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Student Works Edition

The Sex Offender Registration and Notification Act (SORNA): An Unconstitutional Infringement of States' Rights under the Commerce Clause — *Anne Marie Atkinson*

Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds: The Journey to Protect Women's Mental Health with Relevant, Truthful and Not Misleading Information in Informed Consent Abortion Statutes — *Kathleen G. Chewning*

Premises Liability in South Carolina: Should you Expect Criminal Activity on your Property? — *Wylie Clarkson*

Reflecting the Best Interest of the Child: *Middleton v. Johnson* — *Melissa Fried*

The Rise, Fall, and Resurrection of Retaliation Claims under § 1981: A Note on *CBOCS West, Inc. v. Humphries* — *Benjamin N. Garner*

The Creditor's Guide to the Technology Galaxy: The Effect of Technology on Article 9 and Remotely Disabling Collateral — *R. Walker Humphrey, II*

A Call for the Proper Recognition of Habeas Corpus in the 21st Century — *Adam Marinelli*

Monetary Liability for Involuntary Servitude?: South Carolina Needs to Abandon the Negative Incentive Approach and Grant Absolute Immunity to Indigent Criminal Defense Attorneys Appointed under Rule 608 — *Boyd M. Mayo*

The Confrontation Clause at Capital Sentencing: Should Prison Incident Reports be Admissible in South Carolina? — *Anthony Traurig*

THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA): AN UNCONSTITUTIONAL INFRINGEMENT OF STATES' RIGHTS UNDER THE COMMERCE CLAUSE

Anne Marie Atkinson[*]

I. INTRODUCTION 573
II. HISTORICAL ANALYSIS OF THE COMMERCE CLAUSE 577
A. *United States v. Lopez* 581
B. *United States v. Morrison* 582
C. *Gonzales v. Raich* 583
D. Confusion Among Courts: How Should the Commerce Clause Be Applied after *Lopez*, *Morrison*, and *Raich*? 584
III. REGISTRATION LAWS AND THE COMMERCE CLAUSE 586
A. The Wrong Result: SORNA Deemed Constitutional Under the Commerce Clause 587
B. The Correct Result: SORNA Deemed Unconstitutional Under the Commerce Clause 591
IV. CONCLUSION 599

I. INTRODUCTION

Over the past two decades, there has been widespread approval and adoption of sex offender registry laws. Acceptance of these laws is, in large part, due to the highly publicized tragedies of young children, whose names are quickly

[*] J.D. candidate, May 2010, Charleston School of Law; B.A., 2007, Wofford College. The author would like to thank her family and friends for their support and encouragement throughout this process. She is also truly appreciative to the members of the *Charleston Law Review* for their dedication and patience throughout the stages of this publication. Without each of them, completion of this Comment would not have been possible.

recognizable to most: Jacob Wetterling, Megan Kanka, Jessica Lunsford, and Adam Walsh.[1] Since such laws emerged, registry requirements have progressively strengthened in an attempt to cease the problem that persists.[2] In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (the Wetterling Act)[3] to encourage state adoption of sex offender registry laws.[4] In 1996, the Wetterling Act was amended by Megan's Law,[5] which made adoption of the minimum sex offender registry standards a requirement for federal law enforcement funding.[6] As a result, every state implemented some form of Megan's Law by 1996.[7]

To fill the gaps of the previous piecemeal legislation and to create uniformity among states regarding sex offender registry

1. David L. Hudson Jr., *Crime Registries Under Fire: Adam Walsh Act Mandated Sex Offender Lists, But Some Say it's Unconstitutional, The National Pulse*, A.B.A. J., Sept. 2008, at 22, *available at* http://abajournal.com/magazine/crime_registries_under_fire/.

2. *Id.*

3. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, H.R. 3355, 103d Cong. (1994) (codified as amended at 42 U.S.C. §§ 14071-72 (2008)). In 1989, an unknown gunman stopped eleven-year-old Jacob Wetterling along with his younger brother and friend. The children were riding their bicycles on a country road after going to the store to rent a movie. The gunman ordered Jacob's brother and friend to run away, and while doing so, Jacob's friend saw the gunman grab Jacob's arm. Jacob has not been seen since. Steve Irsay, The Search for Jacob, Court TV, 2002, *available at* http://www.courttv.com/news/hiddentraces/wetterling/wetterling_page1.html.

4. Lara Geer Farley, *The Adam Walsh Act: The Scarlet Letter of the Twenty-First Century*, 47 Washburn L.J. 471, 473 (2008).

5. Megan's Law, H.R. 2137, 104th Cong. (1996) (codified at 42 U.S.C. §§ 14071-72 (2008)). At the young age of seven, Megan Kanka was sexually assaulted and murdered by her next-door neighbor. Although the neighbor had a history of sexually assaulting children, Megan Kanka's parents were unaware of this fact. As a result, lawmakers enacted Megan's Law—its main purpose being to inform the community of sex offenders' residences and places of employment. This was a change from the Wetterling Act's intent of informing law enforcement of sex offenders' whereabouts. To achieve their goal, lawmakers changed the Wetterling Act's "may release" information to "shall release" information for "any purpose permitted under the laws of the state." 42 U.S.C. § 14071(e)(1) (2000). Additionally, Megan's Law required states to release "relevant information" to the community. *Id.* § 14071(e). However, what information was considered relevant was not addressed. *Id.*

6. Smith v. Doe, 538 U.S. 84, 89-90 (2003).

7. *Id.* at 90.

laws, on July 27, 2006, Congress took yet another step forward and enacted the Adam Walsh Child Protection and Safety Act of 2006 (the Adam Walsh Act).[8] The Adam Walsh Act is divided into seven titles, each of which addresses a different form of sexual exploitation against children.[9] The first title encompasses the Sex Offender Registration and Notification Act (SORNA)[10]—a national sex offender registry that seeks to eliminate inconsistencies among state laws.[11] Because some states have more lenient laws than others, sex offenders are able to beat the system by moving to states with less stringent requirements.[12] Thus, SORNA mandates uniform national requirements for sex offender registration under federal law.[13]

There are two sections of SORNA that form the basis of this Comment for their questionable constitutional validity under the Commerce Clause.[14] First, § 16913 implements the general requirement that all sex offenders "register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student."[15] Second, upon proof that the offender was required to register under § 16913, § 2250 requires that "whoever travels in interstate or foreign commerce . . . [and] knowingly

8. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006) (codified at 18 U.S.C. § 2250 (2006)).

9. *See id.*

10. 42 U.S.C. §16901 (2006).

11. Farley, *supra* note 4, at 480-81.

12. Farley, *supra* note 4 at 477 (citing Nat'l Ctr. for Missing and Exploited Children, National Center for Missing & Exploited Children Creates New Unit to Help Find 100,000 Missing Sex Offenders and Calls for States to do Their Part ¶ 2 (2007), *available at* http://www.missingkids.com/missingkids/servlet/NewsEvent Servlet?LanguageCountry=en_US&PageId=3081). In 2007, of the 603,000 sex offenders in the nation, 100,000 had failed to register. Nat'l Ctr. for Missing and Exploited Children, National Center for Missing & Exploited Children Creates New Unit to Help Find 100,000 Missing Sex Offenders and Calls for States to do Their Part ¶ 1 (2007), *available at* http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=3081.

13. Applicability of the Sex Offender Registration and Notification Act, 28 C.F.R. § 72.1 (2007).

14. U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause).

15. 42 U.S.C. § 16931(a) (Supp. 2008).

fails to register or update a registration as required by [SORNA]; shall be fined under this title or imprisoned not more than 10 years, or both."[16] Thus, sex offenders who violate the requirements of SORNA are charged under federal law.

When § 16913 and § 2250 are analyzed in conjunction with the Commerce Clause, it is evident that, despite being based on good intentions, the federal government has overstepped its power by enacting provisions for criminal acts that can be effectively regulated by the states. Our Founding Fathers drafted the Constitution with the obvious intent of keeping power within the states whenever possible.[17] As the Supreme Court stated in the early decision of *Barbier v. Connolly*:

> [No] amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.[18]

Congress's tendency to enact legislation under its Commerce Clause power that has only a slight link to interstate commerce has been questioned and limited in recent years.[19] Despite the worthy cause that such statutes often serve and the public appeal that they obtain, they cannot be justified when Congress enacted them upon unfounded rights.[20]

It goes without saying that sex offender crimes, especially sex offender crimes against children, are among the worst crimes committed. It seems, and is the opinion of the author of this Comment, that no punishment is too harsh for such appalling behavior. Nonetheless, even with the best intentions at heart, it is impermissible to act with powers denied by the Founding

16. 18 U.S.C. § 2250(a) (2006).

17. *See* Keller v. United States, 213 U.S. 138, 144 (1909).

18. 113 U.S. 27, 31 (1884).

19. *See, e.g.*, United States v. Lopez 529 U.S. 598 (2000); United States v. Morrison, 514 U.S. 549 (1995).

20. Anna Johnson Cramer, Note, *The Right Results for All The Wrong Reasons: An Historical and Functional Analysis of the Commerce Clause*, 53 VAND. L. REV. 271, 273 (2000).

Fathers.

To illustrate SORNA's infringement of state power, Part II gives a brief history of the Commerce Clause and discusses recent Supreme Court decisions to illustrate the current trend of interpreting Congress's Commerce Clause power in a limited manner. Part III compares arguments of courts holding SORNA constitutional and courts holding SORNA unconstitutional under the Commerce Clause. Finally, Part IV provides a proposed solution to the federal government's encroachment of states' power—abandonment of SORNA—leaving registration requirements in the hands of the states.

II. HISTORICAL ANALYSIS OF THE COMMERCE CLAUSE

The Framers of the Constitution created a federal government of enumerated powers.[21] Moreover, the division between federal and state governments was intended to ensure the protection of our fundamental liberties and to reduce the risk of autocracy from either side.[22] As James Madison stated:

> The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negociation, and foreign commerce. . . . The powers reserved to the states will extend to all the objects, which in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the state.[23]

Among the "few and defined" powers that the Framers left with Congress is the Commerce Clause power—the right to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ."[24] Scholars have continuously questioned the Framers' anticipated purpose of the

21. M'Culloch v. Maryland, 17 U.S. 316, 405 (1819).

22. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (quoting Atascadero State Hosp. v. Scanton, 473 U.S. 234, 242 (1985)).

23. THE FEDERALIST NO. 45, at 82 (James Madison) (E.H. Scott ed., 1898).

24. U.S. CONST. art. I, § 8, cl. 3.

Commerce Clause as there is little indication of the Framers' intent in its creation. However, historians have concluded that the Framers sought to provide Congress with a broad enough power to control imports and exports with foreign nations, without conflicting with state legislation.[25] In *Gibbons v. Ogden*,[26] the United States Supreme Court analyzed the construction of the Commerce Clause for the first time and indicated its purpose was "*to regulate commerce* [and] to rescue it from the embarrassing and destructive consequences, resulting from the legislation of so many different States, and to place it under the protection of a uniform law."[27] In effect, the Commerce Clause solved the federal government's inability to coordinate trade and commerce among the states, a major flaw discovered while the United States was governed by the Articles of Confederation.[28]

At the Constitutional Convention, it was predicted that navigation acts, tariffs, and acts preventing states from placing duties on articles imported from or through other states would be enacted through legislation in an effort to make the United States a desirable place to conduct foreign commerce.[29] Although the Framers acknowledged there were likely to be additional regulations on commerce during the Convention, there was no discussion about what those regulations would be.[30] Thus, it has been an ongoing struggle for courts to determine how far to extend Congress's Commerce Clause power.[31] What is known, however, is that the Framers repeatedly emphasized that the Constitution reserves "power over internal functions to the states."[32] They made their fear of unlimited power evident and rejected the notion repeatedly.[33]

25. Cramer, *supra* note 20, at 275.
26. 22 U.S. 1 (1824).
27. *Id.* at 11.
28. *Id.* at 183-89, 192-96.
29. Cramer, *supra* note 20, at 275.
30. *See* E. PARMALEE PRENTICE & JOHN G. EGAN, THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION 2-9 (Callaghan Co. ed., 1898).
31. Cramer, *supra* note 20, at 277-85.
32. Cramer, *supra* note 20 at 276.
33. Cramer, *supra* note 20 at 276-77.

Furthermore, to determine the Framers' intent in drafting the Commerce Clause, scholars have focused on "(1) the text of the Constitution; (2) the legislation the Framers thought Congress would pass under that power; (3) the referral to committee of Article I, Section 8; and (4) the Framers' understanding of federalism."[34] These sources indicate that the Commerce Clause intended to regulate interstate commerce[35] and to prevent states from regulating the economy that would in turn deter other states from engaging in foreign trade.[36] Furthermore, it has been concluded that Congress sought to give the federal government power under the Commerce Clause to control activities that the states could not regulate themselves.[37]

Although the federal government's power under the Commerce Clause has been both broadened and narrowed through various judicial interpretations over the past century, analysis of each of these phases is beyond the scope of this Comment.[38] Generally, after the passage of the Civil Rights Act of 1964 through the Commerce Clause, Congress obtained immense power, as it was essentially able to regulate any area that had slight relation to interstate commerce.[39] For instance, in *Scarborough v. United States,*[40] the defendant was charged with violating the Omnibus Crime Control and Safe Streets Act of 1968, which made it a crime to possess a firearm after previously being convicted of a felony.[41] The defendant claimed the Act was unconstitutional under the Commerce Clause because mere evidence that the firearm in his possession had "at some time" traveled in interstate commerce did not rise to the level of an adequate nexus with interstate commerce.[42] The Fourth Circuit

34. Cramer, *supra* note 20 at 276.

35. Cramer, *supra* note 20 at 276.

36. Cramer, *supra* note 20 at 276.

37. *See* Cramer, *supra* note 20 at 276.

38. For a complete analysis of judicial interpretations of the Commerce Clause see United States v. Myers, 591 F. Supp. 2d 1312, 1318-24 (S.D. Fla. 2008), *abrogated by* United States v. Ambert, 561 F.3d 1202 (11th Cir. 2009).

39. Cramer, *supra* note 20, at 282-86.

40. 431 U.S. 563 (1977).

41. *Id.* at 563.

42. *Id.* at 565-66.

rejected this argument, and held that because the gun had at some point traveled in interstate commerce, there was an adequate nexus with interstate commerce.[43] The Supreme Court affirmed, thereby creating the "minimal nexus" standard.[44] Over time, thousands of federal laws, especially federal criminal laws, have been enacted by way of Congress's Commerce Clause power. In contrast to the seventeen acts subject to national criminal sanctions in place over two centuries ago, there are now more than 3,000 federal crimes, most of which were passed under Congress's Commerce Clause power.[45]

Congress's broad powers under the Commerce Clause have recently been scrutinized in *United States v. Lopez*,[46] a landmark case subsequently reinforced by *United States v. Morrison*.[47] The holdings in these two cases replaced the previous wavering distinction between federal and state power and implemented a definite limit on federal power under the Commerce Clause. In light of *Lopez* and *Morrison,* it has been stated that:

> The days of *Gibbons* and its natural and textually based constitutional limits on congressional power have long since passed. . . . "[O]ur caselaw has drifted far from the original understanding of the Commerce Clause." Hope is not lost, however, as recent Supreme Court precedent has begun again to enforce some limits on Congress's Commerce Clause power.[48]

Additionally, in *Gonzales v. Raich*,[49] the Supreme Court provided further guidance in determining the permissible areas where Congress may use its Commerce Clause power. Thus, through *Lopez*, *Morrison*, and *Raich*, the Supreme Court has taken great steps in placing limits on Congress's Commerce Clause power.

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43. *Id.* at 566-67.

44. *Id.* at 575.

45. Cramer, *supra* note 20, at 283.

46. 514 U.S. 549 (1995).

47. 529 U.S. 598 (2000).

48. United States v. Myers, 591 F. Supp. 2d 1312, 1323 (S.D. Fla. 2008) (internal citation omitted).

49. 545 U.S. 1 (2005).

A. *United States v. Lopez*

Twelfth-grade student Alfonso Lopez was caught carrying a firearm on his high school campus.[50] After being charged with violating the Gun-Free School Zones Act (§ 922(q)), imposing a federal crime on any individual who knowingly possesses a firearm in a school zone,[51] Lopez argued that § 922(q) was "unconstitutional as it [was] beyond the power of Congress to legislate control over public schools."[52] The district court rejected this argument, stating that § 922(q) is within Congress's constitutional right to regulate activities in and affecting commerce, and the affairs of elementary, middle, and high schools do in fact affect interstate commerce.[53]

On appeal, the Fifth Circuit found that § 922(q) exceeded Congress's power to legislate under the Commerce Clause.[54] Subsequently, the United States Supreme Court granted certiorari and affirmed the Fifth Circuit's decision.[55] Most significantly, the Court identified three broad areas that Congress can constitutionally regulate under the Commerce Clause: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come from intrastate activities" and (3) "activities having a substantial relation to interstate commerce."[56] *Lopez* also established the requirement that a federal statute created through commerce power contain an "express jurisdictional element" limiting the statute's reach over conduct with "an explicit connection with or effect on interstate commerce."[57] Put differently, there must be a requisite nexus between the act and interstate commerce.[58] As Chief Justice Rehnquist, writing for the majority, indicated:

50. *Lopez,* 514 U.S. at 551.
51. 18 U.S.C. § 922(q)(1)(A) (2000).
52. *Lopez,* 514 U.S. at 551.
53. *Id.* at 551-52.
54. *Id.* at 552.
55. *Id.*
56. *Id.* at 558-59.
57. *Id.* at 562.
58. *Id.*

> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road . . . but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated. . . . This we are unwilling to do.[59]

Thus, *Lopez* seemed to mark an end to the liberal powers advantageously used by Congress under the Commerce Clause.

B. *United States v. Morrison*

Lopez's effect of decreasing the federal government's enumeration of power under the Commerce Clause was reinforced in 2000 by *United States v. Morrison*.[60] After being assaulted and raped by a fellow classmate, the victim brought suit under the Violence Against Women Act (§ 13981)[61] which states in part that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender."[62] The case was dismissed after the district court held Congress lacked the power to enact § 13981 under the Commerce Clause.[63] A divided panel of the Fourth Circuit Court of Appeals reversed; however, the Fourth Circuit reinstated the district court's opinion after rehearing the case en banc.[64]

The United States Supreme Court granted certiorari to construe the constitutionality of §13981 and ultimately deemed it to be an invalid use of Congress's power, using *Lopez* as its guide.[65] Furthermore, because §13981 fell under the third "substantial effects" category put forth in *Lopez*, the Court used four factors to determine whether the statute had a substantial

59. *Lopez*, 514 U.S. at 567-68.
60. 529 U.S. 598 (2000).
61. *Id.* at 605.
62. 42 U.S.C. § 13981(b) (2006).
63. *Morrison,* 529 U.S. at 604-05.
64. *Id.* at 605 n.2.
65. *Id.* at 601-02.

effect on interstate commerce: (1) whether the statute regulates commerce "or any sort of economic enterprise," (2) whether the statute contains any "express jurisdictional element which might limit its reach to a discrete set" of instances, (3) whether the statute or its legislative history contains "express congressional findings" that the regulated activity affects interstate commerce; and (4) whether "the link between [the regulated activity] and a substantial effect on interstate commerce was attenuated."[66] The Court held Congress lacked the authority to "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[67] Furthermore, the opinion harped on the unconstitutionality of §13981, indicating that Congress overreached its power and infringed on what must remain in the hands of the states: "The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."[68]

By invalidating the federal criminal laws under scrutiny in *Lopez* and *Morrison* the Supreme Court limited the federal government's ability to control matters through the Commerce Clause that did not substantially affect interstate commerce. As the *Lopez* Court notes, "'[s]tates possess primary authority for defining and enforcing the criminal law.' . . . When Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'"[69]

C. *Gonzales v. Raich*

In 2005, the United States Supreme Court further defined Congress's power under the Commerce Clause in *Gonzales v.*

66. *Id.* at 610-12.

67. *Id.* at 617.

68. *Id.* at 618.

69. United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993); United States v. Enmons, 410 U.S. 396, 411-12 (1973)).

Raich.[70] Here, Raich sued the Attorney General and the Drug Enforcement Administration after her medicinal marijuana plants were seized under the Controlled Substances Act—a "comprehensive statute, provid[ing] meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels, and strengthen law enforcement tools against the traffic in illicit drugs."[71] Raich argued that the federal prohibition of intrastate manufacture and possession of medicinal marijuana pursuant to California state law exceeded Congress's Commerce Clause power.[72] The Court rejected this argument and adopted the idea that "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."[73] In other words, Congress is able to regulate local, noneconomic activity if there is a reasonable basis to believe that not doing so would underscore its ability to effectively regulate the overlying economic regulatory scheme.[74] Thus, *Raich* provides additional guidance in determining Congress's Commerce Clause power over intrastate, non-economic actions deemed part of a larger economic regulatory scheme.

D. Confusion Among Courts: How Should the Commerce Clause Be Applied after *Lopez*, *Morrison*, and *Raich*?

Since *Lopez*, courts have had difficulty defining Congress's powers under the three broad categories distinguished in the case. It is often stated that *Lopez*'s first two categories define Congress's "traditional Commerce Clause power."[75] Under *Lopez*'s first category, the power to "regulate the use of the channels of interstate commerce,"[76] Congress seeks to regulate

70. 545 U.S. 1 (2005).
71. *Id.* at 10.
72. *Id.* at 15.
73. *Id.* at 18.
74. *Id.*
75. United States v. Myers, 591 F. Supp. 2d 1312, 1327 (S.D. Fla. 2008).
76. United States v. Lopez, 514 U.S. 549, 558 (1995).

interstate commerce by excluding certain classes of goods and persons it deems harmful. However, this exclusion "is on the person or thing's movement across state lines with the proscribed purpose or status."[77] For example, the statute under scrutiny in *Caminetti v. United States,*[78] the White Slave Traffic Act, was established to prevent individuals from using interstate commerce to engage in prostitution, not to punish individuals who became prostitutes after crossing state lines.[79]

Under the second *Lopez* category, "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities."[80] Analysis of the cases the *Lopez* opinion cites in support of this power[81] indicate that Congress has control over "things actually being moved in interstate commerce, not all people and things that have ever moved across state lines."[82] Put differently, this category defines the power to regulate instrumentalities (i.e., planes and trains) and the people those instrumentalities are moving.[83]

The third *Lopez* category encompasses "Congress's ability to regulate local, intrastate activities having a substantial effect on interstate commerce."[84] After *Lopez,* it is clear that Congress's ability to control local, noneconomic conduct through the substantial effects category is not without limits,[85] but it is less clear how far this power extends.[86]

Raich adds additional confusion for courts when interpreting

77. *Myers*, 591 F. Supp. 2d at 1328.

78. 242 U.S. 470 (1917).

79. *Id.* at 482, 491.

80. *Lopez,* 514 U.S. at 558.

81. Perez v. United States, 402 U.S. 146, 150 (1971) (citing 18 U.S.C. § 32 (destruction of an aircraft) and § 659 (theft of interstate shipments)); Houston, E. & W. Tex. Ry. v. United States, 234 U.S. 342 (1914); Southern Ry. Co. v. United States, 222 U.S. 20 (1911).

82. United States v. Patton, 451 F.3d 615, 622 (10th Cir. 2006).

83. *Id.*

84. United States v. Myers, 591 F. Supp. 2d 1312, 1329 (S.D. Fla. 2008).

85. *Lopez,* 514 U.S. at 552, 556-57.

86. *Myers,* 591 F. Supp. 2d. at 1329.

the Commerce Clause by allowing Congress to "take over local activities when that regulation is part of a greater overall commercial regulation of an interstate market."[87] When considering the statute challenged under such a regulatory scheme, courts must determine whether Congress had a rational basis for determining the regulated activity would have a substantial effect on interstate commerce.[88]

Because of the broad categories set forth in *Lopez* courts have wrongly and superficially applied the standards the case implemented. This tendency is ever present among courts faced with determining SORNA's constitutionality under the Commerce Clause.

III. REGISTRATION LAWS AND THE COMMERCE CLAUSE

Currently, numerous district courts,[89] and the Eighth, Tenth,

87. *Id.* at 1330.

88. *Id.*

89. *See, e.g.,* United States v. Ditomasso, 552 F. Supp. 2d 233 (D.R.I. 2008); United States v. Mason, No. 6:07-cr-52-Orl-19GJK, 2008 WL 1882255 (M.D. Fla. April 24, 2008); United States v. Craft, No. 4:07CR3168, 2008 WL 1882904 (D. Neb. April 23, 2008); United States v. David, No: 1:08cr11, 2008 WL 2045827 (W.D.N.C. April 18, 2008); United States v. Holt, No. 3:07-cr-0630-JAJ, 2008 WL 1776495 (S.D. Iowa April 14, 2008); United States v. Akers, No. 3:07-CR-00086(01)RM, 2008 WL 914493 (N.D. Ind. April 3, 2008); United States v. Utesch, No. 2:07-CR-105, 2008 WL 656066 (E.D. Tenn. March 6, 2008); United States v. Thomas, 534 F. Supp. 2d 912 (N.D. Iowa 2008); United States v. Nugent, No. 07-5056-01-CRSW-GAF, 2008 WL 413273 (W.D. Mo. Feb. 13, 2008); U.S. v. Hacker, No. 8:07CR243, 2008 WL 312689 (D. Neb. Feb. 1, 2008); United States v. Dixon, No. 3:07-CR-72(01)RM, 2007 WL 4553720 (N.D. Ind. Dec.18, 2007), *rev'd on other grounds,* 551 F.3d 578 (7th Cir. 2008); United States v. Gould, 526 F. Supp. 2d 538 (D. Md. 2007); United States v. Elliott, No. 07-14059-CR, 2007 WL 4365599 (S.D. Fla. Dec. 13, 2007); United States v. Cardenas, No. 07-80108-CR, 2007 WL 4245913 (S.D. Fla. Nov. 29, 2007); Levine v. Pennsylvania State Police, No. 4:07-CV-1453, 2007 WL 3033951 (M.D. Pa. Oct. 16, 2007); United States v. Beasley, No. 1:07-CR-115-TCB, 2007 WL 3489999 (N.D. Ga. Oct. 10, 2007); United States v. Ambert, No. 4:07-CR-053-SPM, 2007 WL 2949476 (N.D. Fla. Oct. 10, 2007); United States v. Lovejoy, 516 F. Supp. 2d 1032 (D.N.D. 2007); United States v. Kelton, No. 5:07-cr-30-Oc-10GRJ, 2007 WL 2572204 (M.D. Fla. Sept. 5, 2007); United States v. May, No. 4:07-cr-00164-JEG, 2007 WL 2790388 (S.D. Iowa Sept. 4, 2007); United States v. Sawn, No.6:07cr00020, 2007 WL 2344980 (W.D. Va. Aug. 15, 2007), *rev'd and vacated on other grounds*, 560 F.3d 222 (4th Cir. 2009); United States v. Gonzales, No. 5:07cr27-RS, 2007 WL 2298004 (N.D. Fla. Aug. 9, 2007); United

and Eleventh Circuits[90] have addressed the constitutional validity of SORNA under the Commerce Clause. Specifically, § 16913 and § 2250 of SORNA are under scrutiny.[91] Courts have essentially rubber-stamped SORNA's criminal provisions as constitutional, and have done so by applying superficial interpretations of Congress's power under the Commerce Clause. These argument are illustrated below through *United States v. Akers*[92] and *United States v. Ditomasso*.[93]

Although very few courts have held SORNA unconstitutional under the Commerce Clause, these holdings have been reached through proper interpretation of Congress's Commerce Clause power. To illustrate why courts holding SORNA unconstitutional are correct in their reasoning, first *United States v. Waybright*[94] presents an argument for the unconstitutionality of § 2250. Next, *United States v. Powers*[95] provides reasons why § 16913 is unconstitutional. Last, *United States v. Myers*[96] presents a thorough opinion of why both §2250 and §16913 are unconstitutional under the Commerce Clause.

A. The Wrong Result: SORNA Deemed Constitutional Under the Commerce Clause

In *United States v. Akers*,[97] the United States District Court

States v. Muzio, No. 4:07CR179CDP, 2007 WL 2159462 (E.D. Mo. July 26, 2007); United States v. Mason, 510 F. Supp. 2d 923 (M.D. Fla. 2007); United States v. Hinen, 487 F. Supp. 2d 747 (W.D. Va. 2007), *rev'd and vacated on other grounds*, 560 F.3d 222 (4th Cir. 2009); United States v. Templeton, No. CR-06-291-M, 2007 WL 445481 (W.D. Okla. Feb. 7, 2007).

90. *See,* United States v. Baccam, ___ F.3d ___, 2009 WL 1119326 (8th Cir. April 28, 2009); United States v. Powers, ___ F.3d ___, 2009 WL 775566 (11th Cir. March 26, 2009); United States v. Ambert, 561 F.3d 1202 (11th Cir. 2009); United States v. Howell, 552 F.3d 709 (8th Cir. 2009); United States v. Hinckley, 550 F.3d 926 (10th Cir. 2008); United States v. Lawrance, 548 F.3d 1329 (10th Cir. 2008); United States v. May, 535 F.3d 912 (8th Cir. 2008).

91. *See*, *e.g.*, United States v. Gould, 526 F. Supp. 2d 538 (D. Md. 2007).

92. No. 3:07-CR-00086(01)RM, 2008 WL 914493 (N.D. Ind. April 3, 2008).

93. 552 F. Supp. 2d 233 (D.R.I. 2008).

94. 561 F. Supp. 2d 1154 (D. Mont. 2008).

95. 544 F. Supp. 2d 1331 (M.D. Fla. 2008).

96. 591 F. Supp. 2d 1312 (S.D. Fla. 2008).

97. No. 3:07-CR-00086(01) RM, 2008 WL 914493, at *1 (N.D. Ind. April 3,

for the Northern District of Indiana found the defendant violated the registration requirements under § 2550 by neglecting to update his registration when he moved from Kentucky to Indiana.[98] Akers alleged § 2250 was unconstitutional and outside of the scope of Congress's power under the Commerce Clause because, although the statute requires interstate travel before it comes into effect, it does not require that the travel be in connection to the defendant's failure to register.[99] Furthermore, the statute does not specify when the travel must have occurred, which indicates the lack of the essential nexus required between the criminal activity and interstate travel.[100]

The court came to its conclusion by relying heavily on a previous SORNA decision it made in *United States v. Dixon*.[101] In *Dixon*, the court deemed SORNA constitutional by holding only a rational basis is needed to conclude a legislated "activity substantially affects interstate commerce."[102] Using this foundation, the *Akers*' court concluded that the statute's interstate travel requirement provided a rational basis for concluding that "SORNA is substantially related to the public's protection from sex offenders whose interstate travel may frustrate any one State's ability to monitor."[103] Furthermore, the court found that there was a proper jurisdictional basis and interstate nexus to give Congress the ability to control the matter because the statute focuses on offenders who travel from one state to another, not offenders who remain in a single state.[104]

Moreover, in *United States v. Ditomasso*,[105] a convicted sex offender was arrested after moving from Massachusetts to Rhode

2008).

98. *Id.* at *1.

99. *Id.* at *2.

100. *Id.*

101. No. 3:07cr72(01)RM, 2007 WL 4553720 (N.D. Ind. Dec. 18, 2007) *rev'd on other grounds*, United States v. Dixon, 551 F.3d 578 (7th Cir. 2008).

102. *Id.* at *5.

103. United States v. Akers, No. 3:07-CR-00086(01)RM, 2008 WL 914493, at *3 (N.D. Ind. April 3, 2008).

104. *Id.*

105. 552 F. Supp. 2d 233 (D.R.I. 2008).

Island for failing to update his registry.[106] Like Akers, he alleged that SORNA had no nexus with interstate commerce and therefore could not withstand constitutional scrutiny under the Commerce Clause.[107] The court found that Congress had properly exercised its power by enacting SORNA because the legislation fell within *Lopez*'s second category, giving Congress the power to regulate the instrumentalities of interstate commerce, including, in the court's opinion, persons or things in interstate commerce.[108]

As in *Akers,* the court in *Ditomasso* found SORNA met the requisite jurisdictional element under the Commerce Clause because the statute requires interstate travel.[109] Also, the court indicated that federal criminal statutes containing a jurisdictional element only have to meet a "minimal nexus test" to show that an object was "in or affecting commerce."[110] Thus, by using "the channels of interstate commerce to travel" from state to state, the court concluded that the government met the minimal nexus requirement.[111] Additionally, the court noted SORNA's importance, as it "prevents sex offenders from being lost in the cracks *between* state regulations, a matter which is beyond the power of any one state to comprehensively address."[112]

Akers and *Ditomasso* illustrate that the courts upholding SORNA's constitutionality under the Commerce Clause have done so by interpreting the *Lopez* opinion incorrectly. *Ditomasso* relied heavily on the *Lopez* second prong in its reasoning, which indicates, "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce."[113] By isolating "persons or things" of *Lopez*'s second category, the court found SORNA's effect of

106. *Id.* at 237-38.
107. *Id.* at 245.
108. *Id.* at 245-46.
109. *Id.* at 246.
110. *Id.* (quoting United States v. Cardoza, 129 F.3d 6, 11 (1st Cir. 1997)).
111. *Ditomasso*, 552 F. Supp. 2d at 246.
112. *Id.* (citing United States v. Reynard, 473 F.3d 1008, 1023-24 (9th Cir. 2007)).
113. *Lopez*, 514 U.S. at 1629.

regulating sex offenders who travel in interstate commerce clearly fell within this category. Clearly this is overreaching—it was not the Supreme Court's intent to allow Congress to control all persons or things who engage in interstate commerce. This would have the effect of being able to regulate almost every activity involving travel.

Furthermore, *Ditomasso*'s holding that the jurisdictional element within § 2250—use of the channels of interstate commerce to travel—met the minimal nexus test set forth in *Scarborough*, is also flawed. The *Myers* court illustrated why use of *Scarborough*'s minimal nexus test to uphold § 2250 under the Commerce Clause is improper. As formerly mentioned, in *Scarborough,* the Supreme Court held that proof of the jurisdictional "element of 'in or affecting interstate commerce' [was satisfied by showing] that the firearm previously traveled in interstate commerce."[114] Thus, holding that the felon did not have to carry the firearm across state lines to be charged with possessing it, the Court's interpretation under its Commerce Clause power came to be known as the "minimal nexus test."[115]

In applying this test to § 2250, the court looked at *United States v. Ballinger*,[116] a case upholding the constitutionality of a statute criminalizing destruction of property because of its religious connotation.[117] In *Ballinger*, the Eleventh Circuit held that Congress has the power to punish individuals who use the channels of instrumentalities of interstate commerce to commit offenses.[118] In its analysis, the court used *Scarborough* to find that the statute was constitutional because he used interstate commerce to carry out his crime.[119] The court did not, however, use *Scarborough* for the purpose of showing that the minimal nexus test applies to persons who at some point crossed state lines.[120] If it would have done so this would mean "that once he

114. *Id.* (quoting Scarborough v. United States, 431 U.S. 563, 575 (1977)).
115. *Id.* (citing *Scarborough*, 431 U.S. at 575-76).
116. 395 F.3d 1218 (11th Cir. 2005).
117. *Id.* at 1342.
118. *Id.* at 1230, 1242.
119. United States v. Myers, 591 F. Supp. 2d 1312, 1341 (S.D. Fla. 2008).
120. *Id.*

crossed state lines, regardless of the purpose and the timing of such travel, Congress was free to regulate whatever purely local conduct that he cho[]se to engage in."[121] In comparison, if § 2250 were to be held constitutional under *Scarborough*'s minimal nexus test to a person's mere travel through interstate commerce one court has concluded that:

> '[T]here would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government.' Upholding the jurisdictional link of a person having traveled at sometime in interstate commerce would allow 'the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and the political responsibility would become illusory.' This cannot be permitted.[122]

B. The Correct Result: SORNA Deemed Unconstitutional Under the Commerce Clause

In *United States v. Powers*,[123] the United States District Court for the Middle District of Florida held SORNA's registration provision to be beyond the scope of Congress's power under the Commerce Clause.[124] Powers was convicted of assault to commit sex crimes in South Carolina in 1995.[125] As a result of his failure to comply with SORNA's registration provision upon moving to Florida in 2007, Powers was arrested—a federal crime punishable either by fine or imprisonment for up to ten years.[126] Powers filed a motion to dismiss on two counts.[127] First, he claimed SORNA's requirement that an offender update

121. *Id.* at 1343.

122. *Id.* at 1345-46 (quoting United States v. Lopez, 514 U.S. 549, 555, 557 (1995) (Kennedy, J., concurring) (citations omitted)).

123. 544 F. Supp. 2d 1331 (M.D. Fla. 2008), *vacated*, United States v. Powers, 562 F.3d 1342, 2009 WL 775566 (11th Cir. March 26, 2009).

124. *Id.* at 1336.

125. *Id.* at 1332.

126. *Id.*

127. *Id.*

registration after moving to a different state did not regulate activities that substantially affected interstate commerce and was therefore beyond the scope of Congress's power under the Commerce Clause.[128] Second, although he admitted the statute contained a jurisdictional element, he argued there was no nexus between the crime of failing to register and interstate travel.[129]

In analyzing the constitutionality of the statute, first the court determined SORNA fell under *Lopez*'s third prong of regulation under the Commerce Clause, the ability to regulate activities that substantially affect interstate commerce because it neither regulated the channels or instrumentalities of commerce nor dealt with the persons or things in interstate commerce.[130] Like the statutes under scrutiny in *Morrison* and *Lopez*, the court found that § 2250 of SORNA had no relation to commerce or any form of economic enterprise.[131] The court indicated that SORNA does not withstand constitutional scrutiny because "[a]ctivities held to affect interstate commerce have been uniformly economic in character, or had some effect on the national market."[132]

Although, the court distinguished § 2250 from the statutes in *Lopez* and *Morrison* because §2250 contains a "jurisdictional element" which attempts to link the crime of failing to register and interstate commerce the statute still did not withstand constitutional scrutiny.[133] The court stated that "upon close examination . . . it becomes apparent that this supposed link is superficial and insufficient to support a finding of substantial affect on interstate commerce."[134] The court reiterated the Supreme Court's determination in *Morrison* that to have a

128. *Id.* at 1333.

129. *Id.*

130. *Id.* at 1333-35. The court concluded SORNA did not deal with regulation of persons or things in interstate commerce because SORNA makes no attempt to regulate the movement of sex offenders. *Id.* Alternatively, it attempts to regulate sex offenders *after* engaging in interstate travel. *Id.* at 1333-34.

131. *Id.* at 1335.

132. *Id.* (citing United States v. Morrison, 529 U.S. 598, 611 (2000)).

133. *Powers*, 544 F. Supp. 2d at 1335.

134. *Id.*

jurisdictional element there must be an explicit connection with or affect on interstate commerce or a clear establishment that the statute attempts to pursue Congress's power to regulate interstate commerce.[135] The court emphasized § 2250's failure to meet the jurisdictional requirement because it is not applicable to an individual until he has *completed* interstate travel and will apply *regardless* of his reason for traveling.[136] Thus, the mere fact that an individual has traveled "does not establish that his or her subsequent failure to register 'substantially affects interstate commerce."[137] The nexus between the crime of failing to register and interstate travel does not exist.[138]

The court further stated that, despite the good intentions of SORNA to protect the population against sex offenders, "a worthy cause is not enough to transform a state concern (sex offender registration) into a federal crime."[139] Although the statute stands for a just cause, it has not been proven that states are incapable of enforcing sex offender registration requirements without Congress's help.[140] In fact, the court found the opposite to be true because each state has implemented its own registration requirements as it sees fit.[141]

In *United States v. Waybright*,[142] the United States District Court for the District of Montana held § 16913; SORNA's general registry requirement obliging all sex offenders to register as a sex offender in each jurisdiction where he resides, works, or attends school; unconstitutional under the Commerce Clause.[143] The court found that because § 16913 does not regulate the use of the channels of interstate commerce or the instrumentalities of interstate commerce, the first two categories of Congress's commerce power as defined under *Lopez,* it fell within the third category, regulation of activities that substantially affect

135. *Id.* at 1335.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id*. at 1336.
140. *Id.*
141. *Id.*
142. 561 F. Supp. 2d 1154 (D. Mont. 2008).
143. *Id.* at 1156-57.

interstate commerce.[144] Under the third category, the court found that § 16913 lacked the express jurisdictional element to limit its reach to sex offenders connected with or affecting interstate commerce.[145] Although the court noted that the registration of all sex offenders would promote public safety and therefore lead to a more productive economy, it concluded that that alone was not enough to survive constitutional scrutiny under the Commerce Clause.[146] Because § 16913 does not have a substantial effect on interstate commerce, the court held requiring sex offenders to comply with the requirements of a national registration without also conducting in interstate commerce was constitutionally invalid.[147]

Recently decided, *United States v. Myers*[148] held both § 2250 and § 16913 unconstitutional but under different reasoning than put forth by either the *Powers* or *Waybright* courts.[149] After analysis of § 16913, the court found that because the statute requires all sex offenders to register where they reside, are employed, or attend school, Congress is regulating only intrastate activities.[150] Therefore, for Congress to exert its Commerce Clause power, § 16913 must fall within *Lopez*'s third category requiring that the activities regulated substantially affect interstate commerce.[151] The court noted that the substantial effects test could be applied under the Supreme Court's analysis of *Raich* or through the four-part test put forth in *Morrison*.[152]

Under the *Raich* analysis—whether Congress has a reasonable basis to believe that the locally regulated activity

144. *Id.* at 1163.
145. *Id.* at 1165.
146. *Id.*
147. *Id.* at 1167. Similar to the *Waybright* decision, other courts have also held § 16913 to be unconstitutional under the Commerce Clause on similar grounds. *See* United States v. Guzman, 582 F. Supp. 2d 305 (N.D.N.Y. 2008); United States v. Hall, 577 F. Supp. 2d 610 (N.D.N.Y. 2008).
148. 591 F. Supp. 2d 1312 (S.D. Fla. 2008).
149. *Id.* at 1316-17.
150. *Id.* at 1331.
151. *Id.*
152. *Id.*

interferes with the nationwide regulation of the market—the court first viewed § 16913 as part of SORNA.[153] It found there to be no economic market for the personal information of sex offenders under SORNA.[154] Also, the court indicated that there is no commercial value for SORNA's information as the information is free for public users over the internet.[155] Thus, SORNA does not amount to an overlying economic regulation as required by *Raich*. Furthermore, concerning whether Congress has a reasonable basis to believe that the regulated behavior under scrutiny affected interstate commerce, after looking at the language of SORNA directly, the court found "no congressional record to support Congress having a reasonable basis to conclude that the registration of a failure to register sex offenders would have an impact on a commercial market."[156] Thus, the court held § 16913, analyzed in connection with SORNA, cannot survive constitutional scrutiny under *Raich*.[157]

Next, the court conducted the same analysis of § 16913 as part of the Adam Walsh Act.[158] However, before doing so it indicated that the Supreme Court would probably not take this approach since the Gun-Free School Zones Act in *Lopez* was analyzed without reference to its larger counterpart, the Crime Control Act of 1990.[159] Because other areas regulated by the Adam Walsh Act involve interstate commerce, such as child pornography, the *Myers* court concluded that the Adam Walsh Act does regulate commercial markets.[160] However, the court found that "nothing suggests a reasonable basis for Congress to believe that the registration of sex offenders under § 16913 has any affect on its ability to regulate and prevent child pornography traveling in interstate commerce."[161] Therefore, lacking the rational basis requirement, the court held § 16913, as

153. *Id.*
154. *Id.* at 1332.
155. *Id.*
156. *Id.* at 1333.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* at 1333-34.
161. *Id.* at 1334.

part of the Adam Walsh Act, was unconstitutional under *Raich*.[162]

Next, applying *Morrison*'s four-part test, the court also found § 16913 unconstitutional.[163] Under the first prong of the test, the court found that the regulation of sex offenders does not involve commerce or any type of economic activity.[164] Second, it found there is no jurisdictional element to limit the registration of sex offenders to a discrete set of activities.[165] The statute lacks any type of jurisdictional element because it affects all sex offenders, regardless of whether they engage in interstate travel.[166] Next, it concluded the statute and its legislative history contain no congressional findings indicating how the regulation of sex offenders affects interstate commerce.[167] Last, the court held the requisite link between sex offenders and interstate commerce is absent.[168] Thus, the court held § 16913 unconstitutional under *Morrison*.[169]

The court went to great lengths when discussing its reason behind holding § 2250 unconstitutional. First, *Myers* indicates that Congress has continuously employed the language "in interstate commerce" when using its traditional Commerce Clause powers used when regulating interstate activities under *Lopez*'s first and second categories.[170] Thus, because § 2250's goal is to regulate sex offenders who "travel[ ] in interstate or foreign commerce"[171] and "[c]ourts operate with the understanding that Congress is capable of saying what it wants and meaning what it says," the statute falls within one of Congress's traditional Commerce Clause powers rather than the third substantial effects category.[172]

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162. *Id.*
163. *Id.* at 1335-36.
164. *Id.* at 1335.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 1336.
169. *Id.*
170. *Id.* at 1337.
171. 18 U.S.C. § 2250(a)(2)(B) (2006).
172. *Myers*, 591 F. Supp. 2d at 1337 (The court based its conclusion on

After making this determination, the court went on to provide an extensive assessment of its reasoning that § 2250 is unconstitutional under both *Lopez*'s first and second categories.[173] Under the first *Lopez* category, concerning the regulation of the channels of interstate commerce, Congress seeks to regulate an individual's movement through the channels of interstate commerce, not the act that takes place once that person has reached his destination.[174] The first category does not apply because § 2250 punishes individuals for "knowingly failing to register," *not* for interstate travel for the purpose of avoiding registration or for failing to register, as the sex offender is in the act of traveling in interstate commerce.[175] Put differently, sex offenders are required to register *after* traveling across state lines.[176] Section 2250 does not punish a sex offender for deviously crossing state lines to avoid the registry requirement, which it constitutionally has the power to do.[177] As the court notes, Congress is not permitted "to attach regulations on a person simply because he has once innocently availed himself of his constitutional right to travel though the channels of intrastate commerce."[178] Thus, the court concluded §2250 is also unconstitutional under *Lopez*'s first category.[179]

Next *Myers* indicated that courts relying on *Lopez*'s second category to prove § 2250 constitutional have done so through the "'persons in interstate commerce, even though the threat may come only from intrastate activities'" phrase of the category.[180] By isolating this phrase, it makes sense to give Congress

United States v. Ballinger, 395 F.3d 1218, 1230-35 (11th Cir. 2005) which applied an in depth study of Congress's use of the phrases "affecting commerce" and "in commerce.").

