanying the increase in awareness of transgender children are services catering exclusively to their demographic, such as summer camps.[29] The rise in awareness of children publicly identifying as transgender is related to two main factors: (1) an increase in familial acceptance of transgender children; and (2) an increase in physical and psychological treatment options for transgender children.

A. Families' Embrace: Increase in Familial Acceptance

A rise in the number of parents who support their children expressing their identified genders has accompanied the increase in public awareness of transgender children.[30] In a 2006 Village Voice article on a transgender child, "Nicole," and her family, the article's author noted that "[e]xperts consulted by this reporter say the Andersons are the only family in the United States supporting a five-year-old's choice to live as the opposite sex."[31] However, only a single year later, one television special commented that there were "hundreds of families with transgender children" allowing their children to live as their identified genders.[32]

---

27. *Id.*

28. See Norman P. Spack et al., *Children and Adolescents with Gender Identity Disorder Referred to a Pediatric Medical Center*, 129 PEDIATRICS 418 (Feb. 20, 2012), *available at* http://pediatrics.aappublications.org/content/early/2012/02/15/peds.2011-0907 (explaining that after a gender clinic was established at Children's Hospital Boston, the number of transgender youth coming to the hospital quadrupled); *see also* Hanna Rosin, *A Boy's Life*, THE ATLANTIC MAG. (Nov. 2008), *available at* http://www.theatlantic.com/magazine/archive/2008/11/a-boys-life/307059/?single_page=true (noting that a leading psychiatrist in treating transgender youth attributes an increase in referrals to "to media coverage and the proliferation of new sites on the Internet").

29. *See* Hope, *supra* note 20 (describing the experience of the author, a parent of a transgender child, witnessing his child at a camp exclusively for transgender children).

30. *See* Alan B. Goldberg & Joneil Adriano, *'I'm a Girl'—Understanding Transgender Children*, ABC 20/20 (Apr. 27, 2007), http://abcnews.go.com/2020/story?id=3088298&page=1.

31. Reischal, *supra* note 2.

32. Goldberg & Adriano, *supra* note 30; *see also* Johanna Olson, Catherine

Although this rise in media coverage does not imply that a transgender child is present in every elementary school classroom, it does reflect a growing awareness of transgender children generally.[33] This awareness may be partially attributed to the increase in parental acceptance of transgender children. After all, a parent must approve an interviewer's request to interview the parent's child, and concerned parents are often the strongest advocates for their minor children.[34] Additionally, at least one parent has taken her support for her transgender child public.[35] Jennifer Carr (pseudonym) recently authored a children's book entitled *Be Who You Are*, which chronicles her and her husband's response to their biologically male child informing them that she identifies as female.[36]

Many parents appear to accept their transgender child regardless of the age at which the child first announces his or her desire to express his or her identified gender.[37] This acceptance suggests that litigation related to transgender students' rights may be seen at all school grade levels. For example, "Jazz," who was born biologically male but identifies as female, asserted at only one-and-a-half years old that she identifies as female.[38] When Jazz reached age five, her parents allowed her to present herself as a female full-time and allowed her to wear dresses and other feminine clothing outside of the home.[39] Now eleven years old, Jazz continues to live as a

Forbes & Marvin Belzer, *Management of the Transgender Adolescent*, 165 ARCHIVES OF PEDIATRIC & ADOLESCENT MED. 171, 173 (2011), http://imatyfa.org/practioners/ManagementTGAdol_Olson.pdf (noting the increase in media attention paid to transgender children).

33. *See* Rosin, *supra* note 28.

34. *See* Reischal, *supra* note 2.

35. Alexia Elejalde-Ruiz, *Meeting the Challenge of a Transgender Child*, CHI. TRIB. (Jan. 25, 2011), http://articles.chicagotribune.com/2011-01-25/features/sc-fam-0125-transgender-child-20110125_1_hope-gender-family-therapy.

36. *Id.* To learn more about Carr's family, visit her blog at Jennifer Carr, TODAY YOU ARE YOU: UNDERSTANDING TRUTH & GENDER DIVERSITY, http://todayyouareyou.com/ (last visited Dec. 28, 2012).

37. *See* Reischal, *supra* note 2 (discussing a 2006 Philadelphia Trans-Health Conference panel "How Young Is Too Young?" and a conference attendee parent's agreement "that it's never too early to support a child as a transsexual, even at age five").

38. *See* Goldberg & Adriano, *supra* note 30. Jazz's parents described Jazz's behavior to include unsnapping her onesie to make her outfit look like a dress and correcting them by saying that she was "a good girl" after they would tell her she was "a good boy." *Id.*

39. *Id.*

female.[40]

Furthermore, this parental advocacy appears to have triggered community advocacy for transgender children. One recent example of community advocacy occurred in Colorado.[41] Seven-year-old Bobby Montoya was born biologically male.[42] Notwithstanding her biological gender, Bobby liked to dress as a female and play with toys typically associated with young girls.[43] Further expressing her identified gender and her enjoyment of activities typically associated with young girls, Bobby requested to join the Girl Scouts of Colorado.[44] Although Bobby's request was initially denied, the Girl Scouts of Colorado later "admitted a mistake was made" and allowed Bobby to join the Girl Scouts.[45] Additionally, the Girl Scouts of Colorado stated that it has received an increase in "requests for support of transgender kids[,] . . . and [it] is working to support the children, their families[,] and the volunteers who serve them."[46] Thus, Bobby's struggle to join the Girl Scouts illuminates not only the current rise in the awareness of transgender children, but also the corresponding rise in people advocating for these children.[47] This increase in advocacy suggests that parents may begin addressing their children's rights in the school system, including the right for transgender children to dress in clothing associated with their identified genders.[48]

B. Increase in Psychological and Physical Treatment Options

The increase in awareness of transgender children is also

40. For a preview of a special that aired about Jazz on November 17, 2011, see Oprah Winfrey Network, *The Rosie Show: Meet Jazz*, YOUTUBE (Nov. 11, 2011), http://www.youtube.com/watch?v=L3L0uJY_Rg4.

41. Dean Praetorius, *Bobby Montoya, 7-Year-Old Transgender Child, Turned Away Form Girl Scouts, Later Accepted*, HUFFINGTON POST (Oct. 31, 2011 3:25 PM), http://www.huffingtonpost.com/2011/10/26/bobby-montoya-girl-scouts_n_1033308.html.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Colorado Girl Scouts Say Boy Welcome to Join*, FOX NEWS (Oct. 26, 2011), http://www.foxnews.com/us/2011/10/26/colorado-girl-scouts-say-boy-welcome-to-join/.

