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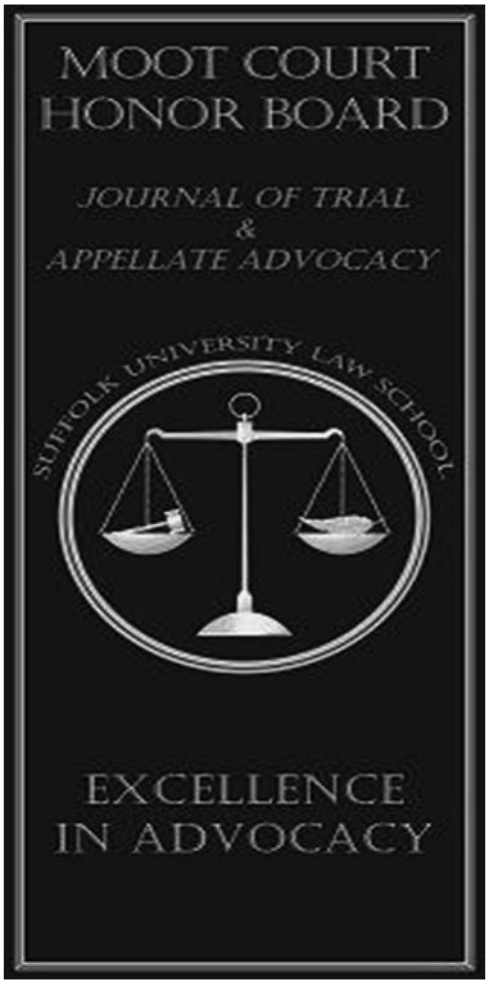

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Volume XXIV 2018 - 2019 Issue 2

TABLE OF CONTENTS

EDITOR'S NOTE

Dear Reader:

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

The Lead Article, *Hit the Ground Running: The Complete Opening Statement Supported By Empirical Research and Illustrations*, was written by Harry Mitchell Caldwell and Deanne S. Elliot. Attorney Caldwell is a Professor of Law and the Director of Trial Advocacy at Pepperdine University School of Law. He teaches criminal law, criminal procedure, and trial advocacy courses. Attorney Elliot is a prosecutor in the Shasta County District Attorney's Office. We are honored to publish an article by Attorneys Caldwell and Elliot, who successfully unveil the intricacies of a properly executed opening statement.

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

- a review of antitrust regulations and the current climate surrounding vertical mergers (Natalie Brough);
- a discussion of the history and creation of the Department of Transportation, and the agency's efforts in creating national safety regulations on highways by comparing efforts to combat drunk driving with efforts to deter texting and driving (Julianne Jeha);
- an analysis of the Massachusetts Slayer Rule and an argument that the Rule violates the Fifth Amendment as it deprives an individual of their constitutionally protected property (Paul Mourad);
- an examination of the development of modern U.S. privacy laws compared to laws established in the European Union, and a discussion of their practicality in the vast technological era, and their applicability and enforceability in disputes (Aleksandra Popova);
- a discussion of contractual dealings handled over text messaging and the Massachusetts' Land Court's analysis of how text messages should be viewed in the context of land dealings (Darius Brown);
- an analysis of the Massachusetts' Supreme Judicial Court's interpretation of the Medical Marijuana Act: An Act for the Humanitarian Medical Use of Marijuana, applied in the context of handicap discrimination claims (Molly Carroll);
- an empirical look at the implications stemming from prosecutorial misstatements in a closing statement at a sexual assault trial, and the effect of the Massachusetts' Supreme Judicial Court's decision (Danielle Paulson); and,

- a presentation of the United States Supreme Court's consideration of whether the Colorado Civil Rights Commission reviewed a case with the religious neutrality constitutionally required by the First Amendment's Free Exercise Clause (Timothy Rennie).

My thanks and gratitude go out to the staff members and Editorial Board of the Moot Court Honor Board who worked tirelessly to publish this Issue. I am especially indebted to our Executive Editor, Julianne Jeha, our Managing Editor, Anya Richard, and our Associate Managing Editor, Natalie Brough, who all worked meticulously to format and polish exceptional articles, notes, and case comments. Finally, I would like to thank the Board's advisor, Professor Richard G. Pizzano, the Board's Staff Assistant, Janice Quinlan, and the Deans and Faculty of Suffolk University Law School for their continued support of the Moot Court Honor Board and *Suffolk Journal of Trial & Appellate Advocacy*.

Thank you for reading the second Issue in Volume XXIV of the *Suffolk Journal of Trial & Appellate Advocacy*. I hope you find it interesting and insightful.

Sincerely,

Michelle A. Reid
Editor-in-Chief

HIT THE GROUND RUNNING: THE COMPLETE OPENING STATEMENT SUPPORTED BY EMPIRICAL RESEARCH AND ILLUSTRATIONS

Harry Mitchell Caldwell[1] *& Deanne S. Elliot*[2]

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[1] Harry Mitchell Caldwell is a Professor of Law and the Director of Trial Advocacy at Pepperdine University School of Law. He teaches criminal law, criminal procedure, and trial advocacy courses. Prior to teaching law, he served as a trial prosecutor for Santa Barbara and Riverside counties in California. He has been published extensively in the areas of criminal procedure, trial advocacy, and the death penalty, including his work as co-author of *Ladies and Gentlemen of the Jury* (1998), *And the Walls Came Tumbling Down* (2004), and *The Devil's Advocates* (2006). He is also co-author of *The Art and Science of Trial Advocacy* (2d ed. 2011), *Case Files for Basic Trial Advocacy* (2d ed. 2011), *Criminal Pretrial Advocacy* (2013), and *Criminal Mock Trials* (2012). The authors thank and acknowledge the Pepperdine Summer Grant Program and the efforts of Lavinia S. Osilesi and Ava Jahanvash.

[2] Deanne S. Elliot is a prosecutor in the Shasta County District Attorney's Office. She would like to thank her family for their support, Professor Caldwell for his continued mentorship, and Lavinia S. Osilesi and Ava Jahanvash for their diligence and friendship.

"*The beginning is the most important part of any work, especially in the case of a young and tender thing; for that is the time at which the character is being formed and the desired impression is more readily taken.*"[3]

Plato, *The Republic*

[3] Plato, *The Republic*, *Book II* (Benjamin Jowett trans.), http://classics.mit.edu/Plato/republic.3.ii.html (last visited Oct. 31, 2018).

A. INTRODUCTION

The opening statement is the window into an advocate's case.[4] A properly executed opening statements stages the advocate's entire case by grabbing the jury's attention,[5] setting forth a succinct thesis and theme,[6] articulating a compelling sense of right and wrong,[7] personalizing the client,[8] mitigating problematic evidence,[9] offering a coherent and compelling story of why the client should win,[10] and ending strong.[11] During opening statements, jurors form impressions of the advocates, the parties, and which side they favor.[12] These first impressions harden like cement and heavily influence everything that follows.[13] Indeed, many jurors reach at least a

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[4] *See* Hooks v. Workman, 606 F.3d 715, 730 (10th Cir. 2010) (noting that an opening statement's narrow purpose is to inform the jury); 3A NICHOLS ILLINOIS CIVIL PRACTICE § 56:7 (2018) (emphasizing that the jury's first "window" of the case is the opening statement); HARRY P. CARROLL & WILLIAM C. FLANAGAN, 43A TRIAL PRACTICE § 11:2 (3d ed. 2018) (indicating that for most jurors the window of opportunity only lasts through the opening statement).

[5] *See* Matthew J. O'Connor & Nicholas B. Schopp, *Opening Statement Restriction Lifted? Are the Scales of Justice Tipping Back to Even After* State v. Thompson*?*, 58 J. MO. B. 35, 37 (2002) (indicating that jurors are more likely to remember concepts when they are in a novel situation and when attention is heightened).

[6] *See* Edward J. Imwinkelried, *The Development of Professional Judgment in Law School Litigation Courses: The Concepts of Trial Theory and Theme*, 39 VAND. L. REV. 59, 61-64 (1986) (noting that a succinct theory or thesis helps the advocate simplify the trial for the jury, and that a theme encapsulates the advocates strongest argument for why they should win).

[7] *See* Thomas A. Demetrio, *Opening Statement: Some Initial Thoughts and Bullet Points*, 13 CHI. B. ASS'N REC. 40, 40 (1999) (noting that the opening statement should be a "clear, convincing, confident, powerful and concise rendition of your case" such that the jury is prepared to reach the conclusion "that your client is on the right side of the controversy").

[8] *See* Mark W. Klingensmith, *Opening Statement*, *in* FLA. CIV. TRIAL PRAC. § 8.2 (11th ed. 2017) (emphasizing the importance of personalizing the client in opening statements by helping the jury identify with them).

[9] *See* Martha Neil, *7 Tips for Winning Opening Statements; Among Them: Tell a Story, Focused on Key Facts*, A.B.A. (Nov. 16, 2011), http://www.abajournal.com/news/article/7_tips_for_winning_opening_statements_among_them_tell_a_story_focused_on_ke (noting that bad facts must be accounted for in an opening statement and that the opening statement should establish a theory of the case that accommodates the bad facts).

[10] *See* Allison Wood, *Opening Statement*, 17 CHI. B. ASS'N REC. 48, 48 (2003) (noting that a winning opening statement has "an identifiable theory surrounded by a compelling story that is confidently delivered").

[11] *See* Demetrio, *supra* note 7, at 42.

[12] *See* DOMINIC J. GIANNA & LISA A. MARCY, OPENING STATEMENTS: WINNING IN THE BEGINNING BY WINNING THE BEGINNING § 7:3 (2017) (indicating that advocates must reach the hearts and minds of jurors in opening statements).

[13] *See* Jim M. Perdue, *The Importance of the Opening Statement*, *in* 3 LITIGATING TORT CASES § 37:5 (2018) (referencing studies that suggest that 80% of jurors' opinions reached during opening statements do not change after hearing evidence).

tentative verdict following opening statements.[14] The importance of the opening statement is remarkable given that the jurors have yet to hear from a single witness or consider a single piece of evidence.[15] Without an effective opening statement, the jurors are left adrift without sufficient context to fully appreciate and understand the testimony and other evidence as it is developed during examinations.[16] And yet, for many trial lawyers opening statements are a bit of an afterthought, thrown over in favor of witness preparation and developing trial strategy.[17] Such myopia is a missed—and perhaps fatal—opportunity to favorably shape the trial from the outset.[18]

This article will suggest a structure for opening statements, which consists of: (1) grabbing the jury's attention; (2) personalizing the client; (3) telling the story of events leading to trial from the client's perspective; (4) pricking any "boils" in the case to neutralize negative information; and (5) ending on a strong note. The effectiveness of each component is supported by research and is well-illustrated. Following examination of the structural components, this article will delve into the advocacy principles essential to a complete and successful opening statement.

B. GRAB THE JURY'S ATTENTION

There is only one chance to get something right the first time—including oral presentations.[19] That first opportunity for a speaker to grab the attention of her audience must not be squandered.[20] The law of primacy

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[14] *See* Douglas Danner & Larry Varn, *Opening Statement and Closing Argument*, *in* 3 PATTERN DISCOVERY: PREMISES LIABILITY § 27:3 (3d ed. 2018) (noting that jurors often make decisions soon after they hear information about the case).

[15] *See* MARGARET C. ROBERTS, TRIAL PSYCHOLOGY: COMMUNICATION AND PERSUASION IN THE COURT ROOM 23 (Butterworth Legal Publishers 1987). Primacy teaches that information presented first is more effectively recalled by the listener and heavily influences the listener's impression of everything that follows. *Id.*

[16] *See* James R. Lucas, *Opening Statement*, 13 U. HAW. L. REV. 349, 350 (1991) (noting that opening statements give advocates the opportunity to provide a context for jurors to assimilate and integrate the evidence as trial proceeds).

[17] *See* Michael J. Ahlen, *Opening Statements in Jury Trials: What are the Legal Limits?*, 71 N.D. L. REV. 701, 701 (1995) ("All good trial attorneys realize the importance of opening statements.").

[18] *See* Klingensmith, *supra* note 8, § 8.1 (expressing that dispensing of an opening statement is the first step to losing a case).

[19] *See* Peter Perlman, *The First Two Minutes of the Opening Statement*, 16 PRAC. LITIGATOR 23, 23-24 (2005) (noting that it is critical to make a good first impression during opening statements).

[20] *See* L. TIMOTHY PERRIN ET. AL., THE ART & SCIENCE OF TRIAL ADVOCACY 122-23 (California Academic Press 2d ed. 2011) ("The first moments of the opening should grab the

dictates that an audience begins making the decision (consciously or otherwise) to either remain engaged because their initial interest is piqued or to fade out with less than full attention.[21] That decision could be made within the first few seconds of an advocate's case.[22] The impressions formed from this first interaction with the jurors will subconsciously stay with them throughout the opening statement and into the trial.[23]

Despite the unflinching reality of the import of primacy, many trial lawyers fail to take full advantage of this one-time opportunity to grab the attention of their jurors.[24] Indeed, the opening statement is not the time to thank the jurors for their service (that can and should come later) or to suggest an opening statement is like a roadmap or outline of the evidence to be produced at trial.[25] Such hackneyed approaches should have gone out with eight-track cassettes. Rather, opening is a time for creativity and bold statements to intrigue and entice the jurors to stay focused.[26]

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attention of the jurors and give them a preview of why they should conclude that the advocate and his client are in the right.").

[21] *See id.* at 22-23.

> Primacy teaches that information presented first is more effectively recalled by the listener and heavily influences the listener's impression of everything that follows. At least two aspects of human nature are at work. First, during the first moments of a speech or presentation the interest of the audience is greatest. The audience will never be so attentive again. That attentiveness translates into better retention of the information later. Second is a matter of first impressions. Once formed, first impressions are nearly impossible to change.

Id.; MEMORY AND MIND: A FESTSCHRIFT FOR GORDON H. BOWER, 31 (Stephen M. Kosslyn et. al. eds., Taylor & Francis Group 1st ed. 2007) ("[F]irst encounters with new situations, people, events, objects, and facts have greater impact on subsequent thought and behavior than later encounters of similar kinds.").

[22] *See* Nicholas Rule, *Snap-Judgment Science,* OBSERVER (Apr. 30, 2014), https://www.psychologicalscience.org/observer/snap-judgment-science (emphasizing studies where participants made accurate decisions on snap judgments made within seconds); *see also* C. Neil Macrae & Galen V. Bodenhausen, *Social Cognition: Thinking Categorically about Others*, 51 ANN. REV. PSYCHOL. 93, 95 (2000); Alexander Todorov et. al., *Inferences of Competence from Faces Predict Election Outcomes*, 308 SCI. 1623, 1624 (2005) (finding that one second decisions were sufficient for subjects to assess competence of a candidate, and these assessments predicted the outcomes of actual elections).

[23] *See* Macrae & Bodenhausen, *supra* note 22, at 95-100.

[24] *See* J. ALEXANDER TANFORD, THE TRIAL PROCESS: LAW, TACTICS AND ETHICS 147 (2002) ("Too often, lawyers squander [the] opportunity to present their theory and highlight the pivotal evidence [during their opening statement].").

[25] *See id.* at 147-49 (noting that if evidence is discussed in an opening statement, it should be key evidence); *infra* note 89 and accompanying text (explaining that many lawyers waste crucial moments when the jury develops their first impression by thanking the jury for their time and service).

[26] *See* JAMES A. LOWE & MARK L WAKEFIELD, AMERICAN LAW OF PRODUCTS LIABILITY 3d § 70:90 (2019) (noting that opening statements can and should be creative and compelling);

The grab is only limited by an advocate's imagination. It may be a staccato recitation of key facts ("that man [pointing to the defendant] grabbed his gun, drove to the victim's home, and shot him dead").[27] It may be using a well-known quote,[28] emphasizing a key statement on which the trial turns,[29] or even reciting the theme of the case (i.e., "with great profits come great responsibilities").[30] Creating a grab is both a product of distillation and inspiration.[31] Distillation in that advocates must thoroughly know their case in order to craft these first words that set the stage for all that follows. Inspiration is needed to find a theme that will establish the "rightness" of the client's case.

1. Create a Theme

The theme of every case should be more than simply why the party should win, it should also connect the jury to some reason why they should *care* about the party winning.[32] The theme should play on accepted notions of right and wrong, and should speak to universal truths all people understand.[33] For instance, "putting profits over people" to describe a callous corporate defendant, or "a person's word is their bond" in a contentious contract case. Finding the right theme for each case can be challenging, but it need not be solely the product of the advocate's inspiration, it can be gleaned from outside sources. However, bear in mind the theme must speak to all the jurors. Pushback from even one or two jurors

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Abraham P. Ordover, *Persuasion and the Opening Statement*, 12 LITIG. 12, 12-14 (1986) (noting that opening statement should grab the jury's attention).

[27] *See* CARROLL & FLANAGAN, *supra* note 4, § 11:23 (explaining that some attorneys get directly to telling the client's story).

[28] *See* David J. Dempsey, *Content Counts*, 65 OR. ST. B. BULL. 33, 35 (2005) (noting that quotations increase your persuasiveness).

[29] *See* THOMAS L. OSBORNE, TRIAL HANDBOOK FOR KENTUCKY LAWYERS § 18:2 (2017) (noting that opening statements should orient the jury to key factual issues).

[30] *See* 2 FRED LANE, LANE GOLDSTEIN TRIAL TECHNIQUE § 10:24 (3d ed. 2018) (noting that the grab can be based on the theme of the case); 1 ADELE HEDGES & DANIEL K. HEDGES, TEXAS PRACTICE GUIDE: CIVIL TRIAL § 5:85 (2018) (expressing that an opening statement can effectively start with a dramatic beginning that grabs that jury's attention).

[31] *See infra* note 41.

[32] PERRIN ET. AL., *supra* note 20, at 25.

> The central theme of every case should do more than simply tell the jury why the party should win, it should also connect the jury to some reason why they should care about the party winning. Logic *and* emotion must be tapped. Advocates must pay attention to the human element in their case, regardless of the particular facts involved.

Id.

[33] *See* CARROLL & FLANAGAN, *supra* note 4, § 11:18 (noting that a theme should regard the theory of the case and capture the fairness and justice of the client's position).

could (will) be costly. Once the right theme is realized, it will resonate throughout the trial, into closing argument, and into the jury deliberation room.

2. Develop a Thesis or Legal Theory

Perhaps the most crucial element of any opening statement is the ability to reduce the case to its absolute essence.[34] Indeed, the primary point or takeaway of any speech should be made very early and very clearly. If counsel is not able to state in a sentence or two why he should prevail, he is not prepared to go to trial. Without a focused thesis or case theory, the advocate lacks crucial understanding of what he must accomplish: ferreting out the essential from the non-essential.[35] As a result, the advocate runs the risk of the case becoming a scattered affair that will only succeed in confusing the jurors.[36] Furthermore, jurors sensing a lack of focus will cast doubt on the competence of the advocate and the legitimacy of his case.[37]

The thesis should immediately follow the grab and focus precisely on what the advocate must prove to prevail.[38] A prosecution's or plaintiff's thesis statement should begin with "We will prove . . . ." A defense's thesis statement should likewise be bold and begin "The evidence will show . . . ."[39] The difference, of course, recognizes which side bears the burden of proof. The thesis statement should be delivered slowly and forcefully to maximize its importance.[40]

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[34] *See* PERRIN ET. AL., *supra* note 20, at 123 ("[T]he 'grab' should conclude with the advocate's thesis statement about the case, which tells the jury who should win and why."); *Differences Between Opening Statements & Closing Arguments*, U.S. CTS., http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/differences (last visited Oct. 31, 2018) (indicating that each party should set the basic scene for jurors during opening statements).

[35] *See* PERRIN ET. AL., *supra* note 20, at 37-38; George A. Googasian, *Opening Statements*, 92 MICH. B.J. 54, 54 (2013) (noting that a theory, or thesis that explains what happened and why is essential to the success of a case).

[36] *See* Googasian, *supra* note 35 (noting that a theme based on the theory of a case can shape juror perceptions of the relevant facts and events).

[37] *See* FRANCIS P. BENSEL ET. AL., PERSONAL INJURY PRACTICE IN NEW YORK § 9:215 (noting that a lack of confidence is harmful when attempting to persuade the trier of fact).

[38] *See* PERRIN ET. AL., *supra* note 20, at 123.

[39] 6 LINDA S. PIECZYNSKI, CRIMINAL PRACTICE & PROCEDURE § 26:15 (2d ed. 2018) (noting that the opening statement should acquaint the trier of fact with the evidence that the lawyer will introduce).

[40] *Contra* Gary S. Gildin, *Reality Programming Lessons for Twenty-First Century Trial Lawyering*, 31 STETSON L. REV. 61 (2001) (noting that speaking too slow may lose the jury's attention).

> Prominent lawyer Theodore Olson, most noted for his masterful advocacy before the United States Supreme Court, explained how he arrives at a thesis statement: I try to develop a succinct summary of my argument in one or two sentences . . . . I employ several exercises to aid in developing the best distillation of my argument. My son . . . asked me about an upcoming argument: "Dad, what does it mean if you win?" That is what it is all about. Can you answer that question in a sentence or two? If not, you have probably not given your case the intense analysis required to make a cogent, persuasive argument.[41]

Even though Olson's advice was directed to oral argument before an appellate court, the necessity of developing a succinct thesis applies equally to the opening statement in a jury trial.

Occasionally the thesis of the case is confused with theme. As discussed above, the thesis is the focused, fact-specific statement of why the advocate's client will win, whereas the theme plays on accepted notions of right and wrong and is not necessarily case specific.[42]

3. Illustrations of a Grab

a. Plaintiff Grab in a Wrongful Death Case

In a mock medical malpractice case a surgeon performed cardiac surgery in which the patient died.[43] The plaintiff's grab may sound as follows:

> Brenda Farrell is a widow, and her two children are fatherless. Why? Because that man (pointing to defendant), that doctor, was too arrogant to admit that he was too tired and too distracted to competently and safely perform heart

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[41] *See* Theodore B. Olson, *Ten Important Considerations for Supreme Court Advocacy,* A.B.A. (Apr. 20, 2018), https://www.americanbar.org/groups/litigation/publications/litigation_journal/2017-18/winter/ten-important-considerations-supreme-court-advocacy/.

[42] *See* 1 BRUCE H. STERN & JEFFREY A. BROWN, LITIGATING BRAIN INJURIES § 7:2 (2018) (noting that an opening statement should be built around the thesis, which is the point of the party's argument); *see also* Imwinkelried, *supra* note 6, at 61-63.

[43] *See* THOMAS F. GERAGHTY, FARRELL, ET. AL. V. STRONG LINE, INC., NITA MEMORIAL HOSPITAL, AND DR. MADDEN: ADVANCED CASE FILE (Nat'l Inst. For Trial Advoc. rev. 2d ed. 1994).

> surgery on Brenda's husband, on Jon and Sara's dad. Ladies and gentlemen, we will prove that the defendant was in the midst of a particularly nasty divorce at the time of the surgery, and he was distracted and tired. In fact, he didn't sleep the night before the delicate and demanding heart surgery on Don Farrell. He didn't notice he had nicked Don's aorta. He didn't notice that nick would cause Don to bleed to death. Folks, you don't take risks with the lives of others.

Note the distillation of a likely complicated set of facts, derived from complex medical records and expert opinion. The grab served all the functions detailed above: laying out plaintiff's theme, the universal truth, that no one should take risks with the lives of others. It also laid out the thesis: plaintiff wins because the defendant fell below the standard of care when he operated on the decedent while tired and distracted.

b. Defense Grab in a Wrongful Death Case

The following illustration is based on a mock case involving the wrongful death of a firefighter who was killed while attempting to rescue a careless rock climber who fell during a climb.[44] Defense counsel is in a difficult position because he must challenge the conduct of a firefighter, a hero, who was killed trying to rescue the defendant, the fallen rock climber. The defense grab might sound like this:

> Plaintiff's counsel is correct. We lost a hero the day firefighter Brown died. His death is a tragedy for all of us, and especially for his family. But there is a hard reality we must confront: even heroes must act reasonably. It is teamwork and discipline that sends firefighters out into dangerous situations, but it is also teamwork and attention to discipline that brings them home safely. Ladies and gentlemen, even firefighters must act reasonably. And unfortunately, the evidence will show that firefighter Brown died because he acted unreasonably.

Such a grab not only seizes the jurors' attention but also introduces the defense theme that even heroes, like all people, must act reasonably. This

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[44] *See* FRANK D. ROTHSCHILD ET. AL., BROWN V. BYRD: CASE FILE (Nat'l Inst. for Trail Advoc. 2d ed. 2013).

aligns perfectly with the defense thesis: that the firefighter did not act reasonably, and the defense should prevail. In this grab, the theme and thesis are almost indistinguishable, the logic for one flows seamlessly to the other.

c. Prosecution Grab in a Domestic Violence Case

In the very difficult context of domestic violence prosecutions, some prosecutors play the audio recording of the victim's 911 call, if available, for their grab at opening. Imagine the impact as the jurors hear the victim screaming that the defendant is hitting her, trying to kill her, begging for help to arrive. This could be particularly critical if the victim is recanting, as so often happens in domestic violence cases.[45] A more conventional grab may be as follows:

> There are abusers and there are victims. And much of the abuse suffered happens behind closed doors, far from the prying eyes of those who would intervene, who would help. That sad reality has always been with us. Unfortunately, most days, we are all powerless to hold abusers accountable and stand up for victims. But today is different. Today you are going to learn how the defendant abused his wife. Today, you will be in a position to take action. During the course of this trial, we will prove that on October 5, the defendant beat his wife so badly she was hospitalized with severe injuries. And today, you will be in a position to hold him accountable.

While this may not match the drama of a 911 call, it serves the necessary functions of introducing the theme of victims and abusers, a well-worn trope in domestic violence that has persisted through the ages. Though this notion may seem antiquated in some respects, juries have historically relied on this binary construction.[46] The thesis here is fairly straightforward: the prosecution should succeed in convicting the abuser because the evidence will show he inflicted serious bodily injuries on his spouse.

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[45] *See* Louise Ellison, *Prosecuting Domestic Violence Without Victim Participation*, 65 MOD. L. REV. 834, 834 (2002) (discussing a study in England and Wales which found that 46% of victims withdrew their support for the prosecution of the case after filing the initial complaint).

[46] *See* Toby D. Goldsmith, *Who Are the Victims of Domestic Violence?*, PSYCHCENTRAL, https://psychcentral.com/lib/who-are-the-victims-of-domestic-violence/ (last updated Oct. 8, 2018) (noting that domestic abuse occurs between a victim and an abuser).

d. Defense Grab in a Domestic Violence Case

Representing an individual charged with domestic abuse can be a daunting challenge because there is typically a significant emotional inclination towards the charging party. Countering that emotional uphill battle can be a severe challenge, but consider the following approach:

> A man striking a woman, for any reason, is never right and must always be condemned. But equally egregious to a law-abiding society is someone falsely claiming she was beaten. That too is also wrong and should never be tolerated. The evidence will establish that Frank Robinson is sitting in the defendant's chair for one reason and one reason only. Because his wife was angry at him for losing his job. The evidence will show she made this false claim to get back at him for his perceived inadequacy, as a man, as a husband, and as a provider for his family.

This grab performs the difficult task of both condemning domestic violence and contrasting the present case with that credo. The advocate ties in his stance with the theme that it is also wrong for someone to make a false claim. The advocate's thesis comes near the end where he makes a clear statement that the evidence will show the real reason for Mrs. Robinson's false claim was her anger over her husband's job loss.

C. PERSONALIZE THE PARTIES

An audience is more likely to view conflicting evidence in the light most favorable to the person with whom they best identify.[47] This holds true in politics, workplace controversies, church disputes, and family matters.[48] Moreover, the perspectives and biases individuals bring to contested affairs frequently carry over to their ultimate opinion.[49] That maxim remains true

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[47] *See* Note, *Confirmation Bias and the Power of Disconfirming Evidence*, FARNAM STREET, https://fs.blog/2017/05/confirmation-bias/ (last visited Oct. 31, 2018) (noting that people tend to cherry-pick information that confirms their ideas).

[48] *See* Bettina J. Casad, *Confirmation Bias*, ENCYCLOPAEDIA BRITANNICA (Aug. 2, 2016), https://www.britannica.com/science/confirmation-bias (noting that all people are subject to interpreting information in a way that confirms their beliefs, expectations, and predictions).

[49] *See* Eric Rassin et. al., *Let's Find the Evidence: An Analogue Study of Confirmation Bias in Criminal Investigations*, 7 J. INVESTIGATIVE PSYCHOL. & OFFENDER PROFILING 231, 242 (2010) (finding that initial beliefs of a suspect's guilt or innocence impacted the jurors' attention towards subsequent evidence).

for individuals impaneled as jurors.[50] As discussed earlier, jurors are drawn to one side or another during opening statements and will most likely view the forthcoming evidence through the lens most favorable to "their" side.[51] The evidence then presented supporting their view will reinforce their initial bias, and contrary evidence will be viewed skeptically.[52] Thus, it is the early personalization of the parties that helps form the jurors' initial biases.[53] Positive impressions of a party will influence the jurors' belief that an individual or an organization is likeable, admirable, or relatable.[54] Conversely, negative first impressions will be difficult to overcome and such individuals so branded are not perceived as credible in the eyes of the jurors.

1. Make a Positive First Impression

Given the importance of personalization, advocates should expend considerable time and thought in crafting the personalization of their client.[55] A brief *pro forma* effort will not suffice. The personalization should follow on the heels of the grab but come before moving on to tell the "story," the chronology of the events that will be the focus of trial.[56] The personalization should be conducted at the shoulder of the client so as to further identify the party with the lawyer, based on the notion that the goodwill generated by counsel will spill over to the client.[57] Given the competing narratives set forth during opening statements, the party who better personalizes their client will likely have the upper hand as the trial progresses to witness examinations.

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[50] *See* Bill Kanasky, Jr., *Juror Confirmation Bias: Powerful, Perilous, Preventable*, 33 TRIAL ADVOC. Q. 35, 35 (2014) ("[J]urors [tend] to search for, interpret, or remember information in a way that 'confirms' their preconceptions [or beliefs].").

[51] Christopher A. Cosper, *Rehabilitation of the Juror Rehabilitation Doctrine*, 37 GA. L. REV. 1471, 1480-83 (2003) (noting that confirmation bias effects jurors as they listen to evidence about a case).

[52] *See* David C. Sarnacki, *Winning Divorce Trials*, 81 MICH. B.J. 22, 24 (2002) (explaining that jurors frequently accept facts that support their beliefs and discount facts that do not).

[53] *See* Daniel G. Kagan, *Advocacy in Jury Selection*, *in* A PRACTICAL GUIDE TO SUPERIOR COURT PRACTICE IN MAINE § 19.2 (1st ed. 2015 & Supp. 2018) (noting that at the outset of the case, the jury forms impressions about the participants in trial).

[54] *See* Michael J. McNulty III, *Practical Tips for Effective Voir Dire*, 48 LA. B.J. 110, 110-11 (2000) (explaining that a good first impression can establish rapport with the jury).

[55] *See id.* (indicating the importance of establishing the credibility and trustworthiness of the client).

[56] *See* 5 AM. JUR. *Trials* § 285 (2019) (noting that one of the first things a trial advocate should do is dispel any association of him with unfavorable images).

[57] *See* Kagan, *supra* note 53, § 5.

In representing a corporation, company, or organization, personalization becomes even more essential. After all, the positive qualities we associate with persons do not generally extend to non-persons. Of course there are some exceptions, like Doctors Without Borders, the Red Cross, and Habitat for Humanity. But for the most part, companies do not generate positive impressions. In fact, most will probably present an impersonal and unsympathetic image. One approach to representing a corporation is choosing a representative of the corporation (generally middle management) to sit at counsel table as the face of the organization for the duration of the trial.[58] That individual must be conversant in the facts of the case, personable, and relatable to the jurors.[59] The representative should be personalized first, making him the embodiment of all that is positive in the corporation, before discussing the corporate entity itself.[60]

Several studies have documented the significance of personalization. Researchers at the Institute of Psychology in the Netherlands analyzed whether participants in their study made different conclusions of a defendant's guilt or innocence based on the initial personalization of the subject.[61] The seventy-nine participants received a thorough case file identifying a young man as a suspect in the beating of another.[62] Before and after reading the case file, the participants shared whether they believed the suspect was innocent or guilty.[63] After the participants reviewed the case file, they could request additional "investigations" to assist in their verdict.[64] The researchers found that participants who initially believed the suspect was innocent chose to discover additional evidence supporting the suspect's innocence, whereas participants who initially believed the suspect was guilty chose to discover facts supporting the suspect's guilt.[65] The study determined that the evidence

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[58] *See* Merrie Jo Pitera, *Selecting Your Corporate Representative*, LITIG. INSIGHTS (May 2, 2013), http://litigationinsights.com/jury-consulting/selecting-your-corporate-representative/ (noting that jurors expect a representative to exude the values of their companies).

[59] *See* PERRIN ET. AL., *supra* note 20, at 125-26.

[60] *See id.*

[61] *See* Rassin et. al., *supra* note 49.

[62] *See id.* at 234. All of the students were law students, sixty-eight were women, and the mean age of the group was twenty-one years of age (ranging from nineteen to twenty-seven). *Id.*

[63] *See id.*

[64] *See id.* Half of the possible investigations the participants could utilize strengthened the evidence against the suspect, whereas the other half were "framed so as to obtain exonerating information, by either reducing the strength of existing incriminating evidence, or by obtaining evidence for an alternative scenario" such that they were directed at reducing the strength of the existing evidence against the suspect. *Id.*

[65] *See id.* at 238.

each participant sought was determined by their preliminary impression of guilt or innocence, supporting the notion that a juror's initial impression of a party can significantly impact their ultimate decision.[66]

Several other studies suggest that a person's ability to identify with someone impacts his or her belief in the rightness of that individual's opinions.[67] These studies aimed to see how similarity and identification work in the context of narrative persuasion.[68] In one experiment, law students read two versions of the same story about a woman whose husband was killed.[69] One story was from the perspective of the lawyer defending the accused and the other from the perspective of the victim's widow.[70] In a second study, medical students read a casefile about whether a person suffering from Alzheimer's should be euthanized.[71] One perspective was that of a son who promised his father he would request euthanasia for him if his condition worsened, the other from the perspective of the treating doctor who opposed euthanization.[72] The results indicated that the law students identified more with the lawyer than the victim's widow in the criminal case, and the medical students identified more with the doctor than the son in the euthanasia case.[73] However, the results still indicated that "the impact of the story perspective proved stronger: law readers as well as medical readers identified more strongly with the protagonist [of the story] even if the antagonist was a lawyer or [doctor] . . . the strategic use of language can have

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> This finding is well in line with research in other decision-making areas, suggesting that people tend to look for information confirming their prior beliefs . . . . [and] the context of criminal proceedings is no exception . . . . The findings stress the importance of delaying conclusions (about guilt) until all relevant information is obtained. Preliminary conclusions may bias subsequent information search, which is detrimental, especially in case of decisions that affect other people's lives, such as criminal convictions.

Id.

[66] *See id.*

[67] *See* Hans Hoeken et. al., *Story Perspective and Character Similarity as Drivers of Identification and Narrative Persuasion*, 42 HUMAN COMM. RES. 292, 308 (2016); *see also* Anneke de Graaf et. al., *Identification as a Mechanism of Narrative Persuasion,* 39 COMM. RES. 802, 817 (2012).

[68] *See* Hoeken et. al., *supra* note 67, at 295-96; *see also* de Graaf et. al., *supra* note 67, at 805-06.

[69] *See* Hoeken et. al., *supra* note 67, at 297-98. The first study involved 120 humanities and law students. Almost 70% of the participants were female, and the participants ranged in age from eighteen to twenty-seven years old, with an average of twenty-one years old. *Id.* at 297.

[70] *Id.* at 297-99.

[71] *Id.* at 303. The second study involved 120 humanities and medical students. *Id.* About 60% of the participants were female, and the participants ranged in age from seventeen to twenty-seven years old. *Id.*

[72] *Id.*

[73] *See id.* at 302-06.

readers identify more strongly with a character even in the presence of an alternative character they perceive as more similar to themselves."[74] These studies illuminate one consistent truth: people relate more to others when they can see the world from their point of view.[75]

The empirical research is clear that advocates must personalize their clients and strive to have the jurors identify with them at the earliest possible opportunity. Personalization increases the likelihood that jurors will pay particular attention to facts supporting the party with whom they identify.[76] Portraying the client as more colorful, more human, and more relatable, will help the jurors "see themselves" in the party, allowing them to relate to the party on a personal level. The following are some illustrations of ways to personalize a client.

2. Illustrations of Personalization

Sometimes personalizing a client is simple, as in the case of a dedicated family man who made a careless mistake long ago, or a hardworking single mom with a painful injury—someone who has suffered a grievous wrong with whom the jurors can instantly sympathize. But other times, the client is a corporate giant and it seems impossible that it could have a soul. The goal of personalizing is to remind the jurors that even corporate entities are made up of human beings who work hard to make their organization successful.[77]

a. Personalization of Plaintiff in a Personal Injury Case

The following is a personalization of a devoted family man, a fairly straightforward introduction of a relatable individual:

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[74] *See id.* at 306.

[75] *See* sources cited *supra* note 67.

> [T]he perspective manipulation proved to override the impact of attitude similarity. Participants identified more strongly with the perspectivizing character than with the antagonizing character regardless of the opinion of the characters, and subsequently, participants adapted their attitudes accordingly. This study thus provides evidence for the relation between attitude similarity and identification, while at the same time establishing a causal relation between perspective, identification, and narrative persuasion.

de Graff et. al., *supra* note 67.

[76] *See* sources cited *supra* notes 53-54, 61, 67.

[77] *See* PERRIN ET. AL., *supra* note 20, at 125-26.

> Jerry Utley is, above all, a family man. He is absolutely devoted to his wife Karen and his son Scott. Karen is a stay-at-home mom who is active at her son's school. Scott is a junior in high school, a good student, and second baseman on his high school baseball team. Jerry is a postman, not the most glamorous profession, but an important job that he takes very seriously. His job, as we can imagine, is physically demanding, and frankly, Jerry enjoys the physical challenge of his work, and was proud of his strength.
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> For seventeen years, Jerry did his rounds every day. That is, until January 19th of last year, when the defendant failed to stop at a red light and hit Jerry in his car. Jerry was gravely injured. Despite surgeries and physical therapy, he will never be able to work in the physically demanding job he did before the accident, or really any job with any physical requirements. It is safe to say that the defendant's actions took, and continue to take, a heavy toll on Jerry Utley and his family.

This is an example of an easier personalization. The plaintiff here is a hardworking civil servant who was grievously injured and whose injury impacts his small family.

b. Personalization of a Corporate Defendant in a Wrongful Termination Case

Next, consider the more difficult task of personalizing a corporate defendant, represented by a department head who is both involved in the case and highly relatable.

> Bess Rogers sits here today as a representative of Avco Machinery. Ms. Rogers holds a masters in engineering, she is happily married, and has two beautiful children. At Avco, she oversees product development. You will learn during the course of this trial how she and Avco strive to treat all 120 people she works with like family. She always goes the extra mile to work through problems, always looking for a win-win solution. For her, job satisfaction is a high priority. That's why Ms. Rogers is sitting here today, because she represents the very best of Avco and its commitment to

> doing right by its employees. When she gets a chance to speak to you, she will tell you that, unfortunately, not all problems can be fixed. She'll tell you that as a board member of Avco's Human Resources department, she worked with the plaintiff to address his concerns, but for some reason, the plaintiff was uncooperative. He alone prevented them from finding a workable solution.

As this illustration shows, personalizing a corporate defendant requires a representative who represents the best aspects of the company, and who will testify to some relevant evidence at trial.[78] Giving this representative some personal character shows the jury that even large corporations are comprised of human beings who will be affected by their verdict.

D. TELL A STORY

The story is an account of the events leading up to trial. At its core, an opening statement should set forth a factual overview of what the advocate anticipates the evidence will establish.[79] Advocates should not limit this story to only a boring recitation of facts. Such a tactic undervalues this phase of the opening statement, which should be a cohesive, compelling, and easily understood story told from the client's perspective.[80] Delivering the essential information within the framework of a story maximizes juror attention and retention.[81]

Advocates generally opt for a straightforward chronological approach.[82] Most people find it easiest to understand events in the order they occurred.[83] However, in some cases it might be necessary to set forth the backstory to give the jurors a better understanding of the events that led up

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[78] *See id.* at 126.

[79] *See* LANE, *supra* note 30, § 10:5 (noting that the purpose of an opening statement is to set forth the case's evidence).

[80] *See* William Allison, *Tell Your Story Through Opening Statement*, 34 TRIAL 78, 81-83 (1998) (emphasizing that a good opening statement engages in captivating story-telling).

[81] *See* 5 PHILIP J. PADOVANO, FLORIDA CIVIL PRACTICE § 18:1 (2017-18 ed.) (noting that a good trial lawyer will reveal a skillful and engaging description of the facts to keep the attention of the jury).

[82] *See* HEDGES & HEDGES, *supra* note 30 (noting that because most people think chronologically, jurors are more likely to understand an opening statement that flows from beginning to end).

[83] *See id.* (explaining the benefits of using chronological order).

to trial.[84] For instance, describing each key person involved in the story and their interrelationships may be essential to a full understanding before launching into the details of the events leading to trial.[85] Every trial, of course, is fact specific. The most important rule is to set forth a clear, understandable story.

The following are some suggestions for maximizing the value of the story: keep it interesting, strike the proper balance, and use a list.

1. Make It Interesting

Trials are about people and their problems, conflicts, injuries, and misfortunes. Events leading to trial are acutely important to those involved, they are also generally interesting to jurors. As a result, trial advocates generally have interesting material to work with, and they must take care to not bog down the trial with banalities that distract from the human stories at the heart of the trial.[86]

a. Illustration: A Poor Example of Defense Open in a Civil Trial

Unfortunately, opening statements frequently stagnate when advocates veer from the story. One common mistake is beginning the opening statement by explaining to the jurors the purpose of opening statement. Too often jurors hear some version of the following:

> The purpose of opening statement is to give you an overview of the evidence you will hear. Think of an opening statement as the table of contents in a book. First you will learn about the various characters who will play a part. In chapter two you will hear about a dispute that occurred between the plaintiff and the defendant. The next chapter will focus on how the plaintiff was injured when the dispute was not resolved. And in the final chapter you will learn what efforts the defendant made to minimize the harm to the plaintiff.

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[84] *See* PERRIN ET. AL., *supra* note 20, at 129-30.

[85] *See id.*

[86] *See* BILLIE COLOMBARO ET. AL., LOUISIANA CIVIL TRIAL PROCEDURE § 4:2 (2018) (noting that a jury that is overwhelmed with evidence will quickly lose interest).

As stated earlier, there is only one first impression and such an unfortunate opening gambit wastes it, turning a compelling story of the defendant's misdeeds into mind numbing, worthless tripe. First and foremost, the words and content of the story can impact how the jury perceives the events and the advocate—as bright and present, or muted and boring. Advocates should use active, strong language rather than weak, passive language.[87]

Another common error is to introduce the law in an opening statement.[88] Even though the rules of opening specifically preclude extensive discussion of the law, most judges will allow some limited discussion to help focus the jurors.[89] For instance, it is not uncommon for criminal defense attorneys to briefly mention reasonable doubt or for a plaintiff's attorney to offer a cursory explanation of the cause of action. But a detailed discussion of the law will not only draw the ire of the judge, it will also distract jurors from hearing the story at the heart of the trial.[90]

b. Illustration: A Poor Example of a Defense Open in a Criminal Trial

Particularly in criminal trials where the risk to life and liberty are highest, defense attorneys must take extra care to not overburden the jury with the complexities of "beyond a reasonable doubt," and risk overwhelming the jury.[91] The following should never occur during an opening statement:

> The prosecutor in this case has the most demanding burden of proof in our entire justice system. He must prove beyond any reasonable doubt that my client did what he is accused

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[87] *See* LAURIE L. LEVENSON, CALIFORNIA CRIMINAL PROCEDURE § 23:12 (2018) (emphasizing that the language of opening statements should be simple, strong, and active).

[88] *See* RICK FRIEDMAN & BILL CUMMINGS, THE ELEMENTS OF TRIAL 94-97 (2013).

[89] *See* Williams, *Effective Opening Statements*, A.B.A, 1, 7 (2003), https://apps.americanbar.org/labor/lel-aba-annual/papers/2003/mcwilliams.pdf (noting that law is not typically discussed during opening statements but can be carefully introduced).

[90] *See id.* (emphasizing that the judge will give the law to the jury).

[91] FRIEDMAN & CUMMINGS, *supra* note 88, at 99 (noting that while most of the case may seem clear to the advocate, "[t]he jurors are starting in complete and total ignorance . . . [the advocate] must educate them about the simplest parts of [the] case without patronizing").

> of. This burden is way beyond a mere preponderance of the evidence that is used in civil cases. The prosecutor's burden here is to eliminate *any* reasonable doubt whatsoever. So if you find yourself thinking "Well, maybe . . ." that is a reasonable doubt.

Such a lengthy explanation is not only completely objectionable, but also uninteresting and distracting from the story. Opening statements are about relating the interesting and informative story at the heart of the case.

2. Strike the Proper Balance

Unlike the advocates who have been preparing their case for weeks (if not months or years) and are thoroughly versed in the facts, the jurors have never heard the facts before.[92] While the advocates are immersed in the case and conversant with every minute detail, the jurors are hearing the story for the first time and if events or persons involved are not clear in that first telling, the jurors may become lost, confused, or frustrated. That confusion or frustration will cost counsel dearly.[93] One way to avoid gaps in the story and juror misunderstanding is to deliver the opening statement to a friend or acquaintance who is unfamiliar with the trial and then have that person relate back what the trial is about. If the test subject confuses events or parties or is not compelled to side with the advocate's side of the case, there is still time to address the concerns before the jury reacts similarly.

In order to keep the story focused, advocates must strike the proper balance between clarity and accuracy.[94] They must relate the essential facts for the jury to understand what occurred but must be wary of overwhelming the jurors with unnecessary information.[95] By not giving enough facts, the jurors are left with only part of the story and may not comprehend the full scope of the events leading to trial. On the other hand, too much detail will overload the jurors with nonessential facts and cause them to get lost in the

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[92] *See id.*

[93] *See* HEDGES & HEDGES, *supra* note 30, § 5:7 ("[The] opening statement prepares the minds of the jury to follow the evidence and to understand its materiality, force, and effect.").

[94] *See* Williams, *supra* note 89, at 1-2 (noting that opening statements should draw on the themes and theory of trial, to lead to a favorable jury decision).

[95] *See* William F. Sullivan & Adam M. Reich, *Opening Statements: Tips for Effectiveness in 15 Minutes or Less*, A.B.A (Sept. 18, 2013), https://apps.americanbar.org/litigation/committees/youngadvocate/articles/fall2013-0913-opening-statements-tips-effectiveness-15-minutes-less.html (discouraging lawyers from emphasizing every detail of their case).

minutia or worse, cause them to give up trying to make sense of so much information.[96]

The essential must not be overburdened with the nonessential. For instance, not every person involved in the trial needs to be referred to by name. Certainly the key people involved should be referred to by name, but beyond that, characterizations are sufficient and much easier for the jurors to keep in mind.[97] For instance, instead of "Fran Newcombe," refer to her simply as "the crossing guard." The name of the crossing guard is not essential to the story, only that the crossing guard was working the intersection where the accident took place. Likewise, compass directions will confuse most jurors.[98] Instead of stating that the defendant was driving eastbound on "Erie Avenue" and then turned north onto "Coldbrook Boulevard," the advocate should describe the defendant as driving on "Erie" and making a left turn onto "Coldbrook." The latter is much easier to follow. Advocates must strike the proper balance: give the jurors enough that they understand the events, but not overload them with unnecessary detail such that they get lost.

3. Use a List

One essential component of opening statement is presenting a fact specific list of three to five compelling facts which support the advocate's position.[99] Such a list will assist jurors in keeping in mind the most significant aspects of the case as those facts are developed at trial.[100] A list is essentially the advocate's agenda of why she should win. When that agenda is put forth during opening statements and reiterated during closing

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[96] *See* Susan E. Brune, *The Opening Statement: Taking Control of the Narrative*, A.B.A. (Aug. 7, 2017), https://www.americanbar.org/groups/litigation/publications/litigation_journal/2013-14/summer/the_opening_statement_taking_control_the_narrative/ (discouraging an overly detailed recitation of the evidence in opening statements).

[97] *See* 5 AM. JUR. *Trials* § 285 (2018) (emphasizing the importance of humanizing the client and encouraging advocates to refer to their client by name).

[98] *See* Guy Deutscher, *Does Your Language Shape How You Think?*, N.Y. TIMES (Aug. 26, 2010), https://www.nytimes.com/2010/08/29/magazine/29language-t.html (noting that different cultures express location and direction in different ways, such that some cultures are well versed in compass based directions whereas other cultures utilize egocentric based directions).

[99] *See* PERRIN ET. AL., *supra* note 20, at 139-40.

[100] *See id.* ("A list serves as a useful tool for jurors because it enhances their retention of the material presented.").

arguments, it provides compelling reasons for the jurors to side with the advocate during deliberations.[101]

Each list point should be written out as it is spoken. It is beyond dispute that people recall visual information better than auditory information.[102] By writing the list and then talking through it, the list points become imbedded in the minds of the jurors.[103] Researchers have found that "jurors remember 85 percent of what they see as opposed to 15 percent of what they hear."[104] Conversely, too many list points (more than five) will be overwhelming and difficult for the jurors to retain under such pressured conditions.[105]

After each list point is written, the advocate should turn away from the list and discuss that point. Writing the point first helps imbed the point with the jurors, allowing them to read and briefly digest the synthesized statement before the advocate expounds on that point.[106] Advocates should not write the entire list first and then discuss each point.[107] The jurors will lose focus as they consider the complete list and will not attend the discussion of each point. Advocates may use a whiteboard, butcher paper, or PowerPoint to preserve the list which can then be used again during closing argument. Reiterating the points again at closing argument cements the advocate's agenda just prior to jury deliberation.[108]

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[101] *See id.*

[102] *See id.* ("People are essentially 'visual learners.' Jurors will likely forget what they are told, whereas information they are told *and* shown is likely to be remembered.").