173. *Myers*, 591 F. Supp. 2d at 1337-41.

174. *Id.* at 1347; *see* Caminetti v. United States, 242 U.S. 470, 470 (1917) (stating it was Congress's intent to regulate individuals using interstate commerce to become prostitutes, not individuals who became prostitutes once they traveled in interstate commerce).

175. *Myers,* 591 F. Supp. 2d at 1348.

176. *Id.* at 1347-48.

177. *Id.*

178. *Id.* at 1348.

179. *Id.*

180. *Id.* at 1340 (quoting United States v. Lopez, 514 U.S. 549, 558 (1995)).

authority to regulate a person once he has traveled in interstate commerce.[181] However, *Myers* holds this reasoning superficial due to improper interpretation of Congress's power under *Lopez*'s second category.[182]

As noted above, *Lopez*'s second category concerns "Congress's power to regulate and protect the instrumentalities of interstate commerce, i.e., 'the means of conveying people and goods across state lines, such as airplanes and trains.'"[183] The court reasoned that it is impermissible to isolate the phrase "'persons or things in interstate commerce, even though the threat may come only from intrastate activities'," as this would have given Congress a fourth Commerce Clause power.[184] Because this was not the Court's intention in *Lopez,* the phrase's appropriate meaning has to be read "in conjunction with the subject of the second category: the instrumentalities of interstate commerce."[185] Since Congress is not seeking to protect the instrumentalities of interstate commerce, *Myers* held *Lopez*'s second category does not apply.[186]

Because of the variation in the arguments presented above, it is perplexing at first glance to determine who has interpreted the *Lopez* decision correctly. Nonetheless, upon close examination, it becomes apparent that the few courts ruling SORNA unconstitutional under the Commerce Clause have reached the right result. First, because § 16931 places a general requirement on sex offenders to register although they may never engage in interstate travel, the activity regulated under the statute must have a substantial effect on interstate commerce to withstand constitutional scrutiny. Complying with the requirements of a national registry without also conducting in interstate commerce does not amount to a substantial effect on interstate commerce and therefore is constitutionally invalid. Second, courts have wrongfully interpreted and applied each of the *Lopez* categories

181. *Myers*, 591 F. Supp. 2d at 1340.

182. *Id.* at 1341.

183. *Id.* (quoting United States v. Rybar, 103 F.3d 273, 290 (3rd Cir. 1996)).

184. *Myers*, 591 F. Supp. 2d at 1340 (quoting United States v. Lopez, 514 U.S. 549, 558 (1995)).

185. *Myers*, 591 F. Supp. 2d at 1341.

186. *Id.* at 1340.

in attempt to prove § 2250 constitutionality correct. The first *Lopez* category seeks to regulate an individual's movement through the channels of interstate commerce, not the act that takes place once the person has reached their destination. Since § 2250 does not attach until after the sex offender arrived to their destination, it does not withstand constitutional scrutiny under this category. Furthermore, the second category does not support the constitutionality of § 2250. It is evident that the Supreme Court intended for the category to regulate the means of transporting people across state lines such as planes and trains. By isolating the "persons or things in interstate commerce" phrase within the category, courts have wrongfully applied *Lopez*'s second category and have acted with an unfounded right not intended by the Founding Fathers. Last, § 2250 fails under the *Lopez*'s third substantial effects category because the link between the crime of failing to register and interstate travel does not exist. Since § 2250 applies only after completion of travel and regardless of the offender's reason for traveling there is no explicit connection with interstate commerce.[187]

IV. CONCLUSION

The variation in outcomes between the cases analyzed above indicates the difficulty courts have interpreting the *Lopez* decision, specifically defining Congress's powers under the three broad categories distinguished in the case. Because the *Lopez* decision did not overrule the Commerce Clause precedent, courts and the legal community are unsure how to apply the decision to current cases. Nonetheless, if the Supreme Court is faced with the issue of the constitutionality of SORNA under the Commerce Clause, it is not likely it will vary from its decisions in *Lopez* and *Morrison*, falling back into Congress's overreaching power under

187. As this article goes to press, the Eleventh Circuit has declined to follow the arguments set forth by the *Powers* and *Myers* courts analyzed in this section. Nonetheless, the Eleventh Circuit relies on arguments wrongfully construing Congress's power under the Commerce Clause. These decisions further emphasize the tendency of courts to use the Commerce Clause power to uphold the constitutionality of criminal statutes implemented for good cause, despite their lack of authority to do so.

the Commerce Clause.

Furthermore, when the Framers of the Constitution drafted the Commerce Clause, it became clear they intended to vest power in the national government to handle activities states could not effectively govern themselves. In a desperate attempt to protect society, especially children, from sexual predators, Congress has overstepped its boundaries by implementing a national sex offender registry. Being rooted in a just cause does not permit the federal government to regulate an activity that can effectively be administered by the states. Although regulations on sex offenders who engage in interstate travel are necessary, the determination of how and when to regulate should remain a decision for the states. There is simply no reason why states should not be able to create their own standards for such an offense. To leave this power in the hands of Congress as a power given to them under the Commerce Clause would be a gross deviation from the Framers' intentions. SORNA merely requires that a convicted sex offender travel to another state to face criminal charges. The nexus between such a crime and interstate travel is so minute that it is clearly not an area intended by the Framers to be governed by Congress under the Commerce Clause.

PLANNED PARENTHOOD MINNESOTA, NORTH DAKOTA, SOUTH DAKOTA v. ROUNDS: THE JOURNEY TO PROTECT WOMEN'S MENTAL HEALTH WITH RELEVANT, TRUTHFUL AND NOT MISLEADING INFORMATION IN INFORMED CONSENT ABORTION STATUTES

*Kathleen G. Chewning**

I. INTRODUCTION 601
II. BACKGROUND ON RELEVANT LAW 604
A. *Roe v. Wade*: Women Gain the Right to an Abortion .. 604
B. *Planned Parenthood v. Casey*: Setting the Stage for Informed Consent Abortion Statutes 604
1. *Gonzales v. Carhart*: Opening the Information Highway to Abortion and Recent Studies on the Link Between Mental Health and Abortion 607
2. Defining "Relevant" and "Truthful and Not Misleading" 609
III. PLANNED PARENTHOOD MINNESOTA, NORTH DAKOTA, SOUTH DAKOTA v. ROUNDS 611
A. It is Relevant and Truthful and Not Misleading to Inform a Woman that an Abortion Will Terminate the Life of a "Human Being." 614
IV. CONCLUSION: WHAT IS RELEVANT, TRUTHFUL AND NOT MISLEADING INFORMATION? 616

I. INTRODUCTION

South Dakota is one of the most pro-life states in America. In addition to its aggressive pro-life informed consent statute,[1] it

* J.D. candidate, Charleston School of Law, 2010; B.A., The University of North Carolina at Chapel Hill, 2007. I would like to thank my family for their loving and unwavering support and encouragement. I would also like to thank the 2008-09 members of the *Charleston Law Review* for their dedication and hard

also recently attempted, but failed, to pass a ballot initiative outlawing abortion.[2] South Dakota continues to push its abortion laws to the edge of the constitutional map. In June 2008, the Eighth Circuit upheld the constitutionality of a South Dakota statute[3] requiring physicians to inform women before they receive an abortion that their decision to do so will result in the termination of the life of a "human being."[4] This statute is currently the only one of its kind and will likely have a significant effect on the only abortion clinic in the state. Given the recent emphasis by the Supreme Court on the consideration of a woman's mental health in relation to abortion laws,[5] this statute adds another wave to the current pool of abortion laws. Whether or not this information—specifically, defining an abortion as terminating the life of a "human being"—is helpful or harmful to a woman's mental health remains undecided. This Note aims to trace the history of abortion jurisprudence relating to informed consent abortion statutes and show why the Eighth Circuit was correct in its decision that the information required to be conveyed by South Dakota's revolutionary statute is truthful and not misleading.

In 1973 the Supreme Court first recognized the constitutional right of women in the United States to choose to terminate their

work.

1. *See* S.D. CODIFIED LAWS § 34-23A-10.1 (Supp. 2008).

2. *See* South Dakota Secretary of State, 2008 South Dakota Official General ElectionResults, http://www.sdsos.gov/electionsvoteregistration/pastelections_electioninfo08_generalbq.shtm (restating the title of Initiated Measure 11 as it appeared in the 2008 statewide ballot questions as "[a]n Initiative to prohibit abortions except in cases where the mother's life or health is at a substantial and irreversible risk, and in cases of reported rape and incest"). For full text of the initiative, see South Dakota Secretary of State, 2008 South Dakota Ballot Question Attorney General Explanations, http://www.sdsos.gov/electionsvoteregistration/upcomingelection_2008BQExplanations.shtm.

3. § 34-23A-10.1(1)(b).

4. Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds, 530 F.3d 724, 738 (8th Cir. 2008) (en banc).

5. *See* Gonzales v. Carhart, 550 U.S. 124, 159 (2007) (noting that although at the time there were "no reliable data to measure the phenomenon," it seemed self-evident that some women would regret their decision to undergo an abortion and that "[s]evere depression and loss of esteem can follow").

pregnancy before viability in the famous case of *Roe v. Wade*.[6] Since then, pro-life advocates have diligently fought to limit that right. The most ground gained in their battle stems from informed consent abortion statutes. The purpose of informed consent abortion statutes is to regulate the method by which a woman makes the decision of whether or not to have an abortion by providing full disclosure of all medical information deemed necessary to make such a decision. The most recent support for these statutes is the theory that by enacting them, states are protecting women's mental health by attempting to ensure that pregnant mothers do not later regret their decision based on a lack of information.[7]

Part II of this Note begins by mapping abortion law through its relevant history, starting with *Roe v. Wade*. Part II.A of the Note then details the birth of judicial allowance and interpretation of informed consent statutes with the seminal case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[8] Additionally, this section of the Note will provide the basis for the requirement that disclosures pursuant to informed consent abortion statutes be relevant and truthful and not misleading information. Part II.B.i will then address the recent *Gonzales v. Carhart*[9] decision and its emphasis on the effects of abortion on a woman's mental health. This will be followed by an analysis of the effects of abortion on women's health, examined in light of recent conflicting studies over whether such a correlation exists. Part II.B.ii identifies case law which analyzes whether and which information relating to abortion regulation is relevant, truthful and not misleading information. Finally in Part III, this Note addresses *Planned Parenthood of Minnesota, North Dakota, South Dakota v. Rounds*[10] and its potential far-reaching effects on the future of informed consent abortion regulation.

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6. 410 U.S. 113, 164-65 (1973).

7. *See Rounds*, 530 F.3d at 734 (citing Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 882 (1992) (plurality opinion)).

8. 505 U.S. 833.

9. 550 U.S. 124.

10. 530 F.3d 724.

II. BACKGROUND ON RELEVANT LAW

A. *Roe v. Wade*: Women Gain the Right to an Abortion

Thirty-five years after *Roe v. Wade*, many pro-life state legislatures are still actively marching for its demise, one battle at a time. Although *Roe* granted women the right to choose whether or not to have an abortion, it is not an absolute right.[11] A woman's right "must be considered against important state interests in regulation," including protecting potential life.[12] The *Roe* Court implemented the trimester framework, which allowed states to regulate abortion after the first trimester of a pregnancy, to govern state abortion regulation.[13] During the second trimester, states could protect the mother's health, and during the third trimester, a state could "promot[e] its interest in the potentiality of human life," even to the point of proscribing abortion.[14] Slowly but surely, states began to fight the rigidity of *Roe's* trimester framework. They expanded their interests in protecting human life by providing a woman with an informed choice. One of the most common weapons used in the informed choice battle is the informed consent abortion statute.

B. *Planned Parenthood v. Casey*: Setting the Stage for Informed Consent Abortion Statutes

The seminal case governing informed consent abortion statutes is *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[15] Currently, over twenty states have abortion statutes

11. *Roe*, 410 U.S. at 153-54.
12. *Id.* at 154.
13. *Id.* at 163.
14. *See id.* at 164-65.
15. 505 U.S. 833 (1992). In *Casey*, abortion clinics and physicians who performed abortions brought suit for declaratory and injunctive relief from the informed consent statute challenging it as unconstitutional. The Court upheld the informed consent, parental notification, and facility reporting requirements, but found the spousal notification provision to be unconstitutional. *Id.* at 844-45, 900.

containing informed consent provisions.[16] Because the statute in *Casey* passed constitutional muster, many states model their informed consent provisions after it. These statutes generally require that either eighteen or twenty-four hours before an abortion may be performed, the pregnant woman seeking it must receive enumerated, but usually not exhaustive, information verbally or in writing, and then give her voluntary and informed consent for the operating physician to perform an abortion.[17] The most common materials contained in informed consent statutes are: the name of the physician performing the abortion, available medical assistance benefits and services, the proposed abortion procedure to be used and the risks associated with it, the probable gestational age of the fetus, the requirement of paternal child support payments, and a woman's right to view printed materials about the public and private agencies and services available to assist her, including adoption agencies.[18]

In *Casey*, the Pennsylvania abortion statute at issue required a physician to "inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the 'probable gestational age of the unborn child.'"[19] In its analysis, the Supreme Court rejected the trimester framework from *Roe*,[20]

16. *See* ARK. CODE ANN. § 20-16-903 (Supp. 2007); IDAHO CODE ANN. § 18-609(2)-(3) (2004); IND. CODE ANN. § 16-34-2-1.1 (LexisNexis Supp. 2006); KAN. STAT. ANN. § 65-6709 (2002); KY. REV. STAT. ANN. § 311.725 (LexisNexis 2007); LA. REV. STAT. ANN. § 40:1299.35.6(B) (2008); ME. REV. STAT. ANN. tit. 22, § 1599-A (2004); MASS. GEN. LAWS. ANN. ch. 112, § 12S (West 2003); MINN. STAT. ANN. § 145.4242 (West 2005); MISS. CODE ANN. § 41-41-33 (2005); MONT. CODE ANN. § 50-20-104(5) (2007); NEB. REV. STAT. § 28-327 (Supp. 2006); NEV. REV. STAT. ANN. § 442.253 (LexisNexis 2005); N.D. CENT. CODE § 14-02.1-02(5) (2004); 18 PA. CONS. STAT. ANN. § 3205 (West 2000); R.I. GEN. LAWS § 23-4.7-3 (2008); S.C. CODE ANN. § 44-41-330 (Supp. 2008); S.D. CODIFIED LAWS § 34-23A-10.1 (2008); TENN. CODE ANN. § 39-15-202 (2006); UTAH CODE ANN. § 76-7-305 (2008); VA. CODE ANN. § 18.2-76 (2004); WIS. STAT. ANN. § 253.10(3) (West Supp. 2008) [hereinafter *Informed Consent Statutes*].

17. *E.g.*, IND. CODE ANN. § 16-34-2-1.1(a).

18. For a compilation of the most frequently included provisions, see *Informed Consent Statutes*, *supra* note 16.

19. *Casey*, 505 U.S. at 881 (quoting 18 PA. CONS. STAT. § 3205 (1990)).

20. *Id.* at 872-73 ("Though the woman has the right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. . . . States are free to enact laws to provide a reasonable

acknowledging the states' interest in protecting fetal life and women's physical and mental health.[21] The Court further found that the Constitution does not prohibit a state from "expressing a preference for normal childbirth,"[22] and thus opened the door for states to enact legislation to ensure that a woman's choice is always thoughtful and informed. The *Casey* Court reiterated that *Roe* shielded a woman from only an undue burden or substantial interference with the decision to preserve or abort her child; it did not give a woman the limitless right to obtain an abortion.[23] This led to the *Casey* "undue burden" test, which holds that states may regulate previability abortions so long as they do not impose an undue burden on a woman's right to choose an abortion.[24] An undue burden exists if the "regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion."[25] Therefore, a state may further its interest in protecting potential life by ensuring that a woman's choice is informed, but it must avoid hindering that choice through the imposition of an undue burden on a woman's ability to obtain an abortion.

By balancing the states' rights to protect a woman and her child against the right to an abortion, *Casey* attempted "to ensure that a woman apprehend the full consequences of her decision . . . [by] reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed."[26] Once the Court recognized the states' right to impose and women's right to

framework for a woman to make a decision that has profound and lasting meaning. . . . We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*.").

21. Peter M. Ladwein, *Discerning the Meaning of* Gonzales v. Carhart: *The End of the Physician Veto and the Resulting Change in Abortion Jurisprudence*, 83 NOTRE DAME L. REV. 1847, 1876-77 (2008).

22. *Casey*, 505 U.S. at 872-73 (quoting Webster v. Reprod. Health Servs., 492 U.S. 490, 511 (1989)).

23. *Id.* at 874-75.

24. *Id.* at 876-77.

25. *Id.* at 877.

26. *Id.* at 882 (referring to and upholding a requirement that doctors tell women the "probable gestational age" of the fetus before performing an abortion).

receive information before an abortion could proceed, it further explained that "[i]f the information the State requires to be made available to the woman is *truthful and not misleading*, the requirement may be permissible."[27] The Court permitted a requirement to inform women of the probable gestational age of the fetus before a doctor could perform an abortion, finding it "*relevant*, if not dispositive, to the decision."[28] Therefore, *Casey* established the standard that informed consent abortion statute disclosures be relevant and truthful and not misleading. Ensuring that women are fully informed of the possible effects of an abortion is the most common way states may protect women's mental health, attempting to avoid the regret which may come from such a permanent decision.

1. *Gonzales v. Carhart*: Opening the Information Highway to Abortion and Recent Studies on the Link Between Mental Health and Abortion

The Supreme Court recently upheld the Partial-Birth Abortion Ban Act of 2003 (the Act) in *Gonzales v. Carhart*.[29] Justice Kennedy, writing for the majority, emphasized a woman's right to make an informed decision based on the "[r]espect for human life [which] finds an ultimate expression in the bond of

27. *Id.* (emphasis added).

28. *Id.* (emphasis added). However, regulations that encourage or are intended to persuade a woman to choose carrying her child to term over obtaining an abortion are valid unless they affect her right of choice or impose an undue burden on her right to choose. *Id.* at 878.

29. 550 U.S. 124, 132-33 (2007). The Partial-Birth Abortion Ban Act prohibited late term abortions in which a doctor

> (A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and
>
> (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus.

18 U.S.C. § 1531(b)(1) (2006).

love the mother has for her child."[30] The Court focused on the mental health of women in its determination that the Act did not impose an undue burden on women.[31] While *Gonzales* did not specifically discuss informed consent statutes, its emphasis on the importance of women's choices concerning abortion to be fully informed is applicable to them. Admitting that at the time there were "no reliable data to measure the phenomenon," the Court still found it "unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained."[32]

However, conflicting results on whether there is a link between abortion and mental health were released this year. In August 2008, the American Psychological Association released a report finding "no evidence sufficient to support the claim that an observed association between abortion history and mental health was caused by the abortion per se, as opposed to other factors."[33] Conversely, another study released in December 2008 found that "abortion was associated with a small increase in the risk of mental disorders; women who had had abortions had rates of mental disorder that were about 30% higher."[34] These data may change the way the Court approaches informed consent statutes. For now, the Court's last word on the issue of a fully informed abortion decision as protection for the mental health of women permits that a

> State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the

30. *Gonzales*, 550 U.S. at 159.

31. *Id.* at 156-60.

32. *Id*. at 159.

33. TASK FORCE ON MENTAL HEALTH AND ABORTION, AM. PSYCHOLOGICAL ASS'N, REPORT OF THE TASK FORCE ON MENTAL HEALTH AND ABORTION 4 (2008), *available at* http://www.apa.org/pi/wpo/mental-health-abortion-report.pdf.

34. David M. Fergusson et al., *Abortion and Mental Health Disorders: Evidence from a 30 Year Longitudinal Study*, 193 BRIT. J. PSYCHIATRY 444 (2008), *available at* http://www.chmeds.ac.nz/research/chds/publications/2008/328.pdf.

event, what she once did not know.[35]

Although it is clear that a state may require a doctor to fully inform a woman about her abortion decision in an effort to protect her, it is not clear exactly what type of information may be legally utilized in such an effort.

2. Defining "Relevant" and "Truthful and Not Misleading"

Having established the right of a woman seeking an abortion to make a fully informed decision of whether to have an abortion in an attempt to avoid subsequent regret, the inquiry of exactly what information should aid in that decision is still progressing. In order not to impose an undue burden on a woman's choice—and thereby remain constitutional under *Casey*—an informed consent abortion statute may only require a physician to disseminate information that is relevant and truthful and not misleading to a patient's decision of whether or not to have an abortion.[36] Therefore, the crux of determining the constitutionality of an informed consent statute turns on what is deemed "relevant" and "truthful and not misleading." There is little direct guidance for this inquiry. Since *Casey*, the Court has provided no further assistance as to what is relevant and truthful and not misleading. One interpretation of these terms may be inferred from the content of accepted informed consent statutes. In *Casey*, some information deemed "relevant" included the impact of the abortion procedure on the fetus, the availability of information about fetal development, and the assistance available to a woman should she choose to carry her child to term.[37] In addition, there is some guidance from lower courts on what may be considered relevant and truthful and not misleading material for informed consent statutes.

A Wisconsin abortion statute with an informed consent

35. *Gonzales*, 550 U.S. at 159-60 (referring to the fact that a woman needs to understand in the partial-birth abortion procedure "that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form").

36. *See supra* Part II.B.

37. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 882-83 (1992) (plurality opinion).

provision mandating that a physician inform a woman of the option to hear the heartbeat of her unborn child[38] was determined constitutional by the Seventh Circuit in *Karlin v. Foust*.[39] In so holding, *Karlin* emphasized that these provisions should be read with "common sense" and not "so narrow[ly] as to preclude a physician from being able to fully explain the availability of the identified services."[40] Therefore, the Seventh Circuit interpreted truthful and not misleading through a common sense approach.

In *Eubanks v. Schmidt*,[41] the United States District Court for the Western District of Kentucky upheld the constitutionality of an informed consent statute requiring "that physicians inform women about certain specific medical and social information and offer them two state published pamphlets[,] . . . [where] [o]ne pamphlet describes fetal development and the other pamphlet lists resources available to the woman."[42] The *Eubanks* court upheld the provision based on the analysis of a similar provision in the Pennsylvania informed consent statute in *Casey* and reasoned:

> [H]ad Justice O'Connor thought that the state sponsored materials in *Casey* were an ideological statement, she would have said so. Instead, she classified the informed consent pamphlets as little more than the requirement that the physician provide certain medical facts and agency information to patients as part of a comprehensive medical regulatory scheme.[43]

The pamphlet illustrating various stages of fetal development did not require a physician to distribute ideological speech due to the fact that "[s]imply because a subject is controversial . . . does

38. WIS. STAT. ANN. § 253.10(3)(c)1.g. (West Supp. 2008).

39. 188 F.3d 446, 491-93 (7th Cir. 1999) (noting that the heartbeat is usually audible at ten to twelve weeks after conception and many women seek and obtain abortions before ten weeks).

40. *Id.* at 492.

41. 126 F. Supp. 2d 451 (W.D. Ky. 2000).

42. *Id.* at 452; *see also* KY. REV. STAT. ANN. § 311.725 (LexisNexis 2007) (listing the types of information required by the state's informed consent statute).

43. *Eubanks*, 126 F. Supp. 2d at 458.

not make it ideological. It is possible to convey information about ideologically charged subjects without communicating another's ideology, particularly in the context of the reasonable regulation of medical practice."[44] Therefore, under *Eubanks*, information may still be truthful and not misleading even though it is controversial or ideological in nature.

Finally, in *Acuna v. Turkish*[45] the Supreme Court of New Jersey decided that "the common law doctrine of informed consent requires doctors to provide their pregnant patients seeking an abortion *only* with material medical information, including gestational stage and medical risks involved."[46] The *Acuna* court refused to hold a physician liable for not telling the plaintiff that her abortion resulted in the death of a human being because there was no medical consensus that "terminating an early pregnancy involves 'actually killing an existing human being,'"[47] and because "[i]n *Casey* . . . the United States Supreme Court repeatedly refers, when speaking of a fetus or embryo, to the State's 'interest in potential life,' and scrupulously avoids describing either a fetus or an embryo as an existing human being."[48] *Acuna* seems to suggest that information required in an informed consent may be "relevant" or "material" if it is supported by medical consensus.

III. PLANNED PARENTHOOD MINNESOTA, NORTH DAKOTA, SOUTH DAKOTA v. ROUNDS

In 2005, the South Dakota legislature enacted one of the most aggressive pro-life informed consent abortion statutes in

44. *Id.* n.11 (finding the color enhanced and enlarged fetal development photographs in the pamphlets to be "truthful and not misleading").

45. 930 A.2d 416 (N.J. 2007).

46. *Id.* at 427-28 (denying a medical malpractice claim brought by a patient claiming she did not receive informed consent for her abortion because the physician did not tell her that the abortion would result in the killing of an existing human being).

47. *Id.* at 426.

48. *Id.* (quoting *Casey*, 505 U.S. at 875-76). However, most recently in *Gonzales v. Carhart*, Justice Kennedy used the terms "mother" and "child," as opposed to the usual references to "woman" and "fetus." 550 U.S. 124, 127 (2007).

the United States.[49] In its findings, which supported the enactment, the legislature stated that pregnant women considering abortion "are faced with making a profound decision most often under stress and pressures from circumstances and from other persons, and that there exists a need for special protection of the rights of such pregnant women."[50] The statute, which defines "[h]uman being" as "an individual living member of the species of Homo sapiens, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation,"[51] requires that physicians provide women seeking abortions with a written statement that must comply with, among other things, the following:

> A consent to an abortion is not voluntary and informed, unless, in addition to any other information that must be disclosed under the common law doctrine, the physician provides that pregnant woman with the following information:
>
> . . . .
>
> (b) That the abortion will terminate the life of a whole, separate, unique, living human being;
>
> (c) That the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota;
>
> (d) That by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated;
>
> (e) A description of all known medical risks of the procedure and statistically significant risk factors to which the pregnant woman would be subjected, including:
>
> (i) Depression and related psychological distress;

49. *See* S.D. CODIFIED LAWS § 34-23A-10.1 (2008).
50. § 34-23A-1.5.
51. § 34-23A-1(4).

(ii) Increased risk of suicide ideation and suicide.[52]

In June 2005, Planned Parenthood moved for preliminary relief, seeking to enjoin the statute from taking effect.[53] It alleged that the disclosure requirements of the statute violated physicians' free speech rights, were unconstitutionally vague in their failure to give physicians adequate notice of the prohibited conduct, and unduly burdened a patient's rights to an abortion.[54] Most significant to the inquiry of this Note is the allegation that the statute violates "physicians' free speech rights by compelling them to deliver the State's ideological message, rather than truthful and non-misleading information relevant to informed consent to abortion."[55] The resolution of this issue lies in the determination of whether the statement that an "abortion will terminate the life of a whole, separate, unique, living human being"[56] is "truthful and not misleading" information which is relevant to a woman's decision of whether or not to have an abortion.

The district court granted the preliminary injunction Planned Parenthood sought.[57] In its review of the district court decision, the Eighth Circuit set the scope of Planned Parenthood's burden of proof with a combination of case law from *Casey* and *Gonzales*. From *Casey*, the court found that information was "relevant" when it "further[ed] the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed."[58] This,

52. § 34-23A-10.1.

53. Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds, 530 F.3d 724, 727 (8th Cir. 2008) (en banc).

54. *Id.*

55. *Id.* This Note focuses on whether the conveyance to a woman seeking an abortion that her decision will terminate the life of a "human being" is truthful and not misleading as required by *Casey*. However, for a discussion on the implications of such information on physicians' free speech rights, see Whitney D. Pile, *The Right to Remain Silent: A First Amendment Analysis of Abortion Informed Consent Laws*, 73 MO. L. REV. 243 (2009).

56. S.D. CODIFIED LAWS § 34-23A-10.1.

57. *Rounds*, 539 F.3d at 729.

58. *Id.* at 734 (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 883 (1992) (plurality opinion)).

in conjunction with the *Gonzales* finding that some women ultimately regret their choice of abortion[59] and that the "'government may use its voice and its regulatory authority to show its profound respect of the life within the woman,'"[60] led the court to hold that

> while the State cannot compel an individual simply to speak the State's ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion.[61]

The next step was to apply this statement of law to the requirement that a pregnant woman be told that "the abortion will terminate the life of a whole, separate, unique, living human being"[62] before she may obtain an abortion.

A. It is Relevant and Truthful and Not Misleading to Inform a Woman that an Abortion Will Terminate the Life of a "Human Being."

The Eighth Circuit found that informing a woman that an abortion would terminate the life of a "human being" was "at least as relevant to the patient's decision to have an abortion as the gestational age of the fetus, which was deemed to be relevant in *Casey*."[63] While the court easily decided that such information was relevant, it was more difficult to determine whether it was also truthful and not misleading. Both Planned Parenthood and the State presented evidence from expert witnesses about the truthfulness of the definition of "human being" contained in § 34-23A-1(4). The witnesses for Planned Parenthood testified that the disclosures required were "'statements of ideology and opinion, not medicine or fact'"[64] and that there was no scientific

59. *Id.* (citing Gonzales v, Carhart, 550 U.S. 124, 159 (2007)).
60. *Id.* (quoting *Gonzales*, 550 U.S. at 157).
61. *Id.* at 734-35.
62. S.D. CODIFIED LAWS § 34-23A-10.1(1)(b).
63. *Rounds*, 530 F.3d at 736.
64. *Id.* at 727 (quoting Ball Aff. ¶ 2) (further arguing that a doctor would

or medical consensus that a fetus was a human being from the moment of conception.[65] On the other hand, the medical witness for the State found that usage of the term "human being" was correct because "'[a]ll the genetic information sufficient and necessary to mature, and the information that is needed for this human being's entire life is present at the time of conception.'"[66] In spite of such different opinions and without a clear explanation, the court decided, with little trouble, that Planned Parenthood failed to show that the required disclosures were untruthful or misleading.[67]

In support for its decision, the court explained that the statute must be read as a whole, as opposed to isolating one phrase or definition.[68] Taking into consideration the required disclosures and the limited definition of human being, the court found that "the evidence submitted by the parties regarding the truthfulness and relevance of the disclosure in § 7(1)(b) generates little dispute . . . [and] the biological sense in which the embryo or fetus is whole, separate, unique and living should be clear in context to a physician."[69] After such an apparently easy resolution to the decision that the information was truthful and not misleading, Planned Parenthood fought back once more arguing that there may be some instances in which the definition would be untruthful and misleading given the circumstances of a

not be able to clarify the disclosures if requested to do so by a patient because they were not medical facts).

65. *Id.* at 728.

66. *Id.* (quoting *Hearing on House Bills 1166, 1233, 1249 Before Senate State Affairs Comm.*, 80th Sess. 25-26 (S.D. Feb. 23, 2005) (statement of D. Peeters-Ney)).

67. *Id.* at 736.

68. *Id.* at 735.

69. *Id.* at 735-36. The court combined the two statute sections and found that the disclosure required is "'[t]hat the abortion will terminate the life of a whole, separate, unique, living human being,' and that 'human being' in this case means 'an individual living member of the species of Homo sapiens . . . during [its] embryonic [or] fetal age.'" *Id.* (quoting S.D. CODIFIED LAWS § 34-23A-10.1(1)(b), § 34-23A-1(4)). The dissent noted that the court's "pronouncement is quite amazing in light of the well established precept that the point at which human life begins is indeterminable as a legal matter." *Id.* at 745 (Murphy, J., dissenting).

particular patient.[70] However, with as much ease as it found the disclosures to be truthful and not misleading, the court also set this argument to rest when it both stated and challenged that "[i]n the absence of some showing that there are particular circumstances in which a successful abortion will do something other than terminate the life of a whole, separate, unique, living member of the species of Homo sapiens during its embryonic or fetal age,"[71] Planned Parenthood still failed to show that the statute was unconstitutional. Therefore, the court impliedly allowed the information to be disseminated to women because it could not be proven false. The court vacated the preliminary injunction order[72] with four of eleven judges dissenting because they opined that the statute contained ideological beliefs instead of medical facts.[73]

IV. CONCLUSION: WHAT IS RELEVANT,TRUTHFUL AND NOT MISLEADING INFORMATION?

While its opinion makes some logical leaps, the *Rounds* court adds a new fork in the road on the journey to determine what information is relevant and truthful and not misleading within informed consent abortion statutes. Most significantly, it allows information which is ideological in nature, not automatically making it untruthful and misleading, to be included in the required disclosures of informed consent statutes. Like in *Eubanks*, the plaintiffs in *Rounds* also argued that the statute compelled physicians to distribute ideological speech with which they may disagree. By following the same course as *Eubanks* and allowing disclosures argued to be ideological, the Eighth Circuit affirmed the apparently growing consensus that informed consent statutes may require disclosures that are ideological in nature due to the state's interest in protecting women's physical and mental health. Therefore, although the statement that an

70. *Id.* at 737 (majority opinion).

71. *Id.* (referring to Planned Parenthood's failure to demonstrate that a physician's ability to disassociate themselves with the state's message is implicated by this statute).

72. *Id.* at 738.

73. *Id.* at 740 (Murphy, J., dissenting).

abortion will terminate the life of a human being is "controversial, [that] however, does not make it ideological."[74] Due to the Eighth Circuit's conclusion that Planned Parenthood's case failed because of its inability to show that an abortion does not terminate the life of a human being, information which is ideological or controversial in its nature received enhanced judicial protection.

The growing number of studies on the possible negative effects on women's health due to abortion, the Supreme Court's reliance on the concern over such effects in *Gonzales*, and the Eighth Circuit's use of the same reasoning to determine "relevance" in *Rounds* coalesce with the recent trend recognizing that "[f]or decades, the cultural battle over abortion has been about what goes on inside a woman's womb. But more and more, the focus is shifting to what goes on inside her head."[75] In light of the recent conflicting studies over whether or not abortion negatively affects women's health and the fact that no court has decided an abortion case considering those results, it is likely that the effects on women's mental health will play a significant role in the continuing development of abortion informed consent jurisprudence. For the time being, the *Rounds* decision allows the state to fulfill its goal to protect a woman's mental health by increasing the possible information to be conveyed to women before they receive an abortion. Using its interest in protecting a woman's mental health, the *Rounds* court cleared the way for a new path of information allowed to be disseminated to women in informed consent abortion statutes—any information which is relevant and cannot conclusively be proven false.

74. Eubanks v. Schmidt, 126 F. Supp. 2d 451, 458 (W.D. Ky. 2000).

75. Stephanie Simon, *New Front in Abortion Battle*, WALL ST. J., Aug. 12, 2008, at A16, *available at* http://online.wsj.com/public/article_print/SB121849764993731541.html.

PREMISES LIABILITY IN SOUTH CAROLINA: SHOULD YOU EXPECT CRIMINAL ACTIVITY ON YOUR PROPERTY?

Wylie Clarkson[*]

I. INTRODUCTION 619
II. THE CURRENT SOUTH CAROLINA LAW 620
III. THE FOUR APPROACHES 621
A. Specific Imminent Harm Approach 621
B. Prior Similar Incidents Approach 622
C. Totality of the Circumstances Approach 625
D. The Balancing Approach 627
IV. RECOMMENDED APPROACH FOR SOUTH CAROLINA 629
V. ESTABLISHED SOUTH CAROLINA PRECEDENTS 633
VI. CONCLUSION 634

I. INTRODUCTION

To escape civil liability, a landowner or business owner[1] generally has no duty to protect others on his property from criminal attacks of third parties unless the criminal acts are foreseeable.[2] However, the question becomes how courts determine what is foreseeable. The courts have developed four different tests[3] to determine foreseeability.[4] Some courts have

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[*] J.D. candidate, Charleston School of Law, 2009; B.S., University of South Carolina, 2006. Wylie would like to thank the members of the *Charleston Law Review* for their hard work and dedication throughout the editing process. Wylie would also like to thank his wife, Andrea, and his family for all of their patience and support.

1. As discussed *infra*, the terms "landowner" and "business owner" may be used interchangeably to apply to anyone who owns land or is a lessee of land. "Landowner" will generally be used throughout unless otherwise stated.

2. Shipes v. Piggly Wiggly St. Andrews, Inc., 238 S.E.2d 167, 168-69 (S.C. 1977); Miletic v. Wal-Mart Stores, Inc., 529 S.E.2d 68, 69 (S.C. Ct. App. 2000).

3. The words "approach," "rule," and "test," as used in this Comment, are interchangeable.

adopted a more conservative approach by using the specific imminent harm approach or the prior similar incidents approach.[5] Conversely, other courts favor a more liberal approach, such as the totality of the circumstances approach.[6] Additionally, other courts prefer a more middle-of-the-road balancing approach.[7] There are many advantages and disadvantages to each approach, all of which will be discussed separately.

II. THE CURRENT SOUTH CAROLINA LAW

South Carolina adopted perhaps the most restrictive test in the specific imminent harm approach in 1977, and the case law has greatly developed and expanded in other jurisdictions since that time.[8] Generally, for a landowner to be liable under this test, she must know of the specific harm which is imminent.[9] This approach is considered outdated and too restrictive[10] because it limits the protection due to invitees. The specific imminent harm approach allows injured parties to go uncompensated even when many other jurisdictions with less restrictive rules would allow a recovery for such an injury. Thus, the time is well overdue for the South Carolina Supreme Court to re-evaluate this issue to determine a more appropriate and more

4. *Miletic*, 529 S.E.2d at 69.

5. *See, e.g.*, Baptist Mem'l Hosp. v. Gosa, 686 So. 2d 1147, 1152 (Ala. 1996) (using the prior similar incidents approach); *Shipes*, 238 S.E.2d at 169 (using the specific imminent harm approach).

6. *See, e.g.*, Clohesy v. Food Circus Supermarkets, Inc., 694 A.2d 1017, 1024 (N.J. 1997).

7. *See, e.g.*, Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207, 215 (Cal. 1993); McClung v. Delta Square Ltd. P'ship, 937 S.W.2d 891, 898 (Tenn. 1996).

8. *Shipes*, 238 S.E.2d at 169; *Miletic*, 529 S.E.2d at 69; *see also Ann M.*, 863 P.2d at 215; Posecai v. Wal-Mart Stores, Inc., 752 So. 2d 762, 768 (La. 1999); *Clohesy*, 694 A.2d at 1024; *McClung*, 937 S.W.2d at 897.

9. *Miletic*, 529 S.E.2d at 69.

10. *Posecai*, 752 So. 2d at 767 ("Courts have generally agreed that this rule is too restrictive in limiting the duty of protection that business owners owe their invitees."). Moreover, the court on which the South Carolina Supreme Court relied has since overturned its own decision over ten years ago. *McClung*, 937 S.W.2d at 899 (overruling Cornpropst v. Sloan, 528 S.W.2d 188 (Tenn. 1975)).

up-to-date approach to determine whether a landowner should be held liable for criminal acts of third parties.