47. *See id.*

48. *See infra* Part IV.

related to an increase in psychological and physical treatment options for transgender youth.[49] It has also led to a vigorous dispute about how best to treat children who identify as transgender. In the psychiatric community, there are two factions of care providers who disagree on the most appropriate way to treat transgender children.[50] One group practices a line of therapy based on the belief that when a child expresses that his or her biological gender is not his or her identified gender, parents should encourage their child to embrace his or her identified gender.[51] The second group practices a line of therapy designed to compel the child to conform to his or her biological gender and overcome the impulses that accompany the child's desire to dress and behave like his or her identified gender.[52] The second group's practice is consistent with scientific studies finding that most people who identified as transgender when they were children will no longer identify as transgender by the time they reach adulthood.[53]

Complicating the psychological treatment options for transgender youth is the invention of hormone blockers, or so-called "puberty blockers."[54] Hormone blockers became available in 2005 to assist transgender children in undergoing the transition process.[55] Hormone blockers effectively stop the puberty process, putting "teens in a state of suspended development."[56] For example, the blockers prevent a biological male from growing facial hair, developing a deep voice, and growing an Adam's apple.[57] Framed in the context of the transition process, the blockers prevent the development of "physical characteristics that a . . . [transgender individual] would later [have to] spend tens of thousands of dollars to reverse."[58] However, in order to be effective, the blockers must be taken before puberty begins.[59] Therefore, when crafting dress code policies, schools should consider the potential for

49. *See* Spack et al., *supra* note 28.

50. Alix Spiegel, *Two Families Grapple with Sons' Gender Identity*, NAT'L PUB. RADIO (May 7, 2008), http://www.npr.org/2008/05/07/90247842/two-families-grapple-with-sons-gender-preferences.

51. *Id.*

52. *Id.*

53. Spack et al., *supra* note 28, at 571.

54. Rosin, *supra* note 28.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

children to avoid ever outwardly presenting themselves as their biological genders. As children are increasingly able to disguise their biological genders, the capability of schools to define children as male or female is eroded. If a school does not have a gender-neutral dress code, this erosion may complicate the school's ability to enforce its dress policies, albeit possibly in a nondiscriminatory way, as it would be unable to differentiate between a student's biological gender and the gender expressed by the student. As discussed in Part III, transgender children often face difficulties in the school environment specifically because they are transgender.

III. UNIQUE OBSTACLES FACED BY THE TRANSGENDER CHILD

Transgender youth face unique obstacles due to their transgender status.[60] Transgender students are more likely to feel unsafe at school than non-transgender students, including other LGBT[61] students.[62] Additionally, transgender students are more likely to be verbally harassed,[63] physically harassed,[64] and physically assaulted[65] than their nontransgender peers. Almost half of all transgender children who have been assaulted or harassed do not report the incidents.[66]

Additionally, transgender youth face unique institutional obstacles as a result of their student status.[67] For example,

60. Elkind, *supra* note 7, at 921.

61. LGBT is an acronym for Lesbian, Gay, Bisexual, and Transgender people.

62. Harsh Realities *Finds Transgender Youth Face Extreme Harassment in School*, GAY, LESBIAN, & STRAIGHT EDUC. NETWORK (Mar. 17, 2009), *available at* http://www.glsen.org/cgi-bin/iowa/all/news/record/2388.html [hereinafter GLESN study].

63. *Id.* (finding "[a]lmost all transgender students had been verbally harassed (*e.g.*, called names or threatened) in the past year at school because of their sexual orientation (89 [percent]) and gender expression (87[percent])").

64. The GLESN study defined physical harassment as action similar or equivalent to pushing and shoving and found that the majority of transgender students had been physically harassed in the last year "because of their sexual orientation (55 [percent]) and gender expression (53 [percent])." *Id.*

65. Physical assault was defined as action similar or equivalent to punching, kicking, or injuring with a weapon. *Id.* The study found that 28 percent of transgender students had been physically assaulted because of their sexual orientation, and 26 percent had been physically assaulted because of their gender expression. *Id.*

66. *Id.* at 22. It is unclear why such a large percentage of transgender children do not report that they have been harassed or assaulted. *See id.*

67. *Safe and Supportive Schools*, NAT'L CTR. FOR TRANSGENDER EQUAL., http://transequality.org/Issues/education.html (last visited Nov. 15, 2011)

while most gender-conforming students likely have little difficulty enrolling in school, transgender students wishing to enroll as their identified genders, as opposed to their biological genders, often face difficulties. These difficulties arise because students are often required to show documentation, typically in the form of a birth certificate, proving their gender identity in order to enroll.[68] To enroll in school as their identified genders, students may need to legally petition a court to change the sex on their birth certificates from their biological genders to their identified genders.[69]

Though these institutional hurdles often create difficulties for transgender students and their families, they also present an opportunity for parents to insert themselves into the education setting as advocates for their children. A parent's presence at school may impact more than just his or her child; it can also have a profound effect on school policy and school culture. Moreover, many teachers and administrators may be more willing to accommodate a transgender student's parents than to support a transgender child without parental support.[70]

IV. CASE STUDY: THE TRANSGENDER STUDENT FORCED TO VIOLATE SCHOOL DRESS CODES

A. Legal Claims Brought by Transgender Students over School Dress Codes

To date, only a handful of legal actions brought on behalf of transgender children have challenged institutional dress codes. Below, this Comment examines three legal challenges at different stages in the proceedings. The first section examines a transgender student's complaint for damages and demand for jury trial. The student's complaint demonstrates the different contexts in which school dress policies may harm a transgender

(providing a comprehensive list of proposed measures to protect transgender children in the education system).

68. Stephanie Innes, *Meet Josie, 9: No Secret She's Transgender*, ARIZ. DAILY STAR (July 25, 2010), http://azstarnet.com/news/science/health-med-fit/article_62e8719b-5b8d-5f99-80f3-71f00a41c334.html (describing difficulty in enrolling child in school as identified gender without a legally changed birth certificate stating the child's identified gender).

69. *Id.*

70. *See* Reischal, *supra* note 2.

student.[71] The second section summarizes a court order granting a transgender student's request for a preliminary injunction after she brought a suit challenging her school's dress code.[72] This case is instructive in predicting how other courts may respond to similar requests. The third section summarizes a court's decision where a transgender youth had challenged the dress code in a residential foster care facility.[73] The court's decision provides additional insight into the approaches courts have taken to address legal challenges brought by transgender youth related to mandatory dress codes.