[103] *See* Lionel Standing et. al., *Perception & Memory for Pictures: Single-Trial Learning of 2500 Visual Stimuli*, 19 PSYCHONOMIC SCI. 73, 73-74 (1970).

[104] *See id.*

[105] *See* Angela Kinnell & Simon Dennis, *The List Length Effect in Recognition Memory: An Analysis of Potential Confounds*, 39 MEMORY & COGNITION 348, 349 (2011).

[106] *See* PERRIN ET. AL., *supra* note 20, at 140.

[107] *See id.*

[108] Sean H.K. Kang, *Spaced Repetition Promotes Efficient and Effective Learning: Policy Implications for Instruction*, 3 POL'Y INSIGHTS FROM BEHAV. & BRAIN SCI. 12, 13 (2016) ("Having the initial study and subsequent review or practice be spaced out over time generally leads to superior learning.").

a. Illustration: Defense List in a Wrongful Death Case

Using the same mock trial as the second illustration of Section B involving the firefighter who was killed attempting to rescue the fallen rock climber,[109] the defense list may be as follows:

- Completely dark
- Unknown mountainous terrain
- Running - 100 yards ahead of partner
- Slick surface, slick shoes

Note each point is short and fact specific. This list sets forth a memorable, fact specific agenda as to why the defense should prevail because of the unreasonable conduct of the heroic but negligent firefighter.

E. PRICK BOILS

Every advocate in every trial will confront problems such as hurtful evidence, difficult witnesses, admissible prior convictions, and so on.[110] Given this inevitability, advocates must deal with these problems as early as practicable and as thoroughly as possible.[111] Pricking boils serves two essential functions: first, and most obvious, it serves to lessen the negative impact of the problematic evidence.[112] By broaching the problem first, advocates can mitigate its negative impact and deprive the opposition of the

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[109] *See* ROTHSCHILD ET. AL., *supra* note 44.

[110] *See* Robert J. Jossen, *Opening Statements*, *in* MASTER ADVOCATE'S HANDBOOK 61, 65 (D. Lake Ramsey ed., 1986) ("The other side will dwell on the fundamental problems in your case, so it is better for you to be the first to frame the facts. Problems in evidence that will be adduced and received should be disclosed such as 'criminal records, prior bad acts, inconsistent statements, or damaging admissions.'"); *see also* THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 47-48 (3d ed. 1992).

> Often a difficult decision in opening statements is whether, and if so how, to volunteer weaknesses. This involves determining your weaknesses and predicting whether your opponent intends to use them at trial. There is obviously no point in volunteering a weakness that would never be raised at trial. Where, however, that weakness is apparent and known to the opponent, you should volunteer it. If you don't, your opponent will, with twice the impact.

Id.

[111] *See* Jossen, *supra* note 110 (noting that an effective advocate not only emphasizes the weakness in her adversary's case but also directly confronts the problems in her own).

[112] *See* Williams et. al., *The Effects of Stealing Thunder in Criminal and Civil Trials*, 17 L. & HUM. BEHAV. 597, 597 (1993).

"shock value" of revealing the information first.[113] Second, and perhaps more important, revealing the damaging information first enhances the advocate's (and client's) credibility.[114] An advocate who is willing to admit damaging information is generally perceived as truthful.[115] Conversely, failing to acknowledge the boil at the first possible opportunity will damage the advocate's credibility as the jurors are left to speculate why she did not bring it up.[116]

Boil pricking is inextricably related to personalization, a concept which is discussed in more detail above. A client who has suffered an admissible prior offense (as determined during pretrial motions) or who has engaged in damaging conduct must be brought forth and presented to the jury in the best light possible.[117] Indeed, dealing with problematic facts is not just a suggestion but a necessity.[118] The party who first raises a negative fact has the best opportunity to control and shape how the jurors perceive that evidence.

1. Inoculate the Jury

Pricking boils is critical in order to inoculate jurors against hurtful evidence. Inoculation theory is borrowed from the medical sciences,[119] a

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[113] *See id.*

[114] *See* Ronald J. Waicukauski et. al., *Ethos and the Art of Argument*, 26 LITIG. 31, 31 (1999) ("An advocate who creates the impression that he or she is a person of honesty and integrity will have a considerable advantage over one who is perceived otherwise."); THOMAS SANNITO & PETER J. MCGOVERN, COURTROOM PSYCHOLOGY FOR TRIAL LAWYERS 168-69 (1985) ("Once attorneys earn credibility, jurors will take advocates at their word and will ignore inconsistencies and rationalize weaknesses in the case."); *see also* 1 HERBERT J. STERN, TRYING CASES TO WIN: VOIR DIRE & OPENING ARGUMENT 28 (1991).

[115] Michael B. Keating, *Opening Statement*, *in* MASSACHUSETTS COURTROOM ADVOCACY § 4.6.4 (3d ed. 2017) (noting that by mentioning bad facts an advocate preserves her credibility).

[116] *See* JEFFREY T. FREDERICK, THE PSYCHOLOGY OF THE AMERICAN JURY 157 (1987) ("If a source is perceived to be of dubious credibility, then there is no reason to accept the message.").

[117] *See* MAUET, *supra* note 110.

[118] *See id.*

[119] *See* William J. McGuire, *Inducing Resistance to Persuasion: Some Contemporary Approaches*, *in* 1 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 201 (Leonard Berkowitz ed., 1964).

notable example of which is the first polio vaccine.[120] Until Jonas Salk's vaccine in 1955, tens of thousands of Americans every year were paralyzed or killed by the poliovirus, in addition to millions more stricken around the world.[121] When the vaccine was first introduced, many were concerned that subjecting their loved ones to the polio vaccine would actually infect them with the very disease they were trying to avoid.[122] Of course, their concerns were ultimately unwarranted, and the vaccine was safe for a vast majority who received it.[123]

Similarly, an advocate fearing damaging evidence is akin to those who initially feared the polio vaccine. Anxiety over the damaging information and the resulting desire to avoid that negative fact is counterintuitive. By raising the negative information first, the advocate is actually inoculating the jury to much of the negative fact's destructive force.[124] Research supports the notion that people can be protected from attack by opposing arguments through early exposure to weakened forms of the attacking message.[125] Thus, while the "boil" must be pricked during opening statements, the advocate must take care not to overemphasize the

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[120] *See* Anda Baicus, *History of Polio Vaccination*, 1 WORLD J. VIROLOGY 108, 108-09 (2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3782271/pdf/WJV-1-108.pdf.

[121] *See id.*

[122] Robert K. Plumb, *Science in Review; Cutter Polio Vaccine Report Highlights Difficulties in Dealing with Viruses*, N.Y. TIMES, Aug. 28, 1955, at E9.

[123] CENTER FOR DISEASE CONTROL AND PREVENTION, HISTORICAL VACCINE SAFETY CONCERNS, https://www.cdc.gov/vaccinesafety/concerns/concerns-history.html (last visited Nov. 5, 2018) (noting that the Cutter Incident—where the vaccine accidentally contained live poliovirus—was an anomaly and the distribution of safe polio vaccinations quickly resumed).

[124] *See* Ayn E. Crowley & Wayne D. Hoyer, *An Integrative Framework for Understanding Two-Sided Persuasion*, 20 J. CONSUMER RES. 561, 562-74 (1994).

[125] *See* William J. McGuire, *The Effectiveness of Supportive and Refutational Defenses in Immunization and Restoring Beliefs Against Persuasion*, 24 SOCIOMETRY 184, 193-94 (1961); Don Rodney Vaughan, *Inoculation Theory*, *in* 1 ENCYCLOPEDIA OF COMM. THEORY 514, 515-16 (Stephen W. Littlejohn & Karen A. Foss eds., 2009).

> The communicator with the goal to make attitudes, beliefs, and behaviors resistant to change should first warn the audience of a prevalent counterargument toward the attitude. The warning serves to activate the defense component. When individuals' beliefs are threatened, they immediately begin to generate defenses . . . . The next step is to make a weak attack. The communicator must remember that too strong a dose would overwhelm the [listener's] immune system . . . . The final step in the inoculation process is to encourage passive defense by generating a defensive response.

Id. at 516.

harmful information such that it "infects" the jurors.[126] A delicate touch is required to find this balance.

An intriguing use of inoculation occurred immediately after the September 11, 2001 terrorist attacks.[127] In the run-up to the "war on terrorism," the Bush Administration effectively inoculated the public and the media against possible downsides to a war.[128] The administration's public discussion of the potential downsides of a war was substantial, citing possible challenges because of the length of the war, exiting the conflict, and revitalizing Afghanistan.[129] The greatest challenge was perceived to be the duration of the war, which was "addressed 24 times over 15 days in the *New York Times*, with the President discussing the issue 13 times."[130] Researchers found that media dialogue concerning the length of the conflict became more positive following the inoculation, concluding that, "the Bush Administration aggressively used classic inoculation techniques in preparing for the war on terrorism and that journalists' valence on key wartime issues moved in step with the administration's inoculation attempts."[131]

Similarly, in a 1953 experiment, high school students listened to a radio program where a speaker argued that the Soviet Union would not be able to produce large numbers of atomic bombs for at least five years.[132] One group of students heard a one-sided version containing only arguments supporting this conclusion.[133] The other group heard a version with supporting and opposing arguments.[134] Although the initial impact of the

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[126] *See* Williams, *supra* note 89, at 5 (noting that the advocate should take care in introducing negative information). "Jurors commonly do not expect lawyers to say anything negative about their own witnesses, their evidence, or their case. Thus by focusing on harmful information, [a lawyer] may call greater attention to the damaging information than necessary." *Id.* However, the article also noted that it may be wise to "address the negative information and explain why it is not persuasive, thereby emphasizing its insignificance to the case." *Id.*

[127] *See* Andre Billeaudeaux et. al., *The Bush Administration, Inoculation Strategies, and the Selling of a "War,"* GLOBAL MEDIA J. 1, 2-3 (2003), http://www.globalmediajournal.com/open-access/the-bush-administration-inoculation-strategies-and-the-selling-of-a-war.php?aid=35127.pdf.

[128] *See id.* at 2; *see also* Richard Jackson, *War on Terrorism*, ENCYCLOPAEDIA BRITANNICA (Mar. 24, 2014), https://www.britannica.com/topic/war-on-terrorism.

[129] *See* Billeaudeaux et. al., *supra* note 127, at 3, 6.

[130] *See id.* at 15-16.

[131] *See id.* at 2.

[132] *See* Arthur A. Lumsdaine & Irving L. Janis, *Resistance to "Counterpropaganda" Produced by One-sided and Two-sided "Propaganda" Presentations*, 17 PUB. OPINION Q. 311, 312-13 (1953).

[133] *See id.*

[134] *See id.* at 313.

messages was equal in both groups, those who received both the opposing and supportive messages were more resistant to a later counter-argument that the Soviet Union could produce atomic bombs in only two years.[135] Consequently, the students who were "inoculated" against the counter-argument earlier were more resistant to later attempts to persuade them.[136]

2. Enhance Advocate and Party Credibility

The second and perhaps even greater benefit of boil pricking is that it elevates the advocate's credibility, and thus, the party's credibility.[137] Credible sources have the advantage of being seen as more trustworthy and expert.[138] In turn, advocates perceived as trustworthy are more likely to persuade their audience to align with their perspective of events.[139] As one seasoned trial advocate wrote:

> [T]he personal rectitude of the attorney in the courtroom, as perceived by the jurors, is the most important weapon of a trial lawyer. It is bigger than the facts and bigger than the law . . . the jurors will usually vote for the case of the lawyer they believe in.[140]

A 1978 study focused on the "expertise" aspect of credibility.[141] Fifty-six students in an undergraduate management class were given a brief written message supporting proposed consumer protection legislation.[142] The first group of students was told the message was from a "Harvard-trained lawyer with extensive experience in the area of consumer issues and a recognized expert whose advice was widely sought," while the second group was told it was from "an individual with no special expertise, but one who was interested in consumer protection because of a job opportunity as a

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[135] *See id.* at 317-18.

[136] *See id.*

[137] *See* IRVIN V. CANTOR ET. AL., HANDLING AN AUTOMOBILE NEGLIGENCE CASE IN VIRGINIA § 4:14 (2017) (noting that acknowledging the weaknesses in one's own case can increase credibility).

[138] *See* Brian Sternthal et. al., *The Persuasive Effect of Source Credibility: Tests of Cognitive Response*, 4 J. CONSUMER RES. 252, 252 (1978).

[139] *See* Elliot McGinnies & Charles D. Ward, *Better Liked than Right: Trustworthiness and Expertise as Factors in Credibility*, 6 PERSONALITY & SOC. PSYCHOL. BULL. 467 (1980).

[140] *See* STERN, *supra* note 114.

[141] *See* Sternthal et. al., *supra* note 138, at 254.

[142] *See id.*

consumer lobbyist."[143] After reading the messages, the students rated the highly credible "Harvard-trained" messenger as "significantly more trustworthy and expert than . . . the moderately credible person."[144]

In studies specifically testing this tactic in mock criminal and civil trials, researchers found that revealing self-damaging information first not only increases the advocate's and party's credibility, but also has a positive impact on the jury's verdict.[145] Researchers conducted mock criminal and civil trials with students in which they read or listened to one of several versions of a case, in some versions of which the party revealed the damaging information themselves.[146] The participants then assessed the credibility of the parties, the advocates, and their verdict for the mock case.[147] In both the civil and criminal mock trials, researchers found that revealing the damaging information first, "significantly affected ratings of witness credibility and verdicts such that people were perceived to be more credible when they revealed negative information about themselves, and this in turn led to more favorable judgments."[148] Without question, the empirical research illustrates that boil pricking is effective in enhancing the advocate's and the party's credibility, and may well have a significant impact on the verdict.

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[143] *See id.*

[144] *See id.* at 255.

[145] *See, e.g.*, Williams et. al., *supra* note 112, at 602-03; Howard et. al., *How Processing Resources Shape the Influence of Stealing Thunder on Mock-Juror Verdicts*, 13 PSYCHIATRY PSYCHOL. & L. 60, 65 (2006). It is important to note that in both of these studies, the damaging information was not relayed to the jury during opening, but by a witness on the stand during direct or cross examination. Further, the authors in *The Effects of Stealing Thunder in Criminal and Civil Trials* suggest that there may be slight distinctions between inoculation theory and stealing thunder, in that inoculation theory is based on introducing a weakened initial attack, whereas stealing thunder is revealing all of the damaging information at once. Williams et. al., *supra* note 112 at 602-03. Even so, the findings on stealing thunder are informative for utilizing the same tactic in an opening statement.

[146] *See* Williams et. al., *supra* note 112, at 601, 604. The casefiles varied by including no damaging information (the control condition), having the affected party introduce the damaging information themselves, or having their opponent elicit the damaging information on cross-examination. *Id.*

[147] *See id.*

[148] *See id.* at 606-07.

3. Illustrations of Pricking Boils

a. Defense Inoculation of a Prior Conviction in a Criminal Case

Were a trial judge at a pretrial hearing to rule that the defendant's prior burglary conviction was admissible, defense counsel, in an attempt to mitigate the negative impact, should seek to introduce that evidence in the best possible light at the earliest possible opportunity.[149] A portion of the defense's opening statement might proceed as follows:

> Doug Riddle is going to take the witness stand to tell you his side of the story. He's doing this even though he knows he has a right not to testify. But he wants to tell you that he is not guilty of this crime. He is also going to tell you about a mistake he made seven years ago. Now this trial has nothing to do with what happened seven years ago, but in the prosecutor's mind, that doesn't matter. The prosecutor will try to use Doug's old conviction to convince you that he's a bad guy, that he's not to be trusted. But that's just not true, and you will surely hear that for yourself when Doug takes the stand and owns up to his past. He is going to tell you he was running with some rebellious guys back then, that he got caught up breaking into a warehouse, and that he took some golf clubs. He is not proud of it, he deeply regrets it, he was young and foolish. Doug admitted his guilt, paid the consequences, and is now a better person. He hopes you won't judge him solely on what happened long ago, but only on the facts of this case before you.

Take note that defense counsel is readily admitting the defendant's prior offense, not trying to hide the ball. But more than that, counsel goes

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[149] Take note, however, that there are strategic considerations for defense counsel in deciding whether to introduce prior conviction evidence in a criminal trial. If defense counsel believes the prior conviction was improperly admitted for impeachment, it may be unwise for the defense to volunteer that evidence during trial, causing it to be deemed waived on appeal. *See* Ohler v. United States, 529 U.S. 753, 755-56 (2000); Misty D. Garrett, Case Note, *Ohler v. United States: Defendants Waive Appellate Review by Reducing the Sting of Prior Conviction Impeachment Evidence*, 52 MERCER L. REV. 789, 792 (2000) ("The Court . . . [held] a defendant who introduces evidence of a prior conviction during direct examination in an attempt to reduce the sting of impeachment evidence waives appellate review of the alleged erroneous admission of the evidence.").

on to emphasize how long ago the conviction was and the events behind the conviction, and injects a subtle plea for the jury to consider only the evidence of the present case.

b. Plaintiff Inoculation in a Civil Case

In the following illustration, plaintiff counsel will have just finished his grab, approached his client, and rested a hand on his client's shoulder.

> Gregory Hines is a young man who was grievously injured when his motorcycle was struck by defendant's Jeep. But before we get into the extent of Greg's injuries, I want to tell you a little bit about Greg Hines the person. He is 19 years old, a student at Camarillo Community College. He is the only son of Emma and Ted Hines, who are sitting right here in the front row to support him.
>
> Against the advice of his parents, Greg was commuting to school on his motorcycle. As you can see in this photograph, Greg's motorcycle wasn't one of those huge growling motorbikes, but a smaller vehicle meant for getting around. Greg will tell you that even though he operates his vehicle safely, he received a traffic citation from the highway patrol two years ago. He's going to come up here and tell you about that ticket. He got it when he was seventeen. He was speeding, going fifteen miles per hour over the speed limit, and changed lanes without signaling. But he owned up to the ticket and went to traffic school, paying it off with three weeks of his earnings from his part time job, a precious sum to a seventeen year old. He'll tell you that he hasn't sped since and uses his turn signal religiously.

As the illustrations reflect, pricking the boil requires a balanced approach. While the boil must be owned up to and then reasonably mitigated, counsel must not attempt to completely whitewash the negative such that she loses credibility. On the other hand, the advocate must not dig too deep into the negative information such that the jurors are left with only that.[150] The studies detailed above show there are few substitutes for pricking the boil to maximize advocate and party credibility. There is no

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[150] *See* Vaughan, *supra* note 125.

time better to do so than during opening statements to ensure that all the evidence and arguments that follow are seen by the jury as coming from a credible source.

F. END STRONG

The focus on the critical nature of primacy in opening statements is warranted, because during the grab and personalization phases, first impressions are quickly formed such that the majority of jurors reach a tentative verdict by the end of opening statement.[151] Primacy in the context of opening statement cannot be overvalued.

However, there is also a case to be made for recency, such that the last thought or word prior to concluding any speech should be challenging, memorable, and perhaps even inspirational.[152] In the context of an opening statement, the conclusion should relate back to the central theme, compel the jurors to view the advocate's position favorably, and invite the jurors to be proponents for the advocate's position.[153] The conclusion must be a firm statement of precisely what the advocate expects the juror to do.[154]

1. Illustration: Plaintiff Conclusion in a Personal Injury Case

An example of how an advocate can "charge" the jury at the end of opening statement is as follows:

> Keep in mind that people are more important than profits. Huge companies such as Ford Motor Company must not be allowed to put its incredible profits above the very lives of the people who buy their cars. Mr. Plavin lost his wife, his lifelong partner, and he will never walk again. Ford knew the danger, ignored the danger, and the Plavins paid the price. At the conclusion of this trial, I am going to stand before you and ask you to hold Ford fully accountable for the devastation it caused the Plavins. Thank you.

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[151] *See* Perdue, *supra* note 13; Danner & Varn, *supra* note 14; ROBERTS, *supra* note 15.

[152] *See* PERRIN ET. AL., *supra* note 20, at 142-43.

[153] *See id.*

[154] *See* GEORGE E. GOLOMB ET. AL., 1 FEDERAL TRIAL GUIDE § 11.200 (1997) (noting that an opening statement can conclude by reminding the jurors of their role).

In this example, the advocate sums up the key facts the jury will hear during the trial, centers the jury on the most important and emotional aspect of the case, and then charges the jury with their task, subtly recruiting the jurors to the plaintiff's side. As the illustration shows, the charge must be firm but not demanding. A more fervent demand of the jurors may well generate pushback.[155]

G. FOLLOW ADVOCACY PRINCIPLES

1. Anticipate Opponent's Claims and Respond Appropriately

a. Plaintiff/Prosecution Must Foresee and Preempt Defense Claims

Since counsel for the plaintiff or prosecution delivers her opening statement before counsel for the defense, she must anticipate the defense's opening and preempt anticipated defense claims.[156] Effectively preempting the defense's claims places the defense in the unenviable position of attempting to turn the unfavorable impressions some jurors may already have of its case generated by the plaintiff's or prosecution's opening.[157]

In this era of open discovery where virtually no stone is left unturned, both sides are essentially aware of the other's case.[158] Consequently, the advocate going first should take full advantage of characterizing the anticipated defense claims.[159] For instance in an auto accident case alleging the defendant ran a traffic light, the defense claim may be that the plaintiff had a habit of "timing" traffic lights which caused him to prematurely enter the intersection. The plaintiff can point out during

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[155] *See* Rex A. Wright et. al., *Persuasion, Reactance, and Judgments of Interpersonal Appeal*, 22 EURO. J. SOC. PSYCHOL. 85, 86 (1992) ("[A]n opinion statement which is clear but constructed in such a way so to minimally threaten another's freedom to think, feel, and act in the interpersonal sphere will result in [an] agreeable reaction . . . . [i]n contrast, a statement which strongly challenges freedom of interpersonal judgment is likely to produce subjective and behavioural resistance.").

[156] *See* ROBERT E. LARSEN, NAVIGATING THE FEDERAL TRIAL § 6:16 (2018 ed.) (noting that the prosecution should anticipate factual disputes throughout the trial).

[157] *See* PERRIN ET. AL., *supra* note 20, at 140-42.

[158] *See How Courts Work*, A.B.A., https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/openingstatements/ (last visited Nov. 1, 2018) (discovery enables parties to know of evidence before the trial starts).

[159] *See* PERRIN ET. AL., *supra* note 20, at 140.

opening statement that the evidence will not support the defense's claim, that it is simply unsupported, and that the defense is attempting to deflect blame and refusing to accept responsibility for his own unreasonable conduct.

b. Defense Counsel Must Respond to and Deflect Plaintiff's Assertions

Following the plaintiff's opening statement can certainly have its drawbacks, especially if opposing counsel generated positive first impressions of her client and her case, effectively inoculating the jurors against the upcoming defense opening. However, one benefit of going second is that defense counsel knows the opposition's exact factual theory and theme. Consequently, defense counsel need not speculate about the plaintiff's claims and can effectively launch a broadside attack against each specific claim. Furthermore, the defense has the last word before the trial turns to the plaintiff's case-in-chief, allowing defense counsel to plant his claims in the jurors' minds just prior to the introduction of the plaintiff's or prosecution's evidence.[160]

c. Illustration: Defense Response to Plaintiff's Assertions

One effective technique for defense counsel is to begin his opening statement with a staccato refutation of each claim made by the plaintiff. Once again returning to the case involving the firefighter who died attempting the rescue of a fallen amateur rock climber,[161] the defense opening might proceed as follows:

> This isn't about a rock climber's lack of training; it's about a firefighter who rushed over slippery terrain in the dark.
>
> This isn't about a defendant who didn't have the proper equipment; it's about a heroic rescuer who disregarded his basic training.
>
> And this isn't about a climber who attempted a rock climb beyond his abilities; it's about a firefighter who, in a rush, failed to use the teamwork essential to his dangerous work.

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[160] *See id.* at 142.

[161] *See* ROTHSCHILD ET. AL., *supra* note 44.

Here, defense counsel begins each sequence by refuting the plaintiff's claims and then countering each with his own version of the facts. Since the jury has just heard plaintiff's account of events, it is clear that by directly addressing, refuting, and re-characterizing each claim the defense is not attempting to hide the ball, but rather is confronting each assertion directly and confidently.

2. Use Horizontal Dialogue

The most effective mode of communicating to a small audience like a jury is to talk *with* them (horizontal dialogue) rather that *at* them (vertical dialogue).[162] Horizontal dialogue should resemble a discussion with an acquaintance about a serious matter, an exchange between equals.[163] Indeed, there should be a "conversational feel" to opening statement.[164] Conversely, vertical dialogue is analogous to a lecture where the "all knowing" lawyer talks down to her jurors.[165] Horizontal dialogue requires an advocate to focus on each individual juror, finish a thought with that juror, and then move on to the next juror to make a new point.[166] Such a one-on-one approach helps build a bond with each juror.[167] Having twelve one-on-one dialogues is more effective than the "speech-scan" style practiced by too many advocates.[168]

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[162] *See* Jeff Palmer, *A Return to Advocacy: The Art of Lawyering*, 26 AM. J. CRIM. L. 205, 206 (1998) (explaining that horizontal dialogue allows the lawyer to speak to the jurors as equals); *see also* MICHAEL S. LIEF ET. AL., LADIES AND GENTLEMEN OF THE JURY: GREATEST CLOSING ARGUMENTS IN MODERN LAW 124 (1998). In *Estate of Silkwood v. Kerr-McGee* (discussed below), Gerry Spence's closing argument is especially notable for his use of horizontal dialogue, "[h]e never talks at his jurors; he chats with them. His engaging 'country lawyer' style builds credibility with his jurors, as he avoids the dreaded 'attorney-speak' of legal jargon and convoluted sentences that are indecipherable to the nonlawyer." *Id.*

[163] *See* COLOMBARO ET. AL., *supra* note 86, § 12:56.

[164] *See id.*, § 4:44 (noting that advocates should use a conversational tone and maintain eye contact with the jurors).

[165] *See* CARROLL & FLANAGAN, *supra* note 4, § 11:24 (noting that an opening statement is about telling a compelling story and not about delivering a legal lecture).

[166] *See* H. Mitchell Caldwell & Janelle L. Davis, *Timeless Advocacy Lessons from the Masters*, 35 AM. J. TRIAL ADVOC. 19, 43-46 (2011) (noting that mastering horizontal dialogue will facilitate effective communication with every juror).

[167] *See id.*

[168] *See* Mike Landrum, *Speaking Eye to Eye*, TOASTMASTERS INT'L, https://www.toastmasters.org/Magazine/Articles/Speaking-Eye-to-Eye (noting that intentional eye contact is valued by an audience, like a jury, especially in light of

Moreover, such a dialogue is best facilitated by removing barriers between the advocate and the jurors.[169] Podiums, lecterns, legal pads, and laptops interfere with this dialogue by interposing an object between the speaker and her audience, creating a physical barrier. Perhaps more importantly, such objects also divert the speaker's attention to her notes and away from the jurors lending the advocate a less casual manner than horizontal dialogue requires.

Horizontal dialogue mandates the advocate use basic vocabulary.[170] A more sophisticated vocabulary may create an intellectual gap with some jurors; at best, confusing them as to the advocate's meaning; at worst causing those jurors to feel slighted and resentful.[171] Words with more than three syllables should be scrutinized and preferably substituted for a more commonly used word. For instance, say "bruise" rather than "contusion," "cut" instead of "laceration," "after" rather than "subsequent."

3. Develop Sound Bites

An effective sound bite is a powerful tool. Who will ever forget Johnny Cochran telling the jurors at O.J. Simpson's trial, "If it doesn't fit, you must acquit"?[172] Corny, but memorable. Though Cochran did not use this sound bite during his opening statement (because the regrettable glove demonstration happened during trial), it is recognized as one of the most compelling sound bites in legal history.[173] A sound bite helps encapsulate a key aspect of trial, making it easily understood and memorable.[174]

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the fact that "[t]oo many speakers believe that a constant scan of the audience with their eyes, back and forth like a lawn sprinkler, will do the job").

[169] *See* PERRIN ET. AL., *supra* note 20, at 149-50.

[170] *See* COLOMBARO ET. AL., *supra* note 86, § 12:56.

[171] *See* Brett Godfrey, *Make Sense of Medical Jargon*, 43 TRIAL 64, 64 (2007) (noting that when jurors hear words they don't understand their minds will likely wander).

[172] *See* Jennifer S. Lubinski, *Writer's Workshop for Lawyers Improve Your Trial Skills Using Literacy Techniques*, 53 NO. 9 DRI FOR DEF. 42 (2011) (explaining that rhymes, like Cochran's bit in O.J.'s trial, are easier to remember).

[173] *See* Richard D. Williamson, *Closing Thoughts: Quotations from the Closing Arguments of Famous Cases*, NEV. LAW. 50, 50 (June 2014), https://www.nvbar.org/wp-content/uploads/NevLayer_June_2014_BackStory.pdf.

[174] *See* DENT GITCHEL & MOLLY TOWNES O'BRIEN, TRIAL ADVOCACY BASICS 81 (2006) (noting that a catchy phrase or a hook can grab listeners' attention and implant itself in their brains); *see also* Imwinkelried, *supra* note 6, at 64 ("[T]he attorney should reduce the strongest argument on the key element to a short, memorable expression. The expression is a shorthand label for the argument.").

a. Illustration: Spence's Memorable Sound Bite from *The Estate of Karen Silkwood v. Kerr-McGee*

Gerry Spence, in his attack on the Kerr-McGee Corporation on behalf of Karen Silkwood's family, created a memorable sound bite to explain the difficult concept of strict liability.[175] Unfortunately, Spence's opening statement in *Silkwood* has not been preserved. And though this article is about opening statements, it is helpful to read how Spence simplified the complicated concept of strict liability during closing argument.[176] In the following excerpt from his masterful closing argument, Spence refers to his discussion of strict liability in opening statement:

> Well, we talked about "strict liability" at the outset, and you'll hear the court tell you about "strict liability," and it simply means: "If the lion gets away, Kerr-McGee has to pay." It's that simple—that's the law. You remember what I told you in the opening statement about strict liability? It comes out of the Old English common law. Some guy brought an old lion on his ground, and he put it in a cage—and lions are dangerous . . . through no fault of his own, the lion got away. Nobody knew how—like in this case, "nobody knew how." And, the lion went out and he ate up some people—and they sued the man. And they said, you know: "Pay. It was your lion, and he got away." And, the man says: "But I did everything in my power—I had a good cage—had a good lock on the door . . . and it isn't my fault that he got away." Why should you punish him? They said: "We have to punish you . . . ." You have to pay because it was your lion - unless the person who was hurt let the lion out himself. That's the only defense in this case: unless in this case Karen Silkwood was the one who intentionally took the plutonium out, and "let the lion out," that is the only defense . . . .[177]

In a few sentences, Spence breathed life into a dry legal concept. In explaining strict liability, Spence boiled the whole concept down to one easy

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[175] *See* William K. Stevens, *Silkwood Radiation Case Is Ready for Jurors Today*, N.Y. TIMES (May 15, 1979), https://www.nytimes.com/1979/05/15/archives/silkwood-radiation-case-is-ready-for-jurors-today-trial-in-eighth.html.

[176] *See* LIEF ET. AL., *supra* note 162, at 127-57.

[177] *See id.*

to remember phrase: "If the lion gets away, Kerr-McGee has to pay."[178] Throughout the balance of the close, Spence came back to that phrase, and by simply uttering it, his explanation of strict liability is immediately recalled. A sound bite that captures the essence of the case is an extremely persuasive tool. Not unintentionally, Spence's sound bite also beautifully encapsulated his thesis of why his client should prevail. If one can be developed as early as opening statement, so much the better.

4. Don't Make Promises You Can't Keep

Be careful what you promise. Counsel should never promise what they may not be able to deliver.[179] If the admissibility of certain evidence is subject to a possible sustained objection, or a witness's presence is in doubt, an advocate's promise to produce that evidence or that witness can lead to a devastating attack by opposing counsel during closing arguments.

a. Illustration: Defense Attack on Prosecution's False Promise During Closing Argument

> Folks, you all were listening to counsel's opening statement and you will recall that she said, "you are going to hear from Ms. McGuire that she saw Frank near the mall the morning of the shooting." Did we hear any such testimony? Did we hear anything even close to that testimony? Yet opposing counsel assured us we would. What do we make of such a bold promise that was utterly broken. What does that tell us about their case? About the integrity of their case?

It behooves an advocate to take care in stating what witnesses will testify if there is doubt as to whether they will be present, and what evidence will be introduced if there is concern regarding admissibility. At closing, these unfulfilled promises will only serve to injure counsel's credibility immediately prior to jury deliberations.

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[178] *See id.*

[179] *See* GIANNA & MARCY, *supra* note 12, at § 17:2 (advising that advocates should not make promises they cannot keep and noting that if advocates make a promise, they should prove what they say they will prove and deliver what they say they will deliver); *see also* FRIEDMAN & CUMMINGS, *supra* note 88, at 101 (noting that opposing counsel is "just waiting for you to overstate your case or to say something he can prove is inaccurate or incorrect . . . [h]e knows that if he can hurt your credibility, he can hurt your case").

5. Use Appropriate Technology

As discussed earlier, people recall what they see and hear much better than what they only hear.[180] We are all accustomed to receiving much of our information from what we see, from television, cell phones, computer screens, and so on. When we see something it becomes imprinted in our minds, more easily stored and recalled than information we only hear.[181] Recognizing this reality, it is good practice to supplement opening statements with visuals.[182] Visuals can range from sophisticated video recreations to the simpler PowerPoint, photo blowup, diagram, or handwritten list.[183] A list of key facts supporting the advocates case is one "low tech" but effective example discussed above, whether handwritten or integrated into a PowerPoint. Beyond the benefits of increased memory storage and recall, visual stimulation helps retain juror interest and focuses their attention where and when the advocate desires.[184]

One cautionary note: occasionally, advocates become too reliant on technology at the expense of their advocacy. Too many PowerPoint slides or photograph blowups could become distracting, and ultimately hinder juror attention and retention. Strike a balance to enhance your opening statement.

6. Don't Argue

The purpose of opening statement is to relate a factual overview of what the advocate expects the evidence to establish.[185] Opening statement is *not* the time to argue the case, but of course, advocates *should* present their case in the light most favorable to their position. The primary limit on what advocates can say during opening statement is the prohibition on argument, which precludes advocates from drawing conclusions, making inferences, or

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[180] *See* Standing et. al., *supra* note 103, at 73 (finding that humans have a vast memory for remembering photographic stimuli, though the cognitive mechanisms by which this is accomplished are not fully understood).

[181] *See* Jon Hotchkiss, *Are You More Likely to Remember Stuff You See or Stuff You Hear?*, HUFFPOST, (March 6, 2014, 5:36 PM), https://www.huffingtonpost.com/jon-hotchkiss/memory-test-hearing-vs-seeing_b_4912777.html (noting that visual images are easier to remember, not only because they are encoded differently than auditory material, but because people tend to associate them with things that they are already familiar with).

[182] *See* PERRIN ET. AL., *supra* note 20, at 27-28.

[183] *See id.*

[184] *See id.*

[185] *See How Courts Work*, *supra* note 158 (noting that the purpose of the opening statement is to introduce the jurors to what they will be hearing).

going beyond the evidence to be introduced at trial.[186] One rule of thumb is the advocate must have a good faith belief that a witness will be able to competently testify to the fact.[187] If so, the statement is generally not argumentative. Lawyers frequently slip over the line during opening statements, attempting to fend off a sustainable argument objection by prefacing the argumentative phrase with "the evidence will show."[188] Such a play, of course, cannot render an argumentative statement less argumentative.[189] Nonetheless, many advocates attempt to camouflage their objectionable statements using this gambit.

Despite the prohibition against it, arguing during opening statements occurs frequently and yet many judges are reluctant to sustain an argumentative objection.[190] If, in the judge's view, the statement is not "overly" argumentative she may let it pass. Catching a sustained argumentative statement can have a debilitating impact on the effectiveness of an opening statement.[191] It sends a message to the jury that the advocate is not following the rules and is attempting something underhanded. Advocates must take care to avoid anything too argumentative during opening that may lead to a sustained objection, cutting off the flow of dialogue, and damaging juror opinion of the advocate and her case.

H. CONCLUSION

While it may seem difficult to juggle all of the strictures laid out above, striving to master these fundamental opening statement strategies will yield more effective opening statements. The opening statement is the first real time the jurors will get to hear what the trial is all about, the first time

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[186] *See* Sullivan & Reich, *supra* note 95 (noting that advocates should not make an argument during the opening statement); FRIEDMAN & CUMMINGS, *supra* note 88.

[187] *See* Wes Porter, *Motions in Limine*, GOLDEN GATE UNIV. SCH. OF LAW 8, 9 (2012), https://digitalcommons.law.ggu.edu/trial_advocacy_evidence/5/ (scroll to bottom then follow "motions_in_limine.pdf" hyperlink under "Additional Files") (noting that when evidence is introduced the advocate should have a good faith belief that it will be part of trial).

[188] *See* PERRIN ET. AL., *supra* note 20, at 154.

[189] *See id*. at 158.

[190] *See* Craig Lee Montz, *Trial Objections from Beginning to End: The Handbook for Civil and Criminal Trials*, 29 PEPP. L. REV. 243, 254-55 (2002) (noting that a sustained objection can have a severely prejudicial impact).

[191] *See id.* at 272-73 ("An objection that an opening statement is argumentative may be the most frequent objection at the trial court level, but it rarely receives appellate court scrutiny.").

they will be provided some context for the evidence they will hear and see, and the first time they will form opinions of everyone involved. No public speaker, no advocate, gets a second chance to make a first impression. If an opening statement is the window into a case, the advocate must take care to ensure the glass is clear, the frame is intact, and the jury is seeing the advocate's view of the case.

STRAIGHT PAST GO AND COLLECT $200: A LOOK INTO THE CLAYTON ACT AND VERTICAL MERGERS WITHIN CORPORATE AMERICA

INTRODUCTION

In the game of Monopoly, the goal is to purchase and develop as much property as possible while forcing your competitors out of the real estate market.[1] While Monopoly does not directly describe the concepts behind vertical mergers, the ideals of gaining power and merging to ensure ultimate market power are the same.[2] A monopoly is a "market structure characterized by a single seller, selling a unique product in the market. . .in a monopoly market, the seller faces no competition, as he is the sole seller of goods with no close substitute."[3] Many view monopolies as anti-consumer, which inflict an overall negative effect on the economy because of their inherit ability to limit choice and, in turn, provide an inferior product due to the lack of competition.[4] This fear has grown exponentially in the last few centuries, and the reality that only a select and powerful few control the wide economic market is now a major concern.[5] When faced with the concept of monopolies, the prevailing thought is that one company controls a single industry; however, more commonly in the current climate,

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[1] *See Monopoly Board Game*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/Monopoly-board-game (last visited Feb. 25, 2018) (identifying rules of Monopoly).

[2] *See* Jonida Lamaj, *The Evolution of Antitrust Law in USA,* 113 EURO. SCI. J. 154, 157 (2017) (discussing importance of competition in market). Without competition, a company would not have the incentive to produce a better product or market their product at a competitive price. *Id.* Notable industries affected by monopoly power are pharmaceutical companies, the health industry, technology, media, the cable industry, and airlines. *Id.*

[3] *See Definition of 'Monopoly'*, ECONOMIC TIMES, https://economictimes.indiatimes.com/definition/monopoly (last visited Jan. 17, 2019) (defining monopoly).

[4] *See* Lamaj, *supra* note 2, at 154 (explaining history of monopolies). The United States does not ban monopolies, but does ban monopolization. *Id.* at 155. This keeps the individual's right to contract intact with limitations on certain mergers and acquisitions that could be seen to substantially lower competition in a given market. *Id.*

[5] *See id.* at 161 (analyzing growing fear of monopolies in current age).

companies are not only merging in their own industry but with industries outside their own, which creates powerful multi-industry empires.[6]

Over a century ago, the United States Congress passed the Sherman Act of 1890 in an effort to combat growing public concern regarding the concentration of wealth and a single entity's economic power in a given market.[7] To continue its efforts, twenty-four years later, Congress passed the Clayton Act of 1914 and the Federal Trade Commission Act.[8] Subsequently, Congress passed the Robinson-Patman Act of 1936, the Celler-Kefauver Act of 1950, and the Hart–Scott–Rodino Antitrust Improvements Act of 1976.[9]

When Congress began passing antitrust regulations, their focus was primarily on regulating the classic monopoly of direct competitors merging, and it was not until the Clayton Act when regulation on non-direct competitors was introduced.[10] The current trend of using the Clayton Act in conjunction with the Sherman Act has led to further regulation of not only direct but indirect competitors.[11] Three major concerns when two companies are allowed to vertically merge pertain to the possibility that: (1) it can lead to exclusionary effects by increasing rivals' costs of doing business and block ways of entry for emerging businesses; (2) it can lead to coordination

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[6] *See* Jessica Roy, *4 Corporate Mergers Shot Down By the Government,* SPLINTER NEWS, https://splinternews.com/4-corporate-mergers-shot-down-by-the-government-1793840916 (Feb. 26, 2014) (describing corporate mergers shot down). In recent years, several cases have been turned down in an effort to merge. *Id.* These denials have included companies with massive market power, for example, AT&T and Time Warner. *Id.*

[7] *See* 15 U.S.C.A. § 2 (2004) (providing language of Sherman Act).

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Id.; *see also* John B. Kirkwood & Robert H. Lande, *The Fundamental Goal Of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV 191, 203-05 (2008) (outlining Congress's need to pass laws addressing antitrust issues). The Sherman Act sought to protect trade and commerce by making monopolization a felony offence. 15 U.S.C.A. § 2.

[8] *See* Lamaj, *supra* note 2, at 156 (discussing history of Clayton Act and Federal Trade Commission). The Federal Trade Commission Act established the Federal Trade Commission as a branch under the U.S. Department of Justice in 1914 to prosecute injustices, unfair, and deceptive acts and/or practices in commerce. *Id.* The Federal Trade Commission has the power to investigate suspected violations of Antitrust laws. *Id.*

[9] *See* Lamaj, *supra* note 2, at 156 (discussing growing antitrust legislation).

[10] *See* Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L.J. 513, 515 (1995) (discussing evolution of vertical mergers).

[11] *See* Lamaj, *supra* note 2, at 161 (discussing Clayton Act evolution).

of pricing and price sharing; and (3) it can facilitate price fixing.[12] When a company merges with another company in a separate industry, a typical *horizontal merger* is not created; instead, this type of merger is identified as a *vertical merger*.[13] These *vertical mergers* still disrupt the markets in a similar way.[14] Historically, vertical mergers have not been prosecuted at an equal rate as horizontal mergers.[15] While the United States Department of Justice ("DOJ") tries around thirty *horizontal* merger cases a year, it was only recently that they attempted to block the vertical merger between AT&T and Comcast, a first for the DOJ within the last four decades.[16] This extremely rare attempt to block the merger indicates a new initiative by the DOJ to regulate and scrutinize vertical mergers.[17] As will be discussed in detail, the U.S. Court of Appeals of the D.C. Circuit's allowance of the AT&T and Time Warner merger creates conflict and confusion regarding the harm large vertical mergers can have on society and economic markets.[18]

While there is significant case law and statutes regulating horizontal mergers, the same cannot be said for vertical mergers.[19] Without clear guidelines, antitrust regulations, specifically the Clayton Act, cannot perform the purposes they were designed for.[20] This note will (I) examine

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[12] *See* Riordan, *supra* note 10, at 519-20 (noting concerns with vertical merging).

[13] *See id.* (discussing difference in horizontal and vertical mergers).

[14] *See id.* at 515 (defining vertical mergers). The magnitude of power gained when companies vertically merge disrupts the markets in a similar way as horizontal mergers. *Id.*

[15] *See* Noah Brumfield, *INSIGHT: Rare Court Decision Clarifies U.S. Merger Control Rules for Vertical Deals,* BLOOMBERG, (Aug. 14, 2018), https://www.bna.com/insight-rare-court-n73014481742/ (discussing difference between vertical and horizontal prosecution).

[16] *See id.* (explaining AT&T and Time Warner merger). The DOJ believed the merger would allow the single company to "leverage its distribution strengths to increase costs to its rivals for must-have cable and satellite television content." *Id.* The DOJ was unsuccessful in their efforts. *Id.*

[17] *See id.* (discussing DOJ's previous lack of vertical merger prosecution).

[18] *See id.* (criticizing lack of certainty in vertical merger decisions).

[19] *See* Brumfield, *supra* note 15 (explaining Clayton Act's purpose). The Clayton Act of 1914 is one of the only pieces of legislation speaking to the regulation of vertical mergers. *Id.*

[20] *See* Daniel R. Warren, *Stress Fractures: The Need To Stop And Repair The Growing Divide In Circuit Court Application Of Summary Judgment In Antitrust Litigation,* 35 REV. BANKING & FIN. L. 380, 383-84 (2015) (discussing importance of uniformity).

> Historically, on an international level, the Sherman Act can be seen as a successful unification of disparate state antitrust standards, which replaced conflicting and ineffective regulations. However, the advantages of reducing costs by switching to a uniform federal antitrust system rather than disparate state antitrust systems could be lost if that federal system were no longer uniform. The costs of compliance are magnified when conforming to overlapping laws or different interpretations of the same law, as firms could struggle to correctly understand which actions are allowed and which are not according to different interpretations of conflicting laws.

Id. at 384.

the legislative history and landmark cases to analyze the purpose of antitrust regulations; (II) analyze the current climate surrounding vertical mergers including recent merger decisions by the Federal Trade Commission; and (III) examine recent Supreme Court and circuit courts decisions regarding vertical mergers to evaluate whether stricter regulation is necessary.[21]

HISTORY

Antitrust regulation began when several goliath businesses, particularly in the railroad and steel industries, created common-law "trusts" that allowed businesses to centrally control an entire industry.[22] While these "trusts" initially started in the steel and railroad industry, they gradually made their way to almost every industry in America, including oil, telephone, cotton, and whiskey.[23] Americans grew very concerned with the power these trusts held, and Congress reacted by drafting the Sherman Act of 1890.[24] In 1890, Congress passed The Sherman Act making it the first piece of United States legislation to regulate monopolies and antitrust behaviors.[25]

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[21] *See infra* Part I (examining history of antitrust cases); *see infra* Part II (analyzing vertical mergers today); *see infra* Part III (analyzing cases regarding vertical mergers).

[22] *See* Robert H. Lande, *Wealth Transfers as The Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged,* 34 HASTINGS L.J. 65, 67-69 (1982) (discussing history behind anti-trust regulation).

[23] *See id.* at 67-70 (discussing circumstances leading to Sherman Act).

[24] *See id.* (illustrating concern leading to Sherman Act). Antitrust laws were passed to encourage competition and market efficiency, but many believe it goes farther than that with "a number of social, moral, and political concerns" as well. *Id.* at 68. Senator John Sherman presented the bill, which had two key sections dealing with restraints of trade and monopolization. *Id.* at 84.

[25] *See* 15 U.S.C. §§ 1–7 (2004) (outlining provisions of Sherman Act). Section One and Two of the Sherman Act are as follows:

> (1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000 or by imprisonment not exceeding ten years, or by both said punishments, in the discretion of the court.
> (2) Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.
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> *Id.*

Once passed, several questions arose regarding the constitutionality of the government's regulation of businesses and commerce to the extent that the statute allowed.[26] In the ground-breaking case, *Standard Oil v. United States*, the United States brought suit against Standard Oil Company of New Jersey for violating the Sherman Act.[27] Along with ruling that Standard Oil did violate the Sherman Act by having an unreasonable restraint on trade, the Court also discussed whether Congress exceeded its constitutional power by enacting the Sherman Act in light of the Commerce Clause.[28] The Commerce Clause is an enumerated power that allows the federal government to regulate foreign and domestic interstate trade.[29] The Court held that Congress did not violate the Commerce Clause and did not exceed its authority to regulate commerce.[30]

As the industrious growth in modern America began to exceed what the writers of the Sherman Act imagined, an amendment was needed, resulting in the Clayton Act in 1914.[31] The Clayton Act amended the Sherman Act by including additional provisions.[32] During this time in

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[26] *See* Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31 (1911) (holding defendant had violated Section One of Sherman Antitrust Act); *see also* U.S. Dep't of Justice, *Sherman Anti Trust Act of 1890 Society for Human Resource Management*, SHRM.ORG (Apr. 21, 2016), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/sherman-anti-trust-act.aspx (discussing Standard Oil violation). The violation was based on "its excessive restrictions on trade, particularly its practices of eliminating competitors by buying them out directly and by driving them out of business by temporarily slashing prices in a given region." *Id.*

[27] *See Standard Oil Co*., 221 U.S. at 70-74 (providing facts of Standard Oil's violation). By essentially owning all of the oil companies throughout the United States, Standard Oil has put an unreasonable restrain on trade. *Id.* at 74.

[28] *See id.* at 69-70 (illustrating Court's differing opinion); *c.f.* United States v. E.C. Knight Co., 156 U.S. 1 (1895). The Court held that the American Sugar Refining Company had not violated the Sherman Act despite the fact that it controlled approximately ninety-eight percent of all sugar refining in the U.S. *Id.* The Court's explained that the company's control of manufacturing did not constitute control of trade. *Id.* at 12.

[29] *See* U.S. CONST. art. I, § 8, cl. 3 (discussing Congress's power to regulate commerce).

[30] *See id.* (discussing power to regulate interstate commerce gives Congress power to regulate business agreements and mergers); *see also Standard Oil Co*., 221 U.S. at 69-70 (discussing reasonable restraints on trade).