III. THE FOUR APPROACHES[11]

A. Specific Imminent Harm Approach

The oldest approach is the specific imminent harm approach. Under this approach, South Carolina has held that

> [t]here is no duty upon [landowners] generally, whose mode of operation of their premises does not attract or provide a climate for crime, to guard against the criminal acts of a third party, unless they know or have reason to know that acts are occurring or about to occur on the premises that pose imminent probability of harm to an invitee; whereupon a duty of reasonable care to protect against such act arises.[12]

In other words, the injured party is required to prove that the property owner knew of the specific imminent harm which was about to occur.[13] Under this test, evidence of previous crimes on the property is generally not sufficient to prove that the landowner knew of or should have known of the crime because the landowner must know the certain type of crime as well as the time the crime will occur.[14]

However, there are negative repercussions to the specific imminent harm test. Holding a landowner liable for the criminal

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11. For a listing of jurisdictions using each of the four tests, see C. Barry Montgomery & Bradley C. Nahrstadt, *A Primer for the Entertainment Community: Legal and Practical Issues About Venue Safety—What You Should Know*, 3. VA. SPORTS & ENT. L.J. 257 nn.70-73 (2004) and Hunter M. Bagby, *Premises Liability:* Delta Tau Delta, Beta Alpha Chapter v. Johnson: *A Landowner's Duty to Protect Invitees Against Third Party Criminal Acts*, 23 AM. J. TRIAL ADVOC. 461, 463-65 (1999). The authors disagree on the test used in some jurisdictions as it is unclear in such jurisdictions which test is used.

12. *Shipes*, 238 S.E.2d at 169 (citing *Cornpropst*, 528 S.W.2d at 198).

13. *Miletic*, 529 S.E.2d at 69.

14. Gibson v. Wright, 870 So. 2d 1250, 1264-65 (Miss. Ct. App. 2004) (Southwick, J., concurring) (citing W. Marshall Sanders, *Between Bystander and Insurer: Locating the Duty of the Georgia Landowner to Safeguard Against Third-Party Criminal Attacks on the Premises*, 15 G.A. ST. U.L. REV 1099, 1109-11 (1999)).

acts of third parties, even under this restrictive and inflexible test, could encourage the landowners to use violence to resist criminal attacks.[15] Additionally, "[i]t makes little sense to ignore the frequency and nature of criminal activity in the immediate vicinity . . . if the crucial inquiry is the foreseeability of a criminal act occurring on defendant's premises."[16] Furthermore, the courts generally do not use this test because the test is too unclear, gives too much protection to property owners, and gives too little protection to the injured parties.[17] The Tennessee Supreme Court has even gone so far as to say that the specific imminent harm test is obsolete.[18]

B. Prior Similar Incidents Approach

The next approach is the prior similar incidents approach. Pursuant to this approach, an injured party cannot prove the criminal act was foreseeable without proving prior crimes on or near the owner's property, which is decided on a case-by-case basis.[19] Additionally, the court considers the "nature and extent of the previous crimes, as well as their recency, frequency, and similarity to the crime in question."[20] The underlying rationale for this test is that the landowner will be put on notice of the risk by the prior criminal activity as the test is clearer than the others.[21]

Courts have also stated that this test creates unfortunate and inconsistent results.[22] For example, the rule produces results which are against public policy because it discourages property owners from taking reasonable precautions to protect

15. Patrick v. Union State Bank, 681 So. 2d 1364, 1368 (Ala. 1996).

16. McClung v. Delta Square Ltd. P'ship, 937 S.W.2d 891, 899 (Tenn. 1996).

17. Stefan A. Mallen, *Touchdown! A Victory for Injured Fans at Sporting Events?* Hayden v. University of Notre Dame, 66 MO. L. REV. 487, 494 (2001) (citation omitted).

18. *McClung*, 937 S.W.2d at 900.

19. Miletic v. Wal-Mart Stores, Inc., 529 S.E.2d 68, 70 (S.C. Ct. App. 2000).

20. *Id.* (quoting Posecai v. Wal-Mart Stores, Inc., 752 So. 2d 762, 767 (La. 1999)).

21. *Posecai*, 752 So. 2d at 767.

22. *Miletic*, 529 S.E.2d. at 70.

others until at least one person is injured.[23] Thus, the landowner gets one free criminal act that injures third parties, while later injured parties may be compensated for their injuries regardless of the severity of the injuries.[24] Next, there is significant inconsistency between courts to determine how similar the criminal acts must be or how close in proximity they must be for a landowner to be held liable, therefore, creating arbitrary results because the similarity and proximity of the criminal acts are determined on a case-by-case basis.[25] For instance, some jurisdictions require identical incidents while other jurisdictions simply require incidents similar in nature.[26] Further, "the fortuitous absence of prior injury does not justify relieving defendant from responsibility for the foreseeable consequences of its acts."[27] That is, simply because a particular act has not yet happened does not necessarily mean that the act should not have reasonably been anticipated.[28] Ordinarily, the question of foreseeability is a question of fact for the jury, as opposed to a question of law for the judge.[29] However, this test allows a judge to decide a case on summary judgment which removes the question from the jury's province.[30] Moreover, after the first person is injured, the landowner may resort to excessive and unnecessary force, even violence, to stop future criminal attacks in an attempt to avoid liability.[31] Finally, the prior similar incidents rule does not afford an adequate balance between the

23. Issacs v. Huntington Mem'l Hosp., 695 P.2d 653, 658 (Cal. 1985).

24. *Id.*

25. *Id.* at 658-59. *Compare* Baptist Mem'l Hosp. v. Gosa, 686 So. 2d 1147, 1152-53 (Ala. 1996) (stating that, although there were over fifty crimes reported within the last five years, only six entailed physical touching; therefore, assault with a deadly weapon was not foreseeable), *with* Sturbridge Partners, Ltd. v. Walker, 482 S.E.2d 339, 341 (Ga. 1997) (holding that two past burglaries were sufficiently similar that rape was foreseeable).

26. Craig Crawford, Delgado v. Trax Bar & Grill: *Determining the Scope of the Prior Similar Incidents Test in Terms of Efficient Resource Allocation*, 39 U.S.F. L. REV. 499, 503 (2005).

27. Weirum v. RKO Gen., Inc., 539 P.2d 36, 40 (Cal. 1975).

28. Clohesy v. Food Circus Supermarkets, Inc., 694 A.2d 1017, 1024 (N.J. 1997).

29. *Issacs*, 695 P.2d at 659.

30. *Id.*

31. Patrick v. Union State Bank, 681 So. 2d 1364, 1368 (Ala. 1996).

rights of the landowner and the rights of the injured party as it favors landowners too much because the injured person likely will not be made whole for her injuries.[32] Thus, under this inflexible approach, the losses fall upon the ones who are normally least able to bear them—the injured individuals—instead of a business owner who generally has the greater ability to earn money to pay for injuries incurred.[33]

Conversely, the prior similar incidents test has been commended because it prevents the landowners from "effectively becoming insurers of public safety since '[i]t is difficult, if not impossible, to envision any locale open to the public where the occurrence of violent crime seems improbable.'"[34] Furthermore, under this test, a landowner may be able to make his own efficiency calculation so that he may compare the cost of allowing subsequent criminal acts with the cost of taking reasonable precautions to prevent the acts.[35] Additionally, it "reduce[s] the cost of information gathering," as the information regarding criminal acts "will flow towards landowners through the regular course of business," which, in turn, "reduces the cost of accident prevention."[36] Thus, the possibility that landowners will take anticipatory precautions is increased with the decreased costs of information gathering and accident prevention.[37] In addition, the landowners will be put on notice of when they may be subject to liability, and they will be able to prepare for the cost of such liability.[38] The landowner, if he so decides to take reasonable measures to prevent liability, may be able to transfer the cost of such measures to his "customers who arguably receive the greatest benefit of the prevention."[39] Alternatively, if the landowner chooses not to provide security, he would be able to

32. McClung v. Delta Square Ltd. P'ship, 937 S.W.2d 891, 900 (Tenn. 1996).

33. Sanders, *supra* note 14, at 1127.

34. *McClung*, 937 S.W.2d at 899 (quoting Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207, 215 (Cal. 1993)).

35. Crawford, *supra* note 26, at 520.

36. *Id.*

37. *Id.*

38. *Id.* at 520-21.

39. *Id.* at 521.

protect himself and his customers by purchasing insurance from a third party insurer who may be in a better position to determine the amount of insurance needed to shield against future liability, not to mention bear the costs of such liability.[40]

C. Totality of the Circumstances Approach

The totality of the circumstances approach is the most liberal and pro-plaintiff of the four approaches.[41] It "focuses on the level of crime in the surrounding area and courts that apply this test are more willing to see property crimes or minor offenses as precursors to more violent crimes."[42] Under this test, courts consider all of the circumstances surrounding the criminal act and the "nature, condition, and location of the premises, in addition to any prior similar incidents, and a duty can be found where no prior criminal attacks have occurred."[43] Additional factors include the commission of the previous crimes on the property or the surrounding property (whether or not they are different in nature and location), the level of security utilized by the landowner, such as cameras, guards, or lighting, and the property's physical design.[44] Of course, the owner's observations of criminal activity would also be considered in the totality test.[45] It is distinguishable from the prior similar incidents rule in that a crime may be foreseeable in the absence of prior similar incidents on the property,[46] and it "greatly expand[s] the range of circumstances that could constitute notice sufficient to alert a [landowner] of the need to take measures to protect [others on his

40. *Id.*

41. Steven C. Minson, *A Duty Not to Become a Victim: Assessing the Plaintiff's Fault in Negligent Security Actions*, 57 WASH. & LEE L. REV. 611, 621 (2000).

42. Posecai v. Wal-Mart Stores, Inc., 752 So. 2d 762, 767 (La. 1999) (citing Clohesy v. Food Circus Supermarkets, Inc., 694 A.2d 1017, 1028 (N.J. 1997)).

43. Boren v. Worthen Nat'l Bank of Ark., 921 S.W.2d 934, 941 (Ark. 1996).

44. Gibson v. Wright, 870 So. 2d 1250, 1264 (Miss. Ct. App. 2004) (Southwick, J., concurring) (citing Isaacs v. Huntington Mem'l Hosp., 695 P.2d 653 (Cal. 1985)).

45. *Posecai*, 752 So. 2d at 770 (Johnson, J., concurring).

46. *Gibson*, 870 So. 2d at 1264-65 (Southwick, J., concurring).

property] from criminal attack."[47]

However, this approach would impose a duty to foresee and protect against random criminal acts by others[48] and would effectively impose strict liability on the landowner which may cause him to resort to violence.[49] Additionally, it would require a higher duty on landowners and businesses that are willing to operate in high crime areas and economically depressed areas.[50] Consequently, businesses may decide to relocate from poorer areas where crime rates are usually highest to wealthier areas with smaller crime rates so that they are not insurers of other's safety, a result courts attempt to avoid.[51] The courts applying this test effectively require a small business owner to have such great protection, such as insurance coverage or a security guard, that the cost of running the business may be too high for him to continue the business.[52] Thus, the test is too broad and imposes "an unqualified duty to protect customers in areas experiencing any significant level of criminal activity."[53] Additionally, the test has been considered and found to be "too broad and unpredictable, effectively requiring . . . landowners [to] anticipate crime."[54] Similarly, the test "is troublesome, because it raises unrealistic empirical expectations," and "it may be unfair to impute this empirical wisdom to [landowners] or make it a basis for liability."[55] Concisely stated, the totality of the circumstances approach does not provide an appropriate balance between the burden on the landowner and the rights of the injured party.[56]

47. Minson, *supra* note 41, at 621.

48. *Boren*, 921 S.W.2d at 941.

49. *See* Minson, *supra* note 41, at 621.

50. *Boren*, 921 S.W.2d at 941-42.

51. McClung v. Delta Square Ltd. P'ship, 937 S.W.2d 891, 900 (Tenn. 1996).

52. Gibson v. Wright, 870 So. 2d 1250, 1265 (Miss. Ct. App. 2004) (Southwick, J., concurring).

53. Posecai v. Wal-Mart Stores, Inc., 752 So. 2d 762, 767 (La. 1999) (citing *McClung*, 937 S.W.2d at 900).

54. Delta Tau Delta, Beta Alpha Chapter v. Johnson, 712 N.E.2d 968, 972 (Ind. 1999).

55. Robert Weisberg, *Preventing Crime: Private Duties, Public Immunity*, 2 J.L. ECON. & POL'Y 365, 374 (2006) (citing *Posecai*, 752 So. 2d 762).

56. *McClung*, 937 S.W.2d at 900-01.

The approach burdens businesses and landowners too much, and may hamper the likelihood of businesses locating in troubled areas.[57]

D. The Balancing Approach

The fourth and final approach is the balancing approach. This approach "weighs the foreseeability of the harm against the burden imposed on a [landowner] by protecting against that harm."[58] In other words, the approach is based on fairness and justice to both parties in determining whether the risk to the injured party's risk was unreasonable.[59] One must also consider the magnitude and probability of the harm to determine whether the criminal act was foreseeable.[60] Where the foreseeability and the severity of harm are great, the burden on the landowner, therefore, is also great.[61] Conversely, if the degree of foreseeability is less or the possible harm is less severe, then less arduous burdens may be imposed upon the landowner.[62] Thus, "'the degree of foreseeability needed to establish a duty decreases in proportion to the magnitude of the foreseeable harm' and the burden upon defendant to engage in alternative conduct."[63] Alternatively, "[a]s the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution."[64] However, for foreseeability to be adequate to impose a burden on the landowner, the foreseeability will rarely be sufficient without previous incidents of criminal acts on or near the landowner's premises.[65] Courts should consider the extent of the previous crimes and their similarity, frequency, and proximity, as well as

57. *Id.*
58. Miletic v. Wal-Mart Stores, Inc., 529 S.E.2d 68, 70 (S.C. Ct. App. 2000).
59. Staples v. CBL & Assocs., Inc., 15 S.W.3d 83, 89 (Tenn. 2000).
60. *McClung*, 937 S.W.2d at 902.
61. *Id.*
62. *Id.*
63. *Id.* (quoting Pittman v. Upjohn Co., 890 S.W.2d 425, 433 (Tenn. 1994)).
64. *Id.*(quoting PROSSER & KEETON ON THE LAW OF TORTS 171 (W. Page Keeton ed., 5th ed. 2004)).
65. *Id.*

the nature, location, and condition of the premises.[66] Additionally, courts should consider the utility of the criminal act, or its usefulness, if any, and the practicality, safety, and cost of alternative behavior,[67] as well as who may have been in the best position to have acquired insurance to protect against the risk.[68]

However, few courts have rejected the balancing approach.[69] The Indiana Supreme Court rejected this approach because it depends "largely on prior similar incidents . . . to ensure that an undue burden is not placed upon landowners,"[70] and because the issue of whether the landowner's precautions were sufficient is a question for the jury.[71]

The balancing approach seeks to solve the problem of the other tests which do not involve an appropriate balance between the duty of the landowner and the injured party's rights.[72] It also considers the fact that a landowner is generally not responsible for crimes on his property, a problem even law enforcement and other governmental organizations have had difficulty solving, and the fact that a landowner is in the best position to foresee the crime and take reasonable measures to protect others.[73] Therefore, the balancing approach is flexible and contains the beneficial parts of the prior similar incidents approach and the totality of the circumstances approach, but also avoids many of the problems resulting from each test.[74] Consequently, it is more

66. *Id.*

67. Gibson v. Wright, 870 So. 2d 1250, 1264 (Miss. Ct. App. 2004) (Southwick, J., concurring) (quoting Sanders, *supra* note 14, at 1109-11).

68. Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968). Greater foreseeability may require the landowner to employ security guards, while lesser foreseeability may require the landowner only to use surveillance cameras or better lighting or fencing. Posecai v. Wal-Mart Stores, Inc., 752 So. 2d 762, 768 (La. 1999); *see generally* Julie Davies, *Undercutting Premises Liability: Reflections on the Use and Abuse of Causation Doctrine*, 40 SAN DIEGO L. REV. 971, 997 n.120 (2003).

69. *See, e.g.*, Delta Tau Delta, Beta Alpha Chapter v. Johnson, 712 N.E.2d 968, 972-73 (Ind. 1999).

70. *Id.* at 972.

71. *Id.* at 973.

72. *Posecai*, 752 So. 2d at 767.

73. *Id.* at 768.

74. McClung v. Delta Square Ltd. P'ship, 937 S.W.2d 891, 901 (Tenn.

flexible than the prior similar incidents rule and also avoids the drawbacks resulting therefrom and also answers the problems of the "more liberal totality of the circumstances approach,"[75] as it seeks to protect the safety of people on another's property and the property owner's economic interest.[76]

It has also been stated that the balancing approach is similar, if not identical, to the "Hand Formula,"[77] set out in *United States v. Carroll Towing Co.*[78] The Hand Formula has become so well-known that "any first-year law student knows . . . [that] the basic approach to negligence law [is] outlined by Judge Learned Hand" in *Carroll Towing*.[79] Thus, it "essentially defines negligence as the unreasonable balancing of the cost of safety measures against the risk of accidents."[80] Similarly, the balancing approach for foreseeability of criminal acts in determining liability balances the gravity and probability of the harm as well as the cost or burden on the landowner to implement security measures.

IV. RECOMMENDED APPROACH FOR SOUTH CAROLINA

The law on premises liability in South Carolina should be revised to modernize and clarify previous court holdings within this important area of law. The legal community should make

1996).

75. *Id.* (quoting Donna Lee Welch, Comment, Ann M. v. Pacific Plaza Shopping Center: *The California Supreme Court Retreats from its 'Totality of the Circumstances' Approach to Premises Liability*, 28 GA. L. REV. 1053, 1068-69 (1994)).

76. Katherine J. Donohue, Note, McDonald v. PKT, Inc.*: Who is Responsible For Your Protection?: The Michigan Supreme Court Limits a Merchant's Duty*, 80 U. DET. MERCY L. REV. 127, 133 (2002).

77. Minson, *supra* note 41, at 622 n.69. Therefore, a test similar to the balancing test has been around at least since 1947.

78. 159 F.2d 169 (2d Cir. 1947).

79. Smith v. Wash. Metro. Area Transit Auth., 290 F.3d 201, 215 (4th Cir. 2002) (Michael, J., concurring in part and dissenting in part). The Hand Formula says that "if the probability [of an injury] be called P; the [gravity of the] injury, L; and the burden [of sufficient precautions], B; liability depends upon whether B is less than L multiplied by P: i.e., whether B [is less than] PL." *Carroll Towing*, 159 F.2d at 173.

80. *Smith*, 290 F.3d at 215 (Michael, J., concurring in part and dissenting in part).

the initial determination that there is no distinction, for the purposes of premises liability, between whether a business is or is not being conducted on the property at the time of the injurious event. This question unnecessarily obscures the preeminent issues of the law. For example, in many instances businesses are not consistently ongoing and viable during the entire period in which a landowner is the titled owner or lessee of the property. Moreover, some smaller family businesses may use the property as both a business and a residence. Therefore, the question of premises liability should attach regardless of the use of the property. After making this determination, the court should use the balancing approach for the foreseeability of criminal acts in determining the landowner's liability. The court should balance the gravity and probability of the harm against the cost or burden on the landowner to implement security measures.

The balancing approach is the most appropriate rule of law to apply to premises liability in South Carolina. It allows courts to justly balance the competing rights and responsibilities of the landowner with the rights of the injured party. Primarily, strict liability rules should not be applied to landowners because many conditions and injuries to third parties resulting from criminal acts are not strictly within the landowner's control. On the other hand, injured parties need to be made whole for their injuries, and the person who commits the crime is generally not in a position to put the injured party in as good a position as he would have been in had the injury not occurred. Instead, the landowner is the party who may be most capable of avoiding some, if not all, of the injuries and may be best situated for compensating the injured party for those injuries incurred. Even if the landowner cannot avoid or mitigate the harm, she is still in a better position to acquire insurance so long as she is on notice of similar criminal activity on her property. If the landowner is running a business, the business owner may be able to pass the cost of insurance onto her customers. The elements of the balancing approach are the most adaptable to premises liability, and the test results in the most fair and equitable decisions.

For example, under the specific imminent harm test, the current approach used in South Carolina, the landowner is given

an unreasonable amount of protection. Under this approach, in situations where the landowner does not know of a specific imminent harm, he could not be held liable even though the crime easily could have been prevented with only minor preliminary precautions. Therefore, the injured party would be unfairly deprived of a recovery for his injuries. The balancing approach would eliminate this distinction and allow for recovery by the injured party if the plaintiff can prove that the foreseeability and seriousness of the harm outweighs the burden of taking precautions to prevent the injury from occurring.

Also, under the prior similar incidents approach, the injured party is unable to prevail even if the landowner should have foreseen a criminal act if that act was dissimilar to any prior criminal acts. Generally, the plaintiff must be able to prove foreseeability by showing that prior crimes occurred on or immediately near the landowner's property. The nature and extent of the crime is also taken into consideration. In many situations under this approach, the landowner is given broad discretion on his property and a high burden is placed on the injured party. The balancing approach would likely increase the injured party's probability of recovery while simultaneously decreasing his burden of production by weighing the foreseeability of the injury with the landowner's burden of taking precautions. This would decrease the likelihood that the harm would occur. Also, it would not necessarily require prior similar incidents on the land to create liability, but it would make very serious crimes foreseeable even in the absence of past comparable crimes. Under the balancing approach, even if similar incidents are required for liability to attach, the court or the jury has the ability to construe the similarity of the crimes in a manner such that the landowner could be encouraged to be proactive and take proper precautions before a serious injury occurs.

The totality of the circumstances approach would require a landowner to guard against future harm by taking precautions regardless of whether he knows or should know of any crime ever occurring on the property. The injured party's burden would be lessened and would consist of proving that there are other circumstances present, despite their insignificance, that would be

sufficient to make criminal acts foreseeable. However, under the totality of the circumstances approach, practically every landowner would be required to obtain excessive amounts of liability insurance, as the slightest circumstance may lead to liability. The balancing approach would prevent any discrepancy in unavoidable injuries by eliminating the landlord's possibility of liability for crimes which are virtually unpreventable. Strict liability for the crimes of third parties is beyond the realm of reason and against public policy.

The balancing approach correctly takes into the consideration the economics of law as well as public policy considerations. By considering the cost or burden of implementing security measures, the approach requires a calculation as to how much risk a landowner is to assume and who is the most appropriate party to assume this risk. In the absence of income-making activities on the property, a landowner is not able to pass the risk on to anyone but himself. If the risk of harm is exceedingly great, the landowner may decide to purchase insurance to cover his losses.[81] It is only reasonable to allow the landowner to make his own determination as to whether, and to what extent, to take preventative measures and to bear the costs of such measures. For someone other than the landowner to make such a decision may impose even higher costs on the landowner.

Thus, generally speaking, the balancing approach is a more flexible and a more reasonable approach in that it has the ability to eliminate the extremes and the faults which have been found in the other three approaches. With this approach, a landowner is able to decide for himself whether the gravity of the harm is such that he should take reasonable precautionary measures to guard against crimes he should expect. Insurance could be purchased to minimize the liability of the landowner particularly when he is on notice of criminal acts. In addition, it would minimize the possibility of summary judgment ending a case before it gets to the jury because the weighing of the gravity and

81. In contrast, the high cost of medical expenses makes an injured party susceptible to great loss which may result through no fault of his own. His health insurance may not cover his losses, and he would naturally look to the landowner.

likelihood of the harm and the burden on the landowner are usually questions of fact for a jury. Furthermore, public policy considerations would be enhanced in that a landowner would likely be on notice of previous crimes and can adequately protect himself from potential liability, thus decreasing the likelihood that the landowner would resort to violence to prevent the injury to third parties.[82]

V. ESTABLISHED SOUTH CAROLINA PRECEDENTS

Because South Carolina's current use of the specific imminent harm approach is outdated and too restrictive, it should adopt the balancing approach to determine whether a criminal act is foreseeable before imposing liability on a landowner for another's criminal act. In summary, other courts have found the prior similar incidents approach to have produced results that are contrary to South Carolina law in similar areas. For example, that approach could give landowners "one free criminal act" by third parties on his land. Similarly, South Carolina courts have eliminated the negligence cases that gave dogs "one free bite" before dog owners are liable for the acts of their dogs.[83] The one free bite rule stated that domesticated animals are not assumed to be dangerous, and before an injured third person may recover damages from the animal's owner, the injured person must prove that the animal's "dangerous propensity was either known, or should have been known to the owner."[84] Additionally, the totality of the circumstances approach would appear to be too liberal since South Carolina has traditionally been known as a conservative state in legal positions and policies.[85]

82. This is especially beneficial since law enforcement officers generally are charged with the duty of crime prevention and for catching the perpetrators.

83. Giles v. Russell, 180 S.E.2d 201, 202-03 (S.C. 1971).

84. Nesbitt v. Lewis, 517 S.E.2d 11, 14 (S.C. Ct. App. 1999) (quoting Hossenlopp v. Cannon, 329 S.E.2d 438, 440 (S.C. 1985)).

85. Ilya Somin & Jonathan H. Adler, *The Green Costs of* Kelo*: Economic Development Takings and Environmental Protection*, 84 WASH. U. L. REV. 623, 640 (2006); Anders Walker, *Raising the Bar:* Brown *and the Transformation of the Southern Judiciary*, 48 ST. LOUIS U. L.J. 1037, 1037 (2004).

Most of all, the balancing approach is known to be similar to the "Hand Formula." The esteemed Judge Learned Hand outlined the basic approach to negligence law as the "unreasonable balancing of the cost of safety measures against the risk of accidents."[86] South Carolina has used a test for negligence which is very similar, if not identical to, the Hand Formula and the balancing test. The test used stated "[t]he duty of care applicable to this case was to take reasonable precautions in the light of the known risks, balancing the likelihood of harm, and the gravity of harm if it should happen, against the burden of feasible precautions which would tend to avoid or minimize the harm."[87] Thus, it would be consistent and in accordance with existing precedents for the courts of South Carolina to employ the balancing approach to determine the foreseeability of criminal acts of third parties and impose liability on landowners.

VI. CONCLUSION

The South Carolina Supreme Court should change the approach used to determine the foreseeability of a criminal act of a third party from the specific imminent harm approach to the balancing approach in resolving whether a landowner is civilly liable for such acts. The balancing approach is more up-to-date and adequately considers the rights of the landowner and those of the injured third person. Additionally, it would not be a vast change in the law as it is similar to the Hand Formula for negligence used by the courts. Moreover, it is more conservative than the totality of the circumstances approach, and accordingly, more consistent with other decisions of the Supreme Court and legislative statutes.

86. Smith v. Wash. Metro. Area Transit Auth., 290 F.3d 201, 215 (4th Cir. 2002) (Michael, J., concurring in part and dissenting in part).

87. Mickle v. Blackmon, 166 S.E.2d 173, 192 (S.C. 1969).

REFLECTING THE BEST INTEREST OF THE CHILD: *MIDDLETON V. JOHNSON*

*Melissa Fried**

I. INTRODUCTION 635
II. *MIDDLETON v. JOHNSON*: THE ESTABLISHMENT OF SOUTH CAROLINA'S PSYCHOLOGICAL PARENT DOCTRINE 637
A. Other Tests the Court of Appeals Considered Before Adopting the Wisconsin Test in South Carolina 638
B. The Court of Appeals's Reasoning for Adopting the Wisconsin Test 640
III. *MIDDLETON* COMPORTS WITH EXISTING LAW 642
IV. CONCLUSION 645

I. INTRODUCTION

In *Middleton v. Johnson*,[1] the South Carolina Court of Appeals in 2006 answered the question of what legal standard applies to a third party seeking visitation of a non-biological child where he or she has essentially become that child's psychological parent.[2] In 1992, Kenneth Middleton and Elizabeth Johnson

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* J.D. candidate, Charleston School of Law, 2009; B.A. Wofford College. The author would like to thank the members of the *Charleston Law Review* for their perpetual hard work. Additionally, the author would like to thank her family, especially her mother, for its undying love and encouragement throughout her academic career.

1. 633 S.E.2d 162 (S.C. Ct. App. 2006).

2. *Id.* at 167. Legal commentators and the popular press reported *Middleton* extensively. *See, e.g.,* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: ERISA, Jurisdiction, and Third-Party Cases*, 40 FAM. L.Q. 545, 572-73 (Winter 2007); Schuyler Kropf, *Man Wins Rights for "Psychological" Parents*, POST & COURIER (Charleston, S.C.), Apr. 8, 2007, *available at* http://www.postandcourier.com/news/2007/apr/08/man_wins_rights_psychological_parents/; Rena M. Lindevaldsen, *Sacrificing Motherhood on the Altar of Political Correctness: Declaring a Legal Stranger to Be a Parent over the Objections of the Child's Biological Parent*, 21 REGENT U. L. REV. 1, 21 n.128

became romantically involved, and nine months later, Johnson gave birth to her son Josh.[3] Although he was not his biological father, Middleton remained an active father figure in Josh's life with Johnson's encouragement and blessing.[4] Josh's teachers believed that Middleton was Josh's father, and Johnson made no attempt to correct them.[5] Josh referred to Middleton as "my dad."[6]

However, once Johnson entered a serious relationship with another man whom she later married, Johnson wanted to limit Middleton's presence at their house.[7] To do so, they arranged a rotating visitation schedule where Middleton would see Josh every other day and spend every other holiday with him.[8] In January 2003, Josh was visiting Middleton when he told him that his mother had hit him "with a studded belt" and revealed the marks left on his upper thighs.[9] Later that night, Middleton received an angry phone call from Johnson demanding that Josh

(2008-09); Paul Rogers, Note, *The Psychological Parent Doctrine: A Solution to South Carolina's Refusal to Provide Rights to Same-Sex Couples?*, 2 CHARLESTON L. REV. 911 (2008); Posting of J. Benjamin Stevens to South Carolina Family Law Blog, http://www.scfamilylaw.com/tags/psychological-parent/ (July 23, 2007); Children's Rights: Psychological Parent, *Non-Parent Gets Visitation: Court Sets Test to Determine Psychological Parenthood*, http://victimsoflaw.net/PsychologicalParent.htm (last visited Mar. 28, 2009); The Volokh Conspiracy, http://volokh.com/posts/1154730453.shtml.

This Note responds in part to the Note of Mr. Rogers which made the assertion that the South Carolina Court of Appeals may have inadvertently provided rights to those in same-sex relationships by adopting the psychological parent doctrine. Rogers, *supra*, at 920. As this Note will demonstrate, *Middleton* does no such thing, but merely reaffirms this state's long-standing adherence to the "best interest of the child" standard.

3. *Middleton*, 633 S.E.2d at 164. Although she had informed Middleton that Josh's father was actually Eugene Hollington, the resemblance between Josh and Middleton was so striking that Middleton, as well as his family and friends, believed he was Josh's father. *Id.*

4. *Id.* Middleton regularly picked up Josh from school, attended school meetings and field trips, and enrolled him in the Boy Scouts as well as a basketball league. *Id.* at 165.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

be brought to her.[10] Middleton refused, claiming that it was his night to spend with him.[11] Afraid for Josh's welfare, Middleton called the police to report the abuse while Johnson also called the police to report Middleton's refusal to relinquish Josh.[12]

After the incident, Josh was returned to Johnson because she had legal custody, and she made certain that Middleton would no longer be able to see Josh.[13] She informed the school administration that Middleton could no longer see Josh and eventually relocated to Florence, South Carolina.[14] Middleton filed an action in family court, initially seeking custody of Josh but later amending his complaint for only visitation rights.[15] The family court denied Middleton's right to visitation and claimed that under South Carolina law, a fit parent has the right to decide whether a third party may visit her child.[16] Additionally, the court stated that Middleton could not be the psychological father of Josh because Josh was aware that his biological father existed.[17]

This Note begins by examining the test adopted by the court of appeals. Part III will demonstrate how *Middleton* is consistent with South Carolina law as well as the law of other jurisdictions by reflecting the standard governing all child custody disputes—the best interest of the child.

II. *MIDDLETON v. JOHNSON*: THE ESTABLISHMENT OF SOUTH CAROLINA'S PSYCHOLOGICAL PARENT DOCTRINE

The court of appeals found that the family court erred in denying Middleton's visitation claim.[18] In fact, Middleton had

10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 166.
14. *Id.*
15. *Id.* Middleton amended his complaint at trial to only seek visitation with Josh after Johnson answered his complaint and moved to dismiss on the grounds that Middleton lacked standing to bring the cause of action as he was not Josh's biological father. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 167.

become a psychological parent to Josh, and in denying his visitation, the family court was not acting in his best interest but actually causing significant harm to Josh's well-being.[19] Although South Carolina has recognized the idea of a psychological parent, or de facto parent, the underlying case law fails to establish a standard for determining the status of a psychological parent.[20] After examining several different tests employed in other jurisdictions, the court of appeals adopted the Wisconsin test to determine whether a third party is indeed a psychological parent.[21] Under this test, the petitioner must establish:

> (1) that the biological or adoptive parent[s] consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; [and] (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.[22]

A. Other Tests the Court of Appeals Considered Before Adopting the Wisconsin Test in South Carolina

The court of appeals considered several tests from other jurisdictions for defining the psychological parent in South

19. *Id.*

20. *See, e.g.,* Moore v. Moore, 386 S.E.2d 456, 459 (S.C. 1989) (finding that although there was a psychological parent relationship between the child and his nonbiological relatives, such a relationship is not enough to award custody where one of the biological parents is considered fit); Dodge v. Dodge, 505 S.E.2d 344, 350 (S.C. Ct. App. 1998) (finding that the relationship between the stepfather and grandparents did not rise to the level of a psychological parent relationship).

21. *Middleton*, 633 S.E.2d at 168.

22. *Id.* (quoting *In re* Custody of H.S.H.-K., 553 N.W.2d 419, 435-36 (Wis. 1995)).

Carolina.[23] First, the court examined California's definition of the de facto parent as "a person who has been found by the court to have assumed, on a day-to-day basis, the role of parent, fulfilling both the child's physical and psychological needs for care and affection, and who has assumed that role for a substantial period."[24] Being a very broad test, the court then considered the narrower test from the Alaska Supreme Court.[25] In *Evans v. McTaggart*,[26] the Alaska court defined a psychological parent as:

> One who, on a day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for an adult. This adult becomes an essential focus of the child's life, for he is not only the source of the fulfillment of the child's physical needs but also the source of his emotion and psychological needs. . . . The wanted child is one who is loved, valued, appreciated, and viewed as an essential person by the adult who cares for him. . . . This relationship may exist between a child and any adult; it depends not upon the category into which the adult falls—biological, adoptive, foster, or common-law—but upon the quality and mutuality of the interaction.[27]

Additionally, the court of appeals also considered a similar test from the West Virginia Supreme Court which defined the psychological parent as one "who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support."[28] However, in the end, the court of appeals settled on the psychological parent test used in Wisconsin as the standard in South Carolina.[29]

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23. *Id.*
24. *Id.* (citations omitted); CAL. R. CT. 5.502(10).
25. *Middleton*, 633 S.E.2d at 168.
26. 88 P.3d 1078 (Alaska 2004).
27. *Id.* at 1082 (quoting Carter v. Brodrick, 644 P.2d 850, 853 n.2 (Alaska 1982)).
28. *In re* Clifford K., 619 S.E.2d 138, 157 (W. Va. 2005).
29. *Middleton*, 633 S.E.2d at 168.

B. The Court of Appeals's Reasoning for Adopting the Wisconsin Test

The South Carolina Court of Appeals adopted the Wisconsin test for the dual purpose of reflecting the best interest of the child while also "ensur[ing] that a nonparent's eligibility for psychological parent status will be strictly limited."[30] Rather than adopting a test from another jurisdiction, the court of appeals specifically explained its reasoning for adopting the Wisconsin test by analyzing how each factor of the four prong test protects both the interests of the child as well as the rights of the legal parent.[31] The last two factors of the test are the most important of the four "because they ensure both that the psychological parent assumed the responsibilities of parenthood and that there exists a parent-child bond between the psychological parent and child."[32]

The first factor of the psychological parent test requires that the petitioner establish "that the biological or adoptive parent[s] consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child."[33] This factor allows the legal parent to still maintain privacy and control over who may visit her child; however, if such parent consents to or "voluntarily invites a third party to function as a parent to the child," her absolute privacy and control is essentially dissolved.[34] The court recognized that once a parent invites a third party into the child's life, that third party essentially becomes another parent to the child and can drastically affect the child's life.[35] Thus, this first factor is critical because the legal parent has the ultimate right to decide whom to invite into her child's life, but this right does "not extend to erasing a relationship between [the third party] and her child which [the legal parent] voluntarily created and

30. *Id.*

31. *Id.* at 168-70. Significantly, the *Middleton* court did not rely on the facts of the Wisconsin case, as they are not referenced in the opinion.

32. *Id.* at 169.

33. *Id.* at 168.

34. *Id.* at 169.

35. *Id.*

actively fostered."[36]

The second factor of the Wisconsin test requires that the "petitioner and the child lived together in the same household."[37] This factor protects the legal parent from *any* third party essentially attempting to make a claim for visitation as a psychological parent by restricting the test to only those persons with whom the child has resided.[38] The court recognized two situations that would meet this prong: (1) the typical situation where the psychological parent, legal parent, and child have all lived together in the same house at some point in time; or (2) a less common situation, where the legal parent and the psychological parent have developed a "joint custody agreement" where the child spends half of his or her time at the legal parent's house and the other half of the time at the psychological parent's house.[39]

Third, the petitioner must have "assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation" to be deemed a psychological parent.[40] The third prong further limits the psychological parent doctrine to only those persons who have assumed caretaking duties and provided emotional support for the child without financial reimbursement. This requirement ultimately ensures that neither a nanny, babysitter, nor an au pair could make a claim under the doctrine.[41]

The last factor of the Wisconsin test requires "that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature."[42] This factor ensures that enough time has elapsed to develop a sufficient parent-child bond

36. *Id.* (quoting V.C. v. M.J.B., 748 A.2d 539, 552 (N.J. 2000)).
37. *Id.* at 168.
38. *Id.*
39. *Id.* at 169.
40. *Id.*
41. *Id.* at 169.
42. *Id.* at 168.

between the child and the psychological parent.[43] Thus, this prong protects the child from any emotional harm that would result from a court curtailing the bond between a child and psychological parent with whom the child has developed a relationship.[44] Moreover, the court recognized that family courts look to the degree of the attachment between a child and third party when making a custody determination, acknowledging that "inherent in the bond between child and psychological parent is the risk of emotional harm to the child should the relationship be curtailed or terminated."[45]

As a result, the Wisconsin factors were adopted to meet the high burden of establishing compelling circumstances[46] to overcome the presumption that a fit legal parent acts in the child's best interest as well as the fact that visitation must be in the child's best interest.[47]

III. *MIDDLETON* COMPORTS WITH EXISTING LAW

Middleton v. Johnson is consistent with South Carolina case law and is in line with cases from other jurisdictions by affirming the best interest of the child as the controlling factor in any child custody or visitation dispute. For example, in the 2008 decision of *Marquez v. Caudill*,[48] the Supreme Court of South Carolina recognized the court of appeals's four-prong psychological parent test from *Middleton* and applied it to determine that a stepfather could be awarded custody of his stepson.[49] Unlike *Middleton*, there was not a fit biological parent at issue, because the mother had committed suicide.[50] Instead, *Marquez* involved a custody

43. *Id.* at 169.

44. *Id.*

45. *Id.* (quoting *In re* E.L.M.C., 100 P.3d 546, 560 (Colo. App. 2004)).

46. It is presumed that a fit parent will make decisions that are in the best interest of the child, and this presumption may be rebutted only by compelling circumstances, such as significant harm to the child if visitation is not permitted. *See* Camburn v. Smith, 586 S.E.2d 565, 568 (S.C. 2003).

47. *Middleton*, 633 S.E.2d at 173.

48. 656 S.E.2d 737 (S.C. 2008).

49. *Id.* at 737.

50. *Id.* at 739. The biological father was never involved in his son's life. During the custody proceedings, he elected not to participate and presented the

dispute between the stepfather and the maternal grandmother of the stepson.[51] As a result, the court did not need to recognize "the superior rights of a [biological] parent" and found that the stepfather was in fact the psychological parent and that the grandmother could not meet the four-prong test.[52] Thus, the Supreme Court of South Carolina essentially affirmed the court of appeals psychological parent doctrine. Therefore, *Middleton* is not a radical decision and is consistent with South Carolina law.

Recently, the North Carolina Court of Appeals applied *Middleton*'s four-prong test in a case involving a custody dispute between same-sex domestic partners.[53] The question presented on appeal was whether the "best interest of the child" is the proper standard for determining whether a third party should be awarded custody or visitation of the child.[54] Although many states apply a bright-line test to determine when the "best interest of the child" standard applies in a dispute between a third party and a legal parent, North Carolina only applies such a standard on a "case-by-case" basis.[55] In *Mason v. Dwinnell*, the court found that because the legal parent, Dwinnell, acted in a manner "inconsistent with her constitutionally-protected paramount interest in the companionship, custody, care, and control of her child," the trial court was correct in applying the "best interest of the child" standard to the custody dispute.[56] Although Dwinnell was trying to terminate Mason's custody, the trial court relied on the fact that Dwinnell and Mason created a family and "*intentionally* took steps to identify Mason as a parent

court with "an affidavit of relinquishment of his parental rights and consent for adoption." *Id.* As a result, the family court terminated his parental rights. *Id.*

51. *Id.*

52. *Id.* at 745.

53. *See, e.g.*, Mason v. Dwinnell, 660 S.E.2d 58 (N.C. Ct. App. 2008). "It is important to first observe that the factual context of this case—involving same sex domestic partners—is immaterial to the proper analysis of the legal issues involved." *Id.* at 60; *see also id.* at 73 ("Although this appeal arises in the context of a same-sex domestic partnership, it involves only the constitutional standards applicable to all custody disputes between legal parents and third parties.").

54. *Id.* at 60.

55. *Id.* at 71 (quoting Price v. Howard, 484 S.E.2d 528, 537 (N.C. 1997)).

56. *Id.*

of the child."[57] The court found that Dwinnell intended for the parent-like relationship between Mason and the child to remain permanent, and as a result, Dwinnell could not sever the parent-child bond she transformed.[58] In doing so, the court relied on the following language from *Middleton*:

> [W]hen a legal parent invites a third party into a child's life, and that invitation alters a child's life . . . by essentially providing him with another parent, the legal parent's rights to unilaterally sever that relationship are necessarily reduced . . . . A parent has the absolute control and ability to maintain a zone of privacy around his or her child. However, a parent cannot maintain an absolute zone of privacy if he or she voluntarily invites a third party to function as a parent to the child.[59]

In relying on *Middleton*, as well as case law from other jurisdictions, the court held that Dwinnell could not assert her constitutionally-protected parental rights to deprive her child of a relationship with Mason—"the person whom she transformed into a parent."[60] Thus, the trial court was correct in applying the "best interest of the child" in the dispute for custody and visitation.[61] Again, this case shows that *Middleton* reaffirms the child's best interest as the controlling factor in a domestic dispute involving child custody or visitation.

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57. *Id.* at 67. These steps included trying to obtain sperm from a donor who looked similar to Mason, using both parents' last names as the child's name, "allowing Mason to participate in the pregnancy and birth, holding a baptismal ceremony at which Mason was announced as a parent . . . and designating Mason as a parent of the child on forms and to teachers." *Id.*

58. *Id.* at 69.

