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Removal of Women and African Americans in Jury Selection in South Carolina Capital Cases, 1997-2012

Ann M. Eisenberg*

Abstract

The Supreme Court's May 2016 decision in Foster v. Chatman involved smoking-gun evidence that the state of Georgia discriminated against prospective black jurors during jury selection in Foster's 1987 capital trial. Foster was decided on the thirtieth anniversary of Batson v. Kentucky, the first in the line of cases to prohibit striking prospective jurors on the basis of their race or gender. But the evidence of discrimination for Batson challenges is rarely so obvious and available as it was in Foster.

While litigants have struggled to produce evidence of discrimination in individual cases, empirical studies have been able to assess jury selection practices through a broader lens. This Article uses original data gathered from trial transcripts to examine race- and gender-related exclusion of potential jurors during several stages of jury selection in a set of thirty-five South Carolina cases that resulted in death sentences from 1997 to 2012. It includes observations for over 3,000 venire members for gender and observations for over 1,000 venire members for race. This is one of few studies to examine the use of peremptory strikes in actual trials; no previous studies of this magnitude have examined this topic in South Carolina.

Consistent with comparable studies, this study's results — although limited in their generalizability due to data limitations — revealed that white and black potential jurors had substantially different experiences on their path to the jury box, while gender played a subtler role. Some of the findings included that prosecutors used peremptory strikes against 35% of eligible black venire

* Assistant Professor, University of South Carolina School of Law. This Article is dedicated to my father, the late Professor Theodore Eisenberg, who also offered input and provided assistance with data analysis for an earlier draft. I am grateful to the Office of Appellate Defense, a division of the South Carolina Office of Indigent Defense, for providing the trial transcripts observed in this study; to John Blume and Sheri Johnson for their feedback and for the opportunity to conduct this study; to Valerie Hans for feedback and guidance on earlier drafts; to Colin Miller and Italia Patti for their helpful comments; to Tokunbo Fadahunsi, Ph.D. Candidate, West Virginia University Department of Statistics, for data analysis support on the final version of the Article; and to Cornell Law School clinic students, including Mahats Miller, who contributed to data entry.

members in the data set, compared to 12% of eligible white venire members, and that the death-qualification process impeded a substantial number of black venire members from serving. These disparities contributed to overrepresentation of whites on the juries. The study's findings call into question the fairness of some of South Carolina's current death row inmates' trials, and buttress the argument that capital conviction and sentencing procedures are incompatible with the need for representative and impartial juries.

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I. Introduction

The Supreme Court's May 2016 decision in *Foster v. Chatman*¹ involved smoking-gun evidence that the state of Georgia discriminated against black prospective jurors during jury selection in Foster's 1987 capital trial. Prosecutors' files included a list of black venire members' names highlighted in green with "B" next to them, and the handwritten note, "NO Black Church," among other things.² Prosecutors struck all four black prospective jurors who had been qualified to serve, resulting in an all-white jury.³ The Court found, in contrast to the Georgia Supreme Court's holding, that "the focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury."⁴

Foster was decided on the thirtieth anniversary of *Batson v. Kentucky*,⁵ the first in the line of cases to prohibit striking prospective jurors on the basis of their race or gender.⁶ But, *Foster* notwithstanding, this line of cases is known for its impotence.⁷ The main difficulty arises when litigants seek to pursue *Batson* and related challenges, which they begin by making a prima facie showing that a peremptory strike was exercised on a prohibited basis — the first

1 136 S. Ct. 1737 (2016).

2 *Id.* at 1744. Additional evidence included a note from an investigator who worked with the prosecution, stating, "[I]f we had to pick a black juror I recommend that [this juror] be one of the jurors"; a list titled "definite NO's," which included six names, five of which were black prospective jurors (one of whom was disqualified for connection to the case prior to the strike stage); and the jurors' questionnaires, where their responses indicating their race had been circled. *Id.*

3 *Id.* at 1743.

4 *Id.* at 1755.

5 476 U.S. 79 (1986).

6 *Id. J.E.B. v. Alabama* extended *Batson*'s prohibition on discrimination to gender. 511 U.S. 127, 129 (1994).

7 See, e.g., BARBARA O'BRIEN & CATHERINE M. GROSSO, REPORT ON JURY SELECTION STUDY 11-13 (2011), <http://digitalcommons.law.msu.edu/facpubs/331/>; EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 4 (Aug. 2010), <http://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf> ("Today in America, there is perhaps no arena of public life or governmental administration where racial discrimination is more widespread, apparent, and seemingly tolerated than in the selection of juries."); Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks?*, 78 CHI.-KENT L. REV. 1179 (2003); Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 61-62, 83 (2009).

step in a three-step process to evaluate the claim.⁸ Under the second step, the striking party need only respond to the prima facie showing with a race- or gender-neutral basis for the strike.⁹ Under the third step, the court determines whether to accept the rationale as non-discriminatory.¹⁰ The neutral bases put forth in the second step have been called an “unbounded collection of justifications” that “run the gamut.”¹¹ But, the Supreme Court has directed courts to accept even “silly or superstitious” explanations if they appear race- and gender-neutral.¹² Rarely is the evidence of discrimination as compelling and available as it was in *Foster*, and rarely do defendants succeed in their *Batson* challenges.¹³

While litigants have struggled to produce evidence of discrimination in individual cases, empirical studies have been able to assess jury selection practices through a broader lens.¹⁴ This Article adds original data from the state of South Carolina to the empirical literature examining discrimination in jury selection in capital cases. The Article assesses whether the processes of venire selection, voir dire, and the peremptory striking of the jury resulted in disproportionate removal of women and African Americans on juries in a set of thirty-five South Carolina jury trials resulting in death sentences from 1997 to 2012.¹⁵ It is one of “only a handful of published studies” to examine these issues in actual trials rather than simulated experiments.¹⁶ All cases were used to observe

8 Snyder v. Louisiana, 552 U.S. 472, 476-77 (2008).

9 *Id.* at 477.

10 *Id.*

11 Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1093 (2011).

12 *Id.* at 1096 (discussing Purkett v. Elem, 514 U.S. 765, 768 (1995)).

13 Cf. Jessica Gabel Cino, *Gabel on Foster v. Chatman: Stating the Obvious While Setting an Impossible Precedent*, GA. STATE UNIV. COLL. OF LAW (May 26, 2016), <http://law.gsu.edu/2016/05/26/gabel-on-foster-v-chatman-stating-the-obvious-while-setting-an-impossible-precedent/>.

14 Robert P. Mosteller, *Responding to McCleskey and Batson: The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases*, 10 OHIO ST. J. CRIM. L. 103, 104 (2012).

15 The limitations of this study are addressed in more detail below, but it is notable that the thirty-five cases are a sample of an estimated sixty-three death sentences imposed after jury trials in South Carolina for the period of 1997 to 2012. The cases were chosen based on the availability of trial transcripts that included relevant data. See *infra* Part (IV)(A). Other cases were not included because of inaccessibility to the author or inconsistent reporting among courts.

16 Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming*

gender as a factor in removal, including observations for 3,031 venire persons, while a subset of twenty-three cases was used to observe prospective jurors' race, including observations for 1,088 individuals. The Article assesses whether certain jury pools at the outset were racially representative of the defendants' respective communities; whether, and if so, why women and African Americans were removed disproportionately during voir dire; and how defense and prosecution exercised their peremptory strikes among whites versus blacks and men versus women.

Because the question of support for the death penalty tends to differ across race and gender lines,¹⁷ this study focuses in particular on removal for cause for opposition to, or support for, the death penalty. Capital juries are typically "death-qualified," or put through a questioning process to ensure they are willing to impose a death sentence upon the defendant.¹⁸ Although the Supreme Court has stated that capital juries have the mandate to "express the conscience of the community,"¹⁹ the death-qualification process means that judges in capital trials remove prospective jurors who oppose the death penalty due to a presupposed inability to apply the law impartially.²⁰ As a result, approximately one-third of the population, most of whom are women or African Americans, is likely

Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials, 97 IOWA L. REV. 1531, 1538 (2012).

17 *Id.* at 1534, 1550.

18 See John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 Nw. J. L. & SOC. POL'Y 195, 245 n.353 (2009); Richard Salgado, *Tribunals Organized to Convict: Searching for A Lesser Evil in the Capital Juror Death-Qualification Process in United States v. Green*, 2005 B.Y.U. L. REV. 519, 521 (2005) ("Despite arguments that the voir dire practice of death-qualifying a jury creates a predisposition toward finding guilt, the Supreme Court has held the practice constitutional. While the Court has affirmed that the prosecution is entitled to death-qualify the sentencing jury, and that death-qualifying a jury does not violate a defendant's rights per se, the Court has not mandated that a jury be death-qualified before the initial guilt phase of the trial or that the same, unitary jury hear both phases. Thus, courts are given the discretion to death-qualify the jury—with an eye towards the sentencing phase—before the guilt phase has been conducted, or to seek some other alternative such as a bifurcated jury instead.") (internal citations omitted) (emphasis omitted); *State v. Spann*, 308 S.E.2d 518, 519-20 (1983) ("When a potential juror is prevented from rendering an impartial decision or voting for the death penalty, the trial court can exclude him because of his inability to carry out his duty under the law.").

19 *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

20 See *Lockhart v. McCree*, 476 U.S. 162, 172 (1986).

to be removed from capital juries because of such beliefs.²¹

The results of this study show that prospective jurors' race played a critical role during the jury selection process, resulting in disproportionate representation of whites, whereas prospective jurors' gender told a slightly subtler story.²² These findings merit attention for several reasons. At the broadest level, discriminatory jury selection practices implicate the legitimacy of the legal system. Juries' purpose is to "guard against the exercise of arbitrary power."²³ But, unrepresentative juries may do just the opposite, leading to unpredictable and discriminatory outcomes.²⁴ Arbitrariness in the administration of justice undermines society's trust in the rule of law and violates the Eighth Amendment's prohibition on cruel and unusual punishment.²⁵

Unrepresentative juries are also particularly problematic in capital cases. Most critically, death-qualified juries are more inclined to return convictions and death sentences, undermining defendants'

21 See Joseph Carroll, *Who Supports the Death Penalty?*, DEATH PENALTY INFO. CTR. (Nov. 16, 2004), <http://www.deathpenaltyinfo.org/gallup-poll-who-supports-death-penalty>. As discussed in more detail below, see *infra* Part II(A), the Court has upheld death-qualification's effects on jury representativeness because "fair cross section" jurisprudence does not apply to petit juries and even if it did, those who oppose capital punishment do not themselves form a distinctive group. *Buchanan v. Kentucky*, 483 U.S. 402, 415 (1987). Another third of the population is ineligible to serve as capital jurors because they would vote for death automatically if the defendant were found guilty of murder. John Blume, *An Overview of Significant Findings from the Capital Jury Project and Other Empirical Studies of the Death Penalty Relevant to Jury Selection, Presentation of Evidence and Jury Instructions in Capital Cases 5* (Spring 2010) (unpublished manuscript) (<http://www.lawschool.cornell.edu/research/death-penalty-project/upload/empirical-studies-summaries-revised-spring-2010.docx>).

22 The causal effect of these characteristics cannot be proven with certainty because of the absence of controls or the use of regression analysis. However, some causal effect can reasonably be inferred based on the data's consistency with previous studies that did use such controls and methods. See *infra* Parts III-V.

23 See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

24 See *id.* at 531; David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 103-08, 124-25 (2001); Janell Ross, *How big of a difference does an all-white jury make? A leading expert explains.*, WASH. POST (May 30, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/05/30/how-big-a-difference-does-an-all-white-jury-make-a-leading-expert-explains/?utm_term=.fe62be75a8e2 (discussing research illustrating relationships between jury racial composition and arbitrary trial outcomes).

25 *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972).

rights to an impartial jury.²⁶ Processes that siphon women and black venire members off of juries undermine juries' fairness and effectiveness in numerous other ways as well: more diverse juries are likelier to "engage in wider-ranging deliberations," to address issues of race in their deliberations, and to counterbalance other jurors' biases.²⁷ Because South Carolina jury selection has many similarities with jury selection in other states, the findings discussed here likely reflect issues with capital jury representativeness and fairness that arise throughout the justice system.²⁸

Most immediately, the data discussed here have implications for the thirty-eight South Carolina inmates on death row as of this writing.²⁹ The most compelling racial disparity revealed by this study is comparable to that revealed in a study of the same topic in North Carolina by Catherine Grosso and Barbara O'Brien.³⁰ Their study has been the subject of ongoing litigation over the validity of certain North Carolina inmates' capital sentences.³¹ Twenty-nine of

26 Jill M. Cochran, Note, *Courting Death: 30 Years Since Furman, Is the Death Penalty Any Less Discriminatory? Looking at the Problem of Jury Discretion in Capital Sentencing*, 38 VAL. U. L. REV. 1399, 1444 (2004); Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathic Divide,"* 45 LAW & SOC'Y REV. 69, 73 (2011).

27 Erin York Cornwell & Valerie P. Hans, *Representation Through Participation: A Multilevel Analysis of Jury Deliberations*, 45 LAW & SOC'Y REV. 667, 668-69 (2011).

28 See Theodore Eisenberg et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277, 282 (2001). Aspects of South Carolina's history stand out, however. As of 2002, "[o]nly six states ha[d] executed more death-sentenced inmates," making South Carolina's execution rate relatively high compared to its murder rate. John Blume, *Twenty-Five Years of Death: A Report of the Cornell Death Penalty Project on the "Modern" Era of Capital Punishment in South Carolina*, 54 S.C. L. REV. 285, 292-93, 297 (2002). Further, although this may be the case in other states, race continues to play a substantial role in South Carolina's capital punishment scheme. For instance, "substantial variation exists in South Carolina's death sentencing rates when the race of the defendant and the race of the victim are taken into account. African-Americans who kill whites are sentenced to death at approximately three times the rate of whites who kill whites . . . [A] person charged with killing someone who is white is more than seven times more likely to be sentenced to death than a person charged with killing an African-American." *Id.* at 298.

29 S.C. DEP'T OF CORR., DEATH ROW LIST (2017), <http://www.doc.sc.gov/pubweb/news/death-row-report.pdf> (last visited Jan. 31, 2017).

30 See O'BRIEN & GROSSO, *supra* note 7.

31 *State v. Robinson*, 780 S.E.2d 151 (N.C. 2015), *cert. denied*, 137 S.Ct. 67 (2016). Grosso's and O'Brien's study was used pursuant to a provision of North Carolina's now-repealed Racial Justice Act, which created a cause

South Carolina's current death row inmates had sentences imposed from 1997 to 2012.³² This study includes twelve of their trials, with information on juror race available for eight.³³ Although the limited generalizability of the data is addressed in more depth below, the fairness of South Carolina's jury selection processes for these trials is of interest in and of itself.

The Article proceeds as follows. Part II.A explains the significance of jurors' race and gender in the context of capital punishment. Part II.B describes the relationship between race and gender and specific pre-trial procedures for jury empanelment, as well as relevant Supreme Court jurisprudence, including *Taylor v. Louisiana*,³⁴ *Witherspoon v. Illinois*,³⁵ and *Batson v. Kentucky*³⁶ and related judgments.³⁷ Part III surveys literature and empirical studies examining race and gender in capital punishment. Part IV.A explains the methodology of the instant study and addresses its limitations, such as the limited availability of trial transcripts and the absence of controls for race- and gender-neutral bases for removal. Part IV.B provides the results of the empirical analysis of the data. Part V discusses the data's implications, including the difficulty of reconciling jury representativeness with capital conviction and sentencing procedures.

of action for death row inmates to use statistical evidence revealing racial discrimination in their trials. See *infra* Part III.

32 See S.C. DEPT OF CORR., *supra* note 29.

33 The trials included in this study where the inmates are currently on death row are *State v. Aleksey*, 538 S.E.2d 248 (S.C. 2000), *State v. Bixby*, 698 S.E.2d 572 (S.C. 2010), *State v. Bryant*, 642 S.E.2d 582 (S.C. 2007), *State v. Finklea*, 697 S.E.2d 543 (S.C. 2010), *State v. Lindsey*, 642 S.E.2d 557 (S.C. 2007), *State v. Owens*, 664 S.E.2d 80 (S.C. 2008), *State v. Sigmon*, 623 S.E.2d 648 (S.C. 2005), *State v. Starnes*, 531 S.E.2d 907 (S.C. 2000) ("Starnes I"), *State v. Starnes*, 698 S.E.2d 604 (S.C. 2010) ("Starnes II"), *State v. Williams*, 690 S.E.2d 62 (S.C. 2010), *State v. Winkler*, 698 S.E.2d 596 (S.C. 2010), *State v. Woods*, 676 S.E.2d 128 (S.C. 2009). The cases among these with information containing juror race are *Aleksey*, *Bryant*, *Finklea*, *Lindsey*, *Sigmon*, *Starnes I*, *Williams*, and *Woods*.

34 419 U.S. 522 (1975).

35 391 U.S. 510 (1968).

36 476 U.S. 79 (1986).

37 *E.g.*, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

II. The Significance of Jurors' Race and Gender

A. *Jury Composition Influences Case Outcomes, Particularly in Capital Cases*

Jurors' traits are not generally outcome-determinative.³⁸ Rather, "verdicts usually depend more on the facts of the case and less on the personal characteristics of the jurors."³⁹ Thus, "[d]etermining whether race, sex, or other juror characteristics influence how capital case jurors vote is difficult. Jurors tend to vote for death in more egregious cases and for life in less egregious cases no matter what their own characteristics."⁴⁰

Nevertheless, juror characteristics do influence jury deliberations and verdicts in capital cases.⁴¹ Capital cases differ from other trials in the gravity of the potential penalty, the amount of discretion given to the jury, and the bifurcation of the trial between the verdict and penalty phases.⁴² For instance, in the sentencing phase in South Carolina, jurors are given a list of aggravating and mitigating circumstances and are told only that they may choose a life sentence instead of death for "any reason or no reason at all."⁴³ "[C]ompared to most jury decisions," Theodore Eisenberg and colleagues argue, "[b]ecause capital sentencing is so discretionary, considerable room exists for a juror's personal characteristics to influence her judgment."⁴⁴

Various studies have shown that the racial composition of a jury influences the likelihood of the jury imposing a death sentence.⁴⁵

38 See Eisenberg et al., *supra* note 28.

39 *Id.*

40 *Id.* at 277.

41 See *id.* at 283, 285-86, 308 (noting influence of jurors' race and religion on juror voting).

42 See *id.* at 282.

43 *Id.* at 283.

44 *Id.*; see also David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1643 (1998) ("The potential influence of race in the administration of the death penalty takes root in the broad exercise of discretion that state laws grant prosecutors and juries."); Lynch & Haney, *supra* note 26, at 69 (discussing the additional potential for reliance on racial stereotypes in capital cases).

45 E.g., William J. Bowers, Benjamin D. Steiner, & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 195 (2001); Mustafa El-Farra, *Race*

In particular, white jurors are more likely to vote for death than black jurors,⁴⁶ men are more likely to vote for death than women,⁴⁷ and “support for the death penalty among whites is highly correlated with measures of anti-black racial prejudice and stereotyping.”⁴⁸ Further, “the more a juror supports the death penalty, the more likely she is to find a criminal defendant (capital and noncapital alike) guilty in the first place,” and more likely to ultimately vote for death.⁴⁹ Other juror characteristics, such as religion, influence outcomes as well.⁵⁰

The Supreme Court and Congress have acknowledged an interest in having proportional representation of the community on juries.⁵¹ Indeed, “[a]s early as the twelfth century, English law recognized the danger that inhered in allowing members of a minority community to be tried entirely by . . . majority jurors.”⁵² Not only does a representative jury seem and act more neutral, better reflect the judgment of the community, promote public confidence in the judicial process, and keep the justice system from becoming “the organ of any special group or class,”⁵³ it also eases the potential blow of the “minority effect,” where a minority faction of less than three on a particular jury tends to be overwhelmed by the stance of the majority.⁵⁴ Diversity also allows a jury to serve its democratic and political functions more effectively, acting as a “check on government functionaries,”⁵⁵ “guard[ing] against the exercise of arbitrary power,”⁵⁶ and counteracting the biases or zealotry of judges

and the Jury: Racial Influences on Jury Decision-Making in Death Penalty Cases, 4 HASTINGS RACE & POVERTY L.J. 219, 226 (2006); Lynch & Haney, *supra* note 26, at 84 (“[T]here were differences in final case outcomes as a function of defendant race and ratio of white men on the jury.”).

46 Eisenberg et al., *supra* note 28, at 298.

47 Lynch & Haney, *supra* note 26, at 69.

48 *Id.* at 73.

49 Eisenberg et al., *supra* note 28, at 283-84.

50 *See id.* at 285-86.

51 28 U.S.C. § 1861 (1993); e.g., *Smith v. Texas*, 311 U.S. 128, 130-31 (1940); *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972); *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975).

52 Hiroshi Fukurai, *The Representative Jury Requirement: Jury Representativeness and Cross Sectional Participation from the Beginning to the End of the Jury Selection Process*, in *THE JURY SYSTEM: CONTEMPORARY SCHOLARSHIP* 169-70 (Valerie Hans ed., 2006).

53 *Glasser v. United States*, 315 U.S. 60, 86 (1942); Fukurai, *supra* note 52, at 170, 172.

54 Fukurai, *supra* note 52, at 170.

55 *Id.* at 172.

56 *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

and prosecutors.⁵⁷

Thus, the composition of the jury is central to a trial, with the stakes higher and the effects stronger in capital cases. As is the case in South Carolina,⁵⁸ “the typical jury exercises virtually complete discretion on the life or death decision once it finds a statutory aggravating circumstance present in the case.”⁵⁹ Given the nearly 1,000-year-old common law value in having a representative jury render such grave decisions, the mechanisms for filling the jury box represent much more than simple administrative procedure.

B. The Centrality of Jury Composition Underscores the Importance of Empanelment Procedures, Each of Which Interacts with Prospective Jurors’ Race and Gender

In light of the impact that the composition of juries can have in capital cases, the pre-trial processes of venire selection, voir dire, and the use of peremptory strikes wield significant influence over each case as a whole. The discussion below addresses how each phase uniquely interacts with the empanelment or removal of women and black venire members.

1. The Venire Selection Process

The venire selection process typically involves two steps. “First, a list of names from which the venire can be drawn must be compiled . . . Second, names from the source list are [randomly] selected to form the jury venire.”⁶⁰ Defendants are not entitled to a jury composed in whole or in part of members of their race.⁶¹ However, in *Taylor v. Louisiana*, the Supreme Court required venire selection to draw from a “fair cross section of the community” as a fundamental aspect of the right to a jury trial guaranteed by the Sixth Amendment.⁶² *Taylor* also held that the Equal Protection Clause

57 Fukurai, *supra* note 52, at 172 (quoting *Taylor*, 419 U.S. at 530-31 and *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)).

58 Eisenberg et al., *supra* note 28, at 282-83.

59 Baldus et al., *supra* note 44, at 1644.

60 Mark McGillis, *Jury Venires: Eliminating the Discrimination Factor by Using a Statistical Approach*, 3 HOW. SCROLL: SOC. JUST. L. REV. 17, 17 (1995).

61 *Taylor*, 419 U.S. at 538.

62 U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury”); *Taylor*, 419 U.S. at 528.

of the Fourteenth Amendment prohibits systematic exclusion of particular racial (or gender) groups from jury service.”⁶³

Taylor’s mandate is often not the practice in reality, however. *Taylor v. Louisiana* and its progeny “offer[] no specific mechanism to guarantee the cross-sectional representation on the jury itself,”⁶⁴ and venirees continue to demonstrate disproportionate representation.⁶⁵ As Hiroshi Fukurai explains:

One recurrent problem with this method is that randomly selected jury panels are not always fully or regularly representative of all segments of the relevant community. More specifically, racial and ethnic minorities, as well as the young, old, and the poor, are consistently underrepresented in most federal and state court jury pools and venirees.⁶⁶

Voter and driver registration lists are the most commonly used sources and are perhaps the most comprehensive lists of citizens available.⁶⁷ But “each has significant deficiencies with regard to inclusiveness and representativeness.”⁶⁸ Voter lists may exclude as much as one third of the adult population, neglecting racial minorities in particular, while driver registration lists underrepresent women and the elderly.⁶⁹ The actual impact of the fair cross-section doctrine has itself never been critically assessed.⁷⁰

63 *Taylor*, 419 U.S. at 526-33; see also Duncan, *supra* note 57, at 149 (applying Sixth Amendment to states); Heather Davenport, Note, *Blinking Reality: Race and Criminal Jury Selection in Light of Ovalle, Miller-El, and Johnson*, 58 BAYLOR L. REV. 949, 955 (2006).

64 Fukurai, *supra* note 52, at 171 (emphasis added).

65 E.g., Valerie P. Hans, *Jury Representativeness: It’s No Joke in the State of New York*, CORNELL J.L. & PUB. POL’Y BLOG (Jan. 20, 2012), <http://jlp.org/blogzine/jury-representativeness-its-no-joke-in-the-state-of-new-york/>.

66 Fukurai, *supra* note 52, at 144 (explaining four reasons behind these lacunae: underrepresentation on voter registration lists, exclusionary screening questions (such as inquiries about economic hardship), subjective selection criteria focusing on integrity and character, and failure to examine the rights of excluded jurors).

67 *Id.* at 146-47.

68 *Id.* at 146.

69 *Id.* at 146-47.

70 *Id.* at 148.

2. *Removals for Cause during Voir Dire*

After venire members arrive to court, the voir dire stage poses a second hurdle on their path to the jury box. During voir dire, which is usually lengthier for capital cases, the court deems jurors to be “qualified” or “unqualified” after their views have been vetted through questioning and cross-examination.⁷¹ Members of the venire may be removed for bias or strong feelings; familiarity with the case, parties, or witnesses; or any other experience or view that may undermine impartiality in rendering a decision — including, in capital cases, views on the death penalty.⁷²

But, commentators note flaws inherent in the voir dire process.⁷³ Primarily, it is a subjective process that depends on self-reporting. Jurors may not disclose their biases because they are unaware of them, uncooperative, resentful of the court, or apprehensive of being evaluated, among other reasons.⁷⁴ Jurors may also demonstrate inconsistency in self-assessments of their own biases.⁷⁵ Subjective standards for removals combined with substantial judicial discretion might facilitate pretextual removals based on discriminatory motivations, whether conscious or not.⁷⁶

The South Carolina Supreme Court has affirmed that in capital cases, “[a] prospective juror may be excluded for cause when his or her views on capital punishment would prevent or substantially impair the performance of his duties as a juror.”⁷⁷ The United States Supreme Court affirmed the constitutionality of this practice in *Lockett v. Ohio*.⁷⁸ The parties may challenge venire members they find biased or otherwise unqualified based on voir dire questioning,⁷⁹ but the decision as to whether to remove them is within the sole discretion of the trial judge.⁸⁰ Thus, in capital cases

71 *Id.* at 149-50; see also NEIL VIDMAR & VALERIE HANS, *AMERICAN JURIES: THE VERDICT* 89, 93 (2007).

72 See VIDMAR & HANS, *supra* note 71, at 93-94.

73 See, e.g., Hans & Jehle, *supra* note 7, at 1182.

74 Neil Vidmar, *Case Studies of Pre- and Midtrial Prejudice in Criminal and Civil Litigation*, in *THE JURY SYSTEM: CONTEMPORARY SCHOLARSHIP* 198-200 (Valerie Hans ed., 2006).

75 *Id.* at 200-05.

76 See Lee Smith, Note, *Voir Dire in New Hampshire: A Flawed Process*, 25 VT. L. REV. 575, 592 (2001).

77 *State v. Lindsey*, 642 S.E.2d 557, 561 (S.C. 2007).

78 438 U.S. 586, 596 (1978).

79 See, e.g., *State v. Bixby*, 388 S.C. 528, 541 (2010).

80 *Lindsey*, 642 S.E.2d at 561.

in South Carolina, judges frequently remove prospective jurors for cause when the prospective jurors express strong reservations about the death penalty, with the rationale that “[t]he state as well as the accused [should] enjoy[] a right to an impartial jury.”⁸¹

An excerpt from the transcript of a 2007 South Carolina capital trial⁸² illustrates the nature of questions posed to jurors and the types of personal moral qualms that may preclude them from serving on a capital jury:

Judge: I understand you’re . . . a pastor? . . .

Potential Juror: No, I am not a pastor, my wife is.

. . . .

Judge: Could you as a juror in a sentencing phase, depending upon the facts . . . and the law . . . render a sentence of life imprisonment?

A: Judge, as I afore stated, my belief and my belief biblically and also personally I feel that anyone can be rehabilitated and I don’t feel that always life in confinement is rehabilitation.

Judge: I see. . . . [A]s a juror in a sentencing phase, . . . could you render a sentence of death? I think I know but I do have to ask the question.

A: No, I do not feel that I could render a sentence of death.

. . . .

[M]y church and church family do take a stand against the death penalty. And I do believe in the scripture and the scripture teaches me . . . that the word of God says that vengeance is mine saith

81 Bruce J. Winick, *Witherspoon in Florida: Reflections on the Challenge for Cause of Jurors in Capital Cases in a State in which the Judge Makes the Sentencing Decision*, 37 U. MIAMI L. REV. 825, 825-26 (1983).

82 Transcript of Record (on file with author).

the Lord. And . . . thou shalt not kill. . . . I'm truly against the death penalty.

Defense Attorney: . . . I think you also wrote [in your questionnaire] that, my church teaches its members to abide by state laws.

A: . . . [N]ot only my church, my bible also teaches me, you know, that we should obey the rules of the land as well as obey the rules of God. But in my case, . . . I don't think the laws of the land would also let me do anything to go against what I believe in.

. . . .

Defense Attorney: Please don't think I'm trying to — this is my situation, okay. I need a jury. The justice system needs a jury full of people that have a bunch of different backgrounds and views, okay.

. . . .

A: . . . [I]f I don't believe it in [sic] I just don't feel that I could give a honest, moral — I just don't feel that I could sit there and pass judgment

. . . .

Judge: . . . As I say, the law does not require somebody to do something they cannot in good conscience do. And so that's why we have these things, to find out how people feel.

I, under the examination of this juror, I think I'm going to excuse him from serving on the trial of this case.⁸³

83 *Id.* at 712-28.

In a 2009 capital trial,⁸⁴ another juror expressed similar concerns:

Potential Juror: I guess I would say — you know, you guys are seeking the death penalty, and although I don't think this gentleman . . . deserves to live I think my religious beliefs would stop me from penning something saying that he got the death penalty

I'm just going to say, you know, I think he deserves to be shot, I mean, I really do, but when it comes down to it, I was raised Catholic . . . you know, Jesus died for everybody Not just me, not just you, but even the most heinous person out there he died for —

Judge: Yes sir.

Potential Juror: — He died for, and who am I to say that someone deserves to be put to death. That is not my responsibility.

Judge: Yes sir.⁸⁵

The dialogues above among judge, attorney, and venire member demonstrate the probing inquiry in which counsel and the court engage with each potential juror in capital cases. These excerpts also illustrate the effect of a juror's religion on his or her potential exposure to removal.⁸⁶

The influence of race and gender on individuals' attitudes and opinions toward capital punishment may be subtler than the influence of religion. But the extended, highly personal quality of these inquiries shows the room for jurors' backgrounds and experiences to affect their responses and likelihood of removal. Although the prospective jurors above established relatively clear

84 Transcript of Record (on file with author).

85 *Id.* at 1157-58.

86 Grosso and O'Brien note that "some lower courts have prohibited strikes based on religious affiliation." Grosso & O'Brien, *supra* note 16, at 1534 (citing *United States v. Brown*, 352 F.3d 654 (2d Cir. 2003); Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 957 (1998)).

reasons for their removal — their staunch opposition to the death penalty — the nature of the questioning above also suggests an element of subjectivity. Venire members could potentially be removed for vaguer conscientious scruples. The subjectivity of the process also illustrates the potential for pretextual challenges made by attorneys with discriminatory motivations.

The Court has held constitutional the fact that removal for opposition to the death penalty may have a disparate impact on certain groups.⁸⁷ In *Lockhart v. McCree*, the Court held that death qualification does not violate *Taylor* or the right to an impartial jury because people who object to the death penalty do not themselves form a distinctive group.⁸⁸ The following year, in *Buchanan v. Kentucky*, the Court upheld death qualification's disparate impacts on certain groups because *Taylor's* fair cross-section requirement applies only to veniremen.⁸⁹ The Court also reasoned that death qualification did not involve excluding prospective jurors on the basis of race or gender, but rather, "related to the [State's] legitimate interest in obtaining a jury that does not contain members who are unable to follow the law with respect to a particular issue in a capital case."⁹⁰

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- 87 *Buchanan v. Kentucky*, 483 U.S. 402, 415 (1987). The death qualification process itself has undergone various changes in the past several decades. In *Witherspoon v. Illinois*, 391 U.S. 510, 514 (1968), the Court narrowed the pre-1968 standard of removing prospective jurors for having any "conscientious scruples" against the death penalty, holding that to allow "removal for cause of jurors based merely on their general scruples against capital punishment" was to deny a defendant his due process right to an impartial jury. John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 *Nw. J. L. & Soc. Policy* 195, 319 n.901 (2009); *Witherspoon*, 391 U.S. at 519-23; Winick, *supra* note 81, at 831-32. *Witherspoon* thus restricted removal on this basis to venire persons who make it "unmistakably clear (1) that they would automatically vote against the imposition of capital punishment . . . , or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." 391 U.S. at 522 n.21 (emphasis added). Seventeen years later, the Court expanded permissible removals on this basis with *Wainwright v. Witt*, 469 U.S. 412 (1985), which reinstated some of the judge's discretion.
- 88 *Lockhart v. McCree*, 476 U.S. 162, 174-75 (1986). In *Lockhart*, the Court overruled the lower courts' determination that the death qualification process violated the Sixth and Fourteenth Amendment requirements of a fair-cross-section representation and jury impartiality because the process resulted in "conviction-prone" juries. *Id.* at 167-73 (questioning the reliability of petitioner's social science evidence on the matter).
- 89 483 U.S. at 402, 415 (1987); *see also* *Washington v. Davis*, 426 U.S. 229, 239-40 (1976) (holding that intentional discrimination is unconstitutional but laws' or policies' racially disparate impacts are not).
- 90 *Buchanan*, 483 U.S. at 416.

Although death qualification's constitutionality has been upheld, the process still stands to undermine juries' ability to serve their function fairly and indiscriminately. Valerie Hans and Alayna Jehle observe that exclusions based on death penalty attitudes "may have a deleterious impact on the representativeness and impartiality of the capital jury."⁹¹ In one example, researchers in a California study of 1,275 community residents found that the "jury qualification requirements tend[ed] to disrupt the representative composition of the general population," skewing the composition towards white men.⁹² Others have also noted that women and black prospective jurors are more likely to be removed during voir dire for their opposition to capital punishment.⁹³

3. *Peremptory Strikes*

After voir dire, the parties may choose to exercise a number of peremptory strikes, also known as peremptory challenges, which are vetoes that parties may use against individual jurors without stating a reason for the veto.⁹⁴ In South Carolina, defendants charged with serious crimes are allowed ten strikes and the state is allowed five.⁹⁵ Peremptory strikes are controversial: no constitutional right protects their use, and while some consider them to be essential to the jury system,⁹⁶ others forcefully advocate their elimination.⁹⁷ One commentator called peremptory challenges "the last best tool of Jim Crow."⁹⁸

91 Hans & Jehle, *supra* note 7, at 1181.

92 Fukurai, *supra* note 52, at 151, 162, 165-66.

93 Jill M. Cochran, Note, *Courting Death: 30 Years Since Furman, Is the Death Penalty Any Less Discriminatory? Looking at the Problem of Jury Discretion in Capital Sentencing*, 38 VAL. U. L. REV. 1399, 1444 (2004).

94 Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 447 (1996).

95 S.C. CODE ANN. § 14-7-1110 (1976).

96 Melilli, *supra* note 94.

97 *Miller-El v. Dretke*, 545 U.S. 231, 266-67 (2005) (Breyer, J., concurring) (noting that when *Batson* was decided, Justice Thurgood Marshall predicted that the decision would not achieve its goal, and opining that Miller-El reinforced the reality that "[t]he only way to 'end the racial discrimination that peremptories inject into the jury-selection process' . . . [is] to 'eliminat[e] peremptory challenges entirely.'" (third alteration in original).

98 Mary Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695, 696 (1999) (internal citation omitted).

Batson v. Kentucky and its progeny prohibited peremptory strikes motivated by prospective jurors' race or gender, holding that they violate the Equal Protection Clause of the Fourteenth Amendment.⁹⁹ The *Batson* test now requires a party seeking to challenge a strike to establish a prima facie case that his or her opponent exercised a strike on the basis of race,¹⁰⁰ or, per *J.E.B. v. Alabama ex rel. T.B.*, gender.¹⁰¹ The burden then shifts to the non-moving party to provide a race- or gender-neutral explanation for the strike.¹⁰² The court then determines whether purposeful discrimination motivated the strike.¹⁰³

Although the subject of ample litigation, *Batson* and related decisions are known for their lack of impact.¹⁰⁴ This apparent inefficacy itself is cited as a potential indication that peremptory challenges should be eliminated altogether.¹⁰⁵ As mentioned above, the central weakness is the fact that, when the non-moving party in a *Batson* or *J.E.B.* motion must provide a reason for the strike in question other than race or gender, attorneys are easily able to provide neutral-sounding rationales.¹⁰⁶ "These perfunctory hearings fail to meaningfully interrogate the reasons prosecutors offer as

99 *Batson v. Kentucky*, 476 U.S. 79 (1986); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Powers v. Ohio*, 499 U.S. 400 (1991); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Georgia v. McCollum*, 505 U.S. 42 (1992); see also Sheri Lynn Johnson, *Race and Recalcitrance: The Miller-El Remands*, 5 OHIO ST. J. CRIM. L. 131, 131 (2007). *Batson* overruled *Swain v. Alabama*, 380 U.S. 202 (1965), where the Court had held that equal protection under the Fourteenth Amendment would only be violated if "the defendant could prove that the prosecutor struck African American jurors in every case." Johnson, *infra* at 133. The decision in *Swain* "set the bar so high for proving discriminatory intent that no litigant won a *Swain* claim for [twenty] years." EQUAL JUSTICE INITIATIVE, *supra* note 7, at 12. This means the window for winning claims based on racial discrimination has only relatively recently been opened. See *id.* Practice suggests that it has not been opened very far, however. Some have argued that other distinctive groups, such as people with religious beliefs, should also be protected from discriminatory peremptory challenges. See Anthony D. Foti, Note, *Could Jesus Serve on a Jury? Not in the Third Circuit: Religion-Based Peremptory Challenges in United States v. Dejesus and Bronshtein v. Horn*, 51 VILL. L. REV. 1057, 1057-58 (2006).

100 *Batson*, 476 U.S. at 96-97.

101 *J.E.B.*, 511 U.S. at 129.

102 *Batson*, 476 U.S. at 96-97.

103 *Id.* at 98.

104 Fukurai, *supra* note 52, at 167.

105 Melilli, *supra* note 94, at 483 (noting Justice Marshall's argument that *Batson*'s goals could only be achieved by eliminating peremptory challenges).

106 See Rose, *supra* note 98, at 696.

race neutral motivations for peremptorily striking Black jurors.”¹⁰⁷ Consequently, defendants “monopolize the making of *Batson* claims,” yet, “the success rate of such claims by criminal defendants is manifestly unimpressive.”¹⁰⁸ Although anecdotal, it is telling that despite the rather blatant evidence in *Foster*, the pursuit of *Foster*’s *Batson* claim took thirty years of litigation.

The role of race and gender in the exercise of peremptory strikes has spurred discussion as tense as that surrounding the existence of the strikes themselves. In a study of challenges based on *Batson* from 1986 to 1993, Kenneth Melilli found that 87.38% of challenges during the period challenged the striking of black jurors.¹⁰⁹ He argued:

Because peremptory challenges are exercised after the challenges for cause, any prospective juror who is peremptorily struck is presumably an individual who is not subject to a valid challenge for cause. For this reason . . . peremptory challenges are frequently exercised on the basis of group affiliations rather than individual characteristics. Indeed, evaluating people on the basis of stereotypes is an inherent aspect of the peremptory challenge system. The peremptory challenge system allows lawyers and litigants to impose these stereotypes upon the jury selection process without articulating these potentially offensive and divisive prejudices.¹¹⁰

Consistent with Melilli’s concerns, commentators continue to observe parties’ disproportionate strikes of certain groups, with strike rates depending on the race of the defendant.¹¹¹

107 Price, *supra* note 7, at 57.

108 Melilli, *supra* note 94, at 459.

109 *Id.* at 462.

110 *Id.* at 447 (internal citations omitted). Lawyers’ motivations for exercising peremptory challenges on the basis of race or gender are not necessarily based solely upon derogatory stereotypes. For instance, a defense attorney may take race into account for her choices of strikes if she feels that an attempt to comply with *Batson* would force her to ignore, to her client’s detriment, her knowledge of the statistical evidence of how jurors’ attitudes are influenced by their race. *E.g.*, RICHARD C. DIETER, DEATH PENALTY INFO. CTR., BLIND JUSTICE: JURIES DECIDING LIFE AND DEATH WITH ONLY HALF THE TRUTH 4 (2005), <http://www.deathpenaltyinfo.org/BlindJusticeReport.pdf>.

111 Hans & Jehle, *supra* note 7, at 1190-91; Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM.

A repeated concern in Supreme Court jurisprudence on discrimination in capital trials is preventing the arbitrary application of the law, which potentially violates the Eighth Amendment's prohibition on cruel and unusual punishment.¹¹² The Court explained in *Taylor* and reaffirmed in *Batson* that “[t]he purpose of a jury is to guard against the exercise of arbitrary power — to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor.”¹¹³ Yet, in the 1987 decision *McCleskey v. Kemp*,¹¹⁴ which has been called “the *Dred Scott* decision of our time,”¹¹⁵ the Court concluded that “apparent disparities in sentencing are an inevitable part of our criminal justice system.”¹¹⁶ A discriminatory purpose, as opposed to a disparate impact, must be shown to establish a violation of the Equal Protection Clause.¹¹⁷ This high burden explains, in part, the impotence of *Batson*.

The decision in *Foster* in 2016 did not appear to alter the *Batson* playing field substantially. The evidence, discussed above, prompted Justice Kagan to query during oral arguments, “Isn’t this as clear a *Batson* violation as a court is ever going to see?”¹¹⁸ Commentators agree that the decision was limited in scope at best, and at worst, “create[d] an artificial and impossibly high burden of proof for future cases.”¹¹⁹

CRIM. L. REV. 1099, 1100, 1100 n.6 (1994); see Rose, *supra* note 98, at 697-99 (observing that black venire members were peremptorily struck by the prosecution in a sample that consisted primarily of black defendants).

112 See e.g., Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

113 Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (emphasis added); Batson v. Kentucky, 476 U.S. 79, 86 (1986).

114 481 U.S. 279 (1987).

115 Diann Rust-Tierney, *A Personal Reflection on McCleskey v. Kemp*, ACLU: SPEAK FREELY (Apr. 23, 2012, 5:58 PM), <http://www.aclu.org/blog/capital-punishment-racial-justice/personal-reflection-mccleskey-v-kemp>.

116 McCleskey, 481 U.S. at 312.

117 *Id.* at 292.

118 Dahlia Lithwick, *Peremptory Prejudice*, SLATE (May 23, 2016, 2:26 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/05/john_roberts_s_court_sees_racism_in_foster_v_chatman.html; see also Cino, *supra* note 13 (noting Justice Alito’s concurrence “hint[ing] that you basically have to have a slam dunk to win a *Batson* challenge. Foster’s case is a standout from what is usually a subtler and more discreet form [sic] racial bias that permeates and infects other cases.”).

119 See Cino, *supra* note 13.

III. Survey of Studies Addressing Race and Gender in Capital Punishment

Studies on racial disparities in capital sentencing emerged as a substantial body of scholarship in the 1980s and 1990s in the wake of *Furman v. Georgia*,¹²⁰ which for a short time effectively abolished capital punishment because the Court found that juries exercised unfettered discretion and could impose death discriminatorily.¹²¹ *Furman* was soon followed by *Gregg v. Georgia*,¹²² which upheld state death penalty schemes that incorporated “channeled discretion.”¹²³

These early studies tended to focus on the race of the victim or defendant.¹²⁴ In a 1990 study using data from Georgia, David Baldus and colleagues examined whether legal developments post-*Furman* had “achieved their promise to end arbitrariness and discrimination in death sentencing in this country.”¹²⁵ The study found a strong race-of-victim effect, where “the average defendant with a white victim faced a statistically significant 7- to 9- percentage-point higher risk of a death sentence than did a similarly situated defendant whose victim was black.”¹²⁶ Baldus attributed this effect to prosecutorial discretion.¹²⁷ Generally, the researchers concluded that jury decisions

120 408 U.S. 238 (1972). *Furman* had no controlling opinion, but held that arbitrariness and racial disparities in death sentencing violated the Eighth Amendment. *Id.* at 242, 249-51 (Douglas, J. concurring); *id.* at 274, 277, 294-95 (Marshall, J. concurring); *id.* at 310 (Stewart, J. concurring); *id.* at 313 (White, J. concurring); *id.* at 365 (Marshall, J. concurring). *Furman* imposed a de facto moratorium on the death penalty. See *Gregg v. Georgia*, 428 U.S. 153, 168-69 (1976).

121 Chaka M. Patterson, *Race and the Death Penalty: The Tension Between Individualized Justice and Racially Neutral Standards*, 2 TEX. WESLEYAN L. REV. 45, 46 (1995).

122 428 U.S. 153 (1976).

123 *Id.* at 206-07. The death penalty was reinstated in South Carolina post-*Furman* on July 2, 1974. DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/south-carolina-1> (last visited Aug. 4, 2016).

124 See Hemant Sharma et al., *Race and the Death Penalty: An Empirical Assessment of First Degree Murder Convictions in Tennessee After Gregg v. Georgia*, 2 TENN. J. RACE, GENDER, & SOC. JUST. 1, 5 (2013) (discussing 1980s race-of-victim studies); Ogletree, *supra* note 111 (noting 1970s race-of-defendant findings); Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754, 762, 783 (1983) (examining victim, defendant, and geography).

125 DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 394 (1990).

126 *Id.* at 401.

127 *Id.* at 403.

in Georgia were highly unpredictable,¹²⁸ and “that the problems with fairness and equal justice in Georgia’s death-sentencing system [were] widespread.”¹²⁹ The study established a landmark for the examination of the role of race in the administration of capital punishment.

Until the last fifteen years or so, most social science on race or gender and the justice system continued to focus on questions other than jury representativeness.¹³⁰ More recent studies focused on jury representativeness have often been experimental, i.e., conducted in simulated scenarios.¹³¹ Few published studies have examined the use of peremptory challenges in real trials.¹³² Both before and after *Batson*, a variety of experimental and other laboratory studies demonstrated the importance of race in jury selection.¹³³

In 1999, Mary Rose aimed to fill the dearth of data on peremptory challenges by observing trials in a North Carolina court in order to “investigate how prosecutors and defense attorneys use[d] . . . peremptory challenge[s] and how characteristics of seated jury panels compare[d] to those of the venire.”¹³⁴ She observed thirteen felony criminal jury trials with a total of eighteen defendants, seventeen of whom were black and two of whom were women, in addition to 348 venire members questioned during voir dire.¹³⁵ Rose concluded that, although blacks and whites had the same likelihood of being excused from the jury via peremptory challenge, black prospective jurors had a greater likelihood of being dismissed by the state — 71% of black prospective jurors dismissed — whereas 81% of whites dismissed were excused by the defense.¹³⁶ She found that women and men had roughly equal likelihood of being excused through peremptory challenges, and equal likelihood of being excused by one side or the other.¹³⁷ She noted her results’ limited generalizability, but concluded they “suggest the need for a more informed debate about the [use of the] peremptory challenge[] . . . in modern criminal trials.”¹³⁸

128 *Id.* at 403-04.