[31] *See* 15 U.S.C. § 18 (1914) (discussing text of Sherman Act).

> No person engaged in commerce. . .shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce. . .where in any line of commerce. . .in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.

Id.

[32] *See* 15 U.S.C. §§ 12-27 (1914) (providing restrictions on activities relating to interstate commerce and competition in market place). The provisions specifically attempted to eliminate

American history, businesses were growing at an unprecedented rate, and the Clayton Act sought to limit the horizontal combinations of businesses.[33] The amendment also paid special attention to the regulation of "vertical mergers."[34] Congress focused on vertical mergers because it became apparent that solely regulating horizontal mergers did not provide adequate consumer protection.[35] As opposed to horizontal mergers, vertical mergers were previously unregulated deals, slowing market competition and stifling the innovation of goods and services in multiple industries rather than a singular market.[36]

In 1914, Congress passed the Federal Trade Commission Act, which established a Commission to investigate and cease unfair business.[37] The Federal Trade Commission is an independent agent with the United States Government, and within it sits the Bureau of Competition and the Department of Justice's Anti-Trust Division.[38] The Commission works with three main goals in mind; (1) protect consumers; (2) maintain competition; and (3) advance organizational performance.[39]

In recent decades, two additional amendments to the Clayton Antitrust Act have been the Robinson-Patman Act of 1936 and the Celler-Kefauver Act of 1950.[40] The Robinson-Patman Act of 1936 focuses primarily on price discrimination.[41] The Celler-Kefauver Act of 1950

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price discrimination, buying out competitors, and interlocking boards of directors. *Id.*; *see also* Brown Shoe Co. v. United States, 370 U.S. 294 (1962) (explaining use of Sherman and Clayton Act). In *Brown Shoe Co.*, the government challenged the merger of two shoe manufactures. *Id.* at 296. The Supreme Court affirmed the lower court's decision ordering the defendant to completely divest from the stock, assets, and interests it held with the shoe company it merged with to avoid unfair business practices. *Id.* at 344-46.

[33] *See Brown Shoe Co*., 370 U.S. at 311-18 (discussing trends of businesses in early 19th Century that led to amending Sherman Act).

[34] *See id.* at 324 (Clayton Act does not render all vertical mergers unlawful). While the Court concluded vertical mergers are not immediately unlawful, certain mergers that substantially lessen competition or create monopolies across different industries are restricted. *Id.*

[35] *See id.* at 317 (discussing Congress's vertical merger regulation).

[36] *See id.* (noting that without competition there would be no innovation).

[37] *See* F.T.C. v. Procter & Gamble Co., 386 U.S. 568 (1967) (reviewing an order by Federal Trade Commission). The court analyzed a Federal Trade Commission order that required a manufacturer to divest itself of assets of liquid bleach company on grounds that the merger "might substantially lessen competition or tend to create a monopoly in the production and sale of household liquid bleaches." *Id.* at 570.

[38] *See Guide to Antitrust Laws*, FED. TRADE COMM'N, www.ftc.gov/bc/antitrust (last visited Jan. 17, 2019) (discussing placement of Federal Trade Commission in U.S. government).

[39] *See About The FTC*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc (last visited Feb. 25, 2018) (indicating Federal Trade Commission's benefit to consumers).

[40] *See* 15 U.S.C. § 13 (1936) (providing language of 1936 Robison-Patman Act); *see also* 64 STAT. 1125 (1950) (identifying Celler-Kefauver Act of 1950).

[41] *See* 15 U.S.C. § 13 (1936) (providing text of Robinson-Patman Act of 1936).

regulates vertical mergers and was passed to prevent unfair acquisitions still permitted under the previous regulations, specifically firms that were not in direct competition with each other.[42] In *United States v. Cont'l Can Co.*, the Supreme Court held that a manufacturer of glass bottles and a manufacturer of metal cans could not merge even though their products were not in direct competition, finding that such a merger would violate the Clayton Act and Celler-Kefauver Act of 1950.[43] Finally, the most recent antitrust regulation went into effect with the Hart–Scott–Rodino Antitrust Improvements Act of 1976.[44] Signed into law by President Gerald Ford, this amendment "provides the FTC and the Department of Justice with information about large mergers and acquisitions before they occur. . .The parties to certain proposed transactions must submit premerger notification to the FTC and DOJ."[45]

Courts have historically used two methods to examine antitrust violations: the older notion of *per se* illegality, and the Chicago-based *rule*

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . .

Id.; *see also* United States v. Morton Salt Co*.,* 338 U.S. 632, 635-36 (1950) (analyzing case pertaining to salt prices).

> Proceedings under § 5 of the Federal Trade Commission Act culminated in a Commission order requiring respondents Morton Salt Company and International Salt Company, together with eighteen other salt producers and a trade association, to cease and desist from stated practices in connection with the pricing, producing and marketing of salt.

Id.

[42] *See* United States v. Cont'l Can Co., 378 U.S. 441, 447 (1964) (outlining decision criteria for antitrust cases); *see also* Arthur Holst, *Celler-Kefauver Act,* ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/Celler-Kefauver-Act. (last visited Jan. 17, 2019) (discussing history of Celler-Kefauver Act).

[43] *See Cont'l Can Co.*, 378 U.S. at 447 (discussing merger violation). Justice White held that a merger between the second largest can producer and the third largest glass jar producer violated the Clayton Act despite the contention that specific containers produced by the companies did not substantially compete in the market. *Id.* at 443-44.

[44] *See* 15 U.S.C. § 18(a) (2000) (outlining evolution of antitrust laws).

[45] *See Premerger Notification Program*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/premerger-notification-program (last visited Feb. 25, 2018) (discussing new regulation in antitrust laws).

of reason approach.[46] The Chicago School of Thought or "competition theory" dates back to 1955 and can be attributed to Aaron Director.[47] This theory focuses on a *rule of reason* approach, as opposed to the courts widely used *per se* illegality principal of a monopoly.[48] While the *per se* rule is based off of black-and-white decision making, the Chicago theory centers around analyzing the possible efficiency and reasoning behind a business's monopolistic actions before declaring a violation.[49] A groundbreaking rule of reason case came in 1899 with *Addyston Pipe & Steel Co. v. United States,* where the Supreme Court determined whether or not monopolistic activity was both reasonable and merely ancillary to the main purpose of a lawful and legitimate contract.[50] This method of analyzing antitrust cases was further broadened in *Board of Trade of City of Chicago v. United States*, where the Supreme Court reviewed the nature, scope, and effect of the monopolistic activity and if that activity promoted or restrained

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[46] *See* Thomas A. Piraino, Jr., *Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century,* 82 IND. L.J. 345, 356 (2007) (noting per se presumes illegality while rule of reason evaluates market control and scope).

[47] *See* Richard A. Posner, *The Chicago School of Antitrust Analysis,* 127 U. PA. L. REV. 925, 932 (1979) (declaring Aaron Director as founder of Chicago antitrust thought). These methods were then passed down to his students, including antitrust scholars, Ward Bowman, Robert Bork, John S. McGee, and Lester G. Telser. *Id.*

[48] *See id.* (explaining competition theory); *see also* Brown Shoe Co. v. United States, 370 U.S. 294, 296 (1962) (using of per se illegality); *c.f. Standard Oil Co*., 221 U.S. at 31 (highlighting per se illegality*)*. The seminal antitrust cases of *Standard Oil* and *Brown Shoe* both used the *per se* theory in their rulings. *Standard Oil Co.*, 221 U.S. at 31; *Brown Shoe Co.*, 370 U.S. at 296. The Supreme Court in *Brown Shoe* and *Standard Oil* first looked to see if they could find monopolistic practices in the companies' actions, and because monopolistic practices were found, they held that there had been a violation. *Standard Oil Co*., 221 U.S. at 31; *Brown Shoe Co.*, 370 U.S. at 296.

[49] *See* Richard A. Posner, *The Chicago School of Antitrust Analysis,* 127 U. PA. L. REV. 925, 927 (1979) (describing pillars of competition theory).

> To illustrate, it makes no sense for a monopoly producer to take over distribution in order to earn monopoly profits at the distribution as well as the manufacturing level. The product and its distribution are complements, and an increase in the price of distribution will reduce the demand for the product. Assuming that the product and its distribution are sold in fixed proportions, and thus that the price discrimination analysis is inapplicable, the conclusion is reached that vertical integration must be motivated by a desire for efficiency rather than for monopoly.

Id.; see also Thomas A. Piraino, Jr., *Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century*, 82 IND. L.J. 345, 35-52 (2007) (discussing per se and rule of reason).

[50] *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 229 (1899) (illustrating Supreme Court's use of *rule of reasoning* over *per se*). The Supreme Court found a violation of the Sherman Act because of Addyston Pipe & Steel's practice of price fixing and dividing territories between the two companies. *Id.*

competition.[51] The rule of reason theory also supports the economic principle that if there is an injustice in the market, the market will correct itself without the interference of the courts or the government.[52] Since the Sherman Act enactment, courts have used both the per se illegality method and the Chicago School's rule of reasoning approach to evaluate antitrust matters, however, the rule of reason has been the prevailing method for the courts recently, leaving the per se illegality method for the history books.[53] The trend of giving preference to the rule of reason may be a prevailing reason why vertical mergers have been difficult to regulate in recent years.[54]

FACTS

Vertical Mergers and The Clayton Act

Historically, courts have been more relaxed in regulating vertical mergers in comparison to other anti-trust violations.[55] One unique instance where the Supreme Court has addressed an issue of vertical mergers was in 1962 with *Brown Shoe Co. v. United States*.[56] The Court explained that to find a vertical merger antitrust violation, the companies need to be within the

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[51] *See* Bd. of Trade of City of Chi. v. United States, 246 U.S. 231, 239-40 (1918) (showing Supreme Court's favored use of *rule of reason* over *per se* approach). The Court did not find a violation because the Board of Trade's use of monopolistic activity was reasonable in order to promote fair competition and trade. *Id.* at 240-45.

[52] *See* Piraino, *supra* note 48, at 350 (discussing court's limited involvement under competitive theory). The Chicago School of Thought believed that courts should only "intervene in the competitive process when it was clear, after thorough study, that anticompetitive conduct was threatening consumer welfare." *Id.*

[53] *See* Piraino, *supra* note 48, at 354 (explaining increased use of rule of reason opposed to per se). "The most dramatic retreat from per se analysis occurred in 1977 when, in *Continental T.V., Inc. v. GTE Sylvania Inc*., the Supreme Court reversed its decision in Schwinn and decided that nonprice vertical restrictions should be judged by the rule of reason." *Id.*

[54] *See* Cont'l Television v. GTE Sylvania, 433 U.S. 37, 54-55 (1977) (discussing rule of reason used in vertical merger cases).

[55] *See* Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L.J. 513, 515 (1995) (explaining how vertical mergers have historically been seen as neutral and in favor of competition). The Chicago School of Thinking's view on vertical mergers has been that mergers generally help competition and are better for consumer product and choice. *Id.* at 513-14.

[56] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962) (discussing competition in vertical mergers). In *Brown Shoe*, the Court explained that vertical mergers deny competitors the opportunity to compete but further explains how the Clayton Act does not necessarily render vertical mergers entirely unlawful. *Id.* "[D]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition.' Substantiality can be determined only in terms of the market affected." *Id.* at 324.

same product market.[57] Another early prominent case in determining the scope and limits to vertical mergers was *Ford Motor Co. v. United States*.[58] In *Ford*, the government brought suit against Ford Motor Company for purchasing $28 million worth of the Electric Automobile Company.[59] When the case was heard in the United States District Court of Michigan, the lower court discussed the importance of analyzing the product markets of each entity that intended to merge to determine if it would create unfair competition to the market.[60] The government argued that the Clayton Act had been violated because the merger would combine wide-reaching pre-existing distribution networks.[61] The Supreme Court agreed with the government and held that Ford's acquisition constituted a violation of the Clayton Act because the acquisition substantially lessened competition in automotive batteries and spark plug markets across the country.[62] In addition, the Court reasoned that the phrase "in any line of commerce" under the Clayton Act is all encompassing, and if "the forbidden effect or tendency is produced in one out of all the various lines of commerce" then a violation of the Clayton Act will be present.[63]

Since *Brown* and *Ford*, there have been minimal influential cases involving violation of the Clayton Act through vertical mergers because of

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[57] *See id.* at 325 (describing scope of Clayton Act).

> Clayton Act prohibits any merger which may substantially lessen competition 'in any line of commerce', it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed.

Id. at 325.

[58] *See* Ford Motor Co. v. United States, 405 U.S. 562, 564 (1972) (discussing important early case in vertical merger history). This case was brought in violation of Celler-Kefauver Anti-Merger Act. *Id.*

[59] *See* United States v. Ford Motor Co., 286 F. Supp. 407, 409 (E.D. Mich. 1968) (noting Fords efforts to streamline by purchasing manufacturing plant).

[60] *See id.* at 411 (stressing importance of analyzing product markets for fairness in market competition). The government's argument against this acquisition predicted a high likelihood of "probable substantial lessening of competition in four lines of commerce." *Id.* These four lines of commerce were automobiles, automotive batteries, spark plugs, and ignition parts. *Id.* Ford did not dispute that automobiles, automotive batteries, and spark plugs had their own commercial chains, but disputed that ignition plugs have a market of their own. *Id.*

[61] *See id*. at 418 (citing governments argument for Clayton Act violation in *Ford*).

[62] *See id.* at 441 (finding Clayton and Celler-Kefauver Act violation). The Court assumed that the merge would not create a monopoly in automobiles or industries for automobile parts, but still concluded that this type of merger was a per se violation of the Sherman Act. *Id.* The Court determined that the agreement would have a "pervasive impact on the replacement market for spark plugs" and be a barrier to entry for others, resulting in a violation of the Celler-Kefauver Anti-Merger Act. *Id.* at 429.

[63] See *id.* at 445 (explaining reasoning behind *Ford*).

the "apparent lack of competitive concern" that a Clayton Act violation expresses.[64] In 1997, the Supreme Court heard *Continental Television v. GTE Sylvania,* a case involving an agreement between a manufacturer and a seller of television sets.[65] In *Sylvania,* the Court determined that while the per se illegality reasoning used in previous antitrust cases is still a valid method of analysis, the Court may also need to look at other factors such as market share and scope.[66]

In 1977, the DOJ failed to halt a vertical merger with a potential violation of Section 7 of the Clayton act in *United States v. Hammermill Paper Co*.[67] In *Hammermill*, the U.S. District Court for the Western District of Pennsylvania took the rule of reason approach by looking at the line of commerce, market shares, and the distribution process to determine that there was not a legitimate threat on consumers resulting from the merger.[68] Another significant decision is from the Second Circuit in *Fruehauf Corp. v.*

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[64] *See* James A. Keyte & Kenneth B. Schwartz, *Getting Vertical Mergers Through the Agencies: "Let's Make a Deal,"* 29 ANTITRUST 3, 30 (2015) https://heinonline.org/HOL/LandingPage?handle=hein.journals/antitruma29&div=42&id=&page=. (addressing high-bar violation standards under 1982 FTC updated merger guidelines).

[65] *See* Cont'l Television v. GTE Sylvania, 433 U.S. 37, 54-55 (1977) (finding per se method not applicable when determining antitrust violation). The Court found the rule of reason approach was warranted instead of the per se method that had been used in previous vertical merger cases. *Id.*

[66] *See id.* (differentiating rule of reason and per se illegal approaches).

[67] *See* United States v. Hammermill Paper Co., 429 F. Supp. 1271, 1293 (W.D. Pa. 1977) (holding DOJ's position). The DOJ attempted to block two paper wholesalers from purchasing a paper manufacturer. *Id.* The DOJ failed to convince the court that the purchase was unreasonable. *Id.* The court rejected the government's reasoning based on the history between the companies, the insufficient evidence of limiting either field from competition and that foreclosure would be profitable for the market structure. *Id.*

> 3. The following is the line of commerce within the meaning of Section 7 of the Clayton Act:
> The manufacture and sale of printing and fine paper;
> 4. As to this line of commerce the United States as a whole is the appropriate section of the country within the meaning of Section 7 of the Clayton Act;
> 5. The effect of the acquisition by Hammermill Paper Company of the assets of Western Newspaper Union and the capital stock of Carter Rice Storrs and Bement, Inc. will not be substantially to lessen competition in the lines of manufacture and sale of printing and fine paper;
> 6. The acquisitions of the stock of Carter Rice Storrs and Bement, Inc. and the assets of Western Newspaper Union by Hammermill Paper Company are not violations of Section 7 of the Clayton Act.

Id. at 1294.

[68] See *id.* at 1274 (finding no violation of Clayton Act because of industry standard and size of controlled market).

F.T.C. in 1979.[69] The *Fruehauf* court, cited to *Brown* in its reasoning, and denied the F.T.C.'s ordering of a divestiture, claiming that for a Section 7 liability under the Clayton Act, the F.T.C. must show "a probably anticompetitive impact", which was not present in the set of facts.[70] *Fruehauf* is one of the first examples of the permissive acceptance of vertical mergers that became commonplace in the modern judicial system.[71]

In 1990, courts again sanctioned a merger, this time in the D.C. Circuit with *United States v. Baker Hughes Inc.*[72] In *Baker*, the court looked at the totality of the circumstances instead of the government's argument pertaining to the direct violation of law.[73] *Baker* highlighted that to violate Section 7 of the Clayton Act, the government is required to show that the merger will lead to an undue concentration in the market for a "particular product in a demographic area."[74]

In 1984, the DOJ released updated Vertical Merger Guidelines that echoed the thoughts of many, who found that vertical mergers did not stifle competitive business but were actually a procompetitive action.[75] With the relaxed guidelines, the DOJ stressed against the potential harm of repressing prospective entrants to the market through vertical mergers.[76] The updated guidelines addressed two other possible problems that could lead to violations of the Clayton Act: (1) "vertical mergers could create competitively objectionable barriers to entry" and (2) vertical integration

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[69] *See* Fruehauf Corp. v. F.T.C., 603 F.2d 345, 361 (2d Cir. 1979) (holding that merging of two companies would not have negative effect on markets). The government failed to supply evidence that the merger of the two companies would have a negative effect on customers. *Id.* In contrast, the court thought that it would only provide a greater efficiency in both markets. *Id.*

[70] *See id.* at 360 (finding no presence of anticompetitive impact). "It is true that some market foreclosure may ensue from the merger, but not one that deprives rivals from major channels of distribution, much less one that excludes them from the market altogether." *Id.*

[71] *See* Noah Brumfield, *Insight: Rare Court Decision Clarifies U.S. Merger Control Rules for Vertical Deals,* BLOOMBERG (Aug. 14, 2018), https://www.bna.com/insight-rare-court-n73014481742/ (commenting on lack of vertical merger blocks in past decades).

[72] *See* United States v. Baker Hughes Inc., 908 F.2d 981, 982 (D.C. Cir. 1990) (examining totality of circumstances).

[73] *See id.* at 983 (finding no violation). After looking at all the statistics provided, the court ruled that the government "did not produce any additional evidence showing a probability of substantially lessened competition, and thus failed to carry its ultimate burden of persuasion." *Id.*

[74] *See id.* (explaining reasoning of court).

[75] *See* United States v. Ford Motor Co., 286 F. Supp. 407, 411 (E.D. Mich. 1968) ("[N]on-horizontal mergers are less likely than horizontal mergers to create competitive problems.").

[76] *See id.*; *see also Merger Guidelines*, U.S. DEP'T OF JUSTICE (1968), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11247.pdf (providing merger guidelines). In order to bring a suit accusing a merger of eliminating possible entrants it must prove: "(1) the relevant market (whether upstream or downstream) must be highly concentrated, (2) there must be high entry barriers, (3) the acquiring firm must have some sort of "entry advantage" and (4) the acquired firm must have at least a 5 percent market share." *Ford Motor Co.*, 286 F. Supp. at 411.

"may facilitate collusion in the upstream market by making it easier to monitor price" both of these thresholds are difficult to satisfy.[77] The interpretation of these statutes have been vastly different, especially with the application of the Chicago School of thought.[78]

Vertical Mergers Today

The current structure of America's largest corporations has seen an evolution of vertical merging unlike anything the drafters of the Clayton Act could have anticipated.[79] In the last decade, multimedia giants, pharmaceutical heavyweights, and cable company behemoths have emerged as the byproduct of large companies merging vertically with companies outside of their direct competition to gain advantages in multiple industries.[80] Although the DOJ has not ruled on many vertical merger cases in the past few decades, they have put a stop to some prominent potential acquisitions that would have had a widespread impact on the landscape of modern consumerism, including deals between GE and Avio; Pepsi and PBG; and Coca-Cola and CCE.[81] Alternatively, when Amazon acquired Whole Foods, the deal went through without any of the backlash from the FTC or DOJ which was anticipated from many prominent antitrust scholars.[82]

The paramount case controlling the media today is the $85.4 billion merger between AT&T and Time Warner.[83] AT&T and Time Warner are

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[77] *See* Keyte, *supra* note 64, at 12 (addressing qualifications needed to bring successful vertical merger violation).

[78] *See* sources cited, *supra* notes 45, 46 (discussing approaches to antitrust regulations); *see also* Robert H. Lande, *Proving The Obvious: The Antitrust Laws Were Passed To Protect Consumers (Not Just To Increase Efficiency*), 50 HASTINGS L.J. 959, 964 (1999) (explaining statutory interpretations). The Chicago School of Thought structured their view of antitrust law around the goal of efficiency. *Id.* at 960. The School coined the "strict constructionist" view as opposed to the "populist" view which thinks the laws "were passed to further a variety of social and political goals, such as combating the political power of big business . . .." *Id.*

[79] *See* John Sallet, *The Interesting Case of the Vertical Merger*, DEP'T. OF JUSTICE, https://www.justice.gov/opa/speech/file/938236/download (last visited Feb. 25, 2018) (explaining drastic evolution of vertical mergers).

[80] *See id.* (stating entertainment and telecom industries have led vertical mergers).

[81] *See id.* (noting rarity of FTC finding vertical merger violations).

[82] *See* Bryce Covert, *The Real Price of Those Cheaper Avocados*, SLATE, http://www.slate.com/articles/business/moneybox/2017/08/we_need_a_better_antitrust_standard_to_deal_with_mergers_like_whole_foods.html (last visited Feb. 25, 2018) (describing Amazon's business methods). With Amazon's trend of disturbing every market it enters, there will be little surprise that entering into the grocery market would prove any different. *Id.* One reason why Amazon has been able to avoid antitrust scrutiny is their ability to undercut prices rather than driving them up for profit, which would be a benefit for consumers. *Id.*

[83] *See* James B. Stewart, *Battle Lines Form For Epic Antitrust Case Over AT&T-Time Warner Merger,* SEATTLE TIMES, (Nov. 16, 2017, 8:09 PM) https://www.seattletimes.com/business/battle-

not direct competitors, triggering the Clayton Act and a vertical merger analysis.[84] This merger had the attention of the DOJ and even before filing a complaint, the Justice Department's Antitrust division recommended to Time Warner to sell its DirectTV unit in order to gain permission for the deal to go through.[85] On November 20, 2017, the DOJ announced its intent to sue AT&T for its bid to make a telecommunications empire.[86] The arguments were heard before Judge Richard J. Leon of the U.S. District Court for the District of Columbia.[87] On June 12, 2018, Judge Leon issued his decision, ruling in favor of AT&T and denied the DOJ's enjoinment of the merger.[88] In his 172-page opinion, Judge Leon stated, "[i]f there ever were an antitrust case where the parties had a dramatically different assessment of the current state of the relevant market and a fundamentally different vision of its future development, this is the one."[89] The government argued that if the merger was allowed, Time Warner and AT&T would have an increased bargaining power in its ability to upcharge for its media content that is provided to consumers.[90] This argument was unsuccessful as the government failed to prove that the merger would substantially lessen

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lines-form-for-epic-antitrust-case-over-att-time-warner-merger/ (outlining high stakes in merger between Time-Warner and AT&T).

[84] *See* 15 U.S.C §§ 12-27 (1914) (discussing guidelines of Clayton Act of 1914); *see also* James B. Stewart, *With AT&T and Time Warner, Battle Lines Form for an Epic Antitrust Case*, N.Y. TIMES (Nov. 16, 2017), https://www.nytimes.com/2017/11/16/business/att-time-warner.html?rref=collection%2Ftimestopic%2FAntitrust%20Laws%20and%20Competition%20Issues&action=click&contentCollection=timestopics&region=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection (explaining vertical mergers). A vertical merger is defined as two companies who are not already in direct competition. *Id.* If the two companies were to merge, a competitor would not be eliminated from the market, there would be the same number of competitors as before. *Id.*

[85] *See* Stewart, *supra* note 83 (explaining merger would create "telecom-media goliath" having power to directly affect competitors and consumer prices). If Time Warner divested the DirectTV, the DOJ would have been less concerned about the merger with AT&T. *Id.* Time Warner did not take this suggestion. *Id.*

[86] *See* Brian Fung, *The Justice Department is suing AT&T to Block its $85 billion bid for Time Warner*, WASH. POST (Nov. 20, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/11/20/the-justice-department-just-sued-att-to-block-its-85-billion-bid-for-time-warner/?utm_term=.a6166a7e4157 (reviewing suit brought by Justice Department). The DOJ took action through a violation of Section 7 of the Clayton Act, 15 U.S.C § 18. *Id.*

[87] *See* United States v. AT&T Inc., 310 F.Supp. 3d 161, 161 (D.D.C. 2018) (noting most recent vertical merger case brought by DOJ).

[88] *See id.* at 164 (looking at Judge Leon's reasoning for denying stay).

[89] *See id*. at 163-64 (explaining why court found no violation). Judge Leon reasoned that the two companies were so different that the merger would have little effect on each perspective markets. *Id.*

[90] *See* Karen Hoffman Lent & Kenneth B. Schwartz, *Antitrust Yearly Wrap-Up: Active On All Fronts,* MONDAQ (last updated Jan. 14, 2019) http://www.mondaq.com/unitedstates/x/770942/Antitrust+Competition/Antitrust+Yearly+WrapUp+Active+on+All+Fronts (discussing government's argument).

competition.[91] The court came to this decision by engaging in a comprehensive inquiry into the future competitive conditions in the market by looking to the past decisions of *Hughes* and *Brown Shoe*.[92] To win, the government needed to prove that the "proposed merge . . . at this time and in the remarkably dynamic industry [was] likely to substantially lessen competition in the manner it predicts," which it failed to do.[93] The Appeals Court granted the DOJ's motion for an expedited appeal on July 19, 2018.[94] Oral arguments were held on December 6, 2018, where the panel casted doubt on the strength of the government's argument and seemingly leaned towards agreeing with Judge Leon's original decision.[95] In February 2019, the government lost its second challenge in front of a three-judge panel of the United States Court of Appeals for the District of Columbia, and stated that it did not intend to take the argument any further.[96] The AT&T decision gave a green light to many other companies in negotiating for similar deals; and shortly after the AT&T decision landed, the DOJ had no reaction to a $71.3 billion dollar merger deal between Disney and 21st Century Fox.[97]

Mergers like AT&T and Time Warner, Disney and Fox, Google's acquisition of Motorola, Amazon's acquisition of Whole Foods and Kindle Fire, or Microsoft's long-standing hardware production agreements with Xbox, are changing the landscape of the consumer marketplace.[98] The only method for the government to bring claims against vertical mergers is with the Clayton Act, but even that has not proved strong enough in recent decades.[99] Is it time for Congress to once again visit the subject of vertical

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[91] *See AT&T*, 310 F. Supp. 3d at 192 *(*stating defendant did not create violation).

[92] *See id.* at 189 (explaining rule of reason approach). The court focused on the language "may be substantially to lessen competition" in Section 7 of the Clayton Act, and that a "mere" possibility of harm would be enough to find a violation. *Id.*

[93] *See id.* at 194 (reasoning behind government's failure to meet its burden).

[94] *See* Victoria Graham, *AT&T-Time Warner Appeal May Stall Vertical Mergers, Lawyers Say,* BLOOMBERG (July 24, 2018), https://www.bna.com/atttime-warner-appeal-n73014481061/ (discussing DOJ's grant of appeal).

[95] *See* Lent, *supra* note 89 (discussing oral agreements for AT&T appeal).

[96] *See* Edmund Lee and Cecilia Kang, *U.S. Loses Appeal Seeking to Block AT&T-Time Warner Merger,* N.Y. TIMES (Feb. 26, 2019), https://www.nytimes.com/2019/02/26/business/media/att-time-warner-appeal.html (discussing current state of case).

[97] *See* Richard Drew, *Disney Fox deal valued at $71.3 billion approved by shareholders*, CBS NEWS (July 27, 2018, 11:39 AM), https://www.cbsnews.com/news/disney-fox-deal-valued-at-71-3-billion-approved-by-shareholders/ (discussing Disney and Fox merger deal).

[98] *See How Apple Made 'Vertical Integration' Hot Again – Too Hot, Maybe*, TIME (Mar. 16, 2012), available at http://business.time.com/2012/03/16/how-apple-made-vertical-integration-hot-again-too-hot-maybe/ (discussing vertical mergers in today's climate).

[99] *See* sources cited, *supra* note 32 and accompanying text (discussing Clayton Act).

mergers and enact stronger enforcements current with the industries trends of today?[100]

ANALYSIS

The Sherman Act of 1890 was written to enhance competition and protect consumers across all industries.[101] At the time, the Sherman Act went against the laissez faire foundation of how the framers saw the American market.[102] It was not until the abuse of the railroad and pipeline industries which brought cases like *Standard Oil* that Congress felt it was imperative to implement regulations to maintain fair competition in the interests of consumers.[103] The implementation of the Sherman Act was followed by further regulation to strengthen what it originally put in place.[104] Notably, the Clayton Act in 1914 furthered congressional guidelines on vertical mergers to accommodate the growing demand to regulate conglomerate business entities taking over market control.[105] Regulations like the Clayton Act are the only instruments the FTC and DOJ have to combat monopolization, oligopoly, and singular market control; the question is, should Congress revisit the outdated regulations to include a more strict view

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[100] *See* sources cited, *supra* notes 12 and 15 and accompanying text (showing growth of vertical merger regulation).

[101] *See* sources cited, *supra* notes 20-23 and accompanying text (outlining free competition debate in America pertaining to free competition and freedom of contract); *see also* 15 U.S.C. §§ 1-7 (2004) (citing authority of Sherman Act).

[102] *See* Nicola Giocoli, *Classical competition and freedom of contract in American laissez faire constitutionalism,* INST. FOR NEW ECON. THINKING, 2-3 (June 10, 2014) https://www.ineteconomics.org/uploads/papers/ClassicalCompetitionandFreedomofContract.pdf (explaining contract history in America). The government originally thought that the markets should be free from external forces. *Id.* This became increasingly difficult when trusts were controlling much of the wealth in America. *Id.* at 3. Unfortunately, with the free market without interference, Congress found that companies such as Standard Oil were becoming so powerful that they could not only buy or put their competitors out of business, but they could regulate the product price and the quality of the products sold in the entire industry. *Id.* at 1.

[103] *See* Standard Oil Co. v. United States, 221 U.S. 1, 1 (1911) (noting first judicial restriction on competition in American market). *Standard Oil* was the first case in American history using the Sherman Act to regulate a market. *Id.* The Court held that Standard Oil had indeed exceeded their market control and caused barriers of entry to competitors, had the intent to exclude others from trade, and controlled the commodity across the market. *Id.* at 56-57.

[104] *See* sources cited *supra* notes 2 and 10 and accompanying text (discussing evolution of Antitrust law and regulation).

[105] *See* Jonida Lamaj, *The Evolution of Antitrust Law in USA,* 13 EUR. SCI. J. 154, 162 (2017) (discussing Clayton Anti-Trust Act, Robinson-Patman Act of 1936 and Celler-Kefauver Act of 1950).

on the type of vertical mergers that have become so enticing to corporate companies?[106]

Perfect competition is defined as having multiple buyers and sellers so that not one single action should have a noticeable impact.[107] In the theory of perfect competition, consumers have the opportunity to conform to their preferences over multiple available products, prices are known to producer's, producing capabilities are maximized by the input-output decisions to maximize profits, and finally, every producer has equal access to the market.[108] The theory of perfect competition is threatened when monopolistic actions enter the market place.[109] The problem of monopolization is still evident in today's market, with the growing popularity in vertical merging creating cross industry monopolies.[110] Vertical mergers are considered problematic to the welfare of the consumers because they tend to "[lead to] monopolistic domination of the market by a single corporation."[111] These fears mirror the government's argument in the recent case of *AT&T* because if these companies are allowed to merge, they will have bargaining power across markets, which would allow companies to hike up prices with no other notable competition across not just one, but multiple markets.[112]

Of course, not everyone believes that vertical mergers impact the market in a negative way.[113] Some believe that vertical mergers, instead of

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[106] *See* sources cited *supra* notes 12 and 15 and accompanying text (growth of vertical merger regulation).

[107] *See* Phillip Areeda, Louis Kaplow, and Aaron Edlin, *Antitrust Analysis: Problems, Text, and Cases*, 5 (Aspen Casebook 7th ed., 2013) (discussing theory of perfect competition).

[108] *See id.* (discussing elements of "perfect competition theory"). The theory of perfect competition is important because it provides an equilibrium in the market and it motivates producers to create the best product for the lowest price to gain consumer attention. *Id.* Without competition in the market, producers will have the power to make the products they wish for the prices they want, without interference from outside competitors. *Id.* at 7. In this scenario, consumers are bound to lose out in a market with limited choice stemming from a single or just handful of producers. *Id.*

[109] *See* Posner, *supra* note 48 and accompanying text (discussing effect of monopolies on economic markets).

[110] *See* Keyte, *supra* note 64 (discussing merger methods); *see also* Jon Sallet, *The Interesting Case of the Vertical Merger,* DEP'T. OF JUSTICE (Nov. 17, 2016), https://www.justice.gov/opa/speech/file/938236/download (last visited Feb. 25, 2018) (looking at new trends in vertical mergers).

[111] *See* Patrick Stothers Kwak, *Advantages and Disadvantages of Vertical Mergers,* BIZFLUENT, https://bizfluent.com/info-8367056-advantages-disadvantages-vertical-mergers.html (last updated Sept. 26, 2017) (outlining advantages and disadvantages of vertical mergers).

[112] *See* Drew, *supra* note 96 and accompanying text (outlining bargaining power agreement).

[113] *See* Bharat Anand, *AT&T, Time Warner, and What Makes Vertical Mergers Succeed***,** HARV. BUS. REV. (Oct. 28, 2016)**,** https://hbr.org/2016/10/att-time-warner-and-what-makes-vertical-mergers-succeed (analyzing AT&T and Time Warner merger). The largest deal down the pipeline in vertical mergers is AT&T and Time Warner. *Id.* Some think that allowing this merger

hurting the economy and market competition, help the economy grow and give more options to consumers.[114] There have arguably been many mergers that have benefited consumers, but when these mergers begin to limit consumer choice and create barriers to entry for small businesses, government regulation is necessary to keep some semblance of a fair and competitive market.[115] As discussed earlier, antitrust regulation was needed to protect the consumers and producers from the effects of unequal competition.[116] Looking at Walmart, on the surface it may seem like its low prices are a benefit to consumers, but in reality, it also has a negative effect on producers and this negative effect can reach the consumers without the average shopper even realizing.[117] This leaves very little room for the producers underneath to negotiate or be competitive in the market.[118]

With the recent allowance of mergers like AT&T and Time Warner, Disney and Fox, Whole Foods with Amazon, Comcast with NBC Universal, and Ticket Master with Live Nation, it is hard to determine if the same outcome would have occurred if *United States v. Ford Motor Co*. had happened today.[119] The DOJ was successful in their attempt to halt Ford in

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would be great for customer content. *Id.* With the merger, consumers would have access to a multitude of content that they previously had to access through different venues. *Id.* The merger would allow a customer to access much more at a single, probably lower, price point. *Id.*

[114] *See id.* (merging companies can help lower prices and give consumers cheaper products).

[115] *See* sources cited, *supra* notes 10 and 15 and accompanying text (discussing vertical mergers); *see also* Phillip Areeda, Louis Kaplow, and Aaron Edlin, *Antitrust Analysis: Problems, Text, and Cases*, 5 (Aspen Casebook 7th ed., 2013) (discussing barriers to entry is obstructing new businesses from establishing presence in market).

[116] *See* Fed. Trade Comm'n, *supra* note 37 at 570 (discussing power used by FTC to combat anticompetitive actions); *see also DOJ: Vertical Merger Precedent*, AT&T, https://about.att.com/content/dam/sitesdocs/AT%26T_TimeWarner/FINAL%20DOJ%20Merger%20Precedent%20One%20Pager%2011.19%203pmET.PDF (Feb. 25, 2019) (discussing precedent of DOJ's restriction of vertical mergers).

[117] *See* Barry C. Lynn, *Breaking the chain: The antitrust case against Wal-Mart*, HARPER'S MAG., 31 (July 24, 2006), https://harpers.org/archive/2006/07/breaking-the-chain/ (discussing Walmart's business model). Walmart's business strategy is to undercut manufacturers to sell the products at the lowest price. *Id.* Walmart will even create their own products to compete if the manufacturers do not agree on a price low enough for Walmart's standards. *Id.* This creates an impossible position for manufacturers and provides a less appealing product made in a lessor quality for customers. *Id.*

[118] *See id.* (discussing effect of monopolies on producers).

[119] *See* Ford Motor Co. v. United States, 405 U.S. 562, 564 (1972) (discussing Ford merger); *see also* DOJ: Vertical Merger Precedent, AT&T, https://about.att.com/content/dam/sitesdocs/AT%26T_TimeWarner/FINAL%20DOJ%20Merger%20Precedent%20One%20Pager%2011.19%203pmET.PDF (last visited Feb. 25, 2018) (discussing commonality of vertical mergers). Recently, the trend has been to grant vertical mergers. *See* United States v. Ford Motor Co., 286 F.Supp. 405, 409 (E.D. Mich. 1968). With the unlikelihood of denial, companies are granted access to conspire and to control their supply chain, which is what *Ford* was denied of in 1972. *Id.* Ford was denied because if granted the control over the supply chain, it would have had too much market power. *Id.* This same logic could be said for

acquiring a supply chain used in their cars, however, only a few years later in *Hammermill*, the U.S. District Court for the Western District of Pennsylvania determined that the merger was beneficial for the paper market.[120] The trend of *Hammermill*, *Hughes*, and more recently *AT&T*, seems to suggest that courts do not see a danger in allowing these companies to control multiple markets.[121] If the government wishes to bring future cases, it will need to provide evidence that these kinds of mergers are not beneficial for the markets, even if analyzed under the rule of reason approach.[122] Perhaps if courts fail in regulating vertical mergers with the current statutes under the Clayton Act, the government will take action and pass further legislation to allow the DOJ to effectively stop mergers when they see a threat to the markets.

In the coming years, there will be a lot to look forward to when it comes to antitrust regulation.[123] Despite the United States Court of Appeals, District of Columbia Circuit decision, the DOJ's attempt to halt AT&T and Time Warner shows an aggressive stance in favor of strong antitrust regulation contrary to the DOJ's stance in previous decades.[124] Next in the pipeline is the expected FTC report following the agency's Hearings on Competition and Consumer Protection in the 21st Century, which will add some guidance on the present climate of vertical mergers.[125] If courts are

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Comcast and NBC Universal, or Ticket Master and Live Nation where there was no action from the DOJ present. *Id.*

[120] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962); *Ford Motor Co.*, 405 U.S. at 411 (stressing importance of analyzing product markets for fairness in market competition); *see also* United States v. Hammermill Paper Co., 429 F. Supp. 1271, 1293 (W.D. Pa. 1977) (involving *Ford* and *Hammermill* merging supply chains with producers, *Ford* was denied and *Hammermill* granted).

[121] *See Hammermill Paper Co.,* 429 F. Supp. at 1293 (discussing shift from per se to rule of reason resulting shift for vertical merger decisions).

[122] *See* Elizabeth Winkler, *AT&T Not Out of the Legal Woods Yet*, WALL ST. J. (Aug. 6, 2018), https://www.wsj.com/articles/at-t-not-out-of-the-legal-woods-yet-1533549600 (analyzing how government's new approach could win under rule of reason).

[123] See *id.* (allowance of AT&T merger steps towards growing trend of vertical mergers).

[124] *See* Joshua D. Wright, *Whither Conservative Merger Policy?*, NAT'L REV., (Jan. 24, 2018, 7:35 AM), *available at* http://www.nationalreview.com/article/455728/donald-trumps-antitrust-enforcement-conservative-merger-policy (discussing merger policy).

> Vertical restraints (including mergers) frequently yield procompetitive benefits and only on rare occasion result in any anticompetitive harms. Indeed, the DOJ's chief economist, Luke Froeb, has explained that "there is a paucity of support for the proposition that vertical restraints and vertical integration are likely to harm consumers." This statement is supported by a tremendous empirical literature, which recognizes that exceptions exist but also demonstrates that these exceptions are few and far between.

Id.

[125] *See* Jacqueline Grise et al., *Antitrust Trends In 2019: Enforcement Watch List For The Year To Come,* MONDAQ (Jan. 10, 2019), available at

holding that there are mainly procompetitive effects of vertical mergers, perhaps the DOJ will also take that stance and lobby for more restrictive legislative action from Congress.[126]

CONCLUSION

The Sherman Act along with the Clayton Act were passed to protect the consumers and emerging businesses in the United States. What started out as a way to combat the amassing of wealth of the American elite, has turned into a regulatory force that has allowed Congress and the courts to rule on what can and cannot be tolerated in American businesses. Congress and the courts have a robust history of ruling that standard monopoly practices are harmful, but provide limited direction when determining the harm of a vertical merger. Courts and Congress need to solidify their stance on the effects and allowance of these mergers, and to what extent non-competing companies can merge.

Generally, vertical mergers do not have the same anti-competitive effect on the economy and consumers as horizontal mergers, and in turn, vertical merger regulations should be more relaxed. Many believe that vertical merges help foster creativity and integrate efficiencies between purchaser and seller instead of negatively affecting them. America was built upon the theory of capitalism and the freedom of business, so to some, antitrust regulation goes against everything for which this country was formed. Although on the surface allowing these mergers seems pro-business, these deals are primarily taking place between the elite of the elite and are limiting the small businessperson chances of breaking into the market. Companies like Amazon and Walmart are regulating the products we buy and the prices we buy them for. It is not a stretch to think that this practice can have a series of negative impacts on the quality or the quantity of the products we purchase over time. Combating price fixing and regulating quality of products were the original principles behind the Sherman and Clayton Act in the twentieth century. Without regulation, companies would be able to control the landscape of American consumerism without the input of the consumer and will bar new entry for young enterprises.

With the merge of AT&T with Time Warner, and Disney with 21st Century Fox, we will start to see what shape vertical mergers will take in

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http://www.mondaq.com/unitedstates/x/771056/Antitrust+Competition/Antitrust+Trends+In+2019+Enforcement+Watch+List+For+The+Year+To+Come (looking to DOJ for guidance on future vertical mergers).

[126] *See* Lee, *supra* note 96 (discussing allowance of AT&T and Time Warner merger).

American businesses and the economic landscape. The allowance of these mergers may prompt Congress to act and pass further legislation on the matter but considering the procompetitive benefits courts have already discussed when ruling on vertical merger cases, this is unlikely to happen in the current climate. One thing is clear, the controversy surrounding vertical mergers is not likely to go away any time soon.

Natalie Brough

TURNING TEXTERS INTO A CIVIL LIABILITY: TEXTING AND DRIVING BANS AND NEW WAYS OF EXPANDING LIABILITY ON THE ROAD

I. INTRODUCTION

[Daniel] Gallatin was on his motorcycle on his way to visit his daughter when he was hit and dragged by an SUV. State police quickly learned that the driver, Laura Gargiulo, had received a text just moments before the crash. "This wasn't an accident. This could have been prevented. Accidents can't be prevented," said Daniel's daughter, Michelle. According to court papers filed by state police investigators, the text read, "16 hr day. I don't get off till 5am. hun." . . . It was later discovered that the text was sent by Timothy Fend . . . [T]he Gallatin family sought legal advice . . . [and] . . . Attorney Doug Olcott . . . said there is a heavy burden of proof to show that a text sender should be held liable.[1]

The use of a cellphone while driving is undoubtedly distracting but surprisingly, fatalities in motor vehicle accidents have decreased since the beginning of the 21st century.[2] Although significant efforts have been made to deter texting while driving, recent cases raise an issue of first impression to state courts on whether a non-driving texter should be held liable to a

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[1] *See* Heather Abraham, *Texting & Driving: Can Sender Be Held Liable in Crash?,* CBS PITTSBURGH (Feb. 10, 2017, 6:30 PM), http://pittsburgh.cbslocal.com/2017/02/10/texting-driving-can-sender-be-held-liable-in-crash/ (describing first of its kind lawsuit potentially broadening liability of third parties).

[2] *See* Linda C. Fentiman, *A New Form of WMD? Driving with Mobile Device and Other Weapons of Mass Destruction*, 81 UMKC L. REV. 133, 134-35 (2012) (explaining dangers of distracted driving yet noting decrease in traffic injuries); *see also General Statistics*, INSURANCE INST. FOR HIGHWAY SAFETY, HIGHWAY LOSS DATA INST., http://www.iihs.org/iihs/topics/t/general-statistics/fatalityfacts/overview-of-fatality-facts/2015 (drawing statistics of annual motor vehicle fatalities). The Insurance Institute for Highway Safety (IIHS) and Highway Loss Data Institute (HLDI) are nonprofit scientific and educational organizations with missions to reduce deaths, injuries, and property damage from motor vehicle accidents. *Id.* The organizations compile yearly status reports from data collected by Fatality Analysis Reporting System (FARS), an agency working under the Department of Transportation. *Id.* The organization has compiled the data from years 1975 to 2015. *Id.* Looking at the relevant period of the 21st century, between 2000 and 2005, there was a number of fatalities ranging from the lowest at 41,945 in 2000 to the highest at 43,510 in 2005. *Id.* The following ten years, 2006 to 2015, the highest number of deaths reached 41,259 in 2007 and the lowest number reached 32,479 in 2011. *Id.*

victim of distracted driving.[3] This Note seeks to explain the history and creation of the Department of Transportation and the agency's efforts in creating national safety regulations on highways by comparing efforts to combat drunk driving with efforts to deter texting and driving.[4] This Note will also compare the facts of two similar cases involving third parties sending texts to drivers and explain the different outcomes of each court's decision.[5] Finally, this Note will address the rationales used in the outcome of each court and will highlight challenges of imposing liability on a non-driving text sender.[6]

II. HISTORY

In President Lyndon B. Johnson's State of the Union address, he announced his intent to create a Department of Transportation.[7] That year, President Johnson signed the Highway Safety Act and the National Traffic and Motor Vehicle Safety Act.[8] The Highway Safety Act of 1966 was later amended in 1970 to establish a National Highway Traffic Safety Administration (NHTSA), formerly known as the National Highway Safety Bureau.[9] Since 1970, NHTSA has successfully established drunk driving laws, drinking age laws, seatbelt laws, and recently expanded to prevent distracted driving.[10]

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[3] *See infra* Part III (posing first impression issue on state courts).

[4] *See infra* Part II (demonstrating background of United States highway safety regulations).

[5] *See infra* Part III (comparing different court holdings of two similar cases).

[6] *See infra* Parts VI-IV (analyzing courts' decisions and drawing conclusion).

[7] *See Creation of Department of Transportation – Summary*, U.S. DEP'T OF TRANSP. (Feb. 3, 2016), https://www.transportation.gov/50/creation-department-transportation-summary (explaining creation of Department of Transportation). President Johnson was inspired by former Administrator of the Federal Aviation Agency (FAA), Najeeb Halaby, who thought independent agencies would work efficiently if formed into a federally governed executive department. *Id.* After facing criticism from independent agencies like the FAA, President Johnson proposed to Congress the introduction of the Department as a means to "provide leadership resolution in transportation problems." *Id.*

[8] *See Understanding the National Highway Traffic Safety Administration (NHTSA)*, U.S. DEP'T OF TRANSP. (Jan. 31, 2017), https://www.transportation.gov/transition/understanding-national-highway-traffic-safety-administration-nhtsa (noting both Acts led to establishing NHTSA). The principles behind the Highway Safety Act, "helping people chose to drive more safely," and the National Traffic and Motor Vehicle Act, "making vehicles safer," have led the NHTSA's efforts in saving lives. *Id.*

[9] *See* Highway Safety Act of 1970 Public Law 91-605 (Dec. 31, 1970) (p.1738) https://www.gpo.gov/fdsys/pkg/STATUTE-84/pdf/STATUTE-84-Pg1713.pdf (stating legislative amendment to create NHTSA).

[10] *See Understanding the National Highway Traffic Safety Administration (NHTSA)*, *supra* note 8 (discussing various areas involved with NHTSA).

The NHTSA's effort to prevent drivers from texting while driving is similar to the prevention of drunk driving.[11] In the 1980s, President Reagan addressed the national issue of drunk driving and created the Presidential Commission on Drunk Driving in 1982, which influenced social norms through media and inspired legislators to enact laws to deter drunk driving.[12] Similarly, the NHTSA seeks to deter distracted driving and has conducted studies to determine how to achieve the result effectively.[13] In 2010, the NHTSA designed a distracted driving demonstration program that was tested in Syracuse, New York and in Hartford, Connecticut.[14] The program monitored the amount of time spent on media messages aiming to raise awareness of distracted driving laws and the number of citations issued by officers.[15] The NHTSA's objective in modifying driver behavior was notably effective in reducing cellphone use by thirty-two percent in Syracuse and fifty-seven percent in Hartford over a ten-month period.[16]

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[11] *See* Emily K. Strider, Note, *Don't Text a Driver: Civil Liability of Remote Third-Party Texters After Kubert v. Best*, 56 WM. & MARY L. REV. 1003, 1021 (comparing drunk driving to distracted driving).