B. A Complaint: Youngblood v. School Board of Hillsborough County

The complaint in *Youngblood v. School Board of Hillsborough County* alleged that a public school district impermissibly discriminated against a high school senior when it refused to allow the student to wear a shirt, tie, and jacket in her[74] yearbook photograph rather than a "velvet-like, ruffly, scoop neck drape" that it required female students to wear.[75] In her complaint, the student stated that she "has not conformed to gender stereotypes about how girls are supposed to look and behave" from a "very young age."[76] This gender nonconformity included not wearing dresses or skirts after early elementary school.[77] Because she refused to wear the drape in her photograph, the district stated that the student would have to pay for her own photography and purchase a paid advertisement in the yearbook in order for her picture to appear in the yearbook.[78] The student refused to purchase a paid advertisement.[79] Therefore, the student did not appear in the yearbook, and the school did not list her name in the

71. Complaint for Damages and Demand for Jury Trial, *supra* note 3.

72. Doe *ex rel.* Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *1 (Mass. Super. Ct. Oct. 11, 2000).

73. Doe v. Bell, 754 N.Y.S.2d 846, 848 (N.Y. Sup. Ct. 2003).

74. Because it is unclear from her complaint whether the student explicitly identified as transgender, the female pronoun will be used when discussing her claim.

75. Complaint for Damages and Demand for Jury Trial, *supra* note 3, ¶ 7.

76. *Id.* ¶ 8.

77. *Id.* Therefore, as defined in this Comment, the student was transgender. *See supra* Part I.

78. *Id.* ¶ 28.

79. *Id.* ¶ 31.

yearbook's index.[80]

The complaint asserted causes of action for discrimination based on sex in violation of Title IX of the Education Amendment Acts,[81] a Florida state antidiscrimination act that prohibits discrimination on the basis of gender in K-20 education,[82] the right to freedom of expression under the United States Constitution[83] and the Florida state constitution,[84] and equal protection under the Fourteenth Amendment.[85] The court never addressed the merits of the student's complaint because the case settled out of court.[86]

The *Youngblood* complaint is instructive for two reasons. First, it demonstrates one scenario in which a school dress code impacts a transgender student. It appears from the complaint that the student had been gender nonconforming in her dress since the first or second grade.[87] However, it was not until her senior year portrait that the student brought a lawsuit challenging the school dress code.[88] The complaint demonstrates that, even where a school permits a student to wear gender nonconforming clothing, school dress codes are sometimes applied in a discriminatory way in specific situations, such as school yearbook photographs. Therefore, *Youngblood* indicates that when districts examine their dress code policies to determine whether they discriminate against gender nonconforming students, districts must also evaluate their policies with respect to school photographs or other situations in which the district has prescribed clothing and appearance guidelines. Second, as discussed in subsection 4 of this Part, the *Youngblood* complaint is instructive because it sets forth several distinct causes of action under which a

80. *Id.* ¶ 31.

81. *Id.* ¶ 35.

82. *Id.* ¶ 37*; see also* Florida Educational Equity Act, FLA. STAT. ANN. § 1000.05 (West 2011).

83. Complaint for Damages and Demand for Jury Trial, *supra* note 3, ¶ 3.

84. *Id.* ¶ 41.

85. *Id.* ¶ 43.

86. *See Florida Student Settles Lawsuit over Yearbook Dress Code*, FIRST AMEND. CTR. (May 15, 2004), http://www.firstamendmentjournal.com/speech/studentexpression/%5Cnews.aspx?id=13346. The settlement resulted in a new school district policy allowing high school seniors fourteen days to appeal the district's dress code policy if they believe it is discriminatorily applied to them. *See* Adam Lynch, *School Cuts Gay Student Photo from Yearbook*, JACKSON FREE PRESS (Apr. 26, 2010), http://www.jacksonfreepress.com/index.php/site/comments/school_cuts_gay_student_photo_from_yearbook/.

87. Complaint for Damages and Demand for Jury Trial, *supra* note 3, ¶ 8.

88. *See id.* ¶ 6.

gender nonconforming student may challenge a discriminatory school dress code policy.

C. A Preliminary Injunction: Doe ex rel. Doe v. Yunits

In *Doe ex rel. Doe v. Yunits*, an eighth grade student brought a lawsuit against a Massachusetts public school for its refusal to re-enroll her if she wore female clothing or accessories.[89] The student was biologically male and identified as male when enrolling in school.[90] However, in the seventh grade, the student began expressing her identified gender as female by wearing female clothing, accessories, and makeup to school.[91] At this time, the student's therapist diagnosed her with Gender Identity Disorder.[92] Notwithstanding knowledge of her diagnosis, the school principal required the student "to come to his office every day so that he could approve [her] appearance."[93] As a result of this daily screening process, "[s]ome days the [student] would be sent home to change, sometimes returning to school dressed differently and sometimes remaining home."[94]

The school's dress code "prohibit[ed], among other things, 'clothing which could be disruptive or distractive to the educational process or which could affect the safety of students.'"[95] Because the student wore "padded bras, skirts or dresses, or wigs," the school determined the student violated the dress code because her "outfits [were] disruptive to the educational process."[96] Thus, the school gave the student two unfavorable options: enrolling in school but not wearing clothing consistent with her identified gender or not enrolling in school for the academic year.[97] These options led the student to file a lawsuit against the school in Massachusetts state court.[98] The student's suit included eight causes of action based

89. Doe *ex rel.* Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *1 (Mass. Super. Ct. Oct. 11, 2000).
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at *2.
97. *Id.*
98. *Id.*

on the Massachusetts constitution and state statutes.[99] The student requested,[100] and the court subsequently granted,[101] a preliminary injunction allowing her to wear female clothing and accessories to school. In its order granting the preliminary injunction, the court found that three of the eight causes of action likely would be successful on the merits.[102]

First, when granting the student's request for a preliminary injunction, the court found that the student was likely to prevail on her claim that the school's actions unlawfully infringed on her right to freedom of expression.[103] The court found the student could likely establish that "by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with that gender."[104] As the court stated, "[the student's] expression is not merely a personal preference *but a necessary symbol of her very identity*."[105] Additionally, the court found that by prohibiting the student "from wearing items of clothing that are traditionally labeled girls' clothing, such as dresses and skirts, padded bras, and wigs . . . [the school engaged in] direct suppression of speech because biological females who wear items such as tight skirts to school are unlikely to be disciplined by school officials."[106] Although this suppression of speech is permissible if the student's speech "materially and substantially interferes with the work of the school,"[107] the court found the school's argument that the student's dress was distracting to be unpersuasive.[108] In so finding, the court noted that the school did not consider the student's "clothing distracting *per se*, but, essentially, distracting simply because

