Suzana Kraljić
EDITOR

Collected Papers of
THOMAS A. HELLER

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Collected Papers of Thomas A. Heller

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Suzana Kraljić

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Foreword

SUZANA KRALJIĆ
editor

Thomas Allan HELLER, a distinguished American legal scholar and lecturer, has left an indelible mark on our Faculty of Law, University of Maribor. Although his initial involvement with the faculty was intended to be temporary, his journey led him to remain with us longer, during which time he significantly enriched our academic environment through his extensive professional knowledge and unwavering dedication. His contributions spanned a wide range of activities—he actively participated in conferences, delivered expert lectures, supported the pedagogical process for domestic and Erasmus students, and collaborated on various academic projects, always demonstrating exceptional professionalism and commitment.

One of the most valuable aspects of his work was his deep expertise in the American legal system. Students had the unique opportunity to explore the intricacies and nuances of American jurisprudence through his carefully prepared lectures. Thomas Allan Heller not only analyzed relevant case law but also contextualized it in a way that made it accessible and relevant to the Slovenian and European legal framework. His ability to communicate complex legal concepts in a clear and engaging manner

greatly enhanced students' understanding and offered them a comparative perspective that is increasingly vital in today's global legal landscape.

As a native English speaker and lawyer, Thomas Allan Heller provided invaluable support to both students—such as in their preparation for moot court competitions—and academic staff, particularly in drafting and preparing scholarly articles. Moreover, he played a key role in paving the way for institutional cooperation between his Alma Mater, Wayne State University in Detroit, and the Faculty of Law at the University of Maribor. Despite the relatively short period of collaboration, the results have already been substantial and fruitful, including bilateral projects, a joint LLM degree, mutual academic visits, conference participation, and co-authored publications.

In addition to his teaching, Thomas Allan Heller contributed to numerous academic articles published in respected Slovenian journals, such as *Medicine, Law & Society*, *Lexonomica*, and *Pravnik*. These contributions extended far beyond the Slovenian academic sphere—evident in the high readership and citation of his work, which attests to the broad international recognition he has garnered. Alongside his first published work at his Alma Mater, Wayne State University in Detroit, these publications now form a valuable collection available both in print and electronic formats as part of this monograph.

On this occasion, the Faculty of Law, University of Maribor, wishes to express its sincere gratitude and deep appreciation to Thomas Allan Heller for all that he has done for our institution. His knowledge, dedication, and scholarly legacy have become a lasting part of our academic heritage. Thank you, Thomas Allan Heller, for your remarkable contributions and the enduring impact you have made.

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Foreword

THOMAS ALLAN HELLER
J.D. Senior Lecturer in Law

Wayne State Law School will celebrate its centenary in 2027. Throughout its history, Wayne Law has provided generations of students with the legal foundation and tools that have enabled its many graduates to serve the public with competence and compassion. I was such a graduate. Here is my story in brief.

A native of northwest Detroit, I had naturally known about Wayne State University from an early age. In fact, there is a family photo of me, when I was less than ten years old, circa Christmas 1963-1964, sporting a green and gold Wayne State sweatshirt. Perhaps at that time, my parents knew something about my future academic career! After graduating from Detroit Catholic Central in 1973, and then after attending Oakland University for a year, I continued my undergraduate studies at the University of Michigan in Ann Arbor. During my undergraduate years, I became interested in history, politics and law. Memory can be inherently unreliable, but with that caveat, I seem to recall I was drawn to the law not for money, or to help save the world, or some other altruistic reason, but rather because I thought a career in the law would be interesting and allow me to learn my entire life. Although I had offers for other law schools, including some with so-called higher rankings, I decided to "stay at home" in Detroit and attend Wayne. I knew of Wayne's

reputation and that many Michigan judges and lawyers had received their legal training at Wayne. I accepted its offer.

As is probably the case with most first year law students, I had the Paper Chase jitters. My strategy, if one could call it a strategy at all, was to devote my absolute best efforts to the study of law, earn the best grades I could, and then hope for the best. That first year, in 1977, I spent many hours in the Arthur Neef law library, reading the blue case books with the archaic cases; pouring over the green Hornbooks; preparing case outlines; and, even reading other materials to help me understand lectures. I consumed a lot of coffee. All my hard work paid off. No, I was not ranked at the top of my class but did well enough to receive an invitation to be an associate editor on the Wayne Law Review, one of the top student honors. I mention this for two reasons. First, this honor came as a complete shock to me. I had not set out to "Be on the Law Review," or to win other honors, but rather just to do my level best. Second, the time I spent on the Law Review – in those days students on Law Review worked out of a rather dark, confined space in a basement – would forever change the trajectory of my legal career and broader life.

These changes began, in a rather dramatic fashion, in my L2. In 1978, at the age of only 39, Hilda R. Gage was elected to a seat on the Oakland County Circuit Court in Pontiac, Michigan. This is one of the busiest trial courts in America. As with me, Judge Gage had obtained her bachelor's degree from the University of Michigan and earned her law degree from Wayne, taking classes at night. Unlike me, she graduated at the top of her class at Wayne. Also, unlike me, she was raising multiple children and working part time while also studying law. Along the way, she was diagnosed with multiple sclerosis. Ignoring her doctor's advice to quit working and rest, she instead doubled down and worked even harder. One day while in the Law Review dungeon, I noticed an index card on the bulletin board from Judge Gage. She was looking for her first law clerk. Without hesitation I called her and expressed my interest in the position. I thought that working in a busy courthouse would provide me with skills, knowledge and contacts in the legal community that pure classroom work could not. We met soon after. We got along well, and she hired me. I switched to night school (Judge Gage had also attended law school at night) and began working full time for Judge Gage. The routine set in: commute from Dearborn where I was residing to Pontiac early in the morning; spend the day clerking for Judge Gage; commute to Wayne for lectures and Law Review; and then finally return

back home for some studying and rest. And so, my life proceeded for two years, until I graduated in June 1980.

Those were chaotic yet heady days for me. My law professors at Wayne inspired me as I learned black letter law. As Judge Gage's law clerk, I saw firsthand how legal principles were applied in practice. A tribute article to Judge Gage in the March 2025 edition of the Michigan Bar Journal states that she was known as "the picture of efficiency and the picture of a no-nonsense jurist and a careful and fair-minded judge." She was indeed. A huge backlog of cases on the Oakland County docket is what led to Judge Gage, and two other new judges, being elected to the bench. She was determined from the outset to whittle her docket down quickly and she wanted especially to dispose of the oldest cases that the preexisting judges on the bench had given to her and the other two new judges. She told me, Tom, let's look at these old cases. I would bring her the files from the Clerk's office – these were all paper files in those days, no electronic filings – and she would review them. Then she would tell me to call the attorneys and bring them in for pretrial conferences. In a very short period of time those old cases were disposed of either through settlement or trial.

Wednesday is motion day in Oakland County. This is the opportunity for lawyers to bring "housekeeping matters" before the court: the hated discovery dispute motions; motions for summary judgment; family law matters; motions to amend pleadings etc. The motion calendar started at 9:00 am – or at least that was the stated time. But not for Judge Gage. Judge Gage and her staff were at court by 8:00 am. Pencils were sharpened. Pads of paper were placed on her bench inside the courtroom. Dockets were reviewed. Well before 9:00 she would ask me whether parties were ready to have their motions heard. I would check and if all parties to a motion were ready, I would tell her, and into court we would go! Often, by 10:00 or 10:30 she had completed her motion call. Then she would deal with those pretrial conferences and other tasks. She never wasted a minute.

Although Judge Gage was somewhat a taskmaster, she was always fair and polite to all litigants and staff. She simply demanded that attorneys appearing in her court were well-prepared, on time, and courteous. She also was brilliant. She rarely had to take matters under advisement. She was especially vigilant and protective of jurors' time. She demanded that trials proceed with a minimum of interruptions.

It is impossible for me to overstate the innumerous lessons she taught me. My duties included sitting next to her at my own table during trials. I swore in witnesses, assisted with exhibits, interacted with jurors and counsel, etc. During trials she would often hand me notes. She would say things such as, "Tom, pay particular attention to this attorney. This is how it's done!" Or, "Tom when you are trying cases do not be discouraged if the judge starts overruling your evidentiary objections. The judge may recognize you are winning your case and is trying to do you a favor by protecting your record by ensuring your adversary has less to appeal." She taught me to always, always be on time and to be respectful to the court, even when the court made a ruling I disagreed with. She taught me to always be completely honest with the tribunal and with fellow colleagues. She taught me always to be prepared. I took each such lesson to heart and tried my best to emulate her throughout my 37-year career as a litigating attorney. In my career, I appeared before probably hundreds of judges. I always measured them against Judge Gage.

My two-year clerkship came to an end when it was time for me to graduate from Wayne with my law degree in June 1980. While it was time for me to spread my wings, Judge Gage's tenure as a Circuit Court judge was only beginning. She remained on the trial court bench for a total of twenty years. She was held in such high esteem by her fellow judges and colleagues that she was elected chief judge of the Oakland County bench. She also was elected president of the Michigan Judges Association, chair of the American Bar Association National Conference of State Trial Judges, and head of the Judicial Tenure Commission – the first woman to serve in each of those roles. So much for following her doctors' advice!

Gage then served on the Michigan Court of Appeals for another ten years. All told, she served with distinction as a judge for thirty years. She was regarded as one of the most respected judges in the state. She finally succumbed to complications from her multiple sclerosis in 2010, at the age of 71. That same year, the Michigan Judicial Association began presenting the Hilda Gage Judicial Excellence Award to a sitting or retired circuit or appeals judge who demonstrated competence in docket and trial management and made contributions to the legal profession through legal scholarship and community service.

As for my story, with my Wayne law diploma in hand, and lessons learned from years clerking with Judge Gage, I went immediately to work with another female judge, who also was destined to go on to become one of the most famous Wayne

Law alums of all time. Born in 1924, Dorothy Comstock Riley, a Detroit native, achieved her bachelor's degree from Wayne State University in 1946. She graduated from Wayne Law in 1949. We have to remember that in those days female lawyers were practically unheard of. She found it nearly impossible to find an actual legal job; law firms only wanted to hire her as a secretary to type and pour coffee for clients. Determined, Riley practiced on her own for six years, and after making a name for herself was appointed Assistant Wayne County Friend of the Court. She married Wallace D. Riley, former President of the American Bar Association, and member of the iconic Detroit labor law firm Riley and Roumell. Wallace Riley and George Roumell were both giants in the Michigan legal community in their own rights.