129 *Id.* at 409.

130 Rose, *supra* note 98, at 697.

131 Grosso & O’Brien, *supra* note 16, at 1536-38.

132 *Id.* at 1538.

133 *Id.* at 1536.

134 Rose, *supra* note 98, at 697.

135 *Id.* at 697-98.

136 *Id.* at 698-99.

137 *Id.* at 699.

138 *Id.* at 695.

In 2001, Baldus and colleagues focused specifically on peremptory challenges in capital murder trials.¹³⁹ In a study of Philadelphia cases from the 1980s and 1990s, they concluded that race was the predominant factor in prosecutorial use of peremptory challenges, with gender also playing a significant role.¹⁴⁰ Race and gender were also significant factors for defense counsel, with the defense particularly disfavoring men.¹⁴¹ The researchers found that death-sentencing rates were “higher . . . when the prosecutorial strike [rate against] black venire members was high.”¹⁴² By contrast, “[t]he results indicated that a highly discriminatory defense counsel effort against non-black venire members was associated with a five percentage point lower overall death-sentencing rate.”¹⁴³ These findings illustrate how jury selection and the use of peremptory challenges can shape capital trial outcomes. They also highlight the ethical dilemmas faced by defense attorneys, where the duty of zealous advocacy might be perceived to compel targeting white, male jurors for removal due to their higher tendency to be conviction- and death-prone.¹⁴⁴

In 2010-2011, informed in part by the Baldus Philadelphia study and several others with similar findings,¹⁴⁵ Barbara O’Brien and Catherine Grosso examined peremptory strikes in North Carolina by investigating jury selection processes for the trials of all defendants on the state’s death row as of July 1, 2010, in order to assess whether venire members’ race had been a factor in prosecutors’ use of peremptory challenges.¹⁴⁶ They studied 173 proceedings with a total of 7,421 venire members, gathering data from court documents and jury selection transcripts.¹⁴⁷ Their study used detailed, descriptive information about one sample of venire members in order to control

139 Baldus et al., *supra* note 24.

140 *Id.* at 60.

141 *Id.*

142 *Id.* at 107 n.234.

143 *Id.*

144 See Hans & Jehle, *supra* note 7, at 1191 (discussing defense attorney’s belief that “it is unethical for a defense lawyer to disregard what is known about the influence of race and sex on juror attitudes in order to comply with *Batson v. Kentucky* and its progeny.”).

145 For a summary of studies conducted by Billy Turner and colleagues in Louisiana, John Clark and colleagues in a southeastern state, and Richard Bourke and Joe Hingston in Louisiana, in addition to others, see Grosso & O’Brien, *supra* note 16, at 1538-39.

146 O’BRIEN & GROSSO, *supra* note 7, at 2.

147 *Id.* at 2-3.

for factors other than race that may have accounted for the decision to strike.¹⁴⁸

O'Brien and Grosso concluded that “[p]rosecutors exercised peremptory challenges at a significantly higher rate against black venire members than against all other venire members.”¹⁴⁹ Specifically, the prosecution struck 52.6% of eligible black venire members and 25.7% of all other eligible venire members.¹⁵⁰ They found this disparity to be even greater in cases where defendants were black.¹⁵¹ The differences persisted when the data were adjusted to rule out possible race-neutral causes for removals, such as opposition to the death penalty, so that racial disparities in strike patterns “could not be attributable to the possibility that relevant attitudes vary along racial lines.”¹⁵²

O'Brien and Grosso's study has been central to litigation over four North Carolina death row inmates' sentences.¹⁵³ The North Carolina Racial Justice Act (RJA) of 2009 “explicitly authorized the use of statistical evidence in determining whether racial discrimination was a significant factor in death sentences.”¹⁵⁴ Robert Mosteller explains that in *State v. Robinson*, the first decision under the Act:

[T]he RJA demonstrated its potential as an important new tool to eliminate the use of race-based peremptory challenges. . . . [T]he trial court, relying heavily on statistical evidence . . . ruled that race was a significant factor in the prosecution's use of peremptory challenges, vacated the death sentence, and sentenced the defendant to life imprisonment without the possibility of parole.¹⁵⁵

148 *Id.* at 8.

149 *Id.* at 11.

150 *Id.*

151 *Id.* at 12. In these cases, “the average strike rate was 60% against black venire members and 23.1% against other venire members.” *Id.*

152 O'BRIEN & GROSSO, *supra* note 7, at 13.

153 *State v. Robinson*, 780 S.E.2d 151, 152 (N.C. 2015); *State v. Augustine*, 780 S.E.2d 552 (N.C. 2015); Neil Vidmar, *The North Carolina Racial Justice Act: An Essay on Substantive and Procedural Fairness in Death Penalty Litigation*, 97 IOWA L. REV. 1969, 1971, 1971 n.9 (2012) (discussing use of the O'Brien and Grosso study in litigation over Robinson's sentence and others).

154 Robert P. Mosteller, *Responding to McCleskey and Batson: The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases*, 10 OHIO ST. J. CRIM. L. 103, 104 (2012).

155 *Id.* at 105.

Three additional death sentences were subsequently vacated as well.¹⁵⁶ However, in 2012, “a very different legislative majority than the one that passed the RJA rewrote the law . . . [and] significantly reduce[d] in importance but [did] not eliminate the use of statistical evidence”¹⁵⁷ In 2015, the North Carolina Supreme Court reversed and remanded the vacated sentences on procedural grounds.¹⁵⁸ The inmates’ petition for certiorari with the United States Supreme Court was denied in October 2016.¹⁵⁹ The short-lived RJA may have been ineffectual in this instance, and unique in general — South Carolina lacks any comparable law. However, this litigation shows empirical studies’ potential for use in actual cases to compensate for evidentiary difficulties in individual *Batson* claims.

Several studies have considered the role of race and gender in South Carolina capital cases,¹⁶⁰ although none have paralleled O’Brien and Grosso’s study of peremptory challenges and none have delved deeply into issues of jury representativeness. Michael Songer and Isaac Unah examined the role of race in South Carolina

156 Campbell Robertson, *Bias Law Used to Move a Man Off Death Row*, N.Y. TIMES (Apr. 20, 2012), <http://www.nytimes.com/2012/04/21/us/north-carolina-law-used-to-set-aside-a-death-sentence.html?pagewanted=2&r=3>; Order Granting Motions for Appropriate Relief, *State v. Golphin*, No. 97 CRS 47314-15 (Sup. Ct. N.C. Dec. 13, 2012), https://www.aclu.org/files/assets/rja_order_12-13-12.pdf. The inmates are Marcus Robinson, Tilmon Golphin, Christina Walters, and Quintel Augustine. As mentioned above, North Carolina’s 2012 Racial Justice Act (RJA) was an important factor in these vacatur. The RJA provided that “[n]o person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race.” N.C. GEN. STAT. § 15A-2010 (2009), *repealed* by S.L. 2013-154 § 5(a) (June 19, 2013). In 2013, the North Carolina legislature repealed the RJA. In 2015, the North Carolina Supreme Court vacated the lower court’s decision and remanded the cases to give prosecutors more time to respond in the “unusual and complex” case involving statistical data. *Robinson*, 780 S.E.2d at 152; *Augustine*, 780 S.E.2d 552. In May 2016, the inmates filed their petition for certiorari with the Supreme Court of the United States. The petition cites O’Brien’s and Grosso’s study. *Robinson*, 780 S.E.2d 151, *petition for cert.* (U.S. May 13, 2016) (No. 15-1397), <http://www.scotusblog.com/wp-content/uploads/2016/05/15-1397-Marcus-Robinson-v-State-of-North-Carolina-Petition-for-a-Writ-of-Certiorari.pdf>.

157 Mosteller, *supra* note 154, at 105-06.

158 *Robinson*, 780 S.E.2d 151 at 151-52.

159 *Robinson*, 780 S.E.2d 151, *cert denied*, 137 S. Ct. 67 (2016) (mem.).

160 E.g., Theodore Eisenberg et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306 (2003); Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161 (2006).

prosecutorial decisions to seek the death penalty in their study, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*.¹⁶¹ They concluded:

Legally impermissible . . . victim and defendant characteristics . . . affect capital case selection. . . . Perhaps most distressingly, the study confirms that insidious racial disparities still haunt South Carolina's death penalty system. South Carolina prosecutors are [three] times more likely to seek the death penalty in white victim cases than in black victim cases.¹⁶²

As to death qualification, the practice of removing jurors who oppose the death penalty in capital cases has been widely criticized as resulting in biased and unrepresentative juries, as discussed above.¹⁶³ Scholars have observed in particular the process's disparate impact on potential women and African American jurors.¹⁶⁴ Robert Fitzgerald and Phoebe Ellsworth, among the first to study the issue in the early 1980s, found that death-qualified jurors were not representative of the general population. Rather, they found that approximately 15% of whites were excluded compared to 25% of blacks, and that capital juries were more biased towards the prosecution and a guilty verdict.¹⁶⁵ The Capital Jury Project recently produced similar findings, concluding that certain distinctive groups (including racial minorities, women, and Catholics) were less likely to be able to serve on capital juries and that death-qualified juries were more likely to convict and impose a death sentence.¹⁶⁶

IV. South Carolina Data

This study attempts to build upon projects such as O'Brien

161 Songer & Unah, *supra* note 160.

162 *Id.* at 205-06.

163 See Lynch & Haney, *supra* note 26; Winick, *supra* note 81.

164 *E.g.*, Lynch & Haney, *supra* note 26.

165 *Death Qualification, CAPITAL PUNISHMENT IN CONTEXT*, <http://www.capitalpunishmentincontext.org/resources/deathqualification> (last visited Aug. 4, 2016); Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 *LAW & HUM. BEHAV.* 31, 46 (1984) (concluding that death-qualified juries are more likely to exclude women and African American men).

166 *Death Qualification, supra* note 165.

and Grosso's by investigating whether race and gender interacted with the likelihood and manner of prospective jurors' removal from a set of cases resulting in death sentences in South Carolina from 1997 to 2012. The inquiry here is focused additionally on whether removal for opposition to the death penalty had a disparate impact on women and black venire members.¹⁶⁷

A. Methodology

One coding instrument was used to enter all data on prospective jurors' characteristics and manner of removal, which were determined almost entirely from transcripts of voir dire questioning. Trial transcripts were acquired from the Office of Appellate Defense, a division of the South Carolina Office of Indigent Defense. The gender of potential jurors tended to be apparent from their names or the judges' or attorneys' use of the terms, "sir," "ma'am," "Mr.," or "Ms." Potential jurors' race was discernible only where transcripts explicitly stated such information (for instance, by indicating, "Juror 33, a White Female, entered the room.>").

Because data on potential jurors' gender was more easily discernible, the set of workable trial transcripts was smaller for examining race than it was for gender. Thus, the analysis of gender as a factor in removal was based on thirty-five trials from the period of 1997 to 2012 that resulted in death sentences,¹⁶⁸ including

167 For an overview of capital punishment jurisprudence and statistics in South Carolina, see John H. Blume & Lindsey S. Vann, *Forty Years of Death: the Past, Present, and Future of the Death Penalty in South Carolina (Still Arbitrary After All These Years)*, 11 DUKE J. CONST. L. & PUB. POL'Y 183 (2016).

168 *State v. Aleksey*, 538 S.E.2d 248 (S.C. 2000) *aff'g* *State v. Aleksey*, No. E784245 (S.C. Ct. Gen. Sess. Sept. 1, 1998); *State v. Barnes*, 753 S.E.2d 546 (S.C. 2013) *rev'g* *State v. Barnes*, No. H870420 (S.C. Ct. Gen. Sess. Jan. 6, 2011); *State v. Binney*, 608 S.E.2d 418 (S.C. 2005) *aff'g* *State v. Binney*, No. F981513 (S.C. Ct. Gen. Sess. Nov. 14, 2002); *State v. Bixby*, 698 S.E.2d 572 (S.C. 2010) *aff'g* *State v. Bixby*, Nos. 2004GS0100321A, 2004GS0100321C (S.C. Ct. Gen. Sess. Feb. 21, 2007); *State v. Bryant*, 642 S.E.2d 582 (S.C. 2007) *aff'g* *State v. Bryant*, No. G515142 (S.C. Ct. Gen. Sess. Oct. 9, 2004); *State v. Burkhart*, 640 S.E.2d 450 (S.C. 2007) *rev'g in part* *State v. Burkhart*, Nos. E698460-62 (S.C. Ct. Gen. Sess. Mar. 2004); *State v. Cottrell*, 657 S.E.2d 451 (S.C. 2008) *rev'g* *State v. Cottrell*, No. I265178 (S.C. Ct. Gen. Sess. Apr. 6, 2005); *State v. Evans*, 637 S.E.2d 313 (S.C. 2006) *aff'g* *State v. Evans*, No. H359051-52 (S.C. Ct. Gen. Sess. Sept. 22, 2004); *State v. Evins*, 645 S.E.2d 904 (S.C. 2007) *aff'g* *State v. Evins*, No. 2003GS4202533A (S.C. Ct. Gen. Sess. Nov. 19, 2004); *State v. Finklea*, 697 S.E.2d 543 (S.C. 2010) *aff'g* *State v. Finklea*, No. G501546 (S.C. Ct. Gen. Sess. Sept. 6, 2007); *State v. Haselden*,

observations for 3,031 venire members. The analysis of race as a factor was based on a subset of 23 cases that had data for venire members' race available among those 35 (including 19 with data on venire members' race at the voir dire and peremptory strike stages

577 S.E.2d 445 (S.C. 2003) *rev'g in part* State v. Haselden, No. F851854 (S.C. Ct. Gen. Sess. Feb. 10, 2001); State v. Hill, 604 S.E.2d 696 (S.C. 2009) *aff'g in part* State v. Hill, No. F185132 (S.C. Ct. Gen. Sess. Feb. 8, 2000); State v. Jones, 681 S.E.2d 580 (S.C. 2009) *rev'g* State v. Jones, No. E640538 (S.C. Ct. Gen. Sess. Mar. 14, 2007); State v. Kelly, 502 S.E.2d 99 (S.C. 1998) *aff'g* State v. Kelly, No. D931318 (S.C. Ct. Gen. Sess. Aug. 14, 1995); State v. Laney, 627 S.E.2d 726 (S.C. 2006) *rev'g* State v. Laney, No. G099682 (S.C. Ct. Gen. Sess. Oct. 19, 2001); State v. Lindsey, 642 S.E.2d 557 (S.C. 2007) *aff'g* State v. Lindsey, No. H252531 (S.C. Ct. Gen. Sess. May 24, 2004); State v. Locklair, 535 S.E.2d 420 (S.C. 2000) *aff'g* State v. Locklair, No. E231434 (S.C. Ct. Gen. Sess. Sept. 22, 1998); State v. Mercer, 672 S.E.2d 556 (S.C. 2009) *aff'g* State v. Mercer, No. H128342 (S.C. Ct. Gen. Sess. Apr. 22, 2006); State v. Morgan, 626 S.E.2d 888 (S.C. 2006) *vacating* State v. Morgan, No. G487949 (S.C. Ct. Gen. Sess. Mar. 9, 2004); State v. Motts, 707 S.E.2d 804 (S.C. 2011) *aff'g* State v. Motts, No. I359760 (S.C. Ct. Gen. Sess. Dec. 2, 2007); State v. Owens, 664 S.E.2d 80 (S.C. 2008) *aff'g* State v. Owens, No. E658835 (S.C. Ct. Gen. Sess. Feb. 14, 2003); State v. Quattlebaum, 527 S.E.2d 105 (S.C. 2000) *rev'g* State v. Quattlebaum, No. E499159 (S.C. Ct. Gen. Sess. Mar. 4, 1998); State v. Rivera, No. 2011-UP-138, 2011 WL 11733625 (S.C. Ct. App. 2011) *aff'g* State v. Rivera, No. I715656 (S.C. Ct. Gen. Sess. Feb. 13, 2008); State v. Sapp, 621 S.E.2d 883 (S.C. 2005) *aff'g* State v. Sapp, No. G040321 (S.C. Ct. Gen. Sess. May 19, 2003); State v. Sigmon, 623 S.E.2d 648 (S.C. 2005) *aff'g* State v. Sigmon, No. G556370 (S.C. Ct. Gen. Sess. July 18, 2002); State v. Stanko, 741 S.E.2d 708 (S.C. 2013) *aff'g* State v. Stanko, No. I742833 (S.C. Ct. Gen. Sess. Nov. 19, 2009); State v. Starnes, 531 S.E.2d 907 (S.C. 2000) ("*Starnes I*") *rev'g* State v. Starnes, No. E682636 (S.C. Ct. Gen. Sess. Apr. 25, 1997); State v. Starnes, 698 S.E.2d 604 (S.C. 2010) ("*Starnes II*") *aff'g* State v. Starnes, No. E682636 (S.C. Ct. Gen. Sess. Nov. 17, 2007); State v. Tench, 579 S.E.2d 314 (S.C. 2003) *aff'g* State v. Tench, No. F862590 (S.C. Ct. Gen. Sess. May 8, 2000); State v. Vazquez, 613 S.E.2d 359 (S.C. 2005) *aff'g* State v. Vazquez, No. 2002GS2602786B (S.C. Ct. Gen. Sess. Oct. 5, 2003); State v. Weik, 587 S.E.2d 683 (S.C. 2002) *aff'g* State v. Weik, No. E091046 (S.C. Ct. Gen. Sess. May 29, 1999); State v. Williams, 690 S.E.2d 62 (S.C. 2010) *aff'g* State v. Williams, No. H360518 (S.C. Ct. Gen. Sess. Feb. 19, 2005); State v. Winkler, 698 S.E.2d 596 (S.C. 2010) *aff'g* State v. Winkler, No. I252573 (S.C. Ct. Gen. Sess. Feb. 8, 2008); State v. Wise, 596 S.E.2d 475 (S.C. 2001) *aff'g* State v. Wise, Nos. F034429-31, F497161 (S.C. Ct. Gen. Sess. Feb. 1, 2001); State v. Woods, 676 S.E.2d 128 (S.C. 2009) *aff'g* State v. Woods, No. H055517 (S.C. Ct. Gen. Sess. Dec. 8, 2006).

Of these thirty-five cases, nineteen cases had information concerning race, gender, voir dire, and peremptory strikes; twelve cases in addition to those had information on gender, voir dire, and strikes; and four cases had information on gender and voir dire only.

and four with data on venire members' race during voir dire only),¹⁶⁹ including observations for 1,088 venire members. These cases were selected based on availability to the author, and it is hoped that more data can be entered for this project.

The research presented here thus has several limitations. First, it is neither a simple random sample of South Carolina capital punishment cases, nor inclusive of all cases for a given period. Records on file with the author indicate that between 1997 and 2012, the state of South Carolina imposed 63 death sentences using juries, including five re-sentencings of repeat defendants. The conclusions here must therefore be taken with a grain of salt: they are limited in their generalizability, and future research with more comprehensive data may help confirm or refute these findings. Further, because this set of trials resulted in death sentences, juror characteristics or pre-trial procedures may already have been skewed toward death. The data are therefore less representative than a sample including jurors who had acquitted or chosen life sentences. The statistical analysis here also provides only summaries and correlations and does not control for factors other than race and gender, such as prior convictions or strike eligibility,¹⁷⁰ which may have contributed to the results. Observations made for race may be less generalizable than observations made for gender due to the smaller sample size.

Nevertheless, the findings presented here are not trivial. Several characteristics of the data suggest elements of normalcy to these trials, including that (1) the rates of excusals for cause in this study also reflect the rates of excusals for cause in other studies;¹⁷¹

169 Aleksey, 538 S.E.2d 248; Barnes, 753 S.E.2d 546; Binney, 608 S.E.2d 418; Bryant, 642 S.E.2d 582; Burkhart, 640 S.E.2d 450; Evins, 645 S.E.2d 904; Finklea, 697 S.E.2d 543; Haselden, 577 S.E.2d 445; Hill, 604 S.E.2d 696; Jones, 681 S.E.2d 580; Kelly, 502 S.E.2d 99; Laney, 627 S.E.2d 726; Locklair, 535 S.E.2d 420; Mercer, 672 S.E.2d 556; Quattlebaum, 527 S.E.2d 105; Sapp, 621 S.E.2d 883; Sigmon, 623 S.E.2d 648; Stanko, 658 S.E.2d 94; Starnes I, 531 S.E.2d 907; Vasquez, 613 S.E.2d 359; Williams, 690 S.E.2d 62; Wise, 596 S.E.2d 475; Woods, 382 S.C. 153, 676 S.E.2d 128. Four among the cases with race information available had data for voir dire only and not peremptory strikes. Thus, the case set for race and peremptory strikes included 19 cases. The case set for race and voir dire included 23 cases.

170 See O'BRIEN & GROSSO, *supra* note 7, at 4 (“‘Strike eligibility’ refers to which party or parties had the chance to exercise a peremptory strike against a particular venire member. For instance, if the prosecution struck someone before the defense had a chance to question that person, that juror would be strike eligible to the prosecution only.”).

171 Cf. tbl.1; Shari Seidman Diamond et al., *Achieving Diversity on the Jury: Jury Size*

(2) the juries in these cases were selected from venire pools that were relatively representative of their counties in cases for which that information was available (see **Table 1** below); and (3) the findings here are consistent with findings in previous studies. This analysis thus provides meaningful insight into how race and gender interact with South Carolina capital jury selection processes, and, potentially, elsewhere.

B. Empirical Findings

1. Venire Representativeness

TABLE 1:

Comparison of Black/White Composition in Venires and Trial Counties

Case	Venire % Black/White ¹⁷²	County % Black/White ¹⁷³	Venire Representative? ¹⁷⁴	Statistically Significant?
Anthony Woods	47% Black 53% White	52% Black 48% White (Clarendon)	YES [(Absolute disparity 5%) divided by (52% population) = 1% less than expected]	NO ($p = .57$, 2-tail Fisher exact)
Charles Williams	17% Black 83% White	20% Black 80% White (Greenville)	MAYBE [(Absolute disparity 3%) divided by (20% population) = 15% less than expected]	NO ($p = .72$, 2-tail Fisher exact)
James Bryant	13% Black 87% White	14% Black 86% White (Horry)	YES [(Absolute disparity 1%) divided by (14% population) = 1% less than expected]	NO ($p > .99$, 2-tail Fisher exact)

and the Peremptory Challenge, 6 J. EMPIRICAL LEGAL STUD. 425, 436 (2009).

172 Calculated based on trial transcripts from which this data could be reasonably discerned.

173 Community demographics were calculated using government census data and excluded residents who were neither white nor black. See *United States Census 2010*, U.S. CENSUS BUREAU, <http://www.census.gov/2010census/> (follow “Population Finder” hyperlink by selecting “South Carolina; then follow “Areas Within” hyperlink after selecting “South Carolina”; then follow “Search” hyperlink after selecting “Counties / Municipios”; then follow “Areas Within” after selecting the desired county) (last visited Feb. 9, 2017).

TABLE 1:
Comparison of Black/White Composition in Venires and Trial Counties

Case	Venire % Black/White ¹⁷²	County % Black/White ¹⁷³	Venire Representative? ¹⁷⁴	Statistically Significant?
Jonathan Binney	32% Black 68% White	21% Black 79% White (Cherokee)	MAYBE (under-rep- resents Whites) [(Absolute disparity 11%) divided by (79% population) = 14% less than expected]	NO ($p = .11$, 2-tail Fisher exact)
Kevin Mercer	6% Black 94% White	15% Black 85% White (Lexington)	NO [(Absolute disparity 9%) divided by (15% population) = 60% less than expected]	NO ($p = .06$, 2-tail Fisher exact)
Ron Finklea	8% Black 92% White	15% Black 85% White (Lexington)	NO [(Absolute disparity 7%) divided by (15% population) = 47% less than expected]	NO ($p = .18$, 2-tail Fisher exact)
Jeffrey Jones	7% Black 93% White	15% Black 85% White (Lexington)	NO [(Absolute disparity 8%) divided by (15% population) = 53% less than expected]	NO ($p = .11$, 2-tail Fisher exact)

174 Determined using the comparative disparity test articulated in *Duren v. Missouri*, 439 U.S. 357 (1979), and *Berghuis v. Smith*, 559 U.S. 314, 327 (2010). The test has three prongs for showing a violation of *Taylor's* requirement that venires be drawn from a fair-cross section of the community: "(1) the group alleged to be excluded is a 'distinctive' group . . . ; (2) the group's representation in the jury pool is not fair and reasonable in relation to the number of such persons in the population; and (3) the under-representation of the group results from systematic exclusion of the group in the jury selection process." *Jury Managers' Toolbox: A Primer on Fair Cross Section Jurisprudence*, NAT'L CTR. FOR STATE CTS. (2010), <http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/What%20We%20Do/A%20Primer%20on%20Fair%20Cross%20Section.ashx>. The second prong is based solely on those eligible for jury service who are also available. *Id.* at 3. "Absolute disparity describes the proportional difference in the representation of the distinctive group Comparative disparity measures the percentage by which the number of distinctive group members in the jury pool falls short of their number in the community." *Id.* To calculate comparative disparity, divide the absolute disparity percentage by the percentage of the jury-eligible population, to indicate the percentage less of the group that is present than would normally be expected. *Id.*

Table 1 represents the racial composition of the venires of seven cases for which the data were available, juxtaposed alongside the composition of the counties where the trials took place. For instance, the first row and second column show that the trial of Anthony Woods involved a venire comprised of 47% black prospective jurors and 53% white prospective jurors. The third column provides the racial composition of Clarendon County (52% black and 48% white), where Woods' trial took place. The column entitled "Venire Representativeness" indicates the determination that, according to the Supreme Court's "comparative disparity" test, Woods' venire pool represented a fair cross-section of the community in terms of its racial composition. The final column includes the conclusion as to whether any difference between the county and the venire was statistically significant, which shows that even where a venire might fail the doctrinal test for representativeness, the venire may not be unrepresentative according to other measures.

The data in **Table 1** establish a general idea of how representative the venire pools were in these seven cases, providing some context for the significance of the subsequent selection procedures (*i.e.*, knowing if there were zero black venire members represented at the beginning might theoretically help explain low strike rates of black prospective jurors). One weakness is that the comparative disparity test is meant to be calculated based on the available, jury-eligible element of the population,¹⁷⁵ which **Table 1** does not include. The information presented in **Table 1** should thus be treated as an approximation.

Based on this approximation, Clarendon, Greenville, Horry, and Cherokee Counties appear to have provided adequately racially representative venire pools for the respective trials held there, with Cherokee County the only one under-representing whites. The "maybes" account for the fact that the Supreme Court has not embraced a bright-line rule of what it means to pass the various fair cross-section tests.¹⁷⁶ Lexington was the only county that appeared to underrepresent blacks in its venire pools. Although the disparity was not statistically significant, the Mercer, Finklea, and Jones trials would clearly fail the comparative disparity test.

¹⁷⁵ *Berghuis v. Smith*, 559 U.S. 314, 328-29 (2010).

¹⁷⁶ *Id.* at 329-30, 330 n.5.

2. Men versus Women in Set of 35 Cases, 1997-2012

a. Status throughout Entire Selection Process

TABLE 2:
Summary of All Removals, by Gender[†]

	Men	Women	Row Total
Did Not Reach Voir Dire	167 Individuals (11% of men)	171 Individuals (11% of women)	338 Individuals (11%)
Excused for Cause	819 Individuals (53%)	800 Individuals (53%)	1,619 Individuals (53%)
Struck	243 Individuals (16%)	216 Individuals (14%)	459 Individuals (15%)
Qualified, Not Reached for Strikes	84 Individuals (5%)	91 Individuals (6%)	175 Individuals (6%)
Seated on Jury	187 Individuals (12%)	182 Individuals (12%)	369 Individuals (12%)
Alternate	33 Individuals (2%)	38 Individuals (3%)	71 Individuals (2%)
Column Total	1,533 Individuals	1,498 Individuals	3,031 Individuals (100%)

[†] $\chi^2(5, N = 3,031) = 2.155, p = 0.8274$. P-values were calculated using the tools at www.openepi.com with the confidence level set at 99.99%.

The results shown in **Table 2** compare the means by which the men and women among the 3,031 venire members observed were removed during pre-trial procedures, if at all. For example, the first row shows that 167 male venire members were brought to court without reaching voir dire questioning because the court had filled its requirements for qualified jurors from whom to select the jury. These 167 men constituted 11% of all male jurors who went through the selection process. Similarly, 171 women, or 11% of all female venire members, were brought to court and sent away without questioning.¹⁷⁷

¹⁷⁷ This number and proportion are likely substantially higher. However, trial transcripts reported this information inconsistently. Some involved a mass questioning pre-voir dire, where many jurors of an indeterminate number were turned away because of age, prior convictions, hardship, and other statutory bases for excuse from jury service. Other transcripts reported a list of jurors who did not reach voir dire questioning. Thus, the first row of this table should be viewed as a placeholder, with the actual proportion not

The data show no significant difference between men and women at any stage ($p = .8274$, χ^2). A total of 1,533 men and 1,498 women went through the jury selection process, and roughly the same percentages of each were excused without being questioned (11%), excused for cause (53%), and qualified without being reached for peremptory challenges (5-6%). Rates of 14-16% of each gender were struck by parties, 12% of each gender were seated on a jury, and 2-3% of each gender served as alternates.

b. Removals for Cause Based on Pro- or Anti-Death Stance

TABLE 3:
Removals for Views on Death, by Gender[†]

	Pro-Death Removal	Anti-Death Removal	Row Total
Women	54 Individuals (21% of women removed for views on death penalty) (30% of pro-death removals)	205 Individuals (79% of women removed for views on death penalty) (58% of anti-death removals)	259 Individuals (100%)
Men	125 Individuals (46% of men removed for views on death penalty) (70% of pro-death removals)	149 Individuals (54% of men removed for views on death penalty) (42% of anti-death removals)	274 Individuals (100%)
Column Total	179 Individuals (34% of death view-based removals)	354 Individuals (66% of death view-based removals)	533 Individuals (100%)

[†] 2-tail Fisher exact, $p < .001$.

The data in **Table 3** indicate who the court removed, among men and women, for expressing views too pro- or anti-capital punishment (jurors who were removed for other reasons, such as medical excuses and financial hardship, were omitted from the data set for this analysis). For instance, the first cell in the first row shows that 54 women were removed for indicating that they would automatically apply the death penalty if the defendant were found guilty of murder. The next cell to the right shows that 205 women were removed for indicating that they would be unable to impose

particularly significant to the issues being discussed here.

the death penalty. Both cells show that, of women removed for their views on capital punishment, 21% were removed for favoring the death penalty too strongly, while 79% were removed for opposing the death penalty.

The difference between men and women in **Table 3** is significant at the .001 level using a 2-tail Fisher exact test. Men were removed more than women for favoring the death penalty too strongly (constituting 70% of pro-death removals), whereas women were removed more than men for opposing the death penalty too strongly (constituting 58% of anti-death removals). However, like women, a majority of men removed for their views on death sentencing were removed for opposition (54% of men removed for death views) rather than for their pro-death views (46%).

c. Peremptory Strikes: Defense and Prosecution Impacts According to Gender

TABLE 4:
Proportion of State and Defense Peremptory Strikes, by Gender[†]

	Men	Women	Row Total
Defense Strikes	192 Individuals (59 % of D Strikes)	134 Individuals (41% of D Strikes)	326 Individuals
Prosecution Strikes	67 Individuals (41% of State Strikes)	96 Individuals (59% of State Strikes)	163 Individuals
Column Total	259 (49% of Total Strikes)	230 (51% of Total Strikes)	489 Individuals

[†] 2-tail Fisher exact, $p = 0.0002909$

The data in **Table 4** indicate prosecutor and defense use of peremptory strikes broken down by gender. The first row shows that the defense struck 192 men and 134 women, and that the defense thus used 59% of its strikes on men and 41% of its strikes on women. The next row down indicates that the prosecution struck 67 men and 96 women (with the lower numbers resulting from the prosecution having half as many strikes as the defense), using 41% of its strikes on men and 59% of its strikes on women.

The differences between the strikes used on each gender shown in **Table 4** are significant at the .001 level using a 2-tail Fisher exact test. Namely, the defense struck men at a higher rate while the prosecution struck women at a higher rate. However, the comparable

rates resulted in roughly equal proportions of each gender being struck overall.

3. Whites versus Blacks in Subset of 23 Cases, 1997-2012

a. Status Throughout the Entire Selection Process¹⁷⁸

TABLE 5:
Summary of Removals/Placements throughout Selection Process, by Race[†]

	Whites	Blacks	Row Total
Excused for Cause	284 Individuals (33% of whites removed)	130 Individuals (56% of blacks removed)	414 Individuals (38% of removals)
Struck	268 Individuals (31%)	39 Individuals (16%)	305 Individuals (28%)
Qualified, Not Reached for Strikes	57 Individuals (7%)	18 Individuals (8%)	75 Individuals (7%)
Seated on Jury	204 Individuals (24%)	40 Individuals (17%)	244 Individuals (22%)
Alternate	42 Individuals (5%)	8 Individuals (3%)	50 Individuals (5%)
Column Total	854 Individuals	234 Individuals	1,088 Individuals

[†] $\chi^2(4, N = 1,088) = 43.75, p < .001$. Data for individuals who arrived at the courthouse but did not reach voir dire were removed because of inconsistency among the transcripts and the lack of race data available at that stage.

The data in **Table 5** indicate the manners in which whites and blacks among the 1,088 assessed were removed during pre-trial procedures, if at all. For example, the first cell in the first row shows that 284 whites were excused for cause, or roughly 33% of all white potential jurors. The next cell shows that 130 black potential jurors were excused for cause, constituting approximately 56% of black venire members.

The differences illustrated in **Table 5** are significant at the .001 level with a chi square test. Blacks were excused for cause at a higher rate than their white counterparts. The overall percentage of blacks struck by peremptory challenge was lower than the overall percentage of whites struck, although this result is discussed in greater detail in Section IV.C in light of the need to account for the

¹⁷⁸ A very small number of venire members were neither white nor black, and they were removed from the data set in order to simplify the analysis.

high rate of for-cause removals of blacks. Blacks were seated on juries at a lower rate than white venire members, at 17% and 24% of the respective venire groups.

b. Removals for Cause Based on Pro- or Anti-Death Views

TABLE 6:
Removals for Views on Death, by Race[†]

	Pro-Death Removal	Anti-Death Removal	Row Total
Blacks	2 Individuals (3% of blacks removed for views on death penalty) (3% of pro-death removals)	75 Individuals (97% of blacks removed for views on death penalty) (51% of anti-death removals)	77 Individuals
Whites	63 Individuals (47% of whites removed for views on death penalty) (97% of pro-death removals)	72 Individuals (53% of whites removed for views on death penalty) (49% of anti-death removals)	135 Individuals
Column Total	65 Individuals (31% of removals based on views on death penalty)	147 Individuals (69% of removals based on views on death penalty)	212 Individuals

[†] 2-tail Fisher exact, $p < .001$.

The data in **Table 6** show the percentages of blacks and whites who were removed for being either pro- or anti-death among those jurors removed for their views on the death penalty (as with gender, jurors who were removed for other reasons, such as medical excuses and financial hardship, were omitted from the data set for this analysis). For instance, the first cell in the first row shows that two African Americans were removed for cause because of their indication that they would automatically impose the death penalty if the defendant were found guilty. These two individuals were three percent of those black prospective jurors removed for their views on death. The next cell to the right shows that 75 blacks were removed for being unable to impose the death penalty, or 97% of black prospective jurors removed for their views on capital punishment.

The differences presented in **Table 6** are statistically

significant at the .001 level with a 2-tail Fisher exact test. White venire members were removed at a much higher rate than their black counterparts for favoring the death penalty too strongly to sit as impartial members of the jury. More whites were excused for favoring the death penalty than for opposing it. By contrast, the vast majority of blacks who were excused for their views on death were excused for opposing capital punishment. Blacks constituted a disproportionately high percentage (75 of 147 individuals, or 51%) of prospective jurors removed for anti-death views.

c. Peremptory Strikes: Defense and Prosecution Impacts According to Race

TABLE 7:

Percentage of State and Defense Peremptory Strikes, by Race[†]

	Whites	Blacks	Row Total
Defense Strikes	200 Individuals (99% of D Strikes)	3 Individuals (1% of D Strikes)	203 Individuals
Prosecution Strikes	68 Individuals (65% of State Strikes)	36 Individuals (35% of State Strikes)	104 Individuals
Column Total	268 Individuals (87% of Total Strikes)	39 Individuals (13% of Total Strikes)	307 Individuals

[†] 2-tail Fisher exact, $p < .001$.

The data in **Table 7** illustrate defense and prosecutorial peremptory strikes broken down by race. The first row and first column show, for instance, that the defense used 200 of its strikes on white individuals, or 99% of its peremptory strikes exercised. The next column shows that the defense struck three black individuals, constituting one percent of its total strikes. The differences in **Table 7** are significant at the .001 level with a 2-tail Fisher exact test. While the defense struck virtually no black prospective jurors, the prosecution used 65% of its strikes on whites and 35% of its strikes on blacks.

Blume and Vann have observed that Lexington and Horry Counties in South Carolina have dramatically higher death sentencing rates than other counties.¹⁷⁹ A death sentence that was vacated in

¹⁷⁹ Blume & Vann, *supra* note 167, at 205-06. Five of the cases used to analyze race in this study were from Lexington County. See *State v. Finklea*, 697 S.E.2d 543 (S.C. 2010); *State v. Jones*, 681 S.E.2d 580 (S.C. 2009); *State v. Kelly*, 502 S.E.2d 99 (S.C. 1998); *State v. Quattlebaum*, 527 S.E.2d 105 (S.C. 2000);

2016 for various racial bias issues came from Lexington County and prosecutor Donald Myers, who has been nicknamed “Death Penalty Donnie” for his aggressive pursuit of the death penalty.¹⁸⁰ Thus, the table below shows peremptory strike patterns based on race with Lexington and Horry removed in case they skewed the data in **Table 7**.

TABLE 7.1:
Percentage of State and Defense Peremptory Strikes by Race with Lexington and Horry Counties Removed[†]

	Whites	Blacks	Row Total
Defense Strikes	115 Individuals (97% of D Strikes)	3 Individuals (3% of D Strikes)	118 Individuals
Prosecution Strikes	33 Individuals (56% of State Strikes)	26 Individuals (44% of State Strikes)	59 Individuals
Column Total	148 Individuals (84% of Total Strikes)	29 Individuals (16% of Total Strikes)	177 Individuals

[†] 2-tail Fisher exact, $p < .001$.

Table 7.1 shows that the differences in the parties’ use of strikes remained at the same proportions and statistically significant at the .001 level, even with the removal of the two notable counties.

To illustrate the relationship between the peremptory strike stage and the overall empanelment process, **Table 8** combines the data in **Table 7** with the overall race data found in **Table 5**.

TABLE 8:
Summary of Removals/Placements throughout Selection Process by Race, with Parties’ Use of Peremptory Strikes[†]

	Whites	Blacks	Row Total
Excused for Cause	284 Individuals	130 Individuals	414 Individuals
Remaining after Voir Dire	570 Individuals	104 Individuals	674 Individuals
Total Struck	268 Individuals	39 Individuals	305 Individuals

Starnes I, 531 S.E.2d 907 (S.C. 2000); Blume & Vann, *supra* note 167, at 229-30. Donald Myers was prosecutor for all of them. Three of the cases were from Horry County. See State v. Bryant, 642 S.E.2d 582 (S.C. 2007); State v. Stanko, 741 S.E.2d 708 (S.C. 2013); State v. Vasquez, 613 S.E.2d 359 (S.C. 2005); Blume & Vann, *supra* note 168, at 230.

180 John Monk, *Avenging Angel? A look at 5 of Donnie Myers’ more memorable death penalty cases*, THE STATE (Mar. 19, 2016), <http://www.thestate.com/news/local/article67122927.html>.

TABLE 8:
Summary of Removals/Placements throughout Selection Process by Race, with Parties' Use of Peremptory Strikes[†]

	Whites	Blacks	Row Total
Struck by Prosecution	68 Individuals	36 Individuals	104 Individuals
Struck by Defense	200 Individuals	3 Individuals	203 Individuals
Percentage of Post-Voir Dire Eligible Venire Members Struck by Prosecution	68/570 = 12%	36/104 = 35%	
Percentage of Post-Voir Dire Eligible Venire Members Struck by Defense	200/570 = 35%	3/104 = 3%	

[†] χ^2 (4, N = 114.5) $p < .001$ (calculated first five rows and first two columns of chart).

Table 8 combines data from Tables 5 and 7 to illustrate that the prosecution's strikes accounted for eliminating 12% of whites who were qualified during voir dire and 35% of blacks who were qualified. It shows that the defense's strikes eliminated 35% of whites who were not removed during voir dire and three percent of blacks. The differences are statistically significant at the .001 level.

V. Discussion of Results

A. Venire Stage and Lexington County

In light of the discussion of *Taylor's* questionable implementation in practice, the mixed data in Table 1 show surprisingly successful jury pool representativeness. However, given the differences among counties, the results suggest ample room for variability according to locale.¹⁸¹ Each of the three Lexington County trial venires, for instance, underrepresented blacks according to the approximation of the comparative disparity test. As mentioned above, Lexington County also stands out because of its high rates of death sentencing — “approximately five times greater [than] the national average and seven times [greater than] the South Carolina average.”¹⁸² Although far from conclusive, it would seem reasonable

¹⁸¹ John H. Blume, *supra* note 28, at 305.

¹⁸² *Id.* at 305 n.121.

to infer that Lexington County's issues with representativeness are not unrelated to its high death sentencing rates.

B. Findings on Gender: Voir Dire and Peremptory Strikes

A comparison of **Table 2** (Summary of All Removals According to Gender) with **Table 3** (Removals for Views on Death by Gender) and **Table 4** (Proportion of State and Defense Peremptory Strikes by Gender) illuminates the influence of gender in the jury selection processes studied. A superficial assessment of men's and women's removals, shown in **Table 2**, suggests that men and women were treated equally during the selection process because their outcomes are virtually the same ($p = 0.8274$, χ^2). For instance, men and women were excused for cause at the same rate (both 53%), struck at around the same rate (16% and 14%, respectively), and seated on the jury at the same rate (12% each).

Yet, **Tables 3** and **4** show that **Table 2's** summary does not tell the whole story. Rather, **Table 3** ($p < .001$, 2-tail Fisher exact) shows that men and women were treated differently by the court, while **Table 4** ($p = 0.0002909$, 2-tail Fisher exact), shows that men and women were treated differently by the parties. Specifically, **Table 3** shows that more men than women were removed for their excessive support for the death penalty, whereas more women than men were removed for their inability to impose death. The data in **Table 4** indicate that the defense exercised peremptory strikes on significantly more men than women (59% of defense strikes), and that the prosecution exercised peremptory strikes on significantly more women than men (59% of prosecution strikes).

Interestingly, echoing similar findings by others such as Mary Rose (in the context of race), the opposing parties' disproportionate use of peremptory strikes according to gender "cancelled each other out."¹⁸³ Namely, the defense used 41% of its strikes on women and 59% of its strikes on men whereas the prosecution used 59% of its strikes on women and 41% of its strikes on men, a difference which is statistically significant ($p < 0.0002909$, 2-tail Fisher exact) — suggesting that gender may have been a factor in strike choices. It is possible that controlling for gender-neutral bases for strikes would eliminate this disparity. However, this finding is consistent with

183 Cf. Rose, *supra* note 98, at 698, 700; Diamond et al., *supra* note 171, at 425.

prior conclusions, such as in Baldus's Philadelphia study,¹⁸⁴ that gender was a factor in parties' choices of whom to strike.

The same "cancelling out" effect occurred with excuses for cause: because women tended to oppose death and men favored it more, they were removed during voir dire in roughly equivalent numbers. But do the equal numbers in removals in the end justify the means? It may appear that the extreme ends of the spectrum on death views are innocuously correlated with gender: men, on one end, are shaved off for favoring death too strongly, whereas women, on the other end, are shaved off for opposing death, resulting in a jury pool in the middle with equal representation of the genders. It is possible that such a "middle of the road" jury was the result here; since women and men ended up seated on juries in equal numbers, the juries at least appear representative. However, the death-qualification process is known to skew the jury pool toward a pro-prosecution bias.¹⁸⁵ Although the genders were equally represented, it is unclear whether conviction-proneness and pro-death biases also evened out.

In any case, the disparate impact on women as 58% of anti-death removals reflects the concerns raised above about death qualification's disproportionate effects on some groups over others. In light of this impact's potential to affect jury impartiality and representativeness, and the jury's supposed protective functions, this effect on women should be of concern, notwithstanding the even gender outcomes.

C. Findings on Race: Voir Dire and Peremptory Strikes

The findings on race are consistent with previous studies' conclusions. Race as a factor in venire members' removals in the 23-case subset observed revealed strong statistically significant differences at both the voir dire stage and in parties' use of peremptory strikes. Although removal for opposition to the death penalty is nominally a race-neutral reason for removal, the data here at least demonstrate the overwhelming disparate impact such removals had on black prospective jurors.

Unlike with gender, discrimination by opposing sides did not cancel itself out for race. Rather, the data here show that it was

¹⁸⁴ David C. Baldus et al., *supra* note 24, at 96-97.

¹⁸⁵ Lynch & Haney, *supra* note 26, at 73.

more difficult for black jurors to be seated on the jury than for white jurors. A rate of 20% of black prospective jurors ended up on juries or as alternates while 29% of whites did — with black jurors seated at roughly 2/3 the rate of white jurors.

The data in **Tables 5** (Summary of Removals throughout the Selection Process, by Race), **6** (Removals for Views on Death, by Race), and **7** (Percentage of State and Defense Peremptory Strikes by Race) illustrate the different experiences of a white venire member and an African American venire member in the set of cases studied. Black potential jurors were excused for cause at a higher rate than whites (56% and 33%, respectively) ($p < .001$, χ^2). The results in **Table 6** indicate that a majority of those black individuals removed for cause were excused because of their opposition to the death penalty. Of the 234 total black venire members, 130 blacks were removed for cause, including 75 individuals removed for anti-death penalty views — representing 58% of blacks removed for cause and 32% of the overall black venire group. By contrast, 72 of 284 whites removed for cause (constituting 25% of whites removed for cause and eight percent of the overall white venire group) were excused because of their opposition to the death penalty. While only two blacks were excused for favoring the death penalty, approximately 22% of whites excused for cause (63 of 284) were removed for pro-death views.

Although these findings might not remain as strong with comprehensive data, they illustrate the problematic nature of removals for cause on the basis of opposition to the death penalty. Not only did such removals have a disparate impact on women and African Americans, but it virtually precluded a significant portion of black prospective jurors from serving on the jury at all. This tension illustrates the basic catch-22 of “fair cross section” jurisprudence and jury representativeness in capital cases: it is impossible to reconcile representativeness with the need for impartiality in capital punishment cases, since particular groups are more likely to have strong feelings in opposition.¹⁸⁶

Although the overall percentage of blacks removed via peremptory strike was lower than the overall percentage of whites removed via peremptory strike (16% and 31%, respectively), the proportions listed in the second row of **Table 5** are misleading. First, they do not take into account the smaller number of blacks available

186 Price, *supra* note 7, at 103-04.

to strike, since such a high proportion was removed at the for-cause stage. After removing the first row in **Table 5** (reducing the pool to those who were available to be struck), the data show that 37% of black prospective jurors were struck (thirty-nine out of 104 black individuals remaining after for-cause removals), whereas 47% of whites remaining were struck (268 out of 570 white individuals remaining after for-cause removals). This difference in strikes calculated using these proportions is not statistically significant ($p = 0.3053$, 2-tail fisher exact) and thus shows that whites and blacks were struck at comparable rates, rather than the twice-higher rate reflected for whites in **Table 5**.