99. *Id.*
100. *Id.* at *8.
101. *Id.*
102. *Id.* at *3–7. When determining whether to grant a preliminary injunction, the court first evaluates "'the moving party's claim of injury and chance of success on the merits.'" *Id.* at *2 (quoting Packing Indus. Grp. v. Cheney, 405 N.E.2d 106, 112 (Mass. 1980)). Next, the court balances the risk that the moving party will suffer irreparable harm if the injunction is not granted against any risk of irreparable harm that the non-moving party may suffer if the injunction is granted. *Id.*
103. *Id.* at *5.
104. *Id.* at *3.
105. *Id.* (emphasis added).
106. *Id.* at *4.
107. *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969)).
108. *Id.*

plaintiff [was] a biological male."[109]

Second, the court found the student was likely to prevail on a liberty interest[110] claim.[111] Although the court's order only briefly addressed this claim, it stated that an individual has a liberty interest in her appearance.[112] It also cited favorably to a decision finding that this liberty interest was violated when a school prohibited a male student from having shoulder-length hair.[113] Accordingly, because the school probably could not demonstrate that the student's dress was distracting, the court found that the school probably could not overcome the student's liberty interest claim in her appearance if the claim went to trial on its merits.[114]

Third, the court found that the student was likely to prevail on her claim of sex discrimination.[115] In doing so, the court incorporated legal principles derived from Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment "because of" or "on the basis of" sex.[116] The court relied on the landmark employment discrimination case *Price Waterhouse v. Hopkins*.[117] In *Price Waterhouse*, the Court held that an employee alleging sex discrimination can prevail on a Title VII sex discrimination claim where the employee is discriminated against for not conforming to gender

109. *Id.*

110. In order to prevail on a due process claim, a plaintiff must establish that he or she was "deprived of a protected interest in 'property' or 'liberty.'" Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59 (1999) (citations omitted). Thus, a liberty interest claim encompasses allegations of a violation of due process such that the plaintiff was deprived of a protected interest in liberty. *See id.* There is no established definition for the types of deprivations encompassed by liberty interest claims. *See, e.g.*, Sandin v. Conner, 515 U.S. 472, 493 (1995); *see also* Rebecca Brown, Note, *Grandparent Visitation and the Intact Family*, 16 S. ILL. U. L.J. 133, 143 (1991). However, some courts have found that "liberty" encompasses personal appearance. *See* Rathert v. Village of Peotone, 903 F.2d 510, 514 (7th Cir. 1990); DeWeese v. Town of Palm Beach, 812 F.2d 1365, 1367 (11th Cir. 1987); Domico v. Rapides Parish Sch. Bd., 675 F.2d 100, 101 (5th Cir. 1982); *see also* Kelley v. Johnson, 425 U.S. 238, 244 (1976) (assuming liberty interest in one's appearance exists for purpose of discussion where police officer challenged county's hair-grooming standards for male police officers).

111. *Id.* at *6.

112. *Id.*

113. *Id.* (citing Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970)).

114. *Id.*

115. *Id.* at *7.

116. 42 U.S.C. § 2000e-2(b) (2006); Doe *ex rel.* Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *6 (Mass. Super. Ct. Oct. 11, 2000).

117. *Yunits*, 2000 WL 33162199 at *6 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989)).

stereotypes.[118] Gender stereotypes include, but are not limited to, dress, speech, mannerisms, and other behavior.[119] In *Yunits*, the court found that the student was discriminated against because the school believed that, by dressing as her identified gender, she did not conform to gender stereotypes of what a male student should wear.[120] In so finding, the court declared it could not "allow the stifling of plaintiff's selfhood merely because it causes some members of the community discomfort."[121]

Accordingly, the court granted the student's motion for a preliminary injunction.[122] In its preliminary injunction, the court ordered that:

> 1. Defendants are preliminarily enjoined from preventing plaintiff from wearing any clothing or accessories that any other male or female student could wear to school without being disciplined;
> 2. Defendants are further preliminarily enjoined from disciplining plaintiff for any reason for which other students would not be disciplined; and
> 3. If defendants do seek to discipline plaintiff in conformance with this order, they must do so according to the school's standing policies and procedures.[123]

Additionally, at the end of its opinion, the court expressed its own belief that transgender students can contribute positively to the school community: "[E]xposing children to diversity at an early age serves the important social goals of increasing their ability to tolerate such differences and teaching them respect for everyone's unique personal experience in that 'Brave New World' out there."[124]

As discussed in Part IV, *infra*, the court's order in *Yunits* can inform the discussion of school dress codes because it offers insight into which causes of action the court found persuasive. Although the court's findings are not binding on other courts, and therefore school districts may not consider them

118. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).
119. *Id.* at 235, 250.
120. *Yunits*, 2000 WL 33162199, at *6.
121. *Id.* at *7.
122. *Id.* at *8.
123. *Id.*
124. *Id.*

persuasive, there is very little precedent to guide schools as they craft nondiscriminatory dress code policies. Therefore, school districts can use the court's discussion in *Yunits* of the various causes of action to ensure their dress codes are not discriminatorily applied to transgender students. Likewise, the language of the court's injunction can be useful when examining how school districts should draft and enforce their dress codes to be inclusive of transgender students.[125]

D. A Final Order: Doe v. Bell

In *Doe v. Bell*, a transgender youth resided in an all-male foster care center in New York State.[126] The youth identified as female and had been diagnosed with Gender Identity Disorder.[127] Despite a recommendation from her psychiatrist that she dress according to her identified gender,[128] the center prohibited her from wearing "female attire" while inside the center.[129] The youth filed a lawsuit against the center, alleging both violations of state law and the constitutional right to freedom of expression.[130] After the youth filed her lawsuit, the center enacted a new dress code.[131] The dress code included the following provisions:

> [R]esidents must wear pants, or in warm weather, loose-fitting shorts that extend at least to mid-thigh. Shirts (or blouses) must also be worn at all times and must not expose the chest or midriff . . . . [C]lothing that is sexually provocative, that is, excessively short or tight fitting, or which is see thru [sic] [is prohibited.] . . . [R]esidents who wish to wear female attire may do so as long as the above guidelines are respected. Female attire that does not conform to the policy may only be worn by a resident when

125. Particularly striking is how much of the policy outlined in the court's order aligns with that promulgated in the Model District Policy discussed in Section B, *infra*.

126. Doe v. Bell, 754 N.Y.S.2d 846, 847–48 (N.Y. Sup. Ct. 2003).

127. *Id.* at 847.

128. *Id.* at 848 (recounting psychiatrist's testimony regarding her recommendations to youth, which included "wearing girls' clothing, accessories, and makeup, and sometimes other items to make [herself] look . . . more feminine, such as breast enhancers") (alteration in original).

129. *Id.* at 849.

130. *Id.* at 848.

131. *Id.* at 849.