In 1972, Riley became a Wayne County Circuit Court Judge and in 1976, she became the first woman to serve on the Michigan Court of Appeals. As had been the case with Judge Gage, Judge Riley had posted an add on the bulletin board at the Wayne Law Review. I had not thought about another judicial clerkship upon graduation but believed that the opportunity to clerk at the Court of Appeals would prove beneficial to my budding career. I telephoned Judge Riley and after an interview she hired me. Obviously, there was a huge difference between clerking for a trial court judge and an appellate judge. Truthfully, I enjoyed the action in the trial court more. However, I did enjoy the more deliberative nature of the appellate court, where the judges and their law clerks poured over trial transcripts and dissected the appellate briefs submitted by counsel. There were some striking similarities between Judges Gage and Riley, aside from the obvious one that both were female in what had been a long-dominated male profession. Both were diminutive in stature but with enormous legal talent. Judge Riley was soft-spoken and had a large smile that would light up the room. When she spoke, everyone listened. As with Judge Gage, Judge Riley was laser focused on ensuring that she issued her opinions promptly. As I recall all these years later, when I first showed up in her office suite for work, one of the first things she told me was that she prided herself on not having a backlog of pending decisions. She gave me an example of some of her colleagues that had decisions pending for a year or longer. To Riley, that was completely unacceptable. My job was to write her opinions. Of course, Judge Riley reviewed them and sometimes made changes, but it was my job to craft the draft opinions and to get them to her as soon as possible after the three-judge panel had voted. I am proud to say Judge Riley must have been generally satisfied with my efforts and often she made no changes. As with Judge Gage before her, Judge Riley imbued in me ideals

that are essential for a successful lawyer: hard work, dedication, efficiency, sense of duty and respect to the profession, precision in writing, and kindness to others. I also enjoyed the occasional lunch at the wood-paneled and elegant restaurant located at the top of the historic 47-story Greater Penobscot Building, an Art Deco masterpiece that has dominated the city's skyline for close to one hundred years. The building is named after a tribe of American Indians in New England. Interestingly, I grew up on Chippewa Street, located several blocks south of 8 Mile Road, also named after another Indian tribe.

Judge Riley was appointed by the Governor to the Michigan Supreme Court in 1982 to fill an opening left by a departing Justice. I was always a little disappointed that I was not able to clerk for her at the Supreme Court. In 1984, she won election to the Court and then won another election in 1992. Justice Riley served as Chief Justice from 1987 to 1991. Justice Riley, who male lawyers in the 1950s refused to hire, was the first Hispanic woman to be elected to the Supreme Court of any state. Now that's karma! She retired from the Court in September 1997, due to the onset of Parkinson's disease at the age of 73. She was the founder and Honorary Chair of the Michigan Supreme Court Historical Society. In 1991, she was inducted into the Michigan Women's Hall of Fame, and the State Bar of Michigan presented her with its Distinguished Public Servant Award in 2000. Justice Riley passed away in 2004 at the age of 79.

During the summer of my internship with Judge Riley, I sat for and passed the Michigan bar exam. Then, as my one-year internship was coming to an end, I half-jokingly told Judge Riley I wished I could stay another year. No such luck, Tom, Riley said. It is time for you to leave the warmth of the nest and head out into the real legal world. Luckily, I did not have to search very hard for work. Hilda Gage's then husband, Noel Gage, was a founding partner in the then prominent Southfield, Michigan firm of Bushnell (George), Gage, Doctoroff (Martin) and Reizen (Mark – another Wayne Law alum. Mark is about ten years older than me, and we are friends, writing to each other frequently). These lawyers, too, were highly respected giants in the legal community, most notably George Bushnell, Jr., who was the son of a Michigan Supreme Court Justice, and ABA president in 1994 and 1995. I was again so fortunate to have had such distinguished and accomplished attorneys that mentored me in my early years at the bar. Each had very different personalities and styles but shared the common trait of being outstanding and highly diligent legal counsel. All young (and even older) attorneys need mentors. I was lucky. I had many

such mentors who taught me lessons I would never forget and that helped me succeed in my career. I was also lucky in those years because I was given substantial tasks early on, such as going to court, taking depositions, writing important briefs, etc. Many young lawyers today are left just to review documents.

In the summer of 1984, I sat for and passed the Washington state bar exam. I took a job with the Keller Rohrback firm, a mainstay in Seattle since 1928. Once again, I was extremely fortunate. I worked extensively with, and had an office adjacent to, Pinckney Rohrback. Pinky, as he affectionately was known, was one of the giants of the greater Seattle legal community. An article aptly described Pinky this way. "Short and dignified, with a cherubic, rosy-cheeked face, this respected Seattle attorney whose family and friends describe him as happy and interested in seeing others happy even if he denied his own needs – liked to poke fun at himself." The lieutenant of the submarine Blenny in the Pacific during the Second World War, he was both the consummate lawyer and gentleman. He specialized in product liability litigation on the defense side. When I first arrived in Seattle in mid-1985, Pinky was fresh off having prevailed in a massive product liability action on behalf of Honda Motor Company, one of the firm's major clients. Pinky picked up the interoffice phone and called me into his office. He wanted me to write Honda's appellate brief on appeal. The case, Baughn v. Honda, involved issues of proximate cause and warnings. Two young boys suffered life-changing, catastrophic injuries while riding motorbikes. Damages were in the millions. The case was of such importance that the state Supreme Court granted a rare motion to have the appeal bypass the Court of Appeals, Washington's intermediate appellate court, so it could be heard directly by the Supreme Court. There were many amicus briefs filed on both sides. The appellants asked the Court to modify liability standards in products liability cases so as to make it easier for plaintiffs to prevail in such cases. There literally were hundreds of pages of briefs filed. The Supreme Court affirmed the trial judge's grant of summary judgment. That Christmas Honda Motor sent the firm a Holiday card thanking us for the early holiday present. Baughn v. Honda has been cited nearly 250 times in product liability cases involving warnings and issues of causation. I am proud to have worked with Pinky on that landmark case.

Truth be told, all of the lessons learned from Judges Gage and Riley, and from my mentors at Bushnell, Gage, Doctoroff and Reizen made me a much more confident and prepared lawyer when I walked into Pinky's office to handle that appeal. I would work on many other interesting cases with Pinky in the ensuing years. Perhaps it was

luck, but most every case I worked on with Pinky turned out well. I was not afraid to speak my mind to Pinky, and to challenge him with my own thoughts and opinions and ideas on case strategies, even in situations where he disagreed with me. I had earned his respect and in later years, he advocated me for partnership. Pinky was the consummate trial attorney. Though he was brilliant, both in court and at all other times, Pinky spoke quietly and confidently, yet in an understated manner. He did not go to court, or come to the office, wearing a Brooks Brothers suit. He dressed neatly and plainly. There were no pretenses with Pinky. He taught me to always remain cordial with my adversaries. This, I came to realize, was central to the idea of professionalism. Acting civil toward others almost always saved the client money, helped me to maintain my own sanity, did not compromise my clients' legal position, and enhanced my standing in the legal community. At Pinky's urging, I became involved in the Seattle-King County Professionalism Committee, and while on the Committee was active in helping to write a Code of Professionalism. Pinky was president of the Seattle-King County Bar Association in 1968-69, a member of the American Board of Trial Advocates and the American College of Trial Lawyers, and a lecturer at the University of Washington. As with Judge Riley, I would enjoy many lunches with Pinky at the famous Rainier Club in Seattle. There we could relax, talk about our families, and socialize. Pinky died of cancer in early 1994. He practiced right up until the time he died, at the early age of 71, the same relatively young age Judge Gage died at. I have never seen so many people at a funeral. The large church was packed, with people standing in the aisles and even overflowing outside. Eulogies lasted a long while.

After eleven plus years at Keller Rohrback, I made a bold move. I should say a second one. The first was moving to Seattle from Detroit in the first place. In January 1997, I opened my own firm, Heller Wiegenstein PLLC. John and I had a thriving insurance defense practice for the next twenty years. We handled a large variety of cases, including those of the same complexity the "Big Firms" handled, and we did so throughout the entire Puget Sound region, which stretches the length of the I-5 corridor from Bellingham to the north (near the border with Canada) to Vancouver, Washington in the south (near the border with Oregon). We handled trials, arbitrations, appeals and I appeared in scores of courts throughout the state, both state and federal. I occasionally served as an arbitrator. One aspect of my practice I am particularly proud of is that I was a member of the Washington asbestos defense bar for nearly the entire time I practiced in Washington state. I say I am proud of this because both the plaintiff and defense lawyers involved in that complex litigation

were some of the finest lawyers I ever worked with. I became friends with many of them, regardless of who they represented, plaintiffs or defendants alike. I am also extremely proud of the fact that although I represented my primary asbestos client, John Crane, a worldwide company manufacturing gaskets and packing, for nearly thirty years, we never paid any plaintiff even one cent. I had multiple other asbestos clients and only one of those clients ever paid a claimant any money. And that was once, for an exceedingly small amount. I doubt many Washington defense lawyers can make this same claim.

I had gone to law school because I thought the profession would be interesting. And that it was. I met literally thousands of interesting clients, judges, lawyers, witnesses, and jurors. Every case was interesting and new. John was a great partner and mentor. I am proud to say we had many successes. We won practically all our trials and arbitrations. We won many cases on summary judgment. None of our clients ever left us. We were never sued, nor have we ever had bar complaints lodged against us. I guess in retrospect, we must have done a lot of things right. Again, I chalk this up largely to my legal education and early mentors. And, of course, a lot of hard work and probably some sleepless nights. My partner John recently closed Heller Wiegenstein PLLC after 28 years. It was inconceivable to me when we opened our office in 1997, that it would remain active for nearly three decades.

In 2017, I made what was probably my third boldest life move. My wife, son and I decided to move to Slovenia. I will spare any reader of this our motivations. Hint: we loved to travel in Europe. Once in Slovenia, I became involved in academia at the University of Maribor Faculty of Law. Maribor is an interesting place. In Yugoslavia times it was one of the major industrial centers, producing literally everything (much as Detroit had been before World War II). Accordingly, it was heavily bombed by the Allies during World War II. Located on the River Drava, it is beautiful and was declared the European Capital of Culture in 2012, the first Slovene city to have won this honor. It supposedly has the oldest grapevine in the world. Back at Wayne in the late 1970s, I had never given any thought to a career in academia. I went through the habilitation process, and the Slovene authorities granted me the title of Senior Lecturer. I have lectured both the foreign exchange students who have come to Maribor under the Erasmus program and the regular Maribor Law students. I truly enjoyed teaching the young law students. I remember how excited and enthusiastic I was during my law school days, and I have tried my best to impart my knowledge and enthusiasm to aspiring lawyers, mixing substantive

legal principles with my real-life experiences. I have spent long hours editing legal articles for journals. Being able to participate in the legal academic sphere has been a very gratifying way for me to cap off my legal career. For this I owe a debt of gratitude to everyone at the University of Maribor Faculty of Law, but especially to Professor and former Dean Vesna Rijavec, Professor and current Law Faculty Dean Tomaž Keresteš and Full Professor Suzana Kraljić.

One of the joys of lawyering, at least for me, was producing work products. I took great pride in writing, whether the content was client reports, legal memoranda, trial or appellate briefs, etc. I missed that when I quit practicing. Honestly, after so many years litigating in the trenches, I have not missed preparing cases for trials and trying them, as this was very demanding work, requiring work on weekends and evenings. Since becoming involved in academia, I have had the opportunity to write on topics of interest to me, or as requested by the law faculty. These articles are geared more toward the local audience and are not in the style of the typical Unted States Law Review article. Nonetheless, I have found considerable joy in crafting articles that are hopefully informative and accurate. Since my early days as a member of the Michigan bar, I always enjoyed reading the section called Plain English in the monthly editions of the Michigan Bar Journal. I continue to read that section every month and save the articles that particularly interest me. I have (co) written a couple of articles on how to write plainly and effectively, and they are included in this volume of my works. These are geared toward lawyers and law professors, though the lessons apply equally to all writers. I strongly believe that lawyers and others in the legal profession have an obligation to write clearly and concisely. I hope that my articles measure up to what I preach, though I leave that to others to decide.