[12] *See Executive Order 12358-Presidential Commission on Drunk Driving*, RONALD REAGAN PRESIDENTIAL LIBRARY & MUSEUM, (Apr. 14, 1982), *available at* http://www.reaganlibrary.gov/research/speeches/41482c (declaring President Reagan's intentions to combat drunk driving). President Reagan stated the Department of Transportation would provide administrative services for the following functions:

> (a) heighten public awareness of the seriousness of the drunk driving problem;
> (b) persuade States and communities to attack the drunk driving problem in a more organized and systematic manner, including plans to eliminate bottlenecks in the arrest, trial and sentencing process that impair the effectiveness of many drunk driving laws;
> (c) encourage State and local officials and organizations to accept and use the latest techniques and methods to solve the problem; and
> (d) generate public support for increased enforcement of State and local drunk driving laws.

Id.; s*ee also* Alexis M. Farris, Note, *LOL? Texting While Driving is No Laughing Matter: Proposing a Coordinated Response to Curb this Dangerous Activity*, 36 WASH. U. J.L. & POL'Y 233 (drawing similarities between DOT's actions against drunk driving and distracted driving).

[13] *See* Linda Cosgrove, Neil Chaudhary, & Ian Reagan, *Four High-Visibility Enforcement Demonstration Waves in Connecticut and New York Reduce Hand-Held Phone Use*, U.S. OF DEP'T OF TRANSP. NHTSA 11, (July 2011) https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/811845_hve_demonstration_waves_in_cn_ny_tsf-rn-july2011.pdf (mentioning NHTSA's efforts to deter distracted driving through studies).

[14] *See id.* at 1 (describing NHTSA's experiment to determine effective approach to curtail texting and driving). The NHTSA developed four high-visibility enforcement demonstration waves which allowed law enforcement from Syracuse and Hartford to patrol drivers after the media in each state was infiltrated with enforcement-based messages. *Id.* The study was conducted over a ten-month period with four intervals that were to measure the effects of the media on the drivers with the ultimate goal of decreasing the drivers' use of hand-held phones. *Id.*

[15] *See id.* (noting NHTSA's research goal).

[16] *See id*. at 10 (noting decrease cellphone use after fourth wave).

In conjunction with the federal government's effort to combat texting and driving, the National Transportation Safety Board ("NTSB"), an independent agency investigating major accidents in civil aviation and other forms of transportation since 1967, made a suggestion in 2011 to all fifty states and the District of Columbia to create a ban on texting while driving.[17] As of July 2017, the Governors Highway Safety Association, a nonprofit organization addressing behavioral highway safety issues, collected data and forty-seven out of fifty states, as well as the District of Columbia, Puerto Rico, Guam, and the Virgin Islands have banned text messaging while driving.[18]

III. FACTS

Advocates against texting and driving, like the Gallatin family of Pennsylvania, have proposed tougher legislation to local governments.[19] The Appellate Division of New Jersey's Superior Court decided in *Kubert v. Best*,[20] that a non-driving text message sender is potentially liable for any resulting damages of a motor vehicle accident if the party had knowledge

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[17] *See No Call, No Text, No Update Behind the Wheel: NTSB Calls For Nationwide Ban on PEDs While Driving*, NAT'L TRANSP. SAFETY BD. OFFICE OF PUBLIC AFFAIR (Dec. 13, 2011), https://www.ntsb.gov/news/press-releases/Pages/No_call_no_text_no_update_behind_the_wheel_NTSB_calls_for_nationwide_ban_on_PEDs_while_driving.aspx (noting growth in cellphone use in transportation accidents resulting in fatalities). The NTSB investigated accidents caused by cellphone use and other portable electronic devices in various modes of transportation, such as collisions with a commuter train and freight train, a motor-coach, a truck-tractor, and an airline. *Id.* However, the NTSB's suggestion was triggered by the most recent incident at the time happening in Missouri. *Id.*

> On August 5, 2010, on a section of Interstate 44 in Gray Summit, Missouri, a pickup truck ran into the back of a truck-tractor that had slowed due to an active construction zone. The pickup truck, in turn, was struck from behind by a school bus. That school bus was then hit by a second school bus that had been following. As a result, two people died and 38 others were injured. The NTSB's investigation revealed that the pickup driver sent and received 11 text messages in the 11 minutes preceding the accident. The last text was received moments before the pickup struck the truck-tractor.

Id.

[18] *See Distracted Driving Laws by State*, GHSA.ORG, http://www.ghsa.org/sites/default/files/2017-07/DistractedDrivingLawChart_July17.pdf (last updated July 2017) (collecting data of texting and driving laws of all U.S. states and territories). All but four out of the forty-seven states and territories have primary enforcement. *Id.* A state with primary enforcement laws may cite a driver for texting without any other traffic offense. *Id.*

[19] *See* Governor Tom Wolf, *Governor Wolf Signs Bill to Deter Texting and Driving*, COMMONW. OF PA (Nov. 04, 2016), https://www.governor.pa.gov/governor-wolf-signs-bill-to-deter-texting-and-driving/ (noting Governor Tom Wolf's bill enhancing penalties for distracted driving).

[20] 75 A.3d 1214 (N.J. Super. Ct. App. Div. 2013).

that the motorist was driving while sending a text.[21] In 2009, Linda and David Kubert were severely injured after being struck by a pickup truck driven by 18-year-old Kyle Best ("Best").[22] The Kuberts proceeded to file a negligence suit against the distracted driver, Best, and his friend, Shannon Colonna ("Colonna"), who sent him the text while driving.[23]

The claim for compensation against Best was settled before trial and the Kuberts appealed the trial court's dismissal of the claim brought against Colonna.[24] The New Jersey Motor Vehicles and Traffic Regulation statute makes hand-held use of cell phones illegal and punishable with a fine of $100, but the statute did not address the issue faced on appeal.[25] During trial, Colonna's attorney argued that Colonna was not present at the scene and therefore did not have liability for the accident.[26] The defense also argued that Colonna did not know Best was driving and did not have a legal duty to avoid sending the text.[27] The appellate court determined that the defendant's conduct was negligent and found Colonna owed a duty to the plaintiffs.[28] Furthermore, the court held that more than one defendant can be the

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[21] *See id.* (stating case holding and further reasoning).

[22] *See id.* at 1219 (stating facts of case). As a result of the accident, both Linda and David Kubert lost their left legs. *Id.*

[23] *See id.* (mentioning case procedural history). Kyle Best texted his friend Shannon Colonna at 5:48 PM, just before crashing into the plaintiffs. *Id.* at 1220. Best received a text message one minute prior to the crash from Colonna. *Id.* The Kuberts' attorney also discovered evidence of Best and Colonna's relationship, and noted that they texted each other sixty-two times on the day of the accident. *Id.* at 1219.

[24] *See Kubert*, 75 A.3d at 1214 (mentioning case procedural history).

[25] *See* N.J. STAT. § 39:4-97.3 (a) (2019) (prohibiting use of telephones in moving vehicles).

> The use of a wireless telephone or electronic communication device by an operator of a moving motor vehicle on a public road or highway shall be unlawful except when the telephone is a hands-free wireless telephone or the electronic communication device is used hands-free, provided that its placement does not interfere with the operation of federally required safety equipment and the operator exercises a high degree of caution in the operation of the motor vehicle.

Id.

[26] *See Kubert*, 75 A.3d at 1214 (stating defense argument).

[27] *See id.* at 1221 (stating defense another argument of not having legal duty). The appellate court rejected the plaintiffs' claim that the jury could infer from the evidence that Colonna knew Best was driving home from work when she was texting him. *Id.* at 1221-22.

[28] *See id.* at 1222 (noting court's holding). The court established that a plaintiff holding a defendant liable for negligent conduct in a lawsuit must prove all four elements of a negligent tort claim. *Id.* The elements include "(1) that the defendant owed a duty of care to the plaintiff, (2) that the defendant breached that duty, (3) that the breach was a proximate cause of the plaintiff's injuries, and (4) that the plaintiff suffered actual compensable injuries as a result." *Id.*

proximate cause of a plaintiff's injuries.[29] However, additional proof is necessary to establish the sender's liability and to do so, the plaintiff must find that the text sender knew or had special reason to know that the driver would read the message while driving and become distracted from operating the vehicle.[30] The person who sends the text to a driver is not liable for the driver's negligence, instead the driver is responsible for his or her own negligence created by the rules of the road.[31] However, a text sender does have a duty to other drivers on public roads to refrain from sending a driver a text.[32]

In contrast, the New York Supreme Court of Genesee County recently held in *Vega v. Crane*,[33] a case of first impression, that a text sender is not liable to the victim of a distracted driver.[34] In 2012, Carmen Vega ("Vega") was struck by car driver, Collin Crane who died as a result of the crash.[35] Vega, the plaintiff who later brought suit to recover for injuries caused by the accident, alleged that Collin's girlfriend, Taylor Crastley

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[29] *See id.* (noting New Jersey assigns relative fault percentage under comparative negligence statute); *see also* N.J. REV. STAT. § 2A:15-5.1 (2019) (stating relevant contributory and comparative negligence statute).

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought or was not greater than the combined negligence of the persons against whom recovery is sought. Any damages sustained shall be diminished by the percentage sustained of negligence attributable to the person recovering.

Id. See RESTATEMENT 2D OF TORTS § 867 (1976) (explaining individual held liable if knowing another's conduct constitutes breach of duty). The Restatement provides the following example: "A and B participate in a riot in which B, although throwing no rocks himself, encourages A to throw rocks. One of the rocks strikes C, a bystander. B is subject to liability to C." *Id.; see also* Tarr v. Ciasulli, 853 A.2d 921, 929 (N.J. 2004) (noting New Jersey adopted Restatement approach to determine joint liability). *Contra* Durkee v. C.H. Robinson Worldwide, Inc., 765 F. Supp. 2d 742, 745 (W.D.N.C. 2010) (citing New Jersey case used to defeat claim against remote third party). The plaintiffs sued the manufacturer for a design defect of a text-messaging device that was installed in a tractor. *Id.* The truck driver was able to view the device while driving which caused the driver to become distracted. *Id.* at 753. However, the court ultimately did not hold the manufacturer liable for the plaintiff's injuries, finding that the driver had a duty to avoid the distraction. *Id.* at 754.

[30] *See Kubert*, 74 A.3d. at 1226 (determining special reason to know requirement as part of foreseeability test). The *Kubert* court compares a passenger present in the vehicle obstructing the view of the driver to a remote text sender distracting the attention of the driver. *Id.* at 1227.

[31] *See id.* at 1229 (showing how sender of text is not negligent).

[32] *See id.* at 1229 (holding text sender liable to public).

[33] 49 N.Y.S.3d 264 (Sup. Ct. 2017) (comparing diverse findings).

[34] *See* Vega v. Crane*.,* 49 N.Y.S.3d 264, 268 (N.Y. Sup. Ct. 2017) (stating case holding).

[35] *See id.* at 265 (stating facts of case).

("Crastley"), texted him while he was driving and caused the accident.[36] The plaintiff attempted to use the holding in *Kubert* as neighboring state precedent because of the lack of precedent in New York that would protect a third party plaintiff from harm.[37] The plaintiff's issue would have forced the court to re-examine *Palsgraf* and propose an expanded interpretation of foreseeability in negligence claims.[38] Although the plaintiff found a recent New York case which established a precedent permitting an expansion of foreseeability, the court drew a distinction and limited the application of this precedent to physicians owing a duty to the public at large and not to texters.[39] The Court of Appeals in New York gradually expanded the duty

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[36] *See id.* at 265 (summarizing elements of case). The New York State Police discovered the decedent's cell phone in his car, which was damaged. *Id.* The phone was later examined and appeared to expose that Crastley and the decedent exchanged texts while he was driving. *Id.* Crastley's lack of knowledge that decedent was driving while she sent the texts was confirmed in an affidavit and deposition. *Id.*

[37] *See Vega*, 49 N.Y.S.3d at 266 (noting use of New Jersey precedent holding texter liable for resulting harm of distracting driver); *see also* Sartori v. Gregoire, 259 A.D.2d 1004, 1004 (N.Y. App. Div. 1999) (holding car passenger liable for verbally or physically distracting driver). Vega attempted to use this ruling as persuasive support to help prove the remote text sender liable by dissenting that whether the defendant was present or not, the harm is still the same. *Vega*, 49 N.Y.S.3d at 266; *see also* RESTATEMENT (SECOND) OF TORTS § 303 (1965) (defining negligent act). "An act is negligent if the actor intends it to affect, or realizes or should realize that it is likely to affect, the conduct of a third person in such a manner as to create an unreasonable risk of harm to the other". *Id.* Vega sought to create a special relationship between Crastley and the plaintiff in order to establish a duty owed by Crastley, an idea consistent with public policy in New York. *Vega*, 49 N.Y.S.3d at 267.

[38] *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 99 (N.Y. 1928) (holding negligent conduct resulting in injury results in liability only if reasonably foreseeable). "In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted the injury." *Id.* at 342; s*ee also* Davis v. South Nassau Cmtys. Hosp., 46 N.E.3d 614, 616 (N.Y. 2015) (stating New York precedent potentially expanded foreseeability doctrine); 79 NY. JUR. 2D *Negligence* § 47 (2018) (supporting negligence law principle of imposing liability only if act is proximate cause of injury).

[39] *See Davis*, 46 N.E.3d at 616 (applying expanded foreseeability to cases involving physicians). An emergency room physician administered a patient Dilaudid, an opioid narcotic pain-killer, and Ativan, a benzodiazepine drug which an expert later stated typically have cautionary warnings for patients who are driving. *Id.*

at 617. The court held that a physician owes a duty to warn the patient of the drug's side effects. *Id.* at 618. Thus, a physician who is responsible for warning the patient about the side effects of a drug is liable to the public at large, because an accident is likely foreseeable when a patient is administered impairing drugs and later operates a motor vehicle. *Id.* at 617. *Compare* Eiseman v. State, 511 N.E.2d 1128, 1134-36 (N.Y. 1987) (declining duty of State to treat claimants like physicians), *with* Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 350 (Cal. 1976) (noting physician's duty to warn when serious danger of violence is known). In *Eiseman*, the parolee was being treated for mental disorders while incarcerated, in which after his release, parolee enrolled into college where he raped and murdered a student. 511 N.E.2d at 1130-31. The court concluded that "the physician plainly owed a duty of care to his patient and to persons he knew or reasonably should have known were relying on him for this service to his patient. The physician did not, however, undertake a duty to the community at large." *Id.* at 1135. In *Tarasoff*, the psychologist

owed to individuals but always required the existence of a special relationship between the plaintiff and the injured defendant.[40] However, taking into consideration the New York Court of Appeals' caution of expanding the concept of duty, the *Vega* Court decided not to expand liability to individuals who send a text, as "the potential expansion . . . is astronomical."[41]

IV. ANALYSIS

Creating a duty that is not over-broad and imposing that duty inevitably results in a danger of potentially finding liability for non-driving text senders who should not be held liable.[42] *Kubert* sets out a bright line ruling which appropriately distinguishes that someone who texts a driver is not automatically liable versus a texter who knows or has special reason to know that the driver is operating a motor vehicle at the time the text is sent.[43] A misinterpretation of this rule could easily lead to the liability of a person who did not have knowledge that the person was driving.[44] However, this rule can be applied to a case where a third party did have knowledge or special reason to know that a person was driving, thus resorting to the expense of litigation, which entails carefully sifting through records of texts viewed in order to demonstrate that the texter knew that the person was driving.[45] If discovery were to go as far as viewing text messages, and the

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was told by the psychiatric patient his intention to kill a victim. 551 P.2d at 350. The court held that he had a duty to warn because the psychologists had special knowledge of patient's intent to kill decedent. *Id.* at 351.

[40] *See* Tenuto v. Lederle Lab., 687 N.E.2d 1300, 1301 (N.Y. 1997) (discussing doctor's duty extends to members of household if contagious disease involved); Cohen v. Cabrini Med. Ctr., 730 N.E.2d 949, 952 (N.Y. 2000) (explaining doctor not liable for patient's voluntary election to undergo procedure not in doctors control); Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1068 (N.Y. 2001) (holding gun manufacturer had no duty to injured victim through marketing and distribution of guns); McNulty v. City of New York, 792 N.E.2d 162, 167 (N.Y. 2003) (explaining doctors have no duty to guests of their patients).

[41] *See Vega*, 49 N.Y.S. at 271 (stating court's reluctance to expand duty any further).

> [T]exts are routinely sent to, for example, advise the public of breaking news, that prescriptions are ready for pick up, or that a bill is to be paid, the sender would be responsible for any injuries that could be caused should a driver become distracted by their receipt. With texting being as so prevalent, the potential expansion as contemplated by the plaintiff is astronomical.

Id.

[42] *See Kubert*, 75 A.3d at 1227 (hesitating to impose broaden scope of liability) (*quoting* Estate of Desir ex. Rel Estiverne v. Vertus, 69 A.3d 1247 (N.J. 2013)).

[43] *See Kubert*, 75 A.3d at 1226 (establishing rule with special knowledge requirement).

[44] *See id.* (establishing rule).

[45] *See id.* at 1220 (reviewing messages sent by remote texter to driver for proof of knowledge).

records do not plainly identify that the texter knew the person was driving, finding extrinsic evidence to determine the texter's exact knowledge of the drivers whereabouts would be an extreme undertaking.[46]

The decision in *Kubert v. Best* holds that a non-driving text sender owes a limited duty of care to a plaintiff injured by a distracted driver.[47] However, there must be evidence to prove that the remote texter breached their duty, and the plaintiff must consider the efforts in determining evidence about whether the texter knew if the recipient was driving at the time.[48] As the concurring opinion noted, persuading the judge that the remote texter breached a duty is a difficult task.[49] The concurring opinion validly recognized that the driver has the ultimate responsibility of obeying traffic laws and avoiding distractions that are either present in the car or at a remote location.[50]

One of the several arguments that the plaintiffs asserted to show that the defendant owed a duty of care was their suggestion that the defendant

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[46] *See id.* at 525 (Epinosa, J. concurrence) (explaining difficulty in determining remote texter's awareness of tortious activity under aiding and abetting theory). Although the concurring opinion points out the difficulty in measuring the remote texter's awareness of having a role in a tortious activity of distracting the driver under an aiding and abetting theory, being able to determine the remote texter's knowledge would be equally difficult, even if the aiding and abetting theory did not apply. *Id.*

[47] *See Kubert*, *75* A.3d at 1228 (concluding remote texters owe limited duty to third party injured by distracted driver). The court followed the traditions of tort law in stating that establishing a duty is a question of law for the court to decide. *Id.* at 1229. The court also noted that "[l]imiting the duty to persons who have such knowledge will not require that the sender of a text predict in every instance how a recipient will act." *Id.* at 1228.

[48] *See id.* at 1223 (considering when a duty exists).

> [W]hether a person owes a duty of reasonable care toward another turns on whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy. That inquiry involves identifying, weighing, and balancing several factors — the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution. . .

Id.

[49] *See id.* at 1229 ("[T]he bar set by the majority for the imposition of liability is high and will rarely be met since the duty created arises when the conduct of a person, not in an automobile, interferes with the driver's operation of the vehicle."). *Id.*

[50] *See Kubert*, 75 A.3d at 1230 (discussing driver's responsibilities).

> [T]he driver carries the personal responsibility to obey traffic laws and exercise appropriate care for the safety of others. This responsibility includes the obligation to avoid or ignore distractions created by other persons, whether in the automobile or at a remote location, that impair the driver's ability to exercise appropriate care for the safety of others. Text messages received while driving plainly constitute a distraction the driver must ignore.

Id.

aided and abetted the distracted driver to violate the law.[51] The court accurately held that there was not enough evidence to prove liability under an aiding and abetting theory.[52] In order to demonstrate that an aiding and abetting issue existed, the plaintiff will have to show with whatever evidence is available, that the defendant is liable for giving substantial assistance or taking affirmative steps to get the driver to violate the legal duty of driving carefully on the road.[53] Given that the Kuberts did not find evidence available to support their argument, the court stated that a plaintiff dealing with a similar cases would have to look at the "aiders" knowledge of the whereabouts of the driver.[54] This knowledge requirement mentioned by the court is in fact a logical standard to go by in determining a text-sender's liability.[55] As the plaintiff argued that a passenger in the car has the same duty as the remote texter in knowing not to distract the driver, to which the majority opinion agreed, the concurrence provided that a passenger in the car naturally has a precise awareness of the driver's conduct than a remote texter.[56] Even though the majority did not encourage the future use of an aiding and abetting theory, the prospect of making a remote texter's awareness equal to a present passengers awareness of a driver's conduct is unfair.[57]

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[51] *See id*. at 1223 (arguing remote texter "electronically present"). As the attempt to compare the remote texter to a passenger present in the car distracting the driver was argued to the court, the plaintiff said the remote texter was "electronically present." *Id.* The court did not find any evidence that the remote texter encouraged the driver to violate his duty of driving carefully. *Id.* The act of sending a text is not sufficient enough to qualify as encouragement. *Id.* at 1224.

[52] *See id.* at 1225 (dismissing plaintiffs' theory).

[53] *See id*. (discussing aiding and abetting issue).

> We reviewed Restatement § 876 and held that the passengers could be found liable for giving 'substantial assistance' to the driver in failing to fulfill his legal duty to remain at the scene of the accident and to notify the police. We found 'an aiding and abetting theory' to be viable because the passengers had taken 'affirmative steps in the immediate aftermath [of the accident] to conceal their involvement' and to encourage the driver's violation of the law.

Id. (citing Podias v. Mais, 926 A.2d 859, 868 (N.J. App. 2007)).

[54] *See id.* at 1220 (showing difficulty in determining driver's whereabouts through text). The plaintiff would have to show, with extrinsic evidence, that the remote texter knew that the recipient was actually driving. *Id.* at 1220-21. In *Kubert*, the court noted that Colonna was a young teenager who texted on average, 100 times per day. *Id.* at 1220. The court also stated that Colonna did not pay attention to whether the recipient of her texts was driving a car. *Id.* The majority highlighted the difficulty in plaintiff's attempt to come by this type of information. *Id.*

[55] *See Kubert*, 75 A.3d at 1227 (assessing standard of having knowledge or special reason to know driver is distracted).

[56] *See id.* at 1231-32 (comparing passenger and remote texters' awareness of drivers conduct).

[57] *See id.* (acknowledging fault in aiding and abetting argument).

The Supreme Court of New York heard similar arguments brought by a plaintiff who sought to create a duty of care owed by a texter, but appropriately declined to do so.[58] New York has followed its established precedent of creating a duty of care when the injuries caused by the defendant's careless conduct are those that might have been foreseeable by a person of ordinary intelligence and prudence.[59] That precedent originating from *Palsgraf*, stands as an immense barrier to which a plaintiff will have a hard time overcoming in any New York court.[60]

The argument raised in the *Vega* case was based on the same arguments presented in the Kubert case.[61] The court in New Jersey compared the distractions from a passenger present in the car to the distractions stemming from a remote texter.[62] The New York court completely rejected this comparison in holding that a remote texter cannot have first-hand knowledge of the driver's conduct, further denying that the remote texter's knowledge of the driving could be determined by reviewing the texting records.[63] The New York court correctly interpreted the concept of controlling the expansion of duty, as the future consequences of such an expansion would create a vast amount of duties owed to unknown persons.[64]

V. CONCLUSION

The NHTSA's efforts have gone as far as preventing drivers from being distracted by their cellphones through infiltrating the media to send messages of awareness about the dangers caused from texting while driving. However, preventing persons in remote locations who are texting people while they are driving is a feat which has been brought out by cases reaching two different results. On one end, holding a remote text sender liable to third parties is permissible if the correct evidence is discovered. The other end

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[58] *See* Vega v. Crane, 49 N.Y.S.3d 264, 266 (N.Y. Sup. Ct. 2017) (attempting to use *Kubert* precedent as persuasive authority).

[59] *See id.* at 267 (discussing foreseeability of damages). "The injuries or the damages complained of must have been those which might have been foreseen by a person of ordinary intelligence and prudence, although not necessarily in the precise form in which they occurred." *Id.* (*citing* Kellogg v. Church Charity Found. of Long Island, 96 N.E. 406 (N.Y. 1911).

[60] *See Vega*, 49 N.Y.S.3d at 266 (stating courts disfavor of reexamining established precedent from *Palsgraf* case).

[61] *See id.* at 268 (denying use of reasoning set out in *Kubert* case).

[62] *See Kubert*, 75 A.3d at 1231 (finding present passenger who may distract has knowledge more so than remote texter).

[63] *See Vega*, 49 N.Y.S. at 269 (holding remote texter deprived of firsthand knowledge).

[64] *See id.* at 269 (denying expansion of duty). In *Davis*, the medical providers owed a duty to third-party motorists because the risk of a patient taking a drug after a procedure and driving afterwards could potentially cause an accident. *Id.* This expansion was justified because there was a warning label written on the drug for the medical provider to follow. *Id.*

holds that the evidence would involve expanding a scope of liability which is too far removed from the set precedent in *Palsgraf*. The New York court's precedent has been followed in many jurisdictions and going against this tradition would not be favorable to practitioners who have heavily relied on this precedent.

Unfortunately, the details in determining a non-driving texter's liability is a far stretch for a plaintiff's counsel which leaves a victim with a very high burden of proof. Pinpointing the texter's knowledge or reason to know that a driver was operating the vehicle while reading and responding to a text involves more guessing than proof of a conclusive nature. Reviewing the phone records of plaintiff and defendant may bring one closer to an answer, but the remaining issue would be whether to expand the scope of liability. This also would be similar to holding a remote texter to the same standard of awareness as a passenger present in the car. Overall, the New York Supreme Court correctly rejected the arguments brought by the plaintiffs.

Julianne Jeha

STATE OF SLAYER'S ESTATE

The Fifth Amendment of the United States Constitution protects an individual from deprivation of life, liberty, or property, without due process of law.[1] An individual has an entitled right to fair treatment by the government. [2] Massachusetts recognizes that a husband and wife are part of a tenancy by the entirety in which each person owns the property as if they were the "sole" and whole owner.[3] Under a tenancy by the entirety, survivorship rights exist where all property rights go to the survivor of the marriage if predeceased by the other.[4] Husband and wife both have a vested right in the property.[5] Massachusetts's slayer statute prohibits any person charged with an unlawful killing of the decedent from taking any part of the decedent's estate, even if a joint tenancy or tenancy by the entirety exists between slayer and decedent.[6]

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[1] *See* U.S. CONST. amend. V (explaining Fifth Amendment right).

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id.

[2] *See id.* (explaining due process of law under Fifth Amendment).

[3] *See* MASS. ANN. LAWS ch. 209, § 1 (LexisNexis 2017) ("The real and personal property of any person shall, upon marriage, remain the separate property of such person, and a married person may receive, receipt for, hold, manage and dispose of property, real and personal, in the same manner as if such person were sole.").

[4] *See* MASS. ANN. LAWS ch. 191, § 15 (LexisNexis 2017) (explaining survivorship rights of tenancy by entirety).

[5] *See* SHELDON F. KURTZ, MOYNIHAN'S INTRODUCTION TO THE LAW OF REAL PROPERTY 286 (4th ed. 2005) (explaining tenancy by entirety is characterized by time, title, interest, and possession).

[6] *See* MASS. ANN. LAWS ch. 265, § 46 (LexisNexis 2017) (showing text of slayer statute).

> The court shall prohibit any person charged with the unlawful killing of the decedent from taking from the decedent's estate through its distribution and disposition, including property held between the person charged and the decedent in joint tenancy or by tenancy in the entirety. The court shall consider any person convicted of the unlawful killing of the decedent as predeceasing the decedent for the purpose of distribution and disposition of the decedent's estate including property held between the person charged and the decedent in joint tenancy or by tenancy in the entirety. The bar to succession shall apply only to murder in the first degree, murder in the second degree or manslaughter; it shall not include vehicular homicide or negligent manslaughter in the death of the decedent.

The Massachusetts slayer statute's purpose is to prevent a criminal from "gaining a profit" from a crime he or she commits.[7] The Massachusetts statute strays from its purpose and the legislature's goal by taking away the rights of individuals solely for committing a crime.[8] The slayer statute eliminates all property rights of an individual regardless of whether those rights were obtained through a tenancy by the entirety.[9] Therefore, the statute unconstitutionally takes away any property interest an individual already possessed prior to committing a crime.[10] It is unconstitutional to deprive an individual from property that he or she already possessed a preexisting interest in without due process of law.[11] The Massachusetts slayer statute violates the U.S. Constitution when it states that the killer is treated as though he or she predeceased the deceased, thus making it appear as though the killer has been divested of all their rights before the death of the victim.[12] Other states have recognized this as an unconstitutional violation, and tailored their slayer statutes to sever a tenancy by the entirety when a spouse kills the other, thus turning into a tenancy in common where

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Id.

[7] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 190B, § 2-803(f) (West 2018) (explaining principle that killer cannot profit from wrong applies); RESTATEMENT (FIRST) OF RESTITUTION: QUASI CONTRACTS & CONSTRUCTIVE TRUSTS § 188 cmt. a (1937) (states principle behind purpose of slayer statue); Slocum v. Metro. Life Ins. Co., 139 N.E. 816, 817 (Mass. 1923) ("That the person who commits murder, or any person claiming under him or her, should be allowed to benefit by his or her criminal act, would no doubt be contrary to public policy."); Diamond v. Ganci, 103 N.E.2d 716, 718 (Mass. 1952) (explaining answer depends on public policy rule which prevents murderers from profiting from their wrong).

[8] *See e.g., In re* Estate of Foleno *ex rel.* Thomas v. Estate of Foleno, 772 N.E.2d 490, 494 (Ind. Ct. App. 2002) (describing purpose of slayer rule); Neiman v. Hurff, 93 A.2d 345, 347 (N.J. 1952) (stating no one is allowed to profit through his own wrongdoing); Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889) ("No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime."); *In re* Estate of Safran, 306 N.W.2d 27, 29 (Wis. 1981) ("The disqualification of a slayer is premised on the maxim: *Nullus commodum capere potest de injuria sua propria*, no one can attain advantage by his own wrong"); Colton v. Wade, 80 A.2d 923, 925-26 (Del. Ch. 1951) (explaining no one should be able to profit from crime).

[9] *See* MASS. ANN. LAWS ch. 265, § 46 (LexisNexis 2017) (stating tenancy by entirety is included in forfeiture).

[10] *See* U.S. CONST. amend. V (stating there shall be no deprivation of property without due process of law); *In re Estate of Foleno*, 772 N.E.2d at 496 ("To deprive the killer of his half of the tenancy through a constructive trust would impose an unconstitutional forfeiture."); Nat'l City Bank v. Bledsoe, 144 N.E.2d 710, 716 (Ind. 1957) ("These statutes would be unconstitutional if they imposed a forfeiture of property as a penalty for the murder.").

[11] *See* U.S. CONST. amend. V (stating prohibition against deprivation of property rights without due process); RESTATEMENT (FIRST) OF RESTITUTION § 188 cmt. a (1937) (stating it is unconstitutional to deprive someone of property); *Colton*, 80 A.2d at 925 (stating deprivation of property rights would be violation against constitution).

[12] *See* MASS. ANN. LAWS ch. 265, § 46 (LexisNexis 2017) (explaining that individual convicted of crime is considered to have predeceased victim).

the surviving spouse is given their entitled half of the property, which does not allow the killer to profit with survivorship rights.[13]

FACTS:

The Massachusetts slayer statute violates the United States Constitution.[14] It takes vested property rights away from a husband or wife that has killed their spouse.[15] The slayer statute needs to be amended by the legislature to ensure the rights entitled to every American citizen under the U.S. Constitution are not infringed upon.[16] The slayer statute treats killers as non-existent and punishes them unequally.[17] It meets its purpose of not letting criminals benefit from their crimes, but does so unconstitutionally and differently than most states.[18]

North Dakota is the only other state that has taken the same approach as Massachusetts when constructing their slayer statute.[19] Most States that

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[13] *See, e.g.*, *Colton*, 80 A.2d at 926 (stating it is equitable to assume net income would have been evenly divided between spouses); *In re* Estate of Shields, 584 P.2d 139, 140 (Kan. 1978) ("When Victoria Shields murdered her husband and was subsequently convicted of second degree murder, the joint tenancy was severed and terminated and she became a tenant in common with the heirs of her husband. She retains an undivided one-half interest in the property."); Capoccia v. Capoccia, 505 So. 2d 624, 625 (Fla. Dist. Ct. App. 1987) ("An estate by the entirety is deemed severed when one spouse murders the other, and the property is to be treated as if it had been formerly held as a tenancy in common.").

[14] *See* U.S. CONST. amend. V (stating deprivation of property is not allowed without due process); RESTATEMENT (FIRST) OF RESTITUTION § 188 cmt. a (1937) (discussing it is unconstitutional under slayer statute to deprive someone of entitled property rights); *Colton*, 80 A.2d at 926 (explaining taking away preexisting rights is unconstitutional); John W. Wade, *Acquisition of Property by Willfully Killing Another – A Statutory Solution*, 49 HARV. L. REV. 715, 725-26 (1936) ("If the interest is one which has already vested, it cannot be taken away without violating the constitutional provisions as to forfeiture of estates.").

[15] *See* MASS. GEN. LAWS ch. 265, § 46 (2006) (codifying joint tenancies and tenancy by entirety are not exceptions to this deprivation).

[16] *See id.* (stating Massachusetts slayer statute).

[17] *See id.* (setting out rule that allows taking any interest shared with decedent away from killer).

[18] *See id.* (explaining it does not allow killers to gain any benefit from murder); Robert F. Hennessy, Note, *Property – The Limits Of Equity: Forfeiture, Double Jeopardy, And The Massachusetts "Slayer Statute"*, 31 W. NEW ENG. L. REV. 159, 160 (2009) (stating slayer statute meets its purpose behind principle).

[19] *See* N.D. CENT. CODE § 30.1-10-03 (2017) ("The intentional and felonious killing of the decedent voids the interests of the killer in property held with the decedent at the time of the killing as joint tenants with the right of survivorship."); Bradley Myers, Article, *The New North Dakota Slayer Statute: Does It Cause A Criminal Forfeiture?*, 83 N.D. L. REV. 997, 999-1000 (2007) ("North Dakota has long had a legislatively adopted slayer statute on the books. Prior to the recent change, the slayer statute provided that when one joint tenant killed another, the joint tenancy was severed, with each party taking an equal share as tenants in common. The change adopted by the

instituted a slayer statute have taken two different approaches on the issue: 1) the Severance approach; and 2) the Constructive Trust approach.[20] Both approaches are structured as to not deprive the murderer of property he is entitled to, while still not allowing the perpetrator to profit from the murder.[21] The Severance approach treats the tenancy by entirety like a divorce, where the tenancy is severed in half and split equally between the slayer and the victim's heirs.[22] This approach recognizes a slayer's vested right before the killing and still follows its principle purpose of not allowing a criminal to benefit from a crime by diminishing their survivorship rights.[23] The Constructive Trust approach shares some similarities with both the Severance approach and how the Massachusetts slayer statute has been constructed.[24] It is similar to the Massachusetts slayer rule as it also

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North Dakota Legislature alters this result by holding that the interest of the killer in the property becomes void.").

[20] *See, e.g.*, Wade*, supra* note 14, at 715 (explaining out of states having slayer statute, thirty of them require severance); Budwit v. Herr, 63 N.W.2d 841, 847 (Mich. 1954) (stating Michigan uses severance approach); Ashwood v. Patterson, 49 So. 2d 848, 850-51 (Fla. 1951) (stating Florida follows severance approach); Grose v. Holland, 211 S.W.2d 464, 467 (Mo. 1948) (stating Missouri follows severance approach); Colton v. Wade, 80 A.2d 923, 925 (Del. Ch. 1951) ("The court subjected the property to a constructive trust for the benefit of the decedent's heirs in order to overcome the inequitable means utilized in an attempt to gain sole possession."); *In re* Estate of Safran, 306 N.W.2d 27, 38 (Wis. 1981) (stating constructive trust was imposed on killer); *In re Estate of Safran*, 306 N.W.2d at 84 (citing In Will of Wilson, 92 N.W.2d 282, 287 (Wis. 1958)) (holding "that the murderer may take under the will, but that he takes subject to a constructive trust imposed for the benefit of alternate beneficiaries."); Bryant v. Bryant, 137 S.E. 188, 191-92 (N.C. 1927) (imposing constructive trust on killer).

[21] *See In re Estate of Safran*, 306 N.W.2d at 84 (explaining reasoning behind constructive trust approach); *Wilson*, 92 N.W.2d at 284 ("By imposing a constructive trust upon the murderer, the court is not making an exception to the provisions of the statutes, but is merely compelling the murderer to surrender the profits of his crime and thus preventing his unjust enrichment."); *In re* King's Estate, 52 N.W.2d 885, 889 (Wis. 1952) ("We believe that the last-mentioned result is the most equitable and can be justified upon the theory that the murder operates as a severance of the joint tenancy resulting in a tenancy in common whereby the murderer retains ownership to an undivided one-half interest, but gains no title in, or enjoyment of, the other half, which other half vests in the heirs-at-law and next of kin of the murdered joint tenant.").

[22] *See In re* King's Estate, 52 N.W.2d 885, 889 (Wis. 1952). (conceptualizing severance approach as splitting property in half); Budwit v. Herr, 63 N.W.2d 841, 847 (1954) (likening severance approach to husband retaining one-half portion as if parties had been divorced); Ashwood v. Patterson, 49 So. 2d 848, 850-51 (Fla. 1951) ("The Court pointed out in both cases that the fiction of unity of estate is destroyed, and the estate severed, when the parties are divorced, since it would be inequitable to allow one or the other to take all, all things being equal.").

[23] *See* Grose v. Holland, 211 S.W.2d 464, 467 (Mo. 1948) (noting principle purpose is still met without breaking constitutional rights); Barnett v. Couey, 27 S.W.2d 757, 762
(Mo. Ct. App. 1930) (explaining court recognizes vested property rights in their slayer rule).

[24] *See* MASS. GEN. LAWS ch. 265, § 46 (2006) ("The court shall consider any person convicted of the unlawful killing of the decedent as predeceasing the decedent for the purpose of distribution and disposition of the decedent's estate including property held between the person charged and the decedent in joint tenancy or by tenancy in the entirety."); Estate of King, 52 N.W.2d 885, 889 (Wis. 1952) (describing approach as to one-half division); Colton v. Wade, 80 A.2d 923, 925 (Del.

identifies the murderer as predeceasing the victim in order to destroy survivorship rights, and it is similar to the Severance approach as it ultimately recognizes that the murderer only has a preexisting vested right in one half of the property, thus giving the killer only what her or she is entitled to.[25]

HISTORY:

In common law, killers were expressly forbidden from inheriting from their victims.[26] This was preceded by the doctrine of attainder, where the person convicted of murder would forfeit his property to the king due to "the corruption of the perpetrator's blood."[27] As a part of the punishment, the doctrine of forfeiture required all real and personal property of the convicted to be forfeited.[28] The Corruption of Blood was a doctrine that denied heirs to claim any property from the attained or murderer.[29] These doctrines essentially worked toward the idea that "a person who can neither

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Ch. 1951) ("In equity he will be determined to hold the entire interest upon a constructive trust for those other than the defendant entitled to the estate of his co-tenant by the entirety except that the survivor is entitled to receive the commuted value of the net income of one-half of the property for the number of years of his expectancy of life.").

[25] *See* cases cited *supra* note 24 and accompanying text (describing similarities between two approaches and Massachusetts slayer rule).

[26] Alison Reppy, *The Slayer's Bounty – History of Problem in Anglo-American Law*, 19 N.Y.U. L.Q. REV. 229, 241 (1942) ("[T]he common law doctrine of attainder, forfeiture, corruption of blood and escheat . . . constituted a fairly satisfactory . . . solution to the problem of the slayer and his bounty"); Hennessy, *supra* note 18, at 162 (noting at ancient common law ability of killer to inherit was precluded); *In re* Estate of Foleno *ex rel.* Thomas v. Estate of Foleno, 772 N.E.2d 490, 493 (Ind. Ct. App. 2002) ("The Slayer's Rule is of recent origin compared to other property rules whose roots are often embedded in feudalism. 'In England, the common law doctrines of attainder, forfeiture, corruption of blood and escheat played a prominent part in the solution of the problem of the slayer and his bounty.'").

[27] *See* Reppy, *supra* note 26, at 231 (describing details of doctrine of attainder); Hennessy, *supra* note 18, at 162 (describing that person accused of capital murder was put in state of attainder). The doctrine of attainder was used by the King to seize all property from a murderer to punish the criminal and to prevent others from committing murder. Reppy, *supra* note 26, at 231.

[28] *See* Reppy, *supra* note 26, at 232-33 (explaining doctrine of forfeiture and its reasoning for taking all property); Hennessy, *supra* note 18, at 162 (requiring complete divestiture of wrongdoer's real and personal property under doctrine of forfeiture).

[29] *See* Reppy, *supra* note 26, at 233 (describing corruption of blood doctrine and how heirs are restricted from inheriting); Hennessy, *supra* note 18, at 162 ("Corruption of blood was a feudal doctrine that transferred the condemnation of the attained person to his heirs, 'unto the remotest generation.'"). The corruption of blood is where the accused's family was prohibited from inheriting from accused's property. Reppy, *supra* note 26, at 233. The purpose of this was to prevent the killer from transferring over his property because he committed murder. *Id.*

hold, nor devise, nor inherit property is incapable of profiting from his wrong."[30]

All of these doctrines were rendered impotent by the creation of the U.S. Constitution.[31] These doctrines were necessary to prevent injustices, and their abolishment made it possible for killers to profit and inherit from their victims.[32] The law had no way to prevent a killer from inheriting or taking property from a victim.[33] In the ensuing campaign to establish a slayer rule to prevent killers from profiting from their crimes, a conflict between law and equity emerged as states began to create slayer statutes to combat the problem (at the time referred to as the "slayer and his bounty").[34] Forty-seven states have structured slayer statutes to try and tip-toe the line between law and equity when restricting killers from inheriting property from their victims.[35] A majority of the states have tried to accomplish this by using a severance approach, a constructive trust approach, or by prohibiting the killer from accessing their property rights.[36]

In December 2002, Massachusetts approved a law entitled "Person Charged with Unlawful Killing of Decedent Prohibited from Taking from the Decedent's Estate."[37] The statute prohibits anyone convicted of an unlawful killing from taking from the decedent's estate through its

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[30] *See* Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889) (noting purpose behind these maxims); Hennessy, *supra* note 18, at 162-63 ("The effect of this intergenerational condemnation was that a wrongdoer was prevented from conveying, and his heirs from taking, any property through descent or distribution.").

[31] *See* U.S. CONST. art. I, § 10, cl. 1 (prohibiting state from passing bill of Attainder); United States v. Brown, 381 U.S. 437, 441 (1965) ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . .") (quoting U.S. CONST. art. I, § 10, cl. 1). The doctrine of attainder is unconstitutional as it violates Art. I § 9 of the Constitution. *Brown*, 381 U.S. at 440. The doctrine was banned to guard against dangers of it taking over the legislative body's power of creating laws, by giving the legislature the task of rulemaking. *Id.* at 445-46.

[32] *See In re* Estate of Foleno *ex rel.* Thomas v. Estate of Foleno, 772 N.E.2d 490, 494 (Ind. Ct. App. 2002) ("The abolishment of attainder, forfeiture, corruption of blood, and escheat thus left an unanticipated void. No longer would the sovereign emerge to confiscate a killer's property, even when the killer acquired the property by means of his crime.").

[33] *See id.* (explaining there was no law after abolishment to restrict killer from inheriting).

[34] *See* Reppy, *supra* note 26, at 229 (noting emergence of state laws protecting injustice enrichment of killers).

[35] *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 8.4 (2003) (listing forty-seven states that have slayer statutes); Estate of Armstrong v. Armstrong, 170 So. 3d 510, 517 (Miss. 2015) ("Many states have enacted 'slayer statutes' intended to prevent a person who has feloniously caused the death of a decedent from inheriting or receiving any part of the estate of that decedent.").

[36] *See* cases cited *supra* note 20 and accompanying text (noting cases that indicate states using approach to balance law and equity).

[37] *See* MASS. ANN. LAWS ch. 265, § 46 (LexisNexis 2017) (stating title of Massachusetts slayer statute).

distribution and disposition.[38] This includes any property held between the person convicted and the decedent either in a joint tenancy or a tenancy by the entirety.[39] The statute attempts to accomplish this purpose by classifying the killer as having predeceased the decedent, including those who are part of a joint tenancy or tenancy by the entirety.[40] This applies to those convicted of first-degree murder, second-degree murder, or manslaughter.[41] This law became effective on March 24, 2003 and is recognized as Massachusetts's current slayer statute.[42] The statute is effective because it prohibits a killer from profiting from their crime.[43] The Massachusetts slayer statute is similar to other states' slayer statutes, but differs in classifying the killer as having predeceased the victim.[44] Other states have recognized and avoided the constitutional violations behind determining that the killer predeceases the decedent in cases of joint tenancy or tenancy by the entirety.[45] In regards to the joint tenancy and tenancy by the entirety, Massachusetts's slayer statute goes well beyond barring a criminal from profiting from a crime.[46] The statute violates the Fifth and Fourteenth Amendment of the United States Constitution.[47]

ANALYSIS:

The Massachusetts slayer statute is unconstitutional because it violates the Fifth Amendment of the United States Constitution.[48] One

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[38] *See id.* (noting specific purpose behind enactment).

[39] *See id.* (stating its inclusion of joint tenancies and tenancies by the entirety).

[40] *See id.* (explaining its approach to accomplishing its purpose). The approach behind deeming the killer to have predeceased the decedent is to make it as though the killer died before the deceased, thus giving all the property rights to the decedent. *Id.*

[41] *See id.* (noting that it applies to certain crimes). "It shall not include vehicular homicide or negligent manslaughter in the death of the decedent." *Id.*

[42] *See* MASS. ANN. LAWS ch. 265, § 46 (LexisNexis 2017) (mentioning relevant enactment date in amendments).

[43] *See* Wade, *supra* note 14, at 725-26 (stating specific purpose of slayer statute).

[44] *See* William M. McGovern, Jr., *Homicide and Succession to Property*, 68 MICH. L. REV. 65, 86 (1969) ("All authorities agree . . . that the murderer should be allowed to keep whatever right he may have during his lifetime to the income from the property, since that interest is not acquired because of the crime."); *see also* Hennessy, *supra* note 18, at 160 (noting difference of Massachusetts slayer rule is its approach).

[45] *See* Wade, *supra* note 14, at 715 (describing that states have structured their statutes with attention to possible constitutional violations).

[46] *See* MASS. ANN. LAWS ch. 265, § 46 (LexisNexis 2017) (stating slayer rule); *see also* Wade, *supra* note 14, at 715 (explaining that taking away vested property rights is unconstitutional).

[47] *See* U.S. CONST. amend. V (stating no deprivation of property without due process of law); U.S. CONST. amend. XIV (stating due process clause).

[48] *See* U.S. CONST. amend. V (stating that vested property interests cannot be deprived without due process of law); MASS. ANN. LAWS ch. 265, § 46 (LexisNexis 2018) (stating relevant slayer

purpose of the Fifth Amendment is to protect an individual's property rights.[49] Once someone has a vested property right, it cannot be taken away or forfeited.[50] The Fifth Amendment gives every individual that right regardless of whether that individual committed murder.[51] The Massachusetts slayer statute is just and correct in its purpose of preventing criminals from inheriting from the estate of those they have killed, but incorrect in its forfeiture of one's vested property rights.[52] The murderer does not deserve to benefit from his or her crime, but they do deserve to be protected by the rights our forefathers established in the Constitution.[53]

The estate of the deceased should by all means be protected from murderers, however, a vested property interest should not be taken away in its entirety.[54] The Massachusetts slayer statute should not disregard a joint tenancy or tenancy by the entirety because they create vested property rights.[55] They provide the parties with a vested property right that cannot be

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rule); Wade*, supra* note 14, at 735-38 (explaining unconstitutionality of forfeiting vested property rights); Hennessy, *supra* note 18, at 160 (noting that Massachusetts slayer statute is unconstitutional); McGovern, *supra* note 44, at 86 (explaining that it is unconstitutional to take away individual's property interest).

[49] *See* U.S. CONST. amend. V (stating no deprivation of property without due process of law).

[50] *See id.* (explaining that one's right to his or her vested property interest is protected); Wade*, supra* note 14, at 715 (noting that vested property rights cannot be taken away following crime); McGovern, *supra* note 44, at 86 (noting that vested property rights should not be forfeited).

[51] *See* U.S. CONST. amend. V (providing individuals protected right to property); McGovern, *supra* note 44, at 86 (explaining that vested interest cannot be taken away because that person committed murder).

[52] *See* MASS. ANN. LAWS ch. 265, § 46 (LexisNexis 2018) (stating slayer statute); Hennessy, *supra* note 18, at 181 ("The Massachusetts slayer statute prevents a killer from inheriting from their victim but does not keep in mind the constitutional rights of the killer.").

[53] *See* MASS. GEN. LAWS ch. 265, § 46 (2006) (stating no murderer may benefit from committing a crime); *Colton*, 80 A.2d at 925 (stating slayer shall not gain profit from crime); *Slocum*, 139 N.E. at 817 (explaining slayer should not benefit from committing crime as it would be against public policy); Hennessy, *supra* note 18, at 181 ("In passing such a law, the drafters have ignored more than a century of case law from other jurisdictions that carefully balanced the need to honor the interests that citizens have in their property with the indisputable moral justification for denying slayers the right to succeed to their victims' property.").

[54] *See* Wade, *supra* note 14, at 725-26 (stating if interest is vested, it cannot be taken away without violating constitutional provisions); Barnett v. Couey, 27 S.W.2d 757, 762 (Mo. Ct. App. 1930) (stating that slayer rule has recognizable vested rights); Hennessy, *supra* note 18, at 173 ("If it is accepted that a slayer is not actually being deprived of property at all, due process protections are not violated. Likewise, a statute that deprives a defendant of no vested property interest will likely not be considered punitive and thus will not form the basis of a double jeopardy claim. The conclusion to be drawn, therefore, is that a statute that solely prevents a slayer from acquiring property from her victim and does not take any property from her is constitutional. By the same token, a statute depriving a slayer of a vested property interest will be unconstitutional. Such a deprivation may be both an impermissible forfeiture and a violation of other constitutional protections, such as the prohibitions against double jeopardy.").