59. *Id.* (quoting Middleton v. Johnson, 633 S.E. 2d 162, 169 (S.C. Ct. App. 2006) (emphasis omitted)).

60. *Id.* at 70.

61. *Id.* Additionally the court held that "[Dwinnell's] choice does not mean that Mason is entitled to the rights of a legal parent, but only that a trial court may apply the 'best interest of the child' standard in considering Mason's request for custody, including visitation." *Id.*

IV. CONCLUSION

Middleton reaffirmed the "best interest of the child" standard as the paramount factor courts should consider in ruling on child custody and visitation issues. It is significant in that it specifically addressed the special role of psychological parents, but did not open the door to unanticipated litigants. Who might qualify as a psychological parent going forward is immaterial, so long as the person claiming this status satisfies the South Carolina Court of Appeals's rigorous four-part test.

THE RISE, FALL, AND RESURRECTION OF RETALIATION CLAIMS UNDER § 1981: A NOTE ON *CBOCS WEST, INC. V. HUMPHRIES*

Benjamin N. Garner[*]

I. INTRODUCTION 647
II. FACTUAL BACKGROUND 648
III. LEGAL HISTORY 650
A. *Sullivan v. Little Hunting Park, Inc.*: The Rise of Retaliation Claims Under § 1981. 650
B. *Patterson v. McLean Credit Union*: A Premature Sounding of the Death Knell for Retaliation Claims Under §1981. 652
C. A Congressional Response: Initiating the Revitalization of Retaliation Claims Under § 1981. 653
IV. THE COURT'S OPINION 655
A. *CBOCS West Inc., v. Humphries*: A Final Confirmation for Retaliation Claims Under § 1981. 655
B. The Implications of *Humphries*. 659
V. CONCLUSION 663

I. INTRODUCTION

In the months immediately following the Civil War, Congress passed sweeping legislation designed to empower African-Americans and simultaneously heal the country's bitter wounds suffered from four divisive years of fighting on American soil. Among the most significant pieces of legislation passed by Congress during the Reconstruction era was the 1866 Civil Rights Act (the 1866 Act), which proclaimed that African-Americans were United States citizens and therefore, entitled to

[*] J.D. candidate, May 2010, Charleston School of Law; B.A., 2007, Wofford College. The author would like to thank his family, friends, and the members of the *Charleston Law Review* for their constant support.

the same fundamental rights as white citizens.[1] One of the fundamental rights that the statute expressly afforded African-Americans was the "same right . . . to make and enforce contracts . . . to the full and equal benefit of all laws . . . as is enjoyed by white citizens."[2] The supporters of the 1866 Act espoused unwavering advocacy for the legislation, viewing it as instrumental in protecting the civil rights of African-Americans in the wake of the Civil War.[3]

Nearly 150 years after the adoption of the 1866 Civil Rights Act, the United States Supreme Court was called upon in *CBOCS West, Inc. v. Humphries*[4] to determine whether 42 U.S.C. § 1981 incorporated a cause of action for retaliation. At stake were the very vestiges of the Reconstruction-era statute. Without the protection of a retaliation claim, an individual would be free to engage in discriminatory conduct when one attempted to enforce her rights under the statute; a result which would categorically undermine the efficacy of the statute's intended protection.[5]

This Note analyzes the history, current status, and likely future of retaliation claims under § 1981. Part II establishes the factual as well as procedural history of *Humphries*. Part III contains a brief history of retaliation claims under § 1981 and examines how courts have allowed and disallowed plaintiffs to bring retaliation claims under § 1981 based upon their interpretation of closely related Supreme Court jurisprudence. Part IV analyzes the Court's opinion in *Humphries* and anticipates the likely impact of the Court's holding.

II. FACTUAL BACKGROUND

Hendrick Humphries, an African-American male, worked as an associate manager at a defendant-owned Cracker Barrel

1. *See* REBECCA E. ZIETLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS ch. 3 (2006).

2. The 1866 Act was subsequently codified at 42 U.S.C. § 1981(a) (2000).

3. ZIETLOW, *supra* note 1, at 39.

4. 553 U.S. ___, 128 S. Ct. 1951 (2008).

5. *See* Goff v. Cont'l Oil Co., 678 F.2d 593, 598-99 (5th Cir. 1982).

restaurant for three years.[6] Throughout the first two-and-a-half years of his tenure at the restaurant, Humphries's performance was excellent, and as a result, he received merit raises as well as bonuses.[7] Things quickly degraded, however, when a new supervisor presided over Humphries.[8] The new supervisor frequently asserted racially insensitive and derogatory remarks, such as characterizing all African-Americans as being "drunk or high on drugs," and espoused that he was at Cracker Barrel only "for the white people."[9] Within a month of the change in supervisors, Humphries received five disciplinary reports for alleged misconduct, ranging from bank deposit shortages to the inappropriate distribution of free meal tickets for complaining customers.[10] Humphries, believing that the claims were meritless and driven by racial animus, complained to Cracker Barrel's district manager, who in the restaurant's hierarchical management system was directly above Humphries's supervisor.[11] The district manager, however, failed to conduct an investigation into Humphries's claims.[12] After Humphries reasserted his complaints about his supervisor's discriminatory conduct and protested the termination of one of his fellow African-American co-workers, which Humphries believed was racially motivated, the district manager agreed to meet with Humphries.[13] The day before the meeting, however, Humphries was fired for allegedly leaving the store safe unlocked during the evening, which was a violation of Cracker Barrel's policies.[14] The district manager never interviewed Humphries or investigated his claims to determine the validity of the allegations against

6. Humphries v. CBOCS W., Inc., 474 F.3d 387, 389-90 (7th Cir. 2007). Defendant CBOCS, West Inc. will be referred to as "Cracker Barrel" in this Note.

7. *Id.* at 390.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

Humphries's supervisor.[15]

Humphries brought discrimination and retaliation claims against Cracker Barrel, invoking both Title VII and 42 U.S.C. § 1981 statutory protections.[16] The district court, however, dismissed the Title VII claim because Humphries brought the action after the statute of limitations had expired.[17] Humphries proceeded on his § 1981 claim, but the district court granted summary judgment in favor of Cracker Barrel upon finding that Humphries failed to establish a prima facie case.[18] Cracker Barrel did not argue, and the district court did not determine, whether a cause of action for retaliation was even cognizable under § 1981.[19] Nevertheless, on appeal, Cracker Barrel argued that a § 1981 action could not support a retaliation claim.[20] The Seventh Circuit declined to conclude that Cracker Barrel forfeited its argument by not raising it to the district court, but instead opined that "in the interest of justice" it preserved the right to determine whether § 1981 recognized an action for retaliation.[21] In a divided opinion, the Seventh Circuit held that a plaintiff could assert a retaliation action under §1981.[22] Cracker Barrel appealed to the Supreme Court, and it granted Cracker Barrel's petition for certiorari.[23]

III. LEGAL HISTORY

As discussed below, the Supreme Court's decision in *Humphries* hinged upon its adherence to principles of stare decisis. To fully comprehend its reasoning, it is therefore necessary to first briefly examine the history of § 1981

15. *Id.*

16. *Id.*

17. Humphries v. CBOCS W., Inc., 343 F. Supp. 2d 670, 675 (N.D. Ill. 2004) (mem.).

18. Humphries v. CBOCS W., Inc., 392 F. Supp. 2d 1047, 1051 (N.D. Ill. 2005) (mem.), *rev'd*, 474 F.3d at 408.

19. *Humphries*, 474 F.3d at 391.

20. *Id.*

21. *Id.*

22. *Id.* at 408.

23. CBOCS W., Inc. v. Humphries, 553 U.S. ___, 128 S. Ct. 1951 (2008) (mem.).

jurisprudence.

A. *Sullivan v. Little Hunting Park, Inc.*:[24] The Rise of Retaliation Claims Under § 1981.

In *Sullivan*, the Supreme Court analyzed whether § 1982, the companion statute of § 1981, provided protection for an individual who suffered retaliation for opposing the discrimination of one of his tenants.[25] Paul Sullivan was a white male who owned a home in Fairfax, Virginia.[26] Little Hunting Park, Inc. (Hunting) was a corporation charged with operating a community park and playground for the residents of Fairfax.[27] To use park facilities, residents were required to purchase membership shares from Hunting, which authorized all individuals in the immediate family of the shareholder to use the park.[28] Sullivan decided to lease his Fairfax home as well as assign his membership share in Hunting to T. R. Freeman, an African-American.[29] The park's board of directors, however, refused to approve the assignment of the park shares because Freeman was an African-American.[30] After Sullivan protested the board's action, he was expelled from the corporation and given cash for his two shares.[31] He sued the park under § 1982.[32]

In analyzing Sullivan's § 1982 claim, the Supreme Court was troubled by the notion that Sullivan's expulsion from the corporation was predicated upon his advocacy for Freeman's statutorily protected right to inherit and hold real and personal property.[33] The Court repudiated such an outcome, noting that if "Sullivan is punished for trying to vindicate the rights of

24. 396 U.S. 229 (1969).

25. *Id.* at 237 (citing 42 U.S.C. § 1982 ("All citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property.")).

26. *Id.* at 234-35.

27. *Id.* at 234.

28. *Id.*

29. *Id.* at 235.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 237.

minorities protected by § 1982[,] [s]uch a sanction would give impetus to the perpetuation of racial restrictions on property."[34] The Court reasoned that by implying a cause of action for retaliation, it would give the statute necessary efficacy; therefore, the Court allowed Sullivan to maintain his claim.[35] In the wake of *Sullivan*, the courts of appeals that confronted the issue were unanimous in concluding that § 1981 also incorporated an implied cause of action for retaliation that would allow an action if one retaliated against a plaintiff for attempting to enforce his or her statutory right to make and enforce contracts.[36]

B. *Patterson v. McLean Credit Union*:[37] A Premature Sounding of the Death Knell for Retaliation Claims Under §1981.

In 1989, the Supreme Court in *Patterson v. McLean Credit Union* significantly curtailed the protections of § 1981, and in so doing, it categorically dismantled the precedent that emanated from its decision in *Sullivan* two decades earlier.[38] Brenda Patterson was an African-American woman who alleged that her

34. *Id.* In reaching its conclusion, the Court recognized the "broad and sweeping nature of the protection" that Congress intended to afford individuals by the enactment of the Civil Rights Act of 1866. *Id.* It reasoned that adopting a narrow construction of the statute's language, as Hunting advocated, would be incongruous with its legislative design. *Id.*

35. *Id.*

36. *See* Choudhury v. Polytechnic Inst. of N.Y., 735 F.2d 38, 42-43 (2d Cir. 1984) (noting that *Sullivan* supports the conclusion that § 1981 includes a cause of action for retaliation); Goff v. Cont'l Oil Co., 678 F.2d 593, 598-99 & n.7 (5th Cir. 1982) (citing *Sullivan* and reasoning that the exclusion of retaliation claims from § 1981 would "discourag[e] the filing of meritorious civil rights suits and sanction[] further discrimination against those persons willing to risk their employer's vengeance by filing suits. Section 1981 would become meaningless if an employer could fire an employee for attempting to enforce his rights under the statute."); Winston v. Lear-Siegler, Inc., 558 F.2d 1266, 1270 (6th Cir. 1977) (conceding that the holding in *Sullivan* was based upon § 1982, but noting that "in view of both §§ 1981 and 1982 being derived from the Civil Rights Act of 1866 and in view of the similarity in language and intent, no reason is seen not to apply the rationale of *Sullivan* in interpreting § 1981").

37. 491 U.S. 164 (1989).

38. *See id.* at 179; *see also* Benjamin C. Mizer, Note, *Toward a Motivating Factor Test for Individual Disparate Treatment Claims*, 100 MICH. L. REV. 234, 249 n.92 (2001) ("Civil rights activists viewed *Patterson* as particularly pernicious because of the effect it had among the lower courts.").

employer's conduct was in contravention of § 1981 when it had harassed her, denied her a promotion, and terminated her because of her race.[39] Justice Kennedy, writing for the majority, held that Patterson's § 1981 claim was not cognizable because discriminatory conduct that occurs after the formation of the contract, "reprehensible though it [may] be if true, is not actionable under § 1981, which covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process."[40] The Court's decision hinged upon a strict, literal interpretation of the statute's text "to make and enforce contracts."[41] Because retaliation by an employer occurs most often after the formation of the employment contract, the Court's holding in *Patterson* seemed to indicate that retaliation claims were not cognizable under § 1981. Indeed, the courts of appeals after *Sullivan* confirmed that retaliation claims were not actionable under § 1981.[42]

C. A Congressional Response: Initiating the Revitalization of Retaliation Claims Under § 1981.

Congress, however, hearing the tolling of the death knell for retaliation claims under § 1981, passed the Civil Rights Act of 1991 (1991 Act) to supersede the Supreme Court's holding in *Patterson* and thereby resuscitate the broader protections of the statute.[43] The new legislation reenacted the 1866 provision of § 1981 that protected African-Americans' right to "make and

39. *Patterson*, 491 U.S. at 169. Patterson, like Humphries, could not assert a Title VII claim presumably because the statute of limitations had expired. Patterson v. McLean Credit Union, 805 F.2d 1143, 1144 n.* (4th Cir. 1986).

40. *Patterson*, 491 U.S. at 179-80.

41. *Id.* at 176. Beginning his opinion with the statute's text, Justice Kennedy noted that "[s]ection 1981 cannot be construed as a general proscription of racial discrimination in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of contracts." *Id.*

42. *See* Walker v. S. Cent. Bell Tel. Co., 904 F.2d 275, 276 (5th Cir. 1990) (per curiam); Sherman v. Burke Contracting, Inc., 891 F.2d 1527, 1534-35 (11th Cir. 1990) (per curiam); Overby v. Chevron USA, Inc., 884 F.2d 470, 473 (9th Cir. 1989).

43. *See* S. REP. NO. 101-315, at 6 (1990).

enforce contracts" but further defined the clause to include the "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."[44] A House Report accompanying the 1991 Act noted that the new law "would restore rights to sue for . . . retaliatory conduct."[45] Indeed, following Congress's passage of the Civil Rights Act of 1991, the courts of appeals once again were uniformly aligned in holding that § 1981 included a cause of action for retaliation.[46] On September 25, 2007, however, the Supreme Court granted certiorari to determine once and for all whether an action for retaliation was cognizable under § 1981.[47]

44. *Id.* at 5. The Senate Report stated that "[b]y restoring the broad scope of § 1981, Congress will ensure that Americans may not be harassed, fired or *otherwise* discriminated against in contracts because of their race." *Id.* at 6 (emphasis added).

45. H.R. REP. NO. 102-40, at 93 n.92 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 631. The House Report, in no unclear terms, espoused its distaste for the *Patterson* holding, noting that the effect of the Court's holding had been "disastrous." *Id.* at 36.

46. *See* Aleman v. Chugach Support Servs., Inc., 485 F.3d 206, 213-14 (4th Cir. 2007); Foley v. Univ. of Houston Sys., 355 F.3d 333, 338-39 (5th Cir. 2003); Manatt v. Bank of Am., N.A., 339 F.3d 792, 800 & n.11 (9th Cir. 2003); Johnson v. Univ. of Cincinnati, 215 F.3d 561, 575-76 (6th Cir. 2000); Hawkins v. 1115 Legal Serv. Care, 163 F.3d 684, 693 (2d Cir. 1998); Andrews v. Lakeshore Rehab. Hosp., 140 F.3d 1405, 1411-13 (11th Cir. 1998); *see also* Harold S. Lewis, Jr., *Walking the Walk of Plain Text: The Supreme Court's Markedly More Solicitous Treatment of Title VII Following the Civil Rights Act of 1991*, 49 ST. LOUIS U. L.J. 1081, 1092 (2005) (noting the significance of the language incorporated in the 1991 Amendments to the Civil Rights Act as evidenced by the fact that "[i]n the ensuing years, lower federal courts have agreed that this sweeping text effectively restores § 1981 to its pre-*Patterson* status").

47. The Supreme Court's granting certiorari for *Humphries* "spread alarm throughout the civil rights community on the assumption that [the Court] was prepared to shut the door on retaliation claims . . . [and] there was ample reason for that assumption, since Chief Justice Roberts had earlier made clear his distaste for precedents in which the [C]ourt has gone beyond a statute's text to infer a basis for a lawsuit." Linda Greenhouse, *Justices Say Law Bars Retaliation Over Bias Claims*, N.Y. TIMES, May 28, 2008, at A14.

IV. THE COURT'S OPINION

A. *CBOCS West Inc., v. Humphries*: A Final Confirmation for Retaliation Claims Under § 1981.

As mentioned above, the Court's conclusion that § 1981 encompassed retaliation claims hinged upon its adherence to its decision in *Sullivan* almost forty years earlier.[48] The Court noted at the outset of its opinion that principles of stare decisis, combined with its historical practice of interpreting §§ 1981 and 1982 similarly, created a "considerable burden" upon Cracker Barrel to convince the Court that it ought to disavow its established precedent.[49] Indeed, the Court reached its conclusion, not by invoking affirmative arguments highlighting the inherent unreasonableness of Cracker Barrel's position, but rather, by concluding Cracker Barrel's arguments, neither alone nor together, were sufficient to justify the Court's deviating from its previous holdings.

The first argument Cracker Barrel raised before the Court was that retaliation was not a cognizable claim under § 1981 because the protection did not appear in the text of the statute.[50] Conceding that the language of § 1981 was silent regarding whether an individual could bring a retaliation claim, the Court nevertheless reaffirmed its established interpretation of §§ 1981 and 1982, reasoning that protection against retaliation is necessary to give the statutes efficacy and to allow for valid enforcement of an individual's statutorily protected rights.[51]

48. CBOCS W., Inc. v. Humphries, 553 U.S. ___, 128 S. Ct. 1951, 1958 (2008).

49. *Id.*

50. *Id.*

51. *Id.* at 1959. The Court further buttressed its rationale by paralleling § 1981 to Title IX, another civil rights statute couched in broad terms. *Id.* at 1958-59 (citing Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005)). In *Jackson*, the Court, three years before *Humphries*, held that Title IX impliedly incorporated a cause of action for retaliation despite the absence of such protection in the statute's text. *Jackson*, 544 U.S. at 174. There, the Court reasoned that because Title IX was enacted only three years after *Sullivan* was decided, Congress expected that Title IX would "be interpreted in conformity" with *Sullivan*'s holding that an individual has a remedy when the individual

Because *Sullivan* had become entrenched in the §§ 1981 and 1982 jurisprudence, the Court believed that it was "too late in the day to overturn [*Sullivan*] . . . on the basis of a linguistic argument," an argument that the Court declined to adopt forty years earlier.[52]

Cracker Barrel also argued that Congress's failure to include the term "retaliation" in the text of the 1991 Civil Rights Act evidenced that Congress did not intend for § 1981 to cover retaliation claims.[53] It asserted that Congress had specifically included the term "retaliation" in other statutes, such as Title VII,[54] and reasoned that if Congress desired for § 1981 to include the protection, then it would have clearly indicated such a desire as it had with other statutes.[55] The Court, however, rejected this position, reasoning that the language of the 1991 Civil Rights Act nullifying *Patterson* and embracing pre-*Patterson* law was sufficient indicia to conclude that the Act was meant to reinstate retaliation actions under § 1981 as interpreted by *Sullivan* and its progeny that developed throughout the courts of appeals.[56]

Third, Cracker Barrel argued that interpreting § 1981 to include retaliation claims would overshadow Title VII's procedural, administrative, and remedial measures, which are distinct from those found in § 1981.[57] Permitting retaliation claims under § 1981, Cracker Barrel argued, would allow a plaintiff to undermine the administration of Title VII by allowing a plaintiff to circumvent distinct measures that Congress incorporated into Title VII, a notion which Cracker Barrel

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suffers from retaliation in response to an objection that his or her statutory right was infringed upon. *Id.* at 176. The Court reasoned that "[w]ithout protection from retaliation, individuals who witness discrimination would likely not report it . . . and the underlying discrimination would go unremedied." *Id.* at 180-81.

52. *Humphries*, 553 U.S. ___, 128 S. Ct. at 1959.

53. *Id.*

54. 42 U.S.C. § 2000 (2000); *see also infra* note 73.

55. *Humphries*, 553 U.S. ___, 128 S. Ct. at 1959 (citing 42 U.S.C. § 2000e-3(a)).

56. *Id.* (citing H.R. REP. NO. 102-40, at 92 (1991)); s*ee also* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969).

57. *Humphries*, 553 U.S. at ___, 128 S. Ct. at 1959.

contended that Congress could not have possibly intended.[58] This argument, however, failed to persuade the Court that Congress did not intend to incorporate retaliation claims in § 1981.[59] The Court distinguished Title VII from § 1981 on the grounds that Title VII covered only employment-related conduct whereas § 1981 reached both employment and non-employment contract.[60] To accept Cracker Barrel's argument that retaliation is not included in § 1981 would render individuals in non-employment contractual situations without redress when one takes an adverse action against that individual for invoking a statutorily protected right.[61] The Court further bolstered its conclusion regarding Cracker Barrel's "overlapping" argument by noting that the Court has consistently found that Title VII and § 1981 are "directed to most of the same ends" and that Congress designed Title VII "to supplement, rather than supplant, existing laws and institutions relating to employment discrimination."[62] To the extent that the statutes do overlap one another, the Court reasoned, it was because of intentional congressional design, and therefore, Cracker Barrel's argument did not provide a justification for concluding that § 1981 precludes retaliation claims.[63]

Cracker Barrel's final arguments centered around two recent Supreme Court cases. First, it argued that the Court should, as it did in *Burlington Northern & Santa Fe Railway Co. v. White*,[64] distinguish between discrimination predicated upon status (i.e., for being an African-American) and discrimination predicated upon conduct (i.e., action that amounts to a retaliatory response).[65] Drawing upon the distinction between the two types of discrimination, Cracker Barrel maintained that the Court

58. *Id.* at 1959-60.

59. *Id.* at 1960.

60. *Id.*

61. *Id.*

62. *Id.* (quoting Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 461 (1975) and Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-49 (1974)).

63. *Id.*

64. 548 U.S. 53 (2006).

65. *Humphries*, 553 U.S. at ___, 128 S. Ct. at 1960 (citing *Burlington*, 548 U.S. at 63).

should conclude that § 1981 includes only status-based discrimination, thereby precluding actions for retaliation.[66] The Court, however, asserted that although it analyzed the two types of discrimination separately under *Burlington*, the Court never suggested that a statute could not impliedly incorporate both forms of discrimination within its purview.[67] Second, Cracker Barrel argued that, unlike the period when *Sullivan* was decided, the Court presently emphasizes the text as its primary approach to statutory interpretation, and in light of this new trend, the Court is justified in dismantling the precedent stemming from *Sullivan* where the Court implied a cause of action for retaliation that was not in the statute's text.[68] The Court held that even assuming its statutory approach has evolved, that alone is not enough to disrupt *Sullivan*'s message which has remained deeply entrenched in the Court's body of law.[69] Because none of the arguments that Cracker Barrel proffered persuaded the Court that it should deviate from the position it established in *Sullivan*, the Court held that a claim for retaliation was cognizable under

66. *Id.*

67. *See id.* In his dissent, Justice Thomas, joined by Justice Scalia, maintained that the statute's text indicated that Congress intended to protect only status-based discrimination rather than conduct-based discrimination, and therefore, the statute precluded retaliation claims. *Id.* at 1963-64 (Thomas, J., dissenting). To combine conduct and status-based discrimination into § 1981's prohibition, Justice Thomas asserted, would render superfluous provisions found in other statutes, such as Title VII, where Congress separated the discrimination and retaliation prohibitions. *Id.*

68. *Id.* at 1961 (majority opinion). During oral arguments, Chief Justice Roberts and Justice Kennedy, both of whom joined the majority opinion, espoused concern about deviating from the Court's more recent interpretive style of refusing to imply causes of action into statutes. Chief Justice Roberts inquired whether the Court, under principles of stare decisis, should follow the earlier body of law emanating from *Sullivan*, a period when the Court employed a "more freewheeling approach to statutory interpretation," or the more recent body of law which is more restrictive. Transcript of Oral Argument at 21, *Humphries*, 553 U.S. at ___, 128 S. Ct. 1951 (No. 06-1431). Justice Kennedy cast serious doubt about adopting the rationale of *Sullivan*, asserting that if he were to adopt that point of view, he "would have to say that it's necessary to imply a cause of action prohibiting retaliation in order to make these other words effective. And that seems to me a very limited argument and a very difficult argument . . . to prevail upon, given the authorities and the [recent] approach of the Court." *Id.* at 41.

69. *Humphries*, 553 U.S. at ___, 128 S. Ct. at 1961.

§ 1981.[70]

B. The Implications of *Humphries*.

The Supreme Court's decision in *Humphries* will likely have the effect of making § 1981 a more significant and more widely utilized source of redress for plaintiffs who are discriminated against both in and out of the employment arena. Incorporating protection against retaliation into the statute arms those who report discriminatory conduct by providing them with a legal remedy when another takes an adverse action against them for invoking their statutorily protected right or, as in *Sullivan*, the right of another. The Court's decision is particularly significant, given the emerging trends that have developed in the field of employment discrimination. According to the Equal Employment Opportunity Commission (EEOC), the number of retaliation claims filed with the EEOC rose 18% from 2006 to 2007, resulting in the highest level of retaliation claims brought within a year, and doubling the amount of retaliation-based claims that plaintiffs filed in 1992.[71] During the same period, complaints based upon both race and national origin rose 12%, which represented its highest level in almost fifteen years.[72] The

70. *Id.* Justice Thomas criticized the majority's reasoning and characterized it as a "retreat[] behind the figleaf of ersatz *stare decisis*." *Id.* at 1965 (Thomas, J., dissenting). He opined that *Sullivan* did not stand for the proposition that § 1982 contained an implied cause of action for retaliatory conduct but rather that it was a third party standing case which afforded Sullivan the right to bring a claim on behalf of his African-American lessee. *Id.* Because the Court's holding in *Sullivan* was nebulous and could be read as either a third party standing case or a case granting individuals an implied cause of action for retaliation, Justice Thomas maintained that it should not be given stare decisis effect. *Id.* at 1967.

71. Press Release, Equal Employment Opportunity Comm'n, Job Bias Charges Rise 9% in 2007, EEOC Reports (Mar. 5, 2008), *available at* http://www.eeoc.gov/press/3-5-08.html. The EEOC's report captures only those claims that are filed with the EEOC. Because § 1981 does not require that a plaintiff file a claim with the EEOC, the statistics do not reflect the number of retaliation actions that were predicated upon a § 1981 violation. They are relevant, nevertheless, because they reveal the significant growth in retaliation claims and evince that plaintiffs are increasingly utilizing retaliation protections.

72. *Id.*

Supreme Court's confirmation of the viability of retaliation claims under § 1981 coupled with the vibrant growth of retaliation claims, as well as the rise of racial and national origin discrimination claims, indicate that plaintiffs will increasingly make use of § 1981 in asserting their retaliation claims, especially given the procedural as well as substantive advantages that the statute has over Title VII[73] which is discussed below.

Section 1981 provides plaintiffs who allege race or national origin discrimination in the making and enforcing of contracts procedural as well as remedial advantages over those found within Title VII.[74] Unlike Title VII, § 1981 does not require plaintiffs to first file their charge with the EEOC.[75] Plaintiffs asserting a Title VII action must file their suit with the EEOC within 180 days "after the alleged unlawful employment practice occurred" except in states where an antidiscrimination agency exists, and then the plaintiff has 300 days to file her charge.[76] A plaintiff who fails to file her claim within either the 180 or 300-day window will be barred from asserting a Title VII action.[77] It

73. 42 U.S.C. § 2000 (2000). Title VII is a statute in addition to § 1981 that prohibits discrimination, but it is broader than § 1981 in that it covers other forms of discrimination besides only race and national origin.

74. *See, e.g.*, Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 461 (1975) (concluding that "the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent").

75. *See* 42 U.S.C. § 1981 (2000); *see also Johnson*, 421 U.S. at 460.

76. 42 U.S.C. § 2000e-5(e)(1).

77. *See, e.g.*, Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 101-02 (2002) (noting that in the Title VII context, "a litigant has up to 180 or 300 days *after* the unlawful practice happened to file with the EEOC"); *see also* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S ___, 127 S. Ct. 2162 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L.No. 111-2, 123 Stat. 5 (2009) *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ002.111. *Ledbetter* garnered significant criticism from the civil rights community for the Court's holding that the plaintiff's claim was barred as untimely. There, the plaintiff, Lilly Ledbetter, worked for Goodyear for nearly twenty years. *Id.* at 2165. She alleged that throughout her tenure at Goodyear, her supervisors had given her poor evaluations because of her sex, and, as a result, her pay was not increased as much as it should have been. *Id.* at 2165-66. At the conclusion of her tenure at Goodyear, Ledbetter was being paid significantly less than her male colleagues. *Id.* at 2166. Ledbetter brought a Title VII claim against Goodyear alleging pay discrimination, and a jury found in her favor and awarded her

is unclear in the wake of the recent Supreme Court decision *Jones v. R.R. Donnelly & Sons Co.*[78] what the applicable statute of limitations period is for § 1981 claims. Regardless of whether the statute of limitations for § 1981 claims is four years pursuant to federal statute or the amount in an applicable state statute, § 1981 generally will afford a plaintiff a longer time to file his or her claim.[79] Additionally, § 1981 offers a plaintiff preferable damages than those authorized under Title VII. Whereas Title VII damages are capped in relation to the size of the employer, with a statutory ceiling of $300,000 for an employer that has over

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backpay as well as damages. *Id.* at 2165. On appeal, Ledbetter maintained that each paycheck that was issued was a separate act of discrimination retriggering the period during which she was required the file her claim. *Id.* at 2167. The Supreme Court, however, rejected Ledbetter's argument and distinguished discriminatory conduct which initiates that 180-day filing period from the effects of a discriminatory action. *Id.* at 2169. The Court held that "current effects alone cannot breathe life into prior, uncharged discrimination." *Id.* In her dissent, Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, noted the inequity of the majority's decision stating that

> [i]t is only when the disparity becomes apparent and sizeable . . . that an employee in Ledbetter's situation is likely to comprehend her plight and . . . [h]er initial readiness to give her employer the benefit of the doubt should not preclude her from later challenging the . . . continuing payment of a wage depressed on account of her sex.

Id. at 2179 (Ginsburg, J., dissenting). She concluded her opinion criticizing the majority's stance as "incompatible with [Title VII's] broad remedial purpose" and noted that "the ball is in Congress' court . . . to correct this Court's parsimonious reading of Title VII." *Id.* at 2188. Congress, in the Lilly Ledbetter Fair Pay Act of 2009, superseded the Court's holding and declared that a discriminatory decision occurs each time a plaintiff receives a lower paycheck.

78. 541 U.S. 369 (2004). In *Jones*, the Court interpreted a federal statute that created a four-year statute of limitations period for all federal claims that do not have a limitations period expressly incorporated within the statute. *Id.* The Court held that the statute authorizing the four-year limitations period reached only to federal actions enacted after 1990. *Id.* It is unclear whether § 1981 should be analyzed from the date of its original enactment, which would exclude it from the statute's reach, or whether Congress's 1991 Amendments, significantly broadening the statute, will provide the date by which the statute of limitations is judged.

79. In light of Title VII's narrow and, as seen in *Ledbetter*, unforgiving time period in which a plaintiff must file her claim with the EEOC, § 1981's longer statute of limitations offers a plaintiff an alternative means by which she can obtain a remedy. In fact, both *Patterson* and *Humphries* came to the Supreme Court as § 1981 claims only because the plaintiffs' claims were time barred under Title VII.

500 employees, § 1981 has no statutory ceiling.[80] The fact that § 1981 does not mandate a maximum amount of relief a plaintiff can receive will likely have a significant impact among employers. An employer or other individual who chooses to discriminate or retaliate against another on the basis of race or national origin does so at its own peril since punitive damages have in some cases vastly exceeded the statutory maximums incorporated into Title VII.[81] Finally, § 1981 may be an advantageous avenue for relief because its scope extends beyond the employment context and reaches all contracts. Title VII's protections, however, are restricted to individuals who are employed by an entity with more than fifteen employees.[82] Employers, therefore, can escape Title VII's purview by outsourcing work or deliberately refusing to hire enough employees in an effort to avoid becoming a statutory employer. Additionally, an employer can circumvent Title VII by hiring independent contractors or forming a partnership and thereby avoiding the creation of an employment relationship.[83] Section 1981, however, still affords a plaintiff with protection against discrimination regardless of the legal relationship formed or the number of employees the entity hires because it reaches all contractual relationships. An employer that deliberately manipulates the size or structure of its workforce will be unable to evade liability under § 1981. The Supreme Court's decision, therefore, is significant because it provides *all* employers and individuals outside of the employment setting with a genuine incentive to not engage in discriminatory conduct on the basis of race or national origin or make an adverse employment action

80. 42 U.S.C. § 1981a (2000). The statute governing Title VII's remedies expressly states that the statutory caps that limit recovery under Title VII shall not "be construed to limit the scope of, or the relief available under [§ 1981]." *Id.* at § 1981a(b)(4).

81. *See* Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020, 1045 (9th Cir. 2003) (upholding jury award for $2.6 million for employee who was fired in contravention of § 1981).

82. 42 U.S.C. § 2000e(b) (2000).

83. *See* Hishon v. King & Spalding, 467 U.S. 69, 79-80 (1984). Justice Powell wrote separately in his own opinion to make clear that partnership relationship should not "be characterized as an 'employment' relationship to which Title VII would apply." *Id.* (Powell, J., concurring).

against an individual who opposes such conduct.

V. CONCLUSION

Retaliation claims under § 1981 have experienced somewhat of a rollercoaster ride since the Court's decision in *Sullivan*. Nevertheless, the Court's holding in *Humphries* coupled with Congress's passage of the 1991 Civil Rights Act in the wake of *Patterson* indicate that retaliation claims are well embedded into § 1981's protections. Assuming that the current trends in employment discrimination continue and plaintiffs continue to assert an increasing number of retaliation claims, the Court's decision will likely have a significant impact on discrimination litigation. The Court's holding allows African-Americans and individuals claiming discrimination on the basis of race or national origin to avail themselves to the advantageous procedures and remedies found in § 1981. Perhaps even more important, however, is the influence that the Court's holding will likely have on employers and those outside of the employment arena who may discriminate against another. No longer can an individual, without fear of legal recourse, take an adverse action against another for attempting to enforce his or her statutorily protected rights. The effect of the Court's holding secures the message that Congress sought to send nearly 150 years ago by passing the 1866 Civil Rights Act: discrimination on the basis of race has no place in American culture.

THE CREDITOR'S GUIDE TO THE TECHNOLOGY GALAXY: THE EFFECT OF TECHNOLOGY ON ARTICLE 9 AND REMOTELY DISABLING COLLATERAL

R. Walker Humphrey, II[*]

I. INTRODUCTION 665
II. EQUIPMENT AS DEFINED BY THE U.C.C. 668
III. OVERVIEW OF TRADITIONAL SELF-HELP REMEDIES UNDER THE U.C.C. 670
IV. JUDICIAL AND LEGISLATIVE RESPONSES TO TECHNOLOGY 673
A. How Technology Impacts Self-Help under § 9-609(a)(2) 674
B. Legislative Reponses from Connecticut and Colorado 676
C. Judicial and Legislative Responses to Similar Issues Involving Technology and Self-Help Beyond the Confines of § 9-609 679
V. WHAT A CREDITOR NEEDS TO DO TO PROTECT ITSELF 683
VI. CONCLUSION 686

I. INTRODUCTION

On October 20, 2006, Chief Justice of the United States Supreme Court John G. Roberts, Jr. participated in a panel discussion before local attorneys and the students of the

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[*] J.D. candidate, Charleston School of Law, 2010; B.S. with Special Attainments in Commerce, Washington and Lee University, *magna cum laude*, 2007. The author would like to thank Professor Elizabeth McCullough for her suggestion of the topic and her guidance and insight throughout the process and Professor Jon Marcantel for all of his help and feedback while writing this Comment. He would also like to thank his family and friends for their enduring support throughout this arduous process known as law school. Finally, he would like to thank the *Charleston Law Review* for giving him this opportunity.

Charleston School of Law. One of the panelists asked him the following question: "Mr. Chief Justice, what do you think is going to be the biggest challenge for the Court during the next ten years?"[1] The Chief Justice's immediate answer was technology, which is "changing the way established legal principles are implemented."[2] Courts have been grappling with the self-help provisions of Article 9 for decades now, but the advent of remote disablement poses new challenges. As in the past, "the impact of technology on areas of the law that we thought had been pretty well settled and established . . . are going to have to be revisited and rethought in light of the new science."[3] For example, consider the situation involving the purchase of commercial passenger airplanes subject to a security agreement, where the creditor places a device in the planes which renders them inoperable if the airline defaults on the loan. Due to an economic downturn and an increase in fuel prices, air travel drops dramatically, the airline becomes strapped for cash, and it cannot pay its bills. Wary of the impending bankruptcy of the airline, the creditor exercises its time-honored right—self-help. It pushes a button and the airline's fleet is grounded, stranding thousands of passengers and causing untold economic harm.

As technology advances at an ever-increasing rate, it inevitably touches every aspect of our lives and dominates the way the business world operates. It has allowed for precise inventory management and tracking, increased production and innovation, and remote access to data from almost anywhere in the world. As businesses continue to leverage themselves by purchasing their equipment subject to security agreements, technology will influence how the parties to a security agreement effectuate their rights and obligations. The right of self-help, the ability of a creditor to proceed without judicial process in the

1. Chief Justice John G. Roberts, Jr., Address at the Charleston School of Law (Oct. 20, 2006) (transcript of question and answer on file with journal, video recording of entire address available in the Charleston School of Law library) (printed with permission of the Public Information Office, Supreme Court of the United States).

2. *Id.*

3. *Id.*

event of default,[4] is one of the established legal principles the Chief Justice spoke of, and technology has greatly expanded this right. No longer must a creditor be physically present to manually disable collateral. Instead, from thousands of miles away, far removed from the circumstances surrounding the collateral, the creditor can instantaneously disable it.

As with many other areas of settled law, the encroachment of technology on everyday life has forced courts to struggle with the application of time-tested principles to an increasingly digital world. In today's troubled economy, the rate of default on loans has skyrocketed, resulting in the Uniform Commercial Code's (U.C.C.) default provisions being utilized increasingly more. However, the law surrounding a creditor's right to remotely disable its collateral is extremely underdeveloped, and there are many questions lingering in the background.

This Comment will attempt to discern how technology will impact the ability of a creditor to exercise its rights under the law of secured transactions. First, Part II of this comment will examine what types of collateral are subject to the provisions of U.C.C. § 9-609(a)(2), the provision allowing a creditor to render equipment unusable. As is discussed, the term "equipment" necessarily implies a commercial context, yielding the conclusion that this specific use of self-help has its largest impact on the business sector. Next, Part III will provide a brief overview of some of the prevailing issues surrounding traditional self-help remedies. Courts have generally identified three overarching principles with self-help which should serve as a useful guide for creditors in determining how to proceed under § 9-609(a)(2). Part IV will discuss how various courts and legislatures have responded to technology and apply those responses to the traditional self-help principles discussed in Part III. Finally, Part V will explain what creditors can do to protect their rights under the U.C.C. to help prevent them from incurring liability for the wrongful exercise of self-help.

4. U.C.C. § 9-609(b)(2) (2000).

II. EQUIPMENT AS DEFINED BY THE U.C.C.

The U.C.C., as currently promulgated by the National Conference of Commissions on Uniform State Laws, provides: "After default, a secured party . . . without removal, may render equipment unusable."[5] As is the case in many areas of the law, the definition of equipment is very broad, covering "goods other than inventory, farm products, or consumer goods."[6] Interestingly, the unrevised text of Article 9 added a second part to the definition of goods, additionally defining them as goods "used or bought for use primarily in business (including farming or a profession) or by a debtor who is a nonprofit organization or a governmental subdivision or agency."[7] While the drafters of revised Article 9 deleted such language, they did state that the four categories of goods—consumer goods, equipment, farm products, and inventory—are mutually exclusive.[8] Therefore, because equipment cannot also be a consumer good or inventory, for all intents and purposes the definition still includes those goods bought or used primarily for business. As most cases dealing with equipment were decided prior to the revision, it is important to keep in mind that for practical purposes the former definition is applicable today.

In deciding what falls under the umbrella of equipment, courts often look to the primary purpose for which the goods are held, recognizing substance over form.[9] This inquiry gives courts wide discretion in determining what constitutes equipment, which has produced some interesting results. For example, in *Morgan County Feeders, Inc. v. McCormick*[10] the debtor defaulted on the underlying loan and the creditor brought suit to sell the collateral, a herd of forty-five longhorn cattle and one bull, in order to satisfy the debt.[11] In finding that the cattle actually

5. U.C.C. § 9-609(a)(2) (2000).
6. U.C.C. § 9-102(a)(33) (2000).
7. U.C.C. § 9-109(2) (1978).
8. U.C.C. § 9-102 cmt. 4(a) (2000).
9. Buffalo Molded Plastics, Inc. v. Plastic Mold Tech., Inc. (*In re* Buffalo Molded Plastics, Inc.), 354 B.R. 731, 746 (Bankr. W.D. Pa. 2006).
10. 836 P.2d 1051 (Colo. App. 1992).
11. *Id.* at 1052. The defendant had an oral contract with the debtor to buy

were equipment, the court stated the rule that "[g]oods used in a business are equipment when they are fixed assets or have, as identifiable units, a relatively long period of use. They are inventory, even though not held for sale, if they are used up or consumed in a short period of time in the production of some end product."[12] During the trial, the debtor testified that his cattle were used primarily for recreational cattle drives and had a longer period of use in comparison to other types of cattle.[13] In recognizing that a finding of cattle as equipment within the meaning of the U.C.C. was "highly unusual," the court of appeals still affirmed the trial court's determination that they were based on the nature of their use.[14]

This expansive definition of equipment has led to the inclusion of items failing to fit within the other defined categories of goods, such as rose bushes and prefabricated office buildings.[15] Clearly, most cases concerning whether certain items are classified as equipment under the U.C.C. will not involve goods such as cattle or rose bushes. Historically, the cases have involved items more generally used in a business setting, such as an industrial compost screener,[16] tanning beds,[17] furniture and other furnishings,[18] and computer systems.[19] Moreover,

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these cattle and was joined as a third-party when he claimed an interest in them. However, the debtor's loan agreement gave the plaintiff an interest in all after-acquired property, including equipment and proceeds from the sale of equipment. The parties stipulated to the sale of the cattle, and the issue was whether they were equipment within the U.C.C.; if they were, the loan agreement would assign the proceeds to the plaintiff, and if they were not, then the money belonged to the defendant. *Id.* at 1052-53.