> leaving facility premises. Residents whose attire does not conform to these guidelines must be immediately sent to their rooms to change.[132]

The new dress code prohibited all residents from wearing skirts and dresses.[133] The transgender youth's lawsuit alleged that the center had violated the New York State Human Rights Law by discriminating against her on the basis of disability[134] when it refused to make a reasonable accommodation allowing her to wear women's clothing, including skirts and dresses, in her residence.[135] The court evaluated the youth's claim in the context of the center's new dress code.[136]

First, the court found that, under the New York State definition of disability,[137] the youth was disabled because she had Gender Identity Disorder.[138] Second, the court found that, although the center's policy was facially neutral,[139] the center did not provide a requested reasonable accommodation for the youth, as required under the state's disability discrimination law.[140] The court also found that the youth's requested reasonable accommodation—exemption from the center's dress code policy—would not pose a health or safety risk to others living at the center, which otherwise would have provided a defense for the center's failure to accommodate the youth.[141] Therefore, the court concluded that the center impermissibly discriminated against the youth by failing to provide a reasonable accommodation for the youth's Gender Identity

132. *Id.* at 849–50 (internal quotation marks omitted).

133. *Id.*

134. Here, categorizing Gender Identity Disorder as a disability proved helpful for the youth. However, there are problems with this approach, including the further stigmatization of transgender people. *See* L. Camille Hebert, *Transforming Transsexual and Transgender Rights*, 15 WM. & MARY J. WOMEN & L. 535, 543 (2009).

135. Doe v. Bell, 754 N.Y.S.2d 846, 848 (N.Y. Sup. Ct. 2003).

136. *Id.* at 852.

137. Under New York state law, "disability" includes "a physical, mental or medical impairment resulting from anatomical, physiological, genetic, or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques . . . ." *Id.* at 850 (quoting N.Y. HUMAN RIGHTS LAW § 292 (McKinney 2012)) (internal quotation marks omitted).

138. *Id.* at 851.

139. *Id.*

140. *Id.* at 853.

141. *Id.* at 855.

Disorder.[142] Accordingly, the court ordered that the youth be exempt "from respondents' dress policy, to the extent it bars her from wearing skirts and dresses" at the facility.[143]

Under the two primary federal disability discrimination laws, the Americans with Disabilities Act ("ADA") and the Rehabilitation Act, Gender Identity Disorder and transgenderism are excluded from coverage.[144] Because the majority of states with disability discrimination laws patterned their laws after the ADA, Gender Identity Disorder is also excluded from coverage under most state disability discrimination laws.[145] However, the court's decision in *Doe v. Bell* illustrates that under some state laws it is possible for a transgender youth to succeed on a disability discrimination claim. In addition to the state of New York, state courts and administrative forums have construed disability discrimination laws in Connecticut,[146] Florida,[147] Massachusetts,[148] New Hampshire,[149] and New Jersey[150] to cover transgenderism as a disability if the plaintiff has a formal diagnosis of Gender Identity Disorder. Thus, *Doe v. Bell* illustrates the importance of school districts following not only federal laws, but also state laws, when crafting nondiscriminatory school dress code policies.

E. A Summary: Common Threads Through Legal Challenges

The foregoing claims exhibit five causes of action under which a transgender student may challenge a school district's

142. *Id.* at 856.

143. *Id.*

144. 42 U.S.C. § 12211(b)(1) (2006) (excluding "transvestism, transsexualism[,] . . . [and] gender identity disorders" from the definition of disability under the ADA); 29 U.S.C. § 705(20)(F)(i) (2006) (codifying the ADA's language excluding transgenderism in the Rehabilitation Act).

145. *See, e.g.*, IND. CODE § 22-9-5-6 (2012).

146. Comm'n on Human Rights & Opportunities v. City of Hartford, No. CV094019485S, 2010 WL 4612700, at *12 (Conn. Super. Ct. Oct. 27, 2010).

147. Smith v. City of Jacksonville Corr. Inst., No. 88-5451, 1991 WL 833882, ¶ 52 (Fla. Div. Admin. Hrgs. Oct. 2, 1991).

148. Lie v. Sky Publ'g Corp., No. 013117J, 2002 WL 31492397, at *7 (Mass. Super. Ct. Oct. 7, 2002).

149. Doe v. Electro-Craft Corp., No. 87-E-132, 1988 WL 1091932 (N.H. Sup. Ct. Apr. 8, 1988).

150. Enriquez v. W. Jersey Health Sys., 777 A.2d 365, 376–77 (N.J. Super. Ct. App. Div. 2001).

dress code policy.[151] The Fourteenth Amendment is the strongest source for a legal challenge to a public school's dress code under federal law and contains two provisions[152] under which such a claim can be brought. The broad language of the Fourteenth Amendment's equal protection clause offers one basis for such a challenge.[153] In the equal protection context, courts are more likely to find a violation where a school dress code includes gender classifications.[154] Such findings are consistent with the purpose of the equal protection clause, which "is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination."[155] The United States Supreme Court has consistently held that state classifications based on sex and gender are subject to intermediate scrutiny.[156] To pass intermediate scrutiny, the government must prove that a gender-based classification "is substantially related to a sufficiently important governmental interest."[157] Thus, a dress code containing dress or appearance standards that specifically apply to only one gender constitutes gender discrimination unless the school can demonstrate that the classification is sufficiently important to the school's interest. For transgender students, such discrimination may occur where a school dress code states that male students must wear pants but does not require female students to do the same, and the school requires a biologically male student who identifies as female to wear pants to school. To survive an equal protection challenge in such a situation, a school must demonstrate that requiring male students to wear pants is substantially related to an important school interest.

The due process clause of the Fourteenth Amendment

151. This list is almost certainly nonexhaustive in capturing the statutes and constitutional protections under which a transgender student may bring a claim related to a school dress code. Because of the small number of claims brought thus far, it is unclear where other legal bases for bringing such an action may be located, and whether such claims could be successful.

152. U.S. CONST. amend. XIV, § 1.

153. The Fourteenth Amendment mandates that "[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

154. Jennifer L. Greenblatt, *Using the Equal Protection Clause Post-*VMI *to Keep Gender Stereotypes Out of the Public School Dress Code Equation*, 13 U.C. DAVIS J. JUV. L. & POL'Y 281, 287 (2009).

155. Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (internal citations omitted).

156. United States v. Virginia, 518 U.S. 515, 555 (1996); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441 (1985).