[55] *See* Myers, *supra* note 19, at 1009 ("A slayer statute should only be used to prevent a killer from receiving the property of the victim and joint tenancy property is owned, at least in part, by

taken away without violating their constitutional rights.[56] A joint tenancy and tenancy by the entirety both create vested property rights that are not transferable.[57] A tenancy by the entirety is made between a husband and wife, giving each of them full and non-transferable property rights.[58]

An exception to this would apply when a husband or wife kills the other in order to inherit from the deceased person's estate.[59] The exception could follow the Severance approach in which the property, of which both parties have a vested interest, will be severed in half.[60] One half of the property interest would be given to the murderer and the other half would be

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the killer."); Hennessy, *supra* note 18, at 181 ("Rather than severing the interests in the property or imposing an equitable trust, the Massachusetts statute explicitly requires that property held jointly or by the entirety be distributed as if the slayer had predeceased the decedent. The consequence of this approach is that, by operation of law, all property interests, including vested interests, held by a surviving joint tenant are forfeited by operation of the statute.").

[56] *See* Myers, *supra* note 19, at 1009 ("Joint tenancy is defined as ownership 'by several persons in equal shares by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy. Joint tenants have the right of survivorship, meaning that no probate or other proceeding is necessary to pass the property to the surviving joint tenants on death. This right was deemed to exist because the joint tenants, as a group, are deemed to own the property. Under this theory, each of the joint tenants owns the undivided whole of the property. When one member of the group dies, nothing transfers from the deceased to the other joint tenants. Rather, the ownership of the property continues in the joint tenant group, albeit now reduced in number by the loss of the decedent.").

[57] *See id.* (explaining interests created by joint tenancy); Hennessy, *supra* note 18, at 181 ("The Massachusetts slayer rule when applied to joint tenants and tenants by the entirety, it divests a perpetrator of property in which he has a vested and preexistent legal interest.").

[58] *See* Myers, *supra* note 19, at 1009 (explaining that survivorship rights exist under joint tenancy); Hennessy, *supra* note 18, at 175 ("When one joint tenant dies the surviving tenant owns the entire estate by operation of her right of survivorship. Therefore, a slayer has a substantially greater interest in property held jointly with a right of survivorship, whether as a joint tenant or as a tenant by the entirety, than she has in the nonvested expectancy interest that she stands to inherit by will or intestacy.").

[59] *See* Hennessy, *supra* note 18, at 175 (stating that slayer has greater interest in property jointly held).

[60] *See* Myers, *supra* note 19, at 1011 ("Any joint tenant who feloniously and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as his property and the killer has no rights by survivorship."); Hennessy, *supra* note 18, at 177 ("A judicial or statutory severance of the joint interest is the most common solution to the slayer problem. Various rationales support this result. For instance, in cases of tenancy by the entirety, courts have observed that a felonious killing is analogous to a divorce or marriage dissolution in that a murderous spouse willfully dissolves the marital relationship, thereby destroying the essential element of marriage. This act severs the tenancy and the slayer loses his right of survivorship. In the case of joint tenancies, courts have found the justification for severance by parsing out the relevant interests held by a surviving joint tenant. In so doing, courts have observed that, notwithstanding the fiction that the right of survivorship delivers nothing to the survivor, an additional interest is in fact realized in the succession from joint to sole ownership. To the extent that such a gain is cognizable, statutes and the equitable powers of the court can prevent a slayer from so profiting from his wrong.").

given to the descendants of the deceased.[61] A joint tenancy or tenancy by the entirety will thus lose its survivorship rights and become a tenancy in common, where a one-half interest of the property can be transferred.[62] This ensures that the murderer's constitutional rights are not violated as he or she still receives one-half interest in the marital property, and the deceased's descendants receive one-half interest from the estate because the killer's act terminates all survivorship rights.[63] For example, if a wife kills her husband, she will be barred by the slayer statute from inheriting from his estate, but she will still have a one-half property interest in the marital property that they shared under a tenancy by the entirety.[64] The husband's one-half interest in the property will be given to his descendants, and the wife's constitutional right will not be violated.[65]

There are many states that currently follow the Severance approach.[66] These states have recognized the constitutional violations that are created when taking away all property rights from the murderer, and have thus incorporated the severance theory, which splits the property in half, into their slayer statutes.[67] The Severance approach and Constructive Trust approach appear to be the most comprehensive solutions in regard to

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[61] *See* Hennessy, *supra* note 18, at 177 ("An unlawful act causes a severance of the tenancy, thus allowing the slayer to retain only a one-half share – not to acquire the remainder of the jointly owned interest as he normally would."); Myers, *supra* note 19, at 1012 ("The estate of the victim will hold a life estate in the other half of the property and the remainder interest in the property.").

[62] *See* Myers, *supra* note 19, at 1009-11 ("Under the common law, joint tenancies required the existence of the "four unities" of interest, title, time, and possession to exist equally for all joint tenants at the same time. A failure in one of these unities would cause the ownership of the property to transmute to a tenancy in common. Joint tenants could convert the joint tenancy to a tenancy in common at any time by destroying anyone of the four unities. The statute provided that when the killing of a joint tenant affects a severance of that tenancy, the severance of a joint tenancy results in the tenancy in common.").

[63] *See id.* at 1020 (noting that North Dakota slayer statute voids survivorship rights when slaying exists).

[64] *See id.* at 998 ("Enolf Snortland's estate included property that he and Robert held in joint tenancy. Applying the UPC as then effective in North Dakota, the district court ruled that the joint tenancy property was severed into equal shares of tenancy in common property, with Enolf Snortland's estate taking one share and Robert taking the other. . . The court also ruled that Robert's son, Robbie, would receive the intestate share that Robert would have inherited. This changed the treatment of joint tenancy property when one of the joint tenants kills another.").

[65] *See id.* (explaining survivorship rights are forfeited and half interest is distributed to killer and descendant's estate); Hennessy, *supra* note 18, at 176 (stating that killer will only receive half interest).

[66] *See* Hennessy, *supra* note 18, at 160 ("Deeming murderous joint tenants and tenants by the entirety to have legally predeceased the decedent implicates constitutional concerns that other states have carefully avoided for more than a century.").

[67] *See* Myers, *supra* note 19, at 1020 (stating that North Dakota amended its slayer statute in 2007 to implement severance approach).

protecting an individual's constitutional rights while also barring them from profiting from their crime.[68]

CONCLUSION:

The Massachusetts slayer statute has the purpose of barring murderers from profiting from their crimes. While it successfully fulfills this purpose, it does so by violating the constitutional rights of individuals who have a vested property interest through a joint tenancy or tenancy by the entirety. The Massachusetts slayer statute unconstitutionally deprives these individuals of a vested property interest that they are rightfully entitled to, and that they share with their husband or wife. The slayer statute violates the Fifth Amendment as it deprives an individual of their constitutionally protected property. It is necessary for Massachusetts to amend their slayer statute with the intention of making sure no constitutional rights are being violated. Specifically, Massachusetts needs to ensure that an individual who is privy to a tenancy by the entirety or joint tenancy maintains his or her right to the vested property interest. A Severance approach theory should be used to protect one's constitutional rights and to ensure the property is distributed fairly between the surviving spouse and the descendant's estate. Massachusetts must amend its slayer statute in order to discontinue violating the rights the Constitution seeks to protect.

Paul Mourad

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[68] *See* Hennessy, *supra* note 18, at 176-77 ("Two dominant approaches have emerged from these articulations. Under the first approach, an unlawful act causes a severance of the tenancy, thus allowing the slayer to retain only a one-half share – not to acquire the remainder of the jointly owned interest as he normally would. Under the second, the unlawful act causes some portion of the jointly held property to be held in a constructive trust for the heirs of the deceased, often limiting the slayer's retention to a one-half interest for life. The ultimate goal under both of these approaches is to prevent the slayer from benefiting in any way from his act.").

THE FINE LINE BETWEEN IDENTIFIERS CAPABLE OF IDENTIFYING AND "IDENTIFIABLE INFORMATION"

I. INTRODUCTION

Most people do not understand the depths at which the Orwellian reality has materialized in today's highly digitalized world, by way of both continuously advancing "smart" technology and an ever-increasing need to be "connected."[1] The "internet of things" aims to create one swift motion through various means of being connected all working in tandem to accomplish a single lucrative goal: "capturing data that can then be used to measure and control the world around us" in order "to permit the user to accomplish commercial transactions with as little conscious thought as possible. . . ." because data explains "[t]he fewer steps there are in a transaction, the more likely people are to spend their money."[2] Though these devices appear harmless, the problem arises due to their "vacuuming up [of] information. . . ."[3] It is difficult to conceptualize the sheer volume of such Personally Identifiable Information ("PII"),[4] which is constantly being

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[1] *See* Adam Greenfield, *Rise of the machines: who is the 'internet of things' good for?*, GUARDIAN.COM *(*June 6, 2017*)*, https://www.theguardian.com/technology/2017/jun/06/internet-of-things-smart-home-smart-city (warning people to be skeptical and resist tracking as "internet of things" presents new possibilities). Greenfield explains "the internet of things" are a number of connected devices and services capable of gratifying and delivering convenience whether in the form of services for people, referred to as "quantified self," our homes, referred to as "the smart home" or public spaces, referred to as "the smart city." *Id.* He calls this process "the colonisation of everyday life by information processing." *Id.*

[2] *See id.* (discussing demand for instant gratification). The goal being a monetary one, it aims ". . . . to short-circuit the process of reflection that stands between having a desire and fulfilling that desire by buying something." *Id.*

[3] *See id.* (arguing that users do not know what is done with their information).

[4] *See Guidance on the Protection of Personal Identifiable Information*, U.S DEP'T OF LAB., https://www.dol.gov/general/ppii (last visited 2019) (quoting Department of Labor's definition of PII). According to the United States Department of Labor, PII is defined as:

> Any representation of information that permits the identity of an individual to whom the information applies to be reasonably inferred by either direct or indirect means. Further, PII is defined as information: (i) that directly identifies an individual (e.g., name, address, social security number or other identifying number or code, telephone number, email address, etc.) or (ii) by which an agency intends to identify specific individuals in conjunction with other data elements, i.e., indirect identification. (These data elements may include a combination of gender, race, birth date, geographic indicator, and other descriptors). Additionally, information permitting the physical or online contacting of a

collected, analyzed, and packaged from consumers on every platform.[5] "It's not about what we know we're sharing, it's about what we don't know is being collected and sold *about us*."[6] Furthermore, the speed at which PII is being sold and transmitted as a commodity to second or third parties to increase sales without users' direct knowledge is alarming.[7] This collected data can fully identify "who you are on a day-to-day basis" by cataloging anything from simple personal information, such as name, IP address, or income, to who your best friend is, your sexual preference, and medical information relative to your medications or diseases, all in addition to tracking every step, interest, or decision you make along the way.[8] By combining PII and two types of cookies,[9] first and third party cookies, companies reach their ultimate goal: to deliver targeted ads to users in accordance with their specific interests as they surf the Internet, even when using multiple devices, in what appears to be a swift or "seamless" experience.[10] With the help of evolving technologies, companies use "device fingerprinting" to track users across "all kinds of internet-connected devices," such as smart phones, tablets, laptops, desktop computers, and other smart devices, creating the ultimate experience through mobile applications.[11]

> specific individual is the same as personally identifiable information. This information can be maintained in either paper, electronic or other media.

Id.

[5] *See* Greenfield, *supra* note 1 (summarizing how information is being collected from consumers); *see also* Steve Kroft, *The Data Brokers: Selling Your Personal Information*, CBS NEWS, http://www.cbsnews.com/news/data-brokers-selling-personal-information-60-minutes/ (last updated Aug. 24, 2014) (expounding upon various data being collected through internet and mobile devices).

[6] *See id.* (emphasis added) (discussing monetary gains behind data collection and its effects). This script from 60-minutes broadcast grapples with the idea of privacy and preservation of PII in comparison with the notion of merely accepting the internet as an "advertising medium" over which too much regulation would "cripple" one of the fastest-growing sectors of the United States economy today. *Id.*

[7] *See id.* (explaining collected data generally sold to other companies, marketing and advertising companies and sometimes government).

[8] *See id.* (detailing certain types of information being collected).

[9] Packet of data sent by a server to a browser to identify the user or track their access.

[10] *See* Darla Cameron, *How targeted advertising works*, WASH. POST (Aug. 22, 2013), https://www.washingtonpost.com/apps/g/page/business/how-targeted-advertising-works/412 (explaining concept of targeted advertising); *see also Online Tracking*, FED. TRADE COMM'N (June 2016), https://www.consumer.ftc.gov/articles/0042-online-tracking (answering most commonly asked questions regarding online tracking and cookie software).

[11] *See Online Tracking*, *supra* note 10 (discussing how companies can track users across multiple devices). The Federal Trade Commission ("FTC") also explains that companies use device identifiers, such as Apple iOS's Identifiers for Advertising ("IDFA") and Google Android's Advertising ID, to monitor the different applications on a particular device and collect the device's unique ID, which can later be matched to unrelated PII. *Id.*

Furthermore, companies utilize a number of layers to achieve this seamless experience.[12] For example, once the user visits a retail site, companies place a first-party cookie on the user's browser to improve her experience through methods of remembering login information or other information relating to that user's visit.[13] Next, the initial visited site shares this information with third parties.[14] Then, third-party cookies are placed by "someone other than the site you are on," typically, an independent advertising networks that deliver ads, or analytics companies that examine user's online behavior.[15] Ultimately, this combination of first and third-party cookies allows companies to monitor a user's behavior over time, develop a detailed history of that user's interests, and then deliver ads tailored to that user's interests.[16]

This Note will: 1) examine the development of modern privacy laws in the United States ("U.S.") and the use of cookies and protections, depending upon whom they are geared towards in comparison with laws established in the European Union ("E.U.");[17] 2) analyze these laws and their practicality in the vast technological era, as well as their applicability and enforceability in disputes;[18] 3) argue that U.S. privacy protections should extend past merely industry specific regulations and those aimed towards the protection of children to cover all consumers whose personal data is being utilized by companies while still allowing the market to advance;[19] and 4) ultimately conclude that as new privacy regulations are enacted in the U.S. and internationally, the Supreme Court and Congress must address the various questions and concerns stemming from circuit splits, as well as determine the uniform definitions of key terms and clarify their applicability to global companies.[20]

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[12] *See id.* (summarizing process of collecting data and subsequent online tracking).

[13] *See id.* (characterizing first party cookies as login information, weather, zip code, and shopping carts).

[14] *See id.* (explaining how cookies are shared).

[15] *See id.* (discussing placing of third-party cookies).

[16] *See Online Tracking*, *supra* note 10 (outlining types of information obtained). Imagine if, for example, a user reads numerous articles about running and the relevant advertising company notices, the "seamless" experience is achieved when, while later visiting a completely unrelated site, the user stumbles upon a sneaker ad that sparks his or her interest in purchasing and proceeds to place an order for the sneakers. *Id.*

[17] *See infra* Part II, A-B (examining privacy laws and use of cookies).

[18] *See infra* Part III, A-B (considering applicability of privacy cookies).

[19] *See infra* Part IV (asserting need for appropriate regulations).

[20] *See infra* Part V (articulating final reasoning for necessity of privacy regulations).

II. HISTORY

A. Privacy Laws in the U.S.

The United States' concern with privacy is embodied in the Fourth Amendment.[21] While the Fourth Amendment's protections are wholly blurred when it comes to the technology era, privacy advocates have long promoted its protections to extend to PII.[22] PII was first defined by the 1997 Information Infrastructure Task Force ("IITF") under President Clinton as "an individual's claim to control the terms under which personal information . . . identifiable to the individual – is acquired, disclosed, and used."[23] However, as technology continues to progress, new challenges are created.[24] The U.S. currently has no comprehensive federal law regulating the collection and use of personal data or PII.[25] Opponents argue that the U.S. model for data privacy establishes protections not for its people, but for the government and corporations through its vague terminology and sector specificity.[26] "U.S. laws associated with data protection ideas have focused on selected sectors or types of information and not on general regulation of the use and collection of information."[27] One U.S. example that puts the consumer in control is the Children's Online Privacy Protection Act ("COPPA"), which was enacted in 1998 as a result of the longstanding

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[21] *See Technology and the Fourth Amendment: Reconciling Law with the Digital Era*, ENVISAGE TECH (Nov. 15, 2017), https://www.envisagenow.com/technology-fourth-amendment-reconciling-law-digital-era/ (discussing how Fourth Amendment and evolving technology work together).

[22] *See id.* (explaining how Fourth Amendment does not cover technology era).

[23] *See* Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1205 (1998) (favoring default rule that would allow PII use unless parties expressly agree otherwise).

[24] *See id.* (explaining new challenges caused by technology).

[25] *See* LEUAN JOLLY, DATA PROTECTION IN THE UNITED STATES: OVERVIEW, WESTLAW: PRACTICAL LAW COUNTRY Q&A 6-502-0467 (2018) (providing overview of U.S. privacy laws regulated by FTC). The most well-known example is the Health Insurance Portability and Accountability Act ("HIPAA") (42 U.S.C. §1301 et seq.), which regulates medical information. *Id.*

[26] *See* Dan Shearer, *EU-US Cloud Privacy Crash: Why, How, What's Next*, KOPANO (Oct. 25, 2017), https://kopano.com/kopano-documents/EU-US-Cloud-Privacy.pdf (summarizing U.S. and E.U.'s approach, history, future implementation, and arguments). Conversely, the E.U.'s approach requires meeting fundamental moral standards and protecting citizens' privacy rights. *Id.* The document seeks to show while the U.S. is lagging behind, the E.U. has long focused its economic future around privacy protections and establishing trust with its citizens relating to personal data and online markets. *Id.*

[27] *See* Raymond T. Nimmer & Holly K. Towle, Data Privacy, Protection, and Security Law § 2.01(3)(a) (LexisNexis, A.S. Pratt 2018) (explaining data protection covered in U.S.)

concern for the privacy of children.[28] COPPA deters companies from utilizing inadequate protections when collecting the PII of children under the age of thirteen when the company has actual knowledge they are doing so by imposing hefty fines for noncompliance.[29] In addition to forbidding the collection of names, address, screen names, telephone and social security numbers without explicit parental consent, COPPA specifically expands upon the typical definition of PII to include any personal identifiers that *could* identify a child or his parents, whether alone or by combining with another identifier.[30] This expansive definition therefore includes any online contact information including but not limited to IP addresses or video chat identifiers, photo, video, or audio files containing a child's image or voice, and geolocation sufficient to identify a street name and city or town.[31] The FTC is further authorized by COPPA to expand this definition when it deems necessary.[32]

While the definition of PII in the U.S. varies, COPPA is currently one of the only U.S. statutes explicitly stating that Internet Protocol ("IP") and Media Access Control ("MAC") address our personal information but limit the scope only in relation to children and their online activity.[33] Another example is the Video Privacy Protection Act ("VPPA") of 1988 prohibiting "video tape service provider[s]" from "knowingly" disclosing its

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[28] *See* 15 U.S.C. § 6501 (2012) (codifying online privacy rights for children under age of 13); *see also* Children's Online Privacy Protection Rule, 16 C.F.R §312.3 (2018) (detailing regulation of unfair acts or practices in connection with collection of PII from children). To be in compliance with COPPA, servers geared towards children consumers must: (1) provide clear notice as to information on what PII is being collected and how such information is being used; (2) obtain parental consent before collecting, using, or disclosing; (3) provide a way for parents to review or delete the information; (4) not make prizes, activities or contests conditional upon consent; and (5) "establish and maintain reasonable procedures to protect" the privacy of the child's PII. 16 C.F.R §312.3.

[29] *See Children's Online Privacy Protection Act (COPPA)*, EPIC.ORG, https://epic.org/privacy/kids/ (last visited Apr. 10, 2019) (discussing enforcement actions and fines). To impose this stringent law, COPPA violations are equated to violating the FTC Act's prohibitions on deceptive or unfair trade practices and may result in a maximum $11,000 violation per day, and per incident. *Id.* COPPA further authorizes state attorney generals to bring enforcement actions in federal district courts. *Id.* In February 2019, the FTC obtained $5.7 million in fines from Chinese video app company, TikTok, for violating COPPA by collecting personal information from kids without parental consent. *Id.* This is the largest COPPA penalty to date. *Id.*

[30] *See Children's Online Privacy Protection Rule: A Six-Step Compliance Plan for Your Business*, FTC.GOV, https://www.ftc.gov/tips-advice/business-center/guidance/childrens-online-privacy-protection-rule-six-step-compliance (last visited Apr. 2, 2019) (providing tips for COPPA compliance).

[31] *See id.* (highlighting far reaching nature of COPPA).

[32] *See id.* (emphasizing how FTC can change definition where and when it sees fit).

[33] *See* Children's Online Privacy Protection Rule, 16 C.F.R. § 312.3 (2012) (establishing regulations controlling collection of PII with regard to children).

"subscribers' viewing habits" to any person or second or third party.[34] However, courts have not yet agreed upon the meaning of these definitions.[35] Some U.S. circuit courts have been reluctant to define PII or to establish limitations due to possible binding consequences.[36] Although technology continues to evolve, this does not ease future cases as this dated statute and its controversial definitions must be further clarified, especially considering social media's vast online application.[37] Courts must determine exactly how a person becomes a "subscriber" and provide precedent for future cases.[38] The VPPA's creation established a federal cause of action, as it allows plaintiffs to recover actual or liquidated damages of at least $2,500, punitive damages, attorney's fees, equitable relief, and other costs.[39] "The potential

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[34] *See* 18 U.S.C. § 2710 (2012) (explaining when liability arises).

[35] *See* 18 U.S.C. § 2710 (2012) (defining injury claim relating to privacy of renting, purchasing, or delivering of audio/video material); *see also* RICHARD RAYSMAN ET AL., INTELLECTUAL PROP. LICENSING: FORMS AND ANALYSIS § 7.04A (Law Journal Press 2018) (analyzing VPPA's nuances). While PII is broadly defined to incorporate "information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider," the other terms of the statute often cause controversy. *Id.*; Yershov v. Gannett Satellite Info. Network, Inc., 820 F.3d 482, 484 (1st Cir. 2016) (reversing district court's dismissal, concluding there was PII disclosed and consumer relationship under VPPA); *but see* Ellis v. Cartoon Network, Inc., 803 F.3d 1251, 1257 (11th Cir. 2015) (analyzing term "subscriber"). The *Ellis* court decided to follow the *Yershov* district court decision instead and found that there needs to be an established relationship or commitment to be a subscriber. *See Ellis*, 803 F.3d at 1257. Furthermore, the *Ellis* court reasoned that subscriptions "involve some or most of the following factors: payment, registration, commitment, delivery, expressed association, and/or access to restricted content." *Id.* (brackets omitted) (quoting Yershov v. Gannett Satellite Info. Network, Inc., 104 F. Supp. 3d 135, 147 (2015)).

[36] *See* D. Reed Freeman and Joseph Jerome, *The VPPA and PII:Is Geolocation Another Anonymous Identifier?*, BLOOMBERG.COM (July 25, 2016), https://www.bna.com/vppa-piiis-geolocation-n73014445217/ (exploring VPPA's PII definition and impact of geolocation information).

[37] *See id.* (contemplating how other courts will define PII in light of current circuit split). This article analyzes whether PII definition will be interpreted by future courts to include such "anonymous identifiers, geolocational information and elements of data that are sometimes passed through a streaming service to third parties, such as analytics providers." *Id.*

[38] *See In re* Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 267 (3rd Cir. 2016) (describing information that cannot be disclosed). Prohibition on the disclosure of PII applies only to the kind of information that would readily permit an ordinary person to identify a specific individual's video-watching behavior. *Id.* The Third Circuit reasoned that creating a general framework makes more sense as plaintiffs stray further from the "1988 paradigm" due to continual technological development, which leaves courts scrambling. *Id.* at 290. The Court stated, "we recognize that our interpretation of the phrase 'personally identifiable information' has not resulted in a single sentence holding capable of mechanistically deciding future cases." *Id.* "We have not endeavored to craft such a rule, nor do we think, given the rapid pace of technological change in our digital era, such a rule would even be advisable." *Id.*

[39] *See* Allison Grande, *Google, Viacom Ruling Limits Scope of Video Privacy Actions*, LAW 360 (July 14, 2014, 10:16 PM), https://www.law360.com/articles/557319/google-viacom-ruling-limits-scope-of-video-privacy-actions (discussing recent decision's ability to hinder future class actions by narrowing scope of VPPA).

for uncapped damages rewards, coupled with the difficulty of applying vague language drafted in the 1980s to unforeseen technological developments such as the widespread prevalence of video-streaming services, has resulted in numerous VPPA class actions over the dissemination of consumer video-viewing habits . . . ."[40] VPPA also extends its limitations to social media sites that share subscribers' viewing habits by capturing PII. [41]

In addition to COPPA and the VPPA, other heavily regulated sectors include the healthcare and financial industries, however, privacy advocates in the U.S. have long argued that basic privacy protections are needed at every level when handling personally identifiable information, especially technology companies handling immense amounts of PII.[42] Most recently, California passed a digital privacy law granting consumers more control and insight into the ways companies use their personal information online, creating one of the most significant regulations overseeing data-collection practices of technology companies that the U.S. has seen to date.[43] On September 23, 2018, the governor of California signed into law the amended version of the California Consumer Privacy Act of 2018 ("CCPA"), which was originally enacted in June 2018.[44] The CCPA, which will officially go into effect in January 2020, grants consumers: 1) the right to ask companies

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[40] *See id.* (summarizing scope of VPPA). Article discusses two important VPPA determinations due to the ruling: (1) rejecting stretch . . . of video tape service provider to cover any party that is in possession of [PII]; and (2) clarifying that VPPA applies to online videos and not online advertising practices. *Id.*

[41] *See* JAMES B. ASTRACHAN ET AL., 3 LAW OF ADVERTISING § 56.05 (Matthew Bender & Co., Inc., ed. 2018) (explaining laws surrounding advertising and development of social media law). "[W]herever someone's personal information is used to sell them something, there will always be issues with privacy." *Id.* While none of the 2011 cases analyzed reached a trial on the merits, a case against Facebook resulted in a settlement requiring Facebook to: (1) "[stop] misrepresenting the privacy of information on its website; (2). . . give users a clear and prominent notice and to obtain a user's express consent before sharing their information with third parties). . . ; (3). . . establish and maintain a comprehensive privacy program; and (4) subject itself to regular privacy audits for the next 20 years." *Id.*

[42] *See Personally Identifiable Information: What Companies Need to Know*, REGERLAW.COM (March 29, 2017), https://www.regerlaw.com/personally-identifiable-information-what-companies-need-to-know.html (listing examples of Congressional enacted statutes related to data privacy).

[43] *See* Daisuke Wakabayashi, *California Passes Sweeping Law to Protect Online Privacy*, N.Y. TIMES (June 28, 2018), https://www.nytimes.com/2018/06/28/technology/california-online-privacy-law.html (explaining effects and nuances of new California data privacy law).

[44] *See id.* (explaining creation of proposed ballot). Under California law, citizens can propose new laws and constitutional amendments and may secure a statewide vote on their initiatives if they get enough signatures on a petition advocating that the proposed law appear on a future ballot. *Id.* Due to this right, three unlikely privacy advocates proposed the ballot that would eventually be enacted into law to provide consumers with protections from the nation's toughest privacy laws. *Id.*

what information they are collecting about them, including why and with whom they are sharing it; 2) the right to request companies to delete their information; 3) the right to demand that companies not share or sell their data for business purposes; and 4) the right to sue or fine companies that violate these rights.[45] Further, the law makes it increasingly more difficult for companies to share or sell data of younger children by requiring that children under the age of sixteen to affirmatively opt in and that the parents of children under the age of thirteen must opt in on the child's behalf before businesses can sell their personal data.[46] In the wake of the E.U.'s General Data Protection Regulation ("GDPR"), the CCPA is considered the first regulation in the U.S. to attempt to match the GDPR's broad definitional scope of what type of information is covered under PII while also granting consumers extensive rights to control that information.[47] "The nation's most populous state, considered a political trendsetter, is responding to consumers' growing unease with the massive and largely unchecked collection and sharing of vast amounts of their private information that has produced a string of privacy mishaps."[48] The new law will likely carry a tremendous impact on technology companies as most are headquartered in California.[49]

B. Privacy Laws in the E.U.

The European Union's attitude towards personally identifiable information differs substantially from that of the United States, with its longstanding commitment to regulate and standardize data protection across member states.[50] Accordingly, the most notable effort to regulate the

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[45] *See* Wakabayashi, *supra* note 43 (summarizing key rights of CCPA). Businesses must adhere to these and other new regulations while still providing the same quality of service even for consumers who opt out. *Id.*

[46] *See id.* (discussing data protections for children); *see also* Nancy L. Perkins et al., *California's New Privacy Statute: Is It a US GDPR*, ARNOLD & PORTER (Oct. 3, 2018), https://www.arnoldporter.com/en/perspectives/publications/2018/10/californias-new-privacy-statute?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original (summarizing opt-in requirements for protection of children's PII).

[47] *See* Perkins, *supra* note 46 (noting CPPA has significant similarities to GDPR).

[48] Jessica Guynn, *California passes nation's toughest online privacy law*, USA TODAY (June 28, 2018), https://www.usatoday.com/story/tech/2018/06/28/california-lawmakers-pass-tough-new-online-privacy-rules-could-model-other-states/743397002/ (crediting bill's passage to recent data breaches and consumer outrage).

[49] *See id.* (explaining why California companies will need to comply with CCPA).

[50] *See* Phil Lee, *The differences between US and EU data protection*, YOUTUBE (Jan. 13, 2017), https://www.youtube.com/watch?v=-_zLeGKHOpc (explaining key differences such as EU providing "constitution" like fundamental right protections to privacy). The E.U. characterizes the right to privacy as so fundamental as to have it codified within the E.U. Charter of Fundamental

technology industry came from Europe through the enactment of the General Data Protection Regulation ("GDPR"), which was fully implemented on May 25, 2018.[51] Prior to its enactment, however, the E.U. similarly faced a lack of uniformity in protecting and controlling the privacy and data of its citizens.[52] The "1995 Directive"[53] required its member states to implement mandatory standards for the processing of personal data at a stricter standard than that of the U.S.[54] While the 1995 Directive's fundamental goal was the "harmonization of data protection laws and the transfer of personal data to third countries," it was only somewhat successful in supervising these goals as, ultimately, it was unable to control individual member states' level of protection or quality of implementation.[55] While the 1995 Directive successfully created a more unified standard across Europe and furthered the concept that privacy is a fundamental right, its power reached only as far as a suggestion because each individual member state interpreted and administered the law differently.[56] Thus, the E.U. proposed an updated regulation, the GDPR, to bridge the gap between the 1995 Directive and the

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Rights of 2000, which is an enactment resembling the U.S. Constitution. *Id.* This instrument sets out two specific rights of protection stating, first, in Article 7, "everyone has the right to respect for his or her private and family life, home and communications," and second, in article 8, "everyone has the right to the protection of the personal data concerning him or her." *Id.*

[51] *See* Wakabayashi, *supra* note 43 (explaining GDPR as stringent privacy regulation). The GDPR restricts how technology companies "collect, store and use personal data" of E.U. citizens. *Id.*

[52] *See How did we get here? An overview of important regulatory events leading up to the GDPR*, EU GEN. DATA PROTECTION REG, https://www.eugdpr.org/how-did-we-get-here-.html (last visited Feb. 23, 2019) (noting E.U. struggled to control data privacy of its 28 member-states).

[53] European Data Protection Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data ("1995 Directive").

[54] *See* DAVID H. BERNSTEIN ET AL., THE LAW OF ADVERTISING, MARKETING AND PROMOTIONS §6.06 (Law Journal Press ed. 2019) (setting out regulations directing to all member states to pass legislation implementing such requirements).

> For example, the European Directive requires that: (1) personal data may be processed only with the informed consent of the individual; (2) entities collecting data must disclose the purpose for which the data will be used; and (3) individuals have the right to access their personal data, make changes to the data they have provided and object to the use of the data.

Id.; *see also* DAVID H. BERNSTEIN ET AL., THE LAW OF ADVERTISING, MARKETING, AND PROMOTIONS §§ 10, 12, 14 (Law Journal Press ed. 2019) (describing procedural aspects of false advertising challenges, supervisory skills and remedies).

[55] *See How did we get here?, supra* note 52 (explaining major changes from 1995 Directive to current). Through means of "establish[ing] independent public authorities called Data Protection Authorities (DPAs) in each member state," the directive was able to supervise the application. . . of said regulation and serve as a regulatory body. *Id.* However, the transference of personal data to third countries was conditioned on that country's own level of protection, which is more difficult to supervise. *Id.*

[56] *See id.* (describing challenge in making 1995 Directive enforceable law).

modern data-driven world in the hopes of protecting individuals' fundamental privacy rights regardless of evolving technological innovations.[57]

The GDPR remains true to its predecessor, but imposes heightened protections and major changes, and was correctly predicted to have a tremendous impact on companies conducting any business with E.U. citizens.[58] The GDPR fully replaces the 1995 Directive framework by imposing a host of new obligations on parties handling personal information of European citizens, while also enforcing substantial penalties when companies, including U.S. companies, fail to comply.[59] The GDPR creates and strengthens specific rights of individuals, including: 1) the right to obtain details about how their data is being processed; 2) the right to obtain copies of any personal data that companies have on them; 3) the right to have companies fix incorrect or incomplete data; 4) the right to have their data erased if company has no legitimate reason for retaining the data; 5) the right to obtain their data from one company and transfer it to another; 6) the right to object to the processing of their data in certain circumstances; and 7) the right to not be subject to automated profiling.[60]

Upon its implementation, the GDPR superseded the 1995 Directive and any other existing regulations across all European countries, and applied its own definitions with the goal of providing clarity and uniformity.[61] For example, the GDPR uniformly defined IP addresses as PII.[62] This is exemplified in two recent rulings by the Court of Justice of the European Union ("CJEU"), which stated that "one stop shop" must apply to the E.U. member states, and also invalidated the "Safe Harbor Statutes" between E.U.-U.S. for data transfers, thus requiring U.S. companies to comply or suffer substantial penalties.[63] The CJEU clarified its position of requiring uniformity by ruling that IP addresses must be considered PII because they

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[57] *See id.* (comparing GDPR and 1995 directive's fundamental difference: GDPR is enforceable law).

[58] *See GDPR Key Changes*, EU GEN. DATA PROTECTION REG., https://www.eugdpr.org/key-changes.html (last visited Jan. 29, 2018) (summarizing changes from 1995 Directive to GDPR).

[59] *See* Caroline Krass et al., *A GDPR Primer for U.S.-Based Cos Handling EU Data,* LAW360 (Dec. 12, 2017, 12:16 PM), https://www.gibsondunn.com/publications/Documents/Krass-Baladi-Kleinwaks-Bartoli-A-GDPR-Primer-For-US-Based-Cos-Handling-EU-Data-Part-2-Law360-12-13-2017.pdf (laying out scope of GDPR).

[60] *See GDPR Compliance*, *The Most Important Changes Under the GDPR*, HUBSPOT.COM, https://www.hubspot.com/data-privacy/gdpr (last visited Mar. 9, 2018) (setting out new and updated rights of individuals under GDPR).

[61] *See* Eric Lambert, *Are IP and Mac Addresses Personal Information?*, LINKEDIN (June 16, 2016), https://www.linkedin.com/pulse/ip-mac-addresses-personal-information-eric-lambert/ (noting that differentiating definitions between various countries led to need for GDPR).

[62] *See id.* (establishing IP address as part of PII definition).

[63] *See id.* (summarizing important E.U. court decisions).

can be combined with other PII to precisely identify an individual.[64] Even American companies engaging in business in Europe must be aware of the penalties when they fail to meet the standards under the 1995 Directive, which prohibited the transfer of personal data outside the E.U. except where a third-party country "ensure[s] an adequate level of protection" acceptable under the protections of "Safe Harbor Statutes."[65] In October 2015, the CJEU invalidated the Safe Harbor Statutes and replaced them with the EU-US Privacy Shield.[66] However, in reality, the U.S.'s "decentralized privacy regime" would certainly be found inadequate even under this lower standard.[67] The tougher scope of the GDPR shifts on an "absolutely data-centric" approach and applies to all personal data processed by organizations both *inside* the E.U. and personal data of E.U. citizens by organizations *outside* the E.U., even where such data is outside its borders.[68] "Repeated non-compliance with the GDPR can invite fines for up to 20 million EUR or 4% of the total worldwide annual turnover of the preceding financial year,

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[64] *See id.* (holding IP addresses to be PII). Both the 1995 Directive and the GDPR define personal data as "any information relating to an identified or identifiable person." *Id.* However, member states have differed on whether an IP address should qualify as personally identifiable personal data. *Id.* The CJEU reasoned that IP addresses must be considered PII under the GDPR because such online identifiers derived from devices, applications, cookie identifiers, internet addresses, etc. "may leave traces which, in particular when combined with unique identifiers and other information received by servers, may be used to create profiles of the natural person and identify them." *Id.*

[65] *See id.* (defining safe harbor statutes). Safe Harbor Statutes were principles developed between U.S. and EU to prevent businesses from losing or accidentally disclosing consumer PII. *Id.*

[66] *See* Lambert, *supra* note 61 (explaining why safe harbor statutes were replaced); *see also Schrems v. Data Protection Commissioner* (CJEU- "Safe Harbor"), EPIC.ORG, https://epic.org/privacy/intl/schrems/ (last visited Mar. 10, 2018*)* (explaining important CJEU case). In *Schrems v. Data Protection Comm'n*, the Court invalidated the Safe Harbor Statutes where Facebook user data was not adequately protected when it was transferred to the U.S. from Facebook's European headquarters. *Id.* The CJEU found that U.S. data privacy laws cannot provide security that EU citizens "expect[] and require[]." *Id.* The new EU-US privacy shield was intended to make data transfers easier while also protecting citizens further, however, it received much criticism. *Id.*

[67] *See* JAMES B. ASTRACHAN, ET AL., 3 THE LAW OF ADVERTISING § 56.05 (2017) (explaining safe harbor statutes). The U.S. was able to escape some of the 1995 Directive's provisions through these "safe harbor statutes" by only having to comply with seven principles including providing notice, opt-out or opt-in provisions and assuring data collected is relevant for its intended use. *Id.*

[68] *See Complying with the General Data Protection Regulation of the EU*, SECLORE, https://www.seclore.com/solutions-compliance-gdpr/ (last visited Feb. 18, 2019), (summarizing security company's compliance with GDPR through implementation of data-centric technology). Enterprise Digital Rights Management ("EDRM") technology is capable of protecting data-centric information wherever it goes, while traditional perimeter-centric security tools fail to secure when data-centric information as it travels from one platform to another. *Id.* EDRM technology has assisted numerous E.U. organizations in preparing for the GDPR. *Id.*

whichever is higher."[69] The GDPR embraces a risk-based approach to data protection, where organizations that control the processing of personal data or "controllers" are encouraged to implement protective measures corresponding to the risk level of their data processing activities.[70]

III. FACTS

A. Interpretation of Privacy Laws in the U.S.

One of the essential and fundamental cases that explores the limitations of VPPA, while also attempting to redefine some of its terminology, is *In re Nickelodeon Customer Privacy Litigation.*[71] In *Nickelodeon,* the plaintiffs consist of children younger than thirteen years of age who allege that the defendants, Viacom and Google, unlawfully collected PII about them and their internet viewing habits, and sold and distributed this information for the purpose of targeted advertising based on each user's web browsing.[72] Plaintiffs further argue that targeting ads toward

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[69] *See id.* (noting that noncompliance exposes even U.S. based companies to significant fines); s*ee also* Gabriel Maldoff, *The Risk-Based Approach in the GDPR: Interpretation and Implications*, INTERNATIONAL ASSOCIATION OF PRIVACY PROFESSIONALS, https://iapp.org/media/pdf/resource_center/GDPR_Study_Maldoff.pdf (last visited August 30, 2018) (explaining three categories of risk analysis for companies with relevant GDPR articles). Accordingly, the strictest penalties of up to 20 million EUR or 4% of the global annual turnover arise for violations such as processing, obtaining consent, data subject rights, and cross-border data transfers. *Id.*

[70] Maldoff, *supra* note 69 (explaining risk-based approach). The GDPR grants local regulators or "Supervisory Authorities" extensive powers and responsibilities including investigative and enforcement powers. *Id.* Supervisory Authorities are empowered to impose significant administrative fines on both data controllers and data processors that violate the GDPR. *Id.* In order to avoid the grave fines, companies that own internal compliance will need to determine what personal data they process about EU citizens, such as personal data about employees, evaluate current state of compliance, and formulate a roadmap to lay the groundwork for a GDRP compliance program. *Id.*

[71] *See In re* Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 267 (3d Cir. 2016) (raising two first impression questions in Third Circuit). Viacom owns the children's television station Nickelodeon and operates Nick.com, a website geared towards children that offers streaming videos and interactive games. *Id.* at 268. To register for Nick.com, one must sign up for an account creating a username and password by providing information such as birthday and gender. *Id.* Subsequently, Viacom assigns the person a unique code based on the information. *Id.* at 269.

[72] *See id.* (explaining plaintiffs' claims). Plaintiffs alleged that Viacom expressly stated that they did not collect any information about children, but then unlawfully used cookies to track children's web browsing and video-watching habits on Viacom's websites in four ways: (1) placing a first-party cookie on that user's computer during their first visit to the site; (2) allowing Google to contract with Viacom to place ads on Viacom's website by means of placing third-party cookies; (3) providing Google with access to children's profiles and other PII available only in the first-party cookies; and (4) Viacom, allowing Google to place their cookies on children's computer,

children is much more profitable than targeting ads toward adults because children are by nature more susceptive and unable to differentiate between content and ads.[73] Contrary to the defendants' assertion that plaintiffs lacked standing, the court found standing to be satisfied because in some cases, invasion of certain statutes are enough to constitute an injury-in-fact.[74] The Supreme Court has held that intangible harms can qualify as concrete for Article III standing purposes.[75] Accordingly, the Third Circuit concluded that the facts alleged in this case are sufficient to establish Article III standing because the "purported injury is clearly particularized, as each plaintiff complains about the disclosure of information relating to his or her online behavior[,]" and while it may be "intangible[,]" it has traditionally been enough for redressability under the law.[76] The more seminal question is whom, under VPPA, the plaintiffs have the right to sue: the video tape service provider who disclosed PII, the person who received that information, or both.[77] Next, the court determined that the information in question did not even qualify as PII, although the Act "is not entirely clear" as to what triggers liability.[78] The court notes that the fundamental disagreement turns on the idea of a "spectrum," one end of which is a person's actual name, on the other end is "pieces of information such as

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thereby permitted Google to track that person across any website on which Google displays ads and combine that information with information it collected from people using its own websites. *Id.*

[73] *See id.* at 270 (presenting another fundamental argument for plaintiffs). The court, however, found that most of these allegations have been rendered moot due to a preceding case. *Id.*; *see also In re* Google Inc., 806 F.3d 125, 153 (3d Cir. 2015) (dismissing all claims except for invasion of privacy and intrusion upon seclusion). The court determined that a reasonable fact finder could determine that defendants used deceitful methods to override plaintiffs' cookie blockers, constituting an invasion of privacy under California law. *See Google*, 806 F.3d at 153.

[74] *See Nickelodeon*, 827 F.3d at 272-73 (explaining plaintiffs must demonstrate invasion of concrete, particularized harm accompanied by actual and individual effect).

[75] *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549-50 (2016) (remanding because Ninth Circuit only addressed "particularized" requirement ignoring whether it was sufficiently concrete).

[76] *See Nickelodeon*, 827 F.3d at 274 (finding plaintiffs have standing). *But see* Bernardino v. Barnes & Noble Booksellers, Inc., No. 17-CV-04570 (LAK) (KHP), 2017 U.S. Dist. LEXIS 129038, at *PINCITE (S.D.N.Y. Aug. 11, 2017) (concluding plaintiff did not meet standing requirement). The case did not discuss the merits where plaintiff could not make a clear and substantial showing of likelihood of such success, even if she could show irreparable harm. *Id.*

[77] *See Nickelodeon*, 827 F.3d at 279-80 (deciding against plaintiffs that only video tape providers who disclose PII are liable under VPPA). In doing so, the court dismissed the plaintiffs' direct claims against Google as the third-party who received the PII and found Google could not be liable for merely receiving this information from another party. *Id.*

[78] *See id.* at 281 (evaluating merits of claim Viacom disclosed PII). Plaintiffs argue that Viacom disclosed the children's IP addresses, "browser fingerprint," and the device's unique identifier, permitting Google to track that computer across time and space. *Id.* While defendants contend that the information is not PII because it does not, by itself, identify a particular person. *Id.* at 282. Even more remote are social security numbers, which can be linked to a specific person, but not absent assistance of another entity. *Id.* "The kind of information at issue here – static digital identifiers – falls even further down the spectrum." *Id.*

telephone number or physical address, which may not by themselves identify a particular person but from which it would be possible to identify the person by consulting publicly available sources."[79] However, the court found Viacom's narrower understanding more persuasive, relying upon both statutory interpretation and legislative history, and simultaneously cautioned that when Congress passed the VPPA, it did not intend to cover far removed circumstances.[80] In sum, the court reasoned the information disclosed by Viacom falls on the side of "too unforeseeable" and thus, does not constitute a violation.[81]

Conversely, the First Circuit has become an "outlier" as it has been more liberal across the board with its definition of what qualifies as PII and what qualifies someone as a "subscriber" under the statute.[82] Creating an

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[79] *See Nickelodeon*, 827 F.3d at 282-83 (finding static digital identifiers even further down this spectrum). Most courts follow the rule that digital identifiers cannot hypothetically be combined with other information to link to a person are not by themselves PII. *Id.*; *see also In re* Hulu Privacy Litig., No. C 11-03764 LB, 2014 U.S. Dist. LEXIS 59479, at 36 (N.D. Cal. Apr. 28, 2014) (finding unique ID alone not PII but context could render identification of specific person); *see, e.g.*, Robinson v. Disney Online, 152 F. Supp. 3d 176, 178 (S.D.N.Y. 2015) (recognizing there must be some limitation on what information qualifies as PII). While the court found that disclosures to third-party data analytics companies of the encrypted serial number of the digital device and viewing history would generally constitute a VPPA claim, here, the information itself did not rise to the level of PII required, i.e. identifying a "particular person" as having accessed "specific video materials." *Robinson*, 152 F. Supp. 3d at 183. *See* Ellis v. Cartoon Network, Inc., 803 F.3d 1251, 1257 (11th Cir. 2015) (deciding merely downloading free mobile app does not deem consumer a "subscriber"); Eichenberger v. ESPN, Inc., No. C14-463 TSZ, 2015 U.S. Dist. LEXIS 157106, at *PINCITE (W.D. Wash. May 7, 2015) (dismissing plaintiff's complaint with prejudice where plaintiff failed to allege defendant disclosed PII); *but see Yershov*, 820 F.3d at 489 (applying VPPA where static identifiers could "theoretically" permit company to identify viewer).

[80] *See Nickelodeon*, 827 F.3d at 284-90 (interpreting intent of PII under VPPA). The court focused heavily on Congress's decision to retain the 1988 definition of PII under VPPA when it recently revisited the law, leaving it almost untouched nearly thirty years later, signifying its direct intent to keep the law intact. *Id.* at 288. Additionally, the court justified its fundamental disagreement with *Yersho*v on the basis that the First Circuit merely believed that "GPS coordinates contain more power to identify a specific person than, in our view, an IP address, a device identifier, or a browser fingerprint." *Id.* at 289. Further, the court highlighted this quote from *Yershov*: "there is certainly a point at which the linkage of information to identity becomes too uncertain, or too dependent on too much yet-to-be-done, or unforeseeable detective work" to trigger liability under this statute. *Id.*

[81] *See id.* (highlighting reasoning of court).

[82] *See* Perry v. CNN, Inc., 854 F.3d 1336, 1339 (11th Cir. 2017) (finding plaintiff was not subscriber by merely obtaining the channel on TV even though he had standing); *see also* Brian Amaral, *CNN Viewer Isn't CNN Subscriber, Network Tells 11th Circ.,* LAW360 (Sept. 2, 2016), https://www.law360.com/articles/836214 (identifying *Yershov* as "outlier lacking any meaningful limiting principle" in permitting random device identifiers to qualify as PII); Erin Mendillo, *Massachusetts Supreme Court Rules ZIP Codes Are Definitely "Personal Identification Information*," PRIVACY LAW BLOG (Apr. 1, 2013), https://privacylaw.proskauer.com/2013/04/articles/data-privacy-laws/massachusetts-supreme-court-rules-zip-codes-are-definitely-personal-identification-information/ (interpreting PII under state law to include ZIP code, giving consumer right to sue). In *Tyler v. Michael's Store Inc.*, the

exception to the general rule, *Yershov v. Gannett Satellite Info. Network, Inc*. recently analyzed VPPA.[83] In *Yershov*, Gannett, an international media company that produces news and entertainment programming, offered its content via a free mobile app without obtaining the user's consent to disclose any information to third parties.[84] Each time a user viewed a video clip, Gannett sent Adobe (an unrelated third party) the title of the video, the GPS coordinates of the device at the time of the viewing, and certain identifiers associated with the user's device, such as its unique phone ID.[85] As the third party, Adobe compiled this behavioral information by creating user profiles containing "user's name, address, age, income, household structure and online navigation and transactional history" and sold it to its clients through data analytics and online marketing services.[86] Such profiles provided Adobe and its paying clients with "intimate" information that "may reveal, or help create inferences about a user's traits and preferences to accurately target advertisements to them."[87] In reaching its decision that the disclosed information qualified as PII under VPPA, the First Circuit highlighted Congress' intention in enacting the statute in the first place: to "preserve personal privacy" and in turn, went as far as to create a civil remedy for precisely these disclosures.[88] Next, the court answered the consumer question by determining that plaintiff was a "subscriber" because the court reasoned that Congress intended to limit the term "subscriber" by narrowing the definition to require some form of payment, and it would not have made a distinction between "purchasers" and "renters" in preserving the 1998 definition, which clearly showed the same level of protection as it originally

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SJC reasoned regardless of whether ZIP code was explicitly defined in the statute as PII, it could be used to obtain such information, thus giving rise to a violation of Mass. Gen. Laws, ch. 93, § 105(a). *Id.*; s*ee also* Tyler v. Michaels Stores, Inc., 492, 984 N.E.2d 737, 746 (2013) (finding injuries where merchant uses PII by sending unwanted marketing materials or selling for profit). *But see* Kashmir Hill, *A Ridiculous California Court Ruling: Zip Codes are Private*, FORBES (Feb. 11, 2011, 12:52 PM), https://www.forbes.com/sites/kashmirhill/2011/02/11/a-ridiculous-california-court-ruling-zip-codes-are-private/ (highlighting how easy it is for online retailers to target customers through cookies).