This concludes my story. I never would have thought, when growing up as a young boy and teenager in Detroit, delivering the Detroit News to my neighbors; working part-time at my local church and school; and later working my way through high school and university at a local supermarket, that my life would have unfolded as it did. In our later years, we all look back and examine choices we made early in our lives and contemplate roads taken and not taken. My decision to attend Wayne State certainly was one such defining moment, as were our later decisions to move first to Seattle and even later to Slovenia. I dedicate the articles contained in this book to all those who helped mentor me in the legal profession, especially those mentioned in this Preface. I owe each of them a debt of gratitude. I hope they, in turn, will be proud of my modest contributions to our great shared profession.

An Overview of the Law of Attorney Fees in the United States: The American Rule is not so Simple After All

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It often is said that in the United States each party pays their own attorney's fees, win or lose, absent a contractual provision to the contrary or some recognized ground in equity. This basic proposition, which is true as far as it goes, is based on the so-called American Rule, which provides that in the United States each side in a litigated case is responsible for paying their own attorney, regardless of the outcome of the case. On its face this proposition seems simple. On the contrary, however, the laws in the United States governing attorney's fees are surprising quite complex. This article provides a general survey of the patchwork of laws, federal and to a lesser extent state, and the author will demonstrate that rules and laws governing attorney's fees are often grounded in important public policy and fundamentally shape important issues, such as access to the courts and the legal system more generally. Unfortunately, many United States citizens have been priced out of the legal market under the current system.

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1 Introduction

American law schools traditionally have not offered core, substantive classes specifically addressing the topic of attorney's fees. Rather, the heart of the American law school curriculum focuses on familiar and traditional substantive and procedural topics such as torts, contracts, property, criminal law and procedure, civil procedure, constitutional law, legal writing and research, and legal ethics. Nor do bar examinations typically test prospective attorneys on this subject. The American lawyer graduating from law school therefore is usually left to learn about this complicated topic after entering practice. This is rather astounding and surprising when one stops to consider that in every case in which a potential consumer of legal services approaches an attorney about the possibility of legal representation initial discussions must necessarily cover the following topics: what will the services cost? Who will pay for the legal services? What kind of fee agreement will there be? Can the potential consumer afford the legal representation?[1] Answers to these relatively straightforward questions are not always simple. The answers are also very important from a public policy standpoint, as they raise the issue of access to the legal system. In a functioning democracy, and one that prides itself on adhering to the rule of law, as the United States does, it is critical that all citizens, rich and poor alike, must have access to the legal system in order to exercise their rights. A surprisingly complex body of law embodied in statutes, court rules, and common law, at both the federal and state court levels, has evolved to deal with these issues. This article will provide an overview of this body of law and will briefly address the issue of whether the current laws allow all Americans adequate access to the legal system.

Chapter Two will explore practical billing issues attorneys face in every matter they handle, and correlatively, how those matters impact the legal consumer. Chapter Three canvasses typical legal fee arrangements. Chapter Four focuses on legal fees in criminal law cases, and the role the United States Constitution plays in shaping law in that area. Chapter Five discusses the unique role insurance plays in civil litigation. Chapter Six considers the role of the contingent fee arrangement. Chapter 7 then examines the differences between the American Rule and the English Rule. However, there are many exceptions to the American Rule, including: the contract

[1] There are also many ethical issues associated with attorney billing, but a discussion of those issues is beyond the scope of this article. The American Bar Association has promulgated Model Rules of Professional Conduct, and those Rules have numerous provisions regarding attorney billing.

exception; the bad faith exception; the common fund doctrine exception; the substantial benefit doctrine; the contempt exception; and, fee-shifting statutes. These exceptions are explored in detail in Chapter Eight. Sub-parts contained in Chapter Eight analyze fee-shifting legislation – mainly federal, but to a lesser extent state – along with laws pertaining to the concept of the prevailing party and fee-shifting in insurance law cases. Chapter Nine studies miscellaneous situations where attorney's fees might be recoverable from an opponent including: for violation of discovery rules; in cases where a plaintiff brings a frivolous action or a defendant invokes a frivolous defense; under legislation designed to promote settlements; under the equitable indemnity doctrine; and, under so-called long arm statutes. Chapter Ten briefly addresses the issue of legal aid in the United States and the role it plays in providing legal representation to the many consumers that are unable to afford to hire a private attorney. The paper ends with a conclusion, that while the American Rule maintains its vitality, it is riddled with many, often complex exceptions, such that the law governing attorney's fees in the United States are both intricate and nuanced. The rules also fundamentally shape not only the amount of fees that can be earned by the attorney, but strongly impact the important policy issue of access to the legal system itself.

2 A lawyer's time and advice is his or her stock in trade

Abraham Lincoln famously said, "A lawyer's time and advice are his stock in trade." Lincoln's statement, made two centuries ago, still rings true today. Increasingly, the American lawyer is going into more debt to achieve a law degree. Therefore, after years of study, and often faced with a mountain of debt, most lawyers want to practice in areas where they know (or hope) they will be paid, and hopefully be paid handsomely. Therefore, new lawyers venturing into the legal marketplace after securing their bar admissions quickly begin to assess varying practice areas. Questions (not always addressed in the law schools) include what are the hot practice areas; where is money to be made; how will I be paid. In short, as in the days of Lincoln, the modern lawyer quickly faces the reality that all he or she has to offer is time, and that to be economically successful the lawyer needs to find ways to be paid for that time. On the other hand, the prospective client faces his or her own set of financial questions and concerns, some of which include: what is at stake in the legal matter? What will the cost be of pursuing the matter with the assistance of a lawyer? Who will pay the lawyer for those services? Can the prospective legal consumer

afford the services of a lawyer? Is the prospective legal consumer in the end pragmatically better off foregoing the legal representation, and trying to represent him or herself alone, or simply not pursuing the legal claim or matter for which the person tried to seek legal representation?

The amount and variety of legal services provided in the United States in any given day is staggering. In 2017, there were approximately 1.34 million lawyers in the United States.[2] In 2015, there were approximately 164,830 law firms in the United States.[3] Between the years 2008–2013 revenue derived from legal services ranged from approximately 245 billion to $257 billion U.S. dollars and those figures were expected to rise to nearly 283 billion in 2017.[4] Approximately 80 % of the world's attorneys live in the United States.[5] In recent years, approximately 15 million civil cases are filed annually in the United States courts.[6] The plaintiff wins approximately 55 % of all tort trials in the United States.[7] A recent study found that the United States tort system cost $264.6 billion in 2010, which translates to $857 per person, versus $820 per person in 2009.[8] Tort costs in 2009 were an estimated $251.8 billion. Tort costs in 2010 therefore increased by $12.8 billion, or 5.1 %. The tort costs in 2010 were the highest in United States history.[9]

Of course, litigation is only a part of what lawyers do. Every day lawyers are called upon to analyze problems for clients and to provide oral and written advice. They work on real estate transactions; they draft wills and trusts; they evaluate and draft contracts; they prepare documents to establish businesses, among many other things. And in each and every such case, there are the fundamental questions: what will the cost of the legal services be; what form will the fee arrangement take; who will pay for the attorney's time?

[2] See, https://www.statista.com.
[3] Id.
[4] Id.
[5] See, https://www.elocallawyers.com/elocal-reviews (accessed: 12. 6. 2018).
[6] Id.
[7] Id.
[8] See, https://www.towerswatson.com/en/Insights/IC-Types/Survey-Research-Results/2012/01/2011-Update-on-US-Tort-Cost-Trends (accessed: 12. 6. 2018).
[9] Id.

3 Overview of typical legal fee arrangements

The overall costs to properly carry out a legal matter depends on numerous factors, including the amount of time the attorney must devote to the matter; the time frame in which the work has to be done (i.e., over a period of time or perhaps in a condensed time); the novelty and difficulty of the matter; staffing requirements for the matter; the length of the matter; whether the matter has to go to trial; whether there is an appeal, among many other factors. The fees a lawyer charges has many other variables as well, including the geographical location of the attorney (e.g., New York City vs. Great Falls, Montana), the lawyer's experience, reputation, skill and the lawyer's overhead expenses, etc.[10] Lawyers' hourly rates vary wildly. Common fee arrangements used by American lawyers include the following: consultation fee,[11] a contingency fee,[12] flat fee,[13] hourly rate,[14] referral fees,[15] and retainer fees.[16] The

[10] The Civil Division of the United States Attorney's Office for the District of Columbia [USAO] has prepared a matrix of hourly rates for attorneys of varying experience levels and paralegals/law clerks. The matrix is intended for use in cases in which a fee-shifting statute permits the prevailing party to recover "reasonable" attorney's fees. The USAO Attorney's Fees Matrix for 2015 – 2018, lists rates for paralegals and law clerks and also for attorneys with less than 2 years of experience and then with increasing levels of experience, up to 30+ years of experience. For CY 2017-2018 attorney fee rates range from a low of $302 per hour for attorneys with less than two years of experience to a high of $602 per hour for attorneys with more than 31 years of experience. See, https://www.justice.gov/usao-dc/file/796471/download (3. 6. 2018).

[11] Under a consultation fee, the attorney may charge a fixed or hourly fee for the initial meeting where the client and attorney meet to discuss the case and a determination is made whether the attorney can assist the client.

[12] A contingency fee is one where the attorney's fee is based on a percentage of the amount of money obtained by the attorney on behalf of the client, either by way of settlement or following a trial, arbitration or appeal. If the attorney does not obtain a settlement or loses at the trial, or on the appeal, and therefore obtains no money for the client, the attorney does not receive a fee. However, win or lose, the client will have to pay (or reimburse) the attorney's out of pocket costs expended to fund the legal action. In modern practice, many attorneys now offer a sliding scale based on how far along the case has progressed before it was resolved. The low end might be 33 % or even lower and the higher end might be 50 % or even higher (e.g., following a full-blown trial on the merits and appeal).

[13] Flat fees are usually offered only in situations where the case is relatively simple or routine, such as simple will or an uncontested divorce. Some attorneys will offer a client a flat fee for the purpose of investigating a specific legal matter, and offering the client advice on that matter.

[14] In many cases, the attorney will charge the client for each hour, or portion of an hour, that the attorney and office staff such as legal assistants and paralegals, works on the case. Attorney rates in the United States vary wildly based on many factors already discussed in this article. See, for example, footnote 9. Some attorneys charge different fees for different types of work. In addition, attorneys working in larger firms typically have different fee scales with more senior members charging higher fees than younger attorneys.

[15] An attorney that refers a client to other attorney may ask for a portion of the total fee the clients pays to handle the case. Referral fees are common in personal injury matters, where the plaintiff's attorney usually is compensated under a written contingency fee agreement. Referral fees are governed by the ethical rules that attorneys must comply with and the total fee must be reasonable.

[16] The attorney is paid a set fee. A retainer is like a down payment, against which future fees are billed. The retainer fee is usually placed into a special account known as a Trust Account, which is typically required by the Bar Association the attorney belongs to. The attorney must maintain the retainer fees in this Trust Account, solely for the client, and must not use those funds for any other purpose. Improper use of client funds is a major cause for4 attorney discipline and often disbarment.

fees in some cases may be set by statute or the court may set and approve the fee the client pays.