12. *Id.* at 1053. *See also* Hunter v. Key Bank Nat'l Ass'n. (*In re* Wisniewski), 265 B.R. 897, 903 (Bankr. N.D. Ohio 2001); Simon v. Chrysler Credit Corp. (*In re* Babaeian Trans. Co.), 206 B.R. 536, 546 (Bankr. C.D. Cal. 1997) (stating that the test for classifying goods as either equipment or inventory is the owner's use and not how some other party might use them).

13. *Morgan County Feeders*, 836 P.2d at 1054.

14. *Id.*

15. Flores de N.M. v. Banda Negra Int'l, Inc. (*In re* Flores de N.M.), 151 B.R. 571, 580 (Bankr. D.N.M. 1993).

16. Iannacone v. New Holland Credit, Co. (*In re* Organic Conversion Corp.), 259 B.R. 350, 356-57 (Bankr. D. Minn. 2001).

17. *In re Wisniewski*, 265 B.R. at 903-04.

18. United States v. Baptist Golden Age Home, 226 F. Supp. 892, 900 (W.D. Ark. 1964); First Colo. Bank & Trust v. Plantation Inn, Ltd., 767 P.2d

manufacturing machinery, industrial equipment, cranes used for a construction business, etc., arguably could also be considered equipment within the meaning of the U.C.C. due to their long life and use in business. If cattle used for cattle driving are equipment within this definition, then certainly the robots used on General Motors's assembly line are equipment as well.

III. OVERVIEW OF TRADITIONAL SELF-HELP REMEDIES UNDER THE U.C.C.

A critical aspect of the U.C.C. is the provision allowing a secured creditor to use self-help remedies in the event of default. This allows both parties to avoid lengthy and expensive litigation while ensuring the creditor will be able to effectively protect its security interest in the collateral. Section 9-609(b)(2) provides, "[a] secured party may proceed under subsection (a) [granting it the right to render equipment unusable] . . . without judicial process, if it proceeds without breach of the peace."[20] The duty is non-delegable, and if such a breach occurs, the creditor will be liable for its actions and those of its agents.[21] At first glance, this power seems relatively straightforward. However, the U.C.C. does not define the term "breach of the peace" but rather explicitly directs the courts to find their own definitions for the term.[22] "Although it is apparent that the self-help remedy is efficient for creditors and results in reduced costs of credit for debtors, [courts] must seek a reasonable balancing of that interest against private property interests and society's interests in tranquility."[23] There consequently has been a swarm of litigation over this term, and a number of different standards

812, 814 (Colo. App. 1988).

19. *In re Flores*, 151 B.R. at 585; *In re Wisniewski*, 265 B.R. at 903-04. Computer systems will briefly be discussed *infra* Part IV.C. They pose a special challenge, and some states have adopted specific rules for electronic self-help and computers.

20. U.C.C. § 9-609(b)(2) (2000).

21. *See* Sammons v. Broward Bank, 599 So. 2d 1018, 1019 (Fla. Dist. Ct. App. 1992).

22. U.C.C. § 9-609 cmt. 3 (2000).

23. Salisbury Livestock Co. v. Colo. Cent. Credit Union, 793 P.2d 470, 473 (Wyo. 1990) (internal citation omitted).

have emerged. Unfortunately, there is no uniform standard courts apply for breach of the peace, thus muddying the waters. However, there appear to be three common themes for these standards emerging in breach of the peace case law: violence, actual or threatened; the debtor's right to protest; and unconsented physical entry onto the debtor's property.[24]

Issues pertaining to violence or the threat of violence are perhaps the most obvious and prevalent examples of actions with the potential to breach the peace. In one case, the court found a breach where a debtor chased after the repossession agents in his truck, eventually causing a car accident.[25] When discussing breach of the peace, that court noted, "the line . . . is sometimes hard to locate and, even if it is located, it sometimes moves;" but in the end the court had no trouble finding a breach had occurred.[26] However, no actual violence or confrontation may be required.[27] Courts have held a threat of violence or the use of intimidation is sufficient,[28] though the possibility of harm must be more than slight.[29] Courts therefore undertake a very fact-based inquiry to determine if the threats were enough to create a likelihood of an immediate disturbance.[30] One court has even found that if the repossession agent realizes he has committed some wrong and then ceases his repossession, no breach of the peace has occurred.[31] Such was the case when a repossession agent towed a car he mistakenly believed to belong to the debtor,

24. It should be noted that while the following cases deal in terms of repossession of collateral as opposed to rendering it unusable, the breach of the peace provision applies with equal force to both, and thus, the principles contained herein are applicable to rendering equipment unusable as well. Section 9-609(b) of the U.C.C. refers to both provisions of subsection (a) and does not distinguish between them.

25. Ivy v. General Motors Acceptance Corp., 612 So. 2d 1108, 1109-10 (Miss. 1992).

26. *Id.* at 112 (citation omitted).

27. *Salisbury Livestock Co.*, 793 P.2d at 474 n.3.

28. *See, e.g.,* Morris v. First Nat'l Bank & Trust Co. of Ravenna, 254 N.E.2d 683, 686 (Ohio 1970).

29. Salisbury Livestock Co. v. Colo. Cent. Credit Union, 793 P.2d 470, 474 n.3 (Wyo. 1990).

30. Chrysler Credit Corp. v. Koontz, 661 N.E.2d 1171, 1173 (Ill. App. Ct. 1996).

31. Chapa v. Traciers & Assocs., 267 S.W.3d 386, 395 (Tex. App. 2008).

only to find that the third party's children were in the car.[32] The court found he had not breached the peace because there was no confrontation or actual violence when he immediately returned the car and the children, when he discovered what happened.[33]

Courts may also find a breach of the peace where a creditor repossesses collateral over the protest of the debtor. As stated by the Supreme Court of Mississippi, the U.C.C. "does not authorize the secured party to repossess the collateral . . . over the protest of the debtor."[34] A few years later, that same court explained the limits on that right, noting that the right to protest does not give the debtor a right to breach the peace himself as a means of causing a wrongful repossession.[35] However, if the debtor is not present during the repossession the creditor does not have to wait for him to arrive and protest.[36] Thus, the creditor may proceed with repossession absent a protest but may be limited in his ability to do so if the debtor does in fact protest.

The final main category for breaching the peace is the notion that an unconsented physical entry onto the debtor's property is a breach of the peace. On an abstract level, this makes perfect sense. A man's home is his castle, and no one has a right or privilege to enter his property for any reason. From this concept, two main principles emerge: first, the castle rule holds strong when the creditor or his repossession agent must proceed through some enclosure—"at least one gate"—to reach the collateral, or when the creditor proceeds by the "actual breaking

32. *Id.* at 389.

33. *Id.* at 395.

34. Hester v. Bandy, 627 So. 2d 833, 841 (Miss. 1993).

35. Miss. Comm'n on Judicial Perf. v. Osborne, 977 So. 2d 314, 323 (Miss. 2008); *see also* Nixon v. Halpin, 620 So. 2d 796, 798 (Fla. Dist. Ct. App. 1993) ("A secured party who insists on taking possession after resistance by the debtor faces the consequences of its use of force.").

36. *See, e.g.,* Census Fed. Credit Union v. Wann, 403 N.E.2d 348, 351 (Ind. App. Ct. 1980) ("Cases in other jurisdictions have held that absence of consent of the defaulting party to repossession is immaterial to the right of a secured party to repossess without judicial process. This, of course, is a necessary result, for contrary to the argument of plaintiff, [the repossession statute] by its very existence, presupposes that the defaulting party did not consent. Should the defaulting party consent, no statutory authority would be required for a secured party to repossess, with or without judicial process. To hold otherwise would emasculate that statute.") (citations omitted).

or destruction of barriers designed to exclude trespassers."[37] One court even invalidated a contractual provision, voluntarily entered into by the debtor, permitting the creditor to enter property upon default to repossess the collateral stating, "[a]n agreement permitting a family's home to be broken open and entered for the purpose of forcibly taking possession of property therein is contrary to good public policy and void to that extent."[38]

The second principle is essentially the converse: where the creditor or his agent does not have to actually break into a home or pass through any barriers to reach the property, no breach occurs.[39] Take, for example, a car simply sitting in an open driveway. There, the repossession agent simply drives his truck up the driveway and leaves with the car, without crossing any fences or obstacles. Barring threats or some protests from the debtor, such a repossession will usually be seen as peaceful and will not subject the creditor to liability, even without express consent from the debtor.[40]

IV. JUDICIAL AND LEGISLATIVE RESPONSES TO TECHNOLOGY

Though it will truly be a brave new world when creditors place remote disablement technology in cattle and rose bushes,

37. Chrysler Credit Corp. v. Koontz, 661 N.E.2d 1171, 1175 (Ill. App. Ct. 1996); *see also* Oaklawn Bank v. Baldwin, 709 S.W.2d 91, 92 (Ark. 1986) (concluding repossession was lawful when "[t]here [was] no evidence that [the repossession agent] entered any gates, doors, or other barricades").

38. Girard v. Anderson, 257 N.W. 400, 402-03 (Iowa 1934).

39. *See* Raffa v. Dania Bank, 321 So. 2d 83, 85 (Fla. Dist. Ct. App. 1975) ("[S]ince it is undisputed that no door, not even one to a garage, on the Raffa premises was opened, much less broken, we conclude that the way in which the repossession was effected was conclusively shown to have been non-actionable."); Rea v. Universal C.I.T. Credit Corp., 127 S.E.2d 225, 227 (N.C. 1962) (holding a repossession of an automobile was lawful when the car was parked on the debtor's front lawn).

40. *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 25-7 (5th ed. 2000) ("We have found no case which holds that the repossession of an automobile from a driveway or public street (absent other circumstances, such as the debtor's objection) itself constitutes a breach of the peace, and many cases explicitly uphold such a repossession.").

creditors currently have a wide range of technological weapons in their arsenal to protect themselves in the event of default.[41] Because of the commercial nature of equipment, aside from the odd cattle farmer, potential debtors are generally going to be more sophisticated and the transactions may involve more money. This section will first examine what issues remain regarding the use of technological self-help and then discuss how some jurisdictions have responded to them.

A. How Technology Impacts Self-Help under § 9-609(a)(2)

The use of technology to disable collateral is unlikely to cause any actual violence or create a threat of immediate violence. Rather, the most serious potential harm—indeed, the harm likely to result—from disabling equipment will be economic harm. A business presumably cannot function properly without its equipment, and its economic activity and profitability will therefore be disrupted. However, courts may be somewhat hesititant to find a breach of peace in these situations. They may be unwilling to punish a creditor solely because an insolvent debtor, who already could not afford to run its business, continued to do so after default and incurred a loss. That is not to say actionable harm will never occur, but rather that courts may require some further action by the creditor to find a breach of the peace from using self-help.

Additionally, as discussed above, courts tend to impose limits on a debtor's right to protest the repossession of collateral.[42] In the technology realm, the debtor's ability to protest is almost

41. When speaking in terms of technology, there can almost never be such thing as "remote repossession" of collateral. While repossession is permitted under §9-609(a)(1), a creditor will not be able to use a computer to virtually take back a piece of manufacturing equipment. While it may use technology to *locate* its collateral, technology is really only applicable to its ability to render it unusable from a remote location.

42. *Koontz*, 661 N.E.2d at 1174 (holding allowing a debtor to make any protest "would be to invite the ridiculous situation whereby a debtor could avoid a deficiency judgment by merely stepping out of his house and yelling once at a nonresponsive repossessor. Such a narrow definition of the conduct necessary to breach the peace would, we think, render the self-help repossession statute useless.").

completely non-existent. There is little, if any, opportunity for interaction between the debtor and the creditor wherein the former may voice his protest. Though a creditor generally is not required to allow an absent debtor to protest, the debtor does normally have a right to do so when he is in fact present. Often times the debtor may be present when the remote disablement occurs, but the creditor could be thousands of miles of away when he exercises his self-help rights. In that situation, the debtor may protest ad nauseum, but those protests will not fall on any ears, let alone on deaf ones. While removing the debtor from the equation might seem to be an easy way for a creditor to avoid any potential breach of the peace issues, courts may be reluctant to entirely strip the debtor of his right to protest. Courts may impose certain requirements on creditors to somehow afford the debtor his right to protest, at least constructively, before remote disablement can occur.

Lastly, issues regarding entry onto a debtor's property still remain. Arguably, a signal sent through the air or over wires to disable collateral is not an actual physical entry in the same sense as someone physically entering a business's premises and unplugging manufacturing machinery. However, most people would still consider it an invasion into their personal space and find it just as intrusive. To use a non-business analogy, someone who spies on you by hacking your computer is just as guilty of espionage as someone hiding in your closet and listening to your conversations.[43] A police officer using infrared technology to catch you growing marijuana plants without a search warrant is just as responsible for an improper search and seizure as the officer who goes into your house and sees them without a warrant.[44]

Thus, it stands to reason that a secured creditor who uses telephone lines, cable lines, or wireless signals to go into a business and disable manufacturing equipment will face the

43. *See* 18 U.S.C.A. § 2511(1)(a) (West 2003) ("[A]ny person who intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication shall be punished.").

44. Kyllo v. United States, 533 U.S. 27, 40 (2001).

same repercussions as a creditor who goes through the front door of the factory. This is perhaps the most important consideration for a creditor in these circumstances, as remotely disabling devices is one of a creditor's most important rights because of its ease and lack of physical interaction. However, if such action is viewed as an unconsented physical entry onto the debtor's property, the creditor faces liability for breach of the peace and wrongful disablement.

B. Legislative Reponses from Connecticut and Colorado

In response to some of these perceived issues regarding technological self-help, two states included additional provisions in Article 9 to prevent potential harm.[45] Under the respective statutes, there are requirements for creditors to ensure there are fewer breaches of the peace. Connecticut's statute is by the far the most comprehensive in this regard.[46] In addition to the uniform provisions of § 9-609, it added the following subsection:

> (d)(1) In this subsection, "electronic self-help" means the use of electronic means to exercise a secured party's rights under subsection (a) . . . , and "electronic" means relating to technology that has electrical, digital, magnetic, or wireless optical electromagnetic properties or similar capabilities. . . .
>
> (2) Electronic self-help is permitted only if the debtor separately agrees to a term of the security agreement authorizing electronic self-help that requires notice of exercise as provided in subdivision (3) of this subsection. . . .
>
> (3) Before resorting to electronic self-help authorized by a term of the security agreement, the secured party shall give notice to the debtor stating:
>
> (A) That the secured party intends to resort to electronic self-help as a remedy on or after fifteen days following

45. Connecticut has done so in title 42a, section 9-609(d) of the Connecticut General Statutes, CONN. GEN. STAT. ANN. § 42a-9-609(d) (West Supp. 2008), and Colorado's response appears in title 4, section 9-609(e) of the Colorado Revised Statutes, COLO. REV. STAT. § 4-9-609(e) (2008).

46. CONN. GEN. STAT. ANN. § 42a-9-609.

> communication of the notice to the debtor;
>
> (B) The nature of the claimed breach which entitled the secured party to resort to self-help; and
>
> (C) The name, title, address and telephone number of a person representing the secured party with whom the debtor may communicate concerning the security interest.
>
> (4) A debtor may recover direct and incidental damages caused by wrongful use of electronic self-help. The debtor may also recover consequential damages . . . even if such damages are excluded by the terms of the security agreement.
>
> (5) Even if the secured party complies . . . electronic self-help may not be used if the secured party has reason to know that its use will result in substantial injury or harm to the public health or safety or grave harm to the public interest substantially affecting third parties not involved in the dispute.[47]

It is apparent this additional subsection is a direct response to the three potential problems with breaching the peace discussed above.

First, subdivision (d)(5) specifically responds to the potential harm arising from the disablement.[48] While a remote threat of harm will not sustain a breach of the peace, this provision puts the burden on the creditor to not engage in this action where he has reason to know injury will result. By its language, it requires the possibility of harm to be far more than remote by necessitating a finding that the creditor had reason to know it *will* result. Thus, without any harm, a creditor cannot violate this section. Fortunately for the creditor, it will incur liability under this subdivision only if harm actually does occur *and* it at least had reason to know it would occur.

Second, the statute also provides a means for the debtor to protest the pending disablement. Subdivision (d)(3) requires the creditor to notify the debtor of its intentions to exercise its rights

47. *Id.* § 42a-9-609(d).
48. *Id.* § 42a-9-609(d)(5).

under the U.C.C., state its reason for doing so, provide contact information for the creditor or its agent, and give fifteen days notice.[49] The debtor therefore has all the information necessary to protest the impending action: time, reason, and identity of a person to contact. While the statute does not say the creditor must cease his actions upon protest, it certainly ensures the debtor has the ability to voice his protest and perhaps trigger a wrongful disablement.

Finally, the statute also addresses the issue of "entry" without consent under (d)(2).[50] As previously discussed, the use of technology to enter into another's home is analogous to actual, physical entry. Under subdivision (d)(2), the debtor must separately agree to the term permitting the use of electronic self-help in the agreement, thereby effectively consenting to any entry.[51] However, the statute does provide a creditor-friendly presumption that the debtor has agreed to the term if it is included in the agreement specifically authorizing the use of electronic self-help.[52] While the *Girard* theory discussed above places a limit on the debtor's agreement to entry, to any extent a court finds that the agreement allowed a "home to be broken open and entered for the purpose of forcibly taking possession of property therein,"[53] the public policy argument advanced in *Girard* to strike such a provision would be severely conscribed by the mere fact the legislature not only explicitly permits the agreement but requires it.

By comparison, Colorado's statute is less demanding than Connecticut's. However, it is narrowly tailored to address a specific issue with regard to electronic self-help. It provides:

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49. *Id.* § 42a-9-609(d)(3).

50. *Id.* § 42a-9-609(d)(2).

51. *Id.*

52. *Id.* While that subsection also provides that this presumption does not apply to consumer transactions, it is irrelevant to this discussion, as consumer transactions by definition do not involve equipment within the meaning of the U.C.C. However, it remains unclear as to when that presumption would not apply because § 9-609(a)(2) is limited to equipment, which by definition does not include consumer goods, *id.* § 42a-9-102(a)(33), and electronic self-help is not truly applicable to actual repossession of collateral.

53. Girard v. Anderson, 257 N.W. 400, 402-03 (Iowa 1934).

> In exercising its rights under paragraph (2) of subsection (a) [specifically referring to the ability to disable collateral], a secured party may not disable or render unusable any computer program or other similar device embedded in the collateral if immediate injury to any person or property is a reasonably foreseeable consequence of such action.[54]

The language of the statute purports to limit its application to a "computer program or other similar device embedded in collateral,"[55] but that actually covers the vast majority, if not the entirety, of electronic means of self-help in this regard. While the statute does not address two of the major issues surrounding a breach of the peace from self-help, it does address what are arguably the most important to society: violence and harm. It is almost identical to subdivision (d)(5) of Connecticut's statute in that it prevents a creditor from proceeding where it is reasonably foreseeable, as compared with "has reason to know" in Connecticut,[56] immediate injury to person or property will result.

Currently, no court has dealt with either of the non-uniform provisions of § 9-609 in either Connecticut or Colorado. However, the legislatures' decision to include these requirements for creditors reflects a clear concern over what a creditor can do and the consequences of it acting at arm's length and not being present when it renders the equipment unusable. While these are the only two states to have created these statutory limitations, it would not be surprising to see other jurisdictions begin to impose similar restrictions as they grapple with the expansion of technology.

C. Judicial and Legislative Responses to Similar Issues Involving Technology and Self-Help Beyond the Confines of § 9-609

In all areas of the law, the impact of technology has confused lawyers and judges alike. Over the course of modern civilization, society and the law have grappled with and incorporated a wide

54. COLO. REV. STAT. § 4-9-609(e) (2008).
55. *Id.*
56. CONN. GEN. STAT. ANN. § 42a-9-609(d)(5).

range of technological innovations such as printing, typewriting, cars, telephones, and computers.[57] As one scholar stated, technology's impact in the law is really just "old wine in new bottles,"[58] suggesting an application of established legal principles to new technologies is an appropriate response to these issues. While there is very little case law for remote disablement of equipment, courts and scholars have addressed other similar issues regarding technology and its impact on various other commercial transactions, which serve as a useful guide in determining how these new issues will be dealt with.

One of the more common situations in which courts have had to deal with such technology relates to starter-interrupt devices. These are devices creditors can place in cars to disable the starter in the event the debtor does not make payments. The court in *In re Hampton*[59] provided a very thorough discussion of how these devices generally work.[60] In the opinion of some scholars, "[s]o long as a creditor treats the use of the device to render a vehicle inoperable as a repossession and discloses the terms and conditions of the installation of the device to the consumer, existing state laws support the legality of their use in all jurisdictions."[61] Section 9-609(a)(2) "most accurately describes the actions taken by a creditor when using a started interrupt device," however, it does not explicitly apply because cars are generally consumer goods and not equipment.[62] While a motor vehicle may be classified as equipment depending on the nature

57. *See generally* Susan W. Brenner, *Law in an Era of Pervasive Technology*, 15 WIDENER L.J. 667 (2006).

58. *Id.* at 784.

59. 319 B.R. 163 (Bankr. E.D. Ark. 2005). The court did not question the use of the device, but found against the creditor for using it in violation of an automatic stay resulting from the debtor's bankruptcy proceedings. *Id.* at 174.

60. *Id.* at 166-67. Typically, the device is preprogrammed to require the debtor to enter a new code in it every thirty days. The debtor receives these codes when he or she makes a payment and enters it into the device. If the proper code is not entered within seven to ten days after the payment due date, then the vehicle's starter will be disabled. The device has a warning system to let the debtor know of an impending shut off and also comes equipped with an emergency code to restart the car for twenty-four hours if necessary. *Id.*

61. Thomas B. Hudson & Daniel J. Laudicina, *The Emerging Law of Starter Interrupt Devices*, 61 BUS. LAW. 843, 854 (2006).

62. *Id.* at 846.

of its use,[63] it has been said that § 9-609(a)(2) *should* apply simply by analogy.[64] Regulators in many states expressed concerns about the use of these devices, yet scholars have concluded creditors could meet any grace period, notice, and right to cure provisions under state law and not run afoul of the U.C.C.[65]

Perhaps the biggest and most sweeping attempt to limit electronic self-help came with what began as the proposed Article 2B to the U.C.C. and ended as the Uniform Computer Information Transaction Act (UCITA).[66] The UCITA billed itself as "the first uniform contract law designed to deal specifically with the new information economy"[67] and covered computer software transactions. Similar to how creditors can install devices to remotely disable a piece of equipment in the event of default, a software vendor can write a kill switch into the software code itself causing the software to immediately shut down in the event of non-payment. The original draft of the UCITA provided some limitations on the use of electronic self-help including separate assent to the term in the contract, notice to the consumer prior to use, and a requirement that the vendor not engage in it if it will result in substantial harm to the public.[68] Interestingly, this is nearly identical to the limitations imposed by Connecticut in its Commercial Code discussed above. Some experts predicted the UCITA would become the law in many states by 2000.[69] However, currently only two states have adopted it: Virginia[70] and Maryland.[71] In 2002, the National Conference of Commissioners on Uniform State Laws amended

63. *See* Nat'l Bank of Commerce v. First Nat'l Bank & Trust Co. of Tulsa, 446 P.2d 277, 281 (Okla. 1968).

64. Hudson & Laudicina, *supra* note 61, at 846.

65. *Id*. at 850-51.

66. *See* Robbin Rahman, *Electronic Self-Help Repossession and You: A Computer Software Vendor's Guide to Staying Out of Jail*, 48 EMORY L.J. 1477, 1490 (1999).

67. U.C.I.T.A. Prefatory Note (Official Draft 2002).

68. U.C.I.T.A. § 816 (Official Draft 2000).

69. Rahman, *supra* note 66, at 1490.

70. VA. CODE ANN. § 59.1-501.1, *et seq.* (LexisNexis 2006).

71. MD. CODE ANN. COM. LAW § 22-101, *et seq.* (LexisNexis 2005).

the official draft of the UCITA to explicitly state "[e]lectronic self-help is prohibited."[72] As of yet, no state has adopted the revised UCITA. While the official comments do not explain the decision to remove the ability to use electronic self-help completely, it is interesting to note the trend that has occurred through the drafting of the UCITA: no specific restrictions to some restrictions to a complete bar on its use.

Prior to the UCITA, courts were very suspicious when it came to kill switches in computer programs. The seminal case addressing the use of a computer lock-up device is *Clayton X-Ray Co. v. Prof'l Sys. Corp*.[73] There, the parties entered into a purchase agreement for a computer system and software to manage Clayton's business operations.[74] Unbeknownst to Clayton, Professional installed a lock-up program that would prevent Clayton from accessing its files after a certain date due to non-payment.[75] After Professional triggered this program when Clayton refused to pay because of continuing bugs in the system that were never repaired, Clayton sued for, *inter alia*, conversion of its computer system.[76] The court concluded Professional had "no legal right, or any colorable legal right, to lock up Clayton's computer system"[77] and held consideration of punitive damages was appropriate.[78] Other cases have included the granting of an injunction against a software company for use of a lock-up device where the plaintiff did not know of its existence,[79] a remand to determine if a contract provision

72. U.C.I.T.A. § 816(b) (Official Draft 2002). Comment 5 to this section states: "Nothing in this section alters the rights of a seller, lessor or a secured party to take possession or render goods unusable without removal and without judicial process if that can be done with no breach of the peace (see e.g., UCC §§ 2A-525; 9-609 (directly or via 2-401))." While the UCITA does not actually affect rights under Article 9, the provisions are analogous and serve as a good comparison.

73. 812 S.W.2d 565 (Mo. Ct. App. 1991).

74. *Id.* at 566.

75. *Id.*

76. *Id.*

77. *Id.* at 567.

78. *Id.*

79. Frank & Sons, Inc. v. Info. Solutions, Inc., No. 88-C-1474-E, 1988 WL 1107405, at *1 (N.D. Okla. Dec. 8, 1988). *Compare Frank & Sons with* Am.

permitting the vendor to remove source code in the event of non-payment was entered into under economic duress because the buyer had no other choice,[80] and even a case where the court found for the plaintiff law firm when the software vendor installed a lock-up device set to trigger solely upon the reaching of a certain claim number as a hope of generating more revenues through software support.[81] In that last case, the court regretted it was unable to award more punitive damages for the defendant's conduct because it was limited to the amount in the complaint.[82]

V. WHAT A CREDITOR NEEDS TO DO TO PROTECT ITSELF

Unfortunately for creditors, courts vary on how they define breach of the peace and apply different standards.[83] However, because the right to use self-help under Article 9 is one of the more basic ones available to a creditor, it is important to know what one can do to help prevent liability for breach of the peace. As previously discussed, it may appear as though remotely disabling collateral will avoid a breach of the peace because of a lack of confrontation, minimal harm, and absence of physical entry onto the debtor's property. However, it is apparent that courts and legislatures are not taking the issue of electronic self-help lightly and are ready, willing, and able to impose liability on creditors for wrongful use of self-help.

Though courts have not had an opportunity to address this specific issue, their treatment of similar issues is highly indicative of how they will deal with these problems when they arise. Courts have made it clear they are not willing to allow a

Computer Trust Leasing v. Jack Farrell Implement Co., 763 F. Supp. 1473, 1492 (D. Minn. 1991) (holding software deactivation for non-payment was appropriate where contract called for deactivation, plaintiff knew of this term in the contract, and defendant gave plaintiff notice of intent to deactivate if payment was not received).

80. Art Stone Theatrical Corp. v. Technical Programming & Sys. Support, Inc., 549 N.Y.S.2d 789, 790-91 (N.Y. App. Div. 1990).

81. Werner, Zaroff, Slotnick, Stern & Askenazy v. Lewis, 588 N.Y.S.2d 960, 961 (N.Y. Civ. Ct. 1992).

82. *Id.* at 963.

83. *See supra* Part III.

creditor to engage in technological self-help where the debtor had no knowledge of the existence of that right.[84] While future courts may not call this breach of the peace or something analogous to wrongful repossession, they could very well follow *Clayton X-Ray*'s language in holding the creditor has "no legal right, or any colorable legal right,"[85] to engage in such self-help. Courts are very conscious of protecting debtors from creditors who attempt to swoop in seemingly out of nowhere—in fact literally out of nowhere in these situations because the debtor cannot see or interact with the creditor—and prevent his use of the collateral.

What therefore appears to be the easiest way for a creditor to avoid liability is to include in the contract its right to pursue certain avenues of self-help. While such is required in states like Connecticut, it is highly recommended in other jurisdictions where a court's reaction without any legislative mandate is uncertain. As the computer software deactivation case *American Computer Trust Leasing v. Jack Farrell Implement Co.*[86] demonstrated, a court is more willing to accept the use of self-help where both parties willingly agreed to the provisions and the debtor even has notice of the impending deactivation.[87] Connecticut even recognized the value of merely including these provisions by creating a presumption that the debtor has agreed to a term authorizing electronic self-help if the agreement specifically states it.[88] However, this is not universal, and there is no statutory presumption in any other states. Yet, the creditor includes terms in its contract meeting all state requirements for cure, etc., and terms similar to those required by Connecticut preserving the debtor's right to protest and consenting to entry by the creditor, there should be few, if any, issues with respect to

84. *See Frank & Sons*, 1988 WL 1107405, at *1 (declaring installing a lock-up program without the other party's notice "void as a matter of public policy"); *Lewis*, 588 N.Y.S.2d at 962 (couching the defendant's act of secretly installing a computer lock-up program as "morally culpable," "evil and reprehensible," and almost criminal).

85. Clayton X-Ray Co. v. Prof'l Sys. Corp., 812 S.W.2d 565, 567 (Mo. Ct. App. 1991).

86. 763 F. Supp. 1473 (D. Minn. 1991).

87. *Id.* at 1492.

88. CONN. GEN. STAT. ANN. § 42a-9-609(d)(2) (West Supp. 2008).

liability for self-help. These provisions should be clearly stated and not just boilerplate language that blends in with the rest of the contract. Creditors drafting the security agreement are in a great position to state specifically what rights they have and on what terms they intend to exercise them. Any and all ambiguity should be avoided as it generally will be interpreted against the drafter and may result in a judgment in favor of the debtor when these rights are exercised. Of course, such forthrightness is not a guarantee of success. However, if done correctly and reasonably, it will help ensure the debtor is made aware of this right and potentially removes future challenges to the unconscionability of the creditor's actions.[89]

Of course there are limits to what parties can contract for, and creditors must be aware and work within the confines of the general guiding principles of contract law in each jurisdiction. Without the ability to insert secret terms into the contract or force these terms upon debtors, all that remains is full disclosure. In the long run, it will be best for the creditor to be open with the potential debtor and disclose all the terms of the contract including the provisions for the right to self-help; it should explain what the terms are and be clear as to when and why they can be used. After all, in the event of default, self-help can reduce litigation costs for both parties. And for companies worried about losing potential customers and deals due to threats of self-help: anyone who refuses to deal with you just because you want to include a good faith, reasonable, and practical term for self-help is probably not the type of client that is best for the business.

As a word of caution, however, all creditors should pay close attention to changes in the law as courts begin to resolve these issues. On the face of § 9-609(a)(2), it appears creditors can absolutely proceed with self-help and render the collateral in question unusable. But, as more creditors exercise technological self-help and the ramifications of it become apparent, courts and

89. As one scholar stated, "[b]ecause the law has not evolved to the point of addressing every point that may concern a vendor contemplating the use of disabling devices [in software], contractual strategies represent the closest thing to certainty a vendor is likely to find." Rahman, *supra* note 66, at 1507.

legislatures may become more inclined to limit the right in light of this new understanding. While judges are extremely appreciative of self-help in some instances, as it can help reduce their case load and ease the over-booked court system, they are very wary of parties taking the law into their own hands. Additionally, other states may soon begin to follow the lead of Connecticut and Colorado in imposing statutory restrictions on creditors. Lurking in the background of all of this is the UCITA. While only two states have enacted the original draft containing some limitations on a software vendor's ability to deactivate software, the fact that the proposed draft now explicitly and entirely removes a vendor's ability to use electronic self-help is one that could easily migrate into the Article 9 secured transactions world as the law continues to evolve in the coming years. Creditors should use these changes while observing the general principles oulined herein when drafting their security agreements and when deciding how to proceed upon default. The developing trend in the law is to limit the right to technological self-help, but a freely consented to provision providing for this right based on tested principles should survive along with the freedom to contract.

VI. CONCLUSION

As the Supreme Court once stated, "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology."[90] Just as Chief Justice Roberts predicted, courts will have to revisit and rethink the right to self-help in light of technological advance. While a question of self-help under the U.C.C. does not on its face seem to bring up the same sweeping constitutional concerns as wiretaps, courts will be forced to adapt this area of law to the world around them. They previously have approached the emergence of technology into the world of commercial transactions with a fairly cautious and wary eye and have oftentimes erred on the side of the debtor.[91] However, that

90. Kyllo v. United States, 533 U.S. 27, 33-34 (2001).

91. *See supra* Part IV.C.

does not mean self-help is finished. As it is an efficient way for parties to resolve disputes, if executed properly, it is fairly certain it will remain a viable right. Notwithstanding, creditors must use remote disablement of equipment with some caution and ensure that their contract provisions adequately protect them against the major issues associated with the use of self-help. If technology's impact on the law truly is "old wine in new bottles,"[92] the established law of each jurisdiction regarding breach of the peace should serve as a guide to creditors and courts navigating the technology universe and help determine what can and cannot be done. Those creditors who embrace technology and openly incorporate it into their traditional practices will reap the benefits of this time-honored right; those who do not and try to circumvent the rules of self-help and abuse the availability of this technology may very well find themselves at the mercy of the courts.

92. Brenner, *supra* note 57, at 784.

A CALL FOR THE PROPER RECOGNITION OF HABEAS CORPUS IN THE 21ST CENTURY

Adam Marinelli[*]

I. INTRODUCTION 689
II. HISTORICAL BACKGROUND 691
A. English Origins 691
B. Constitutional Inclusion 692
III. HABEAS CORPUS IN THE TWENTY-FIRST CENTURY 694
A. Pre-*Boumediene* Habeas 694
B. *Boumediene* and its Effect on Habeas Corpus 701
IV. THE PROPER RECOGNITION OF HABEAS CORPUS . 704
V. CONCLUSION 707

I. INTRODUCTION

Habeas corpus, that simple procedural mechanism that stands between the rights which we hold dear and the abyss, "finds its place in the 'bright constellation' of American rights to which–in the words of Jefferson's first inaugural address–'the wisdom of our sages and the blood of our heroes have been devoted.'"[1] With the exception of an unlawful killing, the indefinite detainment of a person without explanation or due process of law is the most intolerable of crimes that a government can commit. In his Federalist Paper No. 84,[2] Alexander Hamilton wrote that "[t]he subjecting of men to . . . the practice of arbitrary imprisonments [has] been, in all ages, the favorite and most formidable instrument[] of tyranny."[3] While Americans

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[*] J.D. Candidate, 2009, Charleston School of Law; B.A. Philosophy, 2002, Furman University. I would like to thank my family for their unparalleled patience and support, as well as the members of the *Charleston Law Review* for all of their time and hard work.

1. Arthur J. Goldberg, *Foreword* to THE HUMAN RIGHT TO INDIVIDUAL FREEDOM 7 (Luis Kutner ed., Univ. of Miami Press 1970).

2. THE FEDERALIST No. 84 (Alexander Hamilton).

3. JAMES P. PFIFFNER, POWER PLAY: THE BUSH PRESIDENCY AND THE

have long treasured the nostalgic ideology of the framers of the Constitution, we often assume that those principles are so firmly established that they shall exist in a vacuum indefinitely. On the contrary, the Constitution, in its most visceral and basic form, is a social contract that requires constant and vigorous defense against erosion. On being asked whether the Constitutional Convention had created a republic or a monarchy, Benjamin Franklin prophetically replied, "[a] republic, if you can keep it."[4]

The current state of global affairs, namely the dynamic effects of terrorism, has led to a redefinition of the traditional notions of liberty as somehow mutually exclusive of national security. In the fear and anger that arose after the attacks of September 11, 2001, the American public quickly and understandably ceded the President unprecedented unilateral powers to defend the country from further attacks. Government conduct that normally would send shockwaves of outrage throughout the country such as secret wire-tapping, racial profiling, coercive interrogation tactics, torture, and indefinite detention of suspects, has casually been deemed necessary in the fight against international terrorism. The indefinite suspension of the writ of habeas corpus for those deemed "enemy combatants" by the Bush Administration has precipitated a sharply divided current of jurisprudence and a laundry list of legislative acronyms. The issues that could be explored in examining the executive powers claimed in the last eight years present a vast spectrum of constitutional issues. With respect to brevity, this Comment will focus solely upon the privilege of habeas corpus, arguing the unconstitutionality of the suspension of this right as a contextual footnote in the "war on terror." This discussion will also focus on the implications and need for such a right to be attached through a modern comprehensive "control" test, as opposed to a sovereignty test, for all prisoners held by the United States government in relation to this indefinite conflict, regardless of citizenship or extraterritorial jurisdiction, for a proper preservation of the fundamental American notion of liberty.

CONSTITUTION 84 (2008).

4. *Id.* at 56.

II. HISTORICAL BACKGROUND

A. English Origins

From the Latin phrase literally translated as "you have the body," the privilege of habeas corpus has common law origins from the early constitutional monarchies of medieval England. When Henry the First came to power in 1100, he formally agreed to the issuance of a *Charter of Liberties*, which recognized that the king's authority was not absolute and delineated a number of legal rules.[5] This set a precedent for the principle of the rule of law.[6] More than a century later in 1215, the Magna Carta was written and circulated throughout England. This list of articles, which was negotiated between King John and disgruntled barons attempting to reassert their rights and place limitations upon the monarch's authority, was not originally intended to be a sweeping declaration of individual rights.[7] From its language, however, many of the most important principles of limited government have been derived.[8] Section 39 of the Magna Carta states:

> No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we [the king] proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.[9]

As the rule of law grew stronger in Britain, the earliest forms of the writ of habeas corpus began merely as an administrative tool of the courts.[10] The writ was used in various forms and fell into several categories.[11] One particular form of the writ slowly

5. *Id.* at 35.
6. *Id.*
7. *Id.* at 36.
8. *Id.*
9. *Id.*
10. LARRY W. YACKLE, FEDERAL COURTS: HABEAS CORPUS 10 (2003).
11. *Id.* (citing 3 WILLIAM BLACKSTONE, COMMENTARIES 129-32); The varying forms included: "habeas corpus *ad prosequendum, testificandum,* and *deliberandum* (to produce a person to be prosecuted, to give testimony, or to be

evolved into a mechanism that prisoners could use to obtain judicial orders requiring the officers detaining them to bring them before the court for determining the cause of their detention.[12] This form of the writ, known as habeas corpus *cum causa*, is the earliest precursor of the modern writ in English common law—habeas corpus *ad subjiciendum et recipiendum*.[13] As it evolved in English courts, the *subjiciendum* writ became a procedural means to force the King to defend the lawfulness of his actions.[14] It quickly became a bulwark of individual autonomy. The legal scholar, Sir William Blackstone declared, "[o]f great importance to the public is the preservation of this personal liberty; for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper . . . there would soon be an end of all other rights and immunities."[15]

B. Constitutional Inclusion

Upon securing independence from British rule, the framers of the United States Constitution designed a system of government with a firm cognizance of the centuries of conflict between individual rights and the power of the monarchy. With a full understanding of the necessity for limiting executive power, the framers adopted the Bill of Rights and a separation of powers system that placed significant checks on the government. While formulating this fledgling government, the framers drew from a host of political philosophers, such as John Locke as well as Montesquieu, who declared: "When the legislative and executive powers are united in the same person, or in the same body of

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tried in the proper jurisdiction); habeas corpus *ad satisfaciendum* (to produce a person to be charged with process of execution); habeas corpus *ad faciendum et recipiendum* (to move a case involving a person to Westminster); and habeas corpus *ad respondendum* (simply to produce the body of a person in court)." *Id.*

12. YACKLE, *supra* note 10, at 10.

13. *Id.*; The *subjiciendum* writ settled jurisdictional disputes between law courts (King's Bench and Common Pleas) and courts of equity (Chancery itself and royal prerogative courts), as well as establishing limitations on the Crown to imprison its subjects. *Id.* at 11-12.

14. *Id.* at 12.

15. 3 WILLIAM BLACKSTONE, COMMENTARIES 135.

magistrates, there can be no liberty. . . ."[16] The threat of tyranny, a menace well understood by the Colonialists, was to be kept at bay by a system of government founded upon limiting power. One form of this limitation is the writ of habeas corpus. Known as the "Great Writ," the sole and unbridled purpose of habeas corpus has been to allow a person imprisoned by the Executive to argue before an independent authority that his detention is an unjust incarceration—thus remaining true to the political doctrine of the separation of powers.

Within the constitutional framework, habeas corpus is impliedly recognized as a right possessed by all, as its only mention is a restriction on Congress's power to suspend it. Article I, Section 9 of the Constitution states in relevant part: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[17] It is clear it was the framers' intent to permit only Congress to suspend the writ based upon the placement of the clause in Article I, despite the lack of Congress's mention in the language of the clause. This decision closely resembles the British system and its sole allowance of the Parliament to suspend habeas corpus only in extreme emergencies. Blackstone recognized the need for such governmental mobility as he wrote:

> And yet sometimes, when the state is in real danger, even this [that is, executive detention] may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient; for it is the parliament only, or legislative power, that, whenever it sees proper, can authorize the crown, by suspending the *habeas corpus* Act for a short and limited time, to imprison suspected persons without giving any reason for so doing. . . . [T]his experiment ought only to be tried in case of extreme emergency; and in these the nation parts with its liberty for a

16. *See* PFIFFNER, *supra* note 3, at 62 (citing BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 136-37).

17. U.S. CONST. art. I, § 9, cl. 2.

while, in order to preserve it for ever.[18]

Upon ratification of the Constitution, this core tenet of liberty and limited government became protected by the American rule of law. Although presumed so fundamental that an express guarantee was not included, in addition to the Suspension Clause, the United States has also included habeas corpus in various statutory forms since the Judiciary Act of 1789.[19] Habeas corpus is, however, "a writ antecedent to statute, . . . throwing its root deep into the genius of our common law."[20]

III. HABEAS CORPUS IN THE TWENTY-FIRST CENTURY

A. Pre-*Boumediene* Habeas

After the attacks on September 11, 2001, the climate of fear and anger that resounded throughout the American public resembled the reaction of the country to the bombing of Pearl Harbor on December 7, 1941. These were not the acts of a deranged psychotic like Timothy McVeigh or the bombing of a far-off embassy. These were acts of war that struck too close to home for all Americans. Instantly, the landscape of American politics, foreign diplomacy, and national security were drastically altered. In a time of terror, the public was justifiably willing to grant the Executive much authority in the hope of safeguarding the security of a frightened nation. The fear of the public was reflected in congressional campaigns and voting patterns in Congress. With a narrow majority, Republicans supported President Bush by passing most of the legislation that he sought. Democrats supported much of it as well, basing their decisions on the same national security issues and the political consequences of resisting the necessary reactions to such attacks. Congress passed the Authorization to Use Military Force (AUMF) on September 18, 2001, declaring:

18. 3 WILLIAM BLACKSONE, COMMENTARIES 136-37.