[83] *See Yershov*, 820 F.3d at 489 (providing background on plaintiffs' allegations).

[84] *See id.* (highlighting how company failed to obtain consent).

[85] *See id.* (explaining type of information provided to Adobe).

[86] *See id.* at 485 (explaining how Adobe used device ID). Having the unique phone ID allowed Adobe to "identify and track specific users across multiple electronic devices, applications and services that a consumer may use." *Id.*

[87] *See id.* (highlighting way in which Adobe analyzed data). Additionally, the court hypothesized that the link between the GPS address and device identifier, as alleged in the complaint, were enough to connect to a certain person by name, address, or phone number. *Id.* Using the example of Gannett disclosing 146 videos viewed from two sets of specified GPS coordinates, the court ruled that it led to the reasonable and foreseeable inference that the two addresses were a home and work address of the person. *Id.* at 486.

[88] *See id.* at 485-86 (reasoning that Congress intended language to be broad and not exclusive).

intended to grant.[89] The vast contrast between the two recent cases provides certainty on one aspect: the future remains unclear.[90] While PII is at the center of today's privacy law debates, it has no uniform definition in the U.S.[91] Although there are arguments that significant regulation is necessary to create clearer boundaries of the law, it has not been addressed by the Supreme Court nor Congress through an all-encompassing federal law.[92]

B. Interpretation of Privacy Laws in the E.U.

According to a 2015 CJEU ruling, under the new general requirements of the GDPR, each member state will be equipped with its own DPA, enforcing a consistent "one-stop-shop" law for greater conformity with the GDPR.[93] Immediately following the *Weltimmo* holding, the CJEU invalidated the Safe Harbor provisions between the U.S. and E.U., which served as a simpler, legal way for roughly 4,500 businesses to conduct data transfers.[94] It is unknown whether the GDPR will replace the Safe Harbor provisions entirely or evolve with them, which creates uncertainty with how this will affect the U.S.'s contradicting legal framework.[95]

U.S. based ad tech companies are reasonably fearful that their businesses are at risk of being frozen out of the European market and replaced by E.U. competitors.[96] This fear is due to requirements to obtain

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[89] *See Yershov*, 820 F.3d at 487-88 ("Congress itself, in 2012, considered the impact of the VPPA on the electronic distribution of videos and chose only to make consent easier obtain, rather than limiting the reach of the act in absence of consent.").

[90] *See* Paul Schwartz & Daniel Solove, *The PII Problem: Privacy and a New Concept of PII*, 86 N.Y.U.L. REV. 1814, 1815 (2011) (developing new PII model protecting information based on different legal interests associated with each category). This article attempts to offer a more flexible approach to please both sides of the controversy by distinguishing between PII that relates to an "identified or identifiable person," treating the former with a substantial risk, and the latter with caution to avoid using tactically. *Id.*

[91] *See* Kat Sieniuc, *Justices Wont Hear Google Online Child-Tracking Case*, LAW360 (Jan. 9, 2017, 1:09 PM), https://www.law360.com/articles/878725/justices-won-t-hear-google-online-child-tracking-case (noting no uniform definition of PII in U.S.).

[92] *See id.* (discussing Supreme Court's denial of certiorari in *Nickelodeon* in calling for judicial clarity).

[93] *See Schrems v. Data Protection Commissioner*, *supra* note 66 (finding companies must comply with local data laws if they have "establishments" in E.U state). Each state will have its own DPA, tasked with enforcing the uniform law and decisions of the GDPR along with consulting with other DPA's across Europe and ensuring data subject' rights are secured by their availability of legal redress. *Id.*

[94] *See id.* (discussing effect of *Weltimmo* on State Harbor provisions).

[95] *See id.* (referring to uncertainty of GDPR effect on Safe Harbor provisions).

[96] *See* Seb Joseph, *GDPR is coming, and many U.S. ad tech firms aren't ready*, DIGDAY (Sept. 12, 2017), https://digiday.com/marketing/gdpr-coming-many-u-s-ad-tech-firms-arent-ready/ (explaining challenges ad companies face when obtaining specific consent to use individuals' data). "[A]dvertisers won't be able to market to individuals without obtaining specific consent to use their

direct consensual relationships with individuals or not interact with them at all, which U.S. companies were previously not required to comply with, while reaping the monetary benefits.[97] "[T]he GDPR applies directly to any entity that processes personal data about E.U. residents in connection with (i) the offer of goods or services in the E.U.; or (2) [sic] the monitoring of behavior in the E.U."[98] Thus, the GDPR's framework of personally identifiable information will apply, expanding personal data to include unique online identifiers, such as IP addresses, mobile device identifiers, and individual's geo-location data, while extending its jurisdictional reach to include a digital presence and reference to E.U. individuals, currencies accepted, and languages used.[99] The GDPR requires companies to fundamentally change *how* they collect, manage, and store consumer data of E.U. citizens.[100] In practice, U.S. companies will have to store E.U. individuals' information on servers located in the E.U. and if they desire to access servers located in the U.S., the companies are required to comply with stricter standards, including notifying customers within 72 hours of a breach, fulfilling customer requests to delete their records entirely, and obtaining initial customer consent.[101] Actually enforcing the GDPR on U.S. based companies will be accomplished through authority, jurisprudence, assistance from international law, unilateral trade agreements, local due process, and geographical location of the companies.[102] For U.S. companies with "establishments" or physical presences in the E.U., the GDPR can directly

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data. It won't matter whether a company's servers are held in Israel, India or the U.S. — if it is storing the data of an EU citizen, it must abide by the General Data Protection Regulation or face fines." *Id.*

[97] *See id.*; *see also* Yasmeen Abutaleb and Julia Fioretti, *Smaller U.S. businesses fear freeze from EU privacy ruling*, REUTERS (Oct. 7, 2015, 9:43 PM), https://www.reuters.com/article/us-eu-dataprotection/smaller-u-s-businesses-fear-freeze-from-eu-privacy-ruling-idUSKCN0S12TL20151008 (discussing U.S. concerns with court ruling).

[98] *See* Jonathan Millard and Tyler Newby, *EU's General Data Protection Regulation: Sweeping Changes Coming to European and U.S. Companies*, AMERICAN BAR ASSOCIATION (May 23, 2016), http://apps.americanbar.org/litigation/committees/technology/articles/spring2016-0516-eu-general-data-protection-regulation.html (measuring scope of EU's reach by digital, not physical, jurisdiction). As a result, the EU will now be able to hold companies accountable for not complying even if they were previously outside the jurisdictional scope. *Id.*

[99] *See id.* (explaining how companies will need to change due to GDPR).

[100] *See id.* (showing how GDPR forces companies to change data collection methods).

[101] *See id.* (providing examples of changes companies will be required to make).

[102] *See* AJ Dellinger, *EU's GDPR: What Will American Companies Have To Do To Comply*, INTERNATIONAL BUSINESS TIMES (Aug. 1, 2017, 11:38 AM), http://www.ibtimes.com/eus-gdpr-what-will-american-companies-have-do-comply-2573002 (recommending early implementation strategies to avoid high risk of noncompliance); *see also* Aaron W., *How the EU can fine US companies for violating the GDPR*, SPICEWORKS (Jun. 21, 2017, 12:11 PM), https://community.spiceworks.com/topic/2007530-how-the-eu-can-fine-us-companies-for-violating-gdpr (explaining how E.U. has authority to enforce GDPR on U.S. companies initially).

enforce laws against them, while U.S. companies without a physical presence, will be designated a representative in the E.U. by the GDPR to investigate and fine companies that are "knowingly, and actively, conducting business in the E.U."[103]

C. Implementing the GDPR

"Any business that holds data (including IP addresses and online browsing history) on an EU citizen must be able to show where this information resides and that it was captured with the explicit consent of the individual in question."[104] Companies will be incentivized to comply due to threat of tremendous monetary fines and potential negative reputational impact on their brand name.[105] U.S. companies have acknowledged that the GDPR will be expensive, but they believe it is a "worthwhile investment."[106] In accordance with this, two-thirds plan to commit to following the GDPR's principles and further invest in the E.U, while less than one third of companies plan to reduce their E.U. presence.[107] "Companies that lead with transparency have the best chance of continuing to engage with online consumers based in Europe."[108]

An example of changes made by the GDPR is that it changes the consent standard, to requiring it "to be freely given, specific, informed and unambiguous, with controllers using 'clear and plain' legal language that is 'clearly distinguishable from other matters.'"[109] The previous standard required a company to ensure a data subject gave consent before submitting

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[103] *See* Aaron W., *How the EU can fine US companies for violating the GDPR* (clarifying E.U. Regulators relying on international law to issue fines against noncompliant U.S. companies); *see also* Colin Truran, *GDPR Compliance Requirements and Implications for US Companies*, QUEST (Aug. 31, 2017), https://www.quest.com/community/b/en/posts/gdpr-compliance-requirements-and-implications-for-us-companies (answering how GDPR can actually in practice impose penalties on U.S. based companies).

[104] *See* Clark Boyd, *GDPR: How US businesses are preparing*, CLICKZ (Jan. 2, 2018), https://www.clickz.com/gdpr-us-businesses-preparing/203180/ (comparing U.S. and E.U. laws and tensions of new GDPR laws).

[105] *See id.* (explaining incentives to comply with GDPR).

[106] *See id.* (showing how U.S. companies' willingness to comply with GDPR).

[107] *See id.* (illustrating a reduction of U.S. business in E.U.)*; see also* Mike O'Brien, *GDPR: Increased transparency and increased trust*, CLICKZ (Dec. 4, 2017), https://www.clickz.com/gdpr-increased-transparency-increased-trust/203390/ (arguing GDPR provides invaluable opportunity to rebuild consumers trust).

[108] *See* Mimi An, *The General Data Protection Regulation is Coming*, HUBSPOT (Dec. 18, 2018 11:00 a.m.), https://research.hubspot.com/general-data-protection-regulation?_ga=2.14538800.60321635.1521054985-800953669.1494012600 (summarizing survey results regarding opinions on GDPR and preparation of other companies).

[109] *See GDPR Compliance*, *supra* note 60 (discussing new consent standard).

any personal information.[110] Under the 1995 Directive, consent could be inferred, leaving open the possibility for opt-out provisions to be inferred from silence, pre-ticked boxes, and other similar tactics, while customers under the GDPR must provide explicit consent.[111]

IV. ANALYSIS

Within its Bill of Rights or other federal statutes, the U.S. does not explicitly provide that PII is protected under rights of privacy and is often criticized for its all-encompassing federal data privacy law, while continuing to rely on sector-specific rules without one controlling authority.[112] Further, in the U.S., different state legislatures and courts have implemented varying privacy rights through legislation or by recognizing privacy protections in their respective state constitutions, while some choose to not adopt any protections at all, adding to the lack of uniformity.[113] To the contrary, E.U. laws are clearer regarding implementation, while the U.S.'s system is complicated due to the incorporation of sector laws, state laws, and FTC regulations.[114] The Supreme Court's continued reluctance to clarify the

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[110] *See id.* (discussing Hubspot's plan to comply with GDPR and to provide guidance to others). HubSpot's legal team prepared for the May 2018 date by ensuring legal documents such as Customer Terms of Service, Data Processing Agreements, and Privacy Policies, are updated to reflect mandatory GDPR changes. *Id.* Also, companies are required to make consumers aware of what they are consenting to and inform them of their right to withdraw consent in advance. *Id.*

[111] *See id.* (discussing fundamental change in consent to use PII). "Essentially, your consumer cannot be forced into consent, or be unaware that they are consenting . . . ." *Id.*

[112] *See* Lee, *supra* note 50 (summarizing key differences between E.U. and U.S.). Both the 1995 Directive and the GDPR apply to all member-states and types of sectors within Europe. *Id.* On the other hand, the 1995 Directive and the GDPR only apply to U.S.'s sector-specific laws, such as HIPPA, rules only applicable to the financial sector, or certain laws regarding specific risk groups, such as children, whom are protected under COPPA. *Id.*

[113] *See id.* (explaining differences between states). One notable example is the California Online Privacy Protection Act of 2003, which states that the right to privacy is enshrined in the state of California's constitution. *Id.* Similarly, Massachusetts has positioned itself to follow this same stringent standard; also, a large amount of U.S. companies are based out of these two states with stricter standards. *Id.*

[114] *See id.* (noting difficulty for businesses to apply U.S. privacy laws due to multiple controlling agencies). The FTC regulates and enforces trade on a federal level in the U.S and pursues businesses that engage in unfair or deceptive practices relative to private data. *Id.* The FTC will seek consent decrees to stop those businesses' conduct. *Id.* Typically, businesses will settle with the FTC and pay significant sums of money while also being subject to 20-year audits by the FTC. *Id.* On top of the federal regulations, there are sector specific rules which are regulated by specific commissions, such as privacy breaches in the communication sector. *Id.* At the state level, legislatures typically pass a set of laws regarding data breaches and collection of PII that are regulated by the Attorney General, who may bring an action against a company on behalf of state consumers. *Id.* At the consumer level, groups of consumers that are harmed by a business's wrongdoing can collectively bring an action against that business. *Id.* Thus, due to the possibility of class action lawsuits and the high probability of damages, most companies are highly

definition of PII as it pertains to online tracking activity will lead to uncertainty in the law for consumers and providers alike.[115]

A. Personal Information vs. Linkable Information

Companies must understand that linkable information is a "term to define IP addresses, MAC addresses, and other device identifiers which identify **a thing**, not a **person**, but can be linked to an individual depending on what information is obtained."[116] Linkable information becomes PII when it is, or can reasonably be, associated or linked with an identifiable individual in other business records.[117] Thus, companies using such information should ensure that their privacy policies clearly define what they constitute as personal information – opting to include IP and Mac addresses as personal information and ensure that the policy and systems are up to standards.[118] This becomes exceedingly challenging when companies collect this information from European consumers and must work closely with their attorneys and IT support groups to fully comply with the GDPR's definitions.[119]

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incentivized to comply. *Id.* However, at the same time, these companies do not have a consistent standard to follow. *Id.*; *see also* Lambert, *supra* note 61 (suggesting companies monitor IP and Mac identifiers if collecting information from European customers).

[115] *See Nickelodeon*, 827 F.3d at 272-73 (lacking uniform federal law and expansion of scope of privacy). In denying certiorari, the Supreme Court affirmed the Third Circuit's dismissal of claims regarding federal video privacy protections under the 1988 statute, which prohibits videotape service providers from knowingly disclosing customers' personally identifiable information, finding that it is not intended to reach the conduct of Google and Viacom. *Id.* The Third Circuit found that links for viewed videos and "static digital identifiers," such as unique device identifiers or internet protocol addresses, were not considered PII under the statute. *Id.*

[116] *See* Lambert, *supra* note 61 (suggesting strategies for businesses utilizing PII).

[117] *See id.* (offering examples of when information is PII). Example of linkable information includes a driver's license and a license plate. *Id.* A driver's license is considered personal information because it has your name, photo, address, social security number, and other information that identifies you specifically. *Id.* On the other hand, a license plate identifies a piece of property, which is your car. *Id.* As a result, a license plate does not contain personal information on its own, but is linkable information. *Id.* However, once a company is able to combine a license plate with a driver's license, the license plate becomes personal information and should be treated as such. *Id.* Similarly, a phone number is a thing and therefore is linkable information; however, if that phone number is linked to a recording of one's voice, the phone number becomes personal information. *Id.* Lastly, an IP address in a company's server log alone is solely linkable information not associated with a particular person, and therefore, is not personal information. *Id.* However, once an IP address becomes part of an electronic signature record where the IP address is collected and stored alongside a person's name, time, and date of acceptance, it becomes personal information that is liked to a specific person. *Id.*

[118] *See id.* (stating failure to comply gives rise to investigation and potential litigation).

[119] *See id.* (depicting challenges and differentiating requirements in E.U. versus U.S.).

U.S. Federal Courts have conflicting views regarding what constitutes PII; the Third Circuit held that the links to videos viewed were not PII while the First Circuit held that the "USA app" violated the VPPA by recording and sending information to Adobe Systems Inc. which provided the videos watched by the plaintiff.[120] One argument supporting qualifying IP and similar identifiers is that that PII relies on the assumption that if linkable information is, or reasonably can be, associated with an identifiable individual, it triggers PII protections.[121] The difference between the FTC's view versus a company such as Google's turns on the latter's inclusion of a "reasonableness standard" compared to the former's view that privacy protections are automatically triggered when PII "can be *reasonably linked* to a particular person. . . ."[122] This simply suggests that if the identifier can be associated with an identifiable individual, it should be considered PII.[123]

B. Necessity of Compliance

The FTC and other U.S. government authorities have a strong interest in complying with the GDPR in order to protect their own ability to trade, uphold a competitive trading stance, and uphold moral obligations to U.S. citizens as other countries around the world begin to adopt similarly stringent policies.[124] Practically speaking, the U.S. will certainly continue to be pressured to adhere to the GDPR requirements if they desire to continue business relations with not only the European countries, but with E.U. citizens across the world.[125] Nonetheless, the implementation of the GDPR and its key changes will be burdensome because it requires a new operational

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[120] *See id.* (providing two conflicting opinions by federal courts).

[121] *See* Lambert, *supra* note 61 (outlining straight forward argument providing understanding of what is identifiable information).

[122] *See id.* (highlighting varying understandings between company and federal government).

[123] *See id.* (referring to stricter standards followed by companies).

[124] *See* Truran, *supra* note 103 (stressing companies must adhere to GDPR unless they are certain no data regarding E.U. citizens utilized). The GDPR is increasingly relied upon as the standard model by countries seeking to impose fines or penalties on non-E.U. based companies through local data protection regulations and the implementation of DPAs. *Id.* However, in the U.S., where there is not a DPA, enforcement will come through the closest equivalent - the FTC. *Id.*

[125] S*ee* Shearer, *supra* note 26 (explaining how two models are in direct conflict).

> The US has, since before the year 2000, been decreasing protections of non-US citizens from the activities of US companies, and ever-increasing intrusion by the NSA and other US organisations. The EU has, over the same period, decided to base its economic future around giving its citizens reason to trust online markets, and has focused that trust on strict controls on handling personal data. These two things are totally in conflict.

Id.

practice and protocol regarding collecting, maintaining, and handling of E.U. citizens' information, which experts foresee as ultimately increasing the existing divide due to push back from U.S. companies.[126] In addition to the confusion as to whether or not the GDPR even applies to a specific company or how it will be enforced, a chaotic barrier will likely be created as companies may avoid them in full by opting to not do business with the E.U. at all rather than risk failing to comply.[127] This regulation can negatively impact the E.U.-U.S. business relationships and the growing consumer demand of seamless transactions that may not be permitted under the GDPR.[128]

C. Benefits of Compliance

However, companies can use the GDPR to rebuild any existing lost sense of trust with their consumers through transparency.[129] One study found that 56% of consumers are under the impression that brands collect their data without consent and would prefer more transparency; another study found that 75% of consumers are willing to share their data if they trust the brand and 80% are willing to do so in exchange for special offers or benefits, such as reward points or personalized recommendations.[130] Ultimately, the GDPR provides consumers with the power to control how companies and marketers use and store their data, while presenting companies with an opportunity to

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[126] *See* Dellinger, *supra* note 102 (fearing clash of two different standards increases barrier and highlights differences rather than unifying). Various businesses in the U.S., especially smaller sized organizations, may not even be aware that they are subject to the GDPR and will not have begun the immensely complicated process of complying, inclusive of integrating new systems, separating data, and educating employees. *Id.*

[127] *See id.* (effectuating reality of GDPR).

[128] *See id.* (arguing GDPR may not be most balanced model in practice). Experts explain that consumer demand to remove "friction" in transactions resulted in "one-click" checkouts online and has increased quick functional tools that may not be in compliance with the GDPR's requirement of explicit consent, as the company would be storing individuals' information to immediately recall it for them. *Id.* In addition to the demand of a "seamless" transaction, individuals themselves are willingly sharing immense volumes of data about themselves. *Id.* The following sentence is incredibly long and complex, I began to try and edit, but I think you are better off breaking it up into a few sentences. Practical challenges of implementing the GDPR in the U.S. include training employees of all levels, high costs of implementation, lack of awareness, checkpoints, and guidance; difficulty in converting data-giants like Facebook and Google that already allow vast amounts of publicly accessible information, pushback regarding the E.U.'s actual ability to enforce the sanctions, will be actually able to enforce these sanctions, and practical problems in obtaining actual consent, especially from minors, due to the difficulty in determining whether the actual card holder was also the purchaser. *Id.* "Only time will tell if GDPR provides the correct balance of privacy and convenience or if it will create too much of a burden for companies to comply." *Id.*

[129] *See* O'Brien, *supra* note 107 (explaining majority of people believe advertisers lack integrity).

[130] *See id.* (presenting statistics and arguing in support of benefits of GDPR).

reestablish trust.[131] Proponents argue that the GDPR's data-driven foundation will redefine marketing by requiring marketers to "legally justify every bit of data they're holding," which in turn will end unpopular marketing tactics and establish trust between marketers and consumers.[132]

Companies anticipate that they will have to change security protocols and alter how they collect customer data to use as well as the length of time they can store the data.[133] Most companies are planning more social media marketing and content marketing, while shying away from retargeting ads, which also require their customers to log in for services.[134]

V. CONCLUSION

In the absence of a definitive Supreme Court ruling, the application of the VPPA, COPPA, and the definitions of personally identifiable information along with its privacy protections will continue to evolve in the lower courts, resulting in further circuit splits. Although the U.S. courts are split, the additional implications of the GDPR will require companies to implement strategies of compliance and ensure they have systems in place that enable them to adhere to the E.U.'s data holding and consent protocols, prior to being subject to fines or negative impacts on their reputations. Further, the California Act, though less comprehensive than the GDPR, will have a sweeping nature after its implementation in 2020, and will require companies to expend a great deal of efforts to achieve compliance, even reaching companies outside its state lines. Thus, businesses should be cautious when collecting IP addresses due to the current circuit splits and variation that exists between sector and targeted groups. Lastly, businesses must continue being GDPR compliant, as well as prepare to implement strong compliance programs suitable for the California Act's nuances before their reputations and profits are jeopardized.

Aleksandra Popova

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[131] *See id.* (balancing high costs and impacts of GDPR with benefits and opportunities companies may derive).

[132] *See id.* (explaining GDPR removes opt-ins; long jargon-filled terms and conditions; and uninvited email list).

[133] *See* An, *supra* note 108 (describing access companies will have to alter).

[134] *See id.* (addressing new marketing tactics to avoid data regulations).

CONTRACT LAW/PROPERTY LAW - JUST TEXT THE CONTRACT OVER – *ST. JOHN'S HOLDINGS, LLC V. TWO ELECS., LLC*, NO. 16 MISC 000090 RBF, 2016 WL 6191911 (MASS. LAND CT. OCT. 24, 2016).

It is a well-established legal principle that a contract contains promises, for which the failure to adhere to those promises, could result in a remedy under various forms of the law for the aggrieved party.[1] As contracts became a part of business dealings, the extent of this principle found its way into transactions for the sale of goods and property.[2] In recent years, courts have found binding contracts within the email exchanges of parties involved in contract dealings.[3] In *St. John's Holdings, LLC v. Two Electronics, LLC*,

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[1] *See* RESTATEMENT (SECOND) OF CONTRACTS: CONTRACT DEFINED § 1 (1981) (providing general definition of contract). "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." *Id.*

[2] *See* UNIFORM COMMERCIAL CODE § 2-204 (1952) (stating statutory elements of contracts for sale of goods). U.C.C. § 2-204 states:

> (1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.
> (2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.
> (3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

Id.; *see also* Aaron Hall, *The Uniform Commercial Code: What it Means to Your Business*, AARON HALL, https://aaronhall.com/uniform-commercial-code-your-business/ (last visited Mar. 14, 2019) (providing example of how UCC is involved with property transactions). The example provides:

> If a business is selling you property, you should check to see if there is a filed UCC form showing a secured interest in the property before you sign a contract. Also, in the contract, you may want the seller to represent that there is no secured interest in the property.

Id.

[3] *See* Forcelli v. Gelco Corp., 972 N.Y.S.2d 570, 575 (N.Y. App. Div. 2013) (finding valid written settlement in email communications). The court stated:

> Morever [sic], given the now widespread use of email as a form of written communication in both personal and business affairs, it would be unreasonable to conclude that email messages are incapable of conforming to the criteria of CPLR 2104 simply because they cannot be physically signed in a traditional fashion….

the court held that text messages had the capability of creating binding contracts.[4] Finding that the text messages were signed in a previous memorandum and order, the *St. John's Holdings* court held that the Statute of Frauds was satisfied even when a sizeable portion of the contractual dealings were handled over text messages.[5]

St. John's Holdings ("SJH") expressed interest in purchasing the Subject Property owned by Two Electronics through their real estate broker.[6] Two Electronics' broker received an email containing a "Binding Letter of Intent" from the broker representing SJH to purchase the Subject Property.[7] SJH never signed the first letter and when it sent another letter of intent via email, it failed to sign again.[8] The manager of Two Electronics spoke with his broker to make revisions to the letter of intent, and afterwards sent an email to SJH's broker stating they were ready to proceed, but there were a few issues.[9] The next day, SJH's broker sent an email with the unsigned Final Letter of Intent to Two Electronics' broker, but Two Electronics' manager did not review the document because SJH had again failed to sign.[10]

Id.

[4] *See* St. John's Holdings, LLC v. Two Elecs., LLC, No. 16 MISC 000090 RBF, 2016 WL 6191911, at *8 (Mass. Land Ct. Oct. 24, 2016), *aff'd*, 94 N.E.3d 880 (Mass. App. Ct. 2017) (finding text messages satisfy Statute of Frauds).

[5] *See id.* at *8 (giving court's in-depth reasoning within memorandum). "[T]he Court finds that the February 3rd text message is a writing and that, read in the context of exchanges between the parties, it contains sufficient terms to state a binding contract between SJH and Two Electronics." *Id.*; *see also* Seth Heyman, *Can Texting Create a Binding Contract?*, UPCOUNSEL BLOG, https://www.upcounsel.com/blog/can-texting-create-binding-contract (last visited Apr. 2, 2018) (explaining court's findings).

[6] *See St. John's Holdings, LLC*, 2016 WL 1460477, at *3 (summarizing purpose of contractual dealing). Piccione was the manager of Two Electronics, McDonald was the manager of SJH, Cefalo acted as the broker for SJH, and Barry acted as the broker for Two Electronics. *Id.* SJH offered $3,232,000. *Id.*

[7] *See id.* (describing first Letter of Intent). On January 27, 2016, Cefalo ("SJH") sent a Letter of Intent to purchase the Subject Property. *Id.* The letter also contained the deposit, due diligence period, and closing date. *Id.*

[8] *See id.* (illustrating first communications between parties). Piccione reviewed the initial terms and communicated revisions to Barry. *Id.* Two days later, on January 29, 2016, SJH sent a second letter to Two Electronics increasing the nonrefundable deposit from $128,000 to $168,000, but did not sign it. *Id.* Piccione reviewed and again communicated to Barry about terms in the letter. *Id.*

[9] *See id.* at *4 (explaining Two Electronics' issues with second intent letter). Barry sent an email to SJH stating that Piccione preferred three weeks for a due diligence period instead of four, no thirty-day extension, and an applied penalty to the deal if the $200,000 is not paid at the end of forty-eight months. *Id.*

[10] *See id.* (giving details of final intent letter). The only change within the final letter was a reduction of the date for the $200,000 amount from sixty months to forty-eight months post-closing. *Id.* None of the issues raised by Piccione in the second intent letter review were raised in SJH's email. *Id.*

The same day SJH sent the Final Letter of Intent, a second potential buyer sent Two Electronics an offer to purchase the Subject Property, but for a smaller amount.[11] The following day, Two Electronics' broker sent SJH's broker a text message explaining the normal practice of signing intent letters and asking if SJH could sign and return it.[12] SJH signed multiple copies of the Final Letter of Intent and provided a deposit check for their broker to proceed; SJH's broker notified Two Electronics' broker through a text message.[13] While both parties' brokers conducted a physical meeting to exchange documents, Two Electronics' manager accepted the offer of the third party by completing a written purchase and sale agreement.[14] SJH's broker sent a text message to Two Electronics' broker asking about the status of their negotiation, but Two Electronics notified him that they refused to execute the Letter of Intent.[15]

SJH brought an action against Two Electronics claiming that their rights as a buyer were violated because Two Electronics failed to proceed with the Letter of Intent to purchase the Subject Property.[16] SJH claimed that the text messages and emails were evidence of an agreement between the parties and thus, satisfied the requirements for a valid contract under the Statute of Frauds.[17] The court determined whether the parties simply conducted negotiations for the property or if they created an enforceable contract through electronic communications.[18]

The Statute of Frauds was first introduced into modern law in 1677 by the English Parliament to prevent fraud in contractual dealings.[19]

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[11] *See St. John's Holdings, LLC*, 2016 WL 1460477, at *4 (detailing third party's involvement). The third party offered $3,080,000. *Id.; see also* Georgette C. Poindexter, *Letters of Intent in Commercial Real Estate Leases*, ALI CLE (July 25, 2007), available at http://files.ali-cle.org/files/coursebooks/pdf/CN001_chapter_02.pdf (providing examples of importance and presence of intent letters in agreement litigations).

[12] *See id.* (discussing request for signed Letter of Intent).

[13] *See id.* (showing text message communication). "At 4:25 PM on February 3, 2016, Cefalo sent a text message to Barry stating: Tim, I have the signed LOI and check it is 424 [PM] where can I meet you?" *Id.*

[14] *See id.* at *4-5 (describing deal with third party).

[15] *See id.* (stating Piccione's reasons for refusing Final Letter of Intent). Barry attempted to set a meeting time for Piccione to sign the received letters, but Piccione notified Barry that another party had taken the deal. *Id.*

[16] *See St. John's Holdings, LLC*, 2016 WL 1460477, at *5 (stating cause of action).

[17] *See id.* (listing SJH's claim).

[18] *See id.* (providing issue of case).

[19] *See Charles II, 1677: An Act for prevention of Frauds and Perjuryes*, BRITISH HISTORY ONLINE, http://www.british-history.ac.uk/statutes-realm/vol5/pp839-842 (last visited Apr. 12, 2018) [hereinafter *Act for Prevention*] (discussing creation of Statute of Frauds). The statute reads:

> IV. No Action against Executors, upon a special Promise, or upon any Agreement, or Contract for Sale of Lands, unless Agreement, be in Writing and signed.

Effectively, it became the law for all territories that fell under English power in the late 1600s through the early 1700s.[20] The original 1677 Statute of Frauds expressly stated what type of dealings were to be governed by the statute, but while it aimed to be a form of protection against fraud, it failed to address dealings that would develop in the future.[21] While the original 1677 version has since been repealed and revised multiple times, the foundational aspect is still used throughout the English sphere of influence today.[22]

The United States used the 1677 Statute of Frauds as a model for its own legislation to protect against fraud in contractual dealings within the States.[23] Although the legislation was not adopted in whole, it was

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> And bee [sic] it further enacted by the authoritie [sic] aforesaid [t]hat from and after the said fower and twentyeth day of June noe [sic] Action shall be brought whereby to charge any Executor or Administrator upon any speciall [sic] promise to answere [sic] damages out, of his owne [sic] Estate or whereby to charge the Defendant upon any special [sic] promise to answere [sic] for the debt default or miscarriages of another person or to charge any person upon any agreement made upon consideration of Marriage or upon any Contract or Sale of Lands Tenements or Hereditaments or any Interest in or concerning them or upon any Agreement that is not to be performed within the space of one yeare [sic] from the, makeing [sic] thereof unlesse [sic] the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in Writeing [sic] and signed by the partie [sic] to be charged therewith or some other person thereunto by him lawfully authorized.

Id.

[20] *See* 72 AM. JUR. 2D *Statute of Frauds* § 2 (2018) (describing sphere of influence of English Parliament's Statute of Frauds). "The English statute became effective in the English colonies in this country at the same time it became effective in Great Britain, June 24, 1677." *Id.* (citing Kline v. Lightman, 221 A.2d 675 (Md. 1966)).

[21] *See Act for Prevention*, *supra* note 19 (listing contractual topics that statute protects).

[22] *See* Jonnette Watson Hamilton, *Two cases concerning the Statue of Frauds (1677, U.K.)*, ABLAW.CA (Feb. 26, 2008), https://ablawg.ca/wp-content/uploads/2009/09/blog_jwh_statuteoffrauds_abqb_feb2008.pdf (providing modern uses of UK version of Statute of Frauds).

> Most common law jurisdictions have adopted the provisions of the Statute of Frauds in some form which generally requires contracts for the sale of land to be in writing and signed by the party to be charged. In Alberta [Canada], it is the original English statute that is in force.

Id.

[23] *See* 72 AM. JUR. 2D *Statute of Frauds* § 1 (2018) (detailing influence of British Statute of Frauds on United States' version).

> The progenitor of statutes of frauds in this country was the English statute entitled 'An Act for the Prevention of Frauds and Perjuries.' Although it has no effect on statutes of frauds in this country, all provisions of the English Statute of Frauds, except those relating to land and guaranty contracts, were repealed by The Law Reform (Enforcement of Contracts) Act.

remodeled into different versions to serve each state respectively.[24] While the federal government has not adopted a Statute of Frauds, every state has enacted a statute governing the contractual dealings of parties involved in real estate and other matters.[25]

In Massachusetts, the state legislature enacted a Statute of Frauds governing contracts for the sale or dealings of land.[26] The goal of the Massachusetts version of the Statute of Frauds is to protect all real property transactions and ensure sufficient evidence is present within written documents for land dealings.[27] However, the judiciary has interpreted the statute and determined that oral contracts are an exception to the Massachusetts Statute of Frauds.[28]

Technological change in the form of communication forced the judiciary to decide whether electronic communication in contractual dealings satisfied the Statute of Frauds.[29] To help the courts make those

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Id.

[24] *See Statutes of Frauds - Part of English Act Repealed.*, 68 HARV. L. REV. 383, 384 (1954) (illustrating how various states used 1677 English Statute of Frauds in drafting legislation).

[25] *See* 72 AM. JUR. 2D *Statute of Frauds* § 2 (2018) (providing how states have governed contractual dealings).

[26] *See* MASS. GEN. LAWS ANN. ch. 259, § 1 (West 2018) (stating Massachusetts' contractual requirement for land dealings). The fourth portion of the statute states:

> No action shall be brought: . . . Fourth, Upon a contract for the sale of lands, tenements or hereditaments or of any interest in or concerning them . . . Unless the promise, contract or agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or by some person thereunto by him lawfully authorized.

Id.

[27] *See* Schwanbeck v. Fed.-Mogul Corp., 592 N.E.2d 1289, 1293 (Mass. 1992) (listing Massachusetts' objective in real estate dealings and protection); *see also* Blackstone Realty LLC v. FDIC, 244 F.3d 193, 198 (1st Cir. 2001) (stating Massachusetts' objective in real estate transactions). "Massachusetts cases suggest that the adequacy of descriptive language in an agreement is to be determined 'as between the parties' actually involved in the transaction." *Id.*

[28] *See* Hurtubise v. McPherson, 951 N.E.2d 994, 997 (Mass. App. Ct. 2011) (explaining judiciary's reasoning in applying Commonwealth's Statute of Frauds to oral contracts). The Appeals Court reasoned:

> Such an agreement [equitable qualification] 'may be specifically enforced notwithstanding failure to comply with the Statute of Frauds if it is established that the party seeking enforcement, *in reasonable reliance on the contract* and on the continuing assent of the party against whom enforcement is sought, *has so changed his position that injustice can be avoided only by specific enforcement.*'. . . The application of this equitable exception to the operation of the statute has depended upon the degree of reliance on the oral agreement by the party pursuing specific enforcement.

Id. (quoting RESTATEMENT (SECOND) OF CONTRACTS § 129 (1981)).

[29] *See* Shep Davidson, *Emails Can Satisfy the Signature Requirement of the Statute of Frauds*, BURNS & LEVINSON, http://www.in-houseadvisor.com/2012/07/13/emails-can-satisfy-the-

decisions, the Massachusetts legislature adopted the Uniform Electronic Transactions Act, which provided specifications on how to determine whether electronic signatures and contracts sufficiently met the requirements of the Statute of Frauds.[30] As emails became an active part of business dealings, courts held that emails could in fact create binding agreements between parties.[31] Presently, more people have become familiar with using text messages in the business world as a quick way to convey important information in a matter of seconds by pressing a few buttons.[32]

In *St. John's Holdings*, the issue before the court was whether the parties simply negotiated a transaction of the property or if their electronic communication created a binding and enforceable contract.[33] To address the main issue of whether an enforceable contract was formed, the court first had

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signature-requirement-of-the-statute-of-frauds/ (last visited Apr. 2, 2018) (illustrating court's challenge with advancing technology). The article explains:

> Quoting out of state authority, the Massachusetts Superior Court noted that the courts have 'not yet set forth rules of the road for the intersection between the seventeenth-century statute of frauds and twenty-first century electronic mail.' Calling the issue presented by the case one of first impression, the court stated that the Massachusetts Uniform Electronic Transactions Act ("MUETA"), was one attempt to provide those rules of the road to persons involved in real estate transactions.

Id. (quoting Feldberg v. Coxall, No. MICV201201649A, 2012 WL 3854947, at *6 (Mass. Super. Ct. May 22, 2012)); *see also* Brad Reid, *An Unsigned Email May Create a Contract*, HUFFINGTON POST (Feb. 16, 2018), https://www.huffingtonpost.com/brad-reid/an-unsigned-email-may-cre_b_14768022.html (stating Texas' present law on e-signature sufficiency); Liz Kemper, *Text Messages Can Be Writings for Statue of Frauds Purposes*, LINDLEY LAW OFFICE (Oct. 12, 2016), http://lindleylawoffice.com/blog/2016/10/12/text-messages-can-be-writings-for-statute-of-frauds-purposes/ (providing example of how court's ruling can affect future business dealings). "The Massachusetts court's ruling, while not addressing text messages entirely on their own, is a reminder that new technology will be incorporated into case law eventually and as long as these new methods conform to the requirements of the old, they are likely to be accepted, however slowly." *Id.*

[30] *See* F. Robert Allison, *Email and the Statute of Frauds in Massachusetts*, F. ROBERT ALLISON, http://frobertallison.com/email-and-the-statute-of-frauds-in-massachusetts/ (last visited Apr. 2, 2018) (explaining how electronic signatures are viewed under modern law in Massachusetts regarding binding contracts).

[31] *See id.* (detailing common perceptions of email use in contract dealings).

[32] *See* Lawrence Morales, II, *Symposium: The "Best Of" Litigation Update 2017: Discoverability and Admissibility of Electronic Evidence*, 79 ADVOC. 119, 126 (2017) (providing example of how text messages are viewed by Texas' legal community). The State Bar of Texas provides:

> Text messages have replaced many forms of communication, and for some reason, many individuals believe that text messages—and other forms of instant messaging—are private and will not be discovered in litigation. Of course, this belief is incorrect, and text messages are every bit discoverable as any other type of writing.

Id.

[33] *See St. John's Holdings, LLC*, 2016 WL 1460477, at *5 (stating issue considered by court).

to determine whether a contract was formed that satisfied the Statute of Frauds.[34] The court noted that traditional contract formation included an offer, acceptance, consideration, an agreement with sufficiently defined terms, and mutual intent to engage in a contractual dealing.[35]

While the court stated the traditional elements of a contract, the dynamic portion of the court's discussion dealt with whether the text messages exchanged by the parties' brokers constituted a valid writing under the Statute of Frauds.[36] The traditional definition of a writing involves intent and sufficient discussion over the essential terms of the proposed agreement, which are typically present in letters of intent.[37] The joint analysis of *Shattuck v. Klotzbach*[38] and *Feldberg v. Coxall*[39] paralleled the facts and the issue of whether a sufficient writing existed in *St. John's Holdings*. *Feldberg* and *Shattuck* addressed the sale of property and what constituted a sufficient electronic writing under the Statute of Frauds.[40] Ultimately, the court found that the text messages were sufficient writings under the Statute of Frauds due to the essential terms regarding the sale and purchase of the property that were discussed, and no changes were made except for the method of

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[34] *See id.* at *6 (detailing Statute of Fraud's requirement relative to real estate transactions).

[35] *See id.* at *5 (stating elements of valid contract). The court used the reasoning of the Supreme Judicial Court in *Situation Mgmt. Sys., Inc. v. Malouf, Inc.*, 724 N.E.2d 699 (Mass. 2000) to define the elements of an enforceable contract. *St. John's Holdings, LLC*, 2016 WL 1460477, at *5. Furthermore, the court noted that a "meeting of the minds" is still required to find a contractual agreement. *Id.*

[36] *See St. John's Holdings, LLC*, 2016 WL 1460477, at *6 (highlighting issue court focused on). The court reasoned that:

> Resolving this issue [of whether the February 3 text message satisfies the Statute of Frauds] requires determining whether (a) a text message can be a writing under the Statute of Frauds, (b) whether the alleged writing contains sufficiently complete terms and an intention to be bound by those terms, (c) whether the text message is signed, and (d) whether there is an offer and acceptance.

Id.

[37] *See St. John's Holdings, LLC*, 2016 WL 1460477, at *6 (explaining what court considered in determining whether a writing existed).

[38] No. 011109A, 2001 WL 1839720, at *3–4 (Mass. Super. Ct. Dec. 11, 2001).

[39] 2012 WL 3854947, at *6.

[40] *See St. John's Holdings, LLC*, 2016 WL 1460477, at *7 (describing facts of similar cases); *Feldberg*, 2012 WL 3854947, at *6 (acknowledging emails can satisfy Statute of Frauds). The *Shattuck* court held that "email messages exchanged between a prospective buyer and seller satisfied the Statute of Frauds" because "[t]he plaintiff-buyer and defendant-seller had engaged in negotiations concerning the sale of property through their attorneys that were conducted in person, by telephone, and email." *St. John's Holdings, LLC*, 2016 WL 1460477, at *7. Furthermore, the *Feldberg* court decided on "whether a series of emails between their [both parties] attorneys regarding the sale of property was sufficient to satisfy the Statute of Frauds" and held that the "transactions provided a reasonable and supportable response to the defense of Statute of Frauds." *Id.*

acceptance within the text messages.[41] Lastly, the court found that the vital text messages included a signature where previous texts had not.[42]

While some may disagree with the use of text messaging in business dealings, the undisputed facts of *St. John's Holdings* suggest that this form of communication is capable of becoming a norm in the business world.[43] First, the court properly analyzed the traditional elements of a contract and the requirement of present intent of both parties to enter into an agreement for the sale and purchase of land, which is the practice of other jurisdictions.[44] Next, the court provided an analysis of how a text message could meet the writing requirement of the Statute of Frauds by defining how each element was met.[45] Lastly, the court used detailed reasoning to find that the text message met the signature requirement under the Statute of Frauds, and that the decision aligned with the Uniform Electronic Transactions Act.[46]

By following the traditional elements of a contract, a party arguing that it was not their intent to perform a disputed action can easily be addressed by applying proven methods as to what the parties sought to do within their letters of intent and whether negotiations were no longer needed.[47] Also, by expressly reaffirming the Statute of Frauds requirement

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[41] *See St. John's Holdings, LLC*, 2016 WL 1460477, at *8 (discussing how court deemed that text messages were sufficient writings).

[42] *See id.* at *9 (emphasizing signature as vital element that led court to conclude text messages were sufficient writings).

[43] *See St. John's Holdings, LLC*, 2016 WL 1460477, at *1 ("The question raised by defendant's Special Motion to Dismiss is whether a text message, all too familiar to most teenagers and their parents, can constitute a writing sufficient under the Statute of Frauds to create an enforceable contract for the sale of land.").

[44] *See id.* at *8 (explaining court's use of traditional contract law elements).

[45] *See id.* at *6 (stating elements process used by court to find text as sufficient writing).

[46] *See* MASS. GEN. LAWS ANN. ch. 110G, § 7 (West 2018) (stating electronic signatures are enforceable); *see also St. John's Holdings, LLC*, 2016 WL 1460477, at *9 (discussing reasoning behind court's finding of text as sufficient writing). The court noted:

> A series of unsigned text messages between Cefalo and Barry followed over the next few days, which were briefer and less formal, requesting updates on the status of the executed Final LOI. These communications are evidence that each of the parties opted into electronic means to conduct their transaction. Typing their names at the end of certain messages containing material terms, but declining to do so for more informal discussions, is indicative that the parties chose to be bound by those signed communications.

St. John's Holdings, LLC, 2016 WL 1460477, at *9.

[47] *See* Poindexter, *Letters of Intent in Commercial Real Estate Leases*, ALI CLE (July 25, 2007), available at http://files.ali-cle.org/files/coursebooks/pdf/CN001_chapter_02.pdf (discussing presence of intent letters in agreement litigations). The author notes:

that a sale of land be evidenced in writing with the essential terms present, the court allowed the use of other forms of communication, specifically electronic, to be considered in meeting the requirements set forth by the statute.[48] Moreover, in discussing the use of the text message as a sufficient writing, the court set a standard for parties seeking to conduct land dealings to properly consider how they are signing land agreements.[49] This decision joins other jurisdictions' decisions in considering the sufficiency of e-signatures in electronic communications within business dealings.[50]

The finding that the text message amounted to a sufficiently signed writing will allow higher courts in various jurisdictions to begin routinely interpreting electronic communications as sufficient writings under the Statute of Frauds, assuming that all other requirements are met.[51] However, the decision creates a risk that text messages could expand beyond real property sales and into general business dealings, which could cause an increase in claims pertaining to agreements made over text messages.[52] Legal counsels are likely to advise caution as the use of text messages are likely to be subject to similar traditional analysis as used by the court in *St. John's Holding*.[53]

> One of the most common scenarios involves parties who negotiate a letter of intent but agree to later "formalize" this document. The intent to later formalize does not prevent the formation of a binding and enforceable contract. This is especially true when there is evidence that the parties view the execution of a formal contract as merely a convenient memorial of their agreement. However, evidence of preliminary negotiations or an agreement to enter into a binding contract in the future does not, alone, constitute a contract. For the contract to be enforceable it must appear that further negotiations are not required to work out important or essential terms.

Id. at 315.

[48] *See St. John's Holdings, LLC*, 2016 WL 1460477, at *6 (applying elements of Statute of Frauds to other forms of communications).

[49] *See id.* at *9 (stating typed name at end of electronic message is evidence of intent); *see also* MASS. GEN. LAWS ANN. ch. 110G, § 7 (West 2018) ("If a law requires a signature, an electronic signature satisfies the law."); MASS. GEN. LAWS ANN. ch. 110G, § 9 (West 2018) ("The effect of an electronic record or electronic signature attributed to a person under subsection (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law."); Ovsepian, *supra* note 43, at 53 ("That extra step of typing a name at the end of an email highlights the writer's intent to authenticate the email.").

[50] *See* Reid, *supra* note 29 (discussing Texas law addressing e-signature sufficiency); *see also* Brecher, *supra* note 44 (stating how many states, including New Jersey, have adopted Uniform Electronic Transactions Act).

[51] *See* Ovsepian, *supra* note 43, at 54 (stating that electronic communications should constitute sufficient writings when identification of parties is met).

[52] *See* Kemper, *supra* note 29 (discussing legal effect on future business dealings).

[53] *See* Heyman, *supra* note 5 (stating cautionary example of how to proceed when involving text messaging in business dealings).

The court's use of the traditional elements of contract law and the Statute of Frauds led to a fair and accurate decision. In applying those traditional elements, the court was able to address how new communications technology should be considered in light of long-standing precedent. The court prevented major changes to existing law and provided modern approaches in applying the law to future communication methods. Furthermore, the court used emails as an example of how text messages should be viewed in the context of land dealings. The court ruled accurately and has implemented a fair and firm ruling that many jurisdictions should follow.

Darius Brown

CIVIL RIGHTS—MEDICAL MARIJUANA RECOGNIZED AS FACIALLY REASONABLE ACCOMMODATION UNDER HANDICAP DISCRIMINATION CLAIM IN MASSACHUSETTS—*BARBUTO V. ADVANTAGE SALES AND MKTG., LLC*, 78 N.E.3D 40 (MASS. 2017).