But more critically, as illustrated in **Table 8**, the prosecution struck 35% of blacks who made it through the voir dire process, compared to 12% of whites.¹⁸⁷ The prosecution used 36 of its 104 strikes on black individuals (36% of its strikes), even though blacks constituted only 15% of individuals available to be struck.¹⁸⁸

The crux of these numbers is that the prosecution struck

187 The racial disparities in the parties' use of their peremptory challenges were significant ($p < .001$, 2-tail Fisher exact).

188 South Carolina procedure appears to dictate that the prosecution goes first in the parties' alternating use of their strikes. See *Juror Information*, S.C. JUDICIAL DEPT., <http://www.judicial.state.sc.us/jurorinfo/jurorSelection.cfm> (last visited Jan. 31, 2017) ("In criminal cases . . . [t]he clerk calls out the name of the juror. This juror comes forward and stands in front of the jury box. The clerk says, 'What sayeth the State?' The Solicitor, representing the State, will say either (1) 'Excuse the juror,' in which event the juror takes his or her seat back in the courtroom; or (2) 'Present the juror,' or 'Swear the juror.' The clerk will then ask, 'What sayeth the defendant?' The defendant's attorney may say (1) 'Excuse the juror,' in which event the juror takes his or her seat back in the courtroom; or (2) 'Swear the juror,' in which event the juror takes a seat in the jury box as directed by the clerk."). If the prosecution used a strike on a potential juror, the pool available for the defense to strike becomes smaller. It might be a concern that if the defense used its strikes first in each trial, the pool that was available for the prosecution to strike would have had different racial proportions than the one that includes the overall numbers. The trends observed above weaken somewhat but persist even if it is assumed that all 200 white venire persons that the defense struck were not available to the prosecution. If that were the case, the prosecution struck 68 out of 370 whites available to be struck or 18% of them — still substantially lower than the 36% of blacks struck by the prosecution, which persists after adjusting for the only three black venire persons struck by defense. The adjusted numbers would also mean that African Americans were 21% of the pool available to be struck by the prosecution, but the prosecution used 35% of their strikes on them. These adjusted numbers remain statistically significant at the .05 level ($p = 0.007949$) using a 2-tail Fisher exact test.

blacks at a rate higher than they were represented and removed one-third of eligible black jurors. A comparable disparity emerged in O'Brien and Grosso's study, where the prosecution struck 52.6% of eligible black venire members and 25.7% of all other eligible venire members.¹⁸⁹ Of course, the defense had even more dramatically differing numbers for each race, using only one percent of its strikes on blacks. But again, where the concerns are jury representativeness, the jury's protective function for the defendant, and non-arbitrary imposition of death sentences, it is easier to forgive the defense's discrimination and its countervailing ethical obligations than it is the prosecution's discrimination.

The present study unfortunately did not control for race-neutral explanations for the use of strikes, unlike in O'Brien and Grosso's study. Potentially, these disparities would not persist or would weaken with such controls. But, such an outcome seems unlikely. O'Brien and Gross's study revealed little difference in outcomes when they controlled for race-neutral factors.¹⁹⁰ Other studies have shown similar trends.¹⁹¹ It is reasonable to infer here that the defense was targeting whites and that the prosecution was targeting blacks.¹⁹²

Finally, the combined effects of anti-death removals and prosecutorial strikes had dramatically disparate impacts according to race. Seventy-five African Americans were removed for anti-death views and 36 were struck by the prosecution. Combined, this excluded group constitutes 47% of the 234-person black venire pool. Compare this with 72 whites removed for anti-death views and 68 whites struck by the prosecution — constituting 16% of the 854-person white venire pool. While this is not formally a scheme to systematically exclude a particular racial group from jury service, it would seem to be a *de facto* one.

189 Grosso & O'Brien, *supra* note 16, at 1548.

190 O'BRIEN & GROSSO, *supra* note 7, at 13.

191 Grosso & O'Brien, *supra* note 16, at 1536-40 (discussing other studies).

192 It appeared from the majority of the trial transcripts that litigants did not raise a significant number of *Batson* challenges. One challenge by the prosecution was observed, where the prosecution alleged discrimination against a white juror. Since only portions of some transcripts were available, however, it is possible that *Batson* challenges were made and not observed.

VI. Conclusion

The data here illustrate capital punishment's persistent problems with jury representativeness and show trends unlikely to be unique to South Carolina, given their consistency with the literature on race- and gender-related exclusion during jury selection. First, although limited in their generalizability and statistical perfection, disparities related to race and gender in the jury selection process were pervasive in this study. Most significantly, race apparently motivated the parties' use of peremptory strikes, and gender likely did as well. These data contribute to the knowledge of the ineffectual impact that *Batson* and progeny have had in state courts. They also raise questions about the fairness and constitutionality of the trials of certain South Carolina inmates currently on death row.

Further, removal of prospective jurors for their opposition to the death penalty stands in tension with a defendant's Sixth and Fourteenth Amendment rights and Supreme Court jurisprudence. The death-qualification process functioned as a substantial impediment to jury service by African Americans in this study. A process with such a dramatic disparate impact on black jurors flies in the face of *Taylor's* holding that "no one racial group may be systematically excluded from jury service" — particularly when viewed in tandem with the effects of prosecutorial strikes. This tension, combined with death qualification's disparate impact on women, suggests that states maintaining capital punishment schemes have embraced a fiction: that it is possible to reconcile death qualification with society's interest in, and defendants' rights to, impartial, representative juries.

Human Rights Approaches to Women's Health Issues: Dignity and the Right to Health in Guatemala and El Salvador

*Angenette Van Lieu-Muños**

Abstract

Human rights law violations in Central America with respect to reproductive health present challenging questions of state responsibility to protect the dignity of vulnerable citizens, especially women and children. This Article presents an analysis of the divergent histories of Guatemala and El Salvador and their distinct women's rights contexts. Applying human rights standards, viewed through an intersectional lens, the reproductive health rights issues in both nations illustrate the perpetually existent discrimination against women and how that discrimination negatively affects access to healthcare. Arguably, both El Salvador and Guatemala violate multiple human rights standards through their respective domestic legislations' treatment of abortion and women's health rights, although their treatments differ in scope and severity. Particularly difficult are issues with respect to access to reproductive healthcare and information for individuals suffering from poverty and racial discrimination. Accordingly, through a synthesis of human rights as found in multiple regimes, we see the failure of these states to protect the dignity of their female citizens, along with the failure to comply with their treaty obligations under international law. As such, the women of these nations and their supporters must advocate for greater change and adherence to these fundamental rights, as outlined in the ratified United Nations' and Organization of American States' system treaty agreements.

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I. Introduction

Recent developments in Central America, particularly in El Salvador and Guatemala, have led to numerous news and human rights reports on the state of the reproductive health of women and girls in those nations.¹ In particular, infant mortality, teenage motherhood, and lack of access to health services, among other issues, coincide with the challenges surrounding unsafe, or clandestine, abortions.² Although human rights standards and international organizations have addressed the issues in theory, the fact remains that systematic forms of oppression underlie the difficulty of eradicating human rights violations pertaining to women's health in these nations.

When viewed through a holistic lens, the current state of women's reproductive rights in El Salvador and Guatemala also reflects a history of colonialism, civil conflict, and entrenched oppression.³ The current state of women's reproductive rights in

1 See, e.g., Rashida Manjoo (Special Rapporteur on Violence Against Women, Its Causes, and Consequences), *Rep. on Her Follow-up Mission to El Salvador*, ¶ 10, U.N. Doc. A/HRC/17/26/Add.2 (Feb. 14, 2011) (outlining the remaining challenges to preventing violence against women and the attempts of the state to remediate and act within the confines of their treaty obligations); Amnesty Int'l, *On the Brink of Death: Violence Against Women and the Abortion Ban in El Salvador*, AI Index AMR 29/003/2014 (Sept. 25, 2014) [hereinafter Amnesty Int'l, *On the Brink of Death*] (reporting on the state of sexual and reproductive health of women in El Salvador); CTR. FOR REPROD. RIGHTS, *MARGINALIZED, PERSECUTED, AND IMPRISONED: THE EFFECTS OF EL SALVADOR'S TOTAL CRIMINALIZATION OF ABORTION* (2014), available at <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/El-Salvador-CriminalizationOfAbortion-Report.pdf> (reporting on the state of sexual and reproductive health of women in El Salvador); Int'l Planned Parenthood Fed'n [IPPF] & Guttmacher Inst., *Sexual and Reproductive Health of Young Women in Guatemala* (Apr. 2014), available at <https://www.guttmacher.org/sites/default/files/factsheet/fb-dd-guatemala.pdf> (providing a statistical report on sexual and reproductive health in Guatemala); Jonathan Watts, *El Salvador: Where Women are Thrown Into Jail for Having a Miscarriage*, THE GUARDIAN (Dec. 17, 2015, 4:29 PM), <http://www.theguardian.com/global-development/2015/dec/17/el-salvador-anti-abortion-law-premature-birth-miscarriage-attempted-murder> (reporting on the situation of women and the draconian abortion laws in El Salvador); see also, e.g., HUMAN RIGHTS WATCH, *COUNTRY SUMMARY: GUATEMALA 4* (Jan. 2012), available at https://www.hrw.org/sites/default/files/related_material/guatemala_2012.pdf (mentioning gender-based violence as "a chronic problem" with little to no accountability).

2 U.N., Human Rights Council, Statement Submitted by the Int'l Humanist & Ethical Union, U.N. Doc. A/HRC/30/NGO/129 (Sept. 8, 2015).

3 See *infra* Section II(A)-(D).

these countries necessitates a much larger understanding of the complexity of the human right to health, including the need for immediate domestic implementation and realization of human rights laws and the need for an effective remedy against violations for citizens. The different human rights and health issues presented by anti-abortion legislation in both nations are interrelated and intersect towards one general human rights concept at issue — the rights of women and girls in those nations to live with dignity and control over their reproductive health. Structures of power, oppression, and many international and domestic factors affect the rights of women, and the intersectional use of the law⁴ shows how

4 General Comment 20 from the Committee on Economic, Social and Cultural Rights (the “ESCR Committee”) provides a wonderful guide to the idea of intersecting rights within the treaty system. *See* U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 20, U.N. Doc. E/C.12/GC/20 (July 2, 2009). The ESCR Committee emphasizes that equality and protection from multiple forms of discrimination are fundamental principles of law encompassed in the founding human rights documents of the United Nations Charter, under the preamble; Articles 1, 3, and 55; and the United Nations Declaration, under Article 2. *Id.* ¶ 5. “Non-discrimination and equality [in human rights] are fundamental components of international human rights law” and are “immediate and cross-cutting obligation[s.]” *Id.* ¶¶ 2, 7. The Comment further explains that “[s]ome individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying.” *Id.* ¶ 17. It goes on to elaborate that discrimination on the basis of race, sex, language, and political opinion is expressly prohibited, while other statuses, such as economic and social situation and any intersection of expressly prohibited grounds, must also garner protection from discrimination. *Id.* ¶¶ 19-21, 23, 27, 35. Since the fact that women in El Salvador and Guatemala are particularly vulnerable to discriminatory treatment by their government and society leads to this intersectional view of rights, the analysis necessitates viewing the entire context of the woman’s status and experience. Specifically, multiple forms of intersecting discrimination affect each individual woman in the pursuit of her reproductive health in different ways. *Id.* ¶ 17. The Comment specifically prohibits discrimination in economic, social, and cultural rights, including the right to “the enjoyment of the highest attainable standard of physical and mental health” found in Article 12 of the International Covenant on Economic, Social, and Cultural Rights. *Id.* ¶ 2. *See* International Covenant on Economic, Social and Cultural Rights art. 12, Dec. 16, 1966, 993 U.N.T.S. 4 [hereinafter ICESCR]. Discrimination against women occurs alongside and in conjunction with discrimination based on race and class, leading to various reproductive and sexual health human rights violations. *See* Anastasia Vakulenko, *Gender and International Human Rights Law: The Intersectionality Agenda*, in RESEARCH HANDBOOK ON INTERNATIONAL HUMAN RIGHTS LAW 196, 196-97, 202

the state, its representatives, and civil society oppress women.⁵ Furthermore, solely engaging in the ratification of soft law and human rights treaties has proven to be ineffective and will continue to fail to alter the course of the current health issues. Active local campaigns to address those issues and actual hard laws need to be implemented and enforced.

Utilizing this perspective, this Article attempts to synthesize the international human rights standards applied to both the Salvadoran and Guatemalan women's rights contexts. By viewing the divergent history and makeup of each community of women in these nations, we see that injustice and human rights violations cross physical borders and cultural barriers. The inherent dignity of a woman to have control over her own body is threatened in distinct ways in each of these nations, and human rights law provides us with a rubric for understanding and attempting to remedy the violations women continue to experience.

II. Country Profiles: El Salvador and Guatemala

El Salvador and Guatemala share a national territorial border, a shared history of colonialism by the Spanish, and a long road toward independence to develop their own national identities in the 19th and 20th centuries.⁶ However, the contrasts in their history and implementation of law after the end of colonialism have led to a divergence in domestic reproductive rights legislation.⁷ This difference allows for an instructive lesson in the potential for human rights law and governance on women's health issues in different

(Sarah Joseph & Adam McBeth eds., 2010). Throughout this analysis, the issues are analyzed using an intersectional approach to the question of reproductive rights in each national context. This approach includes providing insight into the racial and socio-economic aspects of these women's lives to show that the discrimination and attendant human rights violations are not just a product of gender. Intersectionality provides a framework to understand that unsafe abortion, femicide, rape, and domestic violence do not exist in a vacuum of rights violations. Rather, these violations are part of greater systemic and structural forms of oppression that discriminate against women in multiple forms in violation of international human rights law.

5 See generally Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, 52 EMORY L.J. 71 (2003).

6 See *El Salvador*, ENCYC. BRITANNICA, <https://www.britannica.com/place/El-Salvador/The-colonial-period> (last visited May 11, 2017).

7 Compare *infra* text accompanying notes 22-23, with *infra* text accompanying notes 58-59.

socio-political and historical contexts, where disparate treatment leads to human rights violations and equal results of suffering. Reports provided by various human rights treaty body committees⁸ provide an important tool to compare and contrast the realities that women face on the ground in these different communities. Although these countries differ in significant regards, most notably in history, ethnic make up, and abortion laws, women in both countries suffer similar violations that result in multidimensional oppression on various systemic levels.⁹ Comparison of the nations also illustrates two important themes in the reproductive and sexual health rights framework: first, the significance of poverty and access to healthcare, and second, the way that laws perpetuate discrimination against the most vulnerable groups — particularly women and the indigenous — in society.

8 See Concluding Observations of the Comm. on the Elimination of Discrimination Against Women: El Salvador, U.N. Doc. CEDAW/C/SLV/CO/7 (Nov. 7, 2008), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/SLV/CO/7&Lang=en [hereinafter CEDAW, *El Salvador Report*]; Concluding Observations of the Comm. on the Elimination of Discrimination Against Women: Guatemala, U.N. Doc. CEDAW/C/GUA/CO/7 (Feb. 10, 2009) [hereinafter CEDAW, *Guatemala Report*]; U.N., Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, Concluding Observations on the Combined Third, Fourth and Fifth Periodic Reports of El Salvador, U.N. Doc. E/C.12/SLV/CO/3-5 (June 19, 2014), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/SLV/CO/3-5&Lang=En [hereinafter ESCRC, *El Salvador Report*]; U.N., Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, Concluding Observations on the Third Periodic Report of Guatemala, U.N. Doc. E/C.12/GTM/CO/3 (Dec. 9, 2014), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GTM/CO/3&Lang=En [hereinafter ESCRC, *Guatemala Report*]; Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Comm. El Salvador, U.N. Doc. CCPR/C/SLV/CO/6 (Nov. 18, 2010), http://www.un.org/ga/search/view_doc.asp?symbol=CCPR/C/SLV/CO/6 [hereinafter ICCPR, *El Salvador Report*]; Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Comm. Guatemala, U.N. Doc. CCPR/C/GTM/CO/3 (Apr. 19, 2012), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/GTM/CO/3&Lang=En [hereinafter ICCPR, *Guatemala Report*]; Yuval Shany & Nigel Rodley (Rapporteurs), Article 6: Right to Life, Draft General Comment No. 36, Human Rights Comm., U.N. Doc. CCPR/C/GC/R.36/Rev.2 (Sept. 2, 2015) [hereinafter ICCPR, Comment No. 36].

9 See ICCPR, *El Salvador Report*, *supra* note 8; ICCPR, *Guatemala Report*, *supra* note 8.

A. A Brief Political History of El Salvador

El Salvador, since its independence from Spain around 1824, has struggled regionally and internally to develop a functioning democracy.¹⁰ For a time, El Salvador had a coffee plantation-centered economy and an oligarchic system of governance.¹¹ This system ended with the dawn of the military dictatorships that essentially ruled throughout the 20th century, terminating in the 1980s.¹² Starting in 1979, a civil war between guerrilla groups and the overarching wealthy military class began, culminating with signing of peace accords in 1992.¹³ However, the resulting damage from the conflict included the deaths of 75,000 people, the majority of which were civilians.¹⁴ Today, El Salvador is a democracy, participating in the international human rights regime to the best of its ability, while dealing with new issues of violence and conflict arising from the “*maras*,” or drug gangs, in the region.¹⁵ This continued conflict and desperation has led to waves of migrants trying to escape systemic oppression and violence in their communities.¹⁶

B. Salvadoran Women’s Health in Context

El Salvador today is one of the most dangerous nations in the world, particularly for women and girls for whom violent crime and murder rates are the highest in the region.¹⁷ Discrimination due to cultural attitudes has led to the subjugation of women in all levels of society, including lack of access to education, political rights, and, most importantly for this analysis, health rights.¹⁸ Incidents

10 See *El Salvador*, *supra* note 6; *Freedom in the World 2016: El Salvador*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2016/el-salvador> (last visited May 11, 2017) (finding that, as recently as 2015, El Salvador has struggled to protect its citizens’ political and civil liberties).

11 See *El Salvador*, *supra* note 6.

12 See *El Salvador*, *supra* note 6.

13 See *El Salvador*, *supra* note 6; Benjamin Schwarz, *Dirty Hands: The Success of U.S. Policy in El Salvador—Preventing a Guerilla Victory—Was Based on 40,000 Political Murders*, ATLANTIC MONTHLY, Dec. 1998, at 107-10, 114-16 (detailing the conflict between the landed political elite, with the support of the military class, and the revolutionary guerilla forces).

14 See *El Salvador*, *supra* note 6.

15 See *El Salvador*, *supra* note 6.

16 See *El Salvador*, *supra* note 6.

17 Manjoo, *supra* note 1.

18 Manjoo, *supra* note 1, ¶ 11.

of violence and discrimination against women occur not only on a spontaneous individual basis but also as part of a “continuum of multiple violent acts” during women’s lifetimes, resulting in systemic and structural forms of oppression.¹⁹ Persistent gender discrimination and economic, social, and cultural barriers continue to prevent women from accessing essential tools within their society, such as legal, educational, and political institutions.²⁰ Therefore, fear of, or lack of trust in, these institutions proscribes usage of the legal system, and impunity at all levels of government leads to a lack of access to justice, appeals, or remedies from tribunals.²¹

Reproductive health is a serious part of the larger human rights problem in El Salvador today. Of particular interest is the total abortion ban put into effect in 1999 via a constitutional amendment to protect the life of the unborn.²² In that legislation, all forms of therapeutic abortion, as well as abortion for rape, incest, or genetic abnormalities, were banned and criminalized to protect the life of the embryo.²³ As a result, a woman suffering a miscarriage may be arrested at the hospital and imprisoned for the murder of her child.²⁴ Once a healthcare provider believes the individual has induced an abortion, she may be reported to the authorities by her physician and, in some cases, handcuffed to her hospital bed.²⁵ Upon prosecution, miscarrying women have been automatically accused of and charged with attempted or aggravated homicide, crimes that carry prison sentences of 30 to 50 years.²⁶ In the prison system, there are reports of accused women being harassed by other inmates and subjected to physical, sexual, and psychological abuse by prison guards.²⁷ Certain prisons, such as the one at Ilopango, are notoriously overcrowded and unhygienic; women are allowed to bring their children under five years old to live with them during their sentences, thereby potentially passing on the effects of these conditions to children and

19 Manjoo, *supra* note 1, ¶ 5.

20 Manjoo, *supra* note 1, ¶¶ 5, 11.

21 Manjoo, *supra* note 1, ¶¶ 19, 25, 33.

22 Manjoo, *supra* note 1, ¶ 65.

23 Manjoo, *supra* note 1, ¶ 66.

24 Watts, *supra* note 1.

25 Watts, *supra* note 1.

26 Manjoo, *supra* note 1, ¶ 68.

27 Comisión Interamericana de Derechos Humanos [CIDH], *El Salvador: Mujeres privadas de libertad por emergencias obstétricas*, YOUTUBE (Oct. 19, 2015), <https://www.youtube.com/watch?v=h9Op-28nM2U> [hereinafter CIDH].

infants.²⁸

These anti-abortion laws have led to extreme and disproportionate societal results. A 2007 survey demonstrated the effect on young girls, finding that 48,000 of the young women surveyed were between the ages of 12 and 19 and had given birth to at least one child and approximately 3,000 of those 48,000 mothers were between 12 and 14 years old.²⁹ Consequently, Amnesty International reports “suicide accounts for 57% of the deaths of pregnant females aged 10 to 19” in El Salvador, though it is likely that many more cases have gone unreported.³⁰ The impact on poor women is also disparate; the Center for Reproductive Rights reported that individuals prosecuted for abortion law violations were “by and large, living in situations of poverty or of complete economic dependence.”³¹ Additionally, girls in El Salvador often experience a lack of access to education, specifically on sexual health, and women are often denied or outright misled by service providers about contraception.³² Finally, it is often difficult for young women to access healthcare centers, particularly from rural areas, which has also led to high instances of self-induced, at-home abortions.³³

Procurement of an abortion at home can be extremely detrimental to the mother’s health, where the only alternative is to carry the baby to term even in circumstances extremely dangerous to either the mother’s or the baby’s health.³⁴ It is common practice for

28 U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., El Salvador 2015 Human Rights Report 4 (2015); see also *Situation of Prison Overcrowding in El Salvador Denounced Before the IACHR*, CTR. FOR JUSTICE & INT’L LAW (Mar. 20, 2015), <https://cejil.org/en/situation-prison-overcrowding-salvador-denounced-iachr>; *Growing up Behind Bars: The Tragic Children Born to Women in a Filthy, Overcrowded El Salvador Prison*, DAILY MAIL REPORTER (May 10, 2013), <http://www.dailymail.co.uk/news/article-2322341/Growing-bars-The-tragic-children-born-women-incarcerated-filthy-overcrowded-El-Salvador-prison.html>.

29 Manjoo, *supra* note 1, ¶ 67.

30 Amnesty Int’l, *On the Brink of Death*, *supra* note 1, at 28.

31 CTR. FOR REPROD. RIGHTS, *supra* note 1, at 41.

32 Amnesty Int’l, *On the Brink of Death*, *supra* note 1, at 19.

33 See CTR. FOR REPROD. RIGHTS *supra* note 1, at 41 (stating that given difficult travel conditions, women experiencing birth complications may have premature and unattended births); Amnesty Int’l, *On the Brink of Death*, *supra* note 1, at 18 (“Accessing clinics can prove challenging due to the difficulty of travel in rural settings.”); CEDAW, *El Salvador Report*, *supra* note 8, ¶ 35 (“[V]ulnerable groups of women, in particular in rural areas, still have difficulties in accessing health-care services.”).

34 See Amnesty Int’l, *On the Brink of Death*, *supra* note 1, at 7, 23, 29; CTR. FOR

women to ingest rat poison or insert foreign objects into the cervix to induce abortion.³⁵ A doctor described to Amnesty International that the ban has effectively led women to the “brink of death,” where doctors are unable to provide care until the most dire moments, in order to evade regulations for both his or herself and for the patient.³⁶ As we will see in the next section, although the laws of Guatemala may not be as extreme, issues with reproductive health and human rights are still prevalent in other multidimensional areas. This prevalence points to a greater societal problem for the women of these nations than merely the abortion ban in and of itself.

C. A Brief History of Guatemala

Guatemala’s colonial history is distinct from El Salvador’s because its roots lie in a developed society under the Maya, and the indigenous population of the nation remains an important social, political, and cultural factor in its politics and government.³⁷ Unlike El Salvador, after a period of dictatorship in the early 19th century, Guatemala experienced a revolution and became a liberalized democracy until 1944.³⁸ After World War II, Guatemala’s civil society began manifesting into a prominent Communist party, resulting in a war between the leftist movement and state government.³⁹ The conflict evolved into a civil war that lasted for more than three decades.⁴⁰ During the 1970s, the governing tactics for eradicating this perceived threat of communism included an explicit extermination of political opponents from the nation — 83% of victims during the

REPROD. RIGHTS, *supra* note 1, at 52.

35 Amnesty Int’l, *Twelve Facts About the Abortion Ban in El Salvador* (Sept. 25, 2014), available at <https://www.amnesty.org/en/latest/news/2014/09/twelve-facts-about-abortion-ban-el-salvador/>.

36 Amnesty Int’l, *On the Brink of Death*, *supra* note 1, at 23. “Health professionals risk prosecution and imprisonment of six to [twelve] years for providing abortion services, under any circumstances.” Amnesty Int’l, *Abortion is Not a Crime, Doctors Warn Governments* (Nov. 20, 2015), available at <https://www.amnesty.org/en/press-releases/2015/11/abortion-is-not-a-crime-doctors-warn-governments/>.

37 See *Guatemala*, ENCYC. BRITANNICA, <https://www.britannica.com/place/Guatemala/Sports-and-recreation> (last visited May 11, 2017).

38 *Id.*

39 *See id.*

40 CTR. FOR JUSTICE & ACCOUNTABILITY, GUATEMALA “SILENT HOLOCAUST”: THE MAYAN GENOCIDE, <http://cja.org/where-we-work/guatemala/> (last visited May 11, 2017).

policy's enforcement were also indigenous individuals.⁴¹ The 1996 Peace Accords agreement between the government of Guatemala and the Unidad Revolucionaria Nacional Guatemalteca (URNG), facilitated and assisted by the United Nations Verification Mission in Guatemala (MINUGUA), documented the severe human rights violations committed against the indigenous population and women, among other atrocities perpetrated by military forces during the civil war.⁴²

Although Guatemala currently has an arguably democratic regime in place,⁴³ the current systemic violence against women presents its own challenge to justice and equality for the nation.⁴⁴ The presence of international gangs, similar to the ones in El Salvador, only exacerbates the violence and poor living conditions suffered by the citizenry.⁴⁵ Following a large government scandal and the exposure of an organized crime ring operating at the highest level of the state, a comedian and television personality was elected to the presidency in 2015.⁴⁶ Subsequently, a tribunal was formed in February 2016 to prosecute numerous actors for the use of sex slavery during the civil war conflict, the death of almost 200,000

41 *Id.*

42 *See Guatemala, supra* note 37; Rajeev Pillay, United Nations Development Programme [UNDP], *Evaluation of UNDP Assistance to Conflict-Affected Countries: Case Study Guatemala*, at 4, 12-13 (2006), <http://web.undp.org/evaluation/evaluations/documents/thematic/conflict/Guatemala.pdf>. The UN and international community played a role in the implementation of the Peace Accords, which consisted of multiple smaller agreements incorporating key institutional and structural changes in order to address the human rights violations that occurred during the conflict and craft lasting peace between the warring parties. *Id.* at 13.

43 Recent elections have been considered fair and free, but there continue to be human rights abuses stemming from corruption in government institutions. The cooperation of the government with the United Nations International Commission against Impunity in Guatemala (CICIG) has amounted to prosecution of public officials for human rights violations, but high levels of impunity remain. U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *Guatemala 2015 Human Rights Report 1* (2015), *available at* <http://www.state.gov/documents/organization/253229.pdf>.

44 Amnesty Int'l, *Amnesty International Report 2016/17: The State of the World's Human Rights*, at 173-74, AI Index POL 10/4800/2017 (2017), *available at* <https://www.amnesty.org/en/countries/americas/guatemala/report-guatemala/>.

45 HUMAN RIGHTS WATCH, *supra* note 1.

46 Alexandra Alper & Enrique Pretel, *No Joke: Guatemalan Comedian Wins Presidency in Landslide*, REUTERS (Oct. 26, 2015, 1:48 AM), <http://www.reuters.com/article/us-guatemala-election-idUSKCN0S0J4G20151026>.

people, and the disappearance of an additional 45,000 people.⁴⁷ A major thread in the testimonies from survivors is that the civil war and subsequent conflicts have resulted in grave psychological consequences as well as economic hardships for women and children in the nation, ultimately leading to a lack of access to adequate healthcare.⁴⁸

D. Women's Health in Guatemala

The legacy of the civil war and violence against indigenous peoples remains a serious obstacle to access to healthcare and treatment during pregnancy for Guatemalan women. Along with restricted access to legal and safe abortions, women have a difficult time accessing general medical care — including contraceptives — within the current regulations.⁴⁹ Medical needs, such as basic health services, privacy with one's doctor, and education around sex and sexuality are not readily available.⁵⁰ Lack of access to reproductive healthcare has resulted in the procurement of self-induced abortions, with a disparate impact on poor women and contributing to the rates of maternal morbidity.⁵¹ For example, “[i]n Guatemala, where 37% of the population lives on US\$2 a day or less, the estimated cost for an abortion carried out by a private medical doctor, or in a private clinic, ranges between US\$128 and US\$1,026; for the services of a midwife, the cost ranges between US\$38 in rural areas and US\$128 in urban areas.”⁵² This disparately affects poor women because they are more likely to “try to end pregnancies through their own efforts, or through the unsafe services of unskilled providers,” resulting in poor women being 45-75% more likely than non-poor women to be

47 *In Historic Trial, Mayan Women Accuse Ex-Military Officers of Sex Slavery*, NATIONAL PUBLIC RADIO (Feb. 13, 2016, 4:29 PM), <http://www.npr.org/2016/02/13/466630760/in-historic-trial-mayan-women-accuse-ex-military-officers-of-sex-slavery>.

48 *Id.*

49 Int'l Planned Parenthood Fed'n, *supra* note 1, at 1.

50 Int'l Planned Parenthood Fed'n, *supra* note 1, at 2.

51 Susheela Singh et al., *Induced Abortion and Unintended Pregnancy in Guatemala*, 32 INT'L FAM. PLAN. PERSPS. 136, 137, 141 (Sept. 2006), https://www.gutmacher.org/sites/default/files/article_files/3213606.pdf. Due to a lack of reporting and infrastructure issues, the actual number of self-induced abortions is extremely difficult to determine. *Id.* at 143.

52 SUSHEELA SINGH, ET AL., GUTTMACHER INST., ABORTION WORLDWIDE: A DECADE OF UNEVEN PROGRESS 27 (2009), https://www.gutmacher.org/sites/default/files/report_pdf/abortion-worldwide.pdf (footnotes omitted).

at risk of complications.⁵³

Furthermore, documented violence against women and femicide rates provide a general picture of some of the most serious and pervasive violations of women's rights in the region and the world.⁵⁴ In conjunction with restrictive abortion policies, maternal morbidity, and domestic violence, evidence in human rights reports paints a bleak picture of women's health in Guatemala.⁵⁵ Disparity between indigenous/non-indigenous and rural/urban populations demonstrate structural issues within the society that create large divisions in access to services and healthcare for the reproductive-age population.⁵⁶ Indigenous women often have a fear of healthcare providers because of language barriers, discriminatory treatment, and insults that are prevalent in the society and disparately impact that vulnerable population in the form of lack of access to healthcare.⁵⁷

For those who do have access to family planning, abortion is only allowed under federal law for "therapeutic" reasons,⁵⁸ or when deemed to be medically necessary — a fact that relies on the discretion of the physician.⁵⁹ Further, Guatemala's adolescent pregnancy rates are among the highest in the world and the region; in 2006, "114 of every 1,000 Guatemalan women aged 15-19 [gave] birth."⁶⁰ As

53 *Id.* at 28.

54 *See e.g., Femicide in Latin America*, UN WOMEN (Apr. 4, 2013), <http://www.unwomen.org/en/news/stories/2013/4/femicide-in-latin-america>.

55 *See* Anand Grover (Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health), *Rep. Addendum on Mission to Guatemala*, ¶¶ 9-15, U.N. Doc. A/HRC/17/25/Add.2 (Mar. 16, 2011); *see also infra* notes 124-28, 151-54 and accompanying text.

56 Grover, *supra* note 55, ¶¶ 55-56.

57 *See* SINGH ET AL., *supra* note 52, at 31; *see also* News Release, Guttmacher Inst., In Guatemala, Inequality Persists In Use of Reproductive Health Services (July 16, 2012), <https://www.guttmacher.org/news-release/2012/guatemala-inequality-persists-use-reproductive-health-services>.

58 Under Guatemala's Penal Code, therapeutic abortions are allowed "for the sole purpose of preventing duly established danger to the life of the mother after exhausting all scientific and technical means." *Del Aborto*, VII Código Penal Artículos 133-40 (1973) (Guat.) *translated in Guatemala's Abortion Provisions*, CTR. FOR REPROD. RIGHTS, <http://www.reproductiverights.org/world-abortion-laws/guatemalas-abortion-provisions> (last visited May 13, 2017).

59 Grover, *supra* note 55, ¶ 67.

60 WERNER FIGUEROA ET AL., GUTTMACHER INST., *EARLY CHILDBEARING IN GUATEMALA: A CONTINUING CHALLENGE 1* (Sept. 2006), https://www.guttmacher.org/sites/default/files/report_pdf/rib-guatemala-en.pdf (footnote omitted).

seen in El Salvador,⁶¹ the consequences of such policies can be dire, including death or serious injury for those who seek to either procure an abortion or receive treatment after they have induced one at home.⁶² However, the effects in Guatemala of these issues are particularly affected by multidimensional and intersectional discrimination, which create inequality based on ethnicity, gender, and class, and therefore restrict access to services.⁶³

Particularly at issue are the rates of unsafe abortions and the lack of medical care in both nations. The World Health Organization (WHO) recently reported that unsafe abortion rates worldwide are at a pandemic level, resulting entirely from states' inability to recognize and effectively advocate for the public health and human rights of their citizens.⁶⁴ The practical impact of these restrictive abortion laws in El Salvador and Guatemala is not limited to the need for health services after a self-induced abortion; women continue to be affected throughout their entire lives by health conditions resulting from unsafe procedures, which may include chronic infection and infertility.⁶⁵ Additionally, yet harder to quantify, are the "indirect costs" of stigma and fear associated with procuring abortion services.⁶⁶ As we will see in the next section, the entire multidimensional context of reproductive and sexual health in both countries presents serious human rights and legal concerns and an

61 See *supra* Section II(B).

62 See KATHERINE HALL MARTINEZ & BONNIE SCOTT JONES, CTR. FOR REPROD. RIGHTS, REPORT ON GUATEMALA 24 (2003), <http://www.reproductiverights.org/sites/default/files/documents/guatemala.pdf> ("Abortion is criminalized in virtually all circumstances in Guatemala, therefore large numbers of women resort to unsafe abortion, which causes significant injuries and deaths every year.") (footnotes omitted).

63 Grover, *supra* note 55.

64 See David A. Grimes et al., UNSAFE ABORTION: THE PREVENTABLE PANDEMIC, WORLD HEALTH ORGANIZATION [WHO], at 1-2, 9 (2006) (stating that the unsafe abortion rate is at pandemic levels, "[t]he underlying causes of morbidity and mortality from unsafe abortion today are not blood loss and infection but, rather, apathy and disdain toward women," and that denying safe abortion services is a human rights violation).

65 *Id.* at 4.

66 *Id.* at 7. The indirect costs of women obtaining abortions as a result of the restrictive abortion policies include numerous societal costs. Familial loss of productivity, detrimental effects on children's health and education, and diversion of scarce medical resources are among these costs when women obtain unsafe abortions. Lastly, social stigma and other sociopsychological consequences affect these women, particularly poor and young women with fewer resources. *Id.*

immediate need for state action.

III. The International Human Rights Law Framework

The right of a woman to make reproductive and sexual health decisions is recognized as an integral part of her right to dignity and as part of an understanding of a “constellation of fundamental human rights” crisscrossing multiple treaty regimes.⁶⁷ States have a responsibility to “respect, protect and fulfill” reproductive and sexual rights when they participate in the human rights regime of the United Nations.⁶⁸ The state actions with respect to reproductive health in El Salvador and Guatemala are in violation of their international obligations under multiple human rights treaties, especially when considered as a violation of the ban on discrimination against women.⁶⁹ The criminalization and imprisonment of women for abortion, or a suspicion of attempted abortion in El Salvador, amounts to torture and punishment found cruel, inhuman, and degrading according to accepted customary standards of law.⁷⁰ Similarly, Guatemala’s general reproductive rights issues present greater questions surrounding bodily integrity and right of an individual citizen to make safe, informed choices regarding his or her health.⁷¹

International human rights standards violations committed by these two nations include, but are not limited to: (1) lack of access to healthcare in general, but especially reproductive health services; (2) criminalization of abortion and prosecution of women for miscarriage and seeking out abortion services; (3) general issues of violence, femicide, and persistent forms of discrimination; (4)

67 CTR. FOR REPROD. RIGHTS, REPRODUCTIVE RIGHTS ARE HUMAN RIGHTS 5 (2009), http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/RRareHR_final.pdf; see also International Conference on Population and Development, *Rep. of the International Conference on Population and Development*, 60, U.N. Doc. A/CONF.171/13 (Oct. 18, 1994).

68 U.N. Human Rights Office of the High Comm’r, Information Series on Sexual and Reproductive Health and Rights: Abortion (2015), http://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf.

69 See *id.*

70 See Shany & Rodley, *supra* note 8, ¶ 7 (providing that although states may choose to adopt legislation that protects the life of the unborn child, the legislation should not interfere with the mother’s right to life, and right to be free of “cruel, inhuman and degrading treatment or punishment”).

71 See CEDAW, *Guatemala Report*, *supra* note 8.

violations of the right to privacy and protection from intrusion; and (5) maternal death, adolescent pregnancy, and long-lasting health problems impacting quality of life due to unsafe abortions and home medical remedies. These legal issues, taken together, create a violation of the right to life and dignity under the International Bill of Rights and the United Nations Charter.⁷²

A. *The United Nations Human Rights Regime*

1. *The International Bill of Human Rights*

The International Bill of Human Rights is comprised of the Universal Declaration on Human Rights (“Declaration”), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁷³ The Declaration was proclaimed in 1948 and “sets out, for the first time, fundamental human rights to be universally protected.”⁷⁴ The Declaration, however, is not a per se legally binding document,⁷⁵ but is “hortatory and aspirational.”⁷⁶ It was not until 1976 when the ICCPR⁷⁷ and the ICESCR⁷⁸ came into force that the United Nations was allowed to enforce the human rights deemed universally protected by the Declaration.⁷⁹ The following discussion outlines the United Nations Charter (“Charter”) and the Declaration, and further discusses the specific provisions under the ICCPR and the ICESCR that El Salvador and Guatemala have violated.

72 See U.N. Charter pmb. (recognizing a fundamental right to life and dignity); G.A. Res. 217 (III) A, Universal Declaration of Human Rights, pmb., art. 3 (Dec. 10, 1948) [hereinafter Universal Declaration] (reaffirming the U.N. Charter’s recognition of the right to life and dignity).

73 U.N. Human Rights Office of the High Comm’r., Fact Sheet No. 2 (Rev. 1), The International Bill of Human Rights 1 (2012), <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf> [hereinafter “OHCHR, Fact Sheet No. 2”].

74 Universal Declaration, *supra* note 72.

75 Stephen Gardbaum, *Human Rights as International Constitutional Rights*, 19 EUR. J. INT’L L. 749, 751 (2008).

76 PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 158 (2d ed. 2013).

77 International Covenant on Civil and Political Rights, Sept. 8, 1992, 999 U.N.T.S. 171 [hereinafter ICCPR].

78 ICESCR, *supra* note 4.

79 See Gardbaum, *supra* note 75, at 750-51.

a. The United Nations Charter and the Universal Declaration of Human Rights

The Charter⁸⁰ and the Declaration⁸¹ assert that people have dignity and freedom to be protected from violations of their basic rights by nation states.⁸² Today, the Declaration is understood to have risen to the level of international custom and therefore has gained significant legal force.⁸³ The reproductive rights of women in El Salvador and Guatemala are subject to the fundamental purpose of the Charter, which states explicitly that the member states united to “reaffirm[] faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women” of nations large and small.⁸⁴

The Declaration is the foundation of the international human rights legal system.⁸⁵ Article 2 of the Declaration asserts that all rights contained therein must be implemented without any distinction based on sex, race, or other status (such as class).⁸⁶ El Salvador and Guatemala are both signatories to the Declaration and have participated in the United Nations human rights regime from its inception.⁸⁷ As such, the ratification of the United Nations treaties by those states gives the international law the same legal force as the nations’ respective constitutions.⁸⁸ The fundamental rights of international human rights law at issue in the case of El Salvador and Guatemala are the following:⁸⁹

80 U.N. Charter, *supra* note 72.

81 Universal Declaration, *supra* note 72.

82 U.N. Charter, *supra* note 72, pmbl.; U.N. Declaration, *supra* note 72, pmbl.

83 ALSTON & GOODMAN, *supra* note 76, at 144, 158.

84 Universal Declaration, *supra* note 72, pmbl.

85 ALSTON & GOODMAN, *supra* note 76, at 139.

86 Universal Declaration, *supra* note 72, art. 2.

87 See U.N. GAOR, 3d Sess., 183d plen. mtg., at 912, 930-33, U.N. Doc. A/PV.183 (Dec. 10, 1948) (showing that El Salvador and Guatemala were members of the U.N. General Assembly that adopted the Universal Declaration of Human Rights).

88 See CONSTITUCIÓN DE LA REPUBLICA DE EL SALVADOR Dec. 15, 1983, art. 144; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA Nov. 17, 1993, art. 46.

89 This list is not exhaustive; there may be other violations. The enumerated sections are those the author has chosen to focus on that both El Salvador and Guatemala have violated in their treatment and oppression of women. See CTR. FOR REPROD. RIGHTS, *supra* note 67, at 7-38 (enumerating twelve human rights and detailing provisions within the many treaty documents that are implicated when it comes to fundamental women’s rights).

- The fundamental “right to life, liberty and security of person,”⁹⁰
- The prohibition against “cruel, inhuman or degrading treatment or punishment,”⁹¹
- The equal protection of the law,⁹²
- The “right to an effective remedy by [a] tribunal[] for acts violating the fundamental rights,”⁹³
- The prohibition against “arbitrary arrest, detention or exile,”⁹⁴
- The right to “a fair and public hearing by an independent and impartial tribunal,”⁹⁵
- The right to privacy, and to “protection of the law against such interference or attacks,”⁹⁶ and
- The right to (1) an adequate standard of living and health, and (2) support for mothers and children who are entitled to special care and assistance from their society.⁹⁷

Consecutive treaties enumerate and extrapolate on the application of these essential rights and the states’ duties to their citizens.⁹⁸ Taken together, the ICCPR and the ICESCR make up the fundamental bill of rights utilized in the human rights regime worldwide.⁹⁹ They provide for the protection of citizens’ rights outlined in the Declaration in two separate thematic areas.¹⁰⁰

90 Universal Declaration, *supra* note 72, art. 3.

91 Universal Declaration, *supra* note 72, art. 5.

92 Universal Declaration, *supra* note 72, art. 7.

93 Universal Declaration, *supra* note 72, art. 8.

94 Universal Declaration, *supra* note 72, art. 9.

95 Universal Declaration, *supra* note 72, art. 10.

96 Universal Declaration, *supra* note 72, art. 12.

97 Universal Declaration, *supra* note 72, art. 25.

98 See CTR. FOR REPROD. RIGHTS, *supra* note 67, at 7-38; see also *supra* text accompanying note 89. There are currently nine international treaties pertaining to human rights and each builds upon the Universal Declaration. See U.N. Human Rights Office of the High Comm’r, The Core International Human Rights Instruments and Their Monitoring Bodies, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last visited May 13, 2017).

99 OHCHR Fact Sheet No. 2, *supra* note 73, at 2, 8-9.

100 See ALSTON & GOODMAN, *supra* note 76, at 139, 144.

b. The International Covenant on Civil and Political Rights

First, the International Covenant on Civil and Political Rights (ICCPR) is a multilateral human rights treaty that states that the rights of equality and nondiscrimination are essential to good governance in a society.¹⁰¹ It provides the same protections as the Declaration, but focuses on civil and political rights in government and society such as the right to life,¹⁰² the prohibition against torture,¹⁰³ the prohibition against arbitrary arrest or detention,¹⁰⁴ the right to privacy,¹⁰⁵ and equality under the law and in tribunals.¹⁰⁶ Most importantly, Article 28 of the ICCPR created the Human Rights Committee (“HR Committee”), an oversight body that reports and communicates on human rights abuses and issues directly with and between states.¹⁰⁷ El Salvador ratified the ICCPR in 1979,¹⁰⁸ with Guatemala following in 1992.¹⁰⁹ The First Optional Protocol to the ICCPR authorizes individuals to bring complaints against a state party for violations under the convention.¹¹⁰ El Salvador accepted the complaint procedure for individuals in 1995,¹¹¹ with Guatemala following in 2000.¹¹²

The HR Committee directly addressed the issue of reproductive rights as a civil rights theme in General Comment No. 36.¹¹³ The HR Committee distinguished the United Nations human rights system from the Inter-American system¹¹⁴ by recognizing the conflict between the right to life of the unborn child and the

101 See ICCPR, *supra* note 77.

102 ICCPR, *supra* note 77, art. 6, ¶ 1.

103 ICCPR, *supra* note 77, art. 7.

104 ICCPR, *supra* note 77, art. 8.

105 ICCPR, *supra* note 77, art. 17.

106 ICCPR, *supra* note 77, art. 14.

107 ICCPR, *supra* note 77, arts. 28, 41.

108 ICCPR, *supra* note 77.

109 ICCPR, *supra* note 77.

110 Optional Protocol to the International Covenant on Civil and Political Rights arts. 1-2, Dec. 16, 1966, 999 U.N.T.S. 302 [hereinafter Optional Protocol].

111 *Id.*; see ALSTON & GOODMAN, *supra* note 76, at 808 (providing additional explanation of the individual complaint mechanisms in the international human rights system).

112 Optional Protocol, *supra* note 110.

113 ICCPR, Comment No. 36, *supra* note 8.

114 See *infra* Section III(B).

right to life of a mother.¹¹⁵ Through this comparison, the HR Committee described the balancing of interests that must occur when discussing the dignity of the parties, and concluded that the dignity of the pregnant mother is especially important and should not to be jeopardized.¹¹⁶ This balancing of interests directs the state to prioritize the inherent needs of the mother first and the unborn child second.¹¹⁷ Furthermore, the state's failure to protect women by creating laws that punish them and prohibit their access to reproductive rights results in cruel, unusual, and degrading punishment in violation of Article 7 of the ICCPR.¹¹⁸ Finally, lack of access to preventative and general reproductive health services can also violate Article 7 due to the resulting anguish, stress, and pain that unwanted and health-adverse pregnancies may cause.¹¹⁹

Total abortion bans, except for in extreme circumstances, in human rights country reporting also raise questions of discrimination and equality under the law. The HR Committee, in its report for El Salvador, highlighted specific civil rights that the current abortion ban policies violate.¹²⁰ Recent prosecutions and convictions of women with obstetric emergencies for aggravated homicide, which carries a sentence for 40 or more years, presents serious legal issues such as access to a fair hearing and lack of a judicial remedy, as demonstrated by disproportionate sentencing and automatic arrests and convictions.¹²¹ Additionally, doctors who break their duty of confidentiality and report patients they suspect of procuring an abortion are arguably committing serious violations of a woman's right to privacy.¹²² Furthermore, when governments prosecute women in that situation, they are violating international law,

115 ICCPR, Comment No. 36, *supra* note 8, ¶ 7.

116 ICCPR, Comment No. 36, *supra* note 8, ¶ 7.

117 See ICCPR, Comment No. 36, *supra* note 8, ¶ 7.

118 See ICCPR, *supra* note 77, art. 7 (prohibiting anyone from "being subjected to torture or to cruel, inhuman or degrading treatment or punishment."); see ICCPR Comment No. 36, *supra* note 8, ¶ 7.