4 Fees in criminal cases

In the broadest sense, there are two main classifications of law: civil law and criminal law. The issue of attorney's fees takes on a constitutional law dimension in the criminal side of the law since the 6th Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right [...] to have the Association of Counsel for his defense." The United States Supreme Court has construed the 6th Amendment to mean that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived.[17] In another famous case[18], the Supreme Court considered the question of whether a criminal defendant, charged with a felony in state court (in that case Florida), was entitled to a court appointed attorney under circumstances where the defendant [charged with the crime of breaking and entering with intent to commit burglary] was indigent and thus could not afford to pay for an attorney. The Supreme Court held that the defendant was entitled to have counsel appointed pursuant to the due process clause of the Fourteenth Amendment. The appointed criminal lawyer must be paid for by the state where the prosecution is occurring.

In order to carry out the constitutional mandate of providing indigent criminal defendants with legal representation, many jurisdictions have established public defender offices, while others maintain a roster of criminal defense attorneys who will accept court appointments, and who then in turn are compensated by the state or local government where they provide the legal services. The federal government itself has a robust public defender program.

Estimates of the percentage of criminal defendants represented by appointed counsel generally hover at around 75-80 % (Karlan, 1995). There is a substantial body of literature showing that the United States public defender system is under-funded and that the attorneys and staff that perform these legal services are overworked. This in turn raises serious questions whether indigent criminal defendants receive the same level of representation as criminal defendants that are

[17] See, Johnson v. Zerbst, 304 U.S. 458 (1938).
[18] Gideon v. Wainwright, 372 U.S. 335 (1963).

able to fund their own defense team (Benner, 2011).[19] It can be stated that the vast majority of attorneys that are appointed to represent indigent criminal defendants, whether at the federal or state court level, perform admirably and do a great job for their clients. On the other hand, we can also say that the 20–25 % of criminal defendants that have the financial means to pay for their own legal services, and who have the means to pay for more elaborate and sophisticated legal work, such as multiple attorneys; private investigators; mock juries; unlimited research and maximum attorney effort, likely reap the benefits of those enhanced legal services in many cases. In any event, for constitutional reasons, either the federal or state governments fund much of the legal work performed in the criminal side of the law. The governments both pay prosecutors to prosecute cases and they pay lawyers to defend indigent defendants 75-80 % of the time.

5 The role of insurance in civil litigation

Insurance plays a major role in funding legal services on the civil side of the law. This is true not only in cases which are actively being litigated, but also in cases where there is no litigation but where an insurance company is paying for legal services.[20] Natural persons and legal entities purchase various types of insurance to provide protection in the event that their actions cause injury and/or damage to a person and/or property. Therefore, most persons know why it is a good idea to purchase insurance. However, the average person, and even some attorneys that do not practice in the area of insurance law, do not understand or fully understand the degree to which insurance issues affect civil lawsuits. As a matter of public policy, however, the law promotes the purchase of insurance and, as a practical matter, many civil claims and lawsuits are resolved with the use of insurance money.[21]

[19] See also, Public defenders are overworked and underfunded. That means more people go to jail. Opinion – The Guardian. https://www.theguardian.com (accessed: 3. 6. 2018)

[20] In many cases a dispute will occur which triggers insurance coverage, for example, a fire, or a boating accident. On notice of a claim or potential claim, the carrier(s) for the insured has a duty to investigate, which might well include a duty to retain (and pay for) legal counsel on behalf of its insured to assist with the investigation. Many such disputes are resolved, with the assistance of assigned legal counsel, without a lawsuit being commenced.

[21] There are two primary components (aims) or most insurance policies: (1) a duty by the insurance company "to defend" its insured and (2) a duty by the insurance company "to indemnify" its insured. Insurance policies, as written in the United States, are complex and contain many definitions and conditions, utilizing confusing-sounding language. But in short, the duty to defend and the duty to indemnify are probably the most important components, and they are separate and distinct. As a further general proposition, the insurance company's duty to defend the insured is much broader and extensive than is its duty to indemnify. The duty to defend directly impacts how attorney's fees and court costs are paid.

For the purposes of our discussion involving the role of insurance, we will assume we are dealing with an automobile accident, and that the at-fault driver had purchased a standard automobile insurance policy. We will further assume that when the policyholder purchased the policy, he or she purchased a policy that provided $300,000 of coverage for liability to third persons; $50,000 in coverage for property damage; and, $10,000 in coverage for personal injury protection. These dollar figures are known as "limits of coverage" for the various categories of harm done, and in general, is the most the insurance carrier will have to pay on behalf of its insured. Assume that the insured is operating a covered vehicle and that his or her negligence causes both personal injury and property damage to another, who is not at fault, and to his or her self. Under this hypothetical, the most the insurance company will pay to the injured person is $300,000 [known as "indemnity"] for his or her injuries and $50,000 for property damages. Further, to the extent the insured himself or herself is injured, the most the insurance company will pay is $10,000.

Insofar as our discussion of attorney's fees is concerned, however, the duty to defend provision is most critical. This duty means that when there is an "occurrence" (i.e., an accident of some type covered under the policy), the insurance company has the duty to assign an attorney of its choosing to represent the interests of the insured/tortfeasor throughout the pendency of the claim, whether through settlement or through trial and appeal. Legal proceedings can be prolonged and very expensive and as already discussed, millions of tort lawsuits are filed in the United States annually. The lawyer assigned to defend the case reports to both the client ("the insured") and to the insurance company that hired him or her. The assigned defense lawyer submits regular bills to the insurance company, who in turn pays for both the lawyer's time and for any out-of-pocket costs incurred by the lawyer in defending the case, such as court reporter fees; expert fees; witness fees; jury demand fees; court filing fees; interpreter fees; etc. Even in "routine" cases, legal fees and costs can amount to tens of thousands of dollars. And in many cases, pursuant to the terms of many insurance policies, there is no specific limit to the amount of legal fees and costs the insurance company is obligated to pay on behalf of its insured. Therefore, it is important to recognize that one of the main protections of an insurance policy is that the insurance company agrees to provide a defense to the insured, and is under an obligation to pay for the entire defense. Accordingly, it also is important to remember that in a high percentage of civil cases involving accidents, personal injury, and a variety of other torts, the defendant will not personally be

paying the attorney's fees and costs incurred. Instead, the defendants' insurance company will pay those fees and costs. The applicability of insurance is therefore of great importance in many cases, as it offers a degree of protection to the insured and a source of recovery to the injured party.

6 The role of the contingent fee under American law

In Section 3 of this article, we briefly identified the contingency fee as one type of fee agreement utilized by American lawyers. The role of the contingency fee is highlighted here because of its importance in the legal system. Millions of torts claims are asserted annually. These claims are brought by personal injury attorneys and include claims stemming from dog bites, vehicular accidents, medical malpractice, among many other things. Many of the claims are meritorious, but many others are not. Personal injury lawyers invariably agree to represent their clients in these matters utilizing contingent fee agreements, meaning that the personal injury lawyer only receives a fee if the lawyer achieves either a settlement or wins a case at trial. Clearly there are many personal injury cases filed, and tried to verdict, where the plaintiff ends up losing. The central point here, however, for the purpose of our discussion, is that assuming that a person who suffers a tort injury can find a lawyer to take his or her case – and in most cases an injured person can find at least one personal injury lawyer willing to take on the case – the plaintiff does not have to worry about paying the lawyer up front (out of pocket) to fund the case. Rather, the plaintiff only pays the lawyer a percentage of any settlement recovered or from the amount awarded following successful litigation. In other words, it is really the lawyer, not the client, who assumes the risk of asserting a claim. Furthermore, the contingency fee agreement does promote the public policy of providing injured persons access to the courts. It is fair to say that if injured persons had to pay their lawyers on an hourly basis there would be many fewer tort claims asserted. In this important sense, the contingency fee promotes access to the courts.

7 The English Rule vs. the American Rule

The so-called English Rule provides that the losing party must pay the winning party's legal costs and attorney's fees. This rule is used in England and many other common law countries in the world. The "loser pays" rule is said to help deter frivolous claims and provide more complete compensation for the winning plaintiff

(Eisenberg and Miller, 2013). In contrast, the American Rule provides that each party must bear its own costs of litigation, including attorney's fees, regardless of the outcome. The American Rule was adopted by the United States Supreme Court over 200 years ago[22] and is still the rule today. In all other common law jurisdictions, the award of attorney's fees depends on the outcome of the case. The United States Supreme Court has explained the justifications for the American Rule as follows: (1) Litigation is inherently a risky proposition, and a party should not be penalized for merely participating in a lawsuit; (2) the poor would be unduly discouraged from pursuing their legal rights if they feared that losing the case would also cost them their opponents' legal fees and (3) the cost of proving the amount of legal fees would have an undue burden on judicial administration.[23] A criticism of the American Rule is that it can encourage frivolous litigation and discourage meritorious litigation (Root, 2005).

8 Six general categories of exceptions to the American Rule

8.1 Introduction

As is the case in many areas of the law, the general rule, clear enough at face value, is riddled with many exceptions, all of which are complicated and worthy of lengthy discussion in their own right. But here we shall provide only an overview. The six primary exceptions, discussed briefly in turn below, are as follows: (1) contracts altering the general rule; (2) bad faith; (3) common fund; (4) substantial benefit; (5) contempt; and (6) fee-shifting statutes.

8.2 Contract exception

The law encourages parties to enter into contracts and to self-define the terms of their agreement. This promotes and fosters both economic activity and certainty. Parties to many contracts include provisions that the prevailing party shall be entitled to the recovery of attorney's fees and the costs of litigation. Courts will generally enforce contractual fee-shifting provisions, except in unusual cases where they are deemed to be contrary to public policy, such as where one party to the contract is the more powerful party to the contract and drafts the provision. An example of an

[22] See, Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796).
[23] See, Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967).

unenforceable attorney fee provision might be where an insurance company attempts to make its insured liable for attorney's fees in suits where the insurance company is successful. In civil law countries the "weak-party doctrine" might negate such clauses.[24]

8.3 The bad faith exception

The Supreme Court has held that a federal court has discretion to award attorney's fees to a successful party when the other side has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons."[25] According to the court, the underlying rationale for "fee-shifting" in such cases is "punitive" and the essential element in triggering the award of fees is the existence of "bad faith" on the party of the unsuccessful litigant. According to the Court, "bad faith" might be found not only in the actions that led to the lawsuit itself, but also in the actual conduct of the litigation.[26] An attorney, as well as a party, who acts in bad faith may be ordered to pay the attorney's fees of the opposing party. The Supreme Court has held that federal courts have the inherent powers to sanction bad faith conduct, and that this power extends to both members of the bar and to the litigants before it.[27] Public policy drives this exception by awarding attorneys' fees against parties who litigate in bad faith, for the clear purpose of deterring illegitimate behavior in the courtroom, and sometimes outside of it.