Despite being outlawed by federal law, medical marijuana has gained increasing recognition for its medical benefits, as evidenced by the consistent rise of state statutes authorizing the use of medical marijuana for qualifying patients.[1] Massachusetts has followed this legislative trend, and in 2012, voters approved the Medical Marijuana Act: An Act for the Humanitarian Medical Use of Marijuana (the "Act").[2] The Act states that "there should be no punishment under state law for qualifying patients . . . for the medical use of marijuana."[3] However, with the adoption of the Act also comes unanswered questions regarding the best practices to balance

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[1] *See* 21 U.S.C. §§ 812(b)(1), (c) (2012) (banning all uses of marijuana, and categorizing it as schedule I drug); *see also* Gonzales v. Raich, 545 U.S. 1, 2 (2005) (maintaining under federal law medical marijuana recognized for having no acceptable medical uses). *But see* NAT'L CONFERENCE OF STATE LEGISLATURES, State Medical Marijuana Laws, *Nat'l Conf. of St. Legislatures*, http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (last visited Mar. 3, 2019) (reporting thirty-three states allow "comprehensive public medical marijuana and cannabis programs."). The District of Columbia, Puerto Rico, and Guam also have such programs. *Id.* Additionally, twelve other states allow use of "low THC, high cannabidiol . . . products' for medical reasons in limited situations or as a legal defense." *Id.*

[2] *See* An Act for the Humanitarian Medical Use of Marijuana, 2012 MASS. ACTS ch. 369 § 4 (establishing legal protection for medical cannabis patients, caregivers, physicians, medical professionals, cultivators, and providers). More specifically, the Act allows qualifying patients to access marijuana for medical purposes by lawful means and eliminates the risk of criminal penalties that qualifying patients, healthcare providers and suppliers might otherwise face under state law. *Id.* The Act defines a qualifying patient as a person who has been "diagnosed by a licensed physician as having a debilitating medical condition." *Id.* § 2. The Act lists debilitating medical conditions that may be treated by medical marijuana. *Id.* These debilitating medical conditions may subsequently be considered conditions that could certify an employee as a "qualified handicap employee" under the Massachusetts General Laws. *Id.*; *see also* 105 MASS CODE REGS. §§ 725.004-.015 (2017) (implementing Act's legal protections under Department of Public Health ("DPH")).

[3] *See* An Act for the Humanitarian Medical Use of Marijuana, 2012 MASS. ACTS ch. 369 § 4 ("qualifying patients shall not be penalized under Massachusetts law in any manner, or denied any right or privilege, for their medical marijuana use."). On the other hand, the Act can only provide protections within its scope, and enumerates that the Act "does not provide immunity from prosecution under Federal law", nor does it "limit the applicability of other law as it pertains to the rights of . . . employers, law enforcement authorities, or regulatory agencies." *Id.*

governing law with the Act.[4] Specifically, the Act presents issues in the employment context and the ways in which employers can respect the statutory rights given to medical marijuana patients, while also insulating themselves from liability.[5] Employer's concerns have arisen from the fact that the Act does not provide any protection to employers for regulating an employee's use of medical marijuana, and is silent as to whether employers have an obligation to accommodate off-site use of the drug under Mass. Gen. Laws. ch. 151B.[6] In short, Mass. Gen. Laws ch. 151B states that it is "unlawful practice" for an employer to dismiss an employee from employment, or refuse to hire any person alleging to be a qualified handicapped person, because of her handicap when the person is capable of performing the essential functions of the position involved with reasonable accommodation, "unless the employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undue hardship to the employer's business."[7] Essentially, the conflict for the employer lies in the reconciliation between the Act and Mass. Gen. Laws ch. 151B. Though the Act states that employers cannot deny medical marijuana users any "right or privilege," and Mass. Gen. Laws ch. 151B provides that handicapped employees have a "right to reasonable accommodation," it does not specifically address how

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[4] *See* Barbuto v. Advantage Sales & Mktg., LLC, 2016 WL 8653056, at *2 (Mass. Super. Ct. 2016) *aff'd in part, reversed in part* 78 N.E.3d 37 (Mass. 2017) (interpreting that state disability discrimination statutes do not extend to marijuana for medical purposes). In the past, state disability discrimination statutes have not applied to medical marijuana use because such use remains illegal under federal law. *Id.*; *see also* Erica E. Flores, *Accommodating Employee Use of Medical Marijuana*, 99 MASS. L. REV. 72, 73 (2018) (outlining prior court's history with medical marijuana protections).

[5] *See* Erica E. Flores, *Accommodating Employee Use of Medical Marijuana*, 99 MASS. L. REV. 72, 73 (2018) (providing protections to qualified patients but employers not insulated from civil liability under Act).

[6] *See* MASS. GEN. LAWS ANN. ch. 151B §§ 1(16), 4(16) (LexisNexis 2017) (explaining qualified handicap employee has right not to be fired because of her handicap); *see also* Barbuto v. Advantage Sales & Mktg., LLC, 78 N.E.3d 37, 50 (Mass. 2017) (explaining handicap discrimination claim is established in implied legislative intent). Here, the court stated, "the drafters of the Act appear to have recognized the existence of a cause of action for handicap discrimination by specifically prohibiting 'on-site' medical marijuana use as an 'accommodation.'" *Id.* Thus, the specific language prohibiting "on-site" use led to an implication that "off-site" use may be allowed. *Id.*

[7] *See* MASS. GEN. LAWS ANN. ch. 151B §§ 1(16), 4(16) (LexisNexis 2017) (defining unlawful practice standard under Massachusetts General laws); *see also* Godfrey v. Globe Newspaper Co., Inc., 928 N.E.2d 327, 333 (Mass. 2010) (*quoting* Cox v. New England Tel. & Tel. Co., 607 N.E.2d 1035, 1036 (Mass. 1993)) ("Once an employee 'make[s] at least a facial showing that reasonable accommodation is possible,' the burden of proof [of both production and persuasion] shifts to the employer to establish that a suggested accommodation would impose an undue hardship."). Meanwhile, Mass. Gen. Laws ch. 151B was not amended to address the potential impact of the Medical Marijuana Act in the workplace. §1(16).

employers should regulate the use of drugs or medication for the employees.[8] However, in *Barbuto v. Advantage Sales & Mktg.*,[9] a case of first impression, the Massachusetts Supreme Judicial Court ("SJC") attempted to clarify this grey area and addressed whether a qualifying patient, terminated from employment due to testing positive for her medically prescribed marijuana, has a civil remedy against her employer.[10] This decision comes in light of the passing of the Act, and despite traditional interpretations of Mass. Gen. Laws. ch. 151B which have supported the idea that employers do not need to accommodate for medical marijuana.[11] The SJC held that Barbuto was able to bring a state claim against her employer for both handicap and qualified handicap discrimination, and perhaps even more importantly held that Barbuto's use of medical marijuana was facially reasonable as an accommodation.[12]

The facts of the case explain that in the summer of 2014, the plaintiff, Christina Barbuto ("Barbuto"), was prescribed medical marijuana in compliance with Massachusetts law to treat a gastrointestinal condition, known as Crohn's disease.[13] While legally prescribed the medical marijuana. Barbuto accepted a job offer from Advantage Sales and Marketing, LLC ("ASM").[14] The position was contingent upon the satisfactory completion of a pre-employment drug test.[15] However, before taking the drug test and beginning at ASM, Barbuto voluntarily disclosed to ASM that she used medical marijuana to treat her Crohn's disease.[16] The supervisor at ASM told Barbuto that her medicinal use of marijuana "should

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[8] §§1(16), 4(16) (asserting qualified handicap persons also have "rights and privileges" to reasonable accommodations). The "rights and privileges" include the right not to be fired because of a handicap. *Id.*

[9] 78 N.E.3d 40 (Mass. 2017) (establishing standing for qualified patients prescribed medical marijuana).

[10] *See Barbuto*, 78 N.E.3d at 40 (describing issue at hand).

[11] *See Barbuto*, 2016 WL 8653056, at *2 ("[T]here is no support for finding that G. L. c. 151B requires an employer to accommodate an employee's use of medical marijuana.").

[12] *See id*. at 37 (rejecting "implied right of private action" and "wrongful termination in violation of public policy" claims). The Court further explained that Barbuto would not necessarily win on her handicap discrimination claim, just that the claim was reasonable. *Id.* Furthermore, the Court affirmed that Barbuto's Crohn's disease is a debilitating medical condition that may be treated by medical marijuana. *Id.* at 41.

[13] *See id.* (providing factual background of case).

[14] *See Barbuto*, 78 N.E.3d at 41-42 (explaining ASM's recruiter told Barbuto she would start off entry-level but would advance quickly). Barbuto also brought action against the ASM recruiter ("Villaruz"), individually and in conjunction with ASM. *Id.* at 41.

[15] *See id*. at 40 (providing test was mandatory for all employees).

[16] *See id*. at 41 (explaining HR manager later confirmed with Barbuto that medical marijuana "would not be an issue"). Barbuto also explained that she only used marijuana in small quantities at her home to treat the "little to no appetite" she had developed because of the Crohn's disease. *Id.*

not be a problem."[17] Shortly after taking the drug test, Barbuto began her official first day working at ASM.[18] Approximately one day later, ASM terminated Barbuto for testing positive for marijuana, explaining that the company did not care if Barbuto used medical marijuana to treat her medical condition because the company "follows[s] federal law, not state law."[19]

In her initial complaint to the trial court, Barbuto asserted various claims, including invasion of privacy in violation of the Massachusetts Privacy Act, denial of her rights under the Act, and wrongful termination in violation of public policy.[20] Additionally, Barbuto alleged that she was wrongfully terminated for handicap discrimination in violation of various provisions of Mass. Gen. Laws ch. 151B – arguing she was a "handicap

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[17] *See id.* at 40 (following disclosure of medical condition and drug test, Barbuto's offer was accepted).

[18] *See id*. at 39 (explaining Barbuto worked for one day at Stop & Shop to promote ASM's customers' products).

[19] *See id.* at 41 (referencing Controlled Substance Act, ("CSA"), which qualified marijuana as Schedule I substance, despite medical use); *see also* 21 U.S.C. § 812 (1970) (listing five scheduled levels of federally prohibited substances). Under the Controlled Substance Act, marijuana is listed as a schedule I substance and is scheduled on the same level as heroin. *Id.* The federal CSA prohibition is thus in contrast with the Act, which provides protection for Massachusetts prescribers and more importantly, patients who have been provided certain implied "rights or privileges" under the Act to use medical marijuana to treat their conditions. *Id.*; s*ee also* An Act for the Humanitarian Medical Use of Marijuana, 2012 MASS. ACTS. ch. 369 § 4 ("Any person meeting the requirements under this law shall not be penalized under Massachusetts law in any manner or denied any right or privilege, for such actions."); *see also* Flores, *supra* note 5, at 2 (describing compliance with Act). However, even in compliance with the Act, Massachusetts residents and businesses are still in open defiance of federal law. *Id.* On the other hand, residents and businesses have been able to operate under some level of security as Congress has forbidden the United States Department of Justice (DOJ) from interfering with state medical marijuana programs since 2014. *Id.* Therefore, due to this contradiction between state and federal laws, there still remains many unanswered questions regarding how employers should operate under the Act in light of the CSA. *Id.*

[20] *See* Barbuto v. Advantage Sales & Mktg., LLC, 2016 WL 8653056, at *1 (Mass. Super. Ct. 2016) *aff'd in part, reversed in part* 78 N.E. 3d 37 (Mass. 2017) (describing Barbuto's complaint to Massachusetts Superior Court).

> The complaint included six claims: (1) handicap discrimination, in violation of G. L. c. 151B, § 4 (16); (2) interference with her right to be protected from handicap discrimination, in violation of G. L. c. 151B, § 4 (4A); (3) aiding and abetting ASM in committing handicap discrimination, in violation of G. L. c. 151B, § 4 (5); (4) invasion of privacy, in violation of G. L. c. 214, § 1B; (5) denial of the "right or privilege" to use marijuana lawfully as a registered patient to treat a debilitating medical condition, in violation of the medical marijuana act; and (6) violation of public policy by terminating the plaintiff for lawfully using marijuana for medicinal purposes. The second and third claims were brought against Villaruz alone; the rest were brought against both ASM and Villaruz.

Id. Initially Barbuto filed a discrimination charge against ASM and Villaruz with the Massachusetts Commission against Discrimination ("MCAD"), but later withdrew her MCAD charge in order to file a complaint in the Superior Court. *Id.*

person" suffering from Crohn's disease and a "qualified handicap person" capable of performing the essential functions of her job, and was thus, entitled to a reasonable accommodation.[21] In response, after unsuccessfully attempting to remove the case to the United States District Court, ASM filed a motion to dismiss all counts of Barbuto's complaint with the Superior Court on the basis that employers should not be expected to accommodate the federally prohibited use of a drug.[22] In its motion, ASM argued that the Act does not require "any accommodation of any-onsite employee use of marijuana[,]" and further rejected the implication that the Act required the reasonable accommodation to allow employees to use marijuana off-site, just because the Act and Mass. Gen. Laws ch. 151B did not specifically prohibit an employee's off-site use of marijuana.[23] The Superior Court agreed with ASM's argument and dismissed all of Barbuto's claims except for her invasion of privacy claim, reasoning that the Act does not provide immunity from federal law and further rejected the assertion that Mass. Gen. Laws ch. 151B would extend far enough to require an accommodation for medical marijuana given its prohibited federal status.[24]

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[21] *See Barbuto*, 78 N.E.3d at 41 (claiming ASM discriminated by not providing reasonable accommodation for Barbuto's medical marijuana use). Barbuto asserted that medicating her condition with medically prescribed marijuana is a reasonable accommodation and would not impose undue hardship on ASM. *Id.*; *see also* MASS. GEN. LAWS ANN. ch. 151B § 1(16) (LexisNexis 2017) (explaining "reasonable accommodation" is not defined under Massachusetts General Law); *see also* MASS. GEN. LAWS ANN. ch. 151B §4(16) (LexisNexis 2017) (giving handicap employees right to accommodation if requested, provided no undue hardship imposed); Peabody Props., Inc. v. Sherman, 638 N.E.2d 906, 909 (Mass. 1994) ("A 'reasonable accommodation' is one which would not impose an undue hardship or burden on the entity making the accommodation."); Godfrey v. Globe Newspaper Co., Inc., 928 N.E.2d 327, 333 (Mass. 2010) (mandating employer's obligation to work with employee to determine if another accommodation is more reasonable); Mass. Bay Transp. Auth. v. Mass. Comm'n. Against Discrimination, 879 N.E.2d 36, 49 (Mass. 2008) (requiring employer to "participate in interactive process of determining [accommodation] at handicapped employees request"); *see also* Canfield v. Con-Way Freight, Inc., 578 F. Supp. 2d 235, 240 (D. Mass. 2008) ("[T]o establish a prima facie case of discriminatory discharge based on handicap under Massachusetts law, plaintiff must show, among other things, that he is a qualified handicapped person.").

[22] *See* Barbuto v. Advantage Sales & Mktg., LLC, 2016 WL 8653056, at *1 (Mass. Super. Ct. 2016) *aff'd in part, reversed in part* 78 N.E. 3d 37 (Mass. 2017) (attempting to dismiss all claims).

[23] *See id.* at *2 (holding General Law ch. 151B may require employers to accommodate employee's use of medical marijuana).

[24] *See id.* (reasoning no requirement to accommodate to employee's medical marijuana use under G.L.c. 151B.). The court further bolstered this decision by citing similar decisions in other states with similar medical marijuana laws; however, the facts of these cases vary from the case at hand. S*ee* Ross v. RagingWire Telecommom., 174 P.3d 200, 204 (Cal. 2008) ("No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law [21 U.S.C. §§ 812, 844 even for medical users."]; Brandon Coats v. Dish Network, LLC, 350 P.3d 849, 852 (Colo. 2015) (stating licensed medical marijuana use is not "lawful activity" under Colorado employment discrimination law).

Barbuto responded by filing a notice of appeal regarding the dismissed claims, leading to the SJC's direct appellate review.[25] On appeal, Barbuto took the position that ASM should have accommodated her debilitating condition, by either: (1) not making her take the drug test, or (2) allowing her to fail the drug test without any adverse employment consequences.[26] ASM rejected Barbuto's claim, arguing that Barbuto failed to state a claim for handicap discrimination for two reasons: (1) she was not a "qualified handicap person" because her requested accommodation, the use of medical marijuana, was facially unreasonable due to marijuana's federal prohibition; and (2) even if she was to be considered a "qualified handicap person," she was terminated not because she was handicap, but because she failed a drug test that all employees were required to pass.[27] The SJC found in favor of ASM's argument and upheld the dismissal of Barbuto's wrongful termination claim and implied a private right of action under the Act. However, the SJC reversed the dismissal of Barbuto's claim under Mass. Gen. Laws ch. 151B and unanimously decided that Barbuto's Crohn's disease was a "handicap" and held that Barbuto's proposed accommodation to use medical marijuana to treat her was "facially reasonable."[28] The SJC also found that ASM should have engaged in the interactive process to find a reasonable accommodation for Barbuto.[29] Thus, while Barbuto was

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[25] *See Barbuto*, 78 N.E.3d at 40 (reviewing de novo on appeal whether qualifying patient may be terminated from employment).

[26] *See id.* at 43 (asserting if handicap discrimination is appropriate then accommodation is necessary if facially reasonable); *see also* Godfrey v. Globe Newspaper Co., Inc., 928 N.E.2d 327, 334 (Mass. 2010) (explaining hesitation to set hard and fast rules for determining when accommodation is facially reasonable).

[27] *See Barbuto*, 78 N.E.3d at 45 (explaining ASM arguments); *see also* Garcia v. Tractor Supply Co., 154 F.Supp.3d 1225, 1229 (D.N.M. 2016) ("Medical marijuana is not an accommodation that must be provided for by the employer."); Coats v. Dish Network, LLC, 350 P.3d 849, 851 (Colo. 2015) (upholding employee's termination due to medical marijuana consumption despite authorization as "lawful activity" within state); An Act for the Humanitarian Medical Use of Marijuana, 2012 MASS. ACTS CH. 369, § 7(D) (providing Act does not require any employer to permit "on-site" marijuana use as accommodation).

[28] *See Barbuto*, 78 N.E.3d at 45 (rejecting ASM's argument that accommodation was unreasonable because continued marijuana use would be federal crime); *see also* Flores, *supra* note 5, at 2 (addressing quote) ("According to the court, the mere fact that marijuana remains illegal under federal law does not relieve employers from their obligations under state law—specifically, the obligation under Chapter 151B to engage in the interactive process and to provide reasonable accommodations for handicapped employees.").

[29] *See Barbuto*, 78 N.E.3d at 45 (explaining even if accommodation of medical marijuana was facially unreasonable, duty was still owed).

> [T]he employer here still owed the plaintiff an obligation under ch. 151B §4(16), before it terminated her employment, to participate in the interactive process to explore with her whether there was an alternative, equally effective medication she could use that was not prohibited by the employer's drug policy. This failure to explore a reasonable accommodation alone is sufficient to support a claim of handicap discrimination

successful in her claims against ASM for handicap discrimination, the SJC held that she did not have an implied private right of action under medical marijuana law, or a claim for wrongful termination as a matter of public policy under the Act.[30] In conclusion, the SJC established that if an employer's tolerance of an employee's use of medical marijuana was a facially reasonable accommodation, then the employer effectively would be denying this "right or privilege" provided for under both Mass. Gen. Laws ch. 151B and the Act.[31] In turn, this decision established that a handicapped

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provided the plaintiff proves that a reasonable accommodation existed that would have enabled her to be a "qualified handicapped person."

Id. at 47; *see also* MCAD Guidelines §VII.C, available at https://www.mass.gov/lists/mcad-statutes-and-regulations [hereinafer MCAD Guidelines] ("[E]mployer should initiate an informal interactive process. . . identify the precise limitation resulting from handicap and potential reasonable accommodations that could overcome those limitations."); *see also* Flores, *supra* note 5, at 75 (explaining effect of MCAD policy in conjunction with Act). The MCAD still maintains a policy that employers may "establish and enforce drug and alcohol related work rules, including but not limited to. . . requiring employees to comply with all state and federal drug and alcohol-related laws or regulations to which the employing unit and/or its employees are subject." MCAD Guidelines at §IV. Additionally, in its amicus curaie, the MCAD suggested that the "federal drug and alcohol-related laws" to which it was referring are only those that govern employees as employees. For example, U.S. Department of Transportation regulations that apply to certain types of safety-sensitive positions and not to all federal drug laws "to which . . . its employees are subject" more generally. *Id.* The current MCAD policy, read in light of the decision under *Barbuto*, can be interpreted to require employers to ignore their drug policies when an employee's off-site use of an illegal drug is treatment for a debilitating condition and does not create an undue burden. *Id.*; *see also* Brief and Addendum of Amicus Curiae Massachusetts Commission against Discrimination at *19 n.9, Flagg v. Alimed, Inc., 992 N.E.2d 354, (Mass. 2013) (*quoting* MCAD Guidelines § X.C.4).

[30] *See Barbuto*, 78 N.E.3d at 47 (rejecting Barbuto's remaining claims that her termination was wrongful and violated public policy). The SJC reasoned they would not allow for these claims because they felt they had provided for a claim of right by providing a remedy under discrimination law, and allowing for additional claims could create confusion. *Id.* at 50. ("[W]here a comparable cause of action already exists under our law prohibiting handicap discrimination, a separate, implied private right of action is not necessary to protect a patient using medical marijuana from being unjustly terminated for its use."). *Id.*

[31] *See id.* at 44 (correlating handicap employee denial of insulin is similar to employee denied medical marijuana). The SJC supported its reasoning by analogizing a scenario where an employer upheld a drug policy which prohibited the use of lawfully prescribed insulin by a physician to a diabetic, and further explained that the employer would still have a duty to engage in an interactive process with the employee to determine whether there was an equally effective medical alternative. *Id.* at 47. "[W]here a handicapped employee needs medication to alleviate or manage the medical condition . . . and the employer fires her because company policy prohibits the use of this medication, the law does not ignore the fact that the policy resulted in a person being denied employment because of her handicap." *Id.*; c*ompare* Garcia v. Tractor Supply Co., 154 F.Supp.3d 1225, 1229 (D.N.M. 2016) ("medical marijuana is not accommodation that must be provided by employer") *with* Coats v. Dish Network, LLC, 350 P.3d at 851 (Colo. 2015) (discharging employee based on employee's participation in "lawful activities" off-site during nonworking hours) *and* Ross v. RagingWire Telecomm., Inc., 174 P.3d 200, 204 (Cal. 2008) (finding California's statute prohibiting handicap discrimination does not require employees to accommodate to illegal drugs). Deviating from the *Ross* decision, the *Barbuto* court concluded to provide an employee with a claim

employee in Massachusetts has a statutory "right or privilege" to a reasonable accommodation under the Act, which may now include reasonable accommodations for an employee's use of prescribed medical marijuana.[32]

Prior to the passage of the Act, medical marijuana was strictly prohibited in Massachusetts, and possession of marijuana was a punishable felony.[33] Medical marijuana is still prohibited under federal law, and a qualifying patient in Massachusetts who has been lawfully prescribed marijuana still remains subject to potential criminal penalties.[34] However, states are able to authorize the legalization of marijuana under the Rohrabacher Blumenauer Amendment.[35] Additionally, from 2013 to 2017,

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of action for the denial of the employee's use of medical marijuana. *Barbuto*, 78 N.E.3d at 44. This is a different decision compared to other state courts which prohibited the treatment of state-legalized medical marijuana in the employment context. *Id.* The *Barbuto* court supported its divergence from other state courts by reasoning the differences in language in the Act compared to other state statutes. *Id.*

[32] *See Barbuto*, 78 N.E.3d at 45 (allowing accommodation for employee being treated with medical marijuana for debilitating condition). This requirement to accommodate does not extend to on-site use, as "on-site" use is federally prohibited. *Id.* "[T]he termination of the employee for violating that policy effectively denies a handicapped employee the opportunity of a reasonable accommodation, and therefore is appropriately recognized as handicap discrimination." *Id.* at 47; *see also* Flores, *supra* note 5, at 76 (explaining medical marijuana is not reasonable when there are safety risks). The establishment of a medical marijuana accommodation does not mean that an employee will be instantly granted that right, as an employer may defeat the medical marijuana accommodation by proving that it is unreasonable, unduly burdensome to the employer's business, would "impair the employee's performance of her work," create an "unacceptably significant safety risk", or require the employer to violate a contractual or statutory obligation. *Id.*

[33] *See* 21 U.S.C. § 842 (2018) (explaining CSA makes it illegal to manufacture, distribute, or possess controlled substances except as authorized); *see also* An Act for the Humanitarian Medical Use of Marijuana, 2012 MASS. ACTS ch. 369 § 7(F) ("[N]othing in this law requires the violation of federal law or purports to give immunity under federal law."). However, the implication was that the off-site use of medically prescribed marijuana is lawful under state law. *Id.*

[34] *See* Gonzales v. Raich, 545 U.S. 1, 27 (2005) (continuing to recognize medical marijuana as Schedule I drug, with "no acceptable medical uses"); *see also* MASS. GEN. LAWS ANN. ch. 151B §1(16) (LexisNexis 2018) (finding no requirement for Massachusetts employers to accommodate to use of medical marijuana in workplace).

[35] *See* H.AMDT. 748, 113th Congress (2013-14) available at https://www.congress.gov/amendment/113th-congress/house-amendment/748/text (providing text of Amendment). The Rohrabacher-Farr Amendment otherwise known as the Rohrabacher-Blumenaur Amendment, was signed into law by President Obama on December 16, 2014, and materially changed the legal landscape for the U.S. cannabis industry. *Id.* The Amendment states: "None of the funds made available in this Act to the Department of Justice may be used . . . to prevent such states from implementing their own state laws that authorize the use, distribution, possession, or cultivation of medical marijuana." *Id.* Furthermore, the Amendment was renewed on September 28, 2018, and shall remain in effect through September 30, 2019. *Id.*; *see also* David Wenger, *Risk of Federal Enforcement Actions Against State-Legal Cannabis Businesses Declines*, NEW CANNABIS VENTURES (Jan. 10, 2019, 2:57 PM), https://www.newcannabisventures.com/risk-of-federal-enforcement-actions-against-state-legal-cannabis-businesses-declines/ (describing risks of cannabis industry).

individuals and companies complying with state legalized medical marijuana programs were able to seek protection from federal prosecution under the Cole Memorandum, which instructed prosecutors and law enforcement agencies to focus only on marijuana related activities outside of state-legal cannabis operations, with medical marijuana enforcement not being one of the specific priorities.[36] However, on January 4, 2018, former Attorney General Jefferson Sessions rescinded the Cole Memorandum and issued a separate memorandum giving federal prosecutors the freedom to prosecute marijuana cultivation, distribution, and possession as they would any other federal crime.[37] Nevertheless, since the Cole Memorandum was rescinded, not a single prosecutor has acted against the industry, and the decision to prosecute will continue to remain in the hands of the U.S. Attorneys.[38] Additionally, it is likely the U.S. Attorneys will continue to refrain from taking action to prosecute especially in light of the support that medical marijuana legalization has received both from the public and under the Rohrabacher-Blumenauer Amendment.[39] Therefore, even without the Cole Memorandum, the federal protection of the medical cannabis industry remains promising, and while there are no guarantees that federal enforcement may not come down on employers or individuals, the current regulatory landscape and progress towards federal legalization suggest that

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[36] *See* James M. Cole, Deputy Attorney General, *Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement,* U.S. DEP'T OF JUSTICE (Aug. 29, 2013), available at http://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf (authorizing state regulated marijuana in compliance with provisions of memorandum).

[37] *See* Memorandum from J. Sessions to U.S. Attorneys (Jan. 4. 2018), available at https://www.justice.gov/opa/press-release/file/1022196/download (last visited Mar. 6, 2019) (deciding how to prosecute medical marijuana).

[38] *See* David Wenger, *Risk of Federal Enforcement Actions Against State-Legal Cannabis Businesses Declines*, NEW CANNABIS VENTURES (Jan. 10, 2019, 2:57 PM), https://www.newcannabisventures.com/risk-of-federal-enforcement-actions-against-state-legal-cannabis-businesses-declines/ (explaining position of U.S. Attorneys on medical marijuana enforcement).

[39] *See* Lisa Sacco, Erin Bagalman, Kristin Kinlea & Sean Lowry, *The Marijuana Policy Gap and the Path Forward,* CONG. RESEARCH SERV., (Mar. 10, 2017) https://fas.org/sgp/crs/misc/R44782.pdf (explaining nearly ninety percent of states allow limited possession of marijuana for medical treatment); *see also* United States v. Tote, 1:14-MJ-00212-SAB, 2015 WL 3732010, at *2 (E.D. Cal. 2015) (providing legislative history suggests Amendment's intent to give states control over medical marijuana policy); David Wenger, *Risk of Federal Enforcement Actions Against State-Legal Cannabis Businesses Declines*, NEW CANNABIS VENTURES (Jan. 10, 2019, 2:57 PM), https://www.newcannabisventures.com/risk-of-federal-enforcement-actions-against-state-legal-cannabis-businesses-declines/ ("Prosecutors across the country considering their career ambitions would be hard-pressed to see any upside is starting an enforcement action against a state-legal cannabis business.").

there is little-to-no material risk of federal enforcement action against businesses or individuals who are compliant with state law.[40]

With the federal law on marijuana geared toward state regulation, it is essential that employers, businesses, and individuals within Massachusetts understand the development of the Act and how it intersects and operates with Mass. Gen. Laws ch. 151B, and the federal law, as the innerworkings of these governing authorities proved to be a central issue in *Barbuto*.[41] In Massachusetts, the Act defines a "qualifying patient" as "a person who has been diagnosed by a licensed physician as having a debilitating medical condition," which by the terms of the statute, includes Crohn's disease.[42] In drafting the Act, the legislature included specific wording to explain that a qualifying patient shall be protected from "arrest or prosecution or civil penalty for the use of marijuana," provided the patient complies with the conditions of the Act.[43] In solidifying its intent to provide protection for medical marijuana patients, the legislature went a step further by inserting

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[40] *See* Wenger, *supra* note 38 (explaining enforcement techniques); *see also* Jeremy Berke & Skye Gould, *New Jersey lawmakers postoponed a critical vote to legalize marijuana – here are all the states where pot it legal*, BUS. INSIDER (Mar. 26, 2019, 11:38 AM), https://www.businessinsider.com/legal-marijuana-states-2018-1 (outlining all states where marijuana initiatives have been taken).

[41] *See* David B. Wilson and Jason McGraw, *Barbuto v. Advantage Sales & Marketing, LLC: Employers May Risk Disability Discrimination Claims by Prohibiting Use of Medical Marijuana by Qualified Disabled Employee*s, BOSTON BAR J., (Oct. 26, 2017), available at https://bostonbarjournal.com/2017/10/26/barbuto-v-advantage-sales-marketing-llc-employers-may-risk-disability-discrimination-claims-by-prohibiting-use-of-medical-marijuana-by-qualified-disabled-employees/ (considering whether Medical Marijuana Act is preempted by federal law). *See* Flores, *supra* note 5, at 73 (explaining employers endure conflicts when asked to satisfy federal and state marijuana laws). For instance, employers are asked to satisfy the "Americans with Disabilities Act (ADA) and its state law counterpart, Mass. Gen. Laws ch. 151B, both of which forbid employers from discriminating against prospective and current employees on the basis of disability, require employers to make reasonable accommodations if they would allow disabled employees to perform the essential functions of the job, and imposes potentially devastating civil liability for any missteps." *Id.*; *see also* 42 U.S.C. § 12111 (2012) *et seq*.; MASS GEN. LAWS ch. 151B §§ 4(16), 9 (LexisNexis 2017) (highlighting importance of employers understanding medical marijuana regulations to maintain compliance).

[42] *See* An Act for the Humanitarian Medical Use of Marijuana, 2012 MASS. ACTS ch. 369 §2(K) (outlining conditions that are expressly permissible for treatment with medically prescribed marijuana). Additional conditions include: cancer, glaucoma, positive status for human immunodeficiency virus (HIV), acquired immune deficiency syndrome (AIDS), hepatitis C, amyotrophic lateral sclerosis (ALS), Crohn's disease, Parkinson's disease, multiple sclerosis and other conditions as determined in writing by a qualifying patient's physician. *Id.*

[43] *See* An Act for the Humanitarian Medical Use of Marijuana, 2012 MASS. ACTS ch. 369 § 2(K) ("A patient possesses no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply; and (b) [presents] his or her registration card to any law enforcement official who questions the patients . . . regarding the use of marijuana."). *Id.* § 4a-b.

language in the Act which states that medical marijuana patients shall not be denied "any right or privilege" on the basis of their medical marijuana use.[44]

Generally, once an employee has proven that they are a qualified handicap person, they have an explicit right under Mass. Gen. Laws ch. 151(B) §4(a), not to be discriminated against solely because of their handicap.[45] That right includes the right to require an employer to make a reasonable accommodation, such as an accommodation for a person's medication, to enable the employee to perform the essential functions of their job with the accommodation—provided the accommodation is reasonable under the circumstances.[46] The duty to provide reasonable accommodation applies to all qualified handicap employees and is intended to reduce work-related barriers related to an individual's handicap.[47] Furthermore, the employer need not provide the best accommodation available, or the accommodation specifically requested by the individual with the handicap, but merely a *reasonable* one.[48] However, if the accommodation proposed

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[44] *See id.* § 4 ("Any person meeting the requirements under this law shall not be penalized under Massachusetts law in any manner, or denied any right or privilege, for such actions."). Thus, the choice to include this language implies that under the Act, patients shall not be denied "any right or privilege" on the basis of their medical marijuana. *Id.* Further, it is to be noted that the "right or privilege" language in this Act is unique from the language in other states, such as California, that explicitly chose to leave out this language. *See Barbuto*, 78 N.E.3d at 45 n.7 (distinguishing Massachusetts Act with California Supreme Court decision which denied employees' challenge under similar claims). The decision to include the language provided the SJC with a sound basis to reason that the legislature had the intent to protect medical marijuana patients in its conclusion. *Id.*

[45] *See* MASS GEN. ANN. LAWS ch. 151B § 4(16) (LexisNexis 2017) ("A qualified individual with disability refers to those individuals with a disability who: (1) satisfy the general skill, experience, education and other job-related requirements, and (2) can perform the essential functions of the job, with or without reasonable accommodation."); *see also Employment rights of people with disabilities*, MASS.GOV. (2018), available at https://www.mass.gov/service-details/employment-rights-of-people-with-disabilities (explaining employment rights of people with disabilities). Essential functions are narrowly defined to include fundamental job duties. *Id.* "A job function is more likely to be 'essential' if it requires special expertise, a large amount of time, or if that function was listed in the written job description prepared before the employer advertised for or interviewed job applicants." *Id.*; *see also* Massachusetts Commission Against Discrimination, Guidelines: *Employment Discrimination on the Basis of Handicap*, Ch. 151B, § IX.A.3 (1998) (explaining handicap may limit major life functions including seeing, hearing mobility, and working). Further, it is important to note that Massachusetts law uses the word "handicap" and the Federal Americans with Disabilities Act uses the word "disability", but the laws are very similar. *Id.*

[46] *See* MASS GEN. LAWS ch. 151B § 4(B) (LexisNexis 2017) (defining reasonable accommodation). "Reasonable accommodation" refers to an employment-related modification that an employer must make in order to ensure equal opportunity for an individual with a disability to (1) apply for and test for a job; (2) perform essential job functions; and (3) receive the same benefits and privileges as other employees. *Id.*

[47] *See* Cargill v. Harvard Univ., 804 N.E.2d 377, 386 (Mass. App. Ct. 2004) (establishing "essential job function" is "intensely fact-based," requiring "individualized inquiry").

[48] *See id.* (providing scope of employers reasonable accommodation).

by the employee appears unduly onerous, the employer has an obligation to at least have a conversation with the employee to determine whether another accommodation is possible.[49]

Moreover, within Massachusetts, an employer may not dismiss from employment or refuse to hire "any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation" unless the accommodation would impose undue hardship on the employer's business.[50] Therefore, courts have established that in order to justify an employer's refusal to reasonably accommodate the medical needs of the qualified handicap employee, an employer must prove that the employee's use of the accommodation, such as the use of medication, would cause an undue hardship to the employer's business.[51] The case-in-chief is the first case in Massachusetts to recognize that an employee has a claim for handicap discrimination based upon an employer's unwillingness to accommodate an employee for the use of medical marijuana.[52]

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[49] *See id.* (*citing* Cox. V. New England Tel. Co., 607 N.E.2d 1035, 1040 (Mass. 1993)) ("[D]etermination [of essential function] should be based upon more than statements in a job description and should reflect the actual functioning and circumstances of the particular enterprise involved."); Reed v. LePage Bakeries, Inc., 244 F.3d 254, 259 (1st Cir. 2001) (explaining plaintiff must show accommodation is "feasible for the employer under the circumstances"). Massachusetts law does not require that an employer provide a reasonable accommodation in the form of reassignment to a new or different position. MASS. GEN. LAWS ch. 151B § 4 (LexisNexis 2017). Instead, Mass. Gen. Laws. ch. 151B § 4 requires only that the employer provide reasonable accommodation in the form of modifications to an employee's existing position. *Id.*

[50] *See* Godfrey v. Globe Newspaper Co., Inc., 928 N.E.2d 327, 328 (Mass. 2010) (explaining potential for undue hardship with accommodation increases if position involves safety concerns); *see also* Webster v. Motorola, Inc., 637 N.E.2d 203, 208 (Mass. 1994) (noting undue hardship nexus between job responsibilities and risk of harm is "attenuated").

[51] *See* Gannon v. City of Bos., 73 N.E.3d 748, 749 (Mass. 2017) (asking whether officer was able to perform as qualified handicap without posing risk to others); Godfrey v. Globe Newspaper Co., Inc., 928 N.E.2d 327, 328 (Mass. 2010) (establishing employer has obligation to work with employee to determine whether another accommodation is possible); *see also* Cox v. New England Tel. & Tel. Co., 607 N.E.2d 1035, 1042 (Mass. 1993) (determining burden of proof shifts to employer to show accommodation would impose undue hardship).

[52] *See* Barbuto v. Advantage Sales and Mktg., LLC, 78 N.E.3d 40, 45 (Mass. 2017) (determining Massachusetts medically prescribed marijuana is just as lawful as other prescribed medication); *see also* Mark Pomfret & Kristi Nickodem, *Massachusetts's Highest Court Rules that Employee Fired for Medical Marijuana Use Can Hold Employer Liable for Discrimination*, K&L GATES (Jul. 26, 2017), available at http://www.klgates.com/massachusettss-highest-court-rules-that-employee-fired-for-medical-marijuana-use-can-hold-employer-liable-for-discrimination/#footnote2 (highlighting *Barbuto* decision as marked departure from prior state court rulings). This ruling departs from similar cases in California, Colorado, Oregon, and Washington, where courts have found that employers had no duty to accommodate an employee's use of medical marijuana. *See* Coats v. Dish Network, LLC, 350 P.3d 849, 850 (Colo. 2015) (allowing employee's termination due to medical marijuana usage despite state authorization as "lawful activity"); Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 230 P.3d 518, 520 (Or. 2010) (declining interpretation of state discrimination laws requiring employers to

In *Barbuto v. Advantage Sales & Mktg.*, the SJC reversed the holding of the trial court and opened the door to the possibility that employers within Massachusetts may now be obligated to work with employees to create a reasonable accommodation for medical marijuana.[53] In coming to its conclusion, the SJC considered the conflicting implications of enacting the 2012 Medical Marijuana Act, which provided that "any person prescribed medical marijuana under the law shall not be penalized in any manner or denied any right or privilege for such actions."[54] This provision of the Act is in direct conflict with Mass. Gen. Laws ch. 151B, which have historically provided that employers do not have an obligation to accommodate an employee for using marijuana.[55]

Ultimately, the court concluded that despite marijuana's federally prohibited status, employers within Massachusetts are still under the obligation of Mass. Gen. Laws ch. 151B to engage in the interactive process and to provide reasonable accommodations for qualified handicapped employees, which may include accommodating an employee's medical use of marijuana—provided no "equally effective alternative" exists.[56] Thus, the

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accommodate use of medical marijuana); Ross v. RagingWire Telecomm., Inc. 174 P.3d 200, 204 (Cal. 2008) (holding employee did not have cause of action for wrongful termination after failing drug test); Swaw v. Safeway, Inc., No. C15-939, 2015 U.S. Dist. LEXIS 159761 (W.D. Wash. 2015) (determining Washington's Medical Use of Marijuana Act "does not require employers to accommodate medical marijuana."). Specifically, *Emerald* contained facts very similar to *Barbuto*, and ultimately went to the Oregon Supreme Court; however, the *Emerald* court held that an employee's use of medical marijuana was not a reasonable accommodation under the State's disability act on similar grounds. *Emerald*, 230 P.3d at 530. In this case, the Oregon Supreme Court based their reasoning on the basis that Congress lacks the authority to require Oregon to prohibit the use of medical marijuana and held that Oregon was only free to exempt medical marijuana use from criminal liability. *Id.*

[53] *See Barbuto*, 78 N.E.3d at 41 (explaining requirement reserved for very limited employment situations).

[54] *See* An Act for the Humanitarian Medical Use of Marijuana, 2012 MASS. ACTS ch. 369 §4 ("[Qualifying patients] shall not be penalized under Massachusetts law in any manner, or denied any right or privilege, [for their medical marijuana use]."). However, the Act explicitly states that any "on-site" medical marijuana use by an employee is strictly prohibited as a reasonable accommodation. *Id.*

[55] *See* Barbuto v. Advantage Sales & Mktg., LLC, 2016 WL 8653056, at *2 (Mass. Super. Ct. 2016) *aff'd in part, reversed in part* 78 N.E.3d 37 (Mass. 2017) (arguing that accommodation under 151B does not include medical marijuana because marijuana is federally illegal). The primary argument by courts in the past was that employment discrimination statues did not cover medical marijuana prescription use because "state disability discrimination statutes do not extend to marijuana use for medical purposes because such use remains illegal under federal law." *Id.* at *3 (*citing Ross*, 174 P.3d at 204; *Coats*, 350 P.3d at 852).

[56] *See Barbuto*, 78 N.E.3d at 44 (elaborating Court did not need additional details about Barbuto's condition to declare handicap). Still, the Court determined she could perform the functions of her job with a reasonable accommodation as a "qualified handicap employee." *Id.*

> Where, in the opinion of the employee's physician, medical marijuana is the most effective medication for the employee's debilitating medical condition and where any

court held that because Barbuto was a qualified handicap employee, a facially reasonable accommodation for Barbuto may include taking the appropriate medication.[57] In this case, the Court held the off-site use of medical marijuana to allow Barbuto to perform the essential functions of her job was facially reasonable as an accommodation, and reasoned if ASM were to prohibit the use of medical marijuana as treatment for a debilitating condition, they would be denying Barbuto, a qualified handicap employee, the opportunity of a reasonable accommodation, which is effectively handicap discrimination.[58] Furthermore, the court held that firing Barbuto for the proposed use of the accommodation of medical marijuana before engaging in the interactive process to explore an alternative equally effective medication not prohibited by the employer's drug policy was sufficient enough on its own to support a claim for handicap discrimination under Mass. Gen Laws ch. 151B.[59]

While this case only introduces the prospect for an employee to have a claim against their employer, this decision by the SJC is revolutionary nonetheless as it provides a new opportunity for a claim to be brought by an employee facing adverse action as a result of their qualified handicap.[60]

> alternative medication whose use would be permitted by the employer's drug policy would be less effective, an exception to an employer's drug policy to permit its use is a facially reasonable accommodation.

Id. at 45.

[57] *See id.* at 46 (holding that use of medical marijuana is not per se unreasonable as accommodation). "To declare an accommodation for medical marijuana to be per se unreasonable out of respect for Federal law would not be respectful of the recognition of Massachusetts voters . . . . " *Id.*

[58] *See id.* at 44 (analogizing handicap employee denied insulin as similar to employee denied medical marijuana). Where a handicapped employee needs medication to alleviate or manage the medical condition that renders her handicapped, and the employer fires her because company policy prohibits the use of this medication, the law does not ignore the fact that the policy resulted in a person being denied employment because of her handicap. *Id.* at 47.

[59] *See id.* at 45 (explaining justification for proving undue hardship):

> Where no equally effective alternative exists, the employer bears the burden of proving that the employee's use of the medication would cause an undue hardship to the employer's business in order to justify the employer's refusal to make an exception to the drug policy reasonably to accommodate the medical needs of the handicapped employee.

Id.; see also Godfrey v. Globe Newspaper Co., Inc., 928 N.E.2d 327, 334 (Mass. 2010) (*quoting* Cox v. New England Tel. & Tel. Co., 607 N.E.2d 1035, 1040 (Mass. 1993)) ("Once an employee 'make[s] at least a facial showing that reasonable accommodation is possible,' the burden of proof of both production and persuasion shifts to the employer to establish that a suggested accommodation would impose an undue hardship.").

[60] *See Barbuto*, 78 N.E.3d. at 47 (explaining decision to reverse handicap discrimination does not necessarily mean Barbuto will succeed on claim). "The defendants at summary judgment or trial may offer evidence to meet their burden to show that the plaintiff's use of medical marijuana

However, it does not guarantee that an employee will win on the handicap discrimination claim.[61]

The SJC in *Barbuto* correctly recognized that the use and possession of medically prescribed marijuana, by a qualifying patient, may be just as lawful as the use and possession of any other prescribed medication.[62] Granted, the SJC provided that this accommodation may be reasonable if, and only if, the employee proves that medical marijuana is the most effective medication to treat the employee's qualified handicap, and demonstrates that the proposed "authorized" alternative would be less effective.[63]

In deciding this case, the SJC was at a crossroads between respecting the rigid federal regulations and respecting the intent of the legislatures and citizens who had collectively voted upon the Act with an intention of providing medical marijuana users, just like Barbuto, protection from being penalized for using effective medication.[64] The court sided with the latter, and decided to allow Barbuto's handicap discrimination claim to move forward, implicitly recognizing that under very specific circumstances, medical marijuana may now be permitted as a facially reasonable

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is not a reasonable accommodation because it would impose an undue hardship on the defendants' business." *Id*. at 48.

[61] *See id*. at 47 (explaining *Barbuto* does not give employees right to medical marijuana if use violates company policy). For instance, transportation employers who are subject to regulations promulgated by the United States Department of Transportation that prohibit any safety-sensitive employee subject to drug testing under the Department's drug testing regulations from using marijuana. *Id.* at 48.

[62] *See id.* at 45 (accommodating handicapped employee's off-site use of marijuana pursuant to valid prescription is facially reasonable).

[63] *See id*. (concluding where no equally effective "federally authorized" alternative, employer must prove medication causes undue hardship). In the case at hand, ASM was not justified in refusing to make an exception to their drug policy to accommodate the medical needs of their handicap employee. *Id.* The SJC explained that an accommodation to ASM's drug policy would not be facially unreasonable because the only person at risk of federal criminal prosecution for the possession of medical marijuana is the employee. *Id.* at 46. Employers commit no crime by merely tolerating use of the drug because an employer would not be in joint possession of medical marijuana or aid and abet its possession simply by permitting an employee to continue his or her off-site use. *Id.* at 47.

[64] *See Barbuto*, 78 N.E.3d at 47 (shying away from interpretations of federal law which completely prohibit possession especially where lawfully prescribed). Further, the intent to include a cause of action for handicap discrimination is made inherently clear by the enumeration of a provision within the Act which prohibits 'on-site' medical marijuana use as an 'accommodation,'" but is silent as to the 'off site' use of medical marijuana. *Id.*; *see also* An Act for the Humanitarian Medical Use of Marijuana, 2012 MASS. ACTS ch. 369, § 7 (D) (providing language that bars denial of "right or privilege" for medial marijuana use). This language suggests a preexisting "right or privilege" for the medical use of marijuana as implicated in the language from the Act which bars an already exsisting "right or privilege". *Id.* § 4.

accommodation, despite an employer's policy against marijuana and federal law.[65]

Furthermore, in outlining its reasoning, the SJC provided a rough blueprint for future employers to apply when an employee has established that they are a qualified handicap person and that their use of medical marijuana would provide a reasonable accommodation.[66] However, the blueprint effectively stops there as the SJC acknowledged that they were not willing to decide whether Barbuto's requested accommodation to use medical marijuana would impose undue hardship on the employers business, noting that that decision is best left to the trial court.[67]

Thus, this decision by the SJC was a step towards a more tolerant direction, as it not only allowed for employees to establish a handicap discrimination claim against employers who deny them their statutory "right or privilege" to a reasonable accommodation, but it also created case precedent which implicitly developed an affirmative "right or privilege" for qualified patients in Massachusetts to use marijuana for medical purposes under limited circumstances and without fear of unreasonable employment termination.[68] With not much case law or statutory intent to rely upon, the

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[65] *See Barbuto*, 78 N.E.3d at 47 ("[T]he law does not ignore the fact that the policy resulted in a person being denied employment because of her handicap.").

[66] *See id.* at 48 (holding employer must engage in interactive process before firing employee who tests positive for marijuana). The court compared state court decisions which rejected employees' claims for wrongful termination due to medical marijuana use. *Id.* at 45 n.7.

[67] *See id.* at 48 ("Whether the employer met its burden of proving that the requested accommodation would impose an undue hardship on the employer's business is an issue that may be resolved through a motion for summary judgment or at trial; it is not appropriately addressed through a motion to dismiss."); *see also* Erica E. Flores, *Accommodating Employee Use of Medical Marijuana*, 99 MASS. L. REV. 72, 73 (2018) (providing examples of questions employers may now have under *Barbuto* decision).

> Barbuto raises more questions than it answers—such as what is acceptable proof of registered status, what is an "unacceptably significant" safety risk, who should decide whether there is an "equally effective alternative" and what process should an employer follow to obtain such a determination, can an employer challenge that determination or obtain a second opinion, and when can an employer obtain recertification of an employee's continued need for the accommodation.

Id.