119 See ICCPR, Comment No. 36, *supra* note 8, ¶ 7 (stating that countries that "prohibit voluntary terminations of pregnancy must, nonetheless, maintain legal exceptions for therapeutic abortions necessary for protecting the life of mothers, inter alia by not exposing them to serious health risks, and for situations in which carrying a pregnancy to term would cause the mother severe mental anguish" because this might violate the prohibition against "cruel, inhuman or degrading treatment or punishment[.]").

120 See ICCPR, El Salvador Report, *supra* note 8.

121 Manjoo, *supra* note 1, ¶ 68.

122 See ICCPR, El Salvador Report, *supra* note 8, ¶ 10.

resulting in a serious breach of their duty to protect and implement human rights legal standards.¹²³ Especially for those women who were innocent of inducing an abortion, such a violation of their right against arbitrary detention is a serious concern.

The HR Committee, in its report on Guatemala, recognized recent achievements in legislation¹²⁴ addressing the plethora of issues around violence and women.¹²⁵ However, despite these achievements, the HR Committee noted that the implications of the legal regime were problematic, even when considering Guatemala's restriction on abortion is less of a burden on women and physicians than the regime in El Salvador.¹²⁶ The HR Committee emphasized that the criminalization of abortion results in the seeking out of clandestine services, which unnecessarily endangers the lives of women.¹²⁷ Concurrently, the HR Committee recognized the importance of the reproductive and sexual health of minors and maternal mortality as persistent issues that the state must more actively address.¹²⁸

c. The International Covenant on Economic, Social and Cultural Rights

The final piece of the International Bill of Rights is the International Covenant on Economic, Social and Cultural Rights (ICESCR), which mandates that states promulgate certain standards, including ones focused more directly on health and labor relations,

123 See Amnesty Int'l, *On the Brink of Death*, *supra* note 1, at 33 (stating that “[t]he Salvadoran health system, in accordance with national standards and international human rights law, is required to treat women who have complications arising from abortions. Despite this, there is increasing evidence that the complete ban on abortion in El Salvador is obstructing the provision of post-abortion care . . . ” since health professionals breach their duties of confidentiality and often report women who come in for post-abortion care to the police).

124 ICCPR, Guatemala Report, *supra* note 8. Recent positive legislative developments in Guatemala include the Act against Femicide and Other Forms of Violence against Women (Decree No. 22-2008) and the Act against Sexual Violence, Exploitation and Trafficking in Persons (Decree No. 9-2009 of the Congress of the Republic of Guatemala). *Id.* ¶ 4.

125 ICCPR, Guatemala Report, *supra* note 8.

126 ICCPR, Guatemala Report, *supra* note 8, at ¶¶ 19-20; *cf.* ICCPR, El Salvador Report, *supra* note 8, ¶ 10 (El Salvador has a complete ban on abortions, even for therapeutic reasons).

127 ICCPR, Guatemala Report, *supra* note 8, at ¶ 20.

128 ICCPR, Guatemala Report, *supra* note 8, at ¶ 20.

among others.¹²⁹ For example, Article 12 of the ICESCR provides that there is a right “to the enjoyment of the highest attainable standard of physical and mental health.”¹³⁰ El Salvador ratified the ICESCR in 1979,¹³¹ and Guatemala ratified it in 1988.¹³² However, El Salvador did not accept the individual complaint mechanism via the Optional Protocol¹³³ to the ICESCR until 2011.¹³⁴ Guatemala has not ratified the Optional Protocol.¹³⁵ The Economic and Social Council (“Council”), as set forth in Article 17 of the ICESCR, reports and communicates with states regarding the issues surrounding the provisions of the ICESCR.¹³⁶ In 1985, the Council resolved to create a human rights supervisory body similar to the one created by the ICCPR, named the Economic, Social and Cultural Rights Committee (“ESCR Committee”).¹³⁷

In its General Comment No. 14, the ESCR Committee addressed the rights under Article 12 of the ICESCR in the context of reproductive and sexual health.¹³⁸ First, the ESCR Committee recognized the importance of the right to health first laid out in Article 25 of the Declaration, which is the foundation from which the ESCR Committee built their argument for the state’s duty to provide and protect citizen health.¹³⁹ The ESCR Committee further emphasized that the right to health is not synonymous solely with

129 ICESCR, *supra* note 4.

130 ICESCR, *supra* note 4, art. 12.

131 ICESCR, *supra* note 4.

132 ICESCR, *supra* note 4.

133 The Optional Protocol under the ICESCR is similar to the Optional Protocol of the ICCPR in that it provides a mechanism for individuals to bring claims for violations of the ICESCR. The Optional Protocol went into force on May 5, 2013 and “provides the Committee competence to receive and consider communications from individuals claiming that their rights under the Covenant have been violated.” U.N. Human Rights Office of the High Comm’r., Monitoring Economic, Social and Cultural Rights, <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx> (May 13, 2017).

134 Optional Protocol, *supra* note 110.

135 Optional Protocol, *supra* note 110.

136 ICESCR, *supra* note 4, art. 17.

137 See ALSTON & GOODMAN, *supra* note 76, at 286 (describing the creation of the ESCR Committee).

138 See generally U.N. Econ. & Soc. Council, Comm. on Econ., Soc. and Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 14, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter ESCR, General Comment No. 14].

139 *Id.* ¶ 2.

the right to health care; rather it is a more encompassing term of art for the general concept of a right to be *healthy*.¹⁴⁰ Included in this definition are reproductive and sexual health rights, entitling each person to have bodily integrity and to make choices about their own body.¹⁴¹ The rights enumerated in Article 12 also include access to reproductive health services such as family planning.¹⁴² Moreover, Article 12 prohibits discrimination based on gender in those services.¹⁴³ A major state responsibility under this Article is to provide preventive care and to *reduce* sexual health risks and maternal mortality.¹⁴⁴

The ESCR Committee engages with participating nations in reporting on compliance with the Articles of the ICESCR.¹⁴⁵ Nations report to the ESCR Committee regarding their compliance, and the ESCR Committee issues a report based on the information received from the nations delineating next steps.¹⁴⁶ The country report for El Salvador is especially interesting due to its handling of the questions of budgets and fiscal allocation for the nation in its attempt to comply with the right to health under Article 12.¹⁴⁷ The ESCR Committee addressed the *economic* aspects of the abortion ban by emphasizing the need for a healthcare system, which includes abortions, provided to citizens without discrimination.¹⁴⁸ The state was asked to increase its healthcare budget and provide reproductive and sexual health services to girls and women, with the ESCR Committee recommending accessibility and availability of services along with sex education, particularly in rural areas.¹⁴⁹ Finally, El Salvador was urged to revise the legislation on the total abortion ban, specifically “to make it compatible with . . . women’s right to health,” life, and dignity.¹⁵⁰

Similarly, Guatemala’s report to the ESCR Committee

140 *Id.* ¶ 8.

141 *Id.* ¶ 8.

142 *Id.* ¶¶ 14, 21.

143 *Id.* ¶¶ 18, 19 (stating that “the Covenant proscribes any discrimination in access to health care” and “equality of health care and health services has to be emphasized.”).

144 ESCRC, El Salvador Report, *supra* note 8, ¶¶ 22-23.

145 U.N. Human Rights Office of the High Comm’r, *supra* note 133.

146 U.N. Human Rights Office of the High Comm’r, *supra* note 133.

147 ESCRC, El Salvador Report, *supra* note 8, ¶ 21.

148 *See* ESCRC, El Salvador Report, *supra* note 8, ¶¶ 21-22.

149 *See* ESCRC, El Salvador Report, *supra* note 8, ¶¶ 21-23.

150 ESCRC, El Salvador Report, *supra* note 8, ¶ 22.

showed a disparity in access to and use of healthcare services in poverty-stricken or rural areas as compared to the rest of the nation.¹⁵¹ This disparity disproportionately affects the indigenous people of Guatemala.¹⁵² Again, the shortage of services available for reproductive health and restrictions on access implicate greater societal concerns — at the time of reporting, unsafe abortion was a leading cause of maternal death.¹⁵³ In response, the ESCR Committee called upon the state to educate, advocate, and implement better laws that recognize the health needs of the citizens and reduce the disparities seen in access to services.¹⁵⁴

In sum, the various human rights bodies that further the protection of the human rights identified in the International Bill of Rights have called upon El Salvador and Guatemala to change their records on women's human rights and reproductive health issues in societal, legal, and health areas. The intersectional experiences of women in El Salvador, from human rights violations resulting from a lack of judicial remedy and discrimination in the court system, to arbitrary detention and cruel treatment for suspicion of procuring abortion services, is of primary concern. Likewise, Guatemalan women who are indigenous or live in rural areas face institutional barriers to accessing basic healthcare services and obtaining a nondiscriminatory remedy in a legal and political system that remains impugn. The nations must implement human rights laws and protect their citizens from discrimination in order to fulfill their fundamental treaty obligations.

2. *The Convention on the Elimination of All Forms of Discrimination Against Women*

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) reframes the fundamental rights found in the International Bill of Rights to apply specifically to women, and additionally emphasizes the importance of protecting women's health in ratifying states.¹⁵⁵ El Salvador

151 ESCRC, Guatemala Report, *supra* note 8, ¶ 22.

152 ESCRC, Guatemala Report, *supra* note 8, ¶ 22.

153 ESCRC, Guatemala Report, *supra* note 8, ¶¶ 22-23.

154 ESCRC, Guatemala Report, *supra* note 8.

155 See G.A. Res. 34/180, annex, Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979) [hereinafter CEDAW].

ratified the CEDAW in 1981,¹⁵⁶ while Guatemala ratified it in 1982¹⁵⁷ and its Optional Protocol in 2002.¹⁵⁸ Article 12 of CEDAW requires the elimination of discrimination against women in access to healthcare, and specifically addresses pregnant women in need of financial assistance with healthcare services.¹⁵⁹ Article 14 specifically addresses discrimination against rural women.¹⁶⁰ Finally, Article 15 emphasizes the importance of equality under the law between men and women,¹⁶¹ and Article 16 mandates the right of women to decide the timing of their pregnancies and number of children they carry, along with the right to access requisite information needed to make these decisions in an informed manner.¹⁶²

The CEDAW oversight body, the Committee on the Elimination of Discrimination against Women (“CEDAW Committee”), in General Recommendation 24, affirmed that reproductive health is a right encompassed in the right to health found in the Declaration and other treaty documents.¹⁶³ In paragraph 6 of General Recommendation 24, the CEDAW Committee addressed the familiar reference to the societal implications of discrimination, which makes it clear that gender differences are not the only issues that women face in their pursuit of a healthy body and mind.¹⁶⁴ Lack of access to services due to poverty, minority status, and age are important considerations for each state to address in its domestic implementation of treaty laws.¹⁶⁵ Finally, in paragraph 23, the CEDAW Committee directly addressed family planning, which is an essential aspect of the right to health and one that each state is obligated to respect and promote instead of hinder,¹⁶⁶ as we have seen in this Article’s discussion of the cases of El Salvador and Guatemala.

The CEDAW Committee has recently engaged with both countries on their human rights records with respect to the women

156 *Id.*

157 *Id.*

158 Optional Protocol, *supra* note 110.

159 CEDAW, *supra* note 155, art. 12.

160 CEDAW, *supra* note 155, art. 14.

161 CEDAW, *supra* note 155, art. 15.

162 CEDAW, *supra* note 155, art. 16(1)(e).

163 *See* Comm. on the Elimination of Discrimination Against Women, Rep. on Its Twentieth and Twenty-First Sessions, U.N. Doc. A/54/38/Rev.1, at 3 (1999).

164 *See id.*

165 *See id.*

166 *See id.* at 6.

in their nations.¹⁶⁷ El Salvador was reviewed by the CEDAW Committee in November of 2008, where the Committee reiterated the need to respect the right to health and urged the state to have a national dialogue on its restrictive abortion laws.¹⁶⁸ Guatemala was reviewed in 2009, and was cited for its societal, systemic discrimination against women.¹⁶⁹ The detailed report that followed the review noted the state's party's attempts to implement CEDAW, but also had recommendations for many of the issues discussed by other treaty bodies.¹⁷⁰ Guatemala's ability to respect women's rights is described by the CEDAW Committee as hindered particularly by systemic patriarchal attitudes and gender stereotypes as well as multiple forms of discrimination based on other characteristics, such as indigence and class.¹⁷¹ While celebrating the state's recent legislation on femicide, Guatemala was urged to fully protect victims of violence and prosecute the perpetrators to stop the culture of impunity that appears to persist.¹⁷² The CEDAW Committee further requested that the Guatemalan state consider intersectional discrimination against poor and indigenous women as an important reminder that the issues identified are especially difficult for marginalized populations of women — an obstacle found in both the nations of El Salvador and Guatemala.¹⁷³

Finally, the Committee was additionally concerned in reviewing both states about the prevalence and consequences of unsafe and illegal abortions and their effects on maternal health—

167 See CEDAW, El Salvador Report, *supra* note 8; CEDAW, Guatemala Report, *supra* note 8.

168 See CEDAW, El Salvador Report, *supra* note 8, ¶ 36 (“The Committee urges the State party to facilitate a national dialogue on women’s right to reproductive health, including on the consequences of restrictive abortions laws.”).

169 See CEDAW, Guatemala Report, *supra* note 8, ¶¶ 11-14.

170 See CEDAW, Guatemala Report, *supra* note 8, ¶¶ 4-6 (noting the positive aspects of the State’s efforts, which included legislative, judicial and executive measures).

171 CEDAW, Guatemala Report, *supra* note 8, ¶ 19.

172 CEDAW, Guatemala Report, *supra* note 8, ¶¶ 21-22.

173 See CEDAW, Guatemala Report, *supra* note 8, ¶ 41 (“the Committee is concerned about the precarious situation of indigenous women and the lack of information provided by the State party on Maya, Xinka and Garifuna women, who experience multiple and intersectoral discrimination based on their sex, ethnic origin and social status.”); CEDAW, El Salvador Report, *supra* note 8, ¶ 37. “The Committee is also concerned at the limited awareness of women of their rights, in particular vulnerable groups of women, namely rural and indigenous women” CEDAW, El Salvador Report, *supra* note 8, ¶ 11.

especially for young women in El Salvador¹⁷⁴—and about the lack of information available regarding unsafe abortions in Guatemala.¹⁷⁵ The reports for these two nations are interesting because they do not address the abortion bans directly, in comparison with the explicit discussion that the other treaty bodies do.

B. The Organization of American States Human Rights Framework: A Case Highlight

The Organization of American States (OAS) is a regional agency of the United Nations and an “international organization... developed to achieve an order of peace and justice” among signatory states.¹⁷⁶ The OAS presents another important international human rights regime, and provides a very interesting point of comparison to the United Nations human rights system discussed above. The OAS has two autonomous organs, the Inter-American Commission on Human Rights (Inter-American Commission) and the Inter-American Court of Human Rights (Inter-American Court), which are tasked with enforcing the American Convention on Human Rights.¹⁷⁷ The American Convention on Human Rights contains Article 4, which provides the right to life when it comes to reproductive health.¹⁷⁸ Article 4 states that there is an inherent right to life from the moment of conception that must be respected.¹⁷⁹

Due to this departure from the greater human rights system, the Inter-American Court and its human rights bodies have had to clarify the meaning of this section in the context of abortion laws, like those enacted in El Salvador and Guatemala.¹⁸⁰ In 2014, the Follow-up Mechanism to the Convention of Belém do Pará (The Inter-American Convention on the Prevention, Punishment, and

174 CEDAW, El Salvador Report, *supra* note 8, ¶ 35.

175 CEDAW, Guatemala Report, *supra* note 8, ¶ 35.

176 Organization of American States, Charter of the Organization of American States art 33, Dec. 1951, 119 U.N.T.S. 3.

177 *Id.* art. 4.

178 See Organization of American States, American Convention on Human Rights art. 4, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

179 *Id.*

180 See Alvaro Paul, *Controversial Conceptions: The Unborn and the American Convention on Human Rights*, 9 LOY. U. CHI. INT'L L. REV. 209, 214-30 (2012) (examining the different ways the Inter-American Court has interpreted the right to life provision and the various ways there is an interplay between the provision and various abortion laws).

Eradication of Violence against Women¹⁸¹) published a Declaration on Violence Against Women, where it declared that “reproductive rights are grounded in other essential human rights” in the Inter-American System.¹⁸² These rights include “the right to health, the right to be free from discrimination, the right to privacy, [and] the right not to be subjected to torture . . .”¹⁸³ Finally, the “principles of equality and non-discrimination are fundamental principles and rules of *jus cogens*,” they are the foundation of the legal framework, incompatible with gender stereotypes and violence and must be protected under the OAS and international human rights standards.¹⁸⁴

We cannot know directly from El Salvador’s own reports exactly how these rights provisions affect the state of reproductive rights in that nation because the state human rights framework has not been addressed in over twenty years.¹⁸⁵ However, the Inter-American Court *did* order the Salvadoran government to allow a woman to receive a therapeutic abortion in at least one instance, the Beatriz case.¹⁸⁶ Beatriz was having complications from lupus and her unborn child had birth defects; she had requested to receive an abortion because her life was in danger, but was unable to obtain one because of the ban.¹⁸⁷ Unfortunately, the child was born via emergency cesarean section and died five hours after being born.¹⁸⁸

The Inter-American Commission’s report on Guatemala was published in 2015 and focuses on discrimination against women and

181 Inter-American Convention of the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534.

182 Organization of American States, Follow-Up Mechanism to the Convention of Belém do Pará (MESCEVI), Declaration on Violence Against Women, Girls and Adolescents and their Sexual and Reproductive Rights, OEA/Ser.L/II.7.10, at 2 (Sept. 19, 2014), <https://www.oas.org/en/mesecvi/docs/CEVII1-Declaration-EN.pdf>.

183 *Id.*

184 *Id.* at 2-3.

185 See Inter-Am. Comm’n H.R., *Report on the Situation of Human Rights in El Salvador*, OEA/Ser.L/II.85, doc. 28 rev. (Feb. 11, 1994), <http://www.cidh.org/countryrep/ElSalvador94eng/l.background.htm#negotiations> (documenting that the last report for El Salvador was conducted in 1994).

186 Press Release, Ctr. for Reprod. Rights, Inter-American Court of Human Rights Orders El Salvador Government to Allow Pregnant Woman with Critical Complications Access to Life-Saving Health Care (May 30, 2013), <http://www.reproductiverights.org/press-room/inter-american-court-of-human-rights-orders-el-salvador-government-to-allow-pregnant-woman>.

187 *Id.*

188 *El Salvador Abortion Woman has C-section*, BBC NEWS (June 4, 2013), <http://www.bbc.com/news/world-latin-america-22763510>.

indigenous peoples in many human rights areas, such as the pervasive occurrence of “several forms of violence against indigenous women” and femicide in general.¹⁸⁹ The report notes that indigenous women experience higher barriers to exercising their right to health; for example, they lack access to quality healthcare centers and culturally appropriate care, which often causes them to give birth in precarious conditions and increases their chances of maternal morbidity.¹⁹⁰ The Inter-American Commission has intermittently chastised the Salvadoran and Guatemalan governments for not balancing justice and health interests.¹⁹¹ As seen above, intervention on behalf of women’s reproductive rights has been limited to a clarification document and one extreme case example, Beatriz, where El Salvador did not cooperate with the demands of the OAS in time. Despite this, there was a hearing in 2015 on the abortion restrictions in El Salvador that is especially enlightening.¹⁹²

A hearing on “women deprived of liberty due to obstetric emergencies during pregnancies” was held on October 19, 2015, between civil society,¹⁹³ the Inter-American Commission, and the national representatives of El Salvador.¹⁹⁴ It was an instructive, theatrical portrayal of the dynamics that exist between advocates on reproductive and sexual health rights and advocates of abortion restrictions. Specifically, the presentation of compelling testimony and evidence by nonprofit organizations revealed just how painful and destructive the criminalization of abortion has been for the women who have been prosecuted and imprisoned.¹⁹⁵ Meanwhile,

189 Inter-Am. Comm’n on H.R., *Situation of Human Rights in Guatemala: Diversity, Inequality and Exclusion*, OEA/Ser.L/V/II, doc. 43/15, 237-40, ¶ 95 (Dec. 31, 2015), <http://www.oas.org/en/iachr/reports/pdfs/Guatemala2016-en.pdf>.

190 *Id.* ¶¶ 91-94.

191 Paul, *supra* note 180, at 230, n. 119.

192 CIDH, *supra* note 27.

193 Civil society is a term that encompasses those who contribute to the “promotion, protection and advancement of human rights . . . [H]uman rights defenders, human rights NGOs, bar associations, student clubs, trade unions, university institutes, bloggers, [and] charities working with discriminated groups” are considered a part of civil society. U.N. Human Rights Office of the High Comm’r, *Civil Society* (2016), <http://www.ohchr.org/EN/AboutUs/Pages/CivilSociety.aspx>. Citizens’ Group for Decriminalizing Therapeutic, Ethical and Eugenic Abortion in El Salvador, Families Collective for Local Development in El Salvador, and the Center for Reproductive Rights requested the hearing. CIDH, *supra* note 27, at 1:10-1:25.

194 CIDH, *supra* note 27.

195 Testimony from Cristina Quintanilla included a description of prison conditions and the judicial process she went through after suffering a

state representatives from El Salvador asserted that they did not receive the correct paperwork and therefore were unable to address the abortion legislation directly.¹⁹⁶ Instead, the state representatives focused only on the planned penal reforms and improvements to prison conditions.¹⁹⁷ The President of the hearing disputed this assertion by repeating that the state was sent the correct documentation, which described the purpose of the meeting and included the theme in the title, and therefore it was surprising that they were only prepared for a discussion of prison reform.¹⁹⁸ After a series of questions for El Salvador on the theme of the meeting, the state representatives opted not to answer any questions or acknowledge the abortion legislation further.¹⁹⁹ This hearing and its function bring up a much greater question of the purpose of our human rights system. While it is important to recognize that the state came to the meeting in the first place, its representatives were unable to discuss the theme of the hearing directly at that time. The hearing is meant to be a mechanism for resolution, which was diminished by the state's inability to respond directly to the human rights violations described in the testimony from victims and civil society.

miscarriage. She was unconscious upon arrival at the hospital, and was unable to understand how she could have been interrogated and arrested while under anesthesia. After that point, she testified that she was taken to jail, and during her prosecution and trial, was accused of abortion and aggravated homicide, even though she had had a spontaneous miscarriage, and sentenced to 30 years. The attorney she was assigned did not even know her name. She entered Ilopango prison, where other prisoners harassed her for thinking that she had murdered her child through abortion. Christina described the prevalence of sexual violence in the prison, where she was raped anally and vaginally. She eventually met a human rights attorney who took her case. The experience has been very difficult and she wants people to know exactly what is happening in her country. CIDH, *supra* note 27, at 10:50-17:24.

196 The Director of the Human Rights Office of El Salvador, Tania Camila Rosa, began her presentation in the hearing by saying the state was sorry they were not prepared with the rights documents for the meeting. The documents they had received contained no reference to the situation of women deprived of liberty due to obstetric emergencies. CIDH, *supra* note 27, at 26:40-27:40.

197 CIDH, *supra* note 27, at 27:40-38:35.

198 CIDH, *supra* note 27, at 43:22-44:43. The Rapporteur for El Salvador, Commissioner Ortiz, replied to the state presentation explaining she shared the difficulty understanding that it was not well understood the purpose of the meeting because the information that was sent was very clear. CIDH, *supra* note 27, at 44:40-45:37.

199 CIDH, *supra* note 27, 1:02:50-1:03:10.

IV. Conclusion

As presented at the hearing mentioned above and discussed in multiple committee reviews of El Salvador and Guatemala, the state of reproductive health for the women of these nations is currently precarious. There exists a greater theme of intersectional and multidimensional discrimination facing women, and utilizing a monolithic approach to deal with discreet legal issues, without viewing them in their entire context, is inappropriate. Structural inequality, poverty, and discrimination against indigenous and rural communities obstruct the implementation and use of human rights laws and protections. Marginalized communities in both nations have been highlighted as particularly vulnerable to the discrimination against women created by abortion restriction and lack of access to healthcare. Although we know that reproductive and sexual health affects women, the especially disproportionate discrimination of certain women based on poverty and race must be addressed in any attempt to remedy the violations.

The human rights system is a series of concepts and fundamental principles, and it accepts that the implementation of rights standards are progressive changes to be made over time, adjusting to the needs of a society as it develops. We are in well in the 21st century, with an international human rights regime as we know it beginning in 1945. How long must women wait to have autonomy and decision-making ability over their own bodies? This question may be answered soon if the women of these nations organize and stand up for themselves. They must say to their governments, partners, families, and employers that they will not suffer discrimination and must demand actual equality in all levels of society, for every woman. Direct action and social mobilization, while not always the solution, may provide a conduit for necessary change in these two countries. Considering the history and legacy of colonialism, imperialism, and international politics, it remains to be seen whether these two examples will ever be held accountable by their own citizens for their denial of the fundamental freedoms and rights that are guaranteed to all persons in the international human rights framework. If we truly believe in the freedoms set out in the International Bill of Rights and the human rights echelon, we must use these tools to aid those that are most in need of their guarantees, the vulnerable and the persecuted. Implementation of rights must include some attempt to deal with the multiple forms

of oppression that the women continue to suffer in El Salvador and Guatemala. Reporting and responses are essential, but they are only one part of a solution to systemic discrimination.

Obergefell, Retroactivity, and Common Law Marriage

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I. Introduction

In 2015, the Supreme Court recognized in *Obergefell v. Hodges* that the United States Constitution protects marriage equality.¹ Several prior decisions foreshadowed that result,² which may have made the holding less surprising to the public than it otherwise would have been.³ What is likely underappreciated is that the foundation for *Obergefell* in the prior case law may provide the basis for requiring the retroactive recognition of same-sex common law marriages.

Part II of this Article discusses the Court's jurisprudence with respect to the associational rights of members of the LGBT (lesbian, gay, bisexual, transgender) community, noting how the Court's understanding has evolved over the past three decades. Part III discusses the Court's retroactivity jurisprudence, explaining some of the conditions under which a holding that a particular statute is unconstitutional will be given retroactive effect. Part IV discusses the conditions under which common law marriages are recognized and why retroactive application of *Obergefell* might be important. The Article concludes by noting that a number of questions are raised by *Obergefell* and the Court's ever-changing retroactivity jurisprudence, and that these issues will need to be resolved when it is necessary to decide which common law marriages must be afforded recognition and when those marriages should be recognized as having begun.

II. The Developing Case Law

The Supreme Court's jurisprudence regarding the status of LGBT persons and their families under the Constitution has evolved considerably over a relatively short period of time. Over roughly the past 30 years, the Court's understanding of constitutional

¹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

² Maureen Truax Holland, *Equal Justice for Same-Sex Married Couples: Reflections by a Tennessee Lawyer Who Helped Achieve National Marriage Equality*, 46 U. MEM. L. REV. 175, 181 (2015) (“*Windsor* was the latest and perhaps sturdiest legal building block of Supreme Court cases of marriage as a fundamental right, deserving of equal access and protection for same-sex couples.”).

³ Cf. Ronald Kahn, *The Right to Same-Sex Marriage: Formalism, Realism, and Social Change in Lawrence (2003), Windsor (2013), & Obergefell (2015)*, 75 MD. L. REV. 271, 303 (2015) (“[B]ased on *Windsor*, most federal district and circuit courts, and many state courts, found state bans on same-sex marriage to be unconstitutional under the Constitution.”).

guarantees shifted from one in which the Constitution implicitly if not explicitly viewed sexual minorities as incapable of having families⁴ to one requiring marriage equality. Yet, it is not as if the change occurred overnight, which makes the transformation more appropriately viewed as evolutionary rather than revolutionary. That the transformation was gradual may well have ramifications that are not yet adequately appreciated.

A. *Bowers*

For many, *Bowers v. Hardwick*⁵ represents the low point in constitutional protection for sexual minorities.⁶ At issue was a Georgia law criminalizing sodomy, which read:

(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years.⁷

The Court interpreted the relevant issue to be “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.”⁸ Yet, as Justice Blackmun explained in dissent, the Georgia statute used “broad language,”⁹ which made “[t]he sex or status of the persons who engage in the act . . . irrelevant as a

4 Cf. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003) (“No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated.”).

5 *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

6 Jonathan Handel, Book Note, 24 HARV. C.R.-C.L. L. REV. 611, 611 (1989) (reviewing RICHARD D. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* (1988)) (“A nadir of sorts was reached in 1986 with the Supreme Court’s decision in *Bowers v. Hardwick*, holding that gays have no constitutionally protected right to intimate sexuality.”).

7 *Bowers*, 478 U.S. at 188 n.1 (citing GA. CODE ANN. § 16-6-2 (1984)).

8 *Id.* at 190.

9 *Id.* at 200 (Blackmun, J., dissenting).

matter of state law.”¹⁰ The statute neither exempted married persons from the prohibition¹¹ nor even distinguished between same-sex and different-sex sodomitical behavior,¹² which made “the Court’s almost obsessive focus on homosexual activity”¹³ rather surprising.

In upholding the constitutionality of the law, the *Bowers* Court explained: “No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated.”¹⁴ In dissent, Justice Blackmun criticized the Court for its cramped understanding of human nature, stating: “Only the most willful blindness could obscure the fact that sexual intimacy is ‘a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.’”¹⁵ Thus, consensual sodomy, whether performed by individuals of the same sex or of different sexes, is related to family.

Perhaps the majority was merely pointing out that sodomitical behavior does not itself result in the production of children.¹⁶ But that point might be made regardless of the sexes of the parties engaging in the behavior.¹⁷ Whether the focus was on family or, instead, the likelihood that the sodomitical behavior would produce children, the Court’s distinguishing between the types of couples (same-sex versus different-sex) was not warranted by the articulated state interests. That the Court nonetheless distinguished and limited its focus to same-sex intimacy,¹⁸ and that the Court seemed to

10 *Id.* (Blackmun, J., dissenting).

11 *See* text accompanying *supra* note 8.

12 *See id.* *See also Bowers*, 478 U.S. at 200 (Blackmun, J., dissenting) (“[T]o the extent I can discern a legislative purpose for Georgia’s 1968 enactment of § 16-6-2, that purpose seems to have been to broaden the coverage of the law to reach heterosexual as well as homosexual activity.”).

13 *Bowers*, 478 U.S. at 200 (Blackmun, J., dissenting).

14 *Id.* at 191.

15 *Id.* at 205 (Blackmun, J., dissenting) (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973)).

16 Patrick Lee & Robert P. George, *What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Union*, 42 AM. J. JURIS. 135, 149 (1997) (“[N]o one c[an] have children by performing sodomitical acts.”).

17 *Bowers*, 478 U.S. at 214 (Stevens, J., dissenting) (“[T]he rationale of the Court’s opinion applies equally to the prohibited conduct regardless of whether the parties who engage in it are married or unmarried, or are of the same or different sexes.”).

18 *See id.* at 190 (“The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.”). *See also id.* at 200 (Blackmun, J., dissenting) (“[T]he Court’s . . . focus on homosexual activity is particularly hard to justify in light of the broad language Georgia has used.”).

accept Georgia's argument that the broad statute was constitutional because it would only be applied against sexual minorities,¹⁹ sent the unmistakable message that sexual minorities could be targeted for adverse treatment.²⁰

Some of the *Bowers* rationale provides support for the proposition that the state has the power to criminalize sodomy as a general matter²¹ or, at least, the power to criminalize sodomy outside of marriage.²² For example, the Court expressly rejected the contention that the previous case law stood "for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription."²³ Further, if the Court "is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution,"²⁴ then many of the Court's pronouncements regarding "marriage," "family," and "intimate relations" are vulnerable (regardless of the orientations of the implicated parties), because not one of those terms is contained in the Constitution.²⁵ Nonetheless, subsequent cases made clear that at least some members of the Court interpreted *Bowers* to authorize state discrimination against sexual minorities in particular.

19 See *id.* at 190. See also *id.* at 200–01 (Blackmun, J., dissenting) ("I . . . see no basis . . . for Georgia's attempt, both in its brief and at oral argument, to defend § 16–6–2 . . . solely on the grounds that it prohibits homosexual activity.")

20 See *Watkins v. U.S. Army*, 837 F.2d 1428, 1453 (9th Cir. 1988) (Reinhardt, J., dissenting) ("The anti-homosexual thrust of *Hardwick*, and the Court's willingness to condone anti-homosexual animus in the actions of the government, are clear."), *superseded by* 847 F.2d 1329 (9th Cir. 1988), *withdrawn on reh'g by* 875 F.2d 699 (9th Cir. 1989). *But see* *Stemler v. City of Florence*, 126 F.3d 856, 873 (6th Cir. 1997) ("It is inconceivable that *Bowers* stands for the proposition that the state may discriminate against individuals on the basis of their sexual orientation solely out of animus to that orientation.")

21 See Charles P. Kindregan, Jr., *Religion, Polygamy, and Non-Traditional Families: Disparate Views on the Evolution of Marriage in History and in the Debate over Same-Sex Unions*, 41 SUFFOLK U. L. REV. 19, 43 (2007) ("*Bowers v. Hardwick* . . . upheld the state's power to criminalize even consensual sodomy.")

22 See Mitchell Lloyd Pearl, *Chipping Away at Bowers v. Hardwick: Making the Best of an Unfortunate Decision*, 63 N.Y.U. L. REV. 154, 180 (1988) ("[S]odomy within marriage is protected from proscription by the constitutional right of marital privacy enunciated in *Griswold*.").

23 *Bowers*, 478 U.S. at 191.

24 *Id.* at 194.

25 See generally U.S. CONST.

B. *Romer*

*Romer v. Evans*²⁶ represented a turning point in the constitutional jurisprudence regarding the rights of sexual minorities.²⁷ *Bowers* not only permitted same-sex relations to be criminalized; it communicated an attitude of disapproval. *Romer* undercut that official disapproval.

At issue was a Colorado state constitutional amendment adopted by referendum that prohibited the state from protecting individuals on the basis of sexual orientation.²⁸ The amendment read:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.²⁹

The Court rejected that “the measure does no more than deny homosexuals special rights,”³⁰ instead construing it as having “the peculiar property of imposing a broad and undifferentiated disability on a single named group.”³¹ The Court explained that the amendment’s “sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects,”³² and struck it down as a

26 517 U.S. 620 (1996).

27 Micah R. Onixt, *Romer v. Evans: A Positive Portent of the Future*, 28 LOY. U. CHI. L.J. 593, 656 (1997) (“*Romer v. Evans* represented a turning point in the use of the Equal Protection Clause to support gay-rights.”).

28 See Andrew M. Jacobs, *Romer Wasn’t Built in A Day: The Subtle Transformation in Judicial Argument over Gay Rights*, 1996 WIS. L. REV. 893, 894 (1996) (explaining that *Romer* involved “a Colorado state constitutional amendment prohibiting gay rights policies, laws, and ordinances”).

29 *Romer*, 517 U.S. at 624.

30 *Id.* at 626.

31 *Id.* at 632.

32 *Id.*

violation of equal protection guarantees.³³

In dissent, Justice Scalia complained that the majority decision undercut (his interpretation of) *Bowers*, stating: “In holding that homosexuality cannot be singled out for unfavorable treatment, the Court contradicts a decision . . . pronounced only 10 years ago.”³⁴ He angrily chided the Court, which allegedly had “no business . . . pronouncing that ‘animosity’ toward homosexuality . . . is evil.”³⁵

Romer and *Bowers* are compatible insofar as *Bowers* is understood to demarcate the reach of due process guarantees by suggesting that the Constitution does not reach non-marital behavior,³⁶ although a separate issue is whether *Bowers* accurately describes the protections afforded by those guarantees.³⁷ However, *Romer* is incompatible with, or at least casts doubt upon, the permissibility of a state’s trying to make sexual minorities “unequal to everyone else.”³⁸ When *Romer* and *Bowers* are read *together* as limiting the reach of due process guarantees but as *not* authorizing the imposition of special burdens on the basis of orientation, a variety of state policies and practices are constitutionally vulnerable, such as statutes reserving marriage for different-sex couples even when the state interests implicated in marriage are promoted regardless of whether the marital couples are composed of individuals of the same sex or of different sexes.³⁹

C. *Lawrence*

Lawrence was important because it represented the Constitution’s recognition that same-sex relationships themselves have value of which states must take account. Not only were states precluded from targeting members of the LGBT community for unfavorable treatment but states also had to recognize that members

33 *Id.* at 635 (“Amendment 2 violates the Equal Protection Clause.”).

34 *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

35 *Id.* (Scalia, J., dissenting) (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

36 *See Bowers*, 478 U.S. at 194 (“Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause.”).

37 *See Lawrence*, 539 U.S. at 578 (“*Bowers* was not correct when it was decided.”).

38 *Romer*, 517 U.S. at 635.

39 *See* Mark Strasser, *Loving Revisionism: On Restricting Marriage and Subverting the Constitution*, 51 *How. L.J.* 75, 115 (2007) (“[S]ame-sex marriage serves the same kinds of state and individual interests as are served by different-sex marriages.”).

of the community have inherent value.

At issue in *Lawrence v. Texas* was a Texas statute criminalizing same-sex intimacy in particular.⁴⁰ The Court focused on whether same-sex relations were protected under due process guarantees,⁴¹ which required a reconsideration of *Bowers*.⁴²

In striking down the Texas law, the *Lawrence* Court not only overruled *Bowers*⁴³ in light of subsequent legal developments,⁴⁴ but also took the further step of suggesting that *Bowers* was wrongly decided in light of then-existing precedent.⁴⁵ The *Lawrence* Court considered the *Bowers* reasoning about family and intimate relations,⁴⁶ but then turned that reasoning on its head. Instead of suggesting that there was no connection between family and intimate relations, the *Lawrence* Court noted: “When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”⁴⁷ Presumably, that personal bond would include a family or family-like relationship. Thus, part of the *Bowers* rationale for upholding the prohibition of same-sex sodomitical relations was that the Court could see no connection between such sexual activity and family relationships. Part of the *Lawrence* rationale for striking down the prohibition of same-sex sodomitical relations was that such sexual activity might well be connected to a more enduring (familial) relationship.

The *Lawrence* Court expressly refused to address whether the Constitution protects the right to marry a same-sex partner. The Court stated: “The present case . . . does not involve whether the government must give formal recognition to any relationship that

40 *Lawrence*, 539 U.S. at 562 (“The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.”).

41 *Id.* at 564 (“[T]he case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.”).

42 *Id.* (“For this inquiry we deem it necessary to reconsider the Court’s holding in *Bowers*.”).

43 *Id.* at 578 (“*Bowers v. Hardwick* should be and now is overruled.”).

44 *Id.* at 576 (“The foundations of *Bowers* have sustained serious erosion from our recent decisions in *Casey* and *Romer*.”).

45 *Id.* at 578 (“*Bowers* was not correct when it was decided, and it is not correct today.”).

46 See *supra* notes 15-16 and accompanying text (discussing *Bowers* majority and dissenting views about the connection between intimacy and family).

47 *Lawrence*, 539 U.S. at 567.

homosexual persons seek to enter.”⁴⁸ Notwithstanding the Court’s express refusal to address the issue of same-sex marriage, the opinion had implications for how that issue would be resolved were it to come before the Court. Justice Scalia explained: “Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”⁴⁹ While not identifying the particular constitutional structure allegedly justifying a state’s refusal to recognize same-sex marriage, he asked rhetorically: “If moral disapprobation of homosexual conduct is ‘no legitimate state interest’ for purposes of proscribing that conduct, . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising ‘[t]he liberty protected by the Constitution?’”⁵⁰ He understood that “the encouragement of procreation” would not justify the exclusion⁵¹ because “the sterile and the elderly are allowed to marry.”⁵² He might also have noted that the state has an interest in providing children an environment where they might thrive, even if they do not live with both of their biological parents.⁵³ Just as different-sex couples raising children not biologically related to both of the adults nonetheless promote the state’s interest in providing for the next generation, same-sex couples raising children also promote the state’s interest in providing for the next generation.⁵⁴

Justice Scalia noted *Lawrence’s* import for whether states must recognize same-sex marriage, although he did not offer much elaboration on why that was so. One might infer that he was warning that the *Lawrence* Court had “largely signed on to the so-called homosexual agenda . . . directed at eliminating the moral opprobrium

48 *Id.* at 578.

49 *Id.* at 604 (Scalia, J., dissenting).

50 *Id.* at 604–05 (Scalia, J., dissenting).

51 *Id.* at 605 (Scalia, J., dissenting).

52 *Id.* (Scalia, J., dissenting).

53 Mark Strasser, *The Future of Same-Sex Marriage*, 22 U. HAW. L. REV. 119, 127 (2000) (“Even if lesbians and gays were producing no children and were ‘merely’ providing homes in which the children might thrive, the state’s interest in the next generation would still be promoted by allowing same-sex partners to marry and to provide homes in which the children might be raised to grow up to be happy and productive members of society.”).

54 Cf. Mark P. Strasser, *DOMA and the Constitution*, 58 DRAKE L. REV. 1011, 1021 (2010) (“Society as a whole benefits when children prosper, and society would benefit by recognizing same-sex marriage in the same ways it benefits by recognizing different-sex marriage.”).

that has traditionally attached to homosexual conduct.”⁵⁵ But even if the Court adopted society’s more permissive attitudes toward same-sex relations and toward non-marital relations as a general matter,⁵⁶ its doing so would not require the recognition of same-sex marriage. By the same token, even if Scalia were simply charging that the Court had become too liberal,⁵⁷ a change in the Court’s political stance still would not require recognition of same-sex marriage.

If *Bowers* were simply about whether non-marital consensual relations between adults were protected by the Constitution from criminal prosecution, then overruling it would not by itself establish that the Constitution protects the right to marry a same-sex partner. Further, if Justice Scalia were merely predicting that the liberal faction would eventually strike down same-sex marriage bans, then he might have called such a holding “an *ipse dixit*, rather than a reasoned conclusion.”⁵⁸ But Justice Scalia did not merely suggest that the Court had become more liberal or that it was simply announcing its own view. On the contrary, he stated: “This case [*Lawrence*] ‘does not involve’ the issue of homosexual marriage only if one entertains the belief that *principle* and *logic* have nothing to do with the decisions of this Court.”⁵⁹ Basically, Scalia suggested that if *Bowers* as he understood it were overruled, then it would not be constitutionally permissible to target on the basis of sexual orientation. Further, if “the moral opprobrium that has traditionally attached to homosexual conduct [in particular]”⁶⁰ was not a permissible basis of legislation, then same-sex marriage would have to be recognized.⁶¹

55 *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting).

56 See Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 639 (1996) (“[C]ultural and societal attitudes toward nonmarital sex and toward lesbians and gay men have shifted over the past twenty-five years, with large sectors of the public expressing increased tolerance.”).

57 Cf. Dana Taschner, *PLIVA Shields Big Pharma from Billions, Cuts Consumers’ Rights*, 49 SAN DIEGO L. REV. 879, 905 (2012) (“Justice Kennedy, generally known as a conservative, though not as extreme as his previously mentioned colleagues, is also known for his sometime alignment with the liberal faction of the Court.”).

58 Local 144 Nursing Home Pension Fund v. Demisay, 508 U.S. 581, 591 n.4 (1993). See also *Ipse Dixit*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“He himself said it.” Something asserted but not proved.).

59 *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting) (emphasis added).

60 *Id.* at 602 (Scalia, J., dissenting).

61 Cf. *Romer*, 517 U.S. at 636 (Scalia, J., dissenting) (“In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago,

D. *Windsor*

*United States v. Windsor*⁶² addressed the constitutionality of the Defense of Marriage Act (DOMA). The decision was important both because it held that DOMA was unconstitutional and because that decision was based on due process and equal protection rather than federalism guarantees. *Windsor* represented further validation of the rights of the LGBT community and, in addition, required extending important benefits to same-sex couples and their families.

Windsor involved a challenge to the federal government's refusal to recognize same-sex marriages valid in the states.⁶³ The challenged section read:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.⁶⁴

The *Windsor* Court held the federal statute unconstitutional.⁶⁵ While an argument might have been made that the federal government's refusal to recognize marriages valid in the states violated federalism guarantees,⁶⁶ the *Windsor* Court expressly rejected this approach: "[I]t is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution

see *Bowers v. Hardwick*, 478 U.S. 186 (1986), and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias.").

62 133 S. Ct. 2675 (2013).

63 See *id.* at 2682 ("[A] federal law, the Defense of Marriage Act, which excludes a same-sex partner from the definition of 'spouse' as that term is used in federal statutes.").

64 *Id.* at 2683 (citing 1 U.S.C. § 7).

65 *Id.* at 2695 ("This requires the Court to hold, as it now does, that DOMA is unconstitutional.").

66 *Id.* at 2697 (Roberts, C.J. dissenting) ("The majority extensively chronicles DOMA's departure from the normal allocation of responsibility between State and Federal Governments, emphasizing that DOMA 'rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State.'").

because it disrupts the federal balance.”⁶⁷ Instead, the Court held that “DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.”⁶⁸

The Court’s holding that DOMA violated the Fifth Amendment did not make clear whether the statute violated due process rather than equal protection guarantees, because the due process guarantees of the Fifth Amendment have an equal protection component.⁶⁹ The Court saw no need to choose between those guarantees, instead suggesting that the federal statute violated both due process and equal protection guarantees.⁷⁰

Merely because Fifth Amendment guarantees preclude the federal government from denying recognition to same-sex marriages valid in the states does not establish that Fourteenth Amendment guarantees preclude states from enacting and enforcing their own same-sex marriage bans.⁷¹ Yet, the *Windsor* Court implied that the Fourteenth Amendment might indeed prevent states from refusing to recognize same-sex marriages. The Court stated: “While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.”⁷²

Justice Scalia understood that it was only a matter of time before the Court would strike down same-sex marriage bans, predicting in his *Windsor* dissent that “the second, state-law shoe [will] be dropped later, maybe next Term.”⁷³ He believed “the view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today’s opinion.”⁷⁴ Again, the

67 *Id.* at 2692.

68 *Windsor*, 133 S. Ct. at 2695.

69 *Id.* (“The liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.”) (citing *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954) and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217–18 (1995)).

70 *Id.* at 2693 (“DOMA . . . violates basic due process and equal protection principles applicable to the Federal Government.”).

71 *See id.* at 2696 (Roberts, C.J., dissenting) (“The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their historic and essential authority to define the marital relation, . . . may continue to utilize the traditional definition of marriage.”).

72 *Id.* at 2695.

73 *Id.* at 2705 (Scalia, J., dissenting).

74 *Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting).

reference to “this” Court is open to interpretation. Perhaps he had in mind that “the majority has declared open season on any law that (in the opinion of the law’s opponents and any panel of like-minded federal judges) can be characterized as mean-spirited.”⁷⁵ Perhaps it is because this majority disagreed with him about whether “the Constitution . . . forbid[s] the government to enforce traditional moral and sexual norms.”⁷⁶ In any event, Justice Scalia implied that after *Lawrence* and *Windsor*, the question was not whether the Court would strike down same-sex marriage bans but when.

E. *Obergefell*

In *Obergefell v. Hodges*, the United States Supreme Court held that the right to marry includes the right to marry a person of the same sex.⁷⁷ As far as civil marriage is concerned, same-sex and different-sex couples must be treated equally.⁷⁸ This means that a marriage of a couple celebrated in one state cannot be refused recognition in another state merely because the members of that couple are of the same sex.⁷⁹

Justice Scalia was unstinting in his condemnation of the *Obergefell* opinion, which in his view “robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.”⁸⁰ Worse still, the Court did this by issuing “an opinion lacking even a thin veneer of law.”⁸¹

Yet, if saying that an opinion lacks a thin veneer of law means that it has no basis in law,⁸² then one must offer an account

75 *Id.* at 2707 (Scalia, J., dissenting).