8.4 The common fund exception

What is known as the common fund or common benefit exception, provides that "in the absence of a statutory prohibition, the federal courts have authority to award attorneys' fees from a fund to a party who, having a common interest with other persons, maintains a suit for the common benefit and at his own expense, resulting in the creation or preservation of a fund, in which all those having the common interest share."[28] This exception to the American Rule does not shift the cost of

[24] Of course, the usual defenses to contracts might apply to negate such clauses such as undue influence, duress, lack of capacity, etc.
[25] Hall v. Cole, 412 U.S. 1, 5 (1973).
[26] 412 U.S. at 15.
[27] Roadway Express, Inc. v. Piper, 447 U.S. 752, 765-767 (1980). The Court also noted that under Federal Rule of Civil Procedure 37(b), '[b]oth parties and counsel may be held personally liable for expenses, 'including attorney's fees,' caused by the failure to comply with discovery orders." 447 U.S. at 763.
[28] See, Annotation, 8 L.Ed.2d 894, 905 (1963).

paying attorney's fees to the losing party, but rather to those who benefit from the suit, and the fund created thereby. The common fund doctrine was originally conceived in a case against trustees of ten or eleven million acres of land who had collusively sold hundreds of thousands of those acres at nominal prices. One beneficiary, after eleven years of litigation at his own expense, recaptured the assets and presented a claim for reimbursement of attorney's fees. The Supreme Court approved the award, writing that "if the complainant is not a trustee, he has at least acted the part of a trustee in relation to the common interest."[29] The doctrine's main purpose is to compensate parties who create or preserve a common fund for the benefit of others.

The Supreme Court has offered three main reasons in support of the common fund exception: (1) It would be unjust for the plaintiff to bear all of the costs of litigation when there are other beneficiaries of the same class or group; (2) nonparticipating beneficiaries would have an unfair advantage; and (3) courts of equity historically have awarded attorney's fees from court-controlled funds when the suit of one creditor would benefit other creditors in a bankruptcy proceeding, with the legal fees coming out of the bankrupt assets.[30] Three conditions must be met before the litigation expense will be spread over a number of parties: First, a fund must exist. Second, a court must be able to exert control over the fund. Third, the fund beneficiaries must be identifiable so the court can shift the attorney's fees to those benefiting from the litigation (Cubita, Lichtman and Rubino, 2012: 280–281). While the common fund exception to the American Rule is applied in many situations, most commonly it is employed in antitrust litigation; mass disaster torts; stockholders' derivative suits; and, class action suits.

8.5 Substantial benefit exception

Closely related to the common fund doctrine is the substantial benefit rule, as both force nonparties to share in the litigation expenses and disallow absent parties to be unjustly enriched at the cost of the party bringing the suit. Like the common fund doctrine (absent the fund), the court must exert some control over an entity composed of beneficiaries in order to disperse the fee award. However, the key difference between the two doctrines is that the substantial benefit doctrine applies

[29] Trustees v. Greenough,105 U.S. 527 (1881).
[30] Id.

to non-pecuniary (i.e. something other than money) benefits as well as to pecuniary benefits (Cubita, Lichtman and Rubino, 2012: 280–281).

8.6 The contempt exception

A much less used exception to the American Rule can be found in contempt proceedings. The Supreme Court has held that a party can collect attorney's fees for the enforcement of a contempt order when seeking to enforce a judgment through contempt proceedings.[31] To determine which fees will be awarded, and when, the court looks to the willfulness of the contempt.

8.7 Fee-shifting statutes

8.7.1 Overview of federal fee-shifting statutes

Probably the most meaningful, extensive and complicated, exception to the American Rule can be found in statutory shifting of attorney fees. There are hundreds of federal and thousands of state statutes allowing the shifting of fees (Vargo, 1993: 1588). Many of these statutory exceptions to the American Rule are based on the concept of the so-called Private Attorney General doctrine, which provides that a plaintiff should be awarded attorney's fees when he or she has effectuated a strong Congressional policy which has benefitted a large class of people, and where further the necessity and financial burden of private enforcement are such as to make the award essential.[32] Fee-shifting statutes at the federal court level can be divided into four main categories:

- Civil rights suits, such as the Fair Housing Amendments Act of 1988, 42 U.S.C. §3613(c)(2)(2004);
- Consumer protection suits, such as the Equal Credit Opportunity Act, 15 U.S.C. §1691e(d)(2004);
- Employment suits, such as the Fair Labor Standards Act, 29 U.S.C. §216(b)(2004); and

[31] See, Toledo Scale Co. v. Computing Scale Co., 26 U.S. 399 (1923).
[32] See generally, La Raza Unida v. Volpe, 57 F.R.D. 94, 98 (N.D.. Cal. 1972), *aff'd,* 488 F.2d 559 (9th Cir. 1973), *cert denied*, 417 U.S. 968 (1974).

– Environmental protection suits, such as the Clean Air Act, 42 U.S.C. §7604(d)(2004).

The United States Congress has passed these categories of legislation, and many other statutory provisions shifting fees, because they compel a higher public purpose and because the successful plaintiff in these types of cases should not have to shoulder the costs of advancing American public policy, especially in cases where the successful plaintiff does not always obtain a monetary award. This type of legislation advances the goal of making access to courts easier for litigants with strong cases, and embodies a policy of social reform through litigation, especially in many cases that would not yield plaintiffs a financial award from which a contingent fee may be paid. Furthering these policies and sustaining consistency, these statutes grant fees to virtually all prevailing plaintiffs while denying them to virtually all prevailing defendants. In other words, these are one-sided fee-shifting statutes.

8.7.2 The concept of prevailing party

Undoubtedly, these statutes have made it easier for many plaintiffs to gain access to justice, and therefore have fulfilled their primary mission. And, reflecting back on comments made in section two of this article, American lawyers coming out of law school have seized upon the many fee-shifting statutes as a way of developing their own niches in a competitive legal market. Therefore, these statutes have, in a real sense, been beneficial not only to segments of the public that can avail themselves of them, but also to a large segment of industrious lawyers that are always on the lookout for new fee-shifting legislation, as each such newly enacted statute constitutes the next potential job opportunity.[33] However, the fee-shifting language used by Congress has not been consistent, which itself has led to litigation, and the need for the courts, including appellate courts, to interpret Congressional intent.[34]

[33] Although not technically a fee shifting statute, the Telephone Consumer Protection Act of 1991 (TCPA), codified at 47 U.S.C. §227 is an example of Congressional legislation that has made it both easier for members of the public to seek recourse for a legal violation and has been a financial boon for enterprising lawyers. The TCPS restricts telephone solicitations (i.e., telemarketing) and the use of automated telephone equipment. The TCPA limits the use or automatic dialing systems, artificial or prerecorded voice messages, SMS text messages, and fax machines. Importantly, it also prohibits unsolicited advertising faxes. In the event of a violation of the TCPA, an aggrieved person may sue for up to $500 for each violation or recover actual monetary loss, whichever is greater; may seek an injunction; or both. The TCPA has resulted in many class actions, with some lawyers developing boutique businesses as a direct result of the statute. See, Class Action Defense Strategy Blog. Up-to-date Information on Class Action Litigation. This article can be found at: www.classactiondefensestrategy.com. (25. 5. 2018).

[34] For example, in the Fair Housing Amendment Acts, the language reads in part: "In a civil action under subsection (a)…, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's

The courts also have had to grapple with thorny issues of what exactly constitutes a "prevailing party." Most federal fee-shifting provisions authorize courts to award fees if the fee claimant was the "prevailing party," the "substantially prevailing party," or is "successful." But making these determinations is not always simple.

It has been stated that, "the touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute."[35] For example, many federal Courts of Appeal have ruled that relief obtained via a preliminary injunction can, under appropriate circumstances, render a party "prevailing."[36] A "prevailing party" is not limited to a victor only after entry of a final judgment following a full trial on the merits. To the contrary, fee awards are often granted upon favorable settlements, as such an outcome encourages settlements, lessens docket congestion, and prevents losing parties from escaping liability for fees merely by conceding cases before final judgment, all of which are valid public policy objectives.[37]

In appropriate cases, a declaratory judgment, without any monetary award, can form the basis for a fee award, so long as the judgment affects the behavior of the defendant toward the plaintiff.[38] In a case under the Clean Air Act, the Supreme Court held that Section 307(f) of the Act authorizes awards of attorney's fees only to plaintiffs who have "some degree of success on the merits."[39] This statute, as well as other federal environmental laws, provides: "In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such an award is appropriate." On their face, these statutes allow fee awards even to parties who do not "prevail," and, in the case under consideration, the Court of Appeals had awarded fees to such a

fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person." The relevant portion of the Equal Credit Opportunity Act reads, "Recovery of costs and attorney fees […] In the case of any successful action under subsection (a), (b), or (c), the costs of the action, together with a reasonable attorney's fee as determined by the court, shall be added to any damages awarded by the court under such subsection." On the other hand, the fee-shifting language in the Fair Labor Standards Act reads, "The court in [an action violating section 6 or 7 of this Act], shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs to the action…" Finally, the Clean Air Act reads, in pertinent part, "The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, wherever the court determines such award is appropriate."

[35] Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782, 792–793 (1989).

[36] See, People Against Police Violence v. City of Pittsburgh, 520 F.3d 226, 232-233 (3rd Cir, 2008).

[37] See e.g., Maher v. Gagne, 488 U.S. 122, 129 (1980).

[38] See e.g., Rhodes v. Stewart, 488 U.S. 1, 4 (1988).

[39] Ruckelshaus v. Sierra Club, 463 U.S. 680, 694 (1983).

party, holding that it was "appropriate" for it to receive fees for its contributions to the goals of the Clean Air Act. The Supreme Court, in discussing the rationale for its ruling, observed that Congress, in its use of specific wording in the statute, meant only "to expand the class of parties eligible for fee awards from prevailing parties to partially prevailing parties – parties achieving some success, even if not major success." In another case, the Supreme Court noted that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."[40] In discussing how to determine the amount of fees that were reasonable when the plaintiff only achieved limited success, the court stated: "There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court essentially has discretion in making this equitable judgment."[41]

In another case with the question of what to do in the case the plaintiff scores a partial, and not complete victory, the Supreme Court held that under 42 U.S.C. §1988(b) that although a party must prevail on a "significant" issue in order to be eligible for a fee award, it need not prevail on the "central" issue in the litigation. Rather, the degree of the plaintiff's success in relation to the other goals of the lawsuit is a factor critical to the determination of the size of a reasonable fee, not to the eligibility for a fee award at all. [42] In another case, the plaintiff was awarded only one dollar (i.e., a nominal award of damages) when he sought $17 million under 42 U.S.C. §1988(b). There, although the plaintiff technically "prevailed," nevertheless since he failed to prove an essential element of his claim, namely the entitlement to damages, the Supreme Court ruled he was not entitled to any award of attorney's fees.[43]

In order of advancing the public policy that encourages parties to settle their disputes, litigants can stipulate to an award of reasonable attorney's fees in their settlement agreement (see, Bucklin, 2006).

[40] Hensley v. Eckhart, 461 U.S. 424, 433 (1983).
[41] Id. at 436-437.
[42] Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782 (1989).
[43] Farrar v. Hobby, 506 U.S. 103 (1992).