[68] *See Barbuto*, 78 N.E.3d at 47 (recognizing that off-site medical use of marijuana might be permissible accommodation); *see also* Ross v. RagingWire Telecomm., Inc., 174 P.3d 200, 207 (Cal. 2008) (comparing California statute containing no language to provide users with right or privilege). The SJC cites to *Ross* to recognize the main difference as to why the plaintiff was successful in her handicap claims in *Barbuto* compared to the California case, is due to the language of the statute. *Barbuto*, 78 N.E.3d at 45 n.7. Nothing in the text or history of the California statute suggests the voters intended the measure to address the respective "rights and obligations" of employers and employees. *Id.* at 44. In comparison, the Act specifically includes language to address the "rights and privileges" of medical marijuana users. *Id.*

SJC analyzed the spectrum of authority governing medical marijuana.[69] On the one side was the federal law which provides that medical marijuana has "no accepted medical use in treatment in the United States," and on the other side was the decision of nearly ninety percent of the states which have enacted laws recognizing the medical use of marijuana.[70]

In coming to its conclusion, the court firmly established that Barbuto had the right and privilege to treat her condition using the appropriate medication, without termination, similar to any other handicap employee with a debilitating condition that could be treated using medication.[71] Moreover, the courts decision created greater protections for marijuana patients, and also served as a means to judicially recognize the medical use of marijuana as an effective treatment for the prescribed conditions enumerated within the Act.[72] Specifically, the SJC's analogy comparing Barbuto's circumstances to an employer who denied an employee with diabetes from using effective yet federally prohibited insulin provided some much needed clarity about the court's understanding of the severity of the issue.[73]

In *Barbuto v. Advantage Sales & Mktg.,* the decision to hold that medical marijuana patients have a qualified right to use medical marijuana in certain circumstances, notwithstanding federal law, is a complete departure from existing law. In its reasoning, the SJC established that when marijuana is used to treat a "qualified handicap" and is reasonable under the

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[69] *See Barbuto*, 78 N.E.3d at 45 n.7 (distinguishing Act with similar statutes from other states).

[70] *See Barbuto*, 78 N.E.3d at 46 (recognizing other states decisions to protect medical marijuana users); *but see* Gonzales v. Raich, 545 U.S. 1, 27 (2005) ("The [Controlled Substances Act] designates marijuana as contraband for any purpose; in fact, by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses"). *See Barbuto*, 78 N.E.3d at 49 ("In considering whether there is any such indication from the voters, we look to the closest equivalent to legislative history . . . which is the voters guide."). The court also looked to federal law and opinions from state courts discussing the legalization of medical marijuana. *Id.* Another aspect the court took into consideration in determining the intent of the Act was the legalization of recreational marijuana in Massachusetts. *See* MASS. GEN. LAWS ch. 94G (2017) (legalizing recreational possession and use of marijuana by persons over twenty-one). However, the legalization of recreational marijuana within Massachusetts is irrelevant as to the substantive facts of the *Barbuto* decision because "Barbuto's possession and use of marijuana for medical marijuana use was already lawful at the time her employment was terminated." *Barbuto*, 78 N.E.3d at 49.

[71] *See Barbuto*, 78 N.E.3d at 45 (asserting Barbuto could have competently performed her marketing associate job while treating with medical marijuana); *see also* Cargill v. Harvard Univ., 804 N.E.2d 377, 386 (Mass. App. Ct. 2004) (requiring appropriate findings of fact before making determination about reasonable accommodation).

[72] *See Barbuto*, 78 N.E.3d at 48 (suggesting provisions that would be acceptable for denying employee's use of medical marijuana). Even when medical marijuana would be used to rightfully treat a debilitating condition. *Id.*

[73] *See id.* at 44 (analogizing handicap employee denied insulin as equivalent to employee denied medical marijuana).

circumstances, an employee's use of medical marijuana may be protected by a "right or privilege" encompassed within the Act and General Laws. Subsequently, a qualified handicap employee in Massachusetts may bring a legitimate handicap discrimination claim against their employer for terminating their employment for the off-site and disclosed use of medical marijuana when it is legally prescribed and is a reasonable accomodation to treat the employee's condition. Furthermore, this decision confirmed that even when an employer believes an accommodation for the use of medical marijuana is unreasonable, the employer, at the very least, has an obligation to participate in the interactive process for the purpose of determining if there is an alternative treatment.

In conclusion, the effect of the *Barbuto* decision is two-fold. It undoubtedly answers elementary questions regarding the treatment of medical marijuana in Massachusetts, especially in an employment context. However, it also leaves open a lot of questions to be answered—specifically, in regard to how employers, both within Massachusetts and in other medical marijuana states, should now handle employees who disclose their use of medical marijuana for treatment, and how employers should operate their employment practices to remain compliant under the conflicting state and federal laws. Despite the clarification issues, *Barbuto* is a groundbreaking decision as it provides qualified handicap employees with the right to effectively medicate without fear of retribution. Finally and perhaps most importantly, this decision will motivate employers with strict medical marijuana employment policies to consider revising their policies to become compliant with the *Barbuto* decision, as it is likely that this decision will have a lasting impact on future employment practices for many years to come.

Molly Carroll

CRIMINAL LAW—PROSECUTORIAL MISTAKE RESULTS IN SEXUAL ASSAULT RETRIAL—*COMMONWEALTH V. ANGEL LUIS ALVAREZ*, 103 N.E.3D 1202 (MASS. 2018).

In a criminal trial, it is the role of a prosecutor to argue zealously in order to secure a conviction of the defendant.[1] However, a prosecutor's argument is flawed when she misspeaks in her opening or closing argument and introduces facts not supported by evidence that was submitted over the course of the trial.[2] Such an error is only deemed non-prejudicial if the court is "sure that the error did not influence the jury, or had but very slight effect."[3] In 2018, the Supreme Judicial Court of Massachusetts ("SJC"), in *Commonwealth v. Angel Luis Alvarez*,[4] considered whether "the prosecutor's closing argument was prejudicial error, where she told the jury of critical corroborative evidence that was not presented at trial."[5] The SJC held that the defendant's convictions must be vacated and the case remanded for a new trial because the court could not "say with assurance that the prosecutor's improper closing argument could not have influenced the jury to convict."[6]

The Commonwealth's case relied on the credibility of Camila,[7] a twelve year old girl, who testified to enduring multiple acts of sexual abuse by the defendant when she was between the ages of six and nine.[8] The defendant is Camila's godfather and married to her aunt.[9] During trial, Camila recalled several instances where the defendant sexually assaulted her when the two were alone together.[10]

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[1] *See* Commonwealth v. Rutherford, 71 N.E.3d 481, 486 (Mass. 2017) (explaining that prosecutors are permitted to forcefully argue to secure convictions).

[2] *See* Commonwealth v. Hrabak, 801 N.E.2d 239, 244 (Mass. 2004) (quoting Commonwealth v. Flebotte, 630 N.E.2d 265, 268 (Mass. 1994)) (summarizing holding).

[3] *See id.* (laying out standard court uses to determine whether error is non-prejudicial).

[4] 103 N.E.3d 1202 (Mass. 2018).

[5] *See id.* at 1205 (emphasizing issue before SJC).

[6] *See id.* at 1212 (explaining holding and reasoning of SJC's decision to remand).

[7] A pseudonym is used in place of the child's real name.

[8] *See Alvarez*, 103 N.E.3d at 1205-06 (showing how prosecution relied solely on testimony of Camila).

[9] *See id.* at 1206 (pointing out relationship between victim and defendant).

[10] *See id.* at 1206-07 (highlighting where Camila provided details of abuse). Camila testified that on one occasion, during a family party, the defendant took Camila to his house, where he placed her "on top of him" and "his penis touched [her] vagina." *Id.* at 1206. Camila further testified that

After the first alleged sexual assault, Camila returned home and asked her mother if she could shower because she felt "wet and sticky and gross."[11] Camila later testified that when she confided in her mother about her sexual abuse, she spoke of the first sexual assault and said "I told them how I felt gross and wet; that's why I wanted to take the shower."[12] This incident of sexual assault was the only assault that Camila indicated that the defendant had ejaculated, and therefore, the prosecutor understood that corroboration of Camila feeling "wet and sticky" from another source would increase the perceived validity of Camila's testimony.[13] The prosecutor, however, failed to elicit this testimony from either Camila or her mother during trial, yet referenced the alleged corroboration during her closing argument.[14] Nevertheless, a Superior Court jury found the defendant guilty on three counts of rape of a child and one count of indecent assault and battery upon a child.[15]

The SJC was tasked with determining whether the error in the prosecutor's closing argument was prejudicial enough to potentially influence the jury in their decision to convict the defendant.[16] The SJC held that since the sole witness in the Commonwealth's case was a child, the prosecutor misspoke when referencing the corroborative testimony during her opening statement and closing argument, and in addition, defense

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following the said assault her vagina felt "sticky," "wet, and disgusting." *Id.* Additionally, Camila testified that whenever the defendant picked her up from school, he parked his car behind a restaurant and "place[d] his hand under her pants and underwear and into her vagina." *Id.* Furthermore, she testified that on one occasion when she was six or seven years old, while she waited for a ride to a family party at the defendant's apartment, the defendant walked up to Camila, pulled down his pants and underwear, and put his penis into Camila's mouth, telling her to "suck it and do it." *Id.* "Every time Camila slept at the defendant's apartment, he tried to assault her. She would respond by pushing and kicking him, and the defendant would remain quiet and walk out of the room." *Id.*

[11] *See Alvarez*, 103 N.E.3d at 1206 (providing evidence where prosecutor wrongfully stated there was corroboration).

[12] *See id.* (emphasizing outrageous testimony of Camila that majority ended up discrediting).

[13] *See id.* at 1208 (showing motive of prosecutor to add corroboration in closing statement).

[14] *See id.* at 1208-09 (explaining how prosecutor wrongfully used unsolicited evidence in closing argument). During the prosecutor's closing argument, she stated to the jury "[m]om told you, 'She did come home one day and ask[ed] to take a bath, and I thought it was weird, because she had taken a bath that morning.' That's corroboration." *Id.* at 1209. The defense counsel objected at the close of the prosecutor's argument and stated that there was no evidence submitted that the mother provided any sort of corroboration of Camila's testimony that she told her mother she wanted to take a bath. *Id.* The defendant also claimed the trial judge erred in two additional ways: (1) by allowing Camila's treating physician to testify as an expert witness, and (2) by providing the jury with inadequate instructions. *Id.* at 1214-16.

[15] *See Alvarez*, 103 N.E.3d at 1205 (highlighting charges defendant convicted of).

[16] *See id.* at 1209 (showing type of balancing test SJC conducted).

counsel's timely objection did not result in remedial jury instructions, thus, the defendant's conviction must be reversed and remanded for a new trial.[17]

Under Massachusetts case law, statements made during closing arguments are limited to the evidence that has been submitted throughout the trial.[18] If a prosecutor, in a closing argument, mistakenly includes evidence that was not presented during trial, the mista

ke will be allowed only if the court is assured that the mistake did not influence the jury in their decision to convict the defendant.[19] Whether the mistake influenced the jury enough to affect a conviction will usually depend on whether the mistake went to the "heart of the case."[20] Regardless of the severity of the crime, the SJC has found prejudicial error stemming from prosecutorial misstatements, which results in an ultimate reversal of the defendant's conviction.[21] The SJC will determine the strength of the prosecution's case, absent the mistake, before deciphering the weight of a prosecutorial mistake.[22] The overall strength of the prosecution's case is often primarily reliant on the credibility of the witnesses called to testify.[23]

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[17] *See id.* at 1213 (holding that prosecutor's wrongful use of evidence not admitted during trial warranted vacating conviction).

[18] *See* Commonwealth v. Rutherford, 71 N.E.3d 481, 486 (Mass. 2017) (stating parameters for closing arguments).

[19] *See* Commonwealth v. Beaudry, 839 N.E.2d 298, 304 (Mass. 2005) (clarifying when prosecutorial mistake is non-prejudicial).

[20] *See* Commonwealth v. Pearce, 695 N.E.2d 1059, 1061 (Mass. 1998) (setting forth when mistake is material to case); *see also* Commonwealth v. Barbosa, 972 N.E.2d 987, 990-91 (Mass. 2012) (finding erroneously admitting hearsay to corroborate testimony of Commonwealth's witness material to jury's ultimate decision); Commonwealth v. Rollins, 803 N.E.2d 1256, 1260 (Mass. 2004) (introducing only police officer's witness and not others); Commonwealth v. Walker, 653 N.E.2d 1080, 1085 (Mass. 1995) (introducing only victim's testimony and nothing else); Commonwealth v. Stevens, 400 N.E.2d 261, 262 (Mass. 1980) (affirming defendant's conviction despite prosecutorial mistake because Commonwealth's case was strong regardless of mistake).

[21] *See Beaudry*, 839 N.E.2d at 305 (finding error in conviction when victim was sole witness); Commonwealth v. Loguidice, 650 N.E.2d 1254, 1255-56 (Mass. 1995) (demonstrating how prosecutorial mistakes can result in conviction reversal even if crime was severe); *see also* Commonwealth v. Hrabak, 801 N.E.2d 239, 240 (Mass. 2003) (finding Commonwealth's case weak when victim's testimony was sole evidence); Commonwealth v. Scheffer, 683 N.E.2d 1043, 1045 (Mass. App. Ct. 1997) (finding error when victim's testimony was only evidence); Commonwealth v. LaCaprucia, 671 N.E.2d 984, 985 (Mass. App. Ct. 1996) (reversing defendant's conviction because of prosecutorial mistake when sole witness was sexual assault survivor).

[22] *See* Commonwealth v. Flebotte, 630 N.E.2d 265, 268 (Mass. 1994) (addressing prejudicial effect of admitting improper testimony).

[23] *Compare Barbosa*, 972 N.E.2d at 990, *and Stevens*, 400 N.E.2d at 262, *with Beaudry*, 839 N.E.2d at 300, *and Hrabak*, 801 N.E.2d at 240 (distinguishing circumstances where victim testimony is strongly credited).

A party will often call expert witnesses to testify when their "specialized knowledge would be helpful to the jury."[24] When an expert witness is the treating physician of the child victim of sexual abuse and is testifying to the characteristics of the sexually abused child, the SJC has held that the testimony must "be confined to a description of the general or typical characteristics shared by child victims of sexual abuse."[25] However, the SJC has also held that certain expert testimony from a treating physician can be admitted when it would be of substantial value to the jury's understanding of the issue at hand.[26] When the probative value of the expert witness testimony is used to debunk the assumption that all child victims of sexual abuse suffer physical injuries to their genitals, the SJC has held that the Commonwealth does not need to call a non-treating physician expert to testify.[27]

A defendant is allowed to present evidence of alleged inadequacies of police investigations, as it permits the jury to consider whether there is reasonable doubt regarding the defendant's guilt or innocence.[28] Defense counsel may argue that an inadequate police investigation should lead to an acquittal for his or her client.[29] However, the judge ultimately has discretion in whether to provide the jury with a *Bowden* instruction.[30]

In *Commonwealth v. Alvarez*, the SJC reversed the defendant's conviction and remanded the case for a new trial because the court could not

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[24] *See* Commonwealth v. Pytou Heang, 942 N.E.2d 927, 943 (Mass. 2011) (explaining when expert witnesses are allowed). *See* Commonwealth v. Federico, 683 N.E.2d 1035, 1037-38 (Mass. 1997) (stating characteristics of sexually abused children are proper subjects for expert witness testimony).

[25] *See Federico*, 683 N.E.2d at 1038 (limiting expert testimony regarding child victims of sexual abuse).

[26] *See id.* at 1040 ("In the absence of evidence of physical injury, a medical expert may be able to assist the jury by informing them that the lack of such evidence does not necessarily lead to the medical conclusion that the child was not abused.").

[27] *See* Commonwealth v. Quincy Q., 753 N.E.2d 781, 793-94 (Mass. 2001) (allowing treating-physician to testify as expert witness).

[28] *See* MASS. G. EVID. § 1107(a) (2018) (stating evidence of inadequate police investigation may be admissible).

[29] *See* Commonwealth v. Fitzpatrick, 977 N.E.2d 505, 519-20 (Mass. 2012) (summarizing holding). Defense counsel is permitted to make a *Bowden* argument regardless of whether a judge agrees to give a *Bowden* instruction to the jury. *Id.* at 520. However, a jury instruction that directs the jury to rely on evidence rather than assumptions may be perceived by the jury as undercutting a defendant's permissible *Bowden* argument. *Id*; *see also* Commonwealth v. Gilmore, 506 N.E.2d 883, 886 (Mass. 1987) (holding that judge's instruction cannot undermine defendant's argument).

[30] *See* Commonwealth v. Lao, 948 N.E.2d 1209, 1218 (Mass. 2011) (articulating judge's discretion regarding *Bowden* instruction). In *Commonwealth v. Bowden*, 399 N.E.2d 482, 491 (Mass. 1980), the court held that "[t]he fact that certain tests were not conducted or certain police procedures not followed could raise a reasonable doubt as to the defendant's guilt in the minds of the jurors." *Id.*

assure that the "prosecutor's improper closing argument could not have influenced the jury to convict."[31] Chief Justice Gants, writing for the court, articulated that while the prosecution is allowed to argue fervently for a defendant's conviction, prosecutors must limit their closing arguments to what was properly admitted into evidence throughout the duration of the trial.[32] The SJC held that even though the trial judge instructed the jury not to consider the closing argument as part of the evidence used during deliberation, the court could not "be confident that the jury recognized that the prosecutor erred and that the mother never gave this [corroborating evidence]."[33] Although the court recognized the seriousness of the crime for which the defendant was convicted, it was reminded that it also had vacated past defendants' convictions when there was prejudicial error.[34]

The SJC recognized the potential danger in allowing a witness who personally treated the child victim of sexual abuse to testify as an expert witness.[35] However, the court acknowledged the importance of the testimony elicited by the Commonwealth, holding that it was not required to call a non-treating physician expert to offer an opinion that Camila's treating physician already offered.[36] Additionally, the SJC identified the right of a defendant to contest the adequacy of a police investigation.[37] Conversely,

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[31] *See* 103 N.E.3d 1202, 1212 (Mass. 2018) (explaining limitations of closing arguments).

[32] *See id.* at 1209 (forbidding prosecutors from utilizing information outside of evidence during closing arguments); *see also* Commonwealth v. Rutherford, 71 N.E.3d 481, 486 (Mass. 2017) (limiting closing arguments to facts before jury).

[33] *See Alvarez*, 103 N.E.3d at 1210 (explaining severity of prosecutor's misstatement). The SJC held that the prosecutor's misstatement was the only corroborating evidence to support Camila's testimony and the other corroboration that the prosecutor offered during the trial "amounted to almost nothing." *Id.*

[34] *See* Commonwealth v. Beaudry, 839 N.E.2d 298, 305 (Mass. 2005) (acknowledging court's history of reversing convictions for serious crimes); Commonwealth v. Loguidice, 650 N.E.2d 1254, 1255-56 (Mass. 1995) (demonstrating how prosecutorial mistakes can result in conviction reversal for severe crimes).

[35] *See* Commonwealth v. Federico, 683 N.E.2d 1035, 1039 (Mass. 1997) (acknowledging risk presented when treating physician acts as expert witness). Although the SJC recognized this risk, the court ultimately held that it had "not yet imposed the blanket prohibition proposed by the defendant that would bar a treating physician from offering any expert opinion in all child sexual abuse cases." *Alvarez*, 103 N.E.3d at 1215.

[36] *See Alvarez*, 103 N.E.3d at 1216 (explaining SJC's holding regarding physician testimony); Commonwealth v. Quincy Q., 753 N.E.2d 781, 793-94 (Mass. 2001) (allowing treating-physician to testify as expert witness). The SJC acknowledged the importance of Camila's treating physician's (Dr. Forkey) testimony as it related to the jury's understanding of information outside of a layperson's knowledge. *Alvarez*, 103 N.E.3d at 1215. Dr. Forkey opined generally, that it was "'very uncommon' to find physical injury on the genitals of victims of sexual abuse and that '[t]he absence of physical trauma is not inconsistent with abuse." *Id.* Dr. Forkey did not explicitly reference Camila's situation during this testimony. *Id.*

[37] *See Alvarez*, 103 N.E.3d at 1216 (summarizing holding). The defendant claims that the detective's investigation into Camila's allegations was inadequate. *Id.* at 1216.

the court held that when a judge "tells the jury to decide the case based solely on the evidence rather than on guesswork or conjecture, it is unlikely that the jury will hear that instruction as a derogatory comment on the defendant's *Bowden* argument."[38] Due to the potential impact that the prosecutor's misstatement could have on the jury, the SJC ultimately rejected Camila's credibility as a witness, vacated the defendant's convictions, and remanded the case.[39]

Whether intended, the SJC enforced a strong precedent with its decision.[40] The sole testimony of a child survivor of sexual assault was invalidated because the court decided it was not strong enough to outweigh a prosecutorial mistake.[41] While the court asserts that its decision was not influenced by the sexual assault charges, the dissent compares the court's history of discrediting the sole testimony of a sexual assault survivor, while crediting the testimony of witnesses and victims "in the face of an error in cases without sexual assault charges."[42] It is necessary to properly evaluate

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[38] *See id.* at 1218 (explaining how judge's instruction would not diminish defendant's *Bowden* argument).

[39] *See id.* at 1219 (determining Camila's credibility as witness did not outweigh mistake of prosecution).

[40] *See id.* at 1220 (Cypher, J., dissenting) (asserting basis for dissenting). In her dissent, Justice Cypher acknowledged the importance of the "undisputed, consistent, and clear testimony of a survivor of sexual assault." *Id.* The majority's decision allows a perpetrator of a heinous crime, such as child sexual assault, to walk away from any and all consequences because of a prosecutor's slight mistake or misstatement. *Id.*

[41] *See id.* (acknowledging court's decision regarding Camila's credibility). Moreover, Justice Cypher recognizes the court's history of assessing the testimony of sexual assault survivors more critically than the testimony of victims of other crimes. *Id.* This type of unfair, uneven analysis of testimony ultimately results in a ". . .disservice to all future victims [of sexual assault] whose interests are represented by imperfect prosecutors." *Id.*

[42] *See id.* at 1221 (explaining court's history of upholding credibility for victims of non-sexual offenses). *Compare* Commonwealth v. Barbosa, 972 N.E.2d 987, 990-98 (Mass. 2012), *and* Commonwealth v. Rollins, 803 N.E.2d 1256, 1260 (Mass. 2004), *and* Commonwealth v. Walker, 653 N.E.2d 1080, 1085 (Mass. 1995), *and* Commonwealth v. Stevens, 400 N.E.2d 261, 262 (Mass. 1980), *with* Commonwealth v. Beaudry, 839 N.E.2d 298, 305 (Mass. 2005), *and* Commonwealth v. Hrabak, 801 N.E.2d 239, 240 (Mass. 2003), *and* Commonwealth v. Scheffer, 683 N.E.2d 1043, 1045 (Mass. App. Ct. 1997), *and* Commonwealth v. LaCaprucia, 671 N.E.2d 984, 985 (Mass. App. Ct. 1996) (comparing court's analysis of prosecutorial mistake with or without sexual assault charges present). For example, in *Barbosa*, the defendant was indicted for first degree murder and multiple firearms offenses. 972 N.E.2d at 989. The case against the defendant was "strong" even though all identifying witnesses were impeached for prior inconsistent statements and the judge erroneously admitted hearsay to corroborate the testimony of the Commonwealth's witness. *Id.* at 990-98. *Compare Barbosa,* 972 N.E.2d at 989, *with Beaudry*, 839 N.E.2d at 300 (stating defendant was indicted by court and convicted for sexual offenses against his daughter). In *Beaudry*, the only witness to the abuse was the victim herself, and similar to *Alvarez*, the SJC held that the prosecutor's closing argument was improper and prejudicial and reversed the defendant's conviction. *Beaudry*, 839 N.E.2d at 300; *Alvarez*, 103 N.E.3d at 1221 (Cypher, J., dissenting). When "evaluating the Commonwealth's evidence in the face of an error in cases without sexual assault charges, our jurisprudence frequently credits testimony of witnesses and victims . . . [y]et when performing the

and critique the effect of a prosecutorial mistake, yet it is also crucial that the court think pragmatically about the effect its decisions will have on future cases.[43] The prosecutorial mistake "was an insignificant portion of [the] closing argument, occupying a mere five lines out of approximately nine transcribed pages."[44] The majority seems to disregard the indescribable amount of courage it took Camila to testify and recall the horrific events that she endured at the hands of someone she considered family.[45]

Furthermore, the SJC properly allowed the Commonwealth to call Camila's treating physician, Dr. Forkey, as an expert witness.[46] Expert witness testimony is crucial in facilitating the jury's understanding of topics that fall outside the knowledge of the average layperson.[47] Even though there is a potential risk in allowing a treating physician to testify as an expert witness, the SJC did not hold that Dr. Forkey's testimony was being used as

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same analysis in cases of sexual assault, the testimony of victims appears to be given comparably less weight." *Alvarez*, 103 N.E.3d at 1221 (Cypher, J., dissenting). Chief Justice Gants rebuts Justice Cypher's dissent and proclaims that the inclusion of a sexual assault charge does not alter the way the court approaches the analysis. *Alvarez*, 103 N.E.3d 1213 n.4. (majority opinion). Chief Justice Gants insists that the court's decision did not rest on its perceived credibility of Camila's testimony, but rather the misstatement by the prosecutor and the potential effect of the mistake on the jury. *Id.*

[43] *See Alvarez*, 103 N.E.3d at 1220 (Cypher, J., dissenting) (admitting difficulty of evaluation). Justice Cypher acknowledged the difficulty in bringing forward a claim of sexual assault and realized that the majority's decision had the potential to prevent future claims out of fear that perpetrators would not be punished in the face of a prosecutorial mistake. *Id.* Justice Cypher also commented on the majority's focus on "Camila not displaying the behavioral characteristics of a 'normal' child who has suffered abuse" and how this focus created a "de facto corroboration requirement, necessitating a child without physical symptoms or eyewitnesses to display enough emotional trauma to be credible." *Id.* at 1223. This type of requirement from the court forces "a child to walk a tightrope of being behaviorally symptomatic enough to be believed, but not too emotional so as to be deemed unreliable." *Id.* at 1223-24. It is completely unreasonable to require such a reaction from any survivor of sexual assault, but especially a child survivor. *Id.* Oftentimes, there are no other witnesses to these vulgar acts and therefore it is of the upmost importance that the courts credit the valid testimony of the survivors. *Id.* at 1224.

[44] *See id.* at 1223 (criticizing majority's reliance on such small error). It is unlikely that such a small portion of the prosecutor's closing argument would have such an overwhelming effect on the jury, as to require a vacated conviction and a new trial. *Id.*

[45] *See id.* at 1220 (summarizing holding). Camila was able to recall, in detail, each incident of abuse and her strong testimony should have been enough to affirm the defendant's conviction, despite the minor misstatement from the prosecutor. *Id.* at 1222.

[46] *See id.* at 1216 (majority opinion) (reiterating no abuse of discretion regarding physician's testimony).

[47] *See* Commonwealth v. Pytou Heang, 942 N.E.2d 927, 943 (Mass. 2011) ("The purpose of expert testimony is to assist the trier of fact in understanding evidence or determining facts in areas where scientific, technical, or other specialized knowledge would be helpful."). The SJC acknowledged its prior precedent of allowing experts to testify on the behavioral and emotional reactions of children survivors of sexual assault as this material was typically beyond the common knowledge of a jury member. *Alvarez*, 103 N.E.3d at 1214.

a mechanism to bolster Camila's credibility as a witness.[48] Instead, the court held that Dr. Forkey's testimony had the potential to be extremely beneficial to the jury, by way of explaining that the lack of physical injury on a sexual assault survivor does not necessarily yield the conclusion that the child was not abused.[49] Ultimately, Dr. Forkey's testimony was only used to help the jury understand the facts of Camila's case and therefore, it was properly admissible for the jury's consideration.[50]

Finally, the SJC properly concluded that the trial judge's refusal to give a *Bowden* instruction did not prejudice the defendant.[51] While there is truth to the defendant's assertion that risks may arise from inadequate police investigation, the trial judge ultimately has discretion in deciding to issue a *Bowden* instruction.[52] The trial judge's jury instruction did not undermine the validity or strength of the defendant's *Bowden* defense.[53] The SJC properly decided that the strength of the defendant's *Bowden* defense was reliant on the evidence provided regarding the alleged inadequacy of the police investigation.[54] This decision dissuades future litigants from relying on jury instructions, and instead properly urges them to supply ample evidence in order to support their claims.[55]

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[48] *See* Commonwealth v. Federico, 683 N.E.2d 1035, 1039 (Mass. 1997) (acknowledging risk presented when treating physician acts as expert witness). The unique characteristics of sexually abused children warranted the need for expert witness testimony. *Id.* at 1037-38.

[49] *See Alvarez*, 103 N.E.3d at 1216 (describing why court thought physician's testimony was important). The SJC recognized the importance of Dr. Forkey's testimony since the jury may have been "under the mistaken understanding that certain types of sexual abuse always or nearly always causes physical injury or scarring in the victim" *Id.* (quoting *Federico*, 683 N.E.2d at 1039 n.13).

[50] *See Alvarez*, 103 N.E.3d at 1216 (explaining use of expert testimony). Dr. Forkey's testimony was elicited to ensure that the jury did not draw an improper inference from the absence of genital injury on Camila to the conclusion that the abuse never happened. *Id.*

[51] *See id.* at 1218 (summarizing SJC's holding regarding *Bowden* instruction).

[52] *See* Commonwealth v. Lao, 948 N.E.2d 1209, 1218 (Mass. 2011) (articulating judge's discretion regarding *Bowden* instruction). The defendant argued that his argument, which included a *Bowden* defense, was undermined by the trial judge's refusal to give a *Bowden* instruction to the jury. *Alvarez*, 103 N.E.3d at 1216. However, the SJC held that the trial judge's instructions did not require the jury to reject the *Bowden* defense which was raised by defense counsel. *Id.* at 1218.

[53] *See Alvarez*, 103 N.E.3d at 1218 (discussing other circumstances where *Bowden* argument would be undercut). When a judge instructs the jury to "decide the case based solely on the evidence rather than on guesswork or conjecture, it is unlikely that the jury will hear that instruction as a derogatory comment on the defendant's *Bowden* argument." *Id.*

[54] *See id.* (summarizing court's decision to rely on evidence provided regarding *Bowden* instruction).

[55] *See id.* (explaining court's decision regarding *Bowden* instruction). The SJC did not find any problems with the trial judge's decision to not give a *Bowden* instruction because it realized that the defendant's *Bowden* defense was not compromised by the lack of instruction. *Id.* Instead, the court focused on requiring a defendant to provide the court and jury with sufficient evidence of police investigation inadequacies to support a *Bowden* argument. *Id.*

In the end, the court's decision favored technicalities over logic and resulted in the reversal of a conviction that was properly decided. A child must possess inordinate amounts of courage to relive his or her most traumatizing moments of abuse on a witness stand and in front of a room full of strangers. While the importance of judicial proceedings and rules should not be cast aside, it is crucial that the court consider all of the effects of its decisions, especially ones that involve children subjected to the most atrocious crimes. In the midst of a very open and candid discussion regarding sexual abuse, society can only hope that the voices of sexual assault survivors are always given the credibility they rightfully deserve. Unfortunately, in *Alvarez*, the majority found that Camila's credibility did not trump the prosecutor's mistake. One can only wonder whether Camila's testimony would have been as heavily discounted by the majority if she was an adult, and if this was any crime other than sexual assault.

Danielle Paulson

CONSTITUTIONAL LAW—LET THEM EAT CAKE—*MASTERPIECE CAKESHOP, LTD. V. COLO. CIVIL RIGHTS COMM'N*, 138 S. CT. 1719 (2018).

The First Amendment to the United States Constitution protects an individual's free exercise of religion.[1] The Fourteenth Amendment ensures no state shall deny someone equal protection under the law.[2] Flowing from these fundamental freedoms is an oft-deliberated balance between religious exemptions and antidiscrimination laws in cases involving sexual orientation.[3] In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[4] the United States Supreme Court considered whether the Colorado Civil Rights Commission examined the state's possible religious hostility when adjudicating the case.[5] The Court held that the Colorado Civil Rights Commission did not rule with the religious neutrality required by the Constitution.[6]

Masterpiece Cakeshop, a bakery in Lakewood, Colorado, offers a variety of baked goods including custom-designed cakes for events such as weddings and birthdays.[7] Jack Phillips, an expert baker who has owned and operated the cakeshop for over twenty-four years, is a devout Christian.[8] Due to Phillips's deeply-held religious beliefs, he claimed that making a wedding cake for a same-sex couple was a violation of his religious principles.[9] Charlie Craig and Dave Mullins, a gay couple, visited

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[1] *See* U.S. CONST. amend. I ("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.").

[2] *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[3] *See* Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, 128 YALE L.J. 201, 203 (2018) (describing tension between religious exemptions and antidiscrimination laws in sexual orientation cases).

[4] 138 S. Ct. 1719, 1724 (2018).

[5] *See id.* (introducing main issue in *Masterpiece Cakeshop*). Caution against religious hostility, or the state's bias against a citizen's religious belief, calls for a neutral application of a State's law in a Free Exercise Clause case. *Id.* at 1733-35 (Kagan, J., concurring).

[6] *See id.* at 1724 (majority opinion) (setting forth holding).

[7] *See id.* (describing cakeshop's offerings to customers).

[8] *See id.* at 1724 (citation omitted) (introducing cakeshop's owner). In the complaint, Phillips "explained that his 'main goal in life is to be obedient to' Jesus Christ and Christ's 'teachings in all aspects of his life' and . . . seeks to 'honor God through his work at Masterpiece Cakeshop.'" *Id.*

[9] *See id.* (describing Phillips's opposition to making wedding cakes for gay couples). In the complaint, Phillips said, "'God's intention for marriage from the beginning of history is that it is and should be the union of one man and one woman.'" *Id.*

Masterpiece Cakeshop in the summer leading up to their wedding hoping to order a cake for their celebration.[10] Phillips explained to the couple that he did not create wedding cakes for same-sex couples because of his religious opposition to same-sex marriage and further because Colorado did not recognize same-sex marriage at the time.[11] In September 2012, shortly after the couple's visit to Masterpiece Cakeshop, Craig and Mullins filed a discrimination complaint against Masterpiece Cakeshop.[12]

The Colorado Anti-Discrimination Act (CADA) prohibits discrimination on the basis of sexual orientation and forbids the discriminatory practice of denying "public accommodation" to same-sex couples.[13] The Colorado Civil Rights Commission, an appellate body established by CADA to review matters of discrimination, conducted a formal hearing addressing the alleged discrimination of Craig and Mullins by Phillips.[14] At the hearing, Phillips argued that requiring him to make a

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[10] *See Masterpiece Cakeshop*, 138 S. Ct. at 1724 (pointing out how Phillips refused to service same-sex couple). At the time of the 2012 encounter, Colorado did not recognize same-sex marriage. *Id.* As such, Craig and Mullins planned to first legally wed in Massachusetts and later hold a celebration with their family and friends in Denver, Colorado. *Id.*

[11] *See id.* (explaining Phillips's reasoning for refusing to make wedding cake). Phillips further explained in his complaint that "'to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship [Craig and Mullins] were entering into.'" *Id.*; *see also* Kitchen v. Herbert, 755 F.3d 1193, 1199 (10th Cir. 2014) (holding state may not deny marriage license based solely on sex). Following *Kitchen*, county clerks for states within the Tenth Circuit, which includes Colorado, began issuing marriage licenses to same-sex couples. *See* John Aguilar, *Boulder County begins issuing same-sex marriage licenses; AG says no*, DENVER POST (June 25, 2014, 10:14 AM), https://www.denverpost.com/2014/06/25/boulder-county-begins-issuing-same-sex-marriage-licenses-ag-says-no/ (describing issuance of marriage licenses to same-sex couples).

[12] *See Masterpiece Cakeshop*, 138 S. Ct. at 1725 (elucidating Craig and Mullins's decision to sue Masterpiece Cakeshop). In the complaint, the couple alleged they were "denied 'full and equal service' at the [cakeshop] because of their sexual orientation and that it was Phillips'[s] 'standard business practice' not to provide cakes for same-sex weddings." *Id.*

[13] *See* COLO. REV. STAT. § 24-34-601(2)(a) (2018) ("It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . ."). CADA defines "public accommodation" broadly to include "any place of business engaged in any sales to the public and any place offering services . . . to the public," but excludes "a church, synagogue, mosque, or other place that is principally used for religious purposes." *Id.* at § 24-34-601(1).

[14] *See Masterpiece Cakeshop*, 138 S. Ct. at 1725 (explaining how *Masterpiece Cakeshop* was initially adjudicated). Complaints arising under CADA are addressed, in the first instance, by the Colorado Civil Rights Division and then, if probable cause is found, the matter is referred to the Colorado Civil Rights Commission. *Id.* During the Commission's formal public hearings, two commissioners made comments that the Court deemed to "cast doubt on the fairness and impartiality of the Commission's adjudication." *Id.* at 1730. One commissioner stated that "Phillips can believe 'what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state.'" *Id.* at 1729. Another commissioner stated that using the freedom of religion

cake for a same-sex couple would violate his First Amendment rights to free speech and free exercise of religion.[15] However, the Colorado Civil Rights Commission ordered Phillips to "'cease and desist from discriminating against . . . same-sex couples by refusing to sell them wedding cakes or any product [the bakery] would sell to heterosexual couples.'"[16] Phillips appealed to the Colorado Court of Appeals which affirmed the Commission's decision.[17] After the Colorado Supreme Court declined to hear the case, the Supreme Court of the United States granted certiorari.[18]

The Free Exercise Clause of the First Amendment protects citizens' right to practice their religion free from masked or overt government hostility.[19] With respect to the Constitution's guarantee of free exercise of religion, the government cannot impose burdens that are hostile to a citizen's religious beliefs and cannot act in a manner that presumes the illegitimacy of a citizen's religious beliefs and practices.[20] While it is true that the religious activities of individuals are subject to regulation by the states in the exercise of their power to promote the health, safety, and general welfare of

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to justify discrimination like slavery and the Holocaust are some of the "most despicable pieces of rhetoric that people can use." *Id.* at 1729 (quoting Tr. of Oral Arg. 11-12).

[15] *See id.* at 1726 (explaining Phillips's legal argument).

[16] *See id.* (alteration in original) (quoting App. to Pet. For Cert. at 58a) (explaining Commission's holding). The Civil Rights Commission did not agree that Phillips's creating a wedding cake for Craig and Mullins would force him to adhere to "'an ideological point of view'" that would be seen as violating his freedom of speech. *Id.* (quoting App. to Pet. for Cert. 75a). Furthermore, the Commission upheld the view that CADA is a "'valid and neutral law of general applicability'" and in applying it to the present case, the free exercise of religion clause of the First Amendment was not violated. *Id.*

[17] *See id.* (recognizing Phillips's appeal). The court reasoned that the "Free Exercise Clause 'does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability' on the ground that following the law would interfere with religious practice or belief." *Id.* at 1727 (citing Mullins v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 289 (2015)).

[18] *See id.* (announcing Supreme Court's decision to hear *Masterpiece Cakeshop*).

[19] *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993) (quoting Gillette v. United States, 401 U.S. 437, 452 (1971)) (citation omitted) (quoting Bowen v. Roy, 476 U.S. 693, 703 (1986)) (citation omitted) ("Facial neutrality is not determinative. The Free Exercise Clause . . . extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality,' and 'covert suppression of particular religious beliefs.' Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."); *see also* Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 696 (1970) (Harlan, J., concurring) ("The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.").

[20] *See Church of Lukumi Babalu Aye*, 508 U.S. at 543 ("The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause."); *see also* Braunfield v. Brown, 366 U.S. 599, 607 (1961) ("If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.").

their citizens, it is also true that the states cannot deny religiously-grounded conduct protected by the Free Exercise Clause of the First Amendment.[21]

Supreme Court decisions have established that gay persons and couples may not be discriminated against because of their sexual orientation and are considered a protected class of citizens.[22] While people with religious objections to a protected class are accommodated, these objections generally do not allow business owners to deny people equal access to goods and services.[23] Historically, the Supreme Court protects people from discrimination in the name of religious liberty, particularly discrimination of individuals in a protected class.[24]

At the time the events leading to this litigation unraveled, Colorado did not recognize the validity of same-sex marriages.[25] In the past, Colorado prohibited discrimination, including discrimination on the basis of sexual orientation, in places of public accommodation.[26] Cases concerning

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[21] *See* Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 792-93 (1973) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion."); *see also* Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) (holding certain religiously-grounded conduct is beyond state's control, "even under regulations of general applicability.").

[22] *See* Romer v. Evans, 517 U.S. 620, 633 (1996) ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."); *see also* Shelley v. Kraemer, 334 U.S. 1, 22 (1948) ("Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."); Obergefell v. Hodges, 135 S. Ct. 2584, 2604-05 (2015) ("[U]nder the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of [the fundamental right to marry].").

[23] *See* Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., Inc., 515 U.S. 557, 572 (1995) ("[P]rovisions . . . are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not . . . violate the First or Fourteenth Amendments."); Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402, n.5 (1968) (per curiam) (quoting Newman v. Piggie Park Enters., Inc., 377 F.2d 433, 438 (4th Cir. 1967) (Winter, J., concurring)) (asserting defendant's belief that Act "contravenes . . . will of God" and impedes "free exercise of . . . religion" are not grounds for discrimination). In *Hurley*, the focal point of the state's prohibition was to discriminate "against individuals in the provision of publicly available goods, privileges, and services." 515 U.S. at 572.

[24] *See Obergefell*, 135 S. Ct. at 2593 (holding right to marry is fundamental right guaranteed under Due Process and Equal Protection Clauses); *see also* Roe v. Wade, 410 U.S. 113, 169-71 (1973) (declaring pro-life religious liberties do not undermine women's equality); Loving v. Virginia, 388 U.S. 1, 2 (1967) (preventing marriage based on race violates Equal Protection and Due Process Clauses); Brown v. Bd. of Educ., 347 U.S. 483, 486 (1954) (holding racial segregation of public schools deprives minority group of equal protection).

[25] *See* COLO. CONST. art. II, § 31 (2012) ("Only a union of one man and one woman shall be valid or recognized as a marriage in this state."); *see also Obergefell*, 135 S. Ct. at 2593 (holding marriages, both heterosexual and same-gender, are guaranteed under Fourteenth Amendment); United States v. Windsor, 570 U.S. 744, 749 (2013) (ruling Defense of Marriage Act is unconstitutional).

[26] *See* 1885 Colo. Sess. Laws 132-33 (guaranteeing equal enjoyment of certain public places for all regardless of race, color, or servitude); *see also* 1895 Colo. Sess. Laws 139 (amending

discrimination are adjudicated under the CADA which is an administrative system tasked with resolving discrimination claims.[27] The administrative system is required to review all Free Exercise Clause cases with neutrality and absent of hostility towards citizens' religious beliefs.[28] In 2015, the Colorado Civil Rights Commission heard a series of cases involving complaints that alleged bakers discriminated against citizens by refusing to bake cakes depicting hostile messages aimed towards gay persons.[29] The Commission found that the bakers' ultimate refusal to bake cakes displaying hateful messages fell within the constitutional rights of the bakers.[30]

In *Masterpiece Cakeshop*, the Supreme Court concluded that the Colorado Civil Rights Commission failed to decide Phillips's case with the neutrality required when addressing Free Exercise Clause cases.[31] According to the Court, inappropriate and dismissive comments made by two commissioners during the hearing process indicated a lack of due consideration for Phillips's free exercise rights and the dilemma he faced.[32]

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previous antidiscrimination law to extend protection to "all other places of public accommodation"); *see also* COLO. REV. STAT. §24-34-601(2)(a) (2018) ("It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . ."). CADA was amended in 2007 and 2008 to prohibit discrimination on the basis of sexual orientation in places of public accommodation. § 24-34-601(2)(a).

[27] *See* COLO. REV. STAT. §§ 24-4-105(14), 24-34-306 (2018) (laying out procedural determinations).

[28] *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993) (highlighting Free Exercise Clause cases must be examined free of hostility toward citizen's religious beliefs).

[29] *See* Jack v. Gateaux. Ltd., Charge No. P20140071X (Colo. Civ. Rights Div. Mar. 24, 2015) http://www.adfmedia.org/files/GateauxDecision.pdf; Jack v. Le Bakery Sensual, Inc., Charge No. P20140070X (Colo. Civ. Rights Div. Mar. 24, 2015) http://www.adfmedia.org/files/LeBakerySensualDecision.pdf; Jack v. Azucar Bakery, Charge No. P20140069X (Colo. Civ. Rights Div. Mar. 24, 2015) http://www.adfmedia.org/files/AzucarDecision.pdf [hereinafter *Jack cases*] (offering cases with similar factual circumstances). In each of these cases, the plaintiff requested two cakes, one that resembled an open Bible and decorated with the biblical verses "God hates sin. Psalm 45:7," and "Homosexuality is a detestable sin. Leviticus 18:2." *Jack cases*, *supra* note 29. The second cake depicted two groomsmen holding hands with a red X over the image and the words, "God loves sinners" and "While we were yet sinners Christ died for us. Romans 5:8." *Id.*

[30] *See Jack cases*, *supra* note 29 (concluding bakers acted lawfully in declining to create cakes that demeaned gay persons and weddings).

[31] *See Masterpiece Cakeshop*, 138 S. Ct. at 1729 ("The Civil Rights Commission's treatment of [Phillips's] case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.").

[32] *See id.* ("Phillips can believe 'what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state' [and] 'if a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise.'"). Another commissioner commented during the hearing:

The majority opinion warned that these comments made by the commissioners were inappropriate, especially when considering the commission's primary responsibility is to uphold the fair and neutral enforcement of Colorado's antidiscrimination law.[33]

The Supreme Court wrongly concluded that Craig and Mullins should lose the case by relying too heavily on the comments made by two commissioners in deciding for Phillips.[34] These comments, which came from only two of seven commissioners, on one of the four decision-making entities, are not probative in light of the totality of the circumstances and should not justify reversing the lower court's judgment.[35] The facts of this case are far removed from those of *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, the case the majority relied upon, where there was merely one decision-making body, the city council.[36]

The Court further misidentified the issue when it failed to properly distinguish the Jack cases from the case at hand.[37] In the Jack cases, the bakers refused to provide a cake that displayed hateful messages demeaning gay persons and gay marriage.[38] The bakers' refusal to make a cake with

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> Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.

Id.

[33] *See id.* ("To describe a man's faith as 'one of the most despicable pieces of rhetoric that people can use' is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere.").

[34] *See id.* at 1729-30 (reiterating holding).

[35] *See id.* (Ginsburg, J., dissenting) (outlining steps involved in proceedings). "First, the Division had to find probable cause that Phillips violated CADA. Second, the [judge] entertained the parties' cross-motions for summary judgment. Third, the Commission heard Phillips'[s] appeal. Fourth, after the Commission's ruling, the Colorado Court of Appeals considered the case *de novo*." *Id.*

[36] *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) (reversing city council's ruling that government's actions violated principle of religious neutrality). The minutes from a meeting showed "significant hostility" from the city council members, other city officials, and residents, towards the plaintiff and their practice of animal sacrifice. *Id.* at 541. These meetings were further interrupted when the public crowd cheered in approval of critical comments made by city council members and taunted the president of the Church of Lukumi Babalu Aye when he spoke. *Id.*

[37] *See Masterpiece Cakeshop*, 138 S. Ct. at 1750 (Ginsburg, J., dissenting) ("Craig and Mullins simply requested a wedding cake: They mentioned no message or anything else distinguishing the cake they wanted to buy from any other wedding cake Phillips would have sold.").

[38] *See id.* at 1751 (alternations in original) (quoting App. to Pet. for Cert. 20a, n.8) ("'The Division found that the bakeries did not refuse [Jack's] request because of his creed, but rather

Jack's requested message would extend to any customer, regardless of religion.[39]

In the present case, Phillips refused to sell any cake at all to Craig and Mullins.[40] Phillips's decision not to sell Craig and Mullins a cake—the kind of cake he regularly sold to other people—was based solely on the couple's sexual orientation.[41] Unlike the Jack cases, where the bakers refused to make cakes based on the hateful messages displayed on the cakes, a wedding cake for a gay couple does not signal support for homosexual weddings in general, but rather for that couple's wedding specifically.[42] Phillips refused to create a cake he personally found offensive based solely on the individuals' sexual orientation.[43]

The Court in *Masterpiece Cakeshop* considered whether the Colorado Civil Rights Commission reviewed Phillips's case with the religious neutrality constitutionally required by the Free Exercise Clause of the First Amendment. Deciding against Craig and Mullins, the Court mistakenly relied too heavily on careless comments made by two commissioners who made up a seven-commissioner panel and were part of a larger, four-layer proceeding. While obsessing over those trivial, off-hand comments, the majority missed the significance of the matter. Under a sensible application of CADA, Phillips's refusal to sell a wedding cake to Craig and Mullins solely on the basis of their sexual orientation and decision to marry was discriminatory toward a protected class of citizens and, therefore, unconstitutional.

Timothy Rennie

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because of the offensive nature of the requested message . . . [T]here was no evidence that the bakeries based their decisions on [Jack's] religion . . . .'").

[39] *See id.* at 1750 (emphasizing differences in Jack cases). The bakers in the Jack cases would have sold Jack or anyone else any baked good including a wedding cake, as long as the bakers did not find the requested messages for the cake to be discriminatory or hateful. *Id.* at 1749. In contrast, Phillips refused to sell Craig and Mullins a cake solely because the couple is gay. *Id.* at 1751.

[40] *See id.* at 1751 (second alteration in original) ("[R]efusal 'to design a special cake with words or images . . . might be different from a refusal to sell any cake at all.'").

[41] *See id.* at 1750 ("Phillips would not provide a good or service to a same-sex couple that he would provide to a heterosexual couple.").

[42] *See id.* at 1750 (emphasis in original) ("When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating *their* wedding—not a cake celebrating heterosexual weddings or same-sex weddings—and that is the service Craig and Mullins were denied.").

[43] *See Masterpiece Cakeshop*, 138 S. Ct. at 1750 (emphasis added) ("Phillips declined to make a cake he found offensive where the offensiveness of the product was determined *solely by the identity of the customer requesting it*.").