76 *Id.* (Scalia, J., dissenting) (citing *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting)).

77 135 S. Ct. 2584, 2604 (2015) (“[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”).

78 *Id.* at 2605 (“[T]he State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.”).

79 *Id.* at 2608 (“[T]here is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.”).

80 *Id.* at 2627 (Scalia, J., dissenting).

81 *Id.* at 2628 (Scalia, J., dissenting).

82 *See id.* at 2612 (Roberts, C.J., dissenting) (“The right it announces has no

of *Romer*, *Lawrence*, and *Windsor*⁸³ that does not lend support to the right to marry a same-sex partner. Such an account would have to do more than merely show how those cases did not *require* the Court to recognize that the Constitution protects the right to marry a same-sex partner, but must also demonstrate that those cases did not support such a right.⁸⁴ Otherwise, the Court would be unable to distinguish unsupported legal claims⁸⁵ from legal claims that had support even if no previous case was dispositive.⁸⁶

To some extent, Justice Scalia's criticism focused on how the *Obergefell* Court crafted the majority opinion: "The opinion is couched in a style that is as pretentious as its content is egotistic."⁸⁷ He noted in a footnote that if he "ever joined an opinion for the Court that began: 'The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity,' [he] would hide [his] head in a bag."⁸⁸ As if he had not made his criticism sufficiently pointed, he added that "[t]he Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie."⁸⁹

Yet, Justice Scalia also criticized the *Obergefell* "decision . . . because it was unabashedly based not on law, but on the 'reasoned judgment' of a bare majority of this Court."⁹⁰ Such a comment is surprising from someone who had suggested that the

basis in the Constitution or this Court's precedent.").

83 See *supra* notes 27-77 and accompanying text.

84 Cf. *In re Wiczorek*, 2013 WL 1120019, at *2 (E.D. Mich. Mar. 17, 2013) ("While Coulter is not dispositive, it 'provides strong support for the notion that bankruptcy attorneys should not be forced to bear the costs of defending a fee application against objections.'") (citing *Boyd v. Engman*, 404 B.R. 467, 483 (W. D. Mich. 2009)). *Wiczorek* illustrates that merely because a case is not dispositive does not establish that it has no legal relevance.

85 *United States v. Harris*, 403 U.S. 573, 583 (1971) ("To the extent that *Spinelli* [*Spinelli v. United States*, 393 U.S. 410 (1969)] *abrogated by Illinois v. Gates*, 462 U.S. 213 (1983)] prohibits the use of such probative information, it has *no support* in our prior cases, logic, or experience and we decline to apply it to preclude a magistrate from relying on a law enforcement officer's knowledge of a suspect's reputation.") (emphasis added).

86 Cf. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) ("History and our case law support drawing the distinction . . .").

87 *Obergefell*, 135 S. Ct. at 2630 (Scalia, J., dissenting).

88 *Id.* at 2630 n.22 (Scalia, J., dissenting).

89 *Id.* (Scalia, J., dissenting).

90 *Id.* at 2631 (Scalia, J., dissenting).

Obergefell result was required by “principle and logic” after *Lawrence*,⁹¹ and was simply the “the second, state-law shoe [that would] be dropped later” after *Windsor*.⁹²

Perhaps Justice Scalia exaggerated when he suggested that *Romer*, *Lawrence*, and *Windsor* required the result in *Obergefell* as a matter of principle and logic. That is something about which jurists and commentators might disagree.⁹³ But as Justice Scalia repeatedly pointed out, the *Obergefell* holding was at the very least foreshadowed by the previous case law.

III. Retroactive Application

The United States Supreme Court’s holding that a statute is unconstitutional has important implications, because the Court thereby changes the legal landscape. Prospectively, numerous individuals may benefit because they are no longer constrained by the statute that has been declared unconstitutional. Whether such a holding should be applied retroactively is a separate issue. While the Court has addressed the conditions under which the Court’s invalidation of a statute as unconstitutional should be applied retroactively, that jurisprudence is currently in flux.

A. *Selective Retroactive Application?*

There are two competing views regarding the retroactive application of decisions invalidating statutes. One suggests that an unconstitutional law should have no legal effect, which has been taken to mean that the retrospective application of a holding of unconstitutionality is appropriate as a general matter.⁹⁴ The other is that the retroactive application of a holding of unconstitutionality might create a host of regrettable consequences including the undermining of justified, reasonable expectations, which has been taken to mean that the retroactive application of such holdings should be done selectively.⁹⁵

The case for complete retroactivity might be summed up

91 *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting).

92 *Windsor*, 133 S. Ct. at 2705 (Scalia, J., dissenting).

93 *See, e.g., id.* at 2696 (Roberts, C.J., dissenting) (suggesting that *Windsor* did not foreordain the *Obergefell* result).

94 *See infra* note 97 and accompanying text.

95 *See infra* notes 98-117 and accompanying text.

by an observation made by the Court about 130 years ago: “An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.”⁹⁶ But if such a law is as inoperative as it would have been had it never been passed, then such a law could not justify past actions, such as actions performed prior to the declaration of the statute’s unconstitutionality, because from a legal perspective such a law never existed.

Such an understanding of the effect of statutes later declared unconstitutional might create severe hardship. Consider *Cipriano v. City of Houma*, which involved a challenge to the issuance of utility bonds to pay for improvements to the City’s utility systems.⁹⁷ Only property owners had been permitted to vote in the special election in which the bond issuance was approved.⁹⁸ The approval was challenged by an individual (and others similarly situated) who was a registered voter but was not a property owner.⁹⁹ The Court noted that property owners might view the wisdom of approving the issuance of such bonds somewhat differently than would those who did not own property.¹⁰⁰ However, “these differences of opinion cannot justify excluding either group from the bond election, when . . . both are substantially affected by the utility operations.”¹⁰¹ The Supreme Court struck down the voter restriction.¹⁰²

96 Norton v. Shelby Cty., 118 U.S. 425, 442 (1886).

97 Appellee City of Houma owns and operates gas, water, and electric utility systems. In September 1967 the city officials scheduled a special election to obtain voter approval for the issuance of \$10,000,000 of utility revenue bonds. The city planned to finance extension and improvement of the municipally owned utility systems with the bond proceeds. *Cipriano v. City of Houma*, 395 U.S. 701, 703 (1969).

98 *Id.* (“At the special election a majority ‘in number and amount’ of the property taxpayers approved the bond issue.”).

99 Appellant alleged that he was a duly qualified voter of the City of Houma, and that he had been prevented from voting in the revenue bond election solely because he was not a property owner. He sued for himself and for a class of 6,926 nonproperty taxpayers otherwise qualified as City of Houma voters. *Id.*

100 *Id.* at 705 (“[P]roperty taxpayers may be concerned with expanding and improving the city’s utility operations . . . which eventually would reduce the burden on the property tax to support city services. . . . [N]onproperty taxpayers may feel that their interests as rate payers indicate that no further expansion of utility debt obligations should be made.”).

101 *Id.*

102 *Id.* at 706 (“We therefore reverse the judgment of the District Court.”); *see also id.* at 703–04 (“A three-judge District Court . . . dismissed the suit, finding the

In this particular case, the Court's striking down the electoral limitation did not pose the kind of fairness problems that it might have, because the challenge had been made within the relevant statutory framework¹⁰³ and Cipriano sought to enjoin the issuance of the bonds.¹⁰⁴ Suppose, however, that the bonds had already been issued, authorized by an unconstitutional voting procedure. The *Cipriano* Court noted: "Significant hardships would be imposed on cities, bondholders, and others connected with municipal utilities if our decision today were given full retroactive effect."¹⁰⁵

Rather than apply the decision retroactively, the Court afforded the decision only prospective effect,¹⁰⁶ explaining that the "decision will not apply where the authorization to issue the securities is legally complete on the date of this decision . . . [and] will not affect the validity of securities which have been sold or issued prior to this decision and pursuant to such final authorization."¹⁰⁷ By limiting the effect of the ruling in this way, the Court was able to prevent harm to individuals who had reasonably relied on the validity of such securities.

If some decisions invalidating statutes will have retroactive effect and others will only be prospective, then it will be important to set out criteria to help state and federal courts know which is which. The Court explained in *Chevron Oil Co. v. Huson* that, in deciding whether to apply a decision retroactively, the Court will "generally [consider] three separate factors:"¹⁰⁸

- "[T]he decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied¹⁰⁹ or

Louisiana provisions constitutional.") (citing *Cipriano v. City of Houma*, 286 F. Supp. 823 (D.C. E.D. La. 1968)).

103 *Cipriano*, 395 U.S. at 703 ("[W]ithin the period provided by Louisiana law for contesting the result of the election, La. Rev. Stat. s 33:4260 (1950), this suit was instituted in the United States District Court for the Eastern District of Louisiana.").

104 *Id.* ("Appellant sought to enjoin the issuance of the bonds approved at the special election.").

105 *Id.* at 706.

106 *Id.* ("[W]e will apply our decision in this case prospectively.").

107 *Id.*

108 *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971), *disapproved of by Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 122-24 (1993).

109 *Id.* (citing *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 496 (1968)).

by deciding an issue of first impression whose resolution was not clearly foreshadowed.”¹¹⁰ Decisions overruling clear past precedent or which had not been clearly foreshadowed might upset reasonable and justified expectations.¹¹¹

- The Court “must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.”¹¹² For example, insofar as the exclusionary rule was to deter “lawless police action,”¹¹³ it might be thought that “this purpose would [not] be advanced by making the rule retrospective [because] [t]he misconduct of the police . . . [will have] already occurred and will not be corrected by releasing the prisoners involved.”¹¹⁴ The Court believed that when it had “no bearing on guilt,” retroactive application “would seriously disrupt the administration of justice.”¹¹⁵
- The Court will “weigh[] the inequity imposed by retroactive application, for ‘(w)here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the “injustice or hardship” by a holding of nonretroactivity.’”¹¹⁶ Individuals who relied on clearly established law only to have their justified expectations

110 *Chevron Oil*, 404 U.S. at 106 (citing *Allen v. State Bd. of Elections*, 393 U.S. 544, 572 (1969)).

111 See Nelson Lund, *Retroactivity, Institutional Incentives, and the Politics of Civil Rights*, 1995 PUB. INT. L. REV. 87, 89 (1995) (“Justice O’Connor . . . emphasized that such unacknowledged shifts are bound to upset reasonable expectations, sometimes with crushing effect on those ensnared by unanticipated decisions from the Supreme Court.”).

112 *Chevron Oil*, 404 U.S. at 106–07 (citing *Linkletter v. Walker*, 381 U.S. 618, 629 (1965)). *But see* *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (“[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a ‘clear break’ with the past.”).

113 *Linkletter*, 381 U.S. at 636.

114 *Id.* at 637.

115 *Id.* at 638.

116 *Chevron Oil*, 404 U.S. at 107 (citing *Cipriano*, 395 U.S. at 706) (citing *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932)).

undermined by a novel decision might suffer devastating financial harm that simply could not have been foreseen.

In *Chevron Oil*, the Court discussed the considerations that would be used to determine whether a decision holding a particular practice or statute unconstitutional would be given retroactive effect. However, the Court has since reconsidered the *Chevron Oil* approach, raising significant doubts about when or even whether that case-by-case approach to retroactivity should be employed.

B. Against Selective Retroactive Application

In *Harper v. Virginia Department of Taxation*, the Court cast doubt on whether the *Chevron Oil* factors should be used to determine which decisions invalidating statutes should be applied retroactively:¹¹⁷

When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.¹¹⁸

The announced approach differed from the former approach in the civil context, which “permitted the denial of retroactive effect to ‘a new principle of law’ if such a limitation would avoid ‘injustice or hardship’ without unduly undermining the ‘purpose and effect’ of the new rule.”¹¹⁹ In justifying the new approach, the Court noted that the past “anomalous approach”¹²⁰ seemed to permit “the erection of selective temporal barriers to the application of federal law in noncriminal cases.”¹²¹ But the Constitution does not “permit ‘the substantive law [to] shift and spring’ according to ‘the particular

117 509 U.S. 86, 96 (1993).

118 *Id.* at 97.

119 *Id.* at 94–95 (citing *Chevron Oil*, 404 U.S. at 106–07 (quoting *Cipriano*, 395 U.S. at 706)).

120 *Am. Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 219 (1990) (Stevens, J. dissenting); see also *Harper*, 509 U.S. at 96 (discussing the four dissenting justices who “rejected the plurality’s ‘anomalous approach’ to retroactivity”) (citing *Am. Trucking*, 496 U.S. at 219 (Stevens, J. dissenting)).

121 *Harper*, 509 U.S. at 97.

equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule."¹²² Such an approach to law would be too uncertain and would strike many as unfair because of allegedly not treating similarly situated parties similarly.¹²³

The *Harper* Court explained that selective retroactive application had already been rejected in the criminal context,¹²⁴ offering two reasons: (1) the judicial and legislative functions are qualitatively different and, unlike legislators, the members of the Court are not permitted to choose to make constitutional holdings prospective or retrospective "as [they] see fit,"¹²⁵ and (2) "selective application of new rules violates the principle of treating similarly situated [parties] the same."¹²⁶ So, as a matter of separation of powers and basic fairness, it was inappropriate to make selective prospective applications of federal law in the criminal context.¹²⁷

The Court then noted that similar rationales undercut the appropriateness of selective retroactive application in the civil context: "Mindful of the 'basic norms of constitutional adjudication' that animated our view of retroactivity in the criminal context, we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases."¹²⁸

While it rejected the anomalous case-by-case approach, the Court did not advocate reopening older decisions. In *James B. Beam Distilling Company v. Georgia*, the Court suggested that "when the Court has applied a rule of law to the litigants in one case it must

122 *Id.* (citing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991)).

123 *Cf. Griffith v. Kentucky*, 479 U.S. 314, 327–28 (1987) (citing *United States v. Johnson*, 457 U.S. 537, 556 n.16 (1982)) (discussing "the 'actual inequity that results' when only one of many similarly situated defendants receives the benefit of the new rule").

124 *See Harper*, 509 U.S. at 95 (noting that in *Griffith v. Kentucky*, 479 U.S. 314 (1987) the Court "eliminated limits on retroactivity in the criminal context by holding that all 'newly declared . . . rule[s]' must be applied retroactively to all 'criminal cases pending on direct review.'" (citing *Griffith*, 479 U.S. at 322).

125 *Id.* (quoting *Griffith*, 479 U.S. at 322).

126 *Id.* (quoting *Griffith*, 479 U.S. at 323).

127 *See* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1061 (1997) ("Selective prospectivity, like the *Chevron* Oil test, allowed courts to distinguish among litigants, applying the new rule to some and the old rule to others."); *id.* at 1062 ("Justice Scalia argued that principles of separation of powers rendered both pure and selective prospectivity unconstitutional.").

128 *Harper*, 509 U.S. at 97 (quoting *Griffith*, 479 U.S. at 322).

do so with respect to all others *not barred by procedural requirements or res judicata*.”¹²⁹ The *Beam* Court explained that “retroactivity in civil cases must be limited by the need for finality; once suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed.”¹³⁰ The *Harper* Court made clear that its ruling was controlled by *Beam*.¹³¹ The retroactivity approach announced in *Harper* required that “the controlling interpretation of federal law . . . be given full retroactive effect in all cases still open on direct review.”¹³²

In his *Harper* concurrence, Justice Kennedy argued that “it is sometimes appropriate in the civil context to give only prospective application to a judicial decision.”¹³³ In her dissenting opinion, Justice O’Connor registered her disagreement with the approach taken by the majority, observing that the “Court’s retroactivity jurisprudence has become somewhat chaotic in recent years.”¹³⁴ She worried that “the absolute prohibition on selective prospectivity was not only contrary to precedent, but also so rigid that it [might] produce[] unconscionable results.”¹³⁵

The *Harper* Court did not suggest that a holding of unconstitutionality on *state* grounds had to be applied retroactively, but did make clear that its announced approach had to be used when *federal* law was at issue: “Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law¹³⁶ cannot extend to their interpretations of federal law.”¹³⁷ The Supremacy Clause prohibits States from selectively applying federal law retroactively.¹³⁸

The Court illustrated its point about the Supremacy Clause

129 501 U.S. 529, 544 (1991) (emphasis added).

130 *Id.* at 541 (citing *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940)).

131 *See Harper*, 509 U.S. at 97 (“*Beam* controls this case”) and *id.* at 99 (“under *Griffith*, *Beam*, and the retroactivity approach we adopt today . . .”).

132 *Id.*

133 *Id.* at 110 (Kennedy, J., concurring in part and concurring in the judgment).

134 *Id.* at 113 (O’Connor, J., dissenting).

135 *Id.* at 117 (O’Connor, J., dissenting).

136 *Id.* at 100 (citing *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364–366 (1932)).

137 *Harper*, 509 U.S. at 100 (citing *National Mines Corp. v. Caryl*, 497 U.S. 922, 923 (1990)).

138 *Id.* (“The Supremacy Clause, U.S. Const., Art. VI, cl. 2, does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law.”).

in *Reynoldsville Casket Company v. Hyde*¹³⁹ when considered in light of the Court's decision in *Bendix Autolite Corporation v. Midwesco Enterprises, Incorporated*.¹⁴⁰ In 1987, Carol Hyde, a resident of Ohio, sued out-of-state defendants in tort as a result of a collision in 1984 involving her car and a truck.¹⁴¹ Had the defendants been Ohio residents, Hyde's suit would have been time-barred by the two-year statute of limitations.¹⁴² However, because of a special tolling provision involving out-of-state defendants, the tort action was not time-barred.¹⁴³

In 1988, the United States Supreme Court in *Bendix Autolite Corporation v. Midwesco Enterprises, Incorporated*¹⁴⁴ "held unconstitutional (as impermissibly burdening interstate commerce) an Ohio 'tolling' provision that, in effect, gave Ohio tort plaintiffs unlimited time to sue out-of-state (but not in-state) defendants."¹⁴⁵ Hyde's suit was filed ten months before the *Bendix* Court struck down the Ohio tolling statute,¹⁴⁶ and one important issue was whether the *Bendix* decision should be applied retroactively, which might have meant that Hyde's suit was time-barred.¹⁴⁷ The Ohio Supreme Court held that the tolling provision was applicable in cases arising before that tolling provision had been struck down.¹⁴⁸ In other words, the

139 514 U.S. 749 (1995).

140 486 U.S. 888 (1988).

141 *Hyde v. Reynoldsville Casket Co.*, 626 N.E.2d 75, 75 (Ohio 1994), *rev'd*, 514 U.S. 749 (1995), *rev'd*, 650 N.E.2d 904 (Ohio 1995) ("On March 5, 1984, appellant Carol L. Hyde was injured in a traffic accident in Ashtabula County, Ohio, allegedly caused by the negligence of John M. Blosch while he was operating a vehicle owned by the Reynoldsville Casket Company ("RCC").").

142 *See Reynoldsville Casket*, 514 U.S. at 751 ("All parties concede that, had Blosch and Reynoldsville made their home in Ohio, Ohio law would have given Hyde only two years to bring her lawsuit.") (citing OHIO REV. CODE ANN. § 2305.10 (1991)).

143 *Id.* ("[B]ecause petitioners were from Pennsylvania, a special provision of Ohio law tolled the running of the statute of limitations, making the lawsuit timely.") (citing OHIO REV. CODE ANN. § 2305.15(A)).

144 486 U.S. 888 (1988).

145 *Reynoldsville Casket*, 514 U.S. at 750 (discussing *Bendix*, 486 U.S. 888 (1988)).

146 *Id.* at 751 ("Ten months after Hyde brought her suit, this Court, in *Bendix*, . . . held that the tolling provision on which she relied, § 2305.15(A), places an unconstitutional burden upon interstate commerce.").

147 *See infra* notes 157-60 and accompanying text (discussing a remedy that would have meant that her claim would not be time-barred).

148 *Reynoldsville Casket*, 514 U.S. at 750-51 ("[T]he Supreme Court of Ohio held that, despite *Bendix*, Ohio's tolling law continues to apply to tort claims that accrued before that decision.").

Ohio Supreme Court prospectively applied the holding that the state tolling statute was unconstitutional, which meant that Hyde's suit was not time-barred. The United States Supreme Court reversed, holding that the prospective application of the unconstitutionality of the tolling statute was itself unconstitutional because it violated the Supremacy Clause.¹⁴⁹

Hyde characterized the Ohio Supreme Court's application of the tolling statute to those cases arising before the tolling statute had been struck down "as if it were simply an effort to fashion a remedy that takes into consideration her reliance on pre-*Bendix* law."¹⁵⁰ Allegedly, the Ohio court was simply "continuing to toll the 2-year statute of limitations in pre-*Bendix* cases . . . as a state law 'equitable' device for reasons of reliance and fairness."¹⁵¹ But the United States Supreme Court rejected that ingenious argument¹⁵² in part because the Ohio Supreme Court itself claimed to be applying the *Bendix* decision prospectively rather than retroactively.¹⁵³

The United States Supreme Court offered an additional reason to reverse the Ohio ruling. The Court could not "see how . . . the Ohio Supreme Court could change a legal outcome that federal law, applicable under the Supremacy Clause, would otherwise dictate simply by calling its refusal to apply that federal law an effort to create a remedy."¹⁵⁴ Thus, suppose that the Ohio court did not expressly admit that it applied *Bendix* prospectively and instead said that it employed a remedy to help those who might have relied on the tolling of the statute of limitations. Merely describing the decision as affording a remedy rather than as prospectively applying a federal decision would not have immunized the Ohio ruling from review, especially because limiting the class entitled to the remedy would itself violate constitutional guarantees and so would not be permissible.¹⁵⁵

149 *Id.* at 751 ("This holding, in our view, violates the Constitution's Supremacy Clause.").

150 *Id.* at 753.

151 *Id.*

152 *Id.* at 752 ("Although one might think that is the end of the matter, Hyde ingeniously argues that it is not.").

153 *Reynoldsville Casket*, 514 U.S. at 753 ("[T]he legally authoritative statement of its holding[] speaks, not about remedy, but about retroactivity.").

154 *Id.*

155 *Id.* at 756 ("[T]he Ohio Supreme Court's 'remedy' here (allowing Hyde to proceed) does not cure the tolling statute's problem of unconstitutionality. And, her tort claim critically depends upon Ohio tolling law that continues to violate the Commerce Clause.").

The United States Supreme Court modified the fact scenario in *Reynoldsville Casket* to illustrate how a constitutional remedy might have been created so that Hyde's suit could have proceeded:

Suppose that Ohio violated the Constitution by treating two similar classes of tort defendants differently, say, by applying a 2-year statute of limitations to the first (in-state defendants) but a 4-year statute to the second (out-of-state defendants). Ohio might have cured this (imaginary) constitutional problem either (1) by applying a 4-year statute to both groups, or (2) by applying a 2-year statute to both groups.¹⁵⁶

Either remedy would have been permissible, and Ohio's adopting the 4-year statute of limitations would have permitted Hyde's suit to go forward.¹⁵⁷ However, that would also have meant that suits against in-staters for alleged torts that had occurred more than 2 years before would also not have been time-barred. Nonetheless, the potential remedy whereby the statute of limitations would be tolled for both in-staters and out-of-staters illustrates one of the ways in which retroactive application of the announced federal rule might nonetheless not change the result for a particular party.¹⁵⁸

In *Reynoldsville Casket*, the constitutional violation involved treating out-of state defendants less favorably than in-state defendants, and Hyde (the in-state plaintiff) would not have been harmed by the retroactive prohibition of such local favoritism if the more generous tolling statute were also applied when in-state defendants were being sued.¹⁵⁹ That said, creating such a remedy would itself have had costs. For example, it would have made in-state defendants potentially liable for damages arising from suits that might reasonably have been thought time-barred.¹⁶⁰

156 *Id.*

157 *Id.* ("Had it chosen the first of these remedies, then Hyde's case could continue because the 4-year statute would no longer violate the Federal Constitution.").

158 *Reynoldsville Casket*, 514 U.S. at 759 ("[A] court may find . . . an alternative way of curing the constitutional violation.").

159 *See id.* at 750 ("[T]his Court held unconstitutional (as impermissibly burdening interstate commerce) an Ohio 'tolling' provision that, in effect, gave Ohio tort plaintiffs unlimited time to sue out-of-state (but not in-state) defendants.").

160 Further, tolling the statute of limitations for in-state defendants might have put insurers at increased risk of having to pay additional claims. Such a

The *Reynoldsville Casket* Court discussed other situations in which retroactive application of a ruling might not change the result for a particular party. There might be “a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief.”¹⁶¹ For example, suppose that according to state law an individual who wished to challenge the constitutionality of a tax was required to make that challenge prior to paying it. Suppose further that an individual failed to challenge the tax before paying it and that the United States Supreme Court later found that tax unconstitutional. Retroactive application of that holding would not entail that the taxpayer would now be entitled to a refund, because she had failed to challenge the tax in the way the system required.¹⁶²

There might be other reasons that a retroactive application of a decision would nonetheless not change a result. For example, suppose there is, “as in the law of qualified immunity, a well-established general legal rule that trumps the new rule of law, which general rule reflects *both* reliance interests and other significant policy justifications.”¹⁶³ Thus, an individual might be barred from suing a police officer for making an unconstitutional arrest when the arrest at the time of performance seemed to be free of constitutional difficulty and it was not until later that the Court held such arrests unconstitutional.¹⁶⁴ The police officer who had the reasonable, good faith belief that she acted appropriately when making the arrest would not be subject to suit even if the Court later held that the arrest at issue violated constitutional guarantees.¹⁶⁵

Finally, retroactive application might not change the result

remedy might be thought to violate constitutional guarantees. *Cf. Soc’y Ins. v. Labor & Indus. Review Comm’n*, 786 N.W.2d 385, 405 (Wis. 2010) (holding that retroactive modification of a statute of limitations violated constitutional guarantees).

161 *Reynoldsville Casket*, 514 U.S. at 759.

162 *See Reich v. Collins*, 513 U.S. 106, 110–11 (1994).

163 *Reynoldsville Casket*, 514 U.S. at 759.

164 *See id.* *See also Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (“If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to ‘know’ that the law forbade conduct not previously identified as unlawful.”).

165 *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (“The doctrine of qualified immunity protects government officials ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’”) (citing *Harlow*, 457 U.S. at 818).

in a particular case because of “a principle of law, such as that of ‘finality’ . . . , that limits the principle of retroactivity itself.”¹⁶⁶ Given the great systemic interest in not reopening final judgments, the Court has declined to extend retroactive decisions to those cases that are no longer appealable.¹⁶⁷

In his *Reynoldsville Casket* concurrence, Justice Kennedy observed that the opinion should not be read “to surrender in advance our authority to decide that in some exceptional cases, courts may shape relief in light of disruption of important reliance interests or the unfairness caused by unexpected judicial decisions.”¹⁶⁸ He did not think merely prospective application appropriate in this case because it was incorrect to claim that *Bendix* “had not been foreshadowed by other precedents.”¹⁶⁹

The Court has recognized that *Harper* and *Reynoldsville Casket* cast doubt on the use of the *Chevron Oil* factors, noting that questions had been raised about “the continuing validity of *Chevron Oil* after *Harper v. Virginia Dept. of Taxation* and *Reynoldsville Casket Co. v. Hyde*.”¹⁷⁰ It is simply unclear whether the Court has totally foreclosed the use of the *Chevron Oil* factors even in a case in which there is “the sort of grave disruption or inequity involved in awarding retrospective relief . . . that would bring that doctrine into play.”¹⁷¹

The Court’s retroactivity jurisprudence with respect to civil cases is not entirely clear. Nonetheless, certain conclusions can be drawn from the existing jurisprudence. Assuming that a final judgment is not involved, cases holding statutes unconstitutional will be applied retroactively with a possible exception if one of the *Chevron Oil* factors is implicated. But the *Chevron Oil* factors will not be triggered absent some “grave disruption or inequity.”¹⁷²

IV. Common Law Marriage

Historically, many states permitted couples to contract

166 *Reynoldsville Casket*, 514 U.S. at 759.

167 See *supra* notes 130-31 and accompanying text.

168 *Reynoldsville Casket*, 514 U.S. at 761 (Kennedy, J., concurring in the judgment).
But see *Danforth v. Minnesota*, 552 U.S. 264, 266 (2008) (permitting but not requiring state courts to apply new rules of criminal procedure to convictions that have become final).

169 *Reynoldsville Casket*, 514 U.S. at 762 (Kennedy, J., concurring in the judgment).

170 *Ryder v. United States*, 515 U.S. 177, 184–85 (1995).

171 *Id.* at 185.

172 *Id.*

common law marriages, i.e., marriages that could be accorded legal recognition even if the parties failed to obtain a marriage license and failed to have a state-authorized officiant perform a marriage ceremony.¹⁷³ Currently, most states do not permit common law marriages to be contracted within the state,¹⁷⁴ although some states that do not permit such unions to be contracted locally will nonetheless recognize them if validly celebrated elsewhere.¹⁷⁵ Post-*Obergefell*,¹⁷⁶ it seems likely that some same-sex couples will claim to have a valid common law marriage, and a variety of issues must be addressed if the alleged agreement occurred before the state officially recognized same-sex marriages.

A. Establishing a Common Law Marriage

As a general matter, individuals domiciled in a state that permits individuals to contract a common law marriage can establish such a union by: (1) treating each other as spouses,¹⁷⁷ (2) holding

173 Adam Candeub & Mae Kuykendall, *Modernizing Marriage*, 44 U. MICH. J.L. REFORM 735, 758 (2011) (“A common law marriage does not involve a marriage license or a ceremony.”).

174 See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 6.02 (2002) cmt a (“By 1998, the doctrine of common-law marriage survived in only 11 states and the District of Columbia.”); Peter Nicolas, *Common Law Same-Sex Marriage*, 43 CONN. L. REV. 931, 934 (2011) (“Once available in a majority of U.S. states, common law marriages fell out of favor during the twentieth century, and today only eleven states and the District of Columbia recognize common law marriages newly entered into within their borders . . .”).

175 See *Henderson v. Henderson*, 87 A.2d 403, 409 (Md. 1952) (“We have adopted the generally accepted rule that where a valid common-law marriage has been entered into in a jurisdiction which recognizes the validity of such a marriage, it will be recognized as valid in another jurisdiction, regardless of the rule which prevails in the latter jurisdiction in respect to the validity of common-law marriages.”). See also Sarah Primrose, *The Decline of Common Law Marriage & the Unrecognized Cultural Effect*, 34 WHITTIER L. REV. 187, 189 (2013) (“[M]ost states find, under conflicts of law principles, that a marriage valid where celebrated will be valid elsewhere.”); Nicolas, *supra* note 174, at 934 (“[O]ther states will typically recognize common law marriages lawfully entered into in sister states.”).

176 States that did not recognize ceremonial marriages between individuals of the same sex would also not have recognized a common law marriage between individuals of the same sex. See *De Santo v. Barnsley*, 476 A.2d 952, 954 (Pa. Super. Ct. 1984) (“[T]he limits of common law marriage must be defined in light of the limits of statutory marriage.”).

177 See *Staudenmayer v. Staudenmayer*, 714 A.2d 1016, 1021 (Pa. 1998) (discussing “the rule that a common law marriage does not come into existence unless the

themselves out as spouses to the community,¹⁷⁸ and (3) being free to marry, *e.g.*, not already having a living spouse.¹⁷⁹ However, states recognizing common law marriages may differ with respect to some of the particulars, such as the burden of proof that must be met in order to establish the existence of a common law marriage.¹⁸⁰ It is simply unclear whether some of the differences among states still permitting individuals to contract such unions locally will affect which same-sex common law marriages are recognized or the point at which such marriages will be deemed to have begun.

1. *Treating Each Other as Spouses*

Traditionally, a common law marriage “can only be created by *verba in praesenti*, *i.e.*, an exchange of words in the present tense, spoken with the specific purpose of creating the legal relationship of husband and wife.”¹⁸¹ However, *Obergefell* establishes that the parties do not have to be of different sexes to establish such a marriage,¹⁸² so this condition would be satisfied were the individuals agreeing to be husband and husband or wife and wife. As long as

parties uttered the *verba in praesenti*, the exchange of words in the present tense for the purpose of establishing the relationship of husband and wife”).

178 *In re Manfredi's Estate*, 159 A.2d 697, 700 (Pa. 1960) (discussing “a reputation of marriage, which is not partial or divided but is broad and general”).

179 *Blackwood v. Kilpatrick*, 294 So. 2d 753, 755 (Ala. Civ. App. 1974) (“[B]efore such marriage can exist, both parties must be in a position to contract marriage. That is to say, there cannot be a living spouse of either party.”).

180 *See Cerovic v. Stojkov*, 134 A.3d 766, 774–75 (D.C. 2016) (“[A] party claiming that a common law marriage exists must prove the existence of that common law marriage by a preponderance of the evidence.”) (citing *Coates v. Watts*, 622 A.2d 25, 27 (D.C.1993)) and *id.* at 775 (“[T]he requirement that the proponent of the first marriage must meet a clear and convincing evidence standard applies only in situations in which the proponent is attempting to prove that the common law marriage with one spouse precedes marriage with a *different* spouse, *i.e.*, situations in which the parties to the asserted successive marriages are not the same.”) *But see* *Fravala v. City of Cranston ex rel. Baron*, 996 A.2d 696, 703 (R.I. 2010) (“[C]ommon-law marriage . . . ‘can be established by clear and convincing evidence that the parties seriously intended to enter into the husband-wife relationship and that their conduct was of such a character as to lead to a belief in the community that they were married.’”) (citing *Sardonis v. Sardonis*, 261 A.2d 22, 24 (R.I. 1970)).

181 *Elk Mountain Ski Resort, Inc. v. Workers' Comp. Appeal Bd.*, 114 A.3d 27, 32 (Pa. Commw. Ct. 2015) (citing *In re Manfredi's Estate*, 159 A.2d at 700) (*italics in original*).

182 *See supra* note 75-76 and accompanying text.

the words represent an “express agreement of the parties without ceremony . . . , by words . . . *in praesenti*, uttered with a view and for the purpose of establishing the relationship,”¹⁸³ this prong will be met. The important issue will be whether the parties had the requisite intent rather than the particular words they chose to use.¹⁸⁴ Basically, “the concept of *verba in praesenti* . . . recognizes the notion that a marital relationship springs into existence *at the time* vows are exchanged”¹⁸⁵ and, after *Obergefell*, there is no bar to a same-sex couple reaching the relevant kind of agreement.

Even before same-sex marriage was recognized by any state, same-sex couples celebrated commitment ceremonies and religious marriage ceremonies, expressing their desire and intent to be married.¹⁸⁶ However, a couple’s sincere representation of a desire and intent to establish a common law marriage will not suffice to create such a union.¹⁸⁷ Other criteria must be met as well, including that the law permits such marriages to be celebrated.¹⁸⁸ Thus, except

183 *In re Manfredi’s Estate*, 159 A.2d at 700 (italics in original).

184 *See Fiedler v. Nat’l Tube Co.*, 53 A.2d 821, 823 (Pa. Super. Ct. 1947) (“The form of the words used is not controlling and the intention of the parties may not be disregarded.”).

185 *Monteleone v. Bd. of Pensions & Ret.*, 2015 WL 5314702, at *5 (Pa. Commw. Ct. Mar. 4, 2015) (emphasis in original).

186 *See, e.g., Shahar v. Bowers*, 114 F.3d 1097, 1100 (11th Cir. 1997) (“Plaintiff Robin Joy Shahar is a woman who has ‘married’ another woman in a ceremony performed by a rabbi within the Reconstructionist Movement of Judaism.”). *Cf. Davidson v. Ream*, 161 N.Y.S. 73, 84 (Sup. Ct. 1916), *aff’d*, 164 N.Y.S. 1037 (App. Div. 1917) (noting that a common law marriage “may be ceremonial, in that the parties may adopt any ceremony they elect, or all ceremony may be dispensed with.”).

187 *See infra* note 189 and accompanying text.

188 The elements and conditions necessary to establish the existence of a common-law marriage have been outlined by this court as: (1) intent and agreement *in praesenti* as to marriage on the part of both parties together with continuous cohabitation and public declaration that they are husband and wife; (2) the burden of proof is on the one asserting the claim; (3) all elements of relationship as to marriage must be shown to exist; (4) a claim of such marriage is regarded with suspicion, and will be closely scrutinized; (5) when one party is dead, the essential elements must be shown by clear, consistent and convincing evidence.

See In re Dallman’s Estate, 228 N.W.2d 187, 189 (Iowa 1975) (citing *In re Long’s Estate*, 102 N.W.2d 76, 79 (Iowa 1960)); *Brooks v. State*, 686 S.W.2d 952, 954 (Tex. Crim. App. 1985) (“The elements of a common-law marriage are an agreement between legally eligible individuals presently to become husband and wife, a living together pursuant to the agreement and cohabitation as husband and wife, and a holding out of each other to the public as husband and wife.”) (citing *Hightower v. State*, 629 S.W.2d 920,

for the differences in whom the respective parties wish to marry, the desires and intentions articulated by a couple who successfully establishes a common law marriage might be identical to the desires and intentions articulated by a couple who does not successfully establish such a marriage.

Consider *Brown v. Brown*, in which the Georgia Supreme Court discussed some of the underlying facts establishing the creation of a valid common law marriage.¹⁸⁹ When Gene Brown rejected his partner's request for a ceremonial marriage, Brown reportedly told the woman with whom he was living that "they didn't need a piece of paper, . . . they were already married."¹⁹⁰ The *Brown* court mentioned these comments to help establish that the couple created a common law marriage,¹⁹¹ but failed to offer an interpretation of those comments. For example, the court did not interpret whether Brown merely suggested that no piece of paper was necessary to establish how much he cared or, perhaps, that he (currently) wanted to remain with his cohabiting partner for the rest of his life whether or not they married. Kate, the person whose request for a ceremonial marriage was denied, testified that "she felt married and considered herself married."¹⁹² The court did not offer an explanation of those comments, *e.g.*, whether she was communicating that the ceremonial marriage would merely be a reaffirmation of what already existed¹⁹³ or, instead, would establish in law what was already established in their hearts. The court instead merely observed that "[h]er desire for a ceremonial marriage did not preclude the existence of a common law marriage."¹⁹⁴

The parties did not discuss and may not even have known whether Georgia would recognize their common law marriage. In

924 (Tex. Cr. App. 1981)); *Driscoll v. Driscoll*, 552 P.2d 629, 632 (Kan. 1976) ("The essential elements of a common law marriage are: (1) Capacity of the parties to marry; (2) a present marriage agreement between the parties; and (3) a holding out of each other as husband and wife to the public (citing *In re Keimig's Estate*, 528 P.2d 1228, 1230 (Kan. 1974)).

189 215 S.E.2d 671 (Ga. 1975).

190 *Id.* at 673.

191 *See id.* *See also id.* at 674 ("Here there was direct testimony as well as circumstantial evidence of a marriage contract.").

192 *Id.* at 674.

193 *Cf. Bolden v. Southerland*, 192 S.E.2d 718, 718 (Ga. Ct. App. 1972) ("[T]heir discussion about, and attempt to secure a license and have a ceremonial marriage was to 'prove they were married.'").

194 *Brown*, 215 S.E.2d at 674 (citing *Bolden v. Southerland*, 192 S.E.2d 718 (Ga. App. 1972)).

support of the contention that the parties considered themselves husband and wife, the Georgia court cited a “life insurance policy . . . which named Kate Kenworthy as beneficiary designating her as his wife.”¹⁹⁵ But Gene Brown was married to someone else¹⁹⁶ when he took out that policy,¹⁹⁷ so he presumably did not think of Kate as his “legal” wife.¹⁹⁸ Nonetheless, these comments specifying that Kate was his wife, in addition to the other evidence presented, provided the basis for finding that Gene and Kate established a common law marriage.¹⁹⁹ Therefore, it was not necessary to establish that the parties considered themselves legally married in order to establish the requisite intent to meet the *verba in praesenti* factor.²⁰⁰

Suppose that the members of a same-sex couple agree to be married and from then on refer to each other as “husband,” “wife,” or, perhaps, “spouse.” Those designations should have the same legal effect were the couple composed of individuals of different sexes consistently using the terms “husband,” “wife,” or “spouse” respectively.²⁰¹ Thus, whatever words would suffice to make a common law marital relationship spring into existence between different-sex spouses should, assuming that the other elements are met, literally or analogously suffice to make such a relationship spring into existence for a same-sex couple. Any other approach would offend *Obergefell* to the extent that the approach “exclude[d] same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.”²⁰²

195 *Id.*

196 *Id.* at 673 (“[B]etween 1962 and March, 1972, Gene Brown was married to another woman which prevented him from having the capacity to enter into another marriage contract.”).

197 *Id.* (“[T]he policy was taken out in 1971.”).

198 *Cf.* *Skipworth v. Skipworth*, 360 So. 2d 975, 977 (Ala. 1978) (“This court has further noted that a lawful common-law marriage is formed in this state ‘without regard to what the parties consider the legal effect of such relation to be.’”) (citing *Smith v. Smith*, 23 So.2d 605, 609 (Ala. 1945)).

199 *Brown*, 215 S.E.2d at 674 (“Here there was direct testimony as well as circumstantial evidence of a marriage contract.”).

200 [I]n modern society many individuals realize that common-law marriages have inherent legal problems not found in ceremonial marriages. Such a realization may prompt expressions of concern over the parties’ legal status as well as attempts to eliminate any problems by undergoing a ceremonial marriage. But any evidence of this sort must be examined by the fact-finder in the context of the entire relationship. *Skipworth*, 360 So. 2d at 977.

201 *Cf.* *Norman v. Ault*, 695 S.E.2d 633, 637 (Ga. 2010) (“The parties would tell people that the other was his or her spouse.”).

202 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).

2. *Reputation in the Community*

In order for two individuals to be recognized as having contracted a common law marriage, they must have a reputation in the community of being married.²⁰³ To meet this element, it is not necessary for *everyone* in the community to view the couple as married,²⁰⁴ but merely for those people who normally come in contact with the couple to so view them.²⁰⁵ However, if some of the people who know the cohabiting couple affirmatively state that the cohabitants are single while others report that the cohabitants are spouses, a court might well hold that the conditions for a common law marriage are not met because the reputation in the relevant community is not “general and uniform.”²⁰⁶

Many states require that the couple live together in order for individuals to establish that they have a common law marriage.²⁰⁷ Sometimes, the cohabitation requirement is grouped with the public reputation requirement,²⁰⁸ presumably because cohabitation is one of the reasons that the community would consider the couple married.

203 *Zharkova v. Gaudreau*, 45 A.3d 1282, 1292 (R.I. 2012) (“The plaintiff was also required to establish by clear and convincing evidence that there existed a belief in the community that she and defendant were married.”) (citing *Smith v. Smith*, 966 A.2d 109, 116 (R.I. 2009)).

204 *Nestor v. Nestor*, 472 N.E.2d 1091, 1095 (Ohio 1984) (“As to the element surrounding the reputation of the parties in the community as being man and wife, in order to establish a common law marriage it is not necessary that they disseminate information to all society generally, or to all of the community in which they reside.”).

205 *Id.* (“Rather, there must be a holding out to those with whom they normally come in contact.”).

206 *Smith v. Smith*, 966 A.2d 109, 116 (R.I. 2009) (citing *Williams v. Herrick*, 43 A. 1036, 1037 (R.I. 1899)).

207 *Bansda v. Wheeler*, 995 A.2d 189, 198 (D.C. 2010) (“[T]he proponent of the marriage must show that the parties cohabitated as husband and wife, following an express mutual agreement, which must be words of the present tense.”); *In re Marriage of Winegard*, 278 N.W.2d 505, 510 (Iowa 1979) (“There are three elements requisite to a common law marriage: (1) intent and agreement in praesenti to be married by both parties; (2) continuous cohabitation; and (3) public declaration that the parties are husband and wife.”) (citing *In re Estate of Fisher*, 176 N.W.2d 801, 805 (Iowa 1970)).

208 *Kelly v. Thompson*, 220 P.3d 627, 631 (Mont. 2009) (“To establish a common-law marriage, the party asserting the existence of the common-law marriage must prove: (1) the parties were competent to enter into a marriage; (2) the parties assumed a marital relationship by mutual consent and agreement; and, (3) the parties confirmed their marriage by cohabitation and public repute.”) (citing *In re Estate of Ober*, 62 P.3d 1114, 1115 (Mont. 2003)).

Sometimes, cohabitation is considered a separate element.²⁰⁹ In any event, it may well be quite difficult as a practical matter to establish the necessary reputation without cohabitation.²¹⁰

Community members discussing a couple's reputation will base that assessment at least in part on how the cohabitants publicly address or describe each other.²¹¹ But reputation evidence is not merely another way of discovering whether the members of the couple view themselves as married. Instead, reputation is a separate factor that must be established. "[T]here can be no secret common-law marriage."²¹² Thus, even where there is a mountain of credible evidence regarding how two individuals treated each other, e.g., from members of the household, such evidence would not suffice to establish the required reputation in the community.²¹³

*Keen v. Keen*²¹⁴ illustrates the importance of publicly acknowledging one's relationship with one's common law spouse. The case involved a cohabiting couple who had eight children together²¹⁵ over a period of 30 years.²¹⁶ When outsiders visited the

209 See *Bansda*, 995 A.2d at 198; *Winegard*, 278 N.W.2d at 510; *Maxfield v. Maxfield*, 258 P.2d 915, 921 (Okla. 1953) ("The requisite elements of a common law marriage so often have been stated as to hardly require citation of authority. Such a marriage requires competent parties, who enter the relationship by mutual agreement, exclusive of all others, consummating the arrangement by cohabitation and open assumption of other marital duties.") (citing *In re Trope's Estate*, 124 P.2d 733, 736 (Okla. 1942)).

210 See Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of A Shared Moral Life*, 75 GEO. L.J. 1829, 1843 (1987) ("Because the public behavior most characteristic of husbands and wives and least culturally variable is cohabitation, the reputation element itself depends primarily on open cohabitation.").

211 See *In re Marriage of Martin*, 681 N.W.2d 612, 618 (Iowa 2004) ("[T]here were other times that Roberta and Brett declared themselves to be single or divorced, and otherwise portrayed themselves to others in a manner inconsistent with marriage."); *Winthrop v. Harden*, 2002-Ohio-6217, ¶ 31 ("The record is replete with instances of the appellant representing herself as 'single' and often benefitting from her status as a 'single' person.").

212 *In re Dallman's Estate*, 228 N.W.2d 187, 190 (Iowa 1975) (citing *In re Estate of DeWitte*, 222 N.E.2d 285, 288 (Ind. App. 1966)).

213 Cf. *In re Marriage of Martin*, 681 N.W.2d at 618 ("The public declaration or holding out to the public is considered to be the acid test of a common law marriage.").

214 83 S.W. 526 (Mo. 1904).

215 *Id.* at 526 ("As the fruits of their intercourse, eight children were born . . .").

216 *Id.* at 528 ("The course of living between them continued and remained the same from the beginning of their cohabitation, in 1850 or 1851, down to their final separation and the cessation of their intercourse, in 1882 or 1883.").

couple in their home, Eli Keen referred to Phoebe as his wife.²¹⁷ However, he did not appear in public with her²¹⁸ and did not acknowledge her as his wife outside of his home.²¹⁹ In affirming the failure to establish a common law marriage,²²⁰ the Missouri Supreme Court explained that the couple did not possess the reputation in the community of being married.²²¹ That finding was important. Had the alleged common law marriage been recognized, the alleged husband's subsequent ceremonial marriage²²² would have been null and void,²²³ which would have meant that the ceremonial wife would not have been entitled to elect against the will.²²⁴

Eli Keen's willingness to acknowledge the relationship privately but not publicly is more understandable when one recognizes that (1) Eli and Phoebe were an interracial couple,²²⁵ (2) during the entire relevant period, Missouri law prevented interracial marriage,²²⁶ and (3) during part of that period, Missouri criminalized attempting to enter into such a marriage.²²⁷ Had Eli and Phoebe publicly proclaimed their marriage, doing so would not have

217 *Id.* at 527 (“Eli Keen, at his own house, introduced Phoebe to several different persons as his wife.”).