8.7.3 State fee-shifting statutes – an example from Washington State

The fifty state legislatures have each enacted legislation that shifts fees in cases where the state legislatures have determined that there are compelling public policy reasons for doing so. The following is one example of a fee-shifting statute recently enacted in Washington State. The law jealously guards one's interest in real property. However, the doctrine of adverse possession recognizes that if a person uses another's real property: exclusively; continually; adversely (i.e., without permission); and, for a statutorily defined period of time (e.g., 10 years) without the true, title owner taking action to oust the interloper, then the non-owner is said to have "adversely possessed" the property and that person then becomes the title owner to the property adversely possessed. There has been extensive litigation in Washington over property with many cases in the courts involving adverse possession and related doctrines. The Washington State legislature recently passed legislation regarding adverse possession, and added the following fee shifting provision: "(3) The prevailing party in an action asserting title to real property by adverse possession may request the court to award costs and reasonable attorneys' fees. The court may award all or a portion of costs and reasonable attorneys' fee to the prevailing party if, after considering all the facts, the court determines such an award is equitable and just.[44]

8.7.4 Fee-shifting in insurance setting

In light of the important role that insurance plays in helping to control risk, and the special relationship that exists between the insurer and the insured (again, the so-called "weak-party" concept), in some cases involving insurance contracts, courts have been willing to award attorney's fees to the insured even in the absence of a contractual attorney's fee provision in the policy. The insured, for example, may be entitled to attorney fees after bringing a successful action to secure coverage under the policy of insurance. In Washington State, this doctrine has become known as the Olympic Steamship rule. The Washington State Supreme Court held that an insured party has the right to recover attorney's fees incurred as a result of the insurance

[44] See, RCW 7.28.083.

company's wrongful refusal to provide a defense.[45] The rule also authorizes an award of attorney's fees to the insured for a successful appeal.[46]

8.7.5 Conclusion

Fee-shifting legislation has therefore had a dramatic impact on litigation both at the federal and state court levels. Legislation of this nature is a major paradigm shift from the basic American Rule of each party paying their own fees, win or lose. In some cases, fee-shifting legislation makes it easier for some parties to gain access to the courts,[47] but at the same time such legislation provides economic incentives for litigants to resolve disputes prior to trial (or even without litigation at all) due to the economic risks (and uncertainty) inherent in the losing party paying the opponent's attorney's fees and costs.[48] In all cases, the legislating authorities made institutional value judgments that for various public policy reasons exceptions should be made to the American Rule.

9 Miscellaneous situations where attorney's fees may be recoverable

There are numerous other instances, not previously discussed, where one party may seek to obtain an award of attorney's fees or costs from the other side. The rules vary from jurisdiction to jurisdiction and it is not possible to survey all of these rules in this article. However, some common situations will be discussed, and these examples again help make the point that special court rules; special legislation; and, common law decisions by the courts have led to many deviations and departures from the American Rule, and have had the effect of encouraging parties to resolve their disputes when at all possible but also to litigate fairly and honestly with each other when litigation is pending.

[45] See, Olympic S.S. Co., Inc. v. Centennial Ins. Co., 117 Wash. 2d 37 (1991).
[46] See, Graff v. Allstate Ins. Co., 113 Wash. App. 799 (2002).
[47] Some of the Civil Rights legislation at the federal level, discussed earlier, would be a prime example.
[48] The Washington statute on adverse possession is a prime example. Boundary line disputes typically invoke claims of adverse possession, and litigating such cases are often time-consuming; discovery-intensive; expensive; with the outcome often uncertain. In short, all sides to these disputes usually face uncertainty and RCW 7.28.083 clearly requires parties to these actions to step back and consider settlement in order to foreclose the risk of an adverse fee and cost award. These same considerations hold true in most if not all fee shifting statutes.

9.1 Costs and attorney's fees for violations of discovery rules

Unlike in civil law jurisdictions, in common law jurisdictions such as the United States, large portions of a litigated case are devoted to what is known as pretrial discovery. Federal court civil procedure is governed by the Federal Rules of Civil Procedure (FRCP), and the discovery rules are generally set forth in FRCP 26–37. State courts have civil rules of procedure that are heavily influenced and patterned after the federal rules. Discovery tools include the use of written interrogatories,[49] requests for production of documents,[50] requests for admissions,[51] depositions,[52] and requests for physical and mental examinations in cases where such issues are in dispute.[53] The civil rules, along with case law construing them, provide that these discovery tools are to be utilized liberally and the parties are expected to work together in a cooperative spirit with the court becoming involved only when impasses are reached (Speck, 1951: 1132–1134). The courts expect all counsel and parties to work together cooperatively, even though the system is adversarial at its core. The general notion is that open and free discovery will enable all sides to "discover the truth", including the strengths and weaknesses of the case; will therefore lead to settlement of disputes in most cases; and, where cases do not settle and end up in trial, theoretically there will be no surprises.

Where there are discovery disputes and the parties cannot resolve those disputes on their own, the court intervenes upon motion by the aggrieved party and issues written discovery orders. The procedures for such motions are contained in FRCP 37 and the various state analogues the same. Although the case law varies somewhat from jurisdiction to jurisdiction, the law, put simply, is that a court has the power to enter sanctions against a party that fails to comply with the discovery rules or breaches a discovery order. There is a "pecking order" of sanctions starting with less onerous ones that might include small fines or orders to pay attorney's fees (say $500); to more extensive awards of attorney's fees; to the exclusion of evidence at trial; to so-called adverse inference instructions, where the jury is instructed that it may or shall presume evidence the non-complying party lost or failed to produce

[49] FRCP 33.
[50] FRCP 34.
[51] FRCP 36.
[52] FRCP 30.
[53] FRCP 35.

was adverse to it[54]; all the way to the most severe sanctions of all: dismissal or default. These most severe sanctions are employed by the court where the non-complying party has engaged in a pattern of willful non-compliance with court orders or otherwise has flagrantly violated the rules in some way. The *Morgan Stanley* and *Zubulake* cases, discussed in footnote 63, and many other like them, highlight the fact that violations of the court rules and discovery orders often result in fee and cost shifting and in related rulings that can dramatically tilt the outcome of litigation.

9.2 Recovery of attorney's fees in cases involving a frivolous action or defense

There are statutes in some states that permit the court to award to the prevailing party reasonable expenses and attorney's fees, upon a written finding by the court that the losing party's action, counterclaim, cross-claim, third-party claim, or defense was frivolous and advanced without reasonable cause.[55] Under such a statute in Washington State, attorney's fees may not be awarded unless the claim or defense is frivolous in its entirety. Thus, if any of the claims or defense has merit, then the action is not deemed frivolous and attorney's fees may not be awarded.[56] Still, these kinds of statutes, in instances where they apply, deviate from the basic American Rule.

9.3 The principle of equitable indemnity

There is a principle of law known as "equitable indemnity." The rule is as follows: where the acts or omissions of a party to an agreement or event have exposed the other party to litigation with a third party unconnected with the initial agreement or

[54] Spoliation of evidence is currently a major issue in the United States, especially as it relates to the negligent or intentional destruction of electronically stored evidence [ESI]. FRCP 26, the basic discovery rule, has been amended 5 times since 2000, largely to deal with issues arising out of ESI. FRCP 37 also has been amended recently to clarify the law of sanctions when discovery violations occur, especially sanctions for discovery violations dealing with ESI. A major case that in part helped pave the way for the changes to the FRCP's on discovery was Zubulake v. UBS Warburg LLC., 2004 U.S. Dist. Lexis 13574 (S.D. N.Y. 2004). In that case, the defendant failed to produce emails. The judge ultimately awarded substantial attorney fees to the plaintiff and also entered an adverse inference instruction against the defendant. An extremely large jury verdict in favor of plaintiff resulted. In Coleman v. Morgan Stanley & Co., 2005 WL 674885 (Fl. Cir. Ct. 2005) the court sanctioned Morgan Stanley for improper handling of ESI and entered a sanction of an adverse inference jury instruction. The jury returned a verdict in favor of plaintiff for $1.4 Billion.

[55] See e.g., RCWA 4.84.185 in Washington state; the so-called frivolous action or defense statute.

[56] See, Tiger Oil Corp. v. Department of Licensing, State of Wash., 88 Wash. App. 925 (1997). This statute gives the trial court a measure of discretion in determining whether to award attorneys' fees, and the trial court will not be reversed except for a clear showing of abuse.

event, equity allows a court to award attorney's fees to the innocent party as an element of consequential damages in an action against the party exposing the plaintiff to litigation.[57] Again, this is an example of a situation where a court, sitting in equity, can step in and compensate an innocent party that has been wronged, due to no fault of its own, and such compensation can include an award of attorney fees and costs. The principle is rooted in sound public policy and again is a sensible departure from the basic American Rule.

9.4 Fee shifting after settlement offer not accepted

The law often utilizes various mechanisms to encourage parties to settle their disputes, thereby avoiding court congestion and expense of litigation.[58] One such example can be found in Washington State, which has a statute providing that in any action for damages where the amount pleaded by the prevailing party is $10,000 or less, a reasonable attorney's fee shall be taxed as a party of the costs awarded to the prevailing party.[59] This statute applies to tort and contract actions, and to actions to foreclose on mechanics' liens, and applies only to actions for damages. "Prevailing party" is used in a different sense in this statute. Here, the plaintiff is the prevailing party only if the plaintiff's recovery, exclusive of costs, is as much as or more than the amount offered in settlement by the plaintiff. The defendant is the prevailing party if the recovery is as much as or less than the amount offered in settlement by the defendant, or if the plaintiff recovers nothing.

9.5 Recovery of attorney's fees to non-resident defendant

Some states, including Washington, have what are known as long-arm statutes. Under the Washington statute[60] the court is permitted to award reasonable attorney's fees to a non-resident defendant who was served outside the state but prevails in the action. Attorney's fee awards are not limited to cases in which the defendant prevails on the merits. Attorney's fees may likewise be awarded when then defendant obtains a dismissal for lack of jurisdiction, or even when the plaintiff takes a voluntary dismissal.[61] When attorney's fees are awarded, the amount should be limited to an

[57] See, e.g., Manning v. Loidhamer, 13 Wash. App. 766 (1975). This also is known as the ABC rule.
[58] The federal and state fee-shifting statutes discussed earlier in this article are prime examples.
[59] See, RCWA 4.84.250.
[60] RCWA 4.28.185.
[61] Voluntary dismissals are governed in the federal court system by FRCP 41. State courts have analogue provisions.

amount necessary to compensate the defendant for the added burden of being brought into the foreign court system pursuant to the long-arm statute.[62] In other words, this is an example of a partial fee-shifting provision, and does not authorize the court to award all of the defendant's reasonable attorney's fees in defending the action. Still, this is yet another example of legislative efforts meant to help ensure that plaintiffs' attorneys stop and think before hailing foreign defendants into a local court; and to make them reflect on whether the claim against the foreign defendant truly has merit, for if it does not, the plaintiff faces the serious risk of an adverse attorney fee award.

10 Legal aid in the United States

The sad but unfortunate truth is that the costs associated with legal services in the United States has priced many people out of the market, meaning that they are either foreclosed from the legal system entirely or they have to represent themselves.[63] Legal aid in the United States is different for criminal law and civil law matters. As discussed earlier, under the United States Constitution criminal legal aid with legal representation is guaranteed to defendants under criminal prosecution who cannot afford to hire an attorney. Civil legal aid, on the other hand, is not guaranteed under the law, but is provided by a variety of public interest law firms and community legal clinics either for free or at a reduced cost. The entities providing these services may impose income ceilings as well as restrictions on the types of cases they will take, because there are always too many potential clients and not enough money to go around. Common types of cases undertaken by civil legal aid organizations include the denial or deprivation of government benefits, evictions, domestic violence, immigration status, and discrimination. Most legal aid work involves counseling, informal negotiation, and appearances in administrative hearings as opposed to formal litigation in the courts.[64]

[62] See, Scott Fetzer Co., Kirby Co. Div. v. Weeks, 114 Wash. 2d 109 (1990).