19. PFIFFNER, *supra* note 3, at 92 (citing Charles E. Wyzanski Jr., *Writ of Habeas Corpus,* 243 ANNALS AM. ACAD. POL. & SOC. SCI. 101, 103 (1946)).

20. Williams v. Kaiser, 323 U.S. 471, 484 n.2 (1945).

> [T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[21]

As the United States began its attacks against al Qaeda in Afghanistan, and subsequently Iraq, the country was realizing a conflict unlike any it had been faced with before. Likewise, the profound authority the Executive claimed in addressing these conflicts resulted in a vast number of constitutional issues that the courts had not yet addressed.

On November 13, 2001, President Bush issued a military order declaring that suspected terrorists could be detained and put on trial for violations of the laws of war.[22] Within a year, Guantanamo Bay held approximately 600 detainees, most of whom were captured in Afghanistan by tribal allies and handed over to United States troops.[23] The base at Guantanamo Bay, forty-five square miles of land and water along the southeastern coast of Cuba, is occupied by the United States military pursuant to a 1903 Lease Agreement executed with the newly independent Republic of Cuba in the aftermath of the Spanish-American War.[24] The intention of the administration was to keep the prisoners out of reach of United States courts and try these detainees by military tribunal for war crimes,[25] but before the tribunals were established, several prisoners challenged their detainment in federal court.[26]

Sixteen Guantanamo prisoners appealed for writs of habeas corpus, claiming they were not terrorists but were simply

21. Authorization to Use Military Force, S.J. Res. 23, 107th Cong. § 2(a) (2001).

22. Military Order, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57833 (Nov. 13, 2001).

23. PFIFFNER, *supra* note 3, at 100.

24. *See* Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, Art. III, Feb. 23, 1903, T.S. No. 418.

25. *See* PFIFFNER, *supra* note 3, at 99.

26. *See* Rasul v. Bush, 215 F. Supp. 2d 55, 57-58 (D.D.C. 2002).

innocent civilians who had been turned over to the United States by bounty hunters.[27] The District Court of the District of Columbia dismissed the claims for lack of jurisdiction on the basis that the naval station was outside the sovereign territory of the United States.[28] The Court of Appeals for the District of Columbia Circuit affirmed.[29] Both lower courts based their decision upon their interpretation of *Johnson v. Eisentrager*,[30] a decision from 1950 that established that foreign nationals captured outside the United States' sovereign territory could not appeal to United States courts.[31] In *Eisentrager*, the court held that German soldiers seized in China by United States forces after World War II for continuing to fight after Germany's surrender could be tried by military commission and did not have the right to appeal to civilian courts for writs of habeas corpus.[32] The Supreme Court based its decision in *Eisentrager* on the jurisdictional rationale from a similar case, *Ahrens v. Clark*,[33] which interpreted the § 2241 habeas statute's phrase "within their respective jurisdictions" as requiring the petitioners' actual presence within the territorial jurisdiction of the court.[34]

Upon granting certiorari for the sixteen Guantanamo prisoners in *Rasul*, the Supreme Court reversed the lower court's decision, holding that 28 U.S.C. § 2241 extended statutory habeas corpus jurisdiction to Guantanamo Bay.[35] In doing so, it distinguished *Eisentrager* on three fundamental grounds. First, the Court differentiated the German prisoners from Guantanamo detainees, stating that:

> Petitioners in these cases . . . are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United

27. *Id.* at 60-61.
28. *Id.* at 72-73.
29. Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003).
30. 339 U.S. 763 (1950).
31. *See id.* at 766.
32. *Id.* at 781.
33. 335 U.S. 188 (1948).
34. Rasul v. Bush, 542 U.S. 466, 476-77 (2004) (citing *Ahrens*, 335 U.S. at 192).
35. *Rasul*, 542 U.S. at 484.

> States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.[36]

Second, the court noted that the *Eisentrager* decision focused on the *constitutional* entitlement to habeas corpus and failed to provide any viable instruction on *statutory* entitlement to the privilege.[37] Finally, the majority illuminated the fact that the *Ahrens* "jurisdictional presence" rationale had been overruled in 1973 by *Braden v. 30th Judicial Circuit Court of Kentucky*.[38] In *Braden*, the court reasoned that a prisoner's presence was not "an invariable prerequisite."[39]

> Rather, because "the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody," a district court acts "within [its] respective jurisdiction" within the meaning of [section] 2241 as long as "the custodian [of the prisoner] can be reached by service of process."[40]

Once *Rasul's* jurisdictional issue was decided, the petitioners' cases were consolidated and heard in two separate proceedings, with both coming to antithetical conclusions concerning available rights for detainees.[41] Both proceedings were pending appeal when Congress passed the Detainee Treatment Act of 2005 (DTA).[42] The effects of that legislation, as set forth below, had a strong effect upon the right of a detainee to appeal for a writ of habeas corpus in federal court.

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36. *Id.* at 476.

37. *Id.*

38. *Id.* at 478-79 (citing Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 494-95 (1973)).

39. *Rasul*, 542 U.S. at 478 (citing *Braden*, 410 U.S. at 495) (quotations omitted).

40. *Rasul*, 542 U.S. at 478-79 (citing *Braden*, 410 U.S. at 494-95) (quotations omitted).

41. Boumediene v. Bush, No. 06-1195, slip op. at 4 (U.S. June 12, 2008) (citing Khalid v. Bush, 355 F. Supp. 2d 311, 314 (D.D.C. 2005); *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 464 (D.D.C. 2005)).

42. *Boumediene*, No. 06-1195, slip op. at 4.

Just prior to the passage of the DTA, the case of *Hamdi v. Rumsfeld*[43] was also heard by the Supreme Court in 2004. In that decision, which involved a United States citizen captured abroad, five Justices recognized that while detainment of individuals captured while fighting against the United States in Afghanistan for the duration of the conflict is a "fundamental and an accepted incident to war,"[44] the "indefinite detention for the purpose of interrogation is not authorized."[45] Justice O'Connor stated:

> [T]he most elemental of liberty interests [is] the interest in being free from physical detention by one's own government [without due process of law]. . . . History and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat. . . . We reaffirm today the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law.[46]

The court recognized the impracticalities of extending such privileges in a time of war, holding that the requirement of due process does not apply to "initial captures on the battlefield," but "is due only when the determination is made to *continue* to hold those who have been seized."[47] In a repudiation of the government's argument that the courts do not have jurisdiction over detainees, Justice O'Connor declared:

> [W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. . . . We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. . . . Unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of

43. 542 U.S. 507 (2004).
44. *Id.* at 518 (quoting the AUMF).
45. *Id.* at 521.
46. *Id.* at 529-31.
47. *Id.* at 534.

> governance, serving as an important judicial check on the Executive's discretion in the realm of detentions.[48]

With the prevailing current of jurisprudence subjecting executive policies to harsh judicial scrutiny, the administration pushed the DTA through Congress.[49]

The DTA, which banned the torture of detainees by all United States forces with a vague definition of the subject,[50] also included a restriction on detainees from appealing to United States courts for writs of habeas corpus with a provision that essentially stripped the courts of jurisdiction.[51] The act said that,

> [N]o court, justice, or judge shall have jurisdiction to hear or consider—(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or (2) any other action against the United States or its agents relating to any aspect of the detention.[52]

As a substitute, the DTA established the procedures for what were called Combatant Status Review Tribunals (CSRT) to determine whether a detainee was properly classified as an enemy combatant and whether he was entitled to prisoner of war (POW) status.[53] In this divestiture, the Executive subsumed the entire procedural process. The capture and detainment was performed by executive personnel, evidence was gathered and presented by executive personnel, and the only substantive appeal on the merits or facts was to executive personnel.[54] No independent review remained.

In 2006, the Supreme Court heard the petition for certiorari

48. *Id.* at 535-36.

49. PFIFFNER, *supra* note 3, at 105.

50. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003, 119 Stat. 2739, 2739-40 (2005).

51. § 1005(e), 119 Stat. at 2742-43.

52. § 1005(e), 119 Stat. at 2742.

53. § 1005(e), 119 Stat. at 2742 (This "combatant" classification is used to classify detainees as falling outside of the general protections of the Geneva Convention.)

54. PFIFFNER, *supra* note 3, at 105.

for *Hamdan v. Rumsfeld*.[55] The petitioner was a Yemeni national who was captured in Afghanistan by tribal allies and handed over to United States forces, where he was charged with conspiracy to aid al Qaeda.[56] Hamdan filed a habeas corpus petition claiming that he was entitled to be tried under the requirements of Common Article 3 of the Third Geneva Convention, which provided, in relevant part, that prisoners are guaranteed "as a minimum" to be tried "by a regularly constituted court affording all the judicial guarantees . . . recognized as indispensable by civilized peoples."[57] Justice Stevens, who wrote for the plurality, ruled that the DTA stripped courts of jurisdiction only for future appeals, and not for ones already pending when the law was signed, which included Hamdan's.[58] Further repudiating the Bush Administration's constitutional interpretation, the Court concluded that the military commissions and procedures for detainment and status review were not authorized by the Constitution or any other United States law (including the AUMF, the DTA, or the Uniform Code of Military Justice).[59] Justice Stevens illuminated the severe defects in the procedure of such military commissions, as set forth by the Defense Department's Military Commission Order No. 1.[60] These defects included:

> [T]he detainee, though presumed innocent, had the burden of proof to show that the allegations of the government are incorrect;
>
> the detainee is limited in ability to gather and present his own evidence;
>
> the detainee may be excluded from being present during his commission;
>
> coerced testimony can be used against the detainee; and

55. 548 U.S. 557 (2006).
56. *Id.* at 631-32.
57. *Id.* at 567.
58. *Id.* at 580 n.10.
59. *Id.* at 567.
60. *Id.* at 648-49 (Kennedy, J., joining in part and concurring in part).

civilian defense counsel may be denied access to evidence.[61]

The *Hamdan* decision expanded the judicial barricade the Supreme Court had placed in the way of the Executive Branch's policy on detainment. Members of the *Hamdan* concurrence noted, however, that "[n]othing prevent[ed] the President from returning to Congress to seek the authority he believes necessary."[62] As a result of the ruling, the Bush Administration pushed another piece of legislation through Congress, the Military Commissions Act (MCA) of 2006, which denied the courts jurisdiction over all pending appeals from Guantanamo detainees.

The petitioners' cases were consolidated and sent back to the District of Columbia Circuit, which vacated and dismissed in February of 2007, holding that "the MCA was not an unconstitutional suspension of habeas corpus because aliens held by the United States in foreign territor[ies] do not possess constitutional right[s]."[63] The pro-habeas rulings in *Rasul* and *Hamdan* "were based upon statutory interpretation and did not reach the constitutional question of whether the laws acted as an improper suspension of habeas corpus."[64] The D.C. Court of Appeals, however, placed the constitutional question at the feet of the Supreme Court who, after initially denying review, granted certiorari in *Boumediene v. Bush*.[65]

B. *Boumediene* and its Effect on Habeas Corpus

In an opinion written by Justice Kennedy, the *Boumediene* Court held that Guantanamo detainees had "the constitutional right to habeas corpus;" that the CSRT procedures under the DTA did not provide an adequate substitute for habeas hearings;

61. PFIFFNER, *supra* note 3, at 107.

62. *Hamdan*, 548 U.S. at 636 (Breyer, J., concurring).

63. *The Supreme Court, 2007 Term – Leading Cases*, 122 HARV. L. REV. 395, 396-97 (2008) (citing Boumediene v. Bush, 476 F.3d 981, 984 (D.C. Cir. 2007)).

64. PFIFFNER, *supra* note 3, at 109.

65. 553 U.S. ___, 127 S. Ct. 3078 (2007), *cert. granted*; Al Odah v. United States, 553 U.S. ___, 127 S. Ct. 3067 (2007), *cert. granted*; Boumediene v. Bush, 127 S. Ct. 1478 (2007), *cert. denied*.

and that therefore the provision of the MCA that stripped federal courts of jurisdiction was an "unconstitutional suspension of the writ."[66] The Court went on to refuse the government's argument that the *Eisentrager* sovereignty analysis was dispositive of any constitutional extraterritoriality extensions.[67] Justice Kennedy stated that the Constitution's extraterritorial application "turn[s] on objective factors and practical concerns, not formalism."[68] Based upon the interpretation of its precedents, the Court considered three factors in deciding the Suspension Clause's reach: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."[69]

In employing this three-part analysis, the Court distinguished *Eisentrager* in a similar fashion to the decision in *Rasul*. The Court noted that the prisoners in *Eisentrager* had already been convicted of crimes, whereas the petitioners in *Boumediene* denied they were enemy combatants and were not afforded a "rigorous adversarial process" to determine that status.[70] Moreover, despite the location of Guantanamo being "technically outside the sovereign territory of the United States," the government's control over the base was "absolute" and "indefinite," unlike *Eisentrager* where the detainees were held in Landberg Prison in occupied Germany.[71] Finally, the majority found "no credible arguments" that the extension of the writ to prisoners was impractical or would compromise the military's purpose at Guantanamo.[72]

Justice Scalia's strong dissent concluded the majority's opinion would have "disastrous consequences"[73] and concluded that "[t]he Nation will live to regret what the Court has done

66. Boumediene v. Bush, No. 06-1195, slip op. at 1-2 (U.S. June 12, 2008).
67. *Id.* at 39.
68. *Id.* at 34.
69. *Id.* at 36-37.
70. *Id.* at 37.
71. *Id.* at 38*; see also* Rasul v. Bush, 542 U.S. 466, 475-76 (2004).
72. *Boumediene*, No. 06-1195, slip op. at 39.
73. *Id.* at 2 (Scalia, J., dissenting).

today."[74] He went on to assert that the decision "will almost certainly cause more Americans to be killed"[75] and that it would leave the question of "how to handle enemy prisoners . . . with the branch that knows least about the national security concerns that the subject entails."[76] Justice Scalia then attacked the Court's apparent mistake in the application of the *Eisentrager* sovereignty test, stating that "*all* historical evidence points to the conclusion that the writ would not have been available at common law for aliens captured and held outside the sovereign territory of the Crown."[77]

The Court, however, had answered Justice Scalia's question with a narrow and limited method. Using a functional approach that addressed the practicality issues in the dissenting opinions, the Court limited its holding to Guantanamo Bay.[78] The Court focused upon the "absolute" and "indefinite" control, echoing Justice Kennedy's concurrence in *Rasul*,[79] stating that the Suspension Clause is more likely to apply in territories like Guantanamo, where the United States exercises "total military and civil control."[80]

Although the decision in *Boumediene* struck a blow against executive policies that hindered the extension of the "Great Writ," a number of questions remain regarding the current state of habeas corpus. In both *Rasul* and *Boumediene*, the Court shed little light upon how to determine if the control the United States has over a detainment facility reaches "absolute" and "indefinite" levels.[81] Justice Kennedy's sharp focus upon the lease agreement between Cuba and the United States may leave future decisions shackled by the terms of any sort of leasing agreement or other document detailing the rights of the United States as an occupying force.[82] Other factors that could enter the equation

74. *Id.* at 25 .
75. *Id.* at 2.
76. *Id.* at 6.
77. *Id.* at 23.
78. *The Supreme Court, 2007 Term – Leading Cases*, *supra* note 63, at 400.
79. Rasul v. Bush, 542 U.S. 466, 485-88 (2004) (Kennedy, J., concurring).
80. *Boumediene*, No. 06-1195, slip op. at 16.
81. *The Supreme Court, 2007 Term – Leading Cases*, *supra* note 63, at 400.
82. *Id.*

remain to be seen.

Such a cloudy set of factors for determining the appropriate level of control opens the door to further habeas evasion. An administration resolute upon denying habeas corpus rights to detainees could easily take advantage of such uncertainty by holding prisoners at detainment facilities outside of areas of "absolute" and "indefinite" control. The tactical advantages of the executive detainment of prisoners out of reach of the oversight of United States courts have been made clear,[83] and although Guantanamo's procedures have been challenged, there remains an extremely gray area beyond the Cuban base's walls. For example, after the *Rasul* decision, the United States government relocated several detainees from Guantanamo to other detention centers across the globe.[84] Some critics suggest that the "most sensitive and high profile detainees" are not held at Guantanamo for fear of judicial scrutiny.[85]

IV. THE PROPER RECOGNITION OF HABEAS CORPUS

The unconstitutionality of the indefinite suspension of habeas rights as a contextual footnote in the "war on terror" has been confirmed by the Supreme Court's decisions in *Rasul, Hamdan*, and *Boumediene*.[86] However, the need for such a right to be extended to all prisoners held by the United States government in relation to this indefinite conflict, regardless of citizenship or extraterritorial jurisdiction, can be readily demonstrated by evaluating the uncertainty left by the *Boumediene* decision, the abuse of authority by the Executive, and the importance of preserving the separation of powers set

83. *See* Memorandum from Patrick F. Philbin and John C. Yoo, Deputy Asst. Atty. Gens., Office of Legal Counsel, U.S. Dep't of Justice to William J. Haynes, II, Gen. Counsel, U.S. Dep't of Def., 1 (Dec. 28, 2001), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/01.12.28.pdf.

84. *The Supreme Court, 2007 Term – Leading Cases*, *supra* note 63, at 403 (citing Daphne Eviatar, *Lawyers Consider Implications of Supreme Court Rulings Beyond Guantanamo*, Am. Law., June 16, 2008, http://www.law.com /jsp/article.jsp?id=1202422263008).

85. Human Rights Watch, *The Road to Abu Ghraib* 12 (2004).

86. Rasul v. Bush, 542 U.S. 466 (2004); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Boumediene v. Bush, No. 06-1195, slip op. at 1 (U.S. June 12, 2008).

forth by the Framers of the Constitution.

Following *Boumediene*, the lack of any certain test for control in determining the reach of the Suspension Clause leaves an uneven amount of maneuverability for a future Executive Branch that seeks to escape the independent review of the United States judicial system. On September 24, 2008, a bill was introduced to the House of Representatives entitled the "Interrogation and Detention Reform Act of 2008" (IDRA).[87] If passed, this piece of legislation calls for a repeal of the MCA of 2006, amending the DTA, and the closure of the Guantanamo Bay Detention Facility within 180 days of its enactment.[88] With the election of Barack Obama, the sentiments of this legislation have been echoed by the Executive, who has stated that the base will be shut down. Upon the closure of the Guantanamo facility, the *Boumediene* holding remains only as a vague and inapplicable speed bump in the path of habeas abuses. Without a proper definition of "control," the Supreme Court leaves an Executive with the room to detain individuals indefinitely, so long as the locations of detainment remain in areas of incomplete American control.

The omnipresence of the United States military in the global community today precludes any viable approach to habeas rights under a "sovereignty test." The interaction with multi-national coalitions, the cooperation with countless foreign governments and police forces, and the incalculable amount of foreign operations (hostile, peacekeeping, and aid missions) truly undermine the Court's intentions in striking down the MCA's suspension of the writ and repudiating the Bush administration for its harsh detention policies. Simply put, the extension of the writ of habeas corpus must be granted to all who are held in "custody under or by color of the authority of the United States," so long as the government intends to continue detaining them beyond the initial battlefield capture.[89] In *Braden,* as noted above, the Court properly recognized the approach to applying habeas rights when it stated "the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who

87. H.R. 7056, 110th Cong. (2008).
88. *Id.* at § 302(a)-(i), § 303(a).
89. 28 U.S.C. § 2241(c)(1) (2000).

holds him in what is alleged to be unlawful custody."[90] Essentially, sovereignty tests are overtly impractical in the global community that our military operates in today and, more importantly, fail to implement the inherent purpose of securing habeas corpus rights.

Furthermore, the lofty notion of protecting a valuable liberty often overshadows the precarious mistake of allowing the Executive Branch unilateral power to capture, detain, try, punish, and entertain appeals of its own judgments. Beyond the obvious imbalance created in the delicate separation of powers, the evidentiary falters and prosecutorial mishaps of such a system result in a fundamental breakdown of the purpose of detaining these individuals. Congress has specifically recognized the ineptitude of the military to try and convict terrorists. The IDRA illuminates this fact.

> Attempts to implement a military tribunal system in accordance with Executive Order 13425, the Military Commissions Act of 2006, or the President's Military Order of November 13, 2001, have failed to achieve their stated mission of bringing suspected terrorists and combatants to justice. To date, the tribunals and commissions established in connection with these efforts have yielded just two convictions, the first following a guilty plea by the defendant, and have failed to achieve the conviction of a single individual in connection with the terrorist attacks on the United States on September 11, 2001.[91]

By involving the United States federal court system, the Executive Branch would ensure that the procedures through which proper convictions can be attained would be consistent and in line with Constitutional requirements, federal law, and the international treaties that this country has signed.

90. Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 494-95 (1973).

91. H.R. 7056 at § 301(4).

V. CONCLUSION

While the intrinsic purpose of habeas corpus was profoundly recognized by the Court in *Rasul*, *Hamdan*, and *Boumediene*, the Court's analysis left far too much uncertainty at a time when the defense of the Constitution has become an increasingly uphill battle. The indefinite detainment of prisoners without judicial review cannot be allowed, despite the nebulous legal void the current war on terror has presented. To allow indefinite detainment negates the process of justice that was built upon the principles laid out by the framers. As each of the decisions leading up to the limited extension of the writ in *Boumediene* resulted in sharply divided courts, the proper recognition of habeas rights in the twenty-first century is not yet a foregone conclusion. Although Justice Scalia's dissent in *Hamdi* was strongly opposed to providing the Constitution's protections for all who are imprisoned by the United States, his reasoning became circular when he wrote:

> Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis – that, at the extremes of military exigency, *inter arma silent leges*. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.[92]

His rationale insightfully concedes that the Constitution's protections must not be sacrificed so easily at the altar of fear. Such a principle is the foundation for the proper recognition of habeas corpus in the twenty-first century.

92. Hamdi v. Rumsfeld, 542 U.S. 507, 579 (2004) (Scalia, J., dissenting).

MONETARY LIABILITY FOR INVOLUNTARY SERVITUDE?: SOUTH CAROLINA NEEDS TO ABANDON THE NEGATIVE INCENTIVE APPROACH AND GRANT ABSOLUTE IMMUNITY TO INDIGENT CRIMINAL DEFENSE ATTORNEYS APPOINTED UNDER RULE 608

Boyd M. Mayo[*]

I. INTRODUCTION 710
II. THE DEVELOPMENT OF THE COMMON LAW JUDICIAL AND PROSECUTORIAL IMMUNITIES IN THE FEDERAL ARENA 713
A. Distinguishing Absolute and Qualified Immunity 713
B. The Doctrine of Absolute Judicial Immunity 715
C. The Doctrine of Absolute Prosecutorial Immunity 717
III. RULE 608 APPOINTEES IN SOUTH CAROLINA DESERVE ABSOLUTE IMMUNITY 719
A. It is Inherently Inequitable to Impose Monetary Liability for Involuntary Servitude 719
B. South Carolina's Current Insurance Program Alone Creates More Problems than Solutions 721
C. Adopting Absolute Malpractice Immunity Comports with Authority from Sister Jurisdictions 723
1. The West Virginia Absolute Legal and Monetary Malpractice Immunity 724
2. The Public Defender-Indigent Defender New Mexico Approach 726
3. The Minnesota Utilitarian Approach 727
4. The Nevada Approach 729

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[*] J.D. candidate, Charleston School of Law, expected May 2010; B.A., with *Departmental Distinction*, in English, Southern Methodist University, May 2006. The author would like to express appreciation to David Overstreet, Sarah Wetmore, and Lee C. Weatherly of Carlock, Copeland & Stair, LLP; Britt Kelly of Rosen, Rosen & Hagood, LLC; and Charleston School of Law Professors Constance Anastopoulo, Miller Shealy, and Jon Marcantel.

D. Public Policy Supports Abandoning South Carolina's Negative Incentive Approach and Granting Rule 608 Appointees Absolute Immunity ... 730
IV. RECOMMENDATIONS ... 734

I. INTRODUCTION

> To submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties . . . . [I]t has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.[1]

As a private attorney in South Carolina and a member of the South Carolina Bar, you are required by Rule 608 of the South Carolina Appellate Court Rules to perform court-appointment service for indigents[2] in either family or criminal court.[3] Consider the following hypothetical: You are a private attorney in Charleston, South Carolina, and although your focus is in commercial transactions,[4] a criminal court appoints you to represent an indigent defendant, and you happily fulfill your professional obligations.[5] Upon reviewing the file, you discover

1. Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.).

2. The scope of this comment is limited to criminal appointments because of the constitutional concerns raised by the indigent's right to counsel. Discussed *infra* Part III.D. *See also infra* note 3 and its accompanying text.

3. *See* S.C. APP. CT. R. 608 ("Appointment of Lawyers for Indigents"); *see also* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."); S.C. CODE ANN. § 17-3-10 ("Any person entitled to counsel under the Constitution of the United States . . . and . . . financially unable to retain counsel . . . shall be provided [counsel] upon order of the appropriate judge . . . .").

4. Rule 608 exempts some attorneys from appointment and also permits an attorney to request removal from an appointment on multiple bases. S.C. APP. CT. R. 608(d) and (f). For instance, an attorney may request to be removed from a case involving the possibility of capital punishment. *See, e.g.*, S.C. APP. CT. R. 608(f)(1). That notwithstanding, removal is not always guaranteed, and judges may be unwilling to release an attorney from court-appointment service.

5. The criminal court appointing a private attorney may not necessarily

your client gave both oral and written confessions to committing armed robbery that were neither coerced nor otherwise constitutionally violative. After timely meeting with the client, hearing his version of events, and reviewing all other evidence and witness statements, you advise the client to plead guilty, informing him of all of his options, such as his right to a trial by jury,[6] as well as the consequences of pleading guilty. At the hearing, where you accompany your client, he voluntarily enters the plea. Notwithstanding your competent representation, you are served several months later with a complaint alleging criminal legal malpractice[7] because, *inter alia*, you coerced him into pleading guilty and failed to inform him of his right to trial by jury. The plaintiff seeks $1 million in damages.

While you consider the claim meritless, you unfortunately have a $5,000.00 deductible on your malpractice insurance policy, and the clerk of court failed to inform you that you could have been covered under a state malpractice insurance plan prior to

be within the county where the private attorney practices. Under Rule 608, a county that has already depleted its reserves of lawyers available for indigent-defense appointment can look to surrounding counties. *See* Letter from Marvin Infinger, President, Charleston County Bar Association, to Members of the Bar (Oct. 30, 2008) (discussing the need for court-appointed counsel and appointments in surrounding counties). Additionally, it is important to note that lawyers are permitted to choose the roster on which they wish their names to be added.

6. *See* S.C. CONST. art. I, § 14 ("The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or both.").

7. The phrase "criminal legal malpractice" refers to a malpractice suit arising from actions committed by a criminal defense attorney during the underlying representation. *See*, *e.g.*, Therrien v. Sullivan, 891 A.2d 560, 561 (N.H. 2006). Furthermore, in *Brown v. Theos*, the South Carolina Supreme Court set forth the elements for legal malpractice, which include: (1) his attorney was negligent; (2) the negligence proximately resulted in the client's injuries; and (3) damages. 550 S.E.2d 304, 306 (S.C. 2001). In addition to the base elements, the injured client "must [also] show 'he most probably would have been successful' in the action if [his attorney] had not committed the alleged malpractice." *Id.* (internal citations omitted). "Attorneys will not be liable where, notwithstanding the attorney's negligence, the client had no meritorious defense to the suit in the first place." *Id.*

commencing your indigent representation.[8] If South Carolina recognized absolute malpractice immunity for court-appointed indigent-defense attorneys ("Rule 608 Appointees"), the suit would be dismissed on its face. Instead, you must first look to your private malpractice carrier, which may be unwilling to cover the defense costs. Assuming your carrier agrees, you nevertheless must pay the deductible amount prior to such coverage becoming effective. Moreover, you will possibly face higher premiums with your current and future carriers.

If your private carrier refuses coverage, you must choose between two equally bad choices: (1) defending the claim pro se or (2) hiring private counsel. Furthermore, if a pre-trial motion does not dispose of the case, your participation in the subsequent malpractice proceedings will directly affect your wallet and collaterally affect your legal practice. Neither of these options is attractive and both stem from an involuntary public service.

This Comment argues that when private lawyers in South Carolina are ethically bound[9] to further the best interests of their clients, it is both theoretically and practically illogical for the state to require court-appointment service under Rule 608 and threaten malpractice liability as a negative incentive to ensure adequate representation. In the Anglo-American jurisprudential system, courts routinely grant many individuals immunity to foster and encourage individual decision-making and enable them to adequately perform their duties without fear of monetary retribution. Rule 608 Appointees, despite their ethical obligations and their essential role in the resolution of criminal matters, are not among that class of individuals.

Part I of this Comment details the development of the

8. South Carolina does, in fact, provide malpractice insurance for private attorneys who are appointed by the court to represent indigent defendants in criminal matters. This is discussed further *infra* Part III.B.

9. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2004) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); MODEL RULES OF PROF'L CONDUCT R. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."); MODEL RULES OF PROF'L CONDUCT R. 6.2 (stating the rules regarding accepting or avoiding acceptance of appointments).

common-law judicial and prosecutorial absolute immunities in the federal arena. Part II discusses how South Carolina currently addresses the question of absolute immunity for private lawyers and argues for the extension of absolute immunity to Rule 608 Appointees based upon the rationales underlying the judicial and prosecutorial immunities as well as the practices of several other states. This Comment then concludes by recommending that South Carolina resolve the dilemma by: (1) granting absolute immunity to Rule 608 Appointees, (2) having an automatically applicable insurance coverage for appointed attorneys, and (3) revising Rule 608 to alter the manner by which attorneys are appointed.

II. THE DEVELOPMENT OF THE COMMON LAW JUDICIAL AND PROSECUTORIAL IMMUNITIES IN THE FEDERAL ARENA

"An immunity . . . avoids liability in tort under all circumstances, within the limits of the immunity itself; it is conferred, not because of the particular facts, but because of the status or position of the favored defendant; and it does not deny the tort, but the resulting liability."[10] Prior to understanding why Rule 608 Appointees should receive absolute immunity, one must first understand both the differences between absolute and qualified immunity and the nature of the immunities afforded the two other actors: (1) the judge and (2) the prosecutor.

A. Distinguishing Absolute and Qualified Immunity

In general, there are two common-law immunities: (1) absolute and (2) qualified. Absolute immunity extends to "officials whose special functions or constitutional status requires complete protection from suit[s]" arising in the course of performing their official duties[11] including: legislators,[12] judges,[13]

10. WILLIAM L. PROSSER, THE LAW OF TORTS 970 (4th ed. 1971).

11. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

12. *See generally* Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975).

13. *See generally* Stump v. Sparkman, 435 U.S. 349 (1978).

prosecutors,[14] clerks of court,[15] probation officers,[16] court-appointed medical examiners,[17] court-appointed psychiatrists,[18] social workers,[19] court-appointed receivers,[20] bankruptcy trustees,[21] partition commissioners,[22] and the President of the United States.[23]

Whether absolute immunity will attach in a particular case depends upon a functional analysis set forth by the Supreme Court. Essentially, "absolute immunity goes to the task [performed], not to the office."[24] Qualified immunity, on the other hand, applies to officials with "less complex discretionary responsibilities."[25] It is an affirmative defense created by the courts to protect officials who are sued in their individual capacity.[26]

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14. Butz v. Economou, 438 U.S. 478, 508-12 (1978).

15. *See generally* Wiggins v. New Mexico State Supreme Court Clerk, 664 F.2d 812 (10th Cir. 1981), *cert. denied*, 459 U.S. 840 (1982).

16. *See generally* Demoran v. Witt, 781 F.2d 155 (9th Cir. 1986).

17. *See generally* Burkes v. Callion, 433 F.2d 318 (9th Cir. 1970), *cert denied*, 403 U.S. 908 (1971).

18. *See generally* Moses v. Parwatikar, 813 F.2d 891 (8th Cir. 1987), *cert. denied*, 484 U.S. 832 (1987).

19. *See generally* Babcock v. Tyler, 884 F.2d 497 (9th Cir. 1989), *cert. denied*, 493 U.S. 1072 (1990).

20. *See generally* T & W Inv. Co. v. Kurtz, 588 F.2d 801 (10th Cir. 1978); Kermit Constr. Corp. v. Banco Credito Y Ahorro Ponceno, 547 F.2d 1 (1st Cir. 1976).

21. *See generally* Boullion v. McClanahan, 639 F.2d 213 (5th Cir. 1981).

22. *See generally* Ashbrook v. Hoffman, 617 F.2d 474 (7th Cir. 1980).

23. *See generally* Nixon v. Fitzgerald, 457 U.S. 731 (1982).

24. Erwin Chemerinsky, *Absolute Immunity: General Principles and Recent Developments*, 24 TOURO L. REV. 473, 475 (2008).

25. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (citing Scheuer v. Rhodes, 416 U.S. 232 (1974)).

26. Thomas E. O'Brien, *The Paradox of Qualified Immunity: How a Mechanical Application of the Objective Legal Reasonableness Test Can Undermine the Goal of Qualified Immunity*, 82 TEX. L. REV. 767, 770 (2004). Because qualified immunity is generally granted to state or local officials in § 1983 suits, a thorough discussion of same is intentionally omitted from this Comment. Since South Carolina does not consider court-appointed attorneys to be state employees and the sovereign immunity thus does not extend to said attorneys, the scope of this Comment is limited to advocating the extension of absolute immunity to Rule 608 Appointees. *See generally* Fleming v. Asbill, 483 S.E.2d 751 (S.C. 1997).

In addition to the substantive differences, procedural differences exist. Absolute immunity bars the suit at the outset if the individual's actions or inactions fell within the scope of the tasks the office calls to be performed. "If absolute immunity attaches, it applies however erroneous the act or injurious its consequences."[27] Whether qualified immunity will attach, however, depends "upon the circumstances and motivations of [the defendant's] actions, as established by the evidence at trial."[28] This Comment specifically rejects the contention that Rule 608 Appointees, who are local private attorneys appointed by the judicial branch of the government to perform an involuntary public service, should receive anything less than the absolute immunity afforded both judges and prosecutors.

B. The Doctrine of Absolute Judicial Immunity

"Few doctrines [are] more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction."[29] Providing immunity for judges from personal suits arising from inherently judicial acts, therefore, both preserves the independence of judicial decision-making and ensures a fully functional justice system. Moreover, it is often stated that an appeal, instead of a direct suit, against a judge is the appropriate remedy for a purportedly aggrieved party.[30]

The theory of absolute judicial immunity is rooted in early English jurisprudence. In 1608, an English court found holding judges accountable for inherently judicial acts would "tend to the scandal and subversion of all justice. And those who are the most sincere would not be free from continual calumniations[.]"[31] Two centuries later, another English court reaffirmed this conclusion, stating:

27. Marr v. Maine Dep't. of Human Servs., 215 F. Supp. 2d 261, 267 (D. Me. 2002).

28. Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976).

29. Pierson v. Ray, 386 U.S. 547, 553-54 (1967).

30. *See generally* Dennis v. Sparks, 449 U.S. 24 (1980).

31. Floyd v. Barker, (1607) 77 Eng. Rep. 1305, 1307 (K.B.).

> It is a principle of our law that no action will lie against a Judge . . . for a judicial act, though it be alleged to have been done maliciously and corruptly . . . . The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the Judges, and prevent their being harassed by vexatious actions.[32]

Finding this reasoning persuasive, the United States adopted the doctrine in 1871 in *Bradley v. Fisher*,[33] where a private attorney sued a judge for removing the attorney from a criminal court.[34] Absolute immunity barred the suit because the act was within the purview of the inherent judicial power.[35] The Court reasoned:

> For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful.[36]

Just as the immunity's applicability depends upon the act's nature, a task-oriented exception exists. When a judge knowingly acts beyond his authority or acts in an administrative capacity, the act is not considered a judicial task protected by the immunity because it is clearly outside the inherent judicial power.[37] In such a case, any legal mechanism other than a personal suit against the acting judge falls short of justice.[38]

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32. Fray v. Blackburn, (1863) 122 Eng. Rep. 217, 578 (Q.B.).

33. 80 U.S. 335 (1871).

34. *Id.* at 338-39.

35. *See id*. at 347

36. *Id.*

37. *Id.* In *Bradley*, because the criminal court was considered a court of general criminal jurisdiction, the Court ruled it had the power to strike Bradley from its roll of practicing attorneys. *Id*. at 345-47.

38. The doctrine of absolute judicial immunity is still good law in South Carolina. Section 15-78-60(1) of the South Carolina Tort Claims Act provides

C. The Doctrine of Absolute Prosecutorial Immunity[39]

"The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges . . . acting within the scope of their duties."[40] Historically, when a prosecutor was sued at common law, the common law doctrine of absolute immunity barred the suit. Presently, prosecutors are often sued under 42 U.S.C. § 1983, originally passed as section one of the Civil Rights Act of 1871, for malicious prosecution. That section provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable . . . in an action at law [or] suit in equity[.]"[41]

Until 1976, it was unclear whether § 1983 abrogated the common-law absolute immunity that traditionally protected prosecutors against suits arising from inherently prosecutorial acts. In *Imbler v. Pachtman*, the Supreme Court declared that § 1983 is to be read "in harmony with general principles of tort immunities and defenses rather than in derogation of them"[42] and set the modern standard for prosecutorial immunity.[43]

In *Imbler*, the plaintiff sued his prosecuting attorney under

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that "[t]he governmental entity is not liable for a loss resulting from . . . judicial, or quasi-judicial action or inaction." S.C. CODE ANN. § 15-78-60(1). Thus, "common law judicial immunity was expressly preserved in South Carolina under the Tort Claims Act." Faile v. S.C. Dep't of Juvenile Justice, 566 S.E.2d 536, 540 (S.C. 2002). There are, however, three exceptions to the attachment of absolute judicial immunity: (1) the actor lacked "jurisdiction to act; (2) the act did not serve a judicial function; or (3) the suit is for prospective, injunctive relief only." *Id.* at 540-41.

39. Courts and scholars alike often interchangeably use the terms absolute immunity and "quasi-judicial" immunity for individuals other than judges. *See, e.g.*, *Faile*, 566 S.E.2d at 540-42. Thorough research revealed neither procedural nor substantive differences between the two terms. This is also addressed further in note 46.

40. Imbler v. Pachtman, 424 U.S. 409, 422-23 (1976).

41. 42 U.S.C. § 1983.

42. *Imbler*, 424 U.S. at 418 (citing Tenney v. Brandhove, 341 U.S 367 (1951)).

43. *Imbler*, 424 U.S. at 431.

§ 1983, alleging that "a conspiracy . . . unlawfully to charge and convict him had caused him loss of liberty."[44] Arguing against the adoption of prosecutorial immunity, the plaintiff attempted to distinguish the absolute immunity historically afforded judges and the "quasi-judicial"[45] immunity commonly granted to prosecutors.[46] By drawing the Court's attention to lower courts' "quasi-judicial" characterization of immunity, Imbler contended it would be illogical to grant a non-judicial actor, a prosecutor, absolute immunity.[47]

The Court flatly rejected the argument because § 1983 immunities were not arbitrary judicial conclusions but informed policy decisions.[48] Applying both the rationale underlying the common-law prosecutorial immunity and the functional analysis supporting judicial immunity, the Court held the nature of the prosecutor's tasks, which require free judgment and unwavering attention to the matter at hand, necessitated absolute immunity from § 1983 suits.[49] Furthermore, as with judicial immunity,

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44. *Id.* at 415-16.

45. Previous lower courts had often characterized the prosecutor's immunity as a type of quasi-judicial immunity. *See, e.g.*, Tyler v. Witkowski, 511 F.2d 449, 450-51 (7th Cir. 1975); Guerro v. Mulhearn, 498 F.2d 1249, 1255-56 (1st Cir. 1974); Weathers v. Ebert, 505 F.2d 514, 515-16 (4th Cir. 1974); Barnes v. Dorsey, 480 F.2d 1057, 1060 (8th Cir. 1973); Fanale v. Sheehy, 385 F.2d 866, 868 (2d Cir. 1967); Bauers v. Heisel, 361 F.2d 581, 590 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967); Carmack v. Gibson, 363 F.2d 862, 864 (5th Cir. 1966); Kostal v. Stoner, 292 F.2d 492, 493 (10th Cir. 1961), *cert. denied*, 369 U.S. 868 (1962).

46. *Imbler*, 424 U.S. at 420.

47. *Id.*

48. *Id.* at 421.

49. The Court wrote:

> If a prosecutor had only a qualified immunity, the threat of [section] 1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. Further, if the prosecutor could be made to answer in court each time such a person charged

prosecutorial immunity carries a task-oriented exception: when a prosecutor acts with a malicious or dishonest intent to deprive a defendant of a constitutional right, the prosecutor is not immune from suit.[50]

Judges and prosecutors are essential working elements within the criminal justice machine. For the machine to work, both must be cared for and protected, and absolute immunity is the vehicle by which this end is achieved. However, there is "no valid reason to extend this immunity to state and federal prosecutors and judges and to withhold it from state-appointed . . . defenders."[51]

III. RULE 608 APPOINTEES IN SOUTH CAROLINA DESERVE ABSOLUTE IMMUNITY

While no case in this jurisdiction has directly granted or withheld absolute immunity to or from private attorneys appointed to represent indigent defendants in criminal matters, Rule 608 Appointees deserve absolute immunity because: (A) it is inherently inequitable to impose monetary liability for required service, (B) South Carolina's current insurance program alone creates more problems than solutions, (C) extending absolute immunity comports with authority from sister jurisdictions, and (D) public policy supports extending immunity.

A. It is Inherently Inequitable to Impose Monetary Liability for Involuntary Servitude.

In *Fleming v. Asbill*,[52] the South Carolina Supreme Court held that private attorneys serving as court-appointed guardian ad litems ("GALs" or "guardians") are protected by absolute immunity because, *inter alia*, "[i]t is inequitable for persons who did not ask to be appointed as guardian to be exposed to

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> him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.

Id. at 424-25 (internal citations omitted).

50. *Id.* at 429.

51. Brown v. Joseph, 463 F.2d 1046, 1048 (3d Cir. 1972).

52. 483 S.E.2d 751 (S.C. 1997).

unlimited liability."[53] While court-appointed GALs are clearly distinguishable from court-appointed attorneys,[54] *Fleming* lends strong support for immunizing Rule 608 Appointees.