157. City of Cleburne, 473 U.S. at 441.

provides another avenue to challenge a school's discriminatory dress code policy.[158] Some circuits have interpreted the due process clause to include a distinct cause of action relevant to the discussion of school dress codes: the protection of a liberty interest in one's own appearance.[159] As applied to transgender people, numerous state courts have held that city or county ordinances banning cross-dressing are unconstitutional because they violate a transgender person's liberty interest in dressing as he or she chooses.[160] Thus, a school dress code could be unconstitutional if it prevents transgender students from dressing as they choose. Although courts allow schools some latitude in prescribing dress and appearance regulations because of schools' unique status as educational institutions,[161] students' liberty interests are still implicated by school dress codes.[162] The preliminary injunction issued in *Yunits* suggests

158. In relevant part, the Fourteenth Amendment states that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

159. Rathert v. Village of Peotone, 903 F.2d 510, 514 (7th Cir. 1990); DeWeese v. Town of Palm Beach, 812 F.2d 1365, 1367 (11th Cir. 1987); Domico v. Rapides Parish Sch. Bd., 675 F.2d 100, 101 (5th Cir. 1982); *see also* Kelley v. Johnson, 425 U.S. 238, 244 (1976) (assuming the existence of a liberty interest in one's appearance for purpose of discussion where police officer challenged county's hair-grooming standards for male police officers); James M. Maloney, Note, *Suits for the Hirsute: Defending Against America's Undeclared War on Beards in the Workplace*, 63 FORDHAM L. REV. 1203, 1229 (1995) (discussing a county government's policy prohibiting a distinct class of public employees—police officers—from having facial hair in light of the "general contours of the substantive liberty interest protected by the Fourteenth Amendment"); Doe *ex rel.* Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *6 (Mass. Super. Ct. Oct. 11, 2000).

160. Kristine W. Holt, Comment, *Reevaluating* Holloway*: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*, 70 TEMP. L. REV. 283, 292 n.54 (1997) (describing three cases from different states in which such ordinances were found unconstitutional because they impermissibly infringed on the liberty interests of transgender individuals: Doe v. McConn, 489 F. Supp. 76 (S.D. Tex. 1980); Chicago v. Wilson, 389 N.E.2d 522 (Ill. 1978); and Cincinnati v. Adams, 330 N.E.2d 463 (Hamilton Co. Mun. Ct. 1974)).

161. *See, e.g.*, Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303, 1306 (8th Cir. 1997) (recommending that courts should "enter the realm of school discipline with caution, appreciating that our perspective of the public schools is necessarily a more distant one than that of the individuals working within these schools").

162. *Id.* at 1307. In *Stephenson*, a school district's policy prohibited the "display of 'colors', symbols, signals, signs, etc." related to gangs. *Id.* at 1305. A student who was disciplined for violating the policy challenged its constitutionality. *Id.* at 1304. The student had a cross tattoo that the school district interpreted as a gang symbol even though "there was no evidence that [the student] was involved in gang activity and no other student complained about the tattoo or considered it a gang symbol." *Id.* at 1305. The court held that the school district's policy was void

that courts will give credence to the liberty interest argument and may find it persuasive enough to hold that school dress codes are unconstitutional if they discriminate against transgender students.[163]

Both the *Yunits* decision and the *Youngblood* complaint suggest an additional constitutional source by which a transgender student may challenge a school's dress code: the right to freedom of expression protected by the First Amendment's freedom of speech clause.[164] The Supreme Court has held that choice of dress can be a form of constitutionally protected speech.[165] Students have a constitutionally protected right to freedom of expression, including expression through choice of dress, "[i]n the absence of a specific showing of constitutionally valid reasons to regulate" this type of speech.[166] Thus, a school district's policy that, when applied to a transgender student, limits the student's ability to express his or her identified gender could be unconstitutional for violating the student's right to freedom of expression under the First Amendment.[167]

The complaint in *Youngblood* posits that Title IX of the Educational Amendment Acts could give rise to a cause of action for discrimination related to school dress codes.[168] Indeed, Title IX, on its face, appears to be a logical source

---

for vagueness. *Id.* at 1311. In so finding, the court stated that the "[d]istrict regulation implicated [the student's] liberty interests in governing her personal appearance." *Id.* at 1307.

163. Doe *ex rel.* Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *5–6 (Mass. Super. Ct. Oct. 11, 2000).

164. *Id.*; Complaint for Damages and Demand for Jury Trial, *supra* note 3, ¶ 37.

165. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969). In order for dress to be protected speech, it must constitute "expressive conduct," meaning it has "an intent to convey a 'particularized message' along with a great likelihood that the message will be understood by those viewing it." Zalweska v. Cnty. of Sullivan, 316 F.3d 314, 319 (2d Cir. 2003) (citing Texas v. Johnson, 491 U.S. 397, 404 (1989); Spence v. Washington, 418 U.S. 405, 409 (1974)).

166. *Tinker*, 393 U.S. at 511.

167. To date, the Supreme Court has prescribed no set test—or level of scrutiny—to apply when determining if a school's dress code violates a student's right to freedom of expression. The circuit courts are in disagreement on how to interpret *Tinker* related to this issue and have applied conflicting standards. *See* Jacobs v. Clark Cnty. Sch. Dist., 526 F.3d 419, 430–32 (9th Cir. 2008) (describing the split between circuits applying the *Tinker* test and the test articulated in both *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), and *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)).

168. Complaint for Damages and Demand for Jury Trial, *supra* note 3, ¶ 35.

under which to bring such a claim.[169] However, courts have held that gender discrimination claims for school dress codes brought under Title IX are not actionable.[170] Although a provision that was part of Title IX when it was enacted would have barred schools from including gender classifications in school appearance policies, the provision was quickly removed.[171] As it stands now, courts have been unwilling to find violations of Title IX where school dress codes impose gender-based classifications.[172] Nonetheless, Title IX may provide one legal means by which transgender students can be protected from discrimination in the school setting.

Finally, the examples above illustrate that most or all complaints challenging school dress codes brought on behalf of transgender students are likely to include state-based causes of action. Often, the protections afforded by state constitutions and statutes are broader than those prescribed by federal statutes and the Constitution.[173] For example, the youth in *Doe v. Bell* succeeded in challenging a dress code based on the court's interpretation of New York law that Gender Identity Disorder qualified as a disability that the state was required to accommodate.[174] Although a cause of action based on disability discrimination related to Gender Identity Disorder may be successful under other state disability discrimination statutes,[175] it cannot be successful under the federal disability discrimination statutes.[176] However, as some states have

169. *See* 20 U.S.C. § 1681 (2006) (ordering, subject to some narrow exceptions, that "[n]o person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or *be subject to discrimination under any education program or activity*") (emphasis added).

170. *See* Greenblatt, *supra* note 154, at 285–86.

171. *Id.* Moreover, the only case decided under the provision narrowly construed the bar and upheld a school dress code that banned long hair only for male students. *Id.* at 286; *see also* Trent v. Perritt, 391 F. Supp. 171, 173–74 (S.D. Miss. 1975).