[63] See, e.g., Each year, many Americans try to navigate US courts without a lawyer. Making Justice Equal – Center for American Progress; https://www.salon.com/2017/09/30/every-year-millions-try-to-navigate-us-courts-without-a-lawyer_partner/ (accessed: 28. 5. 2018).

[64] Funding for legal aid often comes from the federal government Legal Services Corporation (LSC), charities, private donors, and some state and local governments. In 1974, the U.S. Congress created LSC to provide federal funding for civil legal aid services. Literature shows that even with supplemental funding from LSC, the total amount of legal aid available for civil cases is grossly inadequate. A report from LSC in 2005 found that all legal aid office nationwide, LSC-funded or not, are together able to meet only about 20 % of all of the estimated legal needs of low-income people in the United States. Source: Helaine M. Barnett, President, Documenting the Justice Gap in American: The Current Unmet Civil Legal Needs of Low-Income Americans, Legal Services Corporation, September 2005.

This issue is briefly discussed in this article because, as we have seen from the discussion above, despite the American Rule, which states that each side is responsible for their own attorney's fees, there are in fact large segments of litigants/legal consumers that do not really have to worry about that rule. One example is indigent criminal defendants who have a constitutionally protected right to assigned counsel. Another prime example are the many civil court defendants who are assigned counsel by their insurance company, which in turns pays defense counsel and funds litigation expenses. And as we have seen, the multitude of fee-shifting statutes facilitate the assertion of claims by certain protected classes of claimants that might not otherwise have the financial wherewithal to assert such claims in the absence of statute. And as we have already seen, in the civil arena, especially where personal injury claims of varying types are asserted, the plaintiffs' counsel primarily bears the financial risk of pursing litigation by taking such cases on a contingency fee basis. Plaintiffs in those cases have little to lose by bringing claims (about 15 million a year) since it is mainly their legal counsel that is taking the financial risk of pursing the claims.

On the other hand, a fundamental problem, leading to issues of proper access to the courts (Buckwalter-Poza, 2016), is that many lower middle class people have "too much income" to qualify for legal aid, but "not enough money" to pay for the services charged by private attorneys. Many of those persons are frozen out of the legal system entirely, or they try to represent themselves in court, often with disastrous results (Nichols, 2015: 198, 207). Some commentators have proposed that mandatory attorney *pro bono* obligations ought to be required of all lawyers in the United States. Most bar associations in the United States merely strongly encourage attorneys to participate in pro bono activities, but do not mandate such activities. Rule 6.1 of the American Model Rules of Professional Conduct states that "a lawyer should aspire to render at least 50 hours of pro bono public legal services per year" and that "a substantial majority of the 50 hours" should be to persons of limited means or to organizations that support the needs of persons of limited means."[65] It is a fair conclusion, however, that even if lawyers provided more pro bono legal work – either voluntarily or through bar mandated rules – many in the United States still would be frozen out of the legal system due to its cost.

[65] For a good overview of *pro bono* representation, see: Supporting Justice III, A Report on the Pro Bono Work of America's Lawyers. Published March 2013; available: www.abaprobono.org.

11 Conclusion

This article has surveyed the main principles governing attorney's fees in the United States. As we have seen, while the United States has adhered to the so-called American Rule for over 200 years, and while the American Rule still maintains vitality, the law governing attorney fees is much more complex than that simple rule suggests at first blush. Further, statutes and rules concerning who pays for a party's legal fees has a fundamental bearing on the important over-arching issue of access to the courts. Many litigants, whether they win or lose, do not have to pay their legal counsel directly, and still have competent representation. However, many middle class and low income persons cannot avail themselves of legal counsel and the United States presently has inadequate systems in place (insufficient legal aid and non-mandatory pro bono requirements for lawyers) to allow many to have the legal representation needed to assert their legal rights.

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Obligatory Insurance as a Form of Social Engineering: A Comparison Paper Between the United States, Italy, Aruba and Poland

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Insurance has been around for centuries. Traditionally, it has been purchased to protect the purchaser, namely, the insured. Over time, the insurance industry has developed an increasing number of products, so that at present one can purchase insurance to cover nearly every risk imaginable. The concept of mandatory or obligatory insurance is a fairly recent development. It traces its origins to the widespread use of the motor vehicle and also employment. Obligatory insurance is designed to protect certain classes of persons, such as workers and those who sustain injury and damage at the hands of others. In this article, the authors compare the current state of obligatory insurance in four democratic countries: the United States, Italy, Aruba and Poland. The aim of the article is to catalogue the similarities and differences in obligatory insurance in those four countries. The countries studied all have obligatory insurance designed to offer some degree of protection to workers injured on the job, and in the course and scope of their work, and to those involved in vehicular collisions. The other primary takeaway from our research is that, predictably, there is less obligatory insurance in the United States than in the other countries studied.

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1 Introduction

Insurance, it has been said, "has been around as long as human existence" (Beattie, 2018). According to some authors, the first insurance policies date back to ancient times, and were written "on a Babylonian obelisk monument with the code of King Hammurabi carved into it."[1] Insurance has long been popular in Europe, especially with rapid advancements in industry brought about by the Industrial Revolution.[2] Insurance was slower to develop in the fledgling United States of the 1800s, but as we shall see, today the United States far and away is the leading consumer of insurance products. Everyone is, of course, familiar with insurance. We all purchase it, for our vehicles, our homes or apartments, for our businesses, for our pets, and for a myriad of other reasons. Life is fraught with peril. Accidents and various catastrophes occur with regularity. Insurance is meant to provide a hedge against risks and perils. It provides peace of mind. It makes it easier for the doctor, the lawyer, the driver, the homeowner, the renter, the farmer, the business owner and many other individuals and business owners to sleep easier at night knowing that when something goes awry the insurance company will be there to respond.

The first thought most of us probably have is that the main purpose of insurance is to protect the purchaser/owner of that insurance, that is, the insured. And in fact, that generally is the case. And for many millennia that was, in fact, the case. However, increasingly, legislators throughout Europe, to a much lesser extent the United States and elsewhere have decided, as a matter of public policy, that certain groups of persons must, as a matter of law, purchase insurance as a condition precedent to engaging in certain proscribed activities. Such insurance is therefore called mandatory or obligatory insurance. Obligatory insurance, therefore, is a form of social engineering designed to protect the harmed party from the possibility that the party causing the harm will not have the assets to compensate those he or she injures. While space limitations prevent the authors from tracing the complete history of obligatory insurance, or the pros and cons of obligatory insurance, the aim of this paper is to discuss the current status of obligatory insurance in a comparative fashion, by examining such legislation in four countries: the United States, Italy, Aruba and Poland. Each country's primary obligatory insurance legislation will be

[1] Id.
[2] Id.

considered in that order.[3] The paper will conclude, in Section VI, with some remarks on both common denominators and differences.

2 Obligatory insurance in the United States

2.1 Introduction

The topic of obligatory insurance is complicated because the United States, when it enacted its constitution, created a system of federalism, which divides powers between the national (federal) government and the various state and territorial governments. Under the doctrine of federalism, the two levels of government have roughly equal status. The United States Constitution gives certain powers to the federal government, other powers to the state governments, and certain other powers to both. The states are empowered to pass, enforce, and interpret laws, as long as they do not violate the federal constitution. The Tenth Amendment of the United States Constitution provides that "all powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Tenth Amendment, therefore, assigns most of the basic responsibilities of governing to the states and local governments. The area of insurance is one that, as a general proposition, has been left to the states, and therefore, there are many variations from state to state. There are, of course, fifty states, and they have, for the most part, autonomy to govern as they deem fit. Former Supreme Court Justice Louis Brandeis, in the case *New State Ice Co. v. Liebman*,[4] popularized the concept of "laboratories of democracy" to describe how a "state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." Therefore, sometimes laws are passed in one state; they turn out to be successful; and, many other states then follow that lead. Of course, the converse is also true.

Most states have insurance offices headed by a state insurance commissioner. And the vast majority of insurance matters are in fact regulated and administered at the state level. However, there are numerous federal offices and agencies that play some role in the United States insurance industry such as the Federal Trade Commission

[3] Due to space limitations, it is not possible to cover every single law imposing obligatory insurance in the countries studied in this paper. However, the authors have strived to discuss the most salient obligatory insurance.
[4] 285 U.S. 262 (1932).

and Federal Insurance Office (FIO), which is part of the Department of Treasury. The FIO is authorized, for example, to monitor all of the insurance industry and identify any gaps in the state-based regulatory system. Further, the Dodd-Frank Wall Street Reform and Consumer Protection Act, passed by Congress in 2010 in response to the market collapse in 2008, also established the Financial Stability Oversight Council, which is charged with monitoring the financial services markets, including the insurance industry, to identify potential risks to the financial stability of the United States.

The insurance industry in the United States is vast. In 2013, $4.640 trillion of gross insurance premiums were written worldwide. Of that, $1.274 trillion, or 27 percent, were written in the United States.[5] For much of its history, the individual states regulated the insurance industry. Typically, each state has an insurance department headed by an insurance commissioner. In *United States v. South-Eastern Underwriters Association*,[6] the Supreme Court held that the Commerce Clause of the U.S. Constitution empowered the federal government to regulate the insurance market. However, the McCarran-Ferguson Act of 1945 imposed rather severe limitations on the federal government's ability to interfere with laws and regulations enacted by state governments for the purpose of regulating the insurance industry.

Although the United States commands a disproportionate amount of the overall global insurance market, unlike the situation in many European states, obligatory insurance in the United States is the exception rather than the rule. The two major departures are vehicular insurance and industrial insurance (worker's compensation) laws, both of which largely are regulated at the state level. Since the individual states have the autonomy to decide through their own laws and regulations how insurance should work, it is not possible in this short article to describe all of the differences in obligatory insurance across all fifty states. We can, however, trace the history of some of the most salient aspects of obligatory insurance in the United States and that history follows in the following sections.

[5] Federal Insurance Office (2014). Annual Report on the Insurance Industry. Washington, D.C.: U.S. Department of the Treasury, at p. 45.
[6] 322 U.S. 533 (1944).

2.2 Obligatory vehicular insurance

With the proliferation of vehicular traffic came, predictably, a high number of collisions, resulting in both bodily injury and property damage. The states decided, as a matter of public policy, that unlike other torts, where the justice system relied solely upon the tortfeasor to personally satisfy judgments, the sheer number of vehicular accidents mandated the imposition of financial responsibility and obligatory insurance laws to ensure that victims of vehicular collisions would be able to collect, or at least partially collect, on judgments entered against the tortfeasor drivers. In the mid-1920s, Massachusetts and Connecticut became the first states to legislatively create financial responsibility and obligatory insurance laws.[7] Over time, the other states followed suit. Today, most states require the owner of a motor vehicle to carry some minimum level of liability insurance. Only a handful of states do not require vehicle owners to purchase insurance. But even those states have legislation requiring owners of vehicles to take other steps to ensure that there is a fund available to help ensure that accident victims will be able to at least partially recover their damages. In Arizona, for example, while insurance is not obligatory, the vehicle owner must either deposit $40,000 in cash, bonds, or certificate of deposits with the State Treasurer or purchase insurance.[8] Similarly, in Mississippi, the owner is required to either post a bond equal to the state minimum limits required for those that do purchase insurance or make a cash or security deposit equal to those limits.[9] In Texas, there is a financial responsibility law in place mandating that the vehicle owner must establish personal financial responsibility through a surety bond or a deposit of $55,000 with the comptroller or the county judge.[10] In Virginia, owners are required to pay $500 a year to drive an uninsured vehicle. However, owners remain responsible for injuries or damages caused in an accident.[11] New Hampshire is a personal responsibility only state. While New Hampshire does not require its citizens to purchase vehicular insurance or to post bonds or otherwise takes steps to ensure (at least partial) financial responsibility, its laws mandate that owners involved in accidents are fully responsible to pay for any bodily injuries or property damage in the event of an accident.[12]

[7] Ct. Public Acts, ch. 183 (1925); Mass. Acts 1925, ch. 346.
[8] Http://www.insurance.az.gov/consumers/help-auto-insurance.
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[11] Https://www.dmv.virginia.gov/vehicles/#uninsured_fee.asp.
[12] Https://www.nh.gov/safety/divisions/dmv/financial-responsibility/faq-crashes.htm.