218 *Id.* (“Eli Keen was never seen out with Phoebe, except when in his own house or yard. He was never seen off of the place with her. He was never known to visit friends with her.”).

219 *Id.* (“He was never known to introduce her to anybody as his wife outside of his own home, and he was never known to be with her and acknowledge her as his wife outside of his own house.”).

220 *Keen*, 83 S.W. at 529 (“The result is that there never was any kind of a marriage between Eli and Phoebe — either ceremonial, statutory, or common law.”).

221 *See id.* at 527.

222 *See id.*

223 *See id.* at 529 (“[M]arriages, where either party has a former wife or husband living, are declared to be void.”) (citing Rev. St. 1899, § 4313); *Davis v. Whitlock*, 73 S.E. 171, 175 (S.C. 1911) (“The second marriage during the life of the first husband must under the Constitution be absolutely void.”).

224 The plaintiff, in due form of law, filed her renunciation of the last will and testament of Eli Keen, her husband, on April 1, 1901, declining to accept the provisions made for her in said will. On April 1, 1901, by her election in writing, executed, acknowledged, filed, and recorded according to law, plaintiff elected to take one-half of her husband's estate, subject to the payment of his debts, under the provisions of section 2939, Rev. St. 1899. *See Keen*, 83 S.W. at 528.

225 *Id.* (“Eli Keen was a white man, and Phoebe was a negro.”).

226 *Id.* at 529 (“[T]he law made such a marriage illegal and void.”).

227 *Id.* (“[S]ince 1879 such a marriage has been a crime that might be punished as a felony or a misdemeanor.”) (citing Rev. St. 1879, c. 24, § 1540; Rev. St. 1889, c. 47, art. 8, § 3797; Rev. St. 1899, c. 15, art. 8, § 2174).

established the marriage's validity²²⁸ but might have made them subject to prosecution.²²⁹

Suppose that an interracial couple lived in a state that did not criminalize the relationship. Even so, a community disapproving of such relationships might be less willing to accept that the couple was living licitly by having contracted a common law marriage. What would have sufficed for an intra-racial couple to acquire the reputation of being married in the community might not have sufficed for an interracial couple to achieve the necessary reputation in the community.²³⁰ When seeking to establish the reputational element, it may be important to inquire whether the members of the couple held themselves out as spouses (as opposed to housemates or good friends) rather than held themselves out as married under the law.²³¹ Otherwise, community beliefs regarding "proper" marriages and the inordinately high bar that might be set for certain couples holding themselves out as common law spouses might prevent relevantly similar couples from enjoying similar benefits.

3. *Legality of the Marriage*

A couple barred by law from celebrating a ceremonial marriage will also be barred from contracting a common law marriage.²³² For that very reason, Eli and Phoebe Keen would not have been able to establish either a ceremonial or a common law marriage during the time that they were together.²³³ Similarly, if the parties are too closely related by blood to enter into a ceremonial marriage, they also cannot enter into a common law marriage.²³⁴

228 See *supra* note 228 and accompanying text.

229 See *supra* note 205 and accompanying text.

230 Cf. *Johnson v. Dudley*, 4 Ohio Dec. 243, 248 (C.P. 1896): Had Malachi Warren been living with a woman of the same blood as himself, under precisely the same circumstances, during all those years, I doubt whether anybody in the town of Oberlin would have ever questioned from the fact of the relationship, his conduct and treatment of his family, anything other than a lawful union.

231 Cf. *Jones v. Gen. Motors Corp., Fisher Body Detroit Div.*, 17 N.W.2d 770, 772 (Mich. 1945) (discussing "parties who live together as husband and wife and who treat each other as such").

232 See *De Santo v. Barnsley*, 476 A.2d 952, 954 (Pa. Super. Ct. 1984) ("[T]he limits of common law marriage must be defined in light of the limits of statutory marriage.").

233 See *supra* note 222.

234 See *In re Wittick's Estate*, 145 N.W. 913, 914 (Iowa 1914) ("[N]o rights could arise under a common-law marriage in Iowa, between cousins, unless such

Sometimes, the bar to a couple's marrying is only temporary. For example, the Browns²³⁵ could not have established a ceremonial or common law marriage while Gene Brown had a wife living from whom he had not obtained a divorce.²³⁶ However, once Brown and his first wife ended their marriage, he was free to marry Kate Kenworthy.²³⁷

Where an individual already has a spouse, there is an impediment to that individual's marrying someone else and that individual will not have the capacity to do so.²³⁸ Thus, even if two individuals have articulated their intentions to establish a marital relationship and even if that couple has the reputation in the community of being in a marital relationship, they will not be able to establish a common law marriage while the impediment to their marrying still exists.²³⁹

Suppose that the impediment is removed. Assuming that the other elements are met, some states suggest that the removal of an impediment to a common law marriage will thereby transform the relationship into such a marriage.²⁴⁰ In contrast, other states suggest that even if the other elements have been met, the couple must recognize that there has been a change in the nature of their relationship now that the impediment has been removed.²⁴¹ For

was entered into prior to July 4, 1909 [the date upon which marriages between cousins were prohibited by statute].”).

235 See *supra* notes 190-200 and accompanying text.

236 See *Brown v. Brown*, 215 S.E.2d 671, 673 (“Gene Brown was married to another woman which prevented him from having the capacity to enter into another marriage contract.”).

237 *Id.* (“After his divorce in March, 1972, he was free to contract a marriage with the plaintiff.”).

238 *Id.*

239 *Callen v. Callen*, 620 S.E.2d 59, 62 (S.C. 2005) (“When, however, there is an impediment to marriage, such as one party’s existing marriage to a third person, no common-law marriage may be formed, regardless whether mutual assent is present.”).

240 *Hill v. Shreve*, 448 P.2d 848, 851 (Okla. 1968) (“[T]he acts of living together and holding themselves out as husband and wife, after removal of a legal impediment to marriage constitute a common-law marriage, even though both parties knew of the impediment.”). See also *Sims v. Sims*, 85 So. 73, 75 (Miss. 1920) (suggesting that the majority view is that “no such new agreement is necessary”).

241 [T]he removal of an impediment to a marriage contract (the divorce in this case) does not convert an illegal bigamous marriage into a common law legal marriage. After the barrier to marriage has been removed, there must be a new mutual agreement, either by way of civil ceremony or by way of a

example, after a divorce has been granted or, perhaps, the former spouse of one of the parties has died, the members of the couple by word or act might recognize that they are *now* free to establish a common law marriage.²⁴²

Another kind of impediment is presented when at least one of the parties is not competent to contract a marriage, *e.g.*, because he or she is too young. Once the minor reaches majority, he or she can ratify the marriage, thereby making it valid from the time that it was initially contracted.²⁴³ Where ratification is at issue, the focus

recognition of the illicit relation and a new agreement to enter into a common law marriage arrangement. *Byers v. Mount Vernon Mills, Inc.*, 231 S.E.2d 699, 700 (S.C. 1977).

242 On May 8, 1962, Mr. Garges and Elizabeth Moyer Garges were divorced. The court found that shortly after the divorce Mr. Garges showed his copy of the divorce decree to Mildred K. Moyer. He told her, "Now we're legally married," and she replied, "It's about time. That's just what we were waiting for." Afterwards, Ms. Moyer began to wear a wedding ring decedent had given her long before his divorce. *See In re Garges' Estate*, 378 A.2d 307, 308 (Pa. 1977). *See also* *Davis v. Whitlock*, 73 S.E. 171, 172 (S.C. 1911) ("[T]he cohabitation of the plaintiff and defendant subsequent to the death of Whitlock, without any new agreement, would be referred to the original unlawful relation, and could not afford ground for inferring a subsequent valid marriage.") However, if the cohabitation had begun after the first spouse was reasonably but mistakenly believed to have died, then the removal of the impediment, *e.g.*, the subsequent death of that first spouse, would not prevent the common law marriage from being recognized even if the couple did nothing new after the death of that first spouse. But the authorities are unanimous in holding that if a man and woman enter into a contract of marriage believing in good faith that they are capable of entering into the relation notwithstanding a former marriage, when, in fact, the marriage is still of force, and after the removal of the obstacle of the former marriage the parties continue the relation and hold themselves out as man and wife, such action constitutes them man and wife from the date of the removal of the obstacle. *See id.* at 175. *See also* *Dowd v. Dowd*, 418 A.2d 1387, 1388-89 (Pa. Super. 1980).

243 *See* *Jones v. Jones*, 36 Md. 447, 456 (1872) ("But there are cases in which marriages, contracted between parties not capable of contracting at the time of the marriage, are made valid by the subsequent ratification of the parties, as in the cases of lunatics and infants, and that without any other or new celebration.") (citing *Cole v. Cole*, 33 Tenn. 57, 63 (1857), *Wightman vs. Wightman*, 4 Johns. Chan. Reps., 345); *Parks v. Parks*, 10 S.E.2d 807, 810 (N.C. 1940) ("The parties, after marrying in Virginia, came back to this State and cohabitated as man and wife. The plaintiff by so doing ratified the voidable marriage which took place in Virginia, and thus became a valid marriage."); *Matter of Estate of Murnion*, 686 P.2d 893, 899-900 (Mont. 1984) ("Here the beginning date of the common-law marriage was the date of their mutual consent to be married, September 4, 1982. At the time of their original consent, their marriage was invalid in the State of Washington.").

is not on the change in understanding of the parties with respect to whether they are free to contract a marriage but, instead, on whether they continue to cohabit when both have attained the age required for consent.²⁴⁴

State law might present a different kind of impediment precluding the recognition of common law marriages.²⁴⁵ However, a couple might move to a state recognizing common law marriages and contract one in that latter state.²⁴⁶ Or, a state might change its law²⁴⁷ and begin to recognize common law marriages.²⁴⁸ In that

244 See *Hood v. Hood*, 178 S.W.2d 670, 674 (Ark. 1944) (discussing whether “at some time after that date, and after appellant became eighteen years old, . . . [there was] cohabitation such as would amount to a ratification of the marriage”); See also *Holtz v. Dick*, 42 Ohio St. 23, 23 (1884) (“A marriage entered into in this state when the wife is less than sixteen years of age, becomes irrevocable by cohabitation at the time, and after she arrives at that age.”).

245 See, e.g., OHIO REV. CODE ANN. § 3105.12(B)(1)-(3) (West 2004)

(1) On and after October 10, 1991, except as provided in divisions (B)(2) and (3) of this section, common law marriages are prohibited in this state, and the marriage of a man and woman may occur in this state only if the marriage is solemnized by a person described in section 3101.08 of the Revised Code and only if the marriage otherwise is in compliance with Chapter 3101 of the Revised Code.

(2) Common law marriages that occurred in this state prior to October 10, 1991, and that have not been terminated by death, divorce, dissolution of marriage, or annulment remain valid on and after October 10, 1991.

(3) Common law marriages that satisfy all of the following remain valid on and after October 10, 1991:

(a) They came into existence prior to October 10, 1991, or come into existence on or after that date, in another state or nation that recognizes the validity of common law marriages in accordance with all relevant aspects of the law of that state or nation.

(b) They have not been terminated by death, divorce, dissolution of marriage, annulment, or other judicial determination in this or another state or in another nation.

(c) They are not otherwise deemed invalid under section 3101.01 of the Revised Code.

246 *Grammas v. Kettle*, 10 N.W.2d 895, 896-97 (Mich. 1943) (couple established common law marriage by moving from Illinois, where such marriages could not be contracted, to Michigan where they could be contracted).

247 *Whyte v. Blair*, 885 P.2d 791, 793 (Utah 1994) (“Prior to 1987, Utah never recognized common law marriages; indeed, such marriages were expressly prohibited.”) (citing Utah Code Ann. § 30-1-2(3) (1984) (repealed by § 30-1-4.5 (1987))).

248 See UTAH CODE ANN. § 30-1-4.5 (West 1953).

event the common law marriage might be recognized as of the time the state permits such marriages.²⁴⁹

As a general matter, when a court finds that a common law marriage has been contracted, the date at which the marriage will have begun will be sometime in the past.²⁵⁰ Establishing the date at which the common law marriage commences depends upon a number of factors, including when the parties agreed to be married²⁵¹ and whether at that time there was an existing impediment to the marriage, such as a statutory prohibition²⁵² or whether a party possessed a living spouse.²⁵³ Regardless of when a common law marriage begins, its creation will have certain implications.

B. The Effect of Contracting a Common Law Marriage

A common law marriage, once contracted, will end only upon divorce, dissolution, annulment, or death of one of the parties.²⁵⁴ Such a marriage will not end simply because one of the parties moves out of the house.²⁵⁵ Because individuals can only have one spouse at a time, an individual who is currently in a common law marriage cannot validly enter into a ceremonial marriage²⁵⁶ or a different

249 See *Whyte*, 885 P.2d at 793 n.2 (“Each of those cases considered the validity of a common law marriage in Utah prior to 1987. Because such marriages were prohibited prior to 1987, they were not valid. By contrast, in the present case the relationship that possibly establishes a common law marriage existed well after 1987.”).

250 *Id.* at 793 (“An order entered today may establish that a marriage was contracted and in existence sometime in the past.”).

251 See *supra* notes 183-86 and accompanying text (discussing this factor).

252 See *supra* notes 247-51 and accompanying text (discussing this factor).

253 See *supra* notes 240-44 and accompanying text (discussing this factor).

254 OHIO REV. CODE ANN. § 3105.12 (B)(2) (West 2004) (“Common law marriages that occurred in this state prior to October 10, 1991, and that have not been terminated by death, divorce, dissolution of marriage, or annulment remain valid on and after October 10, 1991.”); *Aldana v. Aldana*, 42 S.W.2d 661, 665 (Tex. App. 1931) (“Such common-law marriage, like a ceremonial marriage can be set aside or annulled only by a decree of divorce or by death of one of the parties of the marriage.”), *dismissed without judgment* (1932).

255 Cf. *Nicolas*, *supra* note 174, at 934 (“[W]hile common law marriage allows for a less formal method of entry into marriage, there is no equally informal exit option, such as ‘common-law divorce.’”). See also *Wilkins v. Wilkins*, 48 P.3d 644, 649 (Idaho 2002) (“[T]here is no common law divorce.”) (citing *Metro. Life Ins. Co. v. Johnson*, 645 P.2d 356, 362 (Idaho 1982)).

256 *Nyhuis v. Pierce*, 114 N.E.2d 75, 78 (Ohio Ct. App. 1952) (“The common-law marriage of Harry A. Kohler and Willda R. Sampsell which is supported by clear and convincing proof makes the attempted ceremonial marriage of

common law marriage until that first (common law) marriage has ended.²⁵⁷

Part of establishing a common law marriage involves taking on the rights and obligations of marriage.²⁵⁸ When the marriage ends, there may be property to distribute and spousal support to award.²⁵⁹ In addition, there may be issues of child custody and support.²⁶⁰

In short, individuals may marry ceremonially or may enter into a common law marriage where permitted by local law.²⁶¹ Regardless of how the marriage comes to be established, i.e., through a ceremony or through operation of the common law, parties who have married thereby acquire rights and obligations that will affect *inter alia* property rights and their freedom to marry someone else.²⁶²

Nyhuis and Sampsell void ab initio.”).

257 See *Texas Emp’rs’ Ins. Ass’n v. Elder*, 282 S.W.2d 371, 373 (Tex. 1955) (“Ethel Mae and Allen Dade became husband and wife by a common-law marriage prior to 1932; thereafter Ethel Mae became the common-law wife of Grover Cleveland Elder, the deceased employee. Obviously, if the first marriage had never been dissolved, the second marriage was invalid.”).

258 *Metro. Life Ins. Co. v. Johnson*, 645 P.2d 356, 361 (Idaho 1982) (“[A] marriage which is not solemnized requires the mutual consent of competent parties, followed by a mutual assumption of marital rights, duties or obligations.”) (citing *Hamby v. Simplot Co.*, 498 P.2d 1267 (Idaho 1972)).

259 See *Norman v. Ault*, 695 S.E.2d 633, 635 (Ga. 2010) (“In her answer, Ms. Ault counterclaimed for divorce [from her common law marriage], alimony, and an equitable division of the parties’ assets and debts.”); *Morris v. Morris*, 463 S.W.2d 295, 295 (Tex. App. 1971) (affirming trial court judgment that “the parties ‘. . . did consummate a common law marriage and as issue of such marriage there was one child born . . .’ The trial court’s judgment dissolved the marriage, divided the community property, granted the present care, custody and control of the minor child to the appellee and ordered the appellant to make regular child support payments.”).

260 See, e.g., *E. v. E.*, 536 A.2d 1103, 1104 (D.C. 1988) (“We hold that the finding of a common-law marriage is supported by the evidence and that the child support order was within the permissible range of the court’s discretion.”).

261 See *Lowe v. Broward Cty.*, 766 So. 2d 1199, 1211 (Fla. Dist. Ct. App. 2000) (“When recognized in Florida, common law marriages were given the ‘same dignity and recognition’ as was accorded to ceremonial marriages.”) (citing *Budd v. J.Y. Gooch Co.*, 27 So. 2d 72, 74 (Fla. 1946)); *In re Brack’s Estate*, 329 N.W.2d 432, 435 (Mich. App. 1982) (quoting with approval a trial court’s conclusion that “[o]bviously, a valid common law [marriage] would have the same continuous legal effect as a ceremonial marriage.”); *Elk Mountain Ski Resort, Inc. v. Workers’ Comp. Appeal Bd.*, 114 A.3d 27, 32 (Pa. Commw. Ct. 2015) (“In Pennsylvania, a marriage is a civil contract. There are two kinds of marriage: (1) ceremonial and (2) common law.”) (citing *In re Manfredi’s Estate*, 159 A.2d at 700).

262 Cf. *U.S. v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (noting that “the incidents,

C. Same-Sex Common Law Marriages

After *Obergefell*, same-sex couples are also able to contract common law marriages.²⁶³ That said, a number of issues will have to be addressed. States might differ about the required contents of the agreement between the parties. They also might differ about what must be shown to establish the necessary reputation in the community. Further, they may differ about the date at which the common law marriage will have commenced. The resolution of these issues may depend upon interpretations of both federal and state law.

Suppose that two adults of the same sex agree to treat each other as spouses and are regarded by friends and family as spouses. Assuming that they are unmarried,²⁶⁴ competent,²⁶⁵ and are not too closely related by blood,²⁶⁶ they will now be viewed as having contracted a common law marriage, assuming that the jurisdiction permits such marriages to be contracted.

Suppose, however, that the agreement to be married occurred before *Obergefell* and before the state began recognizing same-sex marriages. The state might be tempted to liken such a case to one in which the agreement to be married must later be ratified before the marriage will be recognized.²⁶⁷ Once the couple ratifies the marriage, its existence will have been established. However, a separate issue will involve the date upon which the marriage will be deemed to have begun – whether it should be dated as of June 26, 2015, the date *Obergefell* was issued.²⁶⁸

benefits, and obligations of marriage are uniform for all married couples within each State”).

263 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).

264 750 ILL. COMP. STAT. ANN. 5/212(a)(1) (West 2014) (“The following marriages are prohibited: . . . a marriage entered into prior to the dissolution of an earlier marriage, civil union, or substantially similar legal relationship of one of the parties.”).

265 IND. CODE ANN. § 31-11-8-4 (West 1997) (“A marriage is void if either party to the marriage was mentally incompetent when the marriage was solemnized.”).

266 Marriages between ancestors and descendants of any degree, of a stepfather with a stepdaughter, stepmother with stepson, between uncles and nieces, aunts and nephews, except in cases where such relationship is only by marriage, between brothers and sisters of the half as well as the whole blood, and first cousins are declared to be incestuous, illegal and void, and are expressly prohibited. OKLA. STAT. ANN. tit. 43, § 2 (West 1969).

267 See *supra* notes 243-44 and accompanying text.

268 See *Obergefell*, 135 S. Ct. 2584.

To understand why the date of the *Obergefell* decision might *not* be the effective date, it is helpful to consider a different scenario. Suppose that Congress passed a law requiring all states to recognize same-sex marriages and, further suppose that such a law was constitutional.²⁶⁹ In that event, the valid federal law would be viewed as preempting the existing state prohibition²⁷⁰ and the date that the federal law went into effect would provide a date that the previously prohibited same-sex common law marriage might be thought to have begun because that would be the date as of which the prohibition would be treated as null and void.²⁷¹ The difficulty posed here, however, is that *Obergefell* held same-sex marriage bans unconstitutional,²⁷² and most if not all cases in which the Court holds civil laws unconstitutional are to be given retroactive effect.²⁷³

Suppose that *Obergefell* were given retroactive effect without exception. In that event, all laws banning same-sex marriage would be null and void and would not be a legal impediment to the recognition of a common law marriage. Such a ruling might have important implications in states in which common law marriages could be contracted by different-sex couples. If two individuals of the same sex had agreed to be spouses and were recognized by family and friends as spouses in such a state, and if the legal impediment to their marriage was retroactively removed by *Obergefell*, then the state should recognize the common law marriage as of the time that the hypothesized same-sex couple made the requisite agreement.

*Spellman v. Boland*²⁷⁴ helps illustrate that a same-sex common

269 *But see* United States v. Lopez, 514 U.S. 549, 564 (1995) (suggesting that Congress cannot regulate paradigmatic state concerns such as marriage, divorce, and child custody).

270 See Eang L. Ngov, *Under Containment: Preempting State Ebola Quarantine Regulations*, 88 TEMP. L. REV. 1, 10 (2015) (“Preemption commands that state law yield in the face of conflicting federal law.”); Rene Erm II, *The “Wise Use” Movement: The Constitutionality of Local Action on Federal Lands Under the Preemption Doctrine*, 30 IDAHO L. REV. 631, 646 (1994) (“A valid federal law will always preempt conflicting state or local legislation and preemption is valid regardless of the nature of the conflict.”).

271 See *Ryder v. United States*, 515 U.S. 177, 185 (1995) and *supra* note 173 and accompanying text.

272 *Obergefell*, 135 S. Ct. at 2604 (“[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”).

273 See *Ryder v. United States*, 515 U.S. 177, 185 (1995) and *supra* note 173 and accompanying text.

274 142 A.3d 561 (D.C. 2016).

law marriage might be given effect prior to the time that local law permitted such unions to be celebrated. At issue was a claim by David Spellman that he and Michael Kelly had contracted a common law marriage in the District of Columbia²⁷⁵ starting in 1998²⁷⁶ when they first moved in together.²⁷⁷ This suit focused on whether Spellman could sue Boland “in his capacity as personal representative of Mr. Kelly’s estate.”²⁷⁸ Holding that Boland had sufficient contacts with the District related to the underlying suit for the court to have personal jurisdiction over him,²⁷⁹ the court remanded the case for consideration of the underlying claim.²⁸⁰

A few facets of this case are worth emphasizing. Spellman argues that the common law marriage began in 1998, although the District of Columbia did not recognize same-sex marriage until 2010.²⁸¹ The District will not recognize a common law marriage when a legal impediment to that marriage exists,²⁸² which might be thought to mean that the common law marriage could not have existed before the removal of the legal impediment in 2010. But if under *Obergefell* the legal impediment never existed because the law prohibiting the marriage was void and of no legal effect, then the common law marriage could have begun in 1998 when they allegedly agreed to be married.

The *Spellman* court expressly refused to address whether Spellman and Boland established a common law marriage,²⁸³ and

275 *Id.* at 562 (“Appellant James David Spellman filed a petition in Superior Court seeking a declaration affirming the existence of a common-law marriage between Mr. Spellman and his late partner, Michael Joseph Kelly.”).

276 *Id.* at 564 (“Mr. Spellman further claims that that common-law marriage should now be recognized as having existed since 1998.”).

277 *Id.* at 563 (“Mr. Kelly owned a home in the District until 1998, when he moved in with Mr. Spellman at Mr. Spellman’s home in the District.”).

278 *Id.* at 562.

279 *Id.* at 565 (“[T]he Constitution . . . permit[s] the Superior Court to exercise personal jurisdiction over Mr. Kelly because Mr. Kelly had minimum contacts with the District that sufficiently relate to the underlying dispute.”).

280 *Spellman*, 142 A.3d at 565 (“[T]he case is remanded for further proceedings.”).

281 *Id.* at 564 (“[S]ame-sex marriage was not statutorily recognized in the District until 2010.”).

282 *See Parrella v. Parrella*, 33 F. Supp. 614, 614 (D.D.C. 1940) (“[I]t would be thwarting the true objective of that legal policy to hold that, when such impediment was removed by death, and the parties continued to live together, their relation as husband and wife cannot be recognized.”) and *id.* (“It would be futile to annul the ceremonial marriage in this case when the plaintiff is obligated under his common-law marriage to the defendant.”).

283 *See Spellman*, 142 A.3d at 564 (“Mr. Spellman claims that, as a result of Mr.

therefore did not find they that they contracted the marriage in 1998. Nonetheless, if the relevant factors could be established on remand,²⁸⁴ the point at which the common law marriage began might well depend upon whether there was a legal impediment to that marriage and, if so, when it was removed.

V. Conclusion

After *Obergefell*, same-sex couples, like different-sex couples, can establish common law marriages in jurisdictions permitting such agreements to be contracted. A separate question is whether the Court's holding that same-sex marriage bans are unconstitutional should be retroactive without exception or, instead, retroactive subject to some or all of the *Chevron Oil* exceptions. The *Obergefell* holding was foreseeable in light of the Court's previous holdings, so it was not as if that decision could not have been anticipated and in many cases that *Chevron Oil* prong would not be applicable.²⁸⁵ Nonetheless, a retroactive application in particular cases might cause great hardship by undermining property rights²⁸⁶ or even by making a subsequently celebrated marriage bigamous.

Even if the Court applied *Obergefell* retroactively without exception, state remedies might reduce the harm caused by such an application, e.g., by permitting a putative spouse to share in an

Kelly's substantial and extended conduct in the District, a common-law marriage arose in the District . . . that . . . should now be recognized as having existed since 1998."'). See also *id.* at 564-65 ("The merits of that claim are distinct from the conclusion we reach today."').

284 From 1998 to 2006, Mr. Spellman and Mr. Kelly shared a residence in the District and held themselves out as partners. Mr. Kelly lived and worked in the District until 2006, when he retired. During the period from 2006 to 2012, Mr. Kelly and Mr. Spellman continued to co-host social events in the District, send joint holiday cards from Mr. Spellman's address in the District, and attend events together in the District. See, e.g., *id.* at 563-64.

285 That said, *Obergefell* would not have been reasonably foreseeable in 1986 right after *Bowers v. Hardwick* was issued. For a discussion of *Bowers*, see *supra* notes 6-26 and accompanying text.

286 Compare *DeLyra v. DeLyra*, 532 N.Y.S.2d 899, 900 (1988), *aff'd*, 547 N.E.2d 85 (N.Y. 1989) ("[W]hen a marriage is declared void, the property acquired during the parties' purported marriage and before the commencement of the action is subject to equitable distribution."), with *Osoinach v. Watkins*, 180 So. 577, 581 (Ala. 1938) ("The attempted marriage being null and void conferred no property rights upon Mrs. Watkins.") (citing *Barfield v. Barfield*, 35 So. 884 (Ala. 1904); *Sibley v. Kennedy*, 140 So. 552 (Ala. 1932)).

estate.²⁸⁷ But the Court will have to make clear the conditions, if any, under which *Obergefell* should not be applied retroactively to help state courts decide which same-sex common law marriages came into existence and when they began. A host of rights and obligations might depend upon such a determination, and it is in the interest of both individuals and society as a whole for the Court to make clear how this issue should be handled.

287 Christopher L. Blakesley, *The Putative Marriage Doctrine*, 60 TUL. L. REV. 1, 2 (1985) (“The classic putative marriage doctrine is substantive, ameliorative or corrective; it is designed to allow all the civil effects — rights, privileges, and benefits — which obtain in a legal marriage to flow to parties to a null marriage who had a good faith belief that their ‘marriage’ was legal and valid.”).

Fractality of Patentability under the New Subject Matter Eligibility Scheme

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Abstract

In science, a fractal is a phenomenon that exhibits the same pattern at different scales.¹ Some recent changes in the law of patentability have given the law a fractal-like characteristic. In particular, one section of the law, which deals with the subject matter eligibility of a patent application, has incorporated other sections of the law, albeit in abbreviated forms.

In this paper, we present the evidence of this fractality in the recent rulings of all levels of the federal courts and explore the policies behind the changes and their practical consequences. More specifically, we show that the changes were intended to, and resulted in, enabling lower courts to invalidate a larger number of patents at an earlier stage of litigation as being subject matter ineligible. Similarly, these changes have enabled the United States Patent and Trademark Office (USPTO) to reject a larger number of patent applications based on the threshold criterion of subject matter eligibility.

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¹ See, e.g., *What Are Fractals?* FRACTAL FOUNDATION, <http://fractal.foundation.org/resources/what-are-fractals/> (last visited Mar. 11, 2017).

I. Introduction

To be granted a patent on an invention, a patent application needs to satisfy multiple conditions required by patent law.² One of those conditions asks, as a threshold question, whether the subject matter of the purported invention is of the type that the law even considers for patenting.³ Unless this condition of subject matter eligibility (“SME”) is satisfied, the invention does not reach the more substantive criteria of the patentability test, such as the requirements of novelty, nonobviousness, and enablement.⁴

In the past few years, SME has grown in relevance from a rather easy criterion to one of the most important issues in patent law and a serious hurdle, at least for some categories of inventions. What triggered these changes is a series of seminal rulings by the Supreme Court, which set a purported new scheme for the SME analysis.⁵ Other stakeholders, such as the patent office,⁶ the federal district courts,⁷ and the Court of Appeals for the Federal Circuit (“CAFC”),⁸ have followed suit by working hard to define the practical details of the new law within the new scheme. This recent evolution of the law of SME has not finished yet.⁹ The near future may bring further clarification or revisions in the details of the law or maybe even in the overall scheme.

The present status of the SME analysis, most recently reiterated and explained in *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*,¹⁰

2 See 35 U.S.C. §§ 101, 102, 103, 112 (2012).

3 See 35 U.S.C. § 101(2012).

4 See 35 U.S.C. §§ 102, 103, 112 (2012).

5 See, e.g., *Bilski v. Kappos*, 561 U.S. 593 (2010); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, (2012); *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347 (2014).

6 See, e.g., Interim Guidance on Patent Subject Matter Eligibility, 79 Fed. Reg. 74,618 (Dec. 16, 2014); July 2015 Update on Subject Matter Eligibility, 80 Fed. Reg. 45,429 (July 30, 2015); U.S.P.T.O., JULY 2015 UPDATE: SUBJECT MATTER ELIGIBILITY (2015); ROBERT W. BAHR, U.S.P.T.O., MAY 19, 2016 MEMORANDUM (2016) (interpreting *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1336 (Fed. Cir. 2016)); ROBERT W. BAHR, U.S.P.T.O., RECENT SUBJECT MATTER ELIGIBILITY DECISIONS, MEMORANDUM (Nov. 2, 2016) (interpreting *McRO, Inc. v. Bandai Namco Games America Inc.*, 837 F.3d 1299, 1314-16 (Fed. Cir. 2016) and *Bascom Global Internet Services, Inc. v. AT&T Mobility LLC*, 827 F.3d 1341, 1349-50 (Fed. Cir. 2016)).

7 See *infra* sections III(C), IV(C).

8 See *id.*

9 See *infra* notes 149, 150, and accompanying texts.

10 *Alice*, 134 S.Ct. at 2347.

has given patent law a fractal-like characteristic: the threshold SME question under section 101 is shaping up to include some aspects of the full patentability analysis. Specifically, the SME analysis includes mini versions of the inquiries surrounding patentability that should instead be evaluated under the more substantive criteria within sections 102, 103, and 112.¹¹

These mini-analyses within the SME analysis often implicitly look at other patentability criteria such as definiteness, written description support, novelty, and non-obviousness of the claimed invention, which were traditionally the provinces of other sections of the Patent Act, i.e., sections 112, 102, or 103. These mini-analyses, however, do not follow, and often fall short of, the established frameworks for applying those other criteria. Instead, under the cover of a section 101 analysis, judges often apply those criteria in a summary manner and based on the judge's understanding of the claimed invention or the judge's knowledge of potential prior art.¹² The SME examination, therefore, has turned into a powerful tool to quickly dispose of a patent or a patent application that strikes a judge or a USPTO patent examiner as ineligible for patenting.

Below, we present the evidence that the SME analysis under section 101 has incorporated abbreviated versions of the analyses under sections 102, 103, and 112. Moreover, we explore the intentions behind the changes and the consequences of those changes.

II. Section 101: SME Analysis and Judicial Exceptions

The SME analysis starts with the text of section 101, "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor"¹³ Therefore, the SME analysis asks, in this first step, whether the claimed invention falls within one of the four enumerated patent eligible subject matters, which are: (1) a process, also known as a method, (2) a machine, (3) a manufacture, and (4) a composition of matter, with the last three categories collectively called products.¹⁴

11 See *infra* sections III(B), IV(B).

12 See *infra* sections III(C), IV(C).

13 See 35 U.S.C. § 101.

14 See *id.*; see also MANUAL OF PATENT EXAMINING PROCEDURE, Ninth Edition, Revision 07.2015, § 2106 (I) (hereinafter "MPEP").

But even if the invention is directed to one of these subject matters, and contrary to the plain language of the statute, the inquiry does not stop there.¹⁵ It proceeds further to a second step that asks whether the claimed invention falls within one of the judicially recognized exceptions to section 101, which are: laws of nature, natural phenomena, and abstract ideas, in which case the claimed invention will be disqualified.¹⁶ Below, we trace the history of these judicial exceptions.

A. Foundational Principles

The basis for the SME exceptions has gone through a long evolution. Beginning with *O'Reilly v. Morse*,¹⁷ the SME exceptions were not originally decided under the now-section 101 umbrella. Instead, the Supreme Court found the claims to be too broad or otherwise not patentable as a result of the other substantive Patent Act requirements.

In *O'Reilly v. Morse*, Samuel Morse's claims for the telegraph were challenged.¹⁸ One of Morse's claims was directed to any method of transmitting information over long distances using electro-magnetic force.¹⁹ The language of the claim, therefore, did not limit Morse to his telegraph, but rather to any use of electro-magnetism for print at a distance. The Court invalidated this claim, noting that

15 See e.g. *Parker v. Flook*, 437 U.S. 584, 589 (1978) (stating that a "purely literal reading of §101" is inappropriate).

16 *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980); see *Alice*, 134 S. Ct. at 2354; see also MPEP, *supra* note 14 § 2106 (II).

17 56 U.S. 62 (1853).

18 *Id.* at 106.

19 *Id.* at 112. The eighth claim stated: "I do not propose to limit myself to the specific machinery or parts of machinery described in the foregoing specification and claims, the essence of my invention being the use of the motive power of the electric or galvanic current, which I call electro-magnetism, however developed for marking or printing intelligible characters, signs, or letters, at any distances, being a new application of that power of which I claim to be the first inventor or discoverer." *Id.* To contrast, Morse's other seven claims were held valid. See *id.* at 123. His first claim, for example, did "not claim the use of the galvanic current, or current of electricity, for the purpose of telegraphic communications, generally," but rather claimed "making use of the motive power of magnetism . . . as means of operating or giving motion to machinery." *Id.* at 85. This claim was characterized as "the first recording or printing telegraph by means of electro-magnetism." *Id.* Claims two through seven were similarly tangible machines that improved this invention. *Id.* at 85-86.

the claim would give Morse an exclusive right to a process that he had not invented, because the claim was too broad compared to what was described in the patent.²⁰ In finding the claim too broad to be eligible for patent protection, the Court also considered whether the claim was directed to a natural principle, i.e., a natural law (which the Court deemed not patentable) or an application of the principle (which the Court deemed patentable).²¹ The case however, was decided on the basis that the claim was too broad compared to what was described in Morse's patent, an argument that in today's patent law would translate to lack of enablement.²²

Another relevant case is *Le Roy v. Tatham*,²³ which was cited in the *Morse* ruling. In *Le Roy*, the patent at issue was directed to a process and related machinery for joining lead pipes.²⁴ Here, the Supreme Court discussed whether the invention should be interpreted as directed to newly discovered properties of lead used in producing the joined pipe and described in the specification, or as directed to machinery for applying the discovery, also described in the specification.²⁵ The lower court had taken the first approach and had thus instructed the jury that novelty of the machinery was irrelevant.²⁶ The Supreme Court, on the other hand, took the second approach and thus decided that the instruction was erroneous because the novelty of the machinery was relevant material.²⁷ In

20 *O'Reilly v. Morse*, 56 U.S. 62, 113 (1853) ("In fine he claims an exclusive right to use a manner and process which he has not described and indeed had not invented, and therefore could not describe when he obtained his patent. The court is of opinion that the claim is too broad, and not warranted by law.").

21 *Id.* at 112-20. In making this distinction, the court relied heavily on the English case, *Neilson v. Harford*, which involved the "improved application of air to produce heat in fires, forges, and furnaces where a blowing apparatus is required." *Id.* at 114. The scientific principle at issue was that "hot air [would] promote the ignition of fuel better than cold" air, but the inventor had invented a "mechanical mode of applying [the principle] to furnaces." *Id.* at 116. Therefore, it was not a patent on the principle itself, but on a specific method of applying the principle in a specific situation, much like how Morse's telegraph applied the principle of electro-magnetism in long-distance communication.

22 *See infra* notes 71, 77-79.

23 55 U.S. 156, 175 (1852).

24 *Id.* at 172.

25 *Id.* at 175-77.

26 *Id.* at 176-77 ("[T]he jury were instructed, 'that the originality of the invention did not consist in the novelty of the machinery, but in bringing a newly discovered principle into practical application.'").

27 *Id.* at 177.

reaching this conclusion, the Court stated that “[a] principle, in the abstract, is a fundamental truth; an original cause; a motive; these cannot be patented, as no one can claim in . . . them an exclusive right.”²⁸

These two cases did not decide patent eligibility under section 101. They did, however, provide the foundational principles that have been used in the evolution of the judicial exceptions. They have provided the basis for finding patent invalidity under section 101 over the next century.

B. Twentieth Century Cases

In 1948, the Supreme Court explicitly decided the validity of a patent under section 101 based on the judicial exception in the case of *Funk Brothers Seed Co. v. Kalo Inoculant Co.*²⁹ *Funk Brothers* dealt with product claims directed to “a mixed culture of [bacteria] capable of inoculating the seeds of plants belonging to several cross-inoculation groups.”³⁰ The product was a mixture of specific strains of different species of inoculating bacteria that was capable of inoculating different types of plants, where previously, different species had to be used separately for inoculating each of those different types.³¹ The product worked because, as discovered by the inventor, the selected strains, unlike others, would not inhibit each other.³² The Court deemed the product claims invalid by arguing that the non-inhibitive property is a law of nature and not patentable.³³ The Court stated that “[t]he qualities of these bacteria, like the heat of the sun, electricity, or the qualities of metals, are part of the storehouse of knowledge of all men. They are manifestations of laws of nature, free to all men and reserved exclusively to none.”³⁴

In 1972, the Supreme Court revisited the judicial exception in *Gottschalk v. Benson*.³⁵ The patent claims at issue here were method claims for “converting binary-coded decimal (BDC) numerals into pure binary numerals.”³⁶ The Court invalidated the claims by

28 *Id.* at 175.

29 333 U.S. 127 (1948).

30 *Id.* at 130.

31 *Id.* at 129-30.

32 *Id.* at 130-31.

33 *Id.* at 130.

34 *Id.*

35 409 U.S. 63 (1972).

36 *Id.* at 64.

characterizing them as nothing more than a traditional mathematical algorithm that converts one form of numerical representation into another.³⁷ The Court found that “one may not patent an idea, [and] in practical effect that would be the result if the formula . . . were patented in this case. . . . [It] would wholly pre-empt the mathematical formula and in practical effect would be a patent on the algorithm itself.”³⁸

Next, in the 1980 case of *Diamond v. Chakrabarty*,³⁹ the Supreme Court was faced with the question of whether a genetically modified and engineered bacterium was patentable subject matter under section 101.⁴⁰ The patent office rejected the claims to the bacteria themselves arguing that they were not eligible subject matter.⁴¹ The Supreme Court, however, held the claims patent eligible because the bacteria were a “nonnaturally occurring manufacture or composition of matter — a product of human ingenuity.”⁴²

Later, in 1981, the Supreme Court revisited the patentability of abstract ideas in *Diamond v. Diehr*.⁴³ The claimed invention involved a process for molding rubber into cured products, a process that relied on an algorithm that included measuring the temperature inside of the molding press and inserting the measured value in a mathematical equation for a physical relation to calculate the curing time.⁴⁴ The Court held the method subject matter eligible and contrasted the method at issue with the method claims in *Gottschalk v. Benson* and *Parker v. Flook* by reasoning that the method at issue employed the mathematical equation for a specific use and did not preempt all its applications.⁴⁵ In particular, the Court frowned upon

37 *Id.* at 65, 71-72.

38 *Id.* at 71-72.

39 447 U.S. 303 (1980).

40 *Id.* at 305-06.

41 *Id.* at 306.

42 *Id.* at 309-10. Importantly, the Court distinguished the genetically modified bacteria in *Chakrabarty* from the bacteria in *Funk Brothers Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127, stating that the claimed invention in *Funk Brothers* was directed to a previously undiscovered natural property of the bacteria, whereas *Chakrabarty* “produced a new bacterium with markedly different characteristics from any found in nature.” *Chakrabarty*, 447 U.S. at 310.

43 450 U.S. 175 (1981).

44 *Id.* at 177-79.

45 *Id.* at 185-87, 191-92 (“In contrast, the respondents here do not seek to patent a mathematical formula. Instead, they seek patent protection for a process of curing synthetic rubber. Their process admittedly employs a well-known mathematical equation, but they do not seek to pre-empt the use of

use of novelty in the section 101 analysis:

In determining the eligibility of respondents' claimed process for patent protection under § 101, their claims must be considered as a whole. *It is inappropriate to dissect the claims into old and new elements and then to ignore the presence of the old elements in the analysis.* This is particularly true in a process claim because a new combination of steps in a process may be patentable even though all the constituents of the combination were well known and in common use before the combination was made. *The "novelty" of any element or steps in a process, or even of the process itself, is of no relevance in determining whether the subject matter of a claim falls within the § 101 categories of possible patentable subject matter.*⁴⁶

C. Recent Developments

In the last few decades, it has become increasingly difficult to determine whether claims directed to some more recent innovations, e.g., in software, communications, business methods, or genetics, fall under ineligible judicial exceptions—abstract ideas, laws of nature, or natural phenomena—or otherwise qualify as patent eligible subject matters.⁴⁷ The Federal Circuit, in light of the preceding cases on SME, spent the next three decades employing a variety of tests to determine whether a claimed invention crossed the SME threshold.⁴⁸

that equation. Rather, they seek only to foreclose from others the use of that equation in conjunction with all of the other steps in their claimed process.”).

46 *Id.* at 188-89 (emphasis added).

47 See Jacob S. Sherkow, *The Natural Complexity of Patent Eligibility*, 99 IOWA L. REV. 1137, 1144, 1144 n.31 (2014).

48 See, e.g., *In re Freeman*, 573 F.2d 1237, 1245 (C.C.P.A. 1978) (two-step pre-emption test); *In re Walter*, 618 F.2d 758, 767 (C.C.P.A. 1980) (same test but slightly modified); *In re Abele*, 684 F.2d 902, 906-07 (C.C.P.A. 1982) (clarifying *Walter* test); *In re Grams*, 888 F.2d 835, 840 (Fed. Cir. 1989) (applying the “*Walter* test,” but noting it is not the exclusive test); *In re Iwahashi*, 888 F.2d 1370, 1374-75 (Fed. Cir. 1989) (applying the “*Freeman-Walter* test”); *Arrhythmia Research Tech., Inc. v. Corazonix Corp.*, 958 F.2d 1053, 1058 (Fed. Cir. 1992) (applying the “*Freeman-Walter-Abele* analysis”); *In re Alappat*, 33 F.3d 1526, 1543-44 (Fed. Cir. 1994) (dispensing with the *Freeman-Walter-Abele* test and applying a “useful, concrete, and tangible result” test); *State Street Bank & Tr. Co. v. Signature Fin. Group, Inc.*, 149 F.3d 1368, 1373-75

The Federal Circuit finally dispelled with some non-exclusive tests and created the “machine-or-transformation” test for determining whether a process was eligible for patent protection.⁴⁹ The test indicated that, to be eligible, the process must use a machine or it must transform a product.⁵⁰ The Supreme Court reviewed the machine-or-transformation test in *Bilski v. Kappos*,⁵¹ ruling that the test is *not* to be used as the sole determinant for SME, and that rather it is “a useful and important clue.”⁵² This again left the lower courts without much guidance for determining SME.

To solve the aforementioned problem, the Supreme Court devised a two-step framework in *Mayo*,⁵³ which dealt with the laws of nature exception to patentability;⁵⁴ and later, in *Alice Corporation Pty. Ltd. v. CLS Bank International*, extended this *Mayo* framework (alternatively called the *Alice* framework) to be applicable to all three categories of exceptions.⁵⁵ In this framework, *Mayo* step one (also known as *Alice* step one) determines whether the claim as a whole is directed to one of the subject matter-ineligible exceptions.⁵⁶ If the answer is no, the claim passes the SME test; but if the answer is yes, *Mayo* step two (also known as *Alice* step two) asks whether the claim includes some “inventive concept” that transforms the nature of the claim into a patent-eligible application of the exception.⁵⁷

Mayo dealt with a process patent for determining the correct dosage of a drug by examining the metabolic levels of the patient’s blood.⁵⁸ The Court found that the claims were directed at a patent ineligible law of nature, “namely, relationships between concentrations of certain metabolites in the blood and the likelihood that a dosage of a thiopurine drug will prove ineffective or cause

(applying the *Alappat* test); *AT&T Corp. v. Excel Commc’ns, Inc.*, 172 F.3d 1352, 1358 (Fed. Cir. 1999) (applying the State Street and *Alappat* test); *In re Bilski*, 545 F.3d 943, 958-62 (Fed. Cir. 2008) (abrogating all prior tests and applying the “machine-or-transformation” test).

49 *See In re Bilski*, 545 F.3d at 961-62.

50 *Id.*

51 *Bilski v. Kappos*, 561 U.S. 593 (2010).

52 *Id.* at 603-04.

53 *See Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2355 (2014) and citations therein.

54 *Mayo Collaborative Servs. v. Prometheus Labs. Inc.*, 566 U.S. 66, 71-72 (2012).

55 *See Alice*, 134 S.Ct. at 2355.

56 *See id.* at 2355; *see also* MPEP, *supra* note 14, § 2106 (II).

57 *See Alice*, 134 S. Ct. at 2355.

58 *Mayo*, 566 U.S. at 72.

harm.”⁵⁹ They then asked whether there was a so called inventive concept in the claims, which is something that would transform the claim from a recitation of a law of nature to a patent eligible invention.⁶⁰ The Court concluded that “the claims inform a relevant audience about certain laws of nature; any additional steps consist of well understood, routine, conventional activity already engaged in by the scientific community; . . . [they] add nothing significant . . . [and] are not sufficient to transform unpatentable natural correlations into patentable applications.”⁶¹ In particular, the Court reasoned that the steps described in the claims were nothing more than an instruction to apply the natural law; therefore, they were not inventive enough.⁶²

In *Alice*, the patents at issue recited method, system, and media claims dealing with computer-implemented schemes that manage settlement risk.⁶³ In conducting the first step of the *Mayo* framework, the Court concluded that the claims were directed to the abstract idea of intermediated settlement.⁶⁴ When it came to the second *Mayo* step, the Court decided that the steps performed by the computer in implementing the abstract idea were not sufficiently transformative.⁶⁵ The Court reasoned that each of the steps that the computer performed was “purely conventional,”⁶⁶ and when the steps are taken as an ordered combination, there is nothing added; they “simply recite the concept of intermediated settlement as performed by a generic computer.”⁶⁷

The SME analysis by the Supreme Court, however, has so far left many questions unanswered. Those questions include what is an abstract idea in general, how to determine whether a claim “as a whole” is “directed” to an exception (as required by *Mayo* step one), and what is an “inventive concept” (as searched for in *Mayo* step

59 *Id.* at 76.