172. Carolyn Ellis Staton, *Sex Discrimination in Public Education,* 58 MISS. L.J. 323, 334 (1988).

173. *See, e.g.*, *supra* notes 146–150 and accompanying text; *infra* note 177 and accompanying text.

174. Doe v. Bell, 754 N.Y.S.2d 846, 856 (N.Y. Sup. Ct. 2003).

175. *See supra* notes 146–150 and accompanying text.

176. *See* 42 U.S.C. § 12211(b)(1) (2006) (excluding "transvestism, transsexualism[,] . . . [and] gender identity disorders" from the definition of disability in the ADA); 29 U.S.C. § 705(20)(F)(i) (2006) (codifying the ADA's language excluding transgenderism in the Rehabilitation Act); *see also* Oiler v. Winn-Dixie Louisiana, Inc., No. Civ.A. 00-3114, 2002 WL 31098541, at *3 n.47 (E.D. La. Sept. 16, 2002) ("Congress specifically excluded gender identity disorders from coverage under the ADA.").

continued to increase the protections afforded to transgender people,[177] they have increased the number of methods by which transgender youth can seek relief under state constitutions and statutes. For example, Colorado amended its Anti-Discrimination Act in 2007 to include protections for discrimination based on sexual orientation, where sexual orientation "means a person's orientation toward heterosexuality, homosexuality, bisexuality, or *transgender status* or another person's perception thereof."[178] The Act prohibits discrimination on the basis of sexual orientation in places of public accommodation, which includes educational institutions.[179] Therefore, a Colorado student who is transgender may successfully state a discrimination claim related to a school's dress code policy under the Colorado Anti-Discrimination Act. Transgender students also may be able to challenge school dress code policies under other existing state statutes or constitutions but have not yet done so.

V. PRESCRIPTION: SCHOOLS SHOULD TAKE PROACTIVE MEASURES TO AVOID LITIGATION

Schools should adopt inclusive school dress code policies that allow students to express their identified genders through clothing and accessories. This adoption makes legal and financial sense given the various provisions of both federal and state constitutions and statutes that discriminatory school dress code policies may violate.[180] Regardless of whether the population of transgender students is actually increasing or

177. For example, as of 2009, employment discrimination based on an employee's gender identity, including but not limited to being transgender, was prohibited in twelve states and the District of Columbia. William C. Sung, *Taking the Fight Back to Title VII: A Case for Redefining "Because of Sex" to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 490 n.16 (2011) (citations omitted). The twelve states are California, Colorado, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. *Id.*

178. COLO. REV. STAT. § 24-34-301(7) (2012) (emphasis added).

179. COLO. REV. STAT. § 24-34-601(1) (2012).

180. This article will not discuss in detail the arguably moral obligation a school district has to increase inclusiveness and decrease discrimination within the educational setting. However, it is worth reiterating that the only means through which most transgender students can express their identified genders is by way of their clothing, accessories, and other forms of dress. Harris, *supra* note 16, at 163. Thus, schools place transgender students in the inescapable position of violating school dress codes when students are forbidden from wearing clothing, accessories, etc., typically associated with their identified genders.

merely appears to be, only one transgender student need bring a discrimination claim for a school district to incur liability.[181] Additionally, the uncertainty in this area of law makes it difficult for school districts to determine whether legal challenges to school dress code policies brought by transgender students will be successful. Therefore, school districts should take steps to enact school dress and appearance policies that are inclusive of all students, including transgender youth.

The Model District Policy on Transgender and Gender Nonconforming Students ("Model Policy"), recently released by the Gay, Lesbian and Straight Education Network (GLSEN) and the National Center for Transgender Equality, provides useful guidance to school districts re-evaluating and re-drafting school dress code policies.[182] The Model Policy frames its discussion of school dress codes based on the assumption that the school already has a nongendered dress code in place.[183] Based on this assumption, it advises:

> Schools may enforce dress codes pursuant to District policy. Students shall have the right to dress in accordance with their gender identity consistently asserted at school, within the constraints of the dress codes adopted by the school. School staff shall not enforce a school's dress code more strictly against transgender and gender nonconforming students than other students.[184]

In doing so, the Model Policy advocates nondiscriminatory enforcement of school dress code policies in two ways. First, it states that transgender students may dress in clothing and

---

181. Damages may include nonpecuniary, compensatory damages. *See, e.g.*, Franklin v. Gwinnett Cty. Pub. Schools, 503 U.S. 60, 73 (1992) (discussing remedies available for violations of federal rights when examining a student's discrimination claim brought under Title IX). School districts should also consider attorneys' fees and costs when determining potential litigation cost.

182. GAY, LESBIAN AND STRAIGHT EDUC. NETWORK & NAT'L CTR. FOR TRANSGENDER EQUAL., MODEL DISTRICT POLICY ON TRANSGENDER AND GENDER NONCONFORMING STUDENTS (2011), *available at* http://transequality.org/Resources/Model%20District%20Trans%20and%20GNC%20Policy%20FINAL.pdf (last visited Sept. 22, 2012) [hereinafter MODEL POLICY]. The Model Policy also addresses other areas of concern for transgender students, including a student's official records, bathroom and locker room usage, bullying, and the transition process. *See generally id.*

183. *Id.* at 11 ("The model policy contemplates that a school district may have a dress code that is not gender-specific.").

184. *Id.*

accessories typically associated with their identified genders, as long as such clothing and accessories are allowed under the school's gender-neutral dress code policy.[185] As an example, some school dress codes prohibit all students, with no mention of gender or gender nonconformity, from wearing sleeveless shirts. Thus, if a biologically male student who identifies as female wore a sleeveless shirt to school in order to express her gender identity, the student would be in violation of the school dress code because *no* student is allowed to wear a sleeveless shirt to school. This type of policy would prevent a transgender student from bringing a discrimination claim under the equal protection clause of the Fourteenth Amendment because the policy is gender-neutral on its face and applies nondiscriminatorily to all students.[186]

Second, the Model Policy expresses that school dress codes must be both applied equally to all students and not enforced more harshly against transgender students.[187] Thus, if a school's dress code does not prohibit students from wearing skirts that fall above the knee, the dress code cannot then be enforced against a biologically male student who identifies as female and wears a skirt above the knee. Likewise, if it is permissible under the dress code for male students to wear jeans that sag, biologically female students identifying as male must be allowed to do so as well.