The remaining states require vehicle owners to carry minimum levels of liability insurance. The common thread is that each state has a minimum bodily injury limit per individual; a minimum bodily injury limit per accident; and, a minimum property damage limit per accident. South Carolina's[13] minimum limits of 25/50/25 are common (11 states have these minimum requirements.) Using this as an example, after "an accident each person injured would receive a maximum of up to $25,000 with only $50,000 allowed per accident (ex. 2 people needing $25,000, if the need it more such as 3 people needing $25,000 then whoever files first gets access to the $50,000 limit and you may be sued for the rest if the accident was your fault. The last number refers to the total coverage per accident for property damage."

As can be seen, obligatory vehicular insurance, while providing some minimum levels of insurance, often does not fully protect either the victim(s) of accidents or the owner(s), especially in this day of often high judgments. For instance, in the state of Indiana,[14] the minimum liability limits are $25,000/$50,000/$10,000, and accordingly there is a greater property damage exposure to an owner in Indiana compared to South Carolina for carrying only the minimum limits. To protect oneself, the owner can pay a higher premium in exchange for higher liability/property damage limits. Despite these obligatory insurance laws, many Americans risk driving without insurance. In 5 states, approximately 20 percent of persons operating motor vehicles lack insurance coverage.[15] To protect against the risk of being injured by an uninsured or underinsured tortfeasor driver, many states mandate the purchase of (or at least required insurance companies to offer) what is known as uninsured/underinsured motorist coverage. This insurance provides coverage in the event an at-fault party either does not have any insurance or is underinsured.

2.3 Obligatory Insurance for Medical Professionals

As is the case with obligatory insurance for those owning or operating vehicles, the states, not the federal government, have determined whether health care professionals are obliged to carry liability insurance. In fact, no federal law requires physicians to carry medical malpractice insurance. As of 2018, approximately 32

[13] Https://www.doi.sc.gov.
[14] Https://www.in.gov.
[15] See, Insurance Journal (March 15, 2018). Available at: https://www.insurancejournal.com.

states have no requirements that physicians carry medical malpractice insurance (Weger, 2018). Over the last fifty years or so, most states have passed so-called tort reform legislation in order to help shield the medical profession (and their insurers) against the onslaught of tort cases brought against the profession for medical malpractice. The so-called medical malpractice "crises[16]" led to newer physicians opting out of practicing in high-risk areas of medicine such as OB-GYN, orthopedic surgery among other areas. Additionally, some physicians decided to leave risky parts of the country such as New York City and other urban areas. Some medical malpractice carriers decided not to write malpractice insurance or, if they continued to do so, raised premiums drastically. All of these developments were unhealthy and undesirable not only for the profession but for the American public at large. Tort reform at the state level attempted to alleviate these problems by, for example, imposing caps on damages; modifying the usual rules regarding joint and several liability; mandating pre-suit arbitration or other forms of ADR, etc. The results of tort reform have been described as mixed and uncertain, although in many parts of the country malpractice premiums have, in fact, been reduced (Heller, 2017: 139–163).

Eighteen states do require physicians to take some steps regarding the purchase of malpractice insurance. Some states require minimum levels of malpractice insurance while others require medical professionals to have some insurance in order to qualify for the liability tort reforms that have been legislatively enacted in the state(s) where they practice. Alabama, Alaska, Arizona, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington and West Virginia all do not require medical malpractice insurance nor do they have minimum carrying requirements.

On the other hand, seven states do require doctors to maintain a minimum level of malpractice insurance. These states are: Colorado, Connecticut, Kansas, Massachusetts, New Jersey, Rhode Island and Wisconsin. The amounts of minimum insurance these states require vary from state to state. In Kansas, for example,

[16] The plural of crisis is used here intentionally, as over the last fifty years or so there were several distinct periods of 'crisis'. See, Heller, 2017.

physicians must maintain a medical malpractice insurance policy with a per limit claim of $200,000 and a $600,000 aggregate limit. Other states, including Indiana, Nebraska, New Mexico, New York, Pennsylvania and Wyoming have enacted laws that require doctors practicing in those states to maintain minimal levels of malpractice insurance if they want to avail themselves in programs operated by the state that are designed to help them deal with claims, that is, tort reform legislation. Some of these states provide patient compensation funds which are, in essence, extra malpractice insurance for doctors. When a claim is made against a physician, the physician's malpractice insurance will cover the claim up to the limit of available policy limits while the state compensation fund satisfies any unpaid amount.

While many states do not require doctors to maintain medical malpractice insurance as a matter of law, in reality, even in those states, many doctors, in fact, maintain such insurance. Over the last 50 years or so, in response to the vast number of medical malpractice claims, and other economic pressures, the profession has become consolidated into ever increasing numbers of doctors practicing through hospitals and large clinics (Heller, 2017). Typically, in those settings, the institution where the doctor practices will have malpractice insurance in place. Further, most hospitals and clinics require doctors practicing in those facilities to obtain and maintain malpractice insurance as a condition to practice there. Some healthcare plans also require any doctor who participates in their coverage plan to maintain malpractice insurance. A significant number of doctors practice medicine without having malpractice insurance.[17] These doctors might conclude they are less of a litigation target by not having such insurance. However, it is fair to say that whether doctors technically have to maintain malpractice insurance, whether by state law, employer requirement, health plan requirements or otherwise, most physicians, in fact, maintain such insurance for peace of mind in the event they are sued or claims are made against them. This is due to the fact that more than 65 percent of doctors over the age of 55 report having been sued at least once. This figure is even higher for doctors practicing in high-risk areas.

[17] One researcher noted, for example, that as of 2016 in Florida more than 5 percent of the state's approximately 47,700 active medical doctors did not carry medical malpractice insurance (Silverman, 2016).

2.4 Obligatory insurance for other professionals

Oregon and Idaho currently are the only states requiring attorneys to maintain legal malpractice insurance coverage as a condition for practicing law. Other states, while not requiring attorneys licensed in those states to carry insurance, do require them to disclose to clients if they are not insured. Other states, including Indiana and Washington, among others,[18] are considering whether to require attorneys to carry legal malpractice insurance coverage. In reality, however, many attorneys do carry legal malpractice insurance on a voluntary basis.[19]

Dentists are not legally required to carry malpractice insurance, but, as is the case with attorneys, most of them do nevertheless. Some states offer programs that put a limit on the awards given to patients, often called a State Fund. If a dentist participated in their state's State Fund, they pay a yearly fee to that fund, and any lawsuits brought against them have a limit on the amount of money that can be awarded to the claimant. The limit is set by each state's laws.

2.5 Obligatory workers' compensation insurance

Workers' compensation is another extremely common form of obligatory insurance in the United States. Designed to protect employees (workers) injured and/or disabled during and in the course of employment, these laws provide that in most cases the employer must have insurance as a means to pay for the injured employee's medical care and lost wages. In some cases, these laws also provide that the state (using funds paid jointly by the employer and employee) will pay the injured worker a lump sum for any permanent, partial disability, such as for the partial loss of a limb.

[18] Washington State is considering whether lawyers licensed to practice law in that state should be required to maintain obligatory attorney malpractice insurance. For a good discussion about the status of the debate, including both the pros and cons of such a requirement, the reader is referred to a recent podcast discussion involving the Chief Disciplinary Counsel at the Washington State Bar Association, Doug Ende, entitled: "ALPS in Brief Podcast - Why is mandatory malpractice insurance gaining ground?" (https://blog.alpsnet.com/alps-in-brief-podcast-episode-10-why-is-mandatory-malpractice-insurance-gaining-ground). As is pointed out in the podcast transcript, Washington, as is the case in other states, and as is true in non-legal professions, when considering whether to impose obligatory insurance has to balance both interests of the public in trying to protect persons harmed from the risk they may not have recourse against a judgment proof lawyer against the burdens (cost and administrative) to the lawyer.

[19] On the other hand, many lawyers choose to "go bare." Some researchers found that in a survey of Texas lawyers, for example, "36 percent of private practitioners and 63 percent of solo practitioners did not carry malpractice insurance" even though lawyers face a substantial risk of malpractice claims (see, When the Lawyer Screws Law Scholarship Repository. June 29, 2015; accessed at: https://www.scholarship.law.duke.edu).

If a worker dies as a result of their employment, workers' compensation also makes payments to the deceased's family members or other dependents. Workers' compensation schemes are no-fault, meaning that in situations where the worker sustains injuries while in the course of employment, he or she does not (as in the litigation setting) have to prove fault on behalf of the employer or someone else. Rather, the injured worker is automatically entitled to the statutory benefits upon a showing of injury that occurred during the course and scope of usual employment.

All states have workers' compensation laws and workers' compensation policy most often is handled by the individual states. However, the United States Department of Labor has an Office of Worker's Compensation Program that administers compensation policies for federal employees, coal miners and longshoremen. Some very small businesses, such as ones with four or fewer employees, are exempt from these laws in some states. In most states, workers' compensation claims are handled by administrative law judges, who often act as triers of fact. It should further be noted that regardless of obligatory requirements, many businesses (as is the case with doctors/lawyers for example) may purchase such insurance voluntarily. It should also be noted, that in some instances, workers injured on the job might have tort remedies available in addition to statutory workers' compensation benefits. For instance, the injured worker might have a tort remedy against a third party entity (non-employer/non-co-worker) who contributed to the accident; for example, a product liability claim against a manufacturer of some equipment that worker was injured by during employment.

2.6 Obligatory health insurance

Traditionally, it has not been obligatory for Americans to purchase health insurance. Furthermore, health insurance in America is not a legally protected right. Practically speaking, however, the majority of Americans have had some form of health insurance. Many Americans have purchased their own health insurance through the private, for-profit market. Others have received health insurance through their employers as part of their compensation scheme. Yet other Americans have received health care through the public system offered by the government to certain persons that qualify under specific statutory requirements. Such persons, often military or former military personnel; the partially or totally disabled; and, the elderly, receive health care either for free or at a highly reduced rate. This patchwork scheme has

always meant, unfortunately, that there have been many Americans left "in the gaps" that have been unable to have health care plans. Such persons have been in dire straits and have been a burden on society in the sense that they must usually resort to receiving care at hospitals and emergency care facilities.

In 2010, under the Barack Obama administration