60 *Id.* at 77.

61 *Id.* at 79-80.

62 *Id.* at 77.

63 *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347, 2352-53 (2014).

64 *Id.* at 2355-56 (explaining that the concept of intermediated settlement was very similar to the risk hedging concept in *Bilski v. Kappos*, which had been found to be an abstract idea).

65 *Id.* at 2359.

66 *Id.* (examining each step of the intermediated settlement process and finding that “each step does no more than require a generic computer to perform generic computer functions”).

67 *Id.*

two). When applying the analysis to real cases, courts have answered these questions in manners that have inserted into the SME analysis mini versions of other sections of the law. Below, we provide some examples of these insertions and their consequences.

III. Mini Section 112: Clarity and Specificity

One set of criteria that courts have applied under the SME analysis is related to definiteness, clarity, or narrowness. Very often, a court decides that a claim is directed to an exception such as an abstract idea because the claim is not specific, is not clear, or is too broad. As detailed below, these criteria have traditionally been addressed under sections 112(a)⁶⁸ and 112(b),⁶⁹ which require a written description, enablement, and definiteness.⁷⁰

A. Traditional 112 Inquiries

The written description and enablement requirements under section 112(a) and the definiteness requirement under section 112(b) traditionally involve rigorous analysis of the claims and the specification. The written description requirement asks whether the claims are sufficiently described in the specification to show a person having ordinary skill in the art that the inventor actually invented the claimed invention.⁷¹ This is a question of fact and requires an understanding of the ordinary skill in the art,⁷² as well as a thorough analysis of the specification and application as a whole.⁷³ Similarly, the enablement requirement makes sure that the specification contains sufficient information to enable one having ordinary skill in the art to make and use the claimed invention without undue

68 See 35 U.S.C. § 112(a) (2012) (“The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor or joint inventor of carrying out the invention.”).

69 See *id.* § 112(b) (“The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the inventor or a joint inventor regards as the invention.”).

70 See *id.* § 112; see also MPEP, *supra* note 14, §§ 2161- 2174.

71 *Ariad Pharm. Inc., v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010).

72 *Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1562-63 (Fed. Cir. 1991).

73 See MPEP, *supra* note 14, § 2163(II).

experimentation.⁷⁴ This is a question of law based on various factual findings,⁷⁵ including factual findings concerning the undue experimentation factors.⁷⁶ Lastly, the definiteness requirement requires that the claims “read in light of the specification delineating the patent, and the prosecution history . . . inform, with reasonable certainty, those skilled in the art about the scope of the invention.”⁷⁷

These three requirements often turn on the specificity, the breadth, or the clarity of the claims. If a claim is too broad or not specific, for example, it may be attacked as not being properly covered in the written description,⁷⁸ or as not being sufficiently enabled by the patent application under examination or by the issued patent.⁷⁹ If a claim is not clear, it may be attacked as being indefinite.⁸⁰ But the yet unsettled state of the new SME analysis has included these criteria, or at least abbreviated versions of them, under the SME analysis.

As detailed below, the Supreme Court has initiated the shift of the emphasis on clarity and on specificity by avoiding breadth from section 112 to the SME analysis under section 101. The Court has emphasized that a claim may fail the section 101 test if it is not clear or is too broad. In so doing, the Court has applied a much less rigorous analysis than what traditionally would be used under section 112.

74 *United States v. Telectronics, Inc.*, 857 F.2d 778, 785 (Fed. Cir. 1988) (“The test of enablement is whether one reasonably skilled in the art could make or use the invention from the disclosures in the patent coupled with information known in the art without undue experimentation.”).

75 *In re Vaeck*, 947 F.2d 488, 495 (Fed. Cir. 1991).

76 *See In re Wands*, 858 F.2d 731, 737 (Fed. Cir. 1988); *see also* MPEP, *supra* note 14, § 2164.

77 *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2124 (2014).

78 *See, e.g., Ariad Pharm., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (stating that the written description requirement is satisfied when the specification adequately described the claimed invention; if the claims are too broad they would therefore not be adequately described and would fail the written description requirement).

79 *See, e.g., In re Wands*, 858 F.2d 731, 736-37 (Fed. Cir. 1988) (stating that the enablement requirement requires the “specification teach those in the art to make and use the invention without undue experimentation,” and the factors to determine whether the experimentation is undue include “the breadth of the claims”).

80 *See, e.g., Nautilus, Inc.*, 134 S. Ct. at 2129 (stating that the definiteness requirement “mandates clarity” and prevents patent applicants from drafting ambiguous claims).

B. Supreme Court's Use of Section 112 in SME Decisions

In its recent SME jurisprudence, the Supreme Court has repositioned the above criteria and set forth breadth or clarity as at least some of the criteria that may determine the SME of a claim. The Court referred to this concern in *Bilski*, where it noted some of the invalidated claims, are “broad examples of how hedging can be used in commodities and energy markets . . . attempt to patent the use of the abstract hedging idea, then instruct the use of well-known random analysis techniques.”⁸¹ Furthermore, a concurring opinion emphasized the importance of clarity by stating “[t]he [patent] monopoly is a property right; and like any property right, its boundaries should be clear.”⁸²

Later, in *Mayo*, the Court related its concern about preemption to breadth. It stated that the Court’s precedents “warn us against upholding patents that claim processes that too broadly preempt the use of a natural law.”⁸³ As one example of those precedents, the Court stated that in the *Benson* case, the invalidated “claim (like the claim before us) was overly broad; it did not differ significantly from a claim that just said ‘apply the algorithm.’”⁸⁴ As another example, the Court quoted from *Parker v. Flook*, which had “expressed concern that the claimed process was simply ‘a formula for computing an updated alarm limit,’ which might ‘cover a broad range of potential uses.’”⁸⁵

C. Lower Court Interpretations

The CAFC and the district courts have followed the lead of the Supreme Court and applied breadth as a criterion for SME. The CAFC has made this criterion even more explicit by stating that “[a]t step one of the Alice framework, it is often useful to *determine the breadth of the claims* in order to determine whether the claims extend to cover a ‘fundamental . . . practice long prevalent in our system’”⁸⁶ Applying the criteria to the claims at issue, the

81 *Bilski v. Kappos*, 561 U.S. 593, 612 (2010).

82 *Id.* at 650 (Stevens, J., concurring) (quoting *Festo Corp. v. Shoketsu Kinzoku Kabushiki Co.*, 535 U.S. 722, 730-31 (2002)).

83 *Mayo Collaborative Servs. v. Prometheus Labs. Inc.*, 566 U.S. 66, 72 (2012).

84 *Id.* at 85.

85 *Id.*

CAFC deemed the claims invalid because the claimed “[t]ailoring information based on the time of day of viewing is also an abstract, *overly broad* concept long-practiced in our society.”⁸⁷ In another case, the CAFC invalidated the asserted claims as directed to a patent ineligible abstract idea by, among other things, noting that, the patentee “seeks to broadly claim the unpatentable abstract concept of managing a stable value protected life insurance policy.”⁸⁸ The prohibition against overly broad claims may take the form of a requirement for specificity. For example, in one case, a concurring opinion expressed a “need for specificity sufficient to cabin the scope of an invention.”⁸⁹

These criteria have also been applied by the district courts. In *McRO, Inc. v. Activision Pub., Inc.*,⁹⁰ for example, the district court for the Central District of California first agreed that the claims “[f]acially . . . do not seem directed to an abstract idea . . . [and] are tangible.”⁹¹ Nevertheless, after dividing recitations of each claim into old and novel elements, the court faulted the claims because their novel elements were “specified at the highest level of generality.”⁹² Elsewhere, when analyzing two claimed features, the court stated that “this is just another idea of a [possibly novel feature]; *the patent claims no specific method of doing so.*”⁹³ Therefore, the court deemed the claims ineligible by referring to “the danger that exists when the novel portions of an invention are claimed too broadly.”⁹⁴ Many other lower courts, also, have invalidated claims at issue because they were broad, or because they were not concrete or tangible.⁹⁵

86 *Intellectual Ventures I LLC v. Capital One Bank (USA)*, 792 F.3d 1363, 1369 (Fed. Cir. 2015) (citing *Alice Corp. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2356 (2014)) (emphasis added).

87 *Id.* at 1370 (emphasis added).

88 *Bancorp Servs., L.L.C. v. Sun Life Assur. Co. of Canada (U.S.)*, 687 F.3d 1266, 1280-81 (Fed. Cir. 2012).

89 *I/P Engine, Inc. v. AOL Inc.*, 576 Fed. Appx. 982, 994 (Fed. Cir. 2014) (Mayer J., concurring).

90 *McRO, Inc. v. Activision Pub., Inc.*, 2014 WL 4759953 (C.D. Cal Sep 22, 2014).

91 *Id.* at *8.

92 *Id.* at *11.

93 *Id.* at *12 (emphasis added).

94 *Id.* at *13.

95 *See, e.g., Clear With Computers, LLC v. Altec Indus., Inc.*, No. 6:14-cv-79, 2015 WL 993392, at *5 (E.D. Tex Mar 3, 2015) (“Although verbose, the claims as a whole *broadly* recite a simple process which, in this case, does not require the type of complex programming that confers patent eligibility”) (emphasis added); *Minitab, Inc. v. Engineerroom, LLC*, No. 4:12-cv-2170,

D. *How Broad is Too Broad?*

Inventors generally attempt to recite claims that are as broad as possible to carve out a large exclusion territory for their patent. But how broad can the claim be before it exceeds the boundaries of subject matter eligibility and becomes ineligible? The Supreme Court has not delineated any boundaries. But, in *Mayo*, the Court explained that the concern with the breadth is relative to the strength or breadth of the invention itself:

But the underlying functional concern [with preemption] here is a *relative* one: how much future innovation is foreclosed relative to the contribution of the inventor A patent upon a narrow law of nature may not inhibit future research as seriously as would a patent upon Einstein’s law of relativity, but the creative value of the discovery is also considerably smaller. And, as we have previously pointed out, even a narrow law of nature (such as the one before us) can inhibit future research.⁹⁶

The CAFC has applied this theory of relativity handed down by the Supreme Court. In *I/P Engine*, which was a per curiam ruling, a concurring opinion cited the above excerpt and rejected the claims at issue because “the scope of the claimed invention is staggering, potentially covering a significant portion of all online

2015 WL 12517017, at *8 (M.D. Pa. Feb 3, 2015) (“the patents-in-suit *do* present a significant risk of preemption as they are *broadly* drawn to the concept of automated hypothesis testing with no meaningful limitations”) (first emphasis in original, second emphasis added); *The Money Suite Co. v. 21st Century Ins. and Fin. Servs., Inc.*, No. 13-984-GMS, 2015 WL 436160, at *5 (D. Del. Jan. 27, 2015) (“Money Suite’s contention that it is solely offering an ‘improvement’ to overcome a purely technical problem is belied by the *broad, non-limited claim language*”) (emphasis added); *OpenTV, Inc., v. Apple, Inc.*, 14-cv-01622-HSG, 2015 WL 1535328, at *3 (N.D. Cal. Apr. 6, 2015) (finding that claims at issue were “directed to the abstract idea of compiling, organizing, and transmitting information” and further describing that “[claim] limitations that such information be confidential, verified, or received via unsecure communications lines do nothing to render the idea *concrete or tangible*,” and that the claims were “directed to an ‘abstraction—an idea, *having no particular concrete or tangible form*.’”) (emphasis added).

⁹⁶ *Mayo Collaborative Servs. v. Prometheus Labs. Inc.*, 566 U.S. 66, 88 (2012) (emphasis in original) (internal citations omitted).

advertising,” further explaining that “I/P Engine’s asserted claims fall outside section 101 because their broad and sweeping reach is vastly disproportionate to their minimal technological disclosure.”⁹⁷

The lower courts have also occasionally applied this theory of relativity. In *CertusView Technologies, LLC v. S & N Locating Services, LLC*,⁹⁸ for example, the court considered a claim that related to a narrow field of locating damages in underground infrastructure, and invalidated the claim because “its preemptive effect within that [narrow] field of use is broad.”⁹⁹

Moreover, some courts have clarified that these criteria should be applied to the invention as claimed and not as explained in the specification. While the claims are read in light of the specification, and even when the specification describes the invention in detail, a broadly written claim may still be invalidated.¹⁰⁰

IV. Mini Sections 102 and 103: Prior Art Based Analyses of Novelty and Non-obviousness

Two other conditions for patentability are novelty and non-obviousness as codified under sections 102¹⁰¹ and 103.¹⁰² These

97 *I/P Engine, Inc. v. AOL Inc.*, 576 Fed.Appx. 982, 995 (Fed. Cir. 2014) (Mayer, J., concurring).

98 *CertusView Techs., LLC v. S & N Locating Servs., LLC*, 111 F.Supp.3d 688 (E.D. Vir. Jan. 21, 2015).

99 *Id.* at 716.

100 *See, e.g., id.* at 713 n.9 (stating that “[while] the specification includes detail absent in the claims . . . [which] might suggest that the elements of the asserted claims . . . are more than just an attempt to claim an abstract idea . . . the Court’s analysis of patentability under section 101 involves the elements of the asserted claims as they are written, rather than with the supplementation of detail added in the specification,” and citing a similar analysis from *Accenture Glob. Servs., GmbH v. Guidewire Software, Inc.*, 728 F.3d 1336, 1345 (Fed.Cir.2013)).

101 *See* 35 U.S.C. § 102(a). “Novelty; prior art.--A person shall be entitled to a patent unless -- (1) the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention; or (2) the claimed invention was described in a patent issued under section 151, or in an application for patent published or deemed published under section 122(b), in which the patent or application, as the case may be, names another inventor and was effectively filed before the effective filing date of the claimed invention.”

102 *See* 35 U.S.C. § 103: “A patent for a claimed invention may not be obtained, notwithstanding that the claimed invention is not identically disclosed as set forth in section 102, if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been

conditions assess the strength of the claimed invention when compared to the prior art, i.e., what existed before. That is, a claimed invention is not patentable if it does not add any novel feature to what already existed in the space of human knowledge and technology,¹⁰³ or if what it adds is obvious.¹⁰⁴ Both of these requirements mandate a comprehensive analysis of, and substantive inquiry into, every facet of the claimed invention and the prior art.¹⁰⁵ But, as detailed below, under the new SME scheme these conditions are used, at least in mini-versions, to examine the SME of claims under section 101. As further discussed in ensuing sections, this development has led to invalidity on the basis of lack of novelty or obviousness, but under the guise of SME and without the traditional judicial checks of discovery and careful analysis developed under sections 102 and 103.

A. Traditional Inquiry Under Sections 102 and 103

Rather rigorous processes have been developed for the analyses under sections 102 and 103. Rejecting a claim for lack of novelty under section 102, for example, requires first, an interpretation of the claim language.¹⁰⁶ Second, it requires an analysis and determination of the scope and content of the prior art.¹⁰⁷ Lastly, it requires a thorough comparison of each element of the claim with the features found in prior art, and then, a showing that each and every element of the claimed invention is contained within a single

obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains. Patentability shall not be negated by the manner in which the invention was made.”

103 See 35 U.S.C. § 102; see also, MPEP, *supra* note 14 §§ 2131-2138.

104 See 35 U.S.C. § 103; see also, MPEP, *supra* note 14 §§ 2141-2146.

105 See MPEP, *supra* note 14 § 2152 (“The categories of prior art documents and activities are set forth in AIA 35 U.S.C. 102(a)(1) and the categories of prior art patent documents are set forth in AIA 35 U.S.C. 102(a)(2). These documents and activities are used to determine whether a claimed invention is novel or nonobvious.”).

106 See MPEP, *supra* note 14 § 2111; *Silicon Graphics, Inc. v. ATI Techs., Inc.*, 607 F.3d 784, 795-796 (Fed. Cir. 2010) (detailing, first, the District Court’s interpretation of the elements of the claim).

107 See MPEP, *supra* note 14 §§ 2121-29, 2132-38, 2152-55 (discussing what qualifies as a prior art reference under which circumstances).

prior art reference.¹⁰⁸

Rejecting a claim for being obvious under section 103, on the other hand, requires application of the framework set forth in *Graham v. John Deere Co.*¹⁰⁹ Similar to the novelty analysis, the *Graham* framework requires a detailed comparison of each claimed element with features of prior art.¹¹⁰ It also requires determining the scope and contents of the prior art, ascertaining the differences between the claimed invention and the prior art, resolving the level of ordinary skill in the pertinent art, and a determination of whether the differences are obvious in light of that ordinary skill.¹¹¹

The mini versions of the novelty and non-obviousness analyses under the new SME scheme, however, do not follow any of the aforementioned established processes. Instead, as detailed below, the mini-analyses rely on the Court's impression of the claimed invention and prior art and, at most, the reasoning and limited evidence presented in the preliminary pleadings.

B. Supreme Court Inclusion of Novelty & Non-Obviousness in SME

The Supreme Court has initiated these mini-analyses to claimed inventions by asking, for example, whether the claims recite features that are conventional, routine, or long prevalent in the art. In *Bilski* and *Alice*, for example, the Court deemed the claims at issue to be drawn to the concepts of hedging and intermediated

108 See MPEP, *supra* note 14 §§ 2131 (“A claimed invention may be rejected under 35 U.S.C. 102 when the invention is anticipated (or is “not novel”) over a disclosure that is available as prior art. To anticipate a claim, the disclosure must teach every element of the claim.”); See *Silicon Graphics*, 607 F.3d at 796-799 (comparing the claims against several prior art references).

109 383 U.S. 1, 17-18 (1966).

110 See MPEP, *supra* note 14 §§ 2141-2146; *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 399 (2007) (“*Graham v. John Deere Co.*, set out an objective analysis for applying § 103: “[T]he scope and content of the prior art are . . . determined; differences between the prior art and the claims at issue are . . . ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented.”) (citations omitted; alterations in original).

111 *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 399 (2007); See MPEP, *supra* note 14 §§ 2141-2146.

settlement, respectively, and invalidated the claims by reasoning that each of these concepts “is a fundamental economic practice long prevalent in our system of commerce.”¹¹² Similarly, in *Mayo*, the Court invalidated the claimed processes because they “involve well-understood, routine, conventional activity previously engaged in by researchers in the field.”¹¹³ None of these rejections, however, included an element by element analysis of the claims and a showing that either each element existed in some specific prior art (as done under 102) or a reasoning that it was obvious in light of prior art (as done under 103). Instead, the Court stopped at the above statements, indicating that the wholesale categorizations of the claims and the prior art are sufficient for the analysis under 101. As shown below, the lower courts have followed suit.

C. Lower Court Implementation

The CAFC has also applied the above reasoning and wording in invalidating claims as subject matter ineligible. In *OIP Technologies, Inc. v. Amazon.com, Inc.*,¹¹⁴ for example, the CAFC considered the claimed invention as describing “the automation of the fundamental economic concept of offer-based prize optimization,” which the CAFC deemed an abstract idea.¹¹⁵ Moreover, the CAFC deemed the claim invalid because the added features in the claim “are well-understood, routine, conventional, data-gathering activities that do not make the claims patents eligible.”¹¹⁶ These types of determinations regarding the additional elements of the claimed invention and the subsequent determination of patentability is reminiscent of a traditional section 103 inquiry. In these cases, however, the courts do not engage in the usual analysis regarding obviousness and instead dispose of the claims with conclusory statements such as those quoted above.

Elsewhere, in *Intellectual Ventures I, LLC v. Capital One Bank*,¹¹⁷ the CAFC deemed claims invalid because “the claimed tailoring information based on the time of day of viewing is also an abstract, overly broad concept long-practiced in our society.

112 *Bilski v. Kappos*, 561 U.S. 593, 611 (2010); *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2356 (2014).

113 *Mayo Collaborative Servs. v. Prometheus Labs. Inc.*, 566 U. S. 66, 79 (2012).

114 *OIP Techs., Inc. v. Amazon.com, Inc.*, 788 F.3d 1359 (Fed. Cir. 2015).

115 *Id.* at 1363.

116 *Id.* at 1364.

117 792 F.3d 1363 (Fed. Cir. 2015).

There can be no doubt that television commercials for decades tailored advertisements based on the time of day during which the advertisement was viewed.”¹¹⁸ In this opinion, the CAFC also seems to have explicitly asked for novelty of the inventive concept required by the *Mayo* step two. More specifically, the CAFC rejected the patent holder’s contention that a recited “interactive interface” is an inventive concept as required by *Mayo* step two, and reasoned that “[b]ut nowhere does [the patent holder] assert that it invented an interactive interface . . . Rather, the interactive interface limitation is a generic computer element.”¹¹⁹ That is, according to CAFC, an “inventive concept” should be “invented”, i.e., novel.

Understandably, the lower courts have also followed suit in applying mini versions of novelty and non-obviousness in their SME decisions.¹²⁰ Among those decisions, *McRO, Inc. v. Activision Pub., Inc.*¹²¹ stands out as a prototype. In *McRO*, the patents were directed at automatically animating the facial expression of 3D characters in animations.¹²² To improve prior “laborious and uneconomical” methods, the patents introduced an automated method that used “weighted morph targets and time aligned phonetic transcriptions of recorded text, and other time aligned data.”¹²³ The district court granted defendant’s motion to dismiss under rule 12(c) by deeming the patents subject matter ineligible under section 101.¹²⁴

In reaching this decision, the court applied *Mayo*’s two-step

118 *Id.* at 1369-70.

119 *Id.* at 1370.

120 *See, e.g.,* *Concaten, Inc. v. Ameritrak Fleet Sols., LLC*, 131 F. Supp. 3d 1166, 1177 (D. Colo. 2015) (stating that the patent holder “has not pointed to any problem in the existing process that the industry had been unable to solve,” which is traditionally evaluated under the secondary consideration of long, unmet need under the section 103 analysis); *Exergen Corp. v. Brooklands Inc.*, 125 F. Supp. 3d 307, 315-16 (D. Mass. 2015) (discussing the use of conventional steps as insufficient to satisfy *Mayo* step 2). Some litigants are likewise importing novelty concepts into their section 101 arguments. *See, e.g.,* *Williamson v. Citrix Online, LLC*, 2016 WL 6275177 at *9 (C.D. Cal. Feb. 17, 2016) (“To the extent Plaintiff’s argument centers on evidence (or a lack of evidence point to by Defendants) that the use of industry-standard computer hardware and software in the field of distributed learning as it existed in 1998 was novel and unconventional, the Court declines the opportunity to interpret section 101 in a manner that obviates the independent patentability requirement of “novelty” codified at 35 U.S.C. section 102.”).

121 2014 WL 4759953 (C.D. Cal. Sep. 22, 2014).

122 *See id.* at *1.

123 *Id.*

124 *Id.* at *3, 13.

framework.¹²⁵ The court, on the get go, agreed that “[f]acially, these claims do not seem directed to an abstract idea. They are tangible, . . . [t]hey do not claim a monopoly, . . . [and] the patents do not cover the prior art methods of computer assisted, but non-automated, lip synchronization for three-dimensional computer animation.”¹²⁶ Therefore, the *McRO* court seems to have admitted that the claims, as a whole, were not directed to an abstract idea and thus under *Mayo* step one should have been deemed subject matter eligible. But the court took a different approach. Under a section titled “The Claims Must Be Evaluated in the Context of the Prior Art,” the court first “factor[ed] out” from the claims all of the elements that were part of prior art, which is traditionally a facet of a novelty or an obviousness inquiry under sections 102 and 103, as being “well-understood, routine, conventional activity.”¹²⁷ Then, the court decided that what was left, the so-called “point of novelty” was “the idea of using the rules... to automate the process of generating keyframes,” which it deemed as abstract and thus found the claims subject matter ineligible.¹²⁸

The above application of mini versions of the novelty or non-obviousness analyses under the guise of the SME analysis has been rejected by some interested parties, such as courts and the USPTO.¹²⁹ In *California Inst. of Technology v. Hughes Communications, Inc.*,¹³⁰ for example, the judge criticized the above analysis by the *McRO* court and its approach of “dissecting a claim into old and new elements.”¹³¹ Further quoting *Diehr*, and referring to *Flook*, the ruling stated that “the Supreme Court has held that novelty ‘is of no relevance’ when determining patentability, [and] in so noting, the Supreme Court rejected *Flook’s* point-of-novelty approach.”¹³² To reconcile these rules with the Supreme Court’s analysis in its recent SME rulings, the court opined that “neither *Mayo* nor any other precedent defines

125 *Id.* at *4-6.

126 *Id.* at *8.

127 *Id.* at *9.

128 *Id.* at *9-11. The CAFC later reversed this lower court’s ruling, arguing that the claims, when looked at as a whole, pass *Alice* step one as subject matter eligible, and do not reach *Alice* step two. See *McRO, Inc. v. Bandai Namco Games America Inc.*, 837 F.3d 1316 (Fed. Cir. 2016).

129 See, e.g., *Cal. Inst. of Tech. v. Hughes Commc’ns Inc.*, 59 F. Supp. 3d 974 (C.D. Cal. 2014).

130 *Hughes*, 59 F. Supp. 3d at 974.

131 *Id.* at 989 (quoting *Diamond v. Diehr*, 450 U.S. 175, 185 (1981)).

132 *Id.* (emphasis in original).

conventional elements to include *everything* found in prior art.”¹³³

The USPTO has taken an approach that is similar to the approach of *Hughes*, and has further expanded it. In its May 2016 Subject Matter Eligibility Update, the USPTO provided guidance to its examiners about applying the new SME scheme. The guidance states that

lack of novelty (i.e., finding the element in the prior art) does not necessarily show that an element is well-understood, routine, conventional activity previously engaged in by those in the relevant field . . . Instead, the evaluation turns on whether the [element] was well-understood, routine, conventional activity previously engaged in by scientists in the relevant field . . . If it is determined that the additional element is widely prevalent and its combination with any other additional elements is well-understood, routine, conventional activity, the examiner should provide a reasoned explanation that supports that conclusion.¹³⁴

V. Policy and Consequences

The above discussed recent changes in the law of SME seem to have resulted, at least in part, from concerns about weak or so-called “bad” patents and are an effort to reduce their perceived harms. Many believe that in the past few decades the USPTO has issued a large number of weak patents, especially in the areas of business method or software.¹³⁵ They also believe that such patents have been abused by actors, such as so-called “patent trolls,” in a manner that

133 *Id.* (emphasis in original).

134 Bahr, May 19, 2016 Memorandum, *supra* note 6, at 4 (emphases original).

135 See Michael J. Meurer, *Business Method Patents and Patent Floods*, 8 WASH. U.J.L. & POL'Y 309, 309-10 (2002); James J. Anton et. al., POLICY IMPLICATIONS OF WEAK PATENT RIGHTS, at 3, <http://www.nber.org/chapters/c0203.pdf>; Ashby Jones, *Bilski! Supremes Grant Cert on Business-Method Patent Case*, WALL ST. J., Jun. 1, 2009, blogs.wsj.com/law/2009/06/01/bilski-supremes-grant-cert-on-business-method-patent-case/; Charles Arthur, *Software patents 'a bit of a mess' says Martin Goetz, the first man to get one*, GUARDIAN, Jan. 24, 2013, www.theguardian.com/technology/2013/jan/24/smartphone-patent-wars-intellectual-property.

harms innovation or economy as a whole.¹³⁶ These concerns and beliefs are backed by examples, often reported in popular media,¹³⁷ of technology companies or individuals that have been targeted by patent trolls armed with weak patents. The believers include people from many different walks of life, from ordinary people to legal scholars or practitioners. In particular, these believers include some Justices of the Supreme Court. During a recent oral argument, for example, Justice Breyer stated the following:

[T]he other way to look at [the issue at hand] is that there are these things, for better words, let's call them patent trolls, and that the -- the Patent Office has been issuing billions of patents that shouldn't have been issued -- I overstate -- but only some. And what happens is some person in business gets this piece of paper and -- and looks at it and says, oh, my God, I can't go ahead with my invention.¹³⁸

The recent Supreme Court rulings and the resulting changes in the law of SME may thus have been an effort by the Court to address these problems. It is possible the fractality, i.e., the inclusion

136 See Neal Solomon, *A Weak Patent System Increases Inequality, Protects Incumbent Monopolies*, IPWATCHDOG (Feb. 5, 2017), www.ipwatchdog.com/2017/02/05/weak-patent-system-protects-monopolies/id=77995/; Christopher Mims, *Why patent trolls will laugh in the face of the US government's weak attempts to fight them*, QUARTZ (June 4, 2013), <https://qz.com/90902/why-patent-trolls-will-laugh-in-the-face-of-the-us-governments-weak-attempts-to-fight-them/>; Adi Kamdar & Daniel Nazer, *Deep Dive: Software Patents and the Rise of Patent Trolls*, ELECTRONIC FRONTIER FOUNDATION (Feb. 28, 2013), www.eff.org/deeplinks/2013/02/deep-dive-software-patents-and-rise-patent-trolls.

137 See, e.g., *This American Life: When Patents Attack*, PUBLIC RADIO INT'L (July 22, 2011), <https://www.thisamericanlife.org/radio-archives/episode/441/transcript>; *This American Life: When Patents Attack . . . Part Two!*, PUBLIC RADIO INT'L (May 31, 2013), <https://www.thisamericanlife.org/radio-archives/episode/496/transcript>; see also *Planet Money: Episode 339: Can You Patent A Steak?*, NAT'L PUBLIC RADIO (Apr. 22, 2015), <http://www.npr.org/sections/money/2015/04/22/401491625/episode-399-can-you-patent-a-steak>; *Planet Money: Episode 462: When Patents Hit the Podcast*, NAT'L PUBLIC RADIO (May 31, 2013), <http://www.npr.org/sections/money/2013/05/31/187374157/episode-462-when-patents-hit-the-podcast>; *Planet Money: Episode 705: The Muscle Patents*, NAT'L PUBLIC RADIO (June 10, 2016), <http://www.npr.org/sections/money/2016/06/10/481597112/episode-705-the-muscle-patents>.

138 Transcript of Oral Argument at 14, *Cuozzo Speed Tech., LLC v. Lee*, 136 S.Ct. 2131 (2016) (No. 15-446).

of the other sections in section 101, has been intended by the upper courts. In its *Bilski* ruling, for example, the Court stated that the previously established frameworks developed under sections 102 and 103 may not work properly for inventions directed to business methods:

There is substantial academic debate, moreover, about whether the normal process of screening patents for novelty and obviousness can function effectively for business methods. The argument goes that because business methods are both vague and not confined to any one industry, there is not a well-confined body of prior art to consult, and therefore many “bad” patents are likely to issue, a problem that would need to be sorted out in later litigation.¹³⁹

The *Mayo* ruling made similar statements about inventions that may fall under the law of nature exception by “declin[ing an] . . . invitation to substitute §§ 102, 103, and 112 inquiries for the better established inquiry under § 101.”¹⁴⁰ The Court reasoned that “to shift the patent-eligibility inquiry entirely to these later sections risks creating significantly greater legal uncertainty, while assuming that those sections can do work that they are not equipped to do.”¹⁴¹

In *Ultramercial III*,¹⁴² where the CAFC invalidated as subject matter ineligible a patent that it had twice previously deemed not invalid, a concurring opinion justified the fractality of the new SME scheme by stating that “this court’s approach to sections 103 and 112 has proved woefully inadequate in preventing a deluge of very poor quality patents.”¹⁴³ The opinion thus concluded that “[s]ection 101’s vital role—a role that sections 103 and 112 ‘are not equipped’ to take on . . . is to cure systemic constitutional infirmities by eradicating those patents which stifle technological progress and unjustifiably impede the free flow of ideas and information.”¹⁴⁴

139 *Bilski v. Kappos*, 561 U.S. 593, 654 n.55 (2010); see also *I/P Engine, Inc. v. AOL Inc.*, 576 Fed.Appx. 982, 996 (Fed. Cir. 2014) (Mayer, J., concurring) (advocating addressing section 101’s requirements at the outset of litigation).

140 *Mayo Collaborative Servs. v. Prometheus Labs. Inc.*, 566 U.S. 66, 91 (2012).

141 *Id.* at 90.

142 *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709 (Fed. Cir. 2014) (hereinafter “*Ultramercial III*”).

143 *Id.* at 722 n.2 (Mayer, J., concurring) (quoting *Mayo*, 566 U.S. at 90).

144 *Id.* (Mayer, J., concurring) (quoting *Mayo*, 566 U.S. at 90).

One consequence of the recent developments in the law of SME has been empowering the district courts for early disposition of patents. Under the new regime, district court judges have been enabled, more than before, to invalidate a patent under section 101 in the earliest stages of the trial . . . , such as in rulings in response to the defendant's motion to dismiss under rule 12(b)(6) or rule 12(c).¹⁴⁵ This new power has been acknowledged and sanctioned by the upper courts. A concurrence in *OIP Tech*, for example, stated that “[a]ddressing 35 U.S.C. §101 at the outset not only conserves scarce judicial resources and spares litigants the staggering costs associated with discovery and protracted claim construction litigation, it also works to stem the tide of vexatious suits brought by the owners of vague and overbroad business method patents.”¹⁴⁶ The concurrence, thus, concluded that in cases where “asserted claims are plainly directed to a patent ineligible abstract idea, we have repeatedly sanctioned a district court’s decision to dispose of them on the pleadings.”¹⁴⁷

The new SME scheme, thus, provides a mechanism for the district courts to weed out the “bad” patents expediently and efficiently. Moreover, as detailed above, judges have done so based on their own understanding of the patent or of the state of the technology, and without requiring extensive evidentiary processes such as discovery and often without requiring claim construction. As discussed above, these decisions apply the mini versions of sections 102, 103, and 112, without applying the more rigorous frameworks that have been developed for those sections. Studies show that the district courts have in fact utilized this new mechanism to invalidate a larger number of patents in earlier stages of the litigation as being subject matter ineligible.¹⁴⁸

145 See *id.* at 719 (Mayer, J., concurring) (“[T]he district court properly invoked section 101 to dismiss Ultramercial’s infringement suit on the pleadings. No formal claim construction was required”); See, e.g., *McRO, Inc. v. Activision Pub., Inc.*, 2014 WL 4759953, at *3, 13 (C.D. Cal. Sep. 22, 2014).

146 *OIP Techs., Inc. v. Amazon.com, Inc.*, 788 F.3d 1359, 1364 (Fed. Cir. 2015) (Mayer, J., concurring).

147 *Id.* at 1364-65.

148 See, e.g., Robert R. Sachs, *Two Years After Alice: A Survey of the Impact of a ‘Minor Case’ (Part 1)*, BILSKI BLOG (June 16, 2016), <http://www.bilskiblog.com/blog/2016/06/two-years-after-alice-a-survey-of-the-impact-of-a-minor-case.html>; Robert R. Sachs, *AliceStorm Update for Q1 2017*, BILSKI BLOG (April 6, 2017), <http://www.bilskiblog.com/blog/alicestorm/>.

VI. Conclusion

The recent developments in the law of SME have attempted to address some criticisms of the state of patent system in the US, and have so far visibly affected the decisions of the courts and the Patent Office. In the new formulation of the law of SME under section 101, the courts seem to have found a practical and economical vehicle to purge “bad” patents. The USPTO has also utilized this vehicle for rejecting “weak” patent applications under section 101 and with minimal analysis. The effect has been a large increase in invalidation of patents in early stages of patent litigations based on the judgment of the judge and with no or minimal discovery. Proponents of the changes see these as positive steps in curbing the abuses perpetrated by actors such as patent trolls against technology companies. Opponents, on the other hand, see this as creating uncertainty in the patent law by introducing rules that are not well defined and result in rejections that are subjective. The situation, they argue, has resulted in a non-uniform treatment of patents and confusion among inventors and patent practitioners.

The law of SME, however, is still evolving. With many new cases, the courts and the USPTO continue to explore the metes and bounds of SME under the *Alice/Mayo* framework. For example, after *Alice*, in a number of 2014-2015 cases that involved software patents, the CAFC deemed the patent invalid for being directed to some abstract idea with nothing more.¹⁴⁹ The SME law, therefore, seemed to provide no hope for a software related invention to pass the SME test. That situation, however, has changed. In a few recent cases, the CAFC has ruled in favor the software patent at issue, arguing

149 See, e.g., *Digitech Image Techs., LLC v. Electronics for Imaging, Inc.*, 758 F.3d 1344, 1350-51 (Fed. Cir. 2014); *Planet Bingo, LLC v. VKGS LLC*, 576 Fed. Appx. 1005, 1007-09 (Fed. Cir. 2014); *buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350, 1354-55 (Fed. Cir. 2014); *Ultramercial III*, 772 F.3d 709, 715-17 (Fed. Cir. 2014); *Content Extraction and Transmission LLC v. Wells Fargo Bank, Nat. Ass’n*, 776 F.3d 1343, 1347-48 (Fed. Cir. 2014); *OIP Techs., Inc. v. Amazon.com, Inc.*, 783 F.3d 1359, 1362-64 (Fed. Cir. 2015); *Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343, 1345-49 (Fed. Cir. 2015); *Intellectual Ventures I LLC v. Capital One Bank (USA)*, 792 F.3d 1363, 1367-71 (Fed. Cir. 2015); *Versata Dev. Group, Inc. v. SAP America, Inc.*, 793 F.3d 1306, 1331-34 (Fed. Cir. 2015); *Allvoice Devs. US, LLC v. Microsoft Corp.*, 612 Fed. Appx. 1009, 1016-18 (Fed. Cir. 2015); *Vehicle Intelligence and Safety LLC v. Mercedes-Benz USA, LLC*, 635 Fed.Appx. 914, 918-20 (Fed. Cir. 2015); *but see DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1256-59 (Fed. Cir. 2014) (finding a software patent eligible under section 101).

that some software patents pass either *Mayo* step one (i.e., were not directed to an abstract idea at all), or *Mayo* step two (i.e., included some inventive concepts).¹⁵⁰ Based on these cases, the USPTO has issued guidelines that identify ways that a software patent may be valid under the SME analysis.¹⁵¹

The real challenge is formulating the law such that not only is it consistent with the statute and standing precedence, but also it strikes a right balance between blocking “bad” patents and allowing innovative patents that incentivize technological advances.

150 See, e.g., *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1336 (Fed. Cir. 2016) (finding the claims passed *Mayo* step one); *Thales Visionix Inc. v. United States*, 2017 WL 914618, at *5 (Fed. Cir. Mar. 8, 2017) (finding the claims were not directed at an abstract idea); *McRO, Inc. v. Bandai Namco Games America Inc.*, 837 F.3d 1299, 1314-16 (Fed. Cir. 2016) (finding the claims were not directed to ineligible subject matter); *Trading Technologies Int’l, Inc. v. CQG, Inc.*, 2017 WL 192716, at *3 (Fed. Cir. Jan. 18, 2017); *Amdocs (Israel) Ltd. v. Openet Telecom, Inc.*, 841 F.3d 1288, 1300, 1302, 1305-06 (Fed. Cir. 2016) (finding the claims recited an inventive concept and passed *Mayo* step two); *Bascom Glob. Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341, 1349-50 (Fed. Cir. 2016) (finding the claims contained an inventive concept).

151 See, e.g., *BAHR, MAY 19, 2016 MEMORANDUM*, *supra* note 6; *BAHR, NOVEMBER 2, 2016 MEMORANDUM*, *supra* note 6; *Bascom Global Internet Services, Inc. v. AT&T Mobility LLC*, 827 F.3d 1341, 1349-50 (Fed. Cir. 2016).

N Σ

**National Security Frat Party:
Government Surveillance on College Campuses**

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I. Introduction

The university setting is supposed to be a haven for idea sharing and expression. However, such freedoms are inhibited where “Big Brother”¹ watches over you, questioning your every word, your every move, and in the academic setting — *your every thought*. Government surveillance of college campuses is nothing new. As students began to exercise their First Amendment rights to speak, associate, and protest in the mid-twentieth century, the government deployed invasive tactics to spy on students, professors, and academia at large.² In the following decades, rules were codified that protected students in response to surveillance concerns.³ But most, *if not all*, of the championed laws were either distorted or reversed in the name of national security as a response to the 9/11 terrorist attack. This drastic shift involves various groups, including, but not limited to: Central Intelligence Agency (CIA),⁴ Federal Bureau of Investigation (FBI), National Security Agency (NSA), state police departments, and the universities themselves. Together they form what I call the National Security Fraternity, a network of agencies and university administrations that spy on college students on campuses across the United States out of a long-held tradition to perceive any behavior that questions government actions as a threat to national security.

Although the judicial branch has dealt with privacy rights of students in primary and secondary education profoundly, its analyses regarding those issues do not extend to college students.⁵ In those cases, the Court was concerned with the adolescent mindset during body searches and broadening high school administration authority

1 See GEORGE ORWELL, 1984 (1949).

2 See generally SETH ROSENFELD, SUBVERSIVES: THE FBI'S WAR ON STUDENT RADICALS, AND REAGAN'S RISE TO POWER (2012) (Journalist Seth Rosenfeld's expose of hundreds COINTELPRO through publication and analysis of hundreds of the FBI's memos and documents, concentrating on the program's extensive surveillance of University of California, Berkeley. To read a few highlights of the novel, visit Matt Taibbi, *The Hunters and the Hunted*, N.Y. TIMES (Oct. 5, 2012), <http://www.nytimes.com/2012/10/07/books/review/subversives-by-seth-rosenfeld.html>).

3 See discussion *infra* Section II.B.

4 Notably the CIA is an independent source of foreign intelligence information and purports not to be a law enforcement agency. *What We Do*, CENTRAL INTELLIGENCE AGENCY (Apr. 5, 2007, 10:09 AM), <https://www.cia.gov/about-cia/todays-cia/what-we-do>.

5 See discussion *infra* Section II.A.

to inhibit substance abuse.⁶ Conversely, university students are adults who are expected to make independent decisions. That characteristic places college students in a unique predicament in which participation in political discourse is discouraged because of fear of retaliation and yet encouraged as part of the American college tradition. Currently, undergraduate and graduate students are vocalizing their opinions and rallying support on campuses as part of the Black Lives Matter movement⁷ and the Boycott, Divestment and Sanctions movement (BDS).⁸ But abusive governmental authority in national security operations threaten their freedom to assemble and exercise free speech.

This Article addresses the distinctive issue of government surveillance on college campuses for the purposes of national security.⁹ Accordingly, it proceeds as follows. Section I discusses the history of government surveillance on college campuses, highlighting the FBI program COINTELPRO (COunter INTELLigence PROgram), and developments in the university-student relationship under common law. Section II evaluates federal statutory and Constitutional laws in place that govern surveillance, its scope, and its limitations. Section III reveals the relationship between the university and the

6 See generally *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985); *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995); *Safford Unified School District #1 v. Redding*, 557 U.S. 364 (2009).

7 The Black Lives Matter movement emerged in summer 2013 and utilizes social media and public non-violent protest gatherings to address violence against African-Americans in the United States by law enforcement. See Elizabeth Day, *#BlackLivesMatter: the Birth of a New Civil Rights Movement*, THE GUARDIAN (July 19, 2015), <https://www.theguardian.com/world/2015/jul/19/blacklivesmatter-birth-civil-rights-movement>.

8 BDS began in 2005 and is a coalition of organizations and individuals who call for sanctions against Israel, a boycott of Israel and products made in Israel to pressure Israel to relinquish its settlements in Palestine, grant equal rights for Palestinian citizens of Israel, and for “Palestinian refugees to return to their homes and properties as stipulated in UN Resolution 194 of 1948.” Adam Horowitz and Philip Weiss, *The Boycott Divestment Sanctions Movement*, THE NATION (June 9, 2010), <https://www.thenation.com/article/boycott-divestment-sanctions-movement>.

9 This article excludes college dormitories (dorms) from the analysis of surveillance on college campuses for several reasons. For one, dorms are considered “homes” as spelled out in the Fourth Amendment of the United States Constitution following numerous cases regarding privacy in dorms. Further, dorms and campus organizing activities are two distinctive aspects of college life that do not generally correlate when it comes to engaging in political discourse and assembly.

government that compromises the university-student relationship and jeopardizes the future of American universities. By assessing the past and current state of government surveillance on college campuses, this Article encourages American universities to reconsider their loyalty to the National Security Fraternity.

II. Initiation: History of Surveillance on College Campuses

A. *The Early Beginnings of the College Surveillance Era*

After dabbling in college surveillance in the early 1940s, the FBI created COINTELPRO in 1956, the agency's most notorious activism surveillance program.¹⁰ This program sought to suppress the "subversive," a term concocted by the FBI administration that refers to organizations and individuals who were presumed to be threatening America's security with activism.¹¹ COINTELPRO did not distinguish between political and criminal activity and sought only to neutralize dissent.¹² Targeted groups included the Communist Party USA, the Socialist Workers Party, Black Nationalist Groups, the Ku Klux Klan, and "anarchist"¹³ groups.¹⁴ Yet the program's focus also encompassed any congregation of college student activists who were either protesting a war at the given time or sought racial, gender, or social equality.¹⁵

COINTELPRO employed several tactics that ranged from watching targets from afar to creating conflict from within the organizations themselves. The FBI's illegal surveillance employed over 2,300 wiretaps, 697 bugs, and 57,000 mail openings.¹⁶

10 Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA Patriot Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051, 1060, 1075-76, 1079-80 (2002).

11 *Id.* at 1073-74, 1079-80.

12 *Id.* at 1060-61, 1080.

13 The FBI used the term "anarchist" broadly. For instance, the FBI placed "hippie-type groups" that were small and loosely organized as advocating anarchy. See DAVID CUNNINGHAM, *THERE'S SOMETHING HAPPENING HERE: THE NEW LEFT, THE KLAN, AND FBI COUNTERINTELLIGENCE* 93 (2004).

14 Saito, *supra* note 10, at 1088.

15 *Id.* at 1088-89.

16 WARD CHURCHILL & JIM VANDER WALL, *THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI'S SECRET WARS AGAINST DISSENT IN THE UNITED STATES* 304 (2d ed. 2002) (contains copies of FBI COINTELPRO memos).

Additionally, “[g]overnment agents also actively subverted logistics, such as housing, transportation, and meeting places of anti-war activities.”¹⁷ Throughout its program, the FBI also forged letters to activists and their supporters, families, employers, landlords, and college administrators.¹⁸ The FBI went so far as to use ridicule as a tactic to suppress student activism describing it as a “potent weapon” to target college students for their opinions.¹⁹ For instance, in a memo to halt the New Left Movement,²⁰ agents plotted to publish a cartoon in Temple University’s newspaper that mocked student sit-ins under an “anonymous” contributor and to circulate it amongst legislators, prominent alumni members, and others to embarrass student activists.²¹

Such tactics came as no surprise as the FBI’s essential method to stop civil disorder was by causing civil disorder. For instance, the FBI had agent provocateurs: undercover agents who operated under pseudo-activist identities to instigate activists to pursue and cause distrust within their own activist organizations.²² Provocateurs went to colleges where they urged students to kill police and instructed them on how to carry out bombings.²³ They also provided schools with radical literature, films, and speakers to incite violence.²⁴ The FBI’s tactics led to several arrests of activists including an incident in which nine students and faculty members faced criminal charges for bombing an army recruitment center at Hobart College in Chicago.²⁵ In a memo written in 1967 by then FBI Director J. Edgar Hoover, the program had a specific agenda to target African-American political movements and placed federal agents in

17 Saito, *supra* note 10, at 1094. See generally BRIAN GLICK, *WAR AT HOME: COVERT ACTION AGAINST U.S. ACTIVISTS AND WHAT WE CAN DO ABOUT IT* (1989).