If a school dress code is gender-neutral and is applied identically to all students, the likelihood of a student succeeding on a federal constitutional claim is significantly decreased, as both the language and enforcement of the policy are gender-neutral.[188] Gender-neutral dress codes likely preclude equal protection claims because transgender students are not being treated differently than any other student in the district. For example, had the school district in *Youngblood* required that all students wear either the drape or the jacket, the transgender student could not have alleged she was being treated differently than other students in the district because all students would have been able to choose from the same clothing options. Similarly, gender-neutral dress codes may

185. *Id.*
186. *See supra* Part IV.B.
187. MODEL POLICY, *supra* note 182, at 11.
188. *See id.* (explaining that the "approach minimizes the risk of liability under state and federal constitutions and laws prohibiting discrimination based on sex or gender identity").

prevent claims brought under the First Amendment's protection for freedom of expression and the liberty interest component of the Fourteenth Amendment's due process clause because the parameters in which students can express themselves through their personal appearance, set by the school's dress code, would be identical for both transgender and gender-conforming students. Thus, if a court found that a dress code violated students' rights to freedom of expression or liberty interests, it likely would be because the dress code's restrictions unlawfully infringed on the rights of all students, not just the rights of transgender students.

For a gender-neutral policy to be successful in eliminating legal claims brought under the Constitution, the policy needs to be nondiscriminatory in practice.[189] If a school has recently adopted a gender-neutral dress code policy, or if a student has recently identified himself or herself to the school as transgender, there may be some sort of trial and error in the enforcement process of the dress code. Therefore, school districts should consider providing some type of initial training to school administrators and teachers on how a dress code policy should apply to transgender students.

For the aforementioned reasons, school dress code policies should be written and enforced in a gender neutral way. Should a school district choose to adopt a dress code policy containing gendered language, it should do so carefully. As the Model Policy correctly cautions, "[d]ress codes should be based on educationally relevant considerations, apply consistently to all students, include consistent discipline for violations, and make reasonable accommodations when the situation requires an exception."[190] This advice illustrates three specific difficulties schools may face if required to defend a gender-specific dress code in response to a transgender student's legal challenge.

First, regardless of the legal basis for a student's discrimination claim, schools are required to articulate why the dress code contains appearance restrictions based on the gender or gender-nonconformity of its students.[191] As discussed in Part III, *supra*, the Supreme Court has held that intermediate scrutiny applies to all gender and sex-based classifications.[192] An argument that biologically male students

189. *See supra* Part IV.B.
190. MODEL POLICY, *supra* note 182, at 11.
191. *See supra* Part IV.B.
192. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 454 (1985).

are not allowed to wear skirts because most male students do not wear skirts is likely insufficient.[193] Instead, the school needs to articulate a legitimate, nondiscriminatory reason based on the educational setting and the needs of the student body. Thus, the Model Policy appropriately cautions that the restrictions set forth by school dress codes must "be based on educationally relevant considerations."[194]

Second, the Model Policy captures the difficulty presented by all school dress codes as applied to transgender students: dress codes must be applied consistently to all students.[195] This consistency in enforcement applies not only in determining when a student violates the dress code, but also in ensuring that the levels of punishment for violating the dress code are consistent. Take, for example, the hypothetical school dress code policy that prohibits students from wearing sleeveless shirts. If a biologically female student wearing a tank top to school typically would be told to borrow a sweatshirt from a friend for the rest of the day to cover her shoulders, it is likely impermissible for the school district to effectuate different discipline upon a biologically male student who identifies as female and wears a tank top to school, such as sending the student home for the day. In this scenario, the school imposes different discipline because of the student's transgender status, which likely violates the equal protection clause.

Third, the Model Policy argues that school districts should make reasonable accommodations to school dress code policies for gender-nonconforming students.[196] The obligation to provide a reasonable accommodation to transgender students requesting accommodations related to school dress codes is especially important for school districts given the final order in *Doe v. Bell*. In that case, the court found that the youth succeeded on her disability discrimination claim under state law because her Gender Identity Disorder was a condition included in the law's definition of disability, and the residential foster care center failed to accommodate her disability by allowing her to wear dresses or skirts, which would have allowed her to express her gender identity.[197] The court found

193. *See* Doe *ex rel.* Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *4 (Mass. Super. Ct. Oct. 11, 2000).

194. MODEL POLICY, *supra* note 182, at 11.

195. *Id.*

196. *Id.*

197. Doe v. Bell, 754 N.Y.S.2d 846, 853 (N.Y. Sup. Ct. 2003).

that this was a violation of state law even though the center's dress code policy was gender-neutral and prohibited all youths from wearing dresses and skirts.[198] Accordingly, if a transgender student asks to wear clothing or accessories that are prohibited under a school's dress code, the court's order in *Doe v. Bell* suggests that the school district should examine the request on an individual basis to determine if denying the request would unlawfully discriminate against the student.

Although the Model Policy provides a solid foundation for a school district to build a nondiscriminatory policy, it falls short by failing to advocate for affirmative inclusiveness. Implicit in the Model Policy is the belief that if the language of a school district's dress code policy is gender-neutral, it will be properly applied and not discriminatorily enforced. However, as mentioned above, it is unlikely that all school employees will enforce dress code policies in a nondiscriminatory manner without some type of training. It is also possible, as demonstrated in *Doe v. Bell*, that even gender-neutral policies may result in unlawful discrimination against a transgender student. Thus, school dress code policies should include an affirmative statement of inclusiveness to signify to both students and staff that the policy not only allows gender nonconformity, but also encourages acceptance of gender nonconforming students. For example, the nation's sixth largest school district recently expanded its nondiscrimination policy to cover both the gender identity and gender expression of students and employees.[199] Such a statement communicates to students, parents, and staff that gender-nonconforming students are members of the school community just like gender-conforming students and should be treated as such.

CONCLUSION

The recent increase in awareness of the number of children whose behavior falls under the "transgender" umbrella suggests that protection of the rights of transgender children is an emerging issue. Whether this increase in awareness correlates to a rise in the number of openly transgender students in the American school system remains to be seen.

198. *Id.* at 852.

199. *See* Carli Teproff, *New Broward Policy Offers Protection to Transgender Students*, MIAMI HERALD (June 4, 2011), http://www.miamiherald.com/2011/06/04/2251740/new-broward-policy-offers-protection.html.

However, it is undeniable that, regardless of their numbers, transgender youth face unique obstacles—both inside and outside the classroom—because of their gender nonconformity. Wearing clothing and accessories typically associated with their identified genders is the primary means by which transgender youth are able to express their gender identities. Thus, school dress code policies have a profound impact upon the ability of transgender youth to express their identified genders.

Although only a handful of lawsuits have been brought on behalf of transgender students to challenge school dress codes, more legal challenges may lie ahead. Thus, school districts should adopt dress code policies that are not only gender-neutral, but actively aim to be inclusive of all students, including transgender students.