In *Fleming*, Fleming, by and through his father, sued Asbill, his court-appointed GAL, for breach of fiduciary duty and negligence in the federal district court for the District of South Carolina.[55] After the trial court dismissed all claims, the Fourth Circuit reversed in part, holding South Carolina common law permitted Fleming's negligence suit.[56] On remand at the district court, Asbill claimed the plaintiff should have brought the claims under the South Carolina Tort Claims Act[57] because the alleged acts arose while she was acting "in her capacity as an employee of the State of South Carolina."[58] The district court subsequently directed a certified question to the state Supreme Court as to: (1) whether a court-appointed GAL is a state employee or agent under the South Carolina Tort Claims Act,[59] and (2) whether a court-appointed GAL should be afforded immunity and, if so, the scope of that immunity.[60]

As to the first issue, the court held GALs were not state employees.[61] Although the guardian is a representative of the court in the sense she assists the court by protecting incompetent persons, the guardian does not act on behalf of the court.[62] The lack of agency, therefore, precluded a finding of the employer-employee relationship.[63] While noting guardians are not state

53. *Id.* at 755.

54. The most notable distinction between a guardian ad litem and a court-appointed attorney is that immunity for guardians is necessary to promote frank and open in-court discussion. *See generally* Townsend v. Townsend, 474 S.E.2d 424 (S.C. 1996).

55. *Fleming*, 483 S.E.2d at 753.

56. *Id.* (citing Fleming v. Asbill, 42 F.3d 886 (4th Cir. 1994)).

57. S.C. CODE ANN. §§ 15-78-10 to -200 (Supp. 1995).

58. *Fleming*, 483 S.E.2d at 753.

59. *Id.*

60. *Id.* at 754.

61. *Id.*

62. *Id.* at 753-54.

63. *Id. But see* Vick v. Haller, 512 A.2d 249, 252 (Del. Super. Ct. 1986) (holding court-appointed attorneys are state employees and, therefore, are granted qualified immunity under the Delaware tort claims statute).

employees, the court held GALs nevertheless enjoy absolute immunity. Because a GAL functions as a court representative while furthering her client's best interests, absolute immunity is (1) necessary to protect the guardian's neutrality and independent decision-making, and (2) "reasonable [because] . . . many . . . court-appointed guardians have not volunteered for the position. It is inequitable for persons who did not ask to be appointed as guardian to be exposed to unlimited liability."[64]

Recognizing immunity could negatively impact the client's protection when the guardian knows she is immune from suit, the court created a task-oriented exception similar to those of both judicial and prosecutorial immunities.[65] The guardian's immunity does not prohibit subsequent action against a guardian when she has acted beyond the scope of her official duties.[66]

The *Fleming* court's public policy decision highlights the blatant inequity inherent in imposing monetary liability on court-appointed private counsel. In addition to the necessary independence and neutrality of the guardian, the court recognized that monetary liability is an illogical end to competent involuntary servitude.[67] It is not necessarily denying the existence of the tort. Instead it denies the liability for same. This reflects an important policy decision that is directly applicable to Rule 608 Appointees.

B. South Carolina's Current Insurance Program Alone Creates More Problems than Solutions.

Although South Carolina's current insurance program may solve one problem—who will bear the costs of defending a subsequent malpractice suit arising out of acts committed during the course of the Rule 608 Appointee's performance—such a program creates several more problems. Importantly, (1) there is

64. *Fleming*, 483 S.E.2d at 755.

65. *Id.*

66. *Id.* The court provided an example: "[I]f a guardian abuses a child, she would be liable because her actions fall outside her duties as guardian." *Id.* This exception mirrors the functional analysis generally applied to the attachment of absolute immunity. *See* Chemerinsky, *supra* note 24, at 475.

67. *Fleming*, 483 S.E.2d at 755.

a flaw in the current South Carolina insurance program for Rule 608 Appointees, and (2) the Rule 608 Appointee, without a grant of absolute immunity to bar the suit, suffers monetarily in the form of higher insurance premiums, legally in the form of time commitments, and professionally in the form of diminished reputation in the community.

First, Rule 608 Appointees are not automatically covered under the state's insurance program.

> Lawyers who . . . are appointed pursuant to Rule 608, are . . . covered by malpractice insurance through the Pro Bono Program. To initiate this coverage, complete the Pro Bono Intake form . . . and fax it to [the proper party][68] . . . . You must submit the form to [the proper party][69] before commencing work on the client's case.[70]

Thus, the present state of the South Carolina insurance program carries with it a condition precedent to coverage. It is both foreseeable and not uncommon for an attorney to be omitted from state coverage because she either was unaware that insurance coverage existed or commenced the lawsuit without first submitting the proper paper work. Obviously, this problem could be fixed by either including a memorandum in the file informing the attorney she must submit the paper work to receive coverage or automatically granting the insurance coverage regardless of forms. Both of these solutions, however, fall short of the available comprehensive solution—granting Rule 608 Appointees both absolute immunity and automatically applicable insurance coverage.

It is important to distinguish absolute immunity and malpractice insurance coverage because the two are neither procedurally nor substantively synonymous. First, as noted above, the Rule 608 Appointee must satisfy the conditions precedent before coverage even exists as to her. Second,

68. The individual's name who appeared on this website was intentionally redacted.

69. The individual's name who appeared on this website was intentionally redacted.

70. SCBar//Pro Bono Program, http://www.scbar.org/member_resources/pro_bono_program. (last visited Mar. 29, 2009) (emphasis added).

insurance is not a bar; it does not stop an attorney from being sued. Instead, an insurance policy covers the costs associated with the suit and possibly damage awards. Even if an attorney is covered under the state policy but the suit is dismissed, she must nevertheless, in good faith, report the suit to her present private malpractice carrier as well as any future carriers, thereby possibly incurring higher premiums. Third, if the suit is not dismissed on a pre-trial motion, the private attorney's personal assets might very well be at risk.

Absolute immunity and automatically applicable insurance coverage will operate together to effectively resolve the problems of insurance alone by: (1) not having any conditions precedent to their effectiveness, (2) calling for a dismissal on the face of the malpractice-alleging complaint, (3) minimizing the Rule 608 Appointee's present and future private insurance premiums, and (4) protecting the individual attorney's assets by prohibiting the suit at the outset. More importantly, it is equitable for the state, which required the representation, to bear any costs associated with defending a malpractice suit and to indemnify an appointed attorney for any costs they personally incurred.

C. Adopting Absolute Malpractice Immunity Comports with Authority from Sister Jurisdictions.

It is for the states to decide the immunity question,[71] and the Supreme Court has acknowledged that legitimate policy reasons may support granting court-appointed attorneys immunity.[72] Presently, at least four jurisdictions[73] have embraced such policy

71. *See generally* Dziubak v. Mott, 503 N.W.2d 771, 774 (Minn. 1993) (citing Ferri v. Ackerman, 444 U.S. 193 (1979)).

72. *Ferri*, 444 U.S. at 204-05.

73. In addition to these four jurisdictions, three other states have extended various levels of immunity to court-appointed counsel: (1) Maine, (2) Delaware, and (3) Tennessee. Maine has adopted an absolute quasi-judicial immunity for a court-appointed guardian *ad litem* in the context of a 42 U.S.C. § 1983 suit for malicious prosecution. *See generally* Marr v. Maine Dep't. of Human Servs., 215 F. Supp. 2d 261 (D. Me. 2002). Delaware grants qualified immunity to court-appointed counsel. *See generally* Browne v. Robb, 583 A.2d 949 (Del. 1990). Even prior to *Browne v. Robb*, the Superior Court of Delaware had held court-appointed counsel were entitled to a presumptive qualified immunity pursuant

decisions and granted absolute immunity to private attorneys who are appointed by a court to defend an indigent client in criminal proceedings: (1) West Virginia, (2) New Mexico, (3) Minnesota, and (4) Nevada. Of these four states, West Virginia grants the most protection to private attorneys.

1. The West Virginia Absolute Legal and Monetary Malpractice Immunity

West Virginia has codified this right in § 29-21-20, which provides:

> Any attorney who provides legal representation under the provisions of this article under appointment by a circuit court or by the Supreme Court of Appeals, and whose only compensation therefor is paid under the provisions of this article, shall be immune from liability arising from that representation in the same manner and to the same extent that prosecuting attorneys are immune from liability.[74]

Court appointments are outlined in § 29-21-9. Circuit courts must maintain panels of private attorneys to serve as counsel for indigent defendants, and "[a]n attorney-at-law may become a panel attorney and be enrolled on the . . . panel . . . ."[75] Based upon the face of the statute, private attorneys in West Virginia are not required to sign up for indigent service; they volunteer for it.

In criminal cases involving an indigent defendant who

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to the state's Tort Claims Act. *See generally* Abdul-Akbar v. Figliola, No. CIV. A. 88CN0110CV, 1990 WL 74326 (Del. Super. Ct. May 18, 1990). Finally, Tennessee has a statute providing immunity for public defenders. *See* TENN. CODE ANN. § 8-14-209 (2002). Only one unreported case has come near to raising the issue addressed in this Comment. *See generally* Stovall v. Dunn, No. M1999-00200-COA-R3-CV, 2002 WL 1284276 (Tenn. Ct. App. June 11, 2002). In *Stovall*, the defendant, a private attorney appointed by a Tennessee court to represent an indigent defendant in the underlying criminal matter, was subsequently sued by his client. *Id.* at *1-2. Due to a procedural issue, however, the court-appointed attorney was barred from raising the immunity issue on appeal, and the Tennessee Court of Appeals did not rule on that particular defense. *Id.* at *2.

74. W. VA. CODE ANN. § 29-21-20 (LexisNexis 2008).

75. *Id.* § 29-21-9(a).

necessitates court-appointed counsel, West Virginia courts first look to public defenders.[76] If the public defenders are not available for appointment, then "the court shall appoint one or more panel attorneys from the local panel."[77] Thus, West Virginia courts consider panel attorneys to be a counsel of last resort in the county in which they practice.[78] Private panel attorneys are appointed only when other avenues have been pursued yet failed.

Furthermore, in *Powell v. Wood County Commission*,[79] the West Virginia Supreme Court held that § 29-21-20 grants court-appointed attorneys absolute immunity, reasoning:

> [W]hen a court appoints a private attorney to represent a client pursuant to [the West Virginia Code], and that client then sues the attorney for malpractice in connection with that representation, the attorney shall be immune from liability arising from that representation in the same manner and to the same extent the prosecuting attorneys are immune from liability.[80]

Because West Virginia does not demand private attorneys to serve as counsel for indigent parties, the state relies on private attorneys to volunteer for such service. The reason for granting absolute immunity is therefore intuitive. To encourage private attorneys to volunteer and, in turn, to maintain adequate pools of willing and ready private attorneys, West Virginia protects them from being personally liable for suits arising during the course of such representation.[81] By dismissing the firm's suit for indemnification for the "reasonable costs of their defense, [the lower court in *Powell*] essentially stripped [the firm] of some of that promised immunity."[82]

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76. *Id.* § 29-21-9(b)(1).

77. *Id.* § 29-21-9(b)(2).

78. *Id.* § 29-21-9(b)(3).

79. 550 S.E.2d 617 (W. Va. 2001).

80. *Id.* at 621.

81. *See id.* at 620 ("Because of the challenges we already face in attracting competent attorneys to the appointed defense of indigent clients, we wish to take no action that might further discourage members [of] our bar from taking such cases.").

82. *Id.*

The court thereby shifted the costs of immunizing court-appointed attorneys—the cost associated with defending a subsequent malpractice suit arising out of the attorney's actions during the course of her representation—from the court-appointed attorney to the state via the West Virginia Board of Risk and Insurance Management ("the Board").[83] Because the Board bears the costs of suits against prosecutors, it is logical for the Board to also assume the costs of malpractice suits against court-appointed attorneys.

2. The Public Defender-Indigent Defender New Mexico Approach

New Mexico has two pertinent statutes granting immunity for legal malpractice: (1) the Public Defender Act[84] and (2) the Indigent Defense Act.[85] Under the Public Defender Act, a private attorney may contract with the public defender's office to provide criminal representation to indigent clients. Whereas the Public Defender Act neither explicitly provides for nor precludes immunity, the Indigent Defense Act provides that "[n]o attorney assigned or contracted with to perform services under the Indigent Defense Act . . . shall be held liable in any civil action respecting his performance or nonperformance of such services."[86]

New Mexico courts read the two acts *in pari materia*.[87] In *Herrera v. Sedillo*,[88] the New Mexico Court of Appeals held "the two acts together provide a statutory scheme for providing counsel to indigent criminal defendants. The Indigent Defense Act gives indigent defendant the right to free counsel, thereby recognizing their Sixth Amendment rights. The Public Defender Act, enacted later, provides an administrative agency for accomplishing this objective."[89]

83. *Id.* at 621-22.
84. N.M. STAT. ANN. §§ 31-15-1 to 31-15-12 (LexisNexis 2004).
85. §§ 31-16-1 to 31-16-10.
86. § 31-16-10.
87. *See generally* State v. Brown, 134 P.3d 753 (N.M. 2006).
88. 740 P.2d 1190 (N.M. Ct. App. 1987).
89. *Id.* at 1191.

In *Coyazo v. State*,[90] the same court built upon the foundation of its earlier *Herrera* decision. Since the Public Defender Department is a state agency under the Tort Claims Act, the "Indigent Defense Act and the Tort Claims Act provide complete immunity for all possible professional malpractice claims against attorneys providing criminal defense representation for indigent persons."[91] The court reasoned that malpractice immunity actually benefits indigent criminal defendants and advances indigent defense objectives because it encourages the maximum number of private attorneys to participate in indigent defense; it permits attorneys to perform their duties without the constant dread of monetary retaliation or "Monday morning quarterbacking;"[92] it fosters independent judgment and decision-making; it allows private attorneys to maintain or lower malpractice insurance costs; and it reduces the state's expenditures for the public defender department due to larger numbers of private attorneys participating.[93]

3. The Minnesota Utilitarian Approach

As the need for criminal indigent-defense attorneys increased, the "Minnesota Legislature responded in 1965 by adopting legislation to create a system of state and district public defenders."[94] In *Dziubak v. Mott*,[95] the Minnesota Supreme Court addressed whether public defenders should be afforded immunity. Although *Dziubak* does not concern court-appointed private attorneys who defend criminal indigents, its reasoning is persuasive and can be extended to private attorneys appointed under South Carolina's Rule 608.

The *Dziubak* court stated that "privately retained defense counsel must . . . exercise independent discretion in the defense

90. 897 P.2d 234 (N.M. Ct. App. 1995).

91. *Id.* at 240.

92. *Id.*

93. *Id.*

94. Dziubak v. Mott, 503 N.W.2d 771, 773 (Minn. 1993).

95. *Id.* For an interesting argument against the *Dziubak* decision, see Erika E. Pederson, *You Only Get What You Can Pay For:* Dziubak v. Mott *and its Warning to the Indigent Defendant*, 44 DEPAUL L. REV. 999 (1995).

of her . . . clients, and are not immune from legal malpractice claims. However, there are significant differences between private counsel and public defenders which require the extension of immunity to public defenders."[96]

The most notable differences include client acceptance or rejection and funding. A public defender (or court-appointed private attorney) cannot reject clients.[97] She must represent whomever is assigned to her. A private attorney, on the other hand, "may confer with a potential client, and, based upon such factors as the merits of the case, the personality of the client, or the amount of work they can adequately handle, determine whether to accept or decline representation."[98] Additionally, a public defender's quality of representation is limited to her available resources, which are "grossly under-funded," while private attorneys are limited only by what the prospective client can pay.[99]

In addition to outlining the differences between public defenders and in-house counsel, *Dziubak* directly rebuts the misguided argument that malpractice immunity would ultimately harm the indigent's rights due to the overburdened and under-funded state of any given public defender's office.[100]

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96. *Dziubak*, 503 N.W.2d at 775.

97. As applied to South Carolina Rule 608 Appointees, this assertion assumes the appointee is neither exempt nor qualified for removal from the appointment.

98. *Dziubak*, 503 N.W.2d at 775.

99. *Id.*

100. The Court wrote that:

> The office of the public defender does not have sufficient funds to represent each client assigned to it in the way each client might demand to be served. An increasing crime rate and an economic climate which has resulted in increased claims of indigency and lower state budgets to fund government positions have caused public defender caseloads to grow dramatically. We believe that if the public defender is not immune from liability, the cost and burden of defending civil claims will only exacerbate this situation. In the end, this would hurt indigent defendants, not help them. The indigent defendant who thinks the court-appointed attorney was negligent is not without remedies through the appeal process and motions for post-conviction relief and habeas corpus. It would be an unfair burden to subject the public defender to possible malpractice for acts or omissions due to impossible caseloads and an under-funded office:

Essentially, the costs of having to defend suits as well as the duty to pay damage awards for successful malpractice suits would detract from their other official, necessary, and important public defender duties.[101]

The Minnesota approach is utilitarian because the state recognizes that the court-appointed attorney serves both private and government objectives. Malpractice immunity, therefore, "best serves the indigent population" and "society as a whole" by "preserving" resources, aiding in recruiting "qualified attorneys to represent indigent clients in criminal proceedings," and recognizing that the criminal justice system "relies upon the judge, prosecutor and public defender as essential participants."[102]

4. The Nevada Approach

Nevada prohibits actions from being brought against a state officer when the suit is "[b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the state or any of its agencies or political subdivisions or of any officer, employee or immune contractor of

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something completely out of the defender's control.

Id. at 776.

101. *See id.* at 776-77 ("Substantial time, energy, and money are consumed in discovery: answering interrogatories, filing affidavits, and deposing witnesses. These resources consumed to defend against malpractice suits filed against public defenders would take away from the already limited resources available to serve the indigent constituency. In addition, the potential of civil liability for a lack of resources not within a defender's control would serve as a deterrent to recruiting and maintaining dedicated professionals committed to providing an effective defense to indigent criminal defendants.").

102. *Id.* at 777. This rationale is directly adopted from the Third Circuit's decision in *Brown v. Joseph*, 463 F.2d 1046, 1048 (3d Cir. 1972), where the court stated there is "no valid reason to extend this immunity to state and federal prosecutors and judges and to withhold it from state-appointed and state-subsidized defenders." *Id.* In *Brown*, the court rested its decision on policy considerations similar to those in *Dziubak*, most notably that the criminal justice system wants to encourage attorneys to "assume Public Defender roles" and "the constant threat [of malpractice liability] to the Attorney involved . . . would [create] a chilling effect upon Defense Counsel's tactics. Defense Counsel would be caught in an intrinsic conflict of protecting himself and representing his client." *Id.* at 1049.

any of these, whether or not the discretion involved is abused."[103] In Nevada, a public officer includes a "public defender and any deputy or assistant attorney of a public defender."[104] Thus, the statute provided that a public defender is absolutely immune from malpractice suits arising out of discretionary decisions made during the performance of the defender's duties as public defender. Subsequently, the Supreme Court of Nevada interpreted the statute to signify that court-appointed attorneys "now enjoy the same degree of immunity as is extended to public defenders. They cannot be held liable for malpractice arising out of discretionary decisions made pursuant to their duties as court-appointed defense counsel."[105]

D. Public Policy Supports Abandoning South Carolina's Negative Incentive Approach and Granting Rule 608 Appointees Absolute Immunity

It is well established that a criminal defendant is entitled to counsel. Twelve of the thirteen original colonies recognized the right,[106] and it is presently preserved in the United States Constitution[107] and the South Carolina Constitution.[108] Indeed, "[t]he Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'"[109] In the case of indigents, therefore, "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[110]

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103. NEV. REV. STAT. ANN. § 41.032(2) (LexisNexis 2006).

104. § 41.0307(4)(b).

105. Morgano v. Smith, 879 P.2d 735, 737 (Nev. 1994).

106. *See generally* Powell v. Alabama, 287 U.S. 45, 64-65 (1932).

107. U.S. CONST. amend. VI (Jury trial for crimes, and procedural rights); 18 U.S.C.S. § 3006 (LexisNexis 2008) (Assignment of counsel); 18 U.S.C.S. § 3006A (LexisNexis 2008) (Adequate representation of defendants); 48 U.S.C.S. § 1561 (LexisNexis 2005) (Rights and prohibitions); 48 U.S.C.S. § 1421b (LexisNexis 2008) (Bill of Rights).

108. S.C. CONST. art. I, § 14.

109. Gideon v. Wainwright, 372 U.S. 335, 343 (1962).

110. *Id.* at 344.

Scholars opposing court-appointed indigent-defense immunity[111] argue the negative incentive of threatened monetary liability is necessary to preserve the adversary system,[112] hold the attorney accountable to his client,[113] realize the indigent criminal defendant's constitutionally guaranteed rights,[114] and reduce the high costs that malpractice immunity imposes on both the legal community and society as a whole.[115]

These rationalizations for withholding immunity, however, are without merit because ethics sufficiently protect the right to counsel, court-appointed attorneys further both private and governmental objectives, negative incentives breed ill consequences, and immunity benefits indigents.

Imposing negative incentives is additional to the ethics that bind the lawyer to her client. Regardless of monetary liability, "the lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."[116] The transition from private attorney to Rule 608 Appointee does not abrogate this duty.[117]

Furthermore, Rule 608 Appointees serve both private and governmental objectives while performing their critical function

111. Harold H. Chen, *Malpractice Immunity: An Illegitimate and Ineffective Response to the Indigent Defense Crisis*, 45 DUKE L.J. 783 (1996).

112. *Id.* at 803-04.

113. *Id.* at 806-08.

114. *Id.* at 808-10.

115. *Id.* at 810-12.

116. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1.

117. The Third Circuit Court of Appeals has stated, for instance, that "[c]oncededly, there are differences between a court-appointed lawyer from a pool of volunteers . . . or from an agency funded by private contributions . . . and one serving full time in a public office paid by public revenues authorized and mandated by statute. But the fact that one comes to his court-appointed role as a result of a state-mandated and county-financed system does not, in any respect whatsoever, distinguish his professional responsibility to his client from that of any attorney appointed to serve without pay, or paid . . . ." Brown v. Joseph, 463 F.2d 1046, 1048 (3d Cir. 1972). In addition to the differences between the court-appointed attorney and a court-appointed private attorney, there are still effective mechanisms for disciplining an attorney's poor performance. An attorney may be disbarred, publicly reprimanded, or privately reprimanded. Thus, subjecting an attorney to malpractice liability is not the only measure to ensure the realization of the indigent's Sixth Amendment right to counsel.

within the criminal justice system.[118] That notwithstanding, at least two cases have specifically denied court-appointed attorneys immunity, arguing the attorney's role is generally distinguishable from the roles of the judge or prosecutor. These cases, however, are readily distinguishable.

In *Day v. Trybulski*,[119] a Connecticut court held that "only officials deemed integral to the judicial process are afforded absolute immunity."[120] In *Day*, an attorney appointed to prosecute an indigent's civil case was denied immunity on the ground that a court-appointed attorney does not perform functions traditionally supporting a grant of absolute immunity.[121] While prosecutors both represent the state and "see that impartial justice is done the guilty as well as the innocent,"[122] private court-appointed attorneys "zealously advocate their client's legal claims [while] objectively advanc[ing] additional interests that do not encumber other attorneys."[123] Thus, the court found Day functioned solely to serve his client's interests without being "constrained by broader societal interests," and therefore, he was more analogous to a privately retained counsel and not a court-appointed attorney or prosecutor.[124]

In *Adkins v. Dixon*,[125] the Supreme Court of Virginia looked to "the degree of control and direction exercised by the state over the employee whose negligence is involved" because the higher the level of state control, the likelier immunity should be granted.[126] The court held because the state exercises no more

118. *See* Dziubak v. Mott, 503 N.W.2d 771, 777 (Minn. 1993) ("We, like the United States Supreme Court, recognize the essential role performed by the defendant's attorney within our adversarial system of justice. This role is no less important when performed by counsel appointed to represent an individual accused of a crime.").

119. No. CV030476646S, 2008 WL 2039301 (Conn. Super. Ct. Apr. 28, 2008).

120. *Id.* at *5.

121. *Id.* at *4-5.

122. *Id*. at *6.

123. *Id.*

124. *Id.* at *7.

125. 482 S.E.2d 797 (Va. 1997).

126. *Id.* at 800 (internal citations and quotation marks omitted).

control over court-appointed attorneys than it does over private attorneys, absolute immunity should not attach.[127]

As earlier noted, both *Day* and *Adkins* are distinguishable. A public defender differs from a court-appointed private attorney. The former proactively chooses to become a public defender, accepting her fate of vast numbers of court appointments and relinquishing her capacity for client selection. The latter, however, proactively chooses to become a private attorney, whereby she can confer with clients to refuse some and represent others in furtherance of her own best interests as well as those of the client.

At least one court rejects this analysis as applied to public defenders because "[o]nce the appointment of a public defender in a given case is made, his public or state function ceases, and thereafter, he functions purely as a private attorney concerned with servicing his client."[128] This argument fails when applied to court-appointed private attorneys. The indigent did not seek the private attorney. Instead, the court recognized the state and federal requirements for representation, and therefore, the court called upon the individual private attorney to fulfill a necessary function of the criminal justice system—the defense counsel. She is both the client's attorney as well as the court's assistant in the resolution of the underlying criminal matter. Thus she furthers both private as well as governmental objectives.

Since court-appointed attorneys serve these dual objectives, the negative incentive of malpractice liability works a chilling effect on the Rule 608 Appointee's performance to the same extent as it would in the case of a judge, prosecutor, or GAL. Importantly, judges are absolutely immune from suit "in order to secure the independence of the Judges and prevent their being harassed by vexatious actions."[129] Prosecutors are absolutely immune because "if the prosecutor could be made to answer in court each time . . . a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of

127. *Id.* at 801.

128. P.T. v. Richard Hall Cmty. Mental Health Care Ctr., 837 A.2d 427, 432 (N.J. Super. Ct. App. Div. 2000).

129. Fray v. Blackburn, (1863) 122 Eng. Rep. 217 (B&S) .

enforcing the criminal law."[130] Guardians *ad litem* are absolutely immune because "[f]ear of liability to one of the parents can warp judgment that is crucial to vigilant loyalty for what is best for the child [and] the guardian's focus must not be diverted to appeasement of antagonistic parents."[131]

Similarly, absolute immunity is necessary in order for state-appointed defense counsel to satisfy their obligations to their indigent clients and to the system of criminal justice. A constant dread of monetary retaliation encourages overly cautious representation by the Rule 608 Appointee. The defense counsel is "caught in an intrinsic conflict of protecting himself and representing his client."[132] Instead of promoting the highest level of representation, and notwithstanding the lawyer's ethical obligations,[133] it is not unforeseeable that the negative incentive could possibly work to handicap the criminal justice system by encouraging minimalistic representation—doing just enough to avoid a potential malpractice suit.

Absolute immunity, therefore, benefits attorneys and indigents. Immunity benefits attorneys by reducing malpractice insurance costs and lessening the burden that is systematically imposed on the public defender's office because more private attorneys are willing to participate in the criminal legal process.[134] Moreover, immunity benefits indigents by protecting the right to counsel, permitting independent judgment by the attorney, and ensuring that Rule 608 Appointees fulfill their ethical and legal obligations to the legal system.[135]

IV. RECOMMENDATIONS

South Carolina needs to revolutionize its system of realizing the indigent's Sixth Amendment right to counsel by granting absolute immunity to Rule 608 Appointees, having automatically

130. Imbler v. Pachtman, 409 U.S. 424, 425 (1976).
131. Short v. Short, 730 F. Supp. 1037, 1039 (D. Colo. 1990).
132. Brown v. Joseph, 463 F.2d 1046, 1049 (3d Cir. 1972).
133. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2004).
134. Dziubak v. Mott, 503 N.W.2d 771, 775 (Minn. 1993).
135. *See generally* Ferri v. Ackerman, 444 U.S. 193 (1979).

applicable insurance coverage for appointed attorneys, and revising Rule 608 to alter the manner by which attorneys are appointed.

Whereas pro bono work and court-appointment service are fundamental obligations of members of the legal profession, South Carolina's current system of satisfying those obligations smacks in demanding and forcing instead of fostering and encouraging. It overlooks the private attorney who consciously decided to utilize her mind primarily as her stock in trade, not merely a legal repository in the public trust. Nevertheless, most attorneys recognize their continuing duty and professional responsibility to devote their legal skills at times to needy clients, and most find satisfaction in so doing. The fact remains, however, that court-appointed attorneys, such as Rule 608 Appointees, receive little recompense for potentially vast indigent time commitments. Furthermore, the total inequity imposed upon the Rule 608 Appointee becomes evident when one observes how she suffers small or no payment, devotes large amounts of time,[136] loses business opportunities in the private sector, and incurs possibly high costs associated with defending malpractice suits. This inequity guided other states[137] to implement absolute immunity for court-appointed attorneys.[138] South Carolina can learn from those states.

Therefore, to protect both the indigent and the Rule 608 Appointee, South Carolina needs to abandon the negative incentive approach by adopting absolute immunity. First and

136. Because some attorneys appointed to criminal matters are not criminal attorneys, they must spend much time researching matters far beyond the scope of their immediate knowledge.

137. *See supra*, Parts III.C.1.-4.

138. *See* Powell v. Wood County Comm'n, 550 S.E.2d 617, 620 (W. Va. 2001) ("We note that the hourly compensation paid by the state for representation of indigent parties is not highly remunerative. While some attorneys may specialize in such cases and find them rewarding, all face a limited financial recovery for this serious and demanding work. It may be that part of the reason attorneys take such cases is that our law protects them from personal liability. However, if the immunity offered by W. Va. Code § 29-21-20 does not also protect the attorney from expenses incurred in defending a malpractice suit, then the appointed attorney may face enormous financial uncertainty."). Additionally, this is discussed *supra*, Part III.C.1.

foremost, absolute immunity will foster independent decision-making without fear of monetary retribution and encourage attorneys to maximize their participation in court-appointment service and pro bono work. Moreover, as with the judicial, prosecutorial, and GAL immunities, Rule 608 Appointee absolute immunity will have a task-oriented exception. When an attorney acts beyond the bounds of her court-appointed authority, absolute immunity will not attach. This will ensure that while Rule 608 appointees are presumptively immune from suit, the indigent client who is, in fact, harmed by her attorney will not be left without a remedy. Furthermore, South Carolina needs to provide automatically applicable insurance coverage to ensure the Rule 608 Appointee will not incur any costs associated with defending a subsequent malpractice suit.[139] As earlier stated, it is only equitable that the state—the entity requiring the service—covers any costs associated with any subsequent malpractice suit.

In addition to providing both absolute immunity and automatically applicable insurance coverage, South Carolina needs to revise the Rule 608 appointment process with an eye towards practical efficiency. In its current form, Rule 608 provides that attorneys are appointed alphabetically from the criminal roster.[140] This is not only inefficient but may result in cyclical over-appointments for attorneys higher on the list. Moreover, the fact that one's name appears high on the list does not imply she can immediately devote time and energy to indigent defense or that the attorney is capable of performing the type of legal criminal services demanded. Often, attorneys are appointed and must go through the Rule 608 removal or exemption request process, which wastes the attorney's time and governmental resources and potentially injures the legal rights of the indigent client.

South Carolina can correct these problems by simply mandating an annual hourly court-appointment service requirement. Furthermore, South Carolina should grant private attorneys some authority by permitting the attorney to choose

139. *See supra*, Parts III.B.-C.1.

140. S.C. APP. CT. R. 608(f)(4).

when to complete those hourly requirements within the year. The state should realize that while attorneys are willing to perform the important appointment service, they sometimes lack the time and resources to do so. Thus, the clerk of court should appoint attorneys she knows are available at that time to perform court-appointment service. To achieve this end, attorneys, who have determined that their other legal obligations allow them to take on court-appointment service, should routinely contact the clerk of court to notify them when they are available. This will ensure the indigent receives competent representation because the appointed attorney has adequate time to devote to the indigent client.

Moreover, attorneys will come from one of three panels within the criminal roster. The first panel will be comprised of strictly voluntary attorneys who are not seeking recompense for time spent on the criminal matter and who, while concerned with meeting their hourly requirements, are willing to put in more than the minimum time. These are the attorneys who, after it has been determined that a public defender is unavailable, the clerk of court should first contact for appointment. The absolute immunity and automatically applicable insurance coverage will encourage many attorneys to sign up for this panel. Moreover, South Carolina can save money by appointing large numbers of attorneys working solely on a pro bono basis.

Additionally, South Carolina should create two additional panels of attorneys who wish to both meet their minimum hourly requirement as well as receive payment for services. Attorneys who specialize in criminal matters should comprise this second panel. To fill this panel, attorneys simply must note it on their annual Rule 608 form submission. After the clerk has determined a public defender and an attorney from the first voluntary panel is unavailable, the clerk should appoint a member of this panel who notified her availability for appointment. By maintaining a pool of attorneys skilled in criminal matters higher on the list, the risk of appointing an unseasoned attorney not versed in the intricacies of the criminal code will be minimized. This will serve the indigents' best interests by providing criminal representation to suit their needs. Finally, the third panel of attorneys will be comprised of

attorneys who have not indicated they specialize in criminal matters, but nevertheless wish to satisfy their minimum hourly requirements by performing court-appointment service in criminal court. Finding all other attorneys unavailable, the clerk should appoint an available attorney from this list.

By granting immunity and automatic insurance coverage and revising Rule 608 to maximize practical and fiscal efficiency, South Carolina will protect the attorney while ensuring that indigents get the competent representation they deserve. As stated by Learned Hand in the quote that prefaces this piece, "to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties . . . . [I]t has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."[141]

141. Gregoire v. Diddle, 177 F.2d 579, 581 (2d Cir. 1949).

THE CONFRONTATION CLAUSE AT CAPITAL SENTENCING: SHOULD PRISON INCIDENT REPORTS BE ADMISSIBLE IN SOUTH CAROLINA?

Anthony Traurig[*]

I. INTRODUCTION 740
II. THE APPLICABILITY OF THE CONFRONTATION CLAUSE AT CAPITAL SENTENCING PROCEEDINGS 742
A. The Evolution of Confrontation Rights at Capital Sentencing Proceedings 742
B. South Carolina's Application of the Confrontation Clause at Capital Sentencing 748
III. CONFRONTATION CLAUSE ANALYSIS 750
A. *Crawford* Redefines Confrontation Clause Analysis 751
B. *Crawford*'s Effect on Hearsay 755
C. Are Prison Incident Reports Testimonial? 757
IV. SOUTH CAROLINA'S CONFRONTATION CLAUSE ANALYSIS 761
A. South Carolina's Analysis in the Post-*Crawford* Era 761
B. State v. Owens 765
V. PROPOSAL: THE ADMISSION OF PRISON INCIDENT REPORTS AT CAPITAL SENTENCING PROCEEDINGS WITHOUT THE TESTIMONY OF THEIR AUTHOR VIOLATES THE CONFRONTATION CLAUSE UNLESS THE REPORTS ONLY CONTAIN INCIDENTS WHICH

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[*] J.D. candidate, May 2010, Charleston School of Law; B.A. in Political Science, North Carolina State University, 2007. Anthony would like to thank John H. Blume, Professor of Law, Cornell Law School, and Director, Cornell Death Penalty Project; and Emily C. Paavola, Executive Director, The Center for Capital Litigation in Columbia, South Carolina, for the topic and for their guidance. Anthony would also like to thank his family and the *Charleston Law Review*.

CLEARLY DO NOT AMOUNT TO CRIMINAL OFFENSES. 766

I. INTRODUCTION

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[1] The United States Supreme Court recently revitalized this right in *Crawford v. Washington*,[2] where the Court held that the Confrontation Clause bars the admission of testimonial hearsay against a criminal defendant, unless the witness is unavailable and the defendant had prior opportunity to cross-examine the witness.[3] Because the Court did not articulate a definition or test to determine when a statement is testimonial, scholars and other courts have struggled to interpret and apply *Crawford*.[4]

Crawford's implications for death penalty jurisprudence are also vast. As the United States Supreme Court expanded defendants' rights during capital sentencing proceedings over the last few decades, the Confrontation Clause has become increasingly important to death penalty jurisprudence. *Crawford* gives capital defendants another possible avenue of challenging the admission of hearsay statements, such as prison incident reports, at the penalty phase[5] of their trial.

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1. U.S. CONST. amend. VI.

2. 541 U.S. 36 (2004).

3. *Id.* at 36-37.

4. *See, e.g.*, W. Jeremy Counseller & Shannon Rickett, *The Confrontation Clause After* Crawford v. Washington*: Smaller Mouth, Bigger Teeth*, 57 BAYLOR L. REV. 1 (2005); Richard D. Friedman, Crawford, Davis, *and Way Beyond*, 15 J.L. & POL'Y 553 (2007); Thomas J. Reed, Crawford v. Washington *and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule*, 56 S.C. L. REV. 185 (2004).

5. In South Carolina, capital trials are bifurcated, meaning that once a defendant is found guilty of a crime punishable by death (the "guilt phase"), a separate sentencing proceeding (the "penalty phase") commences to determine whether the defendant should receive a death sentence, life in prison without the possibility of parole, or a mandatory minimum sentence of thirty years in prison. S.C. CODE ANN. § 16-3-20(B) (2003).

Consider the following hypothetical: While in prison for an unrelated drug offense, Mr. Smith is charged with a murder that occurred prior to his incarceration. While in prison awaiting trial on the murder charge, he allegedly assaults a prison guard with a toothbrush whittled to a sharp point. Immediately after the incident, the prison guard fills out a prison incident report detailing the events that transpired. Mr. Smith is subsequently convicted on his original murder charge. Prison officials await the outcome of Mr. Smith's sentencing proceeding before deciding whether to report the alleged assault to law enforcement. (If Mr. Smith receives a death sentence, then pursuing criminal assault charges would be pointless.) During sentencing, the prosecutor introduces the damning prison incident report as character evidence against Mr. Smith without calling the prison guard or any witnesses to the alleged assault to testify. Although Mr. Smith objects that admitting the report without the prison guard testifying would violate his right to confront the witness, the trial judge admits the report through the business record exception to the hearsay rule.[6] Based upon the incident report and other evidence, Mr. Smith receives a death sentence. Such a hypothetical scenario demonstrates how a capital defendant in South Carolina can be sentenced to death based upon the testimony[7] of a witness that he never had the opportunity to cross-examine.

Part II of this Comment addresses the evolution of death penalty jurisprudence regarding confrontation rights at capital sentencing proceedings and briefly discusses how South Carolina has handled the issue. Part II concludes that Confrontation Clause and Sixth Amendment jurisprudence have evolved to require that the right to confrontation applies at capital sentencing proceedings. Part III addresses Confrontation Clause analysis, focusing first on United States Supreme Court precedent both before and after *Crawford*, and then applies that analysis to prison incident reports. Part III concludes that prison incident reports are testimonial under *Crawford* and its progeny,

6. *See* FED. R. EVID. 803(6).

7. For an explanation of why such statements are testimonial, see *infra* Part III.

and are inadmissible without the testimony of the report's author, unless the incidents contained in the report clearly do not amount to a possible criminal offense. Part IV examines South Carolina's analysis of the Confrontation Clause since *Crawford* and concludes that South Carolina needs to reexamine its analysis in light of *State v. Owens*.[8]

II. THE APPLICABILITY OF THE CONFRONTATION CLAUSE AT CAPITAL SENTENCING PROCEEDINGS

A. The Evolution of Confrontation Rights at Capital Sentencing Proceedings

The applicability of the Confrontation Clause at the sentencing, or penalty phase, of a capital trial has been, like many areas of law, a progression that has left lawyers and scholars trying to connect the dots.[9] Although the United States Supreme Court has ruled on several due process and procedural issues at capital sentencing proceedings, it has never directly decided whether the Confrontation Clause applies at such proceedings. Nevertheless, the Court has provided sufficient guidance to allow scholars and lower courts, both state and federal, to resolve the issue in the affirmative.[10]

The starting point for whether confrontation rights apply at capital sentencing is a 1949 decision by the United States

8. 664 S.E.2d 80 (S.C. 2008), *cert. denied,* 555 U.S. ___, 129 S. Ct. 1004 (2009). For a more thorough discussion of this case, see John H. Blume & Emily C. Paavola, *Crime Labs and Prison Guards: A Comment on* Melendez-Diaz *and its Potential Impact on Capital Sentencing Proceedings*, 3 CHARLESTON L. REV. 205 (2009).

9. *See, e.g.,* John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967 (2005); Penny J. White, *"He Said," "She Said," and Issues of Life and Death: The Right to Confrontation at Capital Sentencing Proceedings*, 19 REGENT U. L. REV. 387 (2007).

10. *See, e.g.,* Proffitt v. Wainwright, 685 F.2d 1227, 1251-55 (11th Cir. 1982); Grandison v. State, 670 A.2d 398, 413 (Md. 1995); White, *supra* note 9, at 428 ("Neither the Constitution's text, its history, nor interpretive precedent provide a reasoned basis for denying a person facing death the right to confront the witnesses at a capital sentencing proceeding.").

Supreme Court, *Williams v. New York*.[11] In *Williams*, the trial jury convicted the defendant of first degree murder and, as a part of its verdict, recommended a life sentence.[12] The trial judge, however, disregarded the jury's recommendation and imposed a death sentence based on evidence that was neither presented to the jury nor allowed to be rebutted by the defendant.[13] Under the previously existing law, the trial judge was free to impose a death sentence without providing a reason.[14] The New York Court of Appeals affirmed the conviction and sentence.[15]

On certiorari to the United States Supreme Court, the appellant asserted that the trial court violated his right to due process under the Fourteenth Amendment.[16] The Court held that the appellant was not denied due process.[17] In its analysis, the Court reasoned that a sentencing judge should be "free to avail himself of out-of-court information" when making an individualized sentencing decision.[18] *Williams* led many courts to believe that a capital defendant has no right to confront the witnesses against him during sentencing.[19]

Since *Williams*, death penalty jurisprudence has changed dramatically. First, the Court has subsequently criticized *Williams* and rejected much of its rationale. In *Gardner v. Florida,*[20] the Court held that a capital defendant "was denied due process of law when the death sentence was imposed, at least in part, on the basis of information *which he had no opportunity*

11. 337 U.S. 241 (1949).

12. *Id.* at 242.

13. *Id.* at 242-43.

14. *Id.* at 244-45.

15. *Id.* at 252.

16. *Id.* at 245. The defendant did not assert his right of confrontation most likely because the Sixth Amendment's Confrontation Clause was not applicable to the states at the time. *See* Pointer v. Texas, 380 U.S. 400, 403 (1965) (holding the Confrontation Clause applicable to the states).

17. *Williams*, 337 U.S. at 252.

18. *Id.* at 251.

19. *See, e.g.,* Del Vecchio v. Ill. Dep't of Corr., 31 F.3d 1363, 1387-88 (7th Cir. 1994) (citing *Williams* for the proposition that hearsay rules need not apply at capital sentencing).