18 CHURCHILL & WALL, *supra* note 16, at 112, 186, 198, 200.

19 *Id.* at 186-87, 204-07.

20 In the United States, the New Left Movement grew out of student socialist activism and spanned the 1960s. Although New Left groups did not necessarily share a unified political theory, they generally encompassed left-wing ideology and exercised non-violent mass protest and civil disobedience to vocalize anti-war sentiment. See Madeleine Davis, *New Left Political Movement*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/New-Left> (last updated March 28, 2016).

21 CHURCHILL & WALL, *supra* note 16, at 186-87, 204-07.

22 *Id.* at 222.

23 *Id.*

24 *Id.*

25 *Id.*

African-American student groups, most of which did not cause any disturbances at the universities.²⁶ But COINTELPRO's practices did not go unnoticed. In 1976, a few years following the end of the program, the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities conducted an extensive investigation into COINTELPRO and concluded that the program's "domestic intelligence activity ha[d] threatened and undermined the constitutional rights of Americans to free speech, association and privacy . . . because the constitutional system for checking abuse of power [had] not been applied."²⁷

Although COINTELPRO is now defunct, it left a lasting impression on domestic surveillance, encouraging the government to pursue paranoia as the sole ground for national security investigations. However, the government is "kept in check"²⁸ by the judicial branch. And, when it comes to student activities on college campuses, the courts have indicated that the university plays a significant role in protecting students' constitutional rights.

B. The Court's Evolving Interpretation of the University-Student Relationship

Prior to the Civil Rights Movement, the courts interpreted the university-student relationship to be *in loco parentis*, meaning that the student was merely the university's beneficiary.²⁹ As student filed claims regarding due process rights and free speech violations sharply increased during the Civil Rights Movement, courts shifted from observing students as simply beneficiaries to recognizing their

26 *Id.* at 92-93, 106, 112.

27 U.S. SEN., INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS BOOK II, FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, 290 (1976), https://www.intelligence.senate.gov/sites/default/files/94755_II.pdf (commonly recognized as the Church Committee Reports).

28 Each branch of government — executive, legislative, and judiciary — is limited in power by one another through the system of checks and balances. This system set each branch with control over categories of the law and power to either bolster or block initiatives set by any of the branches that greatly impact the country. For further reference, see The Editors of Encyclopaedia Britannica, *Checks and balances*, ENCYCLOPAEDIA BRITANNICA (Jan. 30, 2009), <https://www.britannica.com/topic/checks-and-balances>.

29 Jason A. Zwara, *Student Privacy, Campus Safety, and Reconsidering the Modern Student-University Relationship*, 38 J.C. & U.L. 419, 433-34 (2012).

inherent rights to study and flourish against university opposition.³⁰

This shift was first cognizable in the public university setting in *Dixon v. Alabama State Board of Education*, a case concerning the due process rights of college students expelled for exercising their right to assemble under the First Amendment.³¹ In *Dixon*, nine African-American students were expelled from Alabama State College for protesting in a non-violent Civil Rights demonstration during a time when Alabama was facing scrutiny from the rest of the country for maintaining its segregation laws.³² While the defendant education board offered several explanations for its actions, its primary argument was that the college held a right to expel the students because they were participating in conduct prejudicial to the school.³³ The Fifth Circuit reviewed whether these students had a due process right to pre-expulsion notice and a hearing.³⁴ The court ruled that the students in this case possessed a fundamental right to due process because their private interest in the right to remain at a public college was of “extremely great value,”³⁵ expelling them requires notice and a disciplinary hearing.³⁶ However, the ruling was only controlling law for tax-supported schools and inapplicable to private universities at the time.³⁷ Other cases followed in *Dixon*’s steps as students continued to prevail on similar arguments claiming a variety of constitutional rights.³⁸ Later on, the standard expanded to also apply to private schools, but some courts interpreted the private school-student relationship to be a contractual one in which students are a party with legal rights.³⁹

Courts have yet to clearly define the university-student relationship, leaving unsettled the extent of the university’s liability

30 *Id.*

31 *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961). The court did not explicitly address the First Amendment rights of the students. *Id.*

32 *See id.* at 152, 154. Six of the nine brought the suit. *Id.* at 154.

33 *Id.* at 153.

34 *Id.* at 151.

35 *Id.* at 157.

36 *Id.* at 157-58.

37 *Id.*

38 Zwara, *supra* note 29, at 434 n.127 (“*See, e.g., Healey v. James*, 408 U.S. 169 (1972) (public university cannot deny recognition of a student organization based solely on disagreement with political views); *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667 (1973) (public university cannot censor editorial content of student-run newspaper)”).

39 Zwara, *supra* note 29, at 434.

for its actions against students.⁴⁰ However, a legal framework for analyzing privacy rights and their limitations has evolved over the past century that provides a reference point for comprehending college students' privacy rights against college surveillance.

III. House Rules: Governing Case Law and Statutes Concerning Student Privacy

A. *The Fourth Amendment & Reasonable Expectation of Privacy*

1. *Fourth Amendment Basics*

*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*⁴¹

The Fourth Amendment protects individuals against unreasonable search and seizure.⁴² In order for a plaintiff to succeed in a Fourth Amendment violation claim, the violation in question must have been committed by a government actor, be considered a "search," and that search must be deemed *unreasonable*: a concept that hinges on whether the government obtained a warrant that states probable cause with particularity to conduct the search and was authorized by an impartial magistrate.⁴³ If a court rules that a violation of the Fourth Amendment occurred and no exception applies, the evidence collected under that violation is inadmissible.⁴⁴

2. *The Development of Expectation of Privacy*

The technology revolution that defined the twentieth century

40 Kristen Peters, Note, *Protecting the Millennial College Student*, 16 S. CA. REV. L. & SOC. JUST. 431, 432 (2007).

41 U.S. CONST. amend. IV.

42 *Id.*

43 *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972); *Marron v. United States*, 275 U.S. 192, 196 (1927).

44 *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391-92 (1920).

advanced the way individuals communicate — but with more methods to speak, the wider the government’s ear grew. Such was the case in *Olmstead v. United States*, where, in 1928, the Supreme Court ruled that the government’s use of wiretapping equipment to secretly listen to conversations in a warrantless investigation was permissible.⁴⁵ In *Olmstead*, the investigating officers placed wiretaps in streets near the defendants’ homes and business offices.⁴⁶ The Court ruled that the officers did not violate the Fourth Amendment because they did not physically trespass on any places enumerated in the Fourth Amendment.⁴⁷ The Court’s holding in *Olmstead* was nothing innovative, the theory that the Fourth Amendment protects only places and not persons had much precedence in Supreme Court and federal court rulings.⁴⁸

But in 1967, amidst a rapid growth of government spies and domestic surveillance on Americans during the Cold War era, the Supreme Court reversed its *Olmstead* decision in *Katz v. United States*, where the Court interpreted the Fourth Amendment to protect people, not places.⁴⁹ In *Katz*, the government, lacking a warrant, secretly placed an electronic eavesdropping device inside a public phone booth to intentionally record the petitioner’s self-incriminating conversation.⁵⁰ The Court ruled against the government, holding that the government’s conduct was a search and seizure for the purposes of the Fourth Amendment and that it was unreasonable.⁵¹

In overturning *Olmstead*, the Court ruled that the government’s activity violated the petitioner’s expectation of privacy that he relied upon when using the phone booth.⁵² In his concurring opinion, Justice Harlan formulated a test to determine whether a reasonable expectation of privacy exists for the purposes of the Fourth Amendment.⁵³ This test is two-pronged: (1) a person has exhibited an actual (subjective) expectation of privacy; and (2) society views the expectation as reasonable (objective).⁵⁴

45 *Olmstead v. United States*, 277 U.S. 438, 466 (1928).

46 *Id.* at 456-57.

47 *Id.* at 466.

48 *See id.* at 465-68.

49 *Katz v. United States*, 389 U.S. 347 (1967).

50 *Id.* at 348.

51 *Id.*

52 *Id.* at 359.

53 *See id.* at 361.

54 *Id.*

The *Katz* two-part reasonable expectation of privacy test went on to become and remains controlling guidance in Fourth Amendment cases analyzed by the Court.⁵⁵ Yet notably, Justice Douglas wrote a concurrence in *Katz* where he addressed fellow Justice White's opinion, which stated that the executive branch is permitted to use electronic eavesdropping tools for national security purposes without a warrant.⁵⁶ Justice Douglas disapproved of this interpretation, stating that such use is impermissible and that there is no distinction under the Fourth Amendment among types of crimes illustrated in constitutional history.⁵⁷ Five years later, the Supreme Court later delved into determining whether the executive branch had the authority to conduct warrantless searches for national security purposes in *United States v. United States District Court* (commonly referred to as the *Keith* case).⁵⁸

In *Keith*, the Court addressed the question of whether the President of the United States had the power to authorize electronic surveillance for national security purposes without prior authorization by a magistrate.⁵⁹ The government argued that an exception to the Omnibus Crime Control Safe Streets Act of 1968, the controlling law on electronic surveillance at the time,⁶⁰ conferred authority to the executive branch to authorize national security-based surveillance.⁶¹ The Court unanimously disagreed with the government, ruling that it was not Congress' intent, nor was it afforded through any authority conferred by the Constitution, to permit the executive branch to override a judicial process requiring

55 See *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968) (applying Justice Harlan's "reasonable expectation of privacy test" from *Katz* in its majority decision). See also *United States v. Jones*, 565 U.S. 400 (2012) (applying the reasonable expectation of privacy test to hold that attaching a GPS tracking device to a vehicle and subsequently using that device to monitor the vehicle's movements on public streets was a search for Fourth Amendment purposes). For a further analysis of the two-part test, see generally Peter Winn, *Katz and the Origins of the "Reasonable Expectation of Privacy" Test*, 40 MCGEORGE L. REV. 1 (2016).

56 *Katz*, 389 U.S. at 359 (Douglas, J., concurring).

57 *Id.* at 360 (Douglas, J., concurring).

58 *United States v. U.S. Dist. Court*, 407 U.S. 297 (1972). This case is referred to as the *Keith* case after District Court Judge Damon J. Keith who ruled against exempting the executive branch's use of unauthorized electronic surveillance in the predecessor case that led to *United States v. United States District Court*. See *United States v. Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971).

59 407 U.S. 297 (1972).

60 See generally Omnibus Crime Control Safe Streets Act of 1968, 42 U.S.C. 3711.

61 407 U.S. at 303.

a neutral and detached magistrate's approval.⁶² The Court reasoned that the procedure to obtain a warrant does not frustrate the legitimate purposes of domestic security searches, that it is not too complex for a judge to comprehend, and that it does not compromise security because such warrants are *ex parte*.⁶³

Furthermore, the Court recognized national security as unique to "ordinary" crime because it is complicated by First and Fourth Amendment values,⁶⁴ an issue that continues to echo today upon determining the legality of government surveillance on college campuses. Although generally in disagreement with Justice Douglas' *Katz* opinion, the *Keith* Court stated that a different standard for national security is permissible only if it is deemed reasonable after balancing the government's legitimate need for intelligence information and the protected rights of American citizens.⁶⁵

3. *What Happens on Campus Stays on Campus: Applying Katz to College Surveillance*

Some argue that the *Katz* test does not apply under national security circumstances,⁶⁶ but this is misguided and inconsistent with *Keith*. The *Katz* inquiry is useful in evaluating a given scenario to determine whether there is an expectation of privacy for the purposes of standing in a Fourth Amendment violation claim. Further, the *Katz* analysis requires balancing the government's and the public's interests, requiring that the analysis not be for a single point of view. Hence, it is appropriate to apply the *Katz* test to determine whether college students have a reasonable expectation of privacy on their college campuses. Under the *Katz* test,⁶⁷ the subjective element analysis requires placing oneself in the mindset of a college student and the objective element requires determining whether society considers college student activity procures an expectation of privacy.⁶⁸

62 *Id.* at 318.

63 *Id.* at 320-21. *Ex parte* motions allow the applicant to file with the court and obtain a hearing by the court without notice to the other party. *See Ex Parte Motion*, BLACK'S LAW DICTIONARY (10th ed. 2014).

64 407 U.S. at 313.

65 *Id.* at 323.

66 *See generally, e.g.*, Glenn Sulmasy & John Yoo, *Katz and the War on Terrorism*, 41 U.C. DAVIS L. REV. 1219 (2007) (authors argue that the *Katz* test is not applicable to searches conducted for national security matters).

67 *Katz v. United States*, 389 U.S. 347, 361 (1967).

68 *Id.*

When selecting a university to attend, incoming students may consider scholarships offered to them, the prestige of the school, and opportunities at the university to achieve their goals and enlighten their minds. However, they generally do not consider whether their privacy rights will be sacrificed by attending a university. And while attending university, students check out books from the school library, conduct research for writing papers, and watch supplemental lecture videos online that aid them in their studies. When doing so, they presumably do not expect the public to be privy to which books they checked out, what they are researching, and their YouTube history. Moreover, the university is regarded as a realm of its own where sharing ideas and thoughts are part of the norm. Outside this realm, people exercise precaution before sharing their two-cents.

Society recognizes this cherished time in a person's life, during which generations of those in the United States have enrolled in college following high school and utilized the time to explore adulthood. Hence, society would not expect students to be surveilled for simply engaging in the valued voyage of navigating college life. Likewise, mere association with a student activist group or a religious student organization would not be viewed as a basis to be surveilled.

One caveat to society's view is that during times of national security turbulence, it has historically endorsed race- or ethnicity-based discrimination that is affiliated with the enemy at the given time.⁶⁹ However, the objective test is based on the reasonable person standard, not the unreasonable person who forgoes reasonableness for fear. Hence, under the *Katz* test,⁷⁰ the subjective and objective elements are met. Thus, college students do have a reasonable expectation to not be surveilled while in the bounds of college campuses.

69 See *Korematsu v. United States*, 323 U.S. 214, 217-18 (1944) (ruling an executive order that relocated people of Japanese descent residing in West Coast of the United States into internment campus during World War II is constitutional). Following the War, the Court was heavily scrutinized for its decision in *Korematsu*. See Eugene V. Rostow, *The Japanese American Cases-A Disaster*, 54 YALE L.J. 489, 531 (1945). See Susan Kiyomi Serrano & Dale Minami, *Korematsu v. United States: A Constant Caution in a Time of Crisis*, 10 ASIAN AM. L.J. 37 (2003); Erwin Chemerinsky, *Korematsu v. United States: A Tragedy Hopefully Never to Be Repeated*, 39 PEPP. L. REV. 1 (2013).

70 See *Katz*, 389 U.S. at 361.

4. *What the Fourth Amendment Does Not Protect as per Case Law*

Although the Court broadened its understanding of the expectation of privacy over the course of a century, it also conversely made rulings in favor of the government that infringe on privacy rights. The Court did so in various cases by deeming the government's actions either not a search or an exception to the warrant requirement under several circumstances. These established loopholes are significant in determining the legality of surveillance on college campuses.

For instance, if a person provides information willingly to another, that information is considered to be provided voluntarily, and thus it is not a "search," even if that information was solicited by an under-cover informant.⁷¹ This concept has evolved into the third-party doctrine, under which there is no reasonable expectation of privacy for information voluntarily provided to third parties, and the doctrine covers methods of communication that are part of our daily lives, including your bank records,⁷² phone numbers that you've dialed,⁷³ and cell-site location history of when and where you sent and received text messages on your cellphone.⁷⁴ All of these are accessible by the government without a warrant.

Another relevant exception is the plain-view doctrine, which permits the seizure of contraband or stolen property that is not listed in the original warrant, so long as it is immediately apparent during the search and requires no further interaction by police to determine its nature.⁷⁵ The plain-view doctrine can be easily manipulated by state actors to find what they intentionally wanted to search but lacked the probable cause to do so. For example, if the government

71 *United States v. White*, 401 U.S. 745, 749 (1971).

72 *United States v. Miller*, 425 U.S. 435, 442-43 (1976).

73 *Smith v. Maryland*, 44 U.S. 735 (1979).

74 *United States v. Graham*, 824 F.3d 421, 424 (4th Cir. 2016). Cell-site location data is a system that logs where you are in the world whenever you start or end a call, send or receive a text, or simply receive a notification on your cellphone — therefore acting like a GPS of your every cellphone move. See Robinson Meyer, *No One Will Save You From Cellphone Tracking*, *THE ATLANTIC* (June 2, 2016), www.theatlantic.com/technology/archive/2016/06/fourth-circuit-csli-cellphone-location-tracking-legal/485225.

75 *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Horton v. California*, 496 U.S. 128, 129, 133 (1990) (deeming "inadvertent" not a necessary element for the plain-view doctrine).

obtains a search warrant for a broad “national security” reason, it can use that warrant to enter a house when its real intention is to find illegal recreational drugs but it lacks probable cause for a drug search warrant. Because the plain-view doctrine can be easily manipulated to serve an ulterior motive, the government can mask an investigation of a student that is based on a generalization of his or her appearance, race, or religion, under the guise of a properly obtained search warrant for national security purposes.

Even if evidence is collected against a person in violation of their Fourth Amendment right, it can be used against that person under the good-faith exception. Under this exception, if an officer relied on either a search warrant that was later proven defective⁷⁶ or a “clerical error”⁷⁷ when obtaining the evidence, the evidence is still admissible.

These rules affect college students because universities act as realms for free discussion, which relies on sharing information. These exceptions and accepted doctrines inhibit sharing of ideas and may lead students to face criminal charges for materials that in no way threaten national security yet are nevertheless used against them.

In addition to the judiciary’s role in affording the government the ability to disregard privacy rights, Congress has legislated numerous laws that impede privacy rights by expanding government access to secured information in the name of national security through the USA PATRIOT (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) Act.

B. USA PATRIOT Act

Six weeks after 9/11, drastic limitations to privacy rights against surveillance were enacted through legislation in the USA PATRIOT Act (Patriot Act).⁷⁸ The Patriot Act amended several U.S.

⁷⁶ United States v. Leon, 468 U.S. 897 (1984).

⁷⁷ Arizona v. Evans, 514 U.S. 1 (1995).

⁷⁸ Uniting And Strengthening America By Providing Appropriate Tools Required To Intercept And Obstruct Terrorism (USA Patriot Act) Act Of 2001, Pub. L. No. 107-56, 115 Stat. 272 [hereinafter Patriot Act] (Certain sunset provisions were reauthorized by the USA PATRIOT Improvement and Reauthorization Act of 2005, 109 Pub. L. No. 109-177, 109-178; along with numerous annual renewals; and most recently with the USA Freedom Act, Pub. L. No. 114-23 § 705 (2015)).

laws to make exceptions to privacy safeguards.⁷⁹ The Patriot Act's most profound alteration to privacy law was its expansion of the executive branch's ability to conduct surveillance, as expressly stated in Title II of the Act: "Enhanced Surveillance Procedures."⁸⁰ Notable sections under Title II that affect government surveillance on college campuses are discussed below.

To start, Section 203 of the Act allows disclosure of information collected by the government that is either foreign intelligence or counterintelligence to any federal agency official if it assists in the official's duties without requiring a court order.⁸¹ At first glance, Section 203 seems harmless. However, the Patriot Act identifies "foreign intelligence information" broadly to include *any* information concerning *any* person that relates to protecting the United States from an international terrorist attack, agents working for a foreign power, national defense, national security, or the conduct of foreign affairs of the United States.⁸² With this extensive definition, virtually anything related to national defense, national security, or foreign affairs counts as foreign intelligence.⁸³ Because the executive branch has expansive authority under the Patriot Act, the decision to select who is associated with terrorism is left to the government which unlike an unattached magistrate, is affixed to the surveillance program's success in finding terrorists.

Furthermore, a foreign intelligence information warrant follows a different procedure than an ordinary criminal warrant, pursuant to the Patriot Act's Amendment to the Foreign Intelligence Surveillance Act (FISA) in 2008. Under Section 215, FISA approved investigations authorizing the FBI to seize "any tangible thing," which includes "books, records, papers, documents, and other items," as long as they are deemed relevant in an international terrorism or intelligence investigation.⁸⁴ Under Section 218, the government must merely show that there is a "significant purpose" in obtaining foreign intelligence information for the requested FISA surveillance activity, and a magistrate from any jurisdiction can approve the request.⁸⁵

79 *Id.*

80 *Id.*

81 *Id.* § 203; 18 U.S.C. § 2517 (2016).

82 50 U.S.C. § 1801(a)(4) (2016).

83 HERBERT N. FOERSTEL, *REFUGE OF A SCOUNDREL: THE PATRIOT ACT IN LIBRARIES* 57 (2004).

84 Patriot Act, *supra* note 78, § 215.

85 50 U.S.C. § 1804(a)(6)(B) (2016).

The Patriot Act may seem remote from intruding on university life, but the Act contains several provisions that affect privacy of students where they least expect it: their academic records.

C. *Academic Records*

1. *Patriot Act Sections Regarding Education-Related Data Collection*

Sections found within Title V of the Patriot Act enable the government to access student records that were previously guarded from it. For instance, Section 507 amended the General Education Provision Act and now permits the Attorney General to obtain an ex parte subpoena of university-protected education records that are in any way relevant to an authorized terrorism investigation.⁸⁶ The written application must only “certify that there are specific and articulable facts giving reason to believe that the education records are *likely* to contain information” related to the investigation.⁸⁷ Section 508 repealed the confidentiality provision of the National Education Statistics Act of 1994⁸⁸ and applied the ex parte standard of Section 507 to the collection of “reports, records, and information . . . including individually identifiable information.”⁸⁹ Section 508 also affords university offices and personnel protection from liability for reproducing and providing information in compliance with a Section 508 investigation — even if it is later shown not to be a valid terrorism investigation — as long as it was done in good faith.⁹⁰

There are minimal efforts to protect information gathered under Sections 507 and 508. Although the Attorney General must consult with the Secretary of State prior to pursuing an investigation of academic records and is limited in disseminating the confidential material outside of what is deemed necessary for the investigation, there is no requirement for independent judicial review.⁹¹ Even with confidentiality in mind, Sections 507 and 508 reverse essential provisions guarding student information from government prying that were integral in the formation of both the General Education

86 Patriot Act, *supra* note 78, § 507; 20 U.S.C. § 1232(g)(j)(1); 34 C.F.R. § 99.31.

87 Patriot Act, *supra* note 78, § 507(j)(2) (emphasis added).

88 20 U.S.C. § 9007 (1994) (repealed 2002).

89 Patriot Act, *supra* note 78, § 508.

90 *Id.*

91 Patriot Act, *supra* note 78, §§ 507(j)(1), 508(c)(2).

Provision Act and the National Education Statistics Act of 1994.

In addition to the Patriot Act, amendments to the Family Education Records Act (FERPA) and its existent ambiguities enable the government to circumvent students' expectation of privacy.

2. *Family Education Records Privacy Act (FERPA)*

Passed in 1974, FERPA is a federal law that protects the privacy of student education records, excluding directory information.⁹² The law applies to all schools that receive funds from the U.S. Department of Education.⁹³ The right is guaranteed to students who are at least 18 years of age and to parents of students under the age of 18.⁹⁴ If no exception applies, schools must have written permission from the student to release any information from a student's education record.⁹⁵ If a university has a pattern or practice of violating its FERPA protected policies, the university is subject to losing its funding from the U.S. Department of Education.⁹⁶ However, there are several exceptions to FERPA concerning the disclosure of education records.

FERPA's health and safety exception is the most pertinent to evaluating national security surveillance on college campuses. Under this exception, universities are permitted to disclose protected information to emergency respondents, such as law enforcement officials, without consent to protect the safety of the student or other individuals in an emergency.⁹⁷ However, the Department of Education guidance requires that "any release must be narrowly tailored considering the immediacy, magnitude, and specificity of information concerning the emergency."⁹⁸ Although the limits of this exception were designed to be strictly construed,⁹⁹ the government

92 20 U.S.C. § 1232g (1968); 34 C.F.R. § 99.2 (2009).

93 20 U.S.C. § 1232g (1968).

94 *Id.* at (d). For the purpose of this article, "student" rights in the FERPA context includes parental rights for students under 18 years of age. *See id.*

95 Written permission must be obtained by a parent if the student is under the age of eighteen. *Id.*

96 *Id.* at (a)(1)(A).

97 *See* 34 C.F.R. §99.36 (2008).

98 U.S. Dep't of Educ., *Recent Amendments to Family Educational Rights and Privacy Act Relating to Anti-Terrorism Activities*, 1, 3 (Apr. 12, 2002), <https://www2.ed.gov/policy/gen/guid/fpco/pdf/htterrorism.pdf>.

99 120 CONG. REC. S39,863 (daily ed. Dec. 13, 1974) (Joint Statement in Explanation of Buckley/Pell Amendment).

has applied it broadly since 9/11. For instance, government racial profiling of Middle Eastern college students surged drastically within a few months after 9/11.¹⁰⁰ Within two months of the attacks, the FBI investigated over 200 campuses to collect information on students of Middle Eastern descent.¹⁰¹ Yet, there is no report of the FBI finding a terrorist amongst the students they investigated during that time.

There are other pertinent exceptions to FERPA that enable universities to provide information without the students' consent and intrude upon their privacy. As already discussed, the Patriot Act created *ex parte* orders for education records, consequentially disabling FERPA's original safeguard that required notice to students whenever their records were accessed by a third-party.¹⁰² Further, the university is not liable when complying with an *ex parte* order so long as the university relied on "good faith" when providing the information to the government.¹⁰³

Although not a technical exception, FERPA's directory information provision provides a loophole for government authorities to obtain identifiable student information. Directory information includes the student's name, residential address, telephone number, email address, photo, place and date of birth, degree concentration, grade level, officially recognized activities and sports, weight, and height.¹⁰⁴ According to the provision's text, revealing these specific biographical details is not considered an invasion of privacy.¹⁰⁵ Unlike the other exceptions mentioned, the university must provide notice to students of the directory information policy and an opportunity for students to opt out of providing that information.¹⁰⁶ However, the notice requirement for the directory information can be met

100 Jacques Steinberg, *A Nation Challenged: The Students; U.S. Has Covered 200 Campuses To Check Up on Mideast Students*, N.Y. TIMES (Nov. 12, 2001), <http://www.nytimes.com/2001/11/12/national/12STUD.html>.; <https://www.thenation.com/article/student-privacy-and-patriot-act>.

101 *See id.* *See also* David Lyon, *Surveillance after September 11, 2001* in *THE INTENSIFICATION OF SURVEILLANCE: CRIME, TERRORISM, AND WARFARE IN THE INFORMATION AGE* 16, 20 (Kirstie Ball & Frank Webster eds., 2003). To learn more about the Muslim student climate following this FBI investigation and continued contact by the FBI, *see* Uzma Kelsey, *Student Privacy and the PATRIOT ACT*, THE NATION (Feb. 24, 2012).

102 20 U.S.C. § 1232g(b)(4) (2013). *See* discussion *supra* Sections II.C.2.

103 Patriot Act, *supra* note 78, §507(j)(3) (amended Section 444 of the General Education Provision Act, 20 U.S.C. § 1232(h)).

104 20 U.S.C. § 1232g(a)(5)(A) (2013).

105 *See id.*

106 34 C.F.R. § 99.37 (2012).

with minimal effort. For instance, the notice does not need to be directed to individual students and can be met by publishing it in the school's handbook.¹⁰⁷ By providing notice through a handbook and not as an isolated document directed toward the student, it is likely that students will inadvertently disregard it because it is part of something seemingly too voluminous and unnecessary to read.

Although a student's race, gender, and national origin information cannot be released pursuant to FERPA, the directory information can be highly suggestive to those characteristics. For instance, a student's affiliation with a religious or cultural student organization will likely pinpoint to the student's religion and national origin. Additionally, the student's photo can be highly suggestive because one can deduce the student's race and religion based on the student's skin color and religious headdress. Hence, the government can discover some of the private information FERPA is designed to protect by utilizing the clues provided by the directory information.

Some argue that students at universities that are partially or fully funded by the U.S. Department of Education are afforded privacy protection under the Protection of Pupil Rights Act (PPRA).¹⁰⁸ Unlike FERPA, PPRA was not altered by the Patriot Act.¹⁰⁹ PPRA prevents schools from requiring students to provide information regarding characteristics that could identify either their or their families' religion, political affiliation, or health issues, as well as self-incriminating answers to school surveys.¹¹⁰ Although courts have not addressed PPRA violation claims raised specifically by college-level students,¹¹¹ PPRA's language clarifies that "student" in the PPRA context refers only to primary and secondary students.¹¹²

107 U.S. DEPT OF EDUC., LAWS & GUIDANCE/GENERAL, FREQUENTLY ASKED QUESTIONS (2015), <https://www2.ed.gov/policy/gen/guid/fpco/pdf/ferpafaq.pdf>.

108 See generally Lynn M. Daggett, *Student Privacy and the Protection of Pupil Rights Act as Amended by No Child Left Behind*, 12 U.C. DAVIS J. JUV. L. & POL'Y 51 (2008).

109 See 20 U.S.C. § 1232(h) (2016) (recognizing the Act's history of amendments after its enactments shows no amendments made by the Patriot Act).

110 20 U.S.C. § 1232h(b)(1)-(8) (2016).

111 Although two cases in recent years included PPRA claims regarding university students — *Namazi v. Univ. of Cincinnati Coll. of Med.*, 3 Fed. App'x 482 (6th Cir. 2001) and *Herbert v. Reinstein*, 976 F. Supp. 331, 340 (E.D. Pa. 1997), *aff'd* 162 F.3d 1151 (3d Cir. 1998) — the courts in both cases did not discuss the viability of PPRA violation claims brought by university students based on information collected during their university education, and both cases were dismissed on grounds not associated with the PPRA-related argument.

112 20 U.S.C. § 1232h(c)(6) (2016).

However, it does apply to universities that both obtain any funding from the U.S. Department of Education and solicit PPRA protected information from a secondary or primary school student without the student's consent.¹¹³ Therefore, if that student were later to attend that university, that PPRA violated information cannot be subsumed in the student's academic records at the university.

Another caveat to FERPA and the Patriot Act is that they treat foreign students unfavorably regarding their privacy interest in their academic records.

3. Rules Regarding Foreign Students' Records

Following 9/11, the threat foreign students were perceived to pose against national security grew exponentially, even though only one of the six terrorists who carried out the attacks was in the United States on a student visa.¹¹⁴

The Patriot Act directly addresses foreign students and the existent program to track admission, entry, and college disciplinary actions against foreign students called the "foreign student monitoring program" ("Monitoring Program") under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).¹¹⁵ The Patriot Act required enforcement of the Monitoring Program and expanded its scope from traditional universities to now include educational institutions such as flight schools, language training schools, and vocational schools.¹¹⁶ Interestingly, the Patriot Act amended the Monitoring Program¹¹⁷ under Title IV's provisions on border security rather than under Title V's provisions on education records.¹¹⁸ A "border security" search is an exception to the Fourth Amendment that elevates police enforcement's authority within a hundred miles of the nation's border and international transportation places by requiring only that they have reasonable

113 See U.S. DEP'T OF EDUC., *Protection of Pupil Rights Amendment (PPRA) - Summary of Requirements*, <http://familypolicy.ed.gov/content/ppra-requirements> (last visited May 13, 2016).

114 JULIE FARNAM, *US IMMIGRATION LAWS UNDER THE THREAT OF TERRORISM* 108 (2005).

115 See Patriot Act, *supra* note 78, § 416; see also Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 104 Pub. L. 104-208, Div. C § 641(a), 100 Stat. 3009-546, 3009-704 (codified at 8 U.S.C. § 1372 (1996)).

116 See 8 U.S.C. § 1761 (2002); see also Patriot Act, *supra* note 78, § 416.

117 8 U.S.C. § 1761 (2002).

118 Patriot Act, *supra* note 78, § 416.

suspicion to conduct a search without a warrant — a standard far lower and easier to meet than probable cause.¹¹⁹ With this in mind, Congress' placement of foreign student records under Title IV instead of alongside the academic records provisions under Title V suggests that it categorizes foreign students as possessing a lower expectation of privacy compared to their peers.

Similarly, while FERPA generally safeguards all students, it is far less protective of foreign students studying in the United States than students who are citizens. Under IIRIRA, for example, the Attorney General is authorized to disregard FERPA protections for foreign students insofar as to implement the Monitoring Program to track and maintain records of these students.¹²⁰ But as discussed earlier, the Patriot Act has given wide discretion to the Attorney General to determine what information the government needs to secure the United States from terrorism and security threats.¹²¹ In turn, foreign students' rights presumed under FERPA can be forgone as long as the Attorney General provides at least a miniscule showing of necessity of those students' information in connection with national security.

Because of the expansion of the Monitoring Program and limited FERPA protections, foreign students can be subjected to more intrusive surveillance that places them in the same league as any person outside the United States who is a perceived threat against national security because they lack the protections garnered to U.S. citizens and permanent residents. This further proves problematic for undocumented students who are restrained from seeking U.S. citizenship, even if they have resided in the United States since childhood.¹²²

The governing statutory and common law frameworks discussed suggest that the government can exercise unsurmountable power to conduct surveillance on college campuses. However, rules that are deeply internalized in American history and culture constrain government intrusion of privacy rights.

119 See *United States v. Montoya De Hernandez*, 473 U.S. 531 (1985) (citing *United States v. Ramsey*, 431 U.S. 606, 616-17, 619 (1977)).

120 8 U.S.C. § 1372(c)(2) (1996).

121 See discussion *supra* Section II.B.

122 See *Why Don't They Just Get In Line? There Is No Line for Many Unauthorized Immigrant*, American Immigr. Council, https://www.americanimmigrationcouncil.org/sites/default/files/research/why_dont_they_just_get_in_line_and_come_legally.pdf (last visited May 3, 2017).

D. *The First Amendment as the Peak of Rights*

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”¹²³

The First Amendment protects the freedom of speech, religion, press, and assembly.¹²⁴ When surveillance targets a specific group based on a suspect class¹²⁵ for exercising rights under the First Amendment, the judiciary employs a heightened scrutiny standard, which requires the government to produce evidence that its conduct was necessary and narrowly tailored to meet a compelling government interest.¹²⁶ Furthermore, the U.S. Constitution applies to all persons in the United States.¹²⁷ Hence, surveillance that either targets a religious student group or a student’s protected characteristic is prohibited, no matter their citizenship status.

In February of 2016, the Third Circuit affirmed in *Hassan v.*

123 U.S. CONST. amend. I.

124 *Id.*

125 Protected classes are race, religion, and national origin. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938) (holding that these classifications are “insular” and therefore call for a more a special judicial inquiry); *see also* *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 981 (N.D. Cal. 2012) (citing *Romer v. Evans*, 517 U.S. 620, 631 (1996)). “Judicial review must begin from the position that ‘any official action that treats a person differently on account of his race or ethnic origin is inherently suspect.’” *Fullilove v. Klutznick*, 448 U.S. 448, 523 (1980).

126 *Aiken v. City of Memphis*, 37 F.3d 1155, 1162-63 (6th Cir.1994) (en banc).

127 Although the text of Foreign Intelligence Surveillance Act of 1978 (FISA) Pub. L. 95-511, 92 Stat. 1783, (codified at 50 U.S.C. ch. 36 (1978)) declares the executive branch is prohibited from conducting surveillance of only U.S. citizens and permanent residents (hence excluding everyone else such as foreign students on visas and the undocumented), the United States Constitution identification of “persons” has precedence in applying to all persons in the United States with regard to protection of First Amendment activity. Accordingly, the executive branch cannot legally conduct surveillance of anyone in the United States solely in response to protected First Amendment activity. For a timeline of cases that establishes interpreting the First Amendment and many other rights under the Constitution to apply to undocumented individual, *see* Raoul Lowery Contreras, *Yes, Illegal Aliens Have Constitutional Rights*, THE HILL (Sep. 29, 2015), <http://thehill.com/blogs/pundits-blog/immigration/255281-yes-illegal-aliens-have-constitutional-rights>.

City of New York that the government's national security and public safety justification does not satisfy its burden of production for heightened scrutiny.¹²⁸ In *Hassan*, the plaintiff class, including two Muslim Student Association chapters in New Jersey, was surveilled by the New York Police Department (NYPD) following the 9/11 attacks as part of its targeted Muslim surveillance program that spanned a decade and was designed to find terrorists among the Muslim community.¹²⁹ Such surveillance included weekly reports on Muslim Student Association chapters at universities in New York, New Jersey, Connecticut, and Pennsylvania.¹³⁰ These reports were digests of an officer's daily information gathering from the associations' websites, forums, and blogs.¹³¹ The NYPD also sent out informants to spy on Muslim student daily life, which included examining Muslim university students, photographing universities, and mapping areas where populations showed "ancestries of interest."¹³² One NYPD officer went as far as to spend his weekend following and watching university Muslim Students Association members river-rafting as part of a group recreational event, and recorded how often those students prayed and discussed religious topics.¹³³ The Court concurred with holdings of other Circuit Courts, affirming that the government's reliance on mere speculation and appeals rooted in stereotypes does not supply the objective evidence required to meet its burden under heightened scrutiny.¹³⁴

Pursuant to the Tenth Amendment of the U.S. Constitution, states are permitted to provide greater protection of free speech and privacy than the Constitution as long as they do not conflict with, or are prohibited by, federal law from doing so.¹³⁵ For instance,

128 *Hassan v. City of New York*, 804 F.3d 277, 306 (3d Cir. 2015), *as amended* (Feb. 2, 2016).

129 *Id.* at 285.

130 *Id.* at 286.

131 *Id.* at 286, 295; *see also Weekly MSA Report*, ASSOCIATED PRESS, 2, <http://hosted.ap.org/specials/interactives/documents/nypd-msa-report.pdf> (last visited Feb. 2, 2012) (reproduced copy of New York Police Department's internal memo of an officer's "MSA Report" dated Nov. 22, 2006).

132 *Hassan*, 804 F.3d at 285.

133 *Id.*

134 *Id.* at 306 (citing *Patrolmen's Benevolent Ass'n of N.Y. v. City of New York*, 310 F.3d 43, 53 (2d Cir. 2002); *Reynolds v. City of Chi.*, 296 F.3d 524, 526 (7th Cir. 2002) (Posner, J.); *Lomack v. City of Newark*, 463 F.3d 303, 310 (3d Cir. 2006)).

135 U.S. CONST. amend. X. *See also Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (holding that the California State Constitution protected

California expressly recognizes privacy in its own constitution as a right alongside the right to liberty and protecting property.¹³⁶ With this in mind, California courts presume covert police surveillance on college campuses violates both the state and federal constitution because of its chilling effect on First Amendment protected activity.¹³⁷ Further, California prevents law enforcement and state agencies from sharing information collected about individuals where such information is unrelated to an investigation of unlawful activity.¹³⁸ Because state laws vary, the amount of protection students have on campus depends on the state in which they attend school. However, there is no distinction between public and private schools regarding national security surveillance because it is conducted according to the government's discretion, *not the university's*. Yet, each university can either further the government's interest in surveillance or protect students' interest in privacy based on its own conduct.

IV. Brotherhood: The University's Ongoing Relationship with the Government

A. *How Universities Work with the Government to Threaten Student Privacy*

The university itself plays a significant role as the middle man between the government and the student. In recent years, universities have worked with the government to invade students' privacy. For one, university administrators allow representatives from the Department of Homeland Security to provide counter-terrorism training to campus police, instilling a sense of a "Homeland Security

speech and petitioning at privately owned shopping centers even though such conduct on privately owned property is not protected speech according to the Supreme Court), and Michael Risher, Alan Schlosser, & Rachel Swain, *Know Your Rights: Free Speech, Protests & Demonstrations in California*, AM. C.L. UNION OF N. CAL., 22 (Jan. 2010), https://www.aclunc.org/sites/default/files/know_your_rights_free_speech.pdf (last visited Apr. 13, 2017).

136 CAL. CONST. art. I, § 1.

137 *White v. Davis*, 13 Cal.3d 757, 767, 777 (1975) (concluding that "the classroom of the university should be a forum of free expression; its very function would largely be destroyed by the practices described in the complaint [of covert police operations at universities]").

138 Cal. Civ. Code §1798.24(e) (West 2017) (permitting law enforcement and state agencies to only disclose collected information they have about a person when it is required for an investigation of unlawful activity or for licensing, certification, or regulatory purposes by that agency).

Campus.”¹³⁹ Secondly, most universities have intelligence sharing agreements between campus police and national security related government entities.¹⁴⁰

The FBI has taken further steps to form a budding relationship with universities. For example, the FBI funded “Academic Alliance” program brings together university chancellors and presidents with national security agencies three times a year to comingle and host lectures on college-related national security concerns.¹⁴¹ The FBI also formed the College and University Security Effort (CAUSE), in which FBI special agents in high managerial positions meet with high-ranking college administrators to counsel them on national security matters.¹⁴² The program, however, instigates fear with its suggestive lecture topics, such as attempts by foreign governments to intercept universities.¹⁴³ Under CAUSE, the FBI expects universities to return favors for its services, such as providing information about departments and personnel on campus, details of suspicious incidents, and access to subject matter experts to aid FBI investigations.¹⁴⁴

Collaborating when there is a threat is one thing, but these trainings and agreements exist even when there is no threat, echoing the years of when COINTELPRO infiltrated universities unnecessarily.¹⁴⁵

B. Why it is in the University's Best Interest to Stop Fraternizing with the Government

Although the National Security Fraternity is lending a hand to the university, the university should consider whether that hand is worth the slap it may face in its numerous facets of running an

139 Michael Gould-Wartofsky, *Seven Steps to a Homeland Security Campus*, THE NATION (Mar. 22, 2012), <https://www.thenation.com/article/seven-steps-homeland-security-campus/>.

140 *Id.*

141 *Academic Alliance Working Together to Protect the Nation*, FED. BUREAU OF INVESTIGATION (Apr. 5, 2006), https://www.fbi.gov/news/stories/2006/april/acad_alliance040506.

142 See *The FBI's College and University Security Effort*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/file-repository/college-and-university-security-effort-cause.pdf> (last visited Nov. 28, 2016).

143 *Id.*

144 *Id.*

145 See discussion *supra* Section I.A.

academic institution.

Firstly, unrestrained government policing can inhibit the university's daily functions. For instance, a subpoena that seeks network tracking requires a program to essentially "attack" the university's networking system relied upon by every student and university personnel alike.¹⁴⁶ Such attacks can wreak havoc on the network that will be difficult and costly for the university to reconstruct.¹⁴⁷

Secondly, if students discover that the FBI is prying through their records, these students and their successors will likely discontinue providing voluntary information such as race and religion. However, such information illuminates racial, gender, and economic classes that do not receive equal education services and opportunities. These demographic details aid the university in addressing and resolving unequal access to its programs.

Thirdly, the presence of surveillance may profoundly discourage students from sharing their opinions and participating in activism. For instance, activism in seeking racial justice highlights students of a specific race who are vocalizing their personal experiences with racism. But if the government deems one of those students a possible threat to national security, then it can surveil the activist group in its entirety pursuant to the Patriot Act.¹⁴⁸ Furthermore, the national security reasoning may be pretext for targeted race-based surveillance. Such a tactic inhibits the academic and leadership experience of these students, creating a racial divide in who has true freedom of expression on campus. By discouraging these now basic principles of college life, students will lack the benefit

146 Edward T. Chapman & Donald G. Marks, *PATRIOT Act: Implications for Colleges and Universities*, 85 PROC. OKLA. ACAD. SCI. 65, 69 (2005).

147 *Id.*

148 The Department of Homeland Security has reportedly monitored the Black Lives Matter movement since the summer of 2014. It is unspecified whether the investigation is conducted pursuant to the Patriot Act or by unauthorized means. For further details, see George Joseph, *Exclusive: Feds Regularly Monitored Black Lives Matter Since Ferguson*, THE INTERCEPT (Jul. 24, 2015, 2:50 PM), <https://theintercept.com/2015/07/24/documents-show-department-homeland-security-monitoring-black-lives-matter-since-ferguson>. Human rights attorneys at the Center of Constitutional Rights filed lawsuit against the FBI and NSA to compel them to disclose information collected by surveillance of the Black Lives Matter movement. Ben Norton, *FBI, Homeland Security Sued for Records on Surveillance of Black Lives Matter Activists*, SALON (Oct. 20, 2016, 5:39 PM), <http://www.salon.com/2016/10/20/fbi-homeland-security-sued-for-records-on-surveillance-of-black-lives-matter-activists>.

of collaborating with their classmates. This type of idea sharing is essential to the emergence of innovation and success for students after graduation that in turn, brings prestige to the university.

Another aspect of university operations the fraternity constrains is management of the growing nontraditional student population, which includes online distance learners and foreign students.¹⁴⁹ For example, online programs offer accessibility and affordability to individuals, partaking in online classes by the millions without stepping foot on a university. Under the current legal framework, however, their freedom to share ideas with professors and other students is hindered because they rely on computer interface to communicate, which potentially subjects them to government to pry on every single word they type.¹⁵⁰

The National Security Fraternity's alienation of foreign students hinders numerous benefits they afford universities. According to a statement issued a year after 9/11 by then President of Massachusetts Institute of Technology Charles M. Vest, maintaining U.S. universities as open facilities to foreign students plays an important role in the university's success.¹⁵¹ He explained that foreign students build excellence of institutions by enhancing the educational experience of students, contributing to American industry and academia, and spreading advancement and good will toward America in other countries.¹⁵² Such considerations are vital in understanding that foreign students are not a threat, but rather a tool for national security. Instead of viewing foreign students as dangerous, they should be integrated in the university to best serve the university and, as Dr. Vest stated, spread good will toward America.¹⁵³ But if universities permit the government to target and harass foreign students, it will discourage them from studying in the

149 See Zwara, *supra* note 29, at 442.

150 See generally Elizabeth Stoycheff, *Mass Surveillance Chills Online Speech Even When People Have "Nothing to Hide"*, SLATE (May 3, 2016), http://www.slate.com/blogs/future_tense/2016/05/03/mass_surveillance_chills_online_speech_even_when_people_have_nothing_to.html.

151 Charles M. Vest, *Response and Responsibility: Balancing Security and Openness in Research and Education*, MASS. INSTIT. TECH. (Sept. 2002), <http://web.mit.edu/president/communications/rpt01-02.html>.

152 *Id.* at 3.

153 To learn more of the several benefits international students provide for U.S. universities, see Niall Hegarty, *Where We Are Now –The Presence and Importance of International Students to Universities in the United States*, 4 J. INT'L STUDENTS 223 (2014).

United States and they will seek an education elsewhere.¹⁵⁴

For these reasons, the university should reconsider its relationship with the government regarding student surveillance to best sustain its operations, prestige, and excellence.

V. Conclusion

Every frat party comes at a cost. In reconciling national security concerns and student privacy rights on campus, it is essential not to reiterate the past. COINTELPRO was an extreme intrusion of privacy of college students, and it deceived the nation for decades.¹⁵⁵ Nevertheless, the current legal framework that provides the government expansive surveillance authority emulates COINTELPRO by overindulging in the idea that the United States is under a constant and extreme threat of terrorism.¹⁵⁶

Although the Patriot Act expanded the government's scope in surveillance, it does not alter what society deems private.¹⁵⁷ Therefore, universities must reconsider whether the government's overzealous desire to surveil is worth sacrificing its place in American culture and history as a haven for ideas and expression.

154 Following the election of Donald J. Trump as the 45th President of the United States, college-ready students who were considering studying in the United States reportedly changed their mind in response to his anti-immigration campaign promises. Nida Najar & Stephanie Saul, *'Is It Safe?' Foreign Students Consider College in Donald Trump's U.S.*, N.Y. TIMES (Nov. 16, 2016), <http://www.nytimes.com/2016/11/17/us/is-it-safe-foreign-students-consider-college-in-donald-trumps-us.html>.

155 See discussion *supra* Section I.A.

156 See discussion *supra* Section II.B.

157 See discussion *supra* Sections II.A., II.B.