20. 430 U.S. 349 (1977).

to deny or explain."[21] As in *Williams*, the trial judge imposed a death sentence based partly on evidence that was not disclosed to the defendant or jury.[22] Under facts very similar to those in *Williams*, the majority in *Gardner* noted significant changes in death penalty jurisprudence since *Williams*,[23] rejected much of *Williams'*s logic,[24] and vacated the defendant's death sentence.[25] Although the Court in *Gardner* did not expressly overturn the *Williams* decision, it severely undermined the applicability of *Williams* in modern death penalty jurisprudence.[26]

Second, in both *Furman v. Georgia*[27] and *Gregg v. Georgia*,[28] the United States Supreme Court recognized that because death is so severe and irrevocable it differs from all other forms of punishment.[29] Accordingly, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die."[30] Since *Furman*, the Court has repeatedly called for heightened procedural safeguards in capital sentencing.[31] Thus, capital sentencing proceedings are

21. *Id.* at 362 (emphasis added).

22. *Id.* at 351.

23. *See id.* at 357 ("In the intervening years [since *Williams*] there have been . . . constitutional developments which require us to scrutinize a State's capital-sentencing procedures more closely than was necessary in 1949.").

24. *Id.* at 358-60.

25. *Id.* at 362.

26. *See id.* at 356 (noting in reference to *Williams* that "the passage of time justifies a re-examination of capital-sentencing procedures"); *accord* United States v. Mills, 446 F. Supp. 2d 1115, 1124 (C.D. Cal. 2006) ("*Williams*'s holding may be rendered questionable in the capital context by this evolution in death penalty jurisprudence."). To be sure, the Court has reaffirmed *Williams* in non-capital cases. *See United States v. Watts*, 519 U.S. 148, 151-52 (1997) (citing *Williams* in a drug possession case for the assertion that a sentencing judge should have the most possible evidence before it in determining a defendant's sentence). However, the Court has made clear capital sentencing differs from all other sentencing and requires heightened procedural safeguards. *See infra* notes 27-32 and accompanying text.

27. 408 U.S. 238 (1972).

28. 428 U.S. 153 (1976).

29. *Id.* at 187; *Furman*, 408 U.S. at 289 (Brennan, J., concurring).

30. *Gregg*, 428 U.S. at 190; *see also* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("Because of [the qualitative difference in the penalty of death], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").

31. *See, e.g.,* Enmund v. Florida, 458 U.S. 782, 797 (1982); Beck v.

more highly scrutinized now than at the time *Williams* was decided.[32] Further, because "the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence,"[33] and cross-examination is "the greatest legal engine ever invented for the discovery of truth,"[34] it does not logically follow that a capital defendant's right to confront witnesses should be denied just before sentencing. The Court demands *more* procedural protection, yet denying this right at sentencing would take away the very procedural protection aimed at ensuring reliability and truth.

Third, the Court's expansion of Sixth Amendment rights required at capital sentencing proceedings indicates that the right to confrontation should also be required. In *Apprendi v. New Jersey,*[35] the Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[36] Applying *Apprendi* to capital sentencing, the Court held in *Ring v. Arizona*[37] that, where an aggravating factor must be found to support a death sentence, the aggravating factors "operate as 'the functional equivalent of an element of a greater offense'" and must be found by a jury.[38]

Although *Ring* addressed only the Sixth Amendment right to trial by jury, it has a significant impact on other Sixth Amendment rights during capital sentencing. *Ring* essentially treated the finding of aggravating factors during capital sentencing as a separate trial which requires adherence to some basic constitutional rights. This concept, however, is not a novel one. In *Bullington v. Missouri*,[39] the Court held that the right

Alabama, 447 U.S. 625, 637-38 (1980); Lockett v. Ohio, 438 U.S. 586, 604-05 (1978); Gardner v. Florida, 430 U.S. 349, 357-58 (1977).

32. *Gardner*, 430 U.S. at 357.

33. Crawford v. Washington, 541 U.S. 36, 61 (2004).

34. 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 32 (Chadbourn rev. ed. 1974).

35. 530 U.S. 466 (2000).

36. *Id.* at 490.

37. 536 U.S. 584 (2002).

38. *Id.* at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19).

39. 451 U.S. 430 (1981).

against double jeopardy applied to capital sentencing because the sentencing phase "in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence."[40] The majority in *Bullington* stated that the sentencing phase "was itself a trial on the issue of punishment,"[41] noting that opening and closing statements are made, "testimony is taken, . . . [and] the jury is instructed."[42] The Court's treatment of capital sentencing certainly begs the question of whether any constitutional right should be denied at this separate trial.

Further, *Ring* suggests that other constitutional rights must accompany the right to a jury during capital sentencing proceedings. Before *Ring* was decided, the Court held in *Specht v. Patterson*[43] that a defendant must be afforded the right to confront and cross-examine witnesses against him during a proceeding which requires "a new finding of fact that was not an ingredient of the offense charged."[44] To be sure, the Court has echoed this principle since *Ring*. In *Schriro v. Summerlin*,[45] the Court stated: "*Ring* held that, because Arizona's statutory aggravators restricted . . . the class of death-eligible defendants, those aggravators *effectively were* elements for federal constitutional purposes, and so were subject to the procedural requirements the Constitution attaches to trial of elements."[46] This statement, coupled with *Specht*'s holding, seemingly imply that if the Sixth Amendment right to a jury attaches to the proceeding, then other constitutionally required procedures also attach[47] (i.e., the right to confrontation).[48]

The relative novelty of *Ring* and its ramifications, however,

40. *Id.* at 438.
41. *Id.*
42. *Id.* at 438 n.10.
43. 386 U.S. 605 (1967).
44. *Id.* at 608 (citation omitted).
45. 542 U.S. 348 (2004).
46. *Id.* at 354.
47. *See* White, *supra* note 9, at 420 ("When a jury is required to find facts beyond a reasonable doubt, the decision in *Specht* requires the presence of other important aspects of due process, including the right to counsel, the right to cross-examine, and the right to confrontation.").
48. *See* Crawford v. Washington, 541 U.S. 36, 61 (2004) (describing the right to confrontation as "a procedural rather than a substantive guarantee").

have created some uncertainty and inconsistency amongst courts across the country. Lower courts have generally been split on applying the Confrontation Clause to capital sentencing proceedings.[49] Several lower courts have expressly held that the right to confrontation applies at capital sentencing proceedings,[50] and even more have reached the same conclusion by assuming the right applies.[51] However, some courts have refused to afford the right to confrontation at capital sentencing.[52] Regardless, United States Supreme Court precedent certainly provides sufficient evidence to conclude that a capital defendant has the right to confrontation at the sentencing phase.

In addition to Supreme Court precedent on rights that must be afforded during capital sentencing, there is an underlying textual reason for applying the Confrontation Clause to capital sentencing proceedings. The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

49. *Compare* United States v. Mills, 446 F. Supp. 2d 1115, 1119 (C.D. Cal. 2006) (holding that testimonial hearsay offered at the selection phase is barred by the Confrontation Clause), *with* United States v. Fields, 483 F.3d 313, 326 (5th Cir. 2007) (concluding that "the Confrontation Clause does not operate to bar the admission of testimony relevant only to a capital sentencing authority's selection decision").

50. Proffitt v. Wainwright, 685 F.2d 1227, 1251-55 (11th Cir. 1982); *Mills*, 446 F. Supp. 2d at 1119; People v. Floyd, 464 P.2d 64, 80 (Cal. 1970); Gardner v. State, 480 So. 2d 91, 94 (Fla. 1985); Grandison v. State, 670 A.2d 398, 413 (Md. 1995).

51. People v. Wharton, 809 P.2d 290, 332 (Cal. 1991); State v. Ross, 849 A.2d 648, 697-98 (Conn. 2004); Johnson v. State, 584 N.E.2d 1092, 1105 (Ind. 1992); State v. Nobles, 584 S.E.2d 765, 768-69 (N.C. 2003); State v. Moen, 786 P.2d 111, 136 (Or. 1990); Commonwealth v. Green, 581 A.2d 544, 564 (Pa. 1990); Russeau v. State, 171 S.W.3d 871, 880-81 (Tex. Crim. App. 2005).

52. *See, e.g., Fields*, 483 F.3d at 325-26; United States v. Littlesun, 444 F.3d 1196, 1199 (9th Cir. 2006); Szabo v. Walls, 313 F.3d 392, 398 (7th Cir. 2002); Chandler v. Moore, 240 F.3d 907, 918 (11th Cir. 2001); Bassette v. Thompson, 915 F.2d 932, 939 (4th Cir. 1990); United States v. Jordan, 357 F. Supp. 2d 889, 904 (E.D. Va. 2005); United States v. Johnson, 378 F. Supp. 2d 1051, 1062 (N.D. Iowa 2005); Summers v. State, 148 P.3d 778, 781 (Nev. 2006).

> compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.[53]

Regarding the right to counsel, the Court has held that the Sixth Amendment applies at capital sentencing proceedings.[54] It follows that, because the Sixth Amendment even-handedly limits the right to confrontation and the right to counsel to "criminal prosecutions," the right to confrontation must also apply at capital sentencing.[55] There is nothing inherently different—either textually or substantively—about the Confrontation Clause that justifies a departure from extending its protection to capital sentencing proceedings.[56] Put differently, there is no reason to conclude that the Framers of the Constitution meant for "criminal prosecutions" to encompass capital sentencing proceedings when referring to some Sixth Amendment rights, but not the right to confrontation.[57]

B. South Carolina's Application of the Confrontation Clause at Capital Sentencing

South Carolina has not dealt directly with the issue of whether the Confrontation Clause applies at capital sentencing

53. U.S. CONST. amend. VI.

54. Strickland v. Washington, 466 U.S. 668, 686-87 (1984).

55. *See* Douglass, *supra* note 9, at 2009 ("The [Sixth Amendment's] text suggests that, whenever the rights of notice, confrontation, compulsory process, and counsel apply, they apply together. All of those rights are in the same sentence, which, as a matter of simple grammar, lists them collectively as the rights an accused 'shall enjoy' 'in all criminal prosecutions.' There is no textual reason for limiting the right of confrontation to trial, while extending the right to counsel through all critical stages of a criminal prosecution, including sentencing.").

56. *See* White, *supra* note 9, at 428 ("Neither the Constitution's text, its history, nor interpretive precedent provide a reasoned basis for denying a person facing death the right to confront the witnesses at a capital sentencing proceeding.").

57. *See* Benjamin C. McMurray, *Challenging Untested Facts at Sentencing: The Applicability of* Crawford *at Sentencing After* Booker, 37 MCGEORGE L. REV. 589, 619 (2006) ("The notion of 'prosecution,' as understood in the context of the Sixth Amendment and in legal writing contemporaneous to the founding of this country, includes sentencing, and structurally, the Confrontation Clause should apply with the same force as the right to counsel.").

proceedings, but case law indicates that South Carolina courts would likely apply it if faced with the issue. Generally, South Carolina courts have applied the rules of evidence at the penalty phase of capital trials.[58] Although some courts have held that more evidence is admissible at the penalty phase than at the guilt phase, this is because more evidence (e.g., evidence of the defendant's character) is *relevant* in making an individualized sentencing determination.[59] Admitting evidence that would violate a defendant's right to confrontation is not an acceptable way of introducing more evidence to the jury.[60] The fact that South Carolina courts have generally applied the rules of evidence, which are not constitutionally mandated and embody many of the same principles as the Confrontation Clause, at the penalty phase of capital trials indicates that South Carolina courts would probably not take issue with applying the Confrontation Clause at such phase.

Additionally, South Carolina courts have exclusively embraced *Gardner* over *Williams* in capital cases. The South Carolina Supreme Court has cited *Gardner* four times for the proposition that a defendant is denied due process when a death sentence is based on information he did not have the opportunity to deny or explain.[61] *Williams* has never been cited by a South Carolina appellate court in a capital case. Although *Gardner* was decided on due process grounds, South Carolina clearly relies on it more than *Williams* in capital cases. This further indicates

58. *See, e.g.*, State v. Owens, 664 S.E.2d 80, 82 (S.C. 2008), *cert denied*, 555 U.S. ___, 129 S. Ct. 1004 (2009); State v. Whipple, 476 S.E.2d 683, 687-88 (S.C. 1996).

59. *See* State v. Kornahrens, 350 S.E.2d 180, 185-86 (S.C. 1986) (finding no error in admitting photographs of the victim at penalty phase because "the scope of the probative value is much broader" at penalty phase).

60. *See* United States v. Mills, 446 F. Supp. 2d 1115, 1130 (C.D. Cal. 2006) ("[T]his call to admit more evidence does not sanction the admission of unconstitutional evidence against the defendant.").

61. *See* State v. Owens, 552 S.E.2d 745, 759 (S.C. 2001), *overruled on other grounds by* State v. Gentry, 610 S.E.2d 494 (S.C. 2005); State v. Kelly, 540 S.E.2d 851, 856 (S.C. 2001), *rev'd on other grounds*, Kelly v. South Carolina, 534 U.S. 246 (2002); State v. Ard, 505 S.E.2d 328, 334 (S.C. 1998), *overruled on other grounds by* State v. Shafer, 531 S.E.2d 524 (S.C. 2000); State v. Riddle, 353 S.E.2d 138, 141 (S.C. 1987), *overruled on other grounds by* State v. Torrence, 406 S.E.2d 315 (S.C. 1991).

South Carolina's willingness to apply the Confrontation Clause, or at least the values therein, at capital sentencing proceedings.

III. CONFRONTATION CLAUSE ANALYSIS

The Confrontation Clause had little practical purpose in early American courts because it was only applicable to federal criminal cases. It was not until 1965 that the United States Supreme Court gave the Confrontation Clause more force by making it applicable to the states in *Pointer v. Texas*.[62] After *Pointer*, the Court first articulated guiding principles on the relationship between the Confrontation Clause and hearsay rules in *Ohio v. Roberts*.[63] In *Roberts*, the Court held that when the witness is unavailable, hearsay is admissible when "it bears adequate 'indicia of reliability,'" which could be established by "fall[ing] within a firmly rooted hearsay exception" or "a showing of particularized guarantees of trustworthiness."[64] Needless to say, this standard was very malleable and was imposed arbitrarily by lower courts.[65] The subjective, capricious meaning of reliability left the lower courts needing a more practical, coherent principle in applying the Confrontation Clause.

62. 380 U.S. 400 (1965).

63. 448 U.S. 56 (1980).

64. *Id.* at 66.

65. *Compare* Nowlin v. Commonwealth, 579 S.E.2d 367, 371-72 (Va. Ct. App. 2003) (finding a statement more reliable because the declarant was in police custody), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004), *with* State v. Bintz, 650 N.W.2d 913, 918 ¶ 13 (Wis. Ct. App. 2002) (finding a statement more reliable because the declarant was *not* in police custody), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

A. *Crawford* Redefines Confrontation Clause Analysis[66]

The United States Supreme Court gave new life to the Confrontation Clause when it held, in *Crawford v. Washington,*[67] that the Confrontation Clause bars the admission of "testimonial" hearsay statements against a criminal defendant unless the declarant is unavailable and the defendant had prior opportunity to cross-examine the declarant.[68] In *Crawford*, the defendant was charged with stabbing a man.[69] The trial court allowed the jury to hear tape-recorded statements made to police by the defendant's wife, who witnessed the altercation, without providing the defendant an opportunity to cross-examine her.[70] The Washington Supreme Court upheld the defendant's conviction, finding that the wife's statements were reliable.[71] The United States Supreme Court reversed, holding that the admission of the statements violated the Confrontation Clause.[72] *Crawford* abrogated *Roberts* and rejected much of its rationale, explaining that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."[73] Therefore, the Confrontation Clause "is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[74] *Crawford* thus redefined the role of the Confrontation Clause in criminal proceedings.

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66. At the time this Comment was written, the case of *Melendez-Diaz v. Massachusetts*, No. 07-591 (U.S. argued Nov. 10, 2008), was pending before the United States Supreme Court. The issue in *Melendez-Diaz* is whether crime-lab reports constitute testimonial hearsay under *Crawford*. The Supreme Court's decision may have implications for the subject of this Comment. For a discussion of its possible implications, see generally Blume & Paavola, *supra* note 8.

67. 541 U.S. 36 (2004).

68. *Id.* at 68.

69. *Id.* at 38.

70. *Id.*

71. *Id.*

72. *Id.* at 68.

73. *Id.* at 62.

74. *Id.* at 61.

Shifting Confrontation Clause analysis from determination of reliability to determination of whether statements are testimonial, *Crawford* clarified the nature and underlying principles of the clause but left many issues unresolved. The Court explicitly "le[ft] for another day any effort to spell out a comprehensive definition of 'testimonial'"[75] and even acknowledged that its failure to do so would "cause interim uncertainty."[76] Although the Court did not articulate a comprehensive definition, it offered some guidance on what the term should encompass and posited some possible definitions. These included: "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact;'"[77] "'*ex parte* in-court testimony or its functional equivalent . . . such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;'"[78] "[s]tatements taken by police officers in the course of interrogations;"[79] and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use later at a trial."[80] Ultimately, the Court recognized there is a "common nucleus" shared by these definitions without articulating exactly what the "common nucleus" is.[81]

The Tenth Circuit has suggested that "the 'common nucleus' present in the formulations . . . centers on the reasonable expectations of the declarant. It is the reasonable expectation that a statement may be later used at trial that distinguishes the flippant remark, proffered to a casual acquaintance, from the true testimonial statement."[82] Other circuits have agreed with

75. *Id.* at 68.

76. *Id.* at 68 n.10.

77. *Id.* at 51 (quoting 2 N. WEBSTER, *An American Dictionary of the English Language* (1828)).

78. *Id.*

79. *Id.* at 52.

80. *Id.* (quoting Brief of National Ass'n of Criminal Defense Lawyers et al. as Amici Curiae at 3, 541 U.S. 36 (2004) (No. 02-9410)).

81. *Id.*

82. United States v. Summers, 414 F.3d 1287, 1302 (10th Cir. 2005)

this conclusion.[83] The "reasonable expectations of the declarant" approach is also efficient, giving lower courts a relatively clear standard to apply.[84] If a reasonable person in the declarant's position would reasonably expect or anticipate that the statements he or she provides will be used prosecutorially, then the statement is testimonial. This objective approach is consistent with statements that the Court in *Crawford* found to be testimonial, regardless of the precise definition—statements made to police in the course of interrogation and ex parte testimony at a preliminary hearing.[85]

The "reasonable expectations of the declarant" approach is also consistent with the Supreme Court's attempt to clarify *Crawford* in *Davis v. Washington*.[86] *Davis* combined the cases of *Hammon v. Indiana* and *Davis v. Washington* to determine whether "statements made to law enforcement personnel during a 911 call or at a crime scene are 'testimonial' . . . ."[87] In *Davis*, the trial court admitted the 911 call recording from Michelle McCottry, the alleged victim who did not testify at trial, into evidence.[88] This evidence ultimately led to the defendant's conviction.[89] The Court held that McCottry's statements during the 911 call were nontestimonial because the purpose of the

(citation omitted).

83. *E.g.,* United States v. Saget, 377 F.3d 223, 229 (2d Cir. 2004) ("All of these definitions provide that the statement must be such that the declarant reasonably expects that the statement might be used in future judicial proceedings."); United States v. Cromer, 389 F.3d 662, 675 (6th Cir. 2004) ("The proper inquiry, then, is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime.").

84. While this approach may create ambiguities in certain situations, such as statements made to an undercover police officer, it creates less ambiguities and problems than other approaches. *See* Friedman, *supra* note 4, at 563 (arguing that the reasonable anticipation of the declarant approach is better than the "primary purpose" and "ongoing emergency" approaches, which are "extremely ambiguous" and would encourage courts to improperly admit accusatory statements without opportunity for confrontation).

85. *Crawford*, 541 U.S. at 52.

86. 547 U.S. 813 (2006).

87. *Id.* at 817.

88. *Id.* at 818-19.

89. *Id.* at 819.

statements "was to enable police assistance to meet an ongoing emergency," not to bear testimony.[90] In *Hammon*, the trial court allowed the testimony of a police officer who arrived at the scene shortly after the alleged assault and had the alleged victim, Amy Hammon, fill out an affidavit; Hammon did not appear at trial.[91] Ultimately, the Court held that Hammon's statements to the officer were testimonial and thus barred under *Crawford*, noting that the "purpose of the [interrogation] was to nail down the truth about past criminal events" and that the statements "d[id] precisely *what a witness does* on direct examination."[92]

In its analysis of these cases, the Court adhered to the declarant's reasonable expectations approach. In the context of interrogations, the Court clarified that statements "are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[93] The Court distinguished *Davis* and *Hammon* by stepping into the proverbial shoes of the declarant and observed that "[t]he statements in *Davis* were taken when McCottry was alone, not only unprotected by police (as Amy Hammon was protected), but apparently in immediate danger from [the defendant]. She was seeking aid, not telling a story about the past."[94] In *Hammon*, however, the Court explained that Hammon's statements were given "at some remove in time from the danger she described" and that "after [Hammon] answered the officer's questions, he had her execute an affidavit, in order, he testified, '[t]o establish events that have occurred previously.'"[95] Consequently, it is objectively reasonable that Hammon would expect her statements to be used in a later criminal prosecution.

Therefore, of all the proffered definitions of testimonial in *Crawford*, the most practicable and plausible definition is

90. *Id.* at 828.
91. *Id.* at 819-20.
92. *Id.* at 830.
93. *Id.* at 822.
94. *Id.* at 831.
95. *Id.* at 832.

"statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[96] On the Court's adherence to the declarant's expectations approach in *Davis*, one scholar stated:

> In this view, *Davis* is perfectly compatible with a general test based on the anticipation of a reasonable person in the position of the declarant. The Court might well believe that, if a statement is made in response to an interrogation and the interrogation was conducted primarily for the purpose of resolving an emergency, then it is highly unlikely that a reasonable person in the declarant's position would anticipate that the statement would be used for prosecution; it might be unlikely both because the circumstances that govern the interrogator also affect the declarant, and because the fact and nature of the interrogation govern the declarant's understanding of the situation.[97]

This approach provides a clear reasonableness standard for judges: if a reasonable person in the declarant's position would reasonably believe her statement would be used later in prosecuting the defendant, then the declarant's statement is inadmissible unless the declarant is unavailable and the defendant had prior opportunity to cross-examine the declarant. Although this determination is not exceedingly complicated, problems often arise in determining the proper relationship between Confrontation Clause analysis and certain hearsay exceptions.

B. *Crawford*'s Effect on Hearsay

For purposes of Confrontation Clause analysis, the only relevant classification of hearsay statements is whether they are testimonial or nontestimonial. The majority opinion in *Crawford* expressly rejected the notion that the Confrontation Clause must bow to the rules of evidence.[98] *Crawford* abrogated *Roberts*, at

96. Crawford v. Washington, 541 U.S. 36, 52 (2004) (citation omitted).
97. Friedman, *supra* note 4, at 561-62.
98. *Crawford*, 541 U.S. at 50-51.

least in part, because it conditioned the admissibility of all hearsay statements on whether it falls under a firmly rooted hearsay exception.[99] Such a test, the majority in *Crawford* argued, is incompatible with the historical principles of the Confrontation Clause.[100] The Court stated: "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence . . . ."[101] The Court reiterated this point in *Davis*, stating: "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause."[102] Thus, the determination of whether a statement is testimonial is completely independent of any determination of whether the statement might normally be admissible through a hearsay exception.

Therefore, it follows that the specific hearsay exception under which the statement might normally fall is irrelevant to Confrontation Clause analysis. Although *Crawford* made clear that the Confrontation Clause effectively trumps the rules of evidence, it mentioned in dicta two examples of hearsay exceptions that have *traditionally* covered nontestimonial statements—business records and statements in furtherance of a conspiracy.[103] This has created confusion amongst some lower courts and led some to conclude that any statement which falls under the business records exception is per se nontestimonial.[104]

Such a conclusion is flawed for two reasons. First, the Court clarified its comment on business records in a footnote at the end

99. *Id.* at 60.

100. *Id.*

101. *Id.* at 61.

102. Davis v. Washington, 547 U.S. ___, 126 S. Ct. 2266, 2273 (2006).

103. *Crawford*, 541 U.S. at 56.

104. *See, e.g.*, United States v. Feliz, 467 F.3d 227, 233 (2d Cir. 2006) (holding that properly admitted business records cannot be testimonial); *but see* Thomas v. United States, 914 A.2d 1, 14 (D.C. 2006) ("[T]he fact that the document might happen to fall within the jurisdiction's business records exception to the hearsay rule does not render the document non-testimonial."); Johnson v. State, 929 So. 2d 4, 7 (Fla. Dist. Ct. App. 2005) ("[T]echnically, . . . [a] lab report is a record kept in the regular course of business but, by its nature, it is intended to bear witness against an accused.").

of the same paragraph. The Court cautioned:

> Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.[105]

Thus, the Court warned against the very practice of prosecutors producing testimonial evidence in preparation for trial in a way that would circumvent the Confrontation Clause via modern rules of evidence. Allowing prosecutors to establish a safe haven in the business records exception—excusing any record which falls within the broad, modern business records exception from Confrontation Clause scrutiny—condones the very prosecutorial abuse that the Court warned against in *Crawford*.

Second, when the Court suggested that business records are nontestimonial, it did so in the context of a historical discussion and referred to the common law business records rule, or the "shop-book" rule.[106] The modern business records exception is significantly broader than the common law shop-book rule, which did not include records prepared in anticipation of litigation.[107] Therefore, records that fit the modern exception may not have fallen within the common law exception. Boldly emancipating modern business records from constitutional scrutiny should not rest on such shaky grounds.

C. Are Prison Incident Reports Testimonial?

Prison incident reports are important in capital sentencing proceedings because they can be essential evidence in proving a nonstatutory aggravating factor, such as future dangerousness, or can be used as character evidence. Incidents contained in

105. *Crawford*, 541 U.S. at 56-57 n.7.

106. *See id.* at 55-56 (citing several common law sources and referring to hearsay exceptions that were "well established by 1791").

107. Thomas v. United States, 914 A.2d 1, 14 (D.C. 2006).

these reports can range from minor prison infractions (e.g., cursing at prison guards) to more serious offenses (e.g., stabbing a fellow inmate). Some incidents contained in the reports are ultimately prosecuted, but many are not. When these reports are admitted into evidence, it is usually through a hearsay exception, like the business records exception. The problem that arises is that such reports can contain statements from prison officials or other inmates who do not testify at the sentencing proceeding.

To demonstrate the procedure pertaining to incident reports, the Federal Bureau of Prisons (FBOP) can provide a helpful model.[108] According to FBOP policy, when prison staff "witnesses or has a reasonable belief" that an infraction of prison rules has occurred and does not believe that the matter can be resolved informally, that staff member must immediately fill out an incident report including a list of people who were present during the incident, any unusual behavior by the inmate, a description of physical evidence, and the extent of, if any, force used.[109] If it appears to the investigator that the incident will likely lead to criminal prosecution, the investigator must suspend the investigation until the Federal Bureau of Investigation (FBI) completes its investigation or allows the prison staff investigator to continue his investigation.[110]

Considering the circumstances under which prison incident reports are made, it is clear that many reports would contain testimonial statements. Under the declarant's expectations approach, a statement in such reports is likely "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial"[111] and seeks "to establish or prove past events potentially

108. The Federal Bureau of Prisons has custody of 85% of federal prisoners, leaving the remaining 15% under the custody of privately owned prisons. Federal Bureau of Prisons, http://www.bop.gov/about (last viewed Mar. 29, 2009). Thus, their policies may differ from some federal and state prisons. However, the Federal Bureau of Prisons' policies are sufficiently representative for the purposes of this Comment.

109. 28 C.F.R. § 541.14(a) (2008), *available at* http://www.bop.gov/policy/progstat/5270_007.pdf, at ch. 5 p. 2 (providing additional information about general rules).

110. *Id.* § 541.14(b)(1).

111. *Crawford,* 541 U.S. at 52 (citation omitted).

relevant to later criminal prosecution."[112] Whichever definition of testimonial one might choose, incident reports qualify as testimonial because they fall within the "common nucleus" of proffered definitions. Prison guards are keenly aware of the fact that the filing of an incident report may lead to criminal prosecution. In fact, under FBOP policy a prison official must inform the prisoner of his right to remain silent when delivering the incident report to the prisoner and at all other stages of the disciplinary process.[113] Filing an incident report is the first necessary step in bringing prosecution; if the incident is not reported, then no investigation will occur and no prosecution will result. Therefore, it is difficult to imagine that a prison guard would fill out an incident report *without* the possibility of prosecution in mind.

Additionally, although *Crawford* rejected the reliability test from *Roberts*, it should be noted that prison incident reports are no more reliable than any other statement excluded as hearsay. Prison guards are often the victims of the incidents that they record. Given the adversarial, hostile relationship between prison guards and inmates, the accuracy of the prison guard's account immediately after the incident is questionable at best.[114] Given the Court's demand for heightened reliability and accuracy of evidence at capital sentencing, it is vital that prison incident reports face our legal system's truth-seeking instrument—cross-

112. Davis v. Washington, 547 U.S. 813, 822 (2006).

113. 28 C.F.R. § 541.14(b)(2).

114. *Cf.* People v. Smith, 565 N.E.2d 900, 914 (Ill. 1990) (reasoning that police reports made at the scene of a crime or apprehension of a suspect lack the trustworthiness and reliability of business records because "[t]he information contained in such reports or records may well call into question the motivation, the recall, or the soundness of conclusions of the author of the report or the person providing the information contained in the report"). Prison guards may also be trying to avoid civil liability when making an incident report. The Seventh Circuit explained:

> That prison guards may be held accountable under 42 U.S.C. § 1983 for physical beatings of prisoners, deprivation of medical care, or deprivation of hygienic conditions, has been established for enough years that it can safely be assumed at least some guards write their reports on such occurrences with that possibility in mind.

Bracey v. Herringa, 466 F.2d 702, 704 (7th Cir. 1972) (footnotes omitted).

examination.

Although the issue of the admissibility of prison incident reports at capital sentencing proceedings has not been addressed by many courts since *Crawford*, some courts have addressed the issue and correctly excluded the reports. In *Russeau v. State*,[115] the Court of Criminal Appeals of Texas held that prison reports detailing disciplinary offenses "amounted to unsworn, *ex parte* affidavits of government employees and were the very type of evidence the [Confrontation] Clause was intended to prohibit."[116] Although the reports were admitted as business records at trial, the court nonetheless found that the statements in the reports were testimonial.[117] Also, in *United States v. Mills*,[118] a federal district court barred the admission of prison discipline reports that described alleged assaults and attempts to smuggle contraband.[119] The court distinguished minor offenses from severe offenses and upheld the admission of reports describing minor offenses, such as being unsanitary and cursing at prison officials.[120] The court reasoned that, when recording minor offenses, a prison official might reasonably believe that the statements would be used only for internal prison discipline, not a later trial.[121] This reasoning seems compatible with *Crawford*'s rationale. Therefore, courts should find that statements contained in prison incident reports are testimonial, unless the incidents described clearly do not amount to criminal offenses.

115. 171 S.W.3d 871 (Tex. Crim. App. 2005).
116. *Id.* at 881.
117. *Id.* at 880.
118. 446 F. Supp. 2d 1115 (C.D. Cal. 2006).
119. *Id.* at 1137-38.
120. *Id.* at 1137.
121. *Id.*

IV. SOUTH CAROLINA'S CONFRONTATION CLAUSE ANALYSIS

A. South Carolina's Analysis in the Post-*Crawford* Era

Despite *Crawford* marking a fundamental change in Confrontation Clause analysis, South Carolina cases that reflect such change are scarce. Of the twelve South Carolina appellate decisions that cite *Crawford*, three were vacated in part,[122] three determined that *Crawford* did not apply and thus did not analyze the issue,[123] and two found that the issue was not preserved for appeal,[124] leaving only four analyses of *Crawford*.[125] Therefore, South Carolina, like many jurisdictions, provides few precedents in this area of law and has rarely given the issue thorough analysis.

The South Carolina Supreme Court first encountered

122. *See* State v. Roach, 613 S.E.2d 791 (S.C. Ct. App. 2005), *vacated in part*, 659 S.E.2d 107, 107 (S.C. 2008) (vacating the portion of the lower court's opinion that addressed *Crawford* because the issue was not preserved for appeal and, therefore, should not have been addressed); State v. Staten, 610 S.E.2d 823 (S.C. Ct. App. 2005), *vacated in part and cert. dismissed*, 647 S.E.2d 207, 207 (S.C. 2007) (granting certiorari only to vacate the lower court's discussion of *Crawford* and then dismiss the writ of certiorari); State v. Davis, 613 S.E.2d 760 (S.C. Ct. App. 2005), *vacated in part*, 638 S.E.2d 57, 61 (S.C. 2006) (affirming the lower court's finding that the statement in issue was nontestimonial but vacated the rest of the discussion of *Crawford* because it did not relate to the case).

123. *See* State v. Pauling, 639 S.E.2d 680, 682 (S.C. Ct. App. 2006) (finding that *Crawford* does not apply to parole revocation hearings); State v. Washington, 623 S.E.2d 836, 840 (S.C. Ct. App. 2005) (finding that *Crawford* did not apply because the declarant testified at trial); State v. Weaver, 602 S.E.2d 786, 793 n.1 (S.C. Ct. App. 2004) (same).

124. State v. Owens, 664 S.E.2d 80, 81 (S.C. 2008), *appeal docketed,* No. 08-7189 (U.S. Nov. 10, 2008); State v. Frazier, 654 S.E.2d 280, 283 (S.C. Ct. App. 2007).

125. State v. Ladner, 644 S.E.2d 684 (S.C. 2007); State v. Cutro, 618 S.E.2d 890 (S.C. 2005); State v. Holmes, 605 S.E.2d 19 (S.C. 2004), *vacated on other grounds*, 547 U.S. 319 (2006); State v. Mitchell, 662 S.E.2d 493 (S.C. Ct. App. 2008). Additionally, *State v. Davis*, *supra* note 112, provides, if nothing else, an example of a statement that South Carolina courts have found to be nontestimonial.

Crawford in *State v. Holmes*.[126] While *Holmes* was decided after *Crawford*, the South Carolina Supreme Court actually heard the case prior to the rendering of *Crawford*. Thus, the appellant argued the Confrontation Clause issue under *Roberts*—without the benefit of *Crawford*.[127] Despite this fact, the South Carolina Supreme Court denied rehearing the case.

Regardless, *Holmes* was a bad harbinger for *Crawford* analysis in South Carolina. The trial judge admitted prison incident reports from various alleged offenses despite hearing testimony from only the custodian of the records, not the author of the records.[128] The custodian of the records did not observe any of the incidents contained in the report, but rather testified that the officers who filed the reports observed or had knowledge of the incidents.[129] On appeal, the South Carolina Supreme Court did not provide any analysis and dismissed the issue through string citations as being "without merit."[130] The court, however, cited *Roberts* for the proposition that "business and public records exceptions are among the safest against a Confrontation Clause challenge of the hearsay exceptions."[131] Although the court acknowledged that *Roberts* was "overruled on other grounds" by *Crawford*, it failed to recognize that *Crawford* left little "ground" on which *Roberts* could still stand.[132] In fact, the portion of the *Roberts* opinion that the court relied on suggests that statements that fall within the business records and public records exceptions comply with constitutional requirements due to their *reliability*—this is the very test used under *Roberts* that was rejected by *Crawford*.[133] Although

126. 605 S.E.2d 19 (S.C. 2004), *vacated on other grounds*, 547 U.S. ___, 126 S. Ct. 1727 (2006).

127. Brief of Appellant at 44-47, State v. Holmes, 605 S.E.2d 19 (S.C. 2004) (No. 25886).

128. *Id.* at 45.

129. *Id.*

130. State v. Holmes, 605 S.E.2d 19, 24-25 (S.C. 2004).

131. *Id.* at 25.

132. *See supra* notes 77-74, 98-102 and accompanying text.

133. *See* Ohio v. Roberts, 448 U.S. 56, 66 & n.8 (1980) ("The Court has applied this 'indicia of reliability' requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the

Holmes was heard before the *Crawford* decision came down and decided when *Crawford* was a novelty, it created the proverbial snowball which would grow as subsequent South Carolina cases relied on and expanded upon it.

The South Carolina Supreme Court expanded the *Holmes* rationale in *State v. Cutro*,[134] where it held that autopsy reports were admissible because they were public records and thus nontestimonial.[135] In *Cutro*, the State's medical expert testified to her analysis of 274 autopsy reports that were marked as exhibits and summarized in a chart, and compared them to those of the victim.[136] The court found that the autopsy reports were admissible under the public records exception.[137] Moreover, the court suggested that public records, in addition to business records, are immune from the Confrontation Clause because they are nontestimonial: "A public record, very much like a business record, is not testimonial and its admission similarly does not violate the defendant's confrontation rights."[138] Although the court did not cite *Holmes* (or any authority) for the assertion that public records are per se nontestimonial, it expanded upon the *Holmes* decision by shielding all public and business records from Confrontation Clause analysis solely because they fit within those exceptions. Essentially, *Cutro* annexed another hearsay exception into the business records' safe haven.

For the first time, the South Carolina Supreme Court engaged in ample *Crawford* analysis in *State v. Ladner*.[139] In *Ladner*, the defendant was convicted of criminal sexual conduct with a minor after the child's caretaker testified that the child told her that the defendant assaulted her.[140] On appeal, the defendant claimed that admitting the child's hearsay statement violated his confrontation rights under *Crawford*.[141] The court

constitutional protection.'").

134. 618 S.E.2d 890 (S.C. 2005).

135. *Id.* at 896.

136. *Id.* at 895.

137. *Id.* at 896.

138. *Id.*

139. 644 S.E.2d 684 (S.C. 2007).

140. *Id.* at 686-87.

141. *Id.* at 688.

concluded that the victim's statement was nontestimonial because it was "much more akin to a remark to an acquaintance rather than a formal statement to government officers" and was "not designed to implicate the criminal assailant, but to ascertain the nature of the child's injury."[142] *Ladner* listed the proffered definitions of testimonial from *Crawford* and declared that *Roberts* holds dominion over nontestimonial statements, while *Crawford* and *Davis* hold exclusive dominion over testimonial statements.[143] Although *Ladner* was unable to address the mistakes of *Holmes* and *Cutro*,[144] the court did provide valuable precedent for *Crawford* analysis.

In 2008, the Court of Appeals of South Carolina made a relatively easy *Crawford* determination in *State v. Mitchell*.[145] In *Mitchell*, after nine hours of police interrogation, one of the defendant's accomplices submitted a written statement implicating the defendant in the crime.[146] When the State called the accomplice to the stand at the defendant's trial, the accomplice refused to answer the prosecutor's questions and was ultimately held in contempt and removed from the courtroom before cross-examination.[147] The trial judge then allowed the State to introduce the accomplice's written statement through the testimony of one of the interrogating police officers.[148] The court of appeals held that the trial judge committed reversible error by admitting the accomplice's statement.[149] The court reasoned that, because the statement was testimonial, *Crawford* requires that the witness be unavailable and a prior opportunity

142. *Id.* at 689-90.

143. *See id.* at 689 ("[W]hile *Crawford* apparently left *Roberts* viable as the primary authority for analyzing nontestimonial hearsay, Davis [sic] arguably 'declared that the Sixth Amendment simply has no application outside the scope of testimonial hearsay.'") (quoting Tom Lininger, *Reconceptualizing Confrontation After* Davis, 85 TEX. L. REV. 271, 285 (2006)).

144. The court did not address the business or public records because the child's statement was admitted through the excited utterance exception. *Id.* at 690.

145. 662 S.E.2d 493 (S.C. Ct. App. 2008).

146. *Id.* at 495.

147. *Id.* at 496.

148. *Id.*

149. *Id.* at 501.

for cross-examination.[150] Even conceding the issue of availability, the court noted, it was inconceivable that the defendant had an opportunity to cross-examine the witness about the statement.[151]

B. State v. Owens

The case of *State v. Owens*[152] exemplifies South Carolina's need to reexamine its post-*Crawford* Confrontation Clause analysis. After his first two death sentences were overturned on appeal, Freddie Owens's third capital sentencing proceeding was tried by a jury.[153] At this third sentencing proceeding, the trial judge, over defense counsel's objection, admitted redacted versions of several prison incident reports through the business records exception.[154] The incident reports included twenty-eight alleged offenses, ranging in severity from breaking a sink to stabbing a corrections officer.[155] The jury subsequently sentenced Owens to death.[156]

On appeal, the South Carolina Supreme Court held that the Confrontation Clause issue was not preserved for review.[157] Despite its holding, the court tipped its hand and indirectly addressed the issue. In holding that the incident reports were properly admitted as business records, the court cited *Roberts* for the proposition that "properly administered, [business records] are among the safest against a confrontation-clause challenges [sic]."[158] The court thus indicated that it still adhered to its holding in *Holmes* that all business records are nontestimonial. Unlike *Holmes*, however, the court in *Owens* had the benefit of experience in analyzing *Crawford* and hearing arguments on this

150. *Id.* at 499.
151. *Id.*
152. 664 S.E.2d 80 (S.C. 2008), *cert. denied,* 555 U.S. ___, 129 S. Ct. 1004 (2009).
153. *Id.* at 80-81.
154. *Id.* at 81.
155. *Id.* at 81-82.
156. *Id.* at 81.
157. *Id.*
158. *Id.* at 82 (citing Ohio v. Roberts, 448 U.S. 56, 100 (1980)).

issue based on *Crawford*. Although the United States Supreme Court denied certiorari in the case,[159] the South Carolina appellate courts will certainly address *Crawford* issues again.

V. PROPOSAL: THE ADMISSION OF PRISON INCIDENT REPORTS AT CAPITAL SENTENCING PROCEEDINGS WITHOUT THE TESTIMONY OF THEIR AUTHOR VIOLATES THE CONFRONTATION CLAUSE UNLESS THE REPORTS ONLY CONTAIN INCIDENTS WHICH CLEARLY DO NOT AMOUNT TO CRIMINAL OFFENSES.

Under South Carolina's current analysis of the Confrontation Clause, the hypothetical Mr. Smith, like Freddie Owens, may be sentenced to death based in part upon the untested and uncross-examined statements of a prison guard who objectively should have known that his statements would likely be used prosecutorially against Mr. Smith. Such a result clearly offends Confrontation Clause jurisprudence since *Crawford* and the demand for heightened reliability in capital sentencing. South Carolina needs to change its approach to Confrontation Clause analysis by adhering more closely to the reasonable expectations of the declarant approach. South Carolina's current approach seemingly determines which, if any, hearsay exception the statement falls within first, and then determines whether the statement is testimonial based on the hearsay exception. Instead, under the reasonable expectations of the declarant approach, the judge first determines whether the hearsay statement is testimonial—i.e., whether a reasonable person in the declarant's position would reasonably expect or anticipate that the statement would be used prosecutorially. If the hearsay statement is determined to be nontestimonial, then the court should determine whether it falls within a hearsay exception. Under this approach, prison incident reports detailing incidents which are clearly criminal in nature are certainly testimonial. Although any change in South Carolina's analysis would come too late for Mr. Owens, it could spare the next Mr. Smith the same injustice.

159. Owens v. South Carolina, 555 U.S. ___, 129 S. Ct. 1004 (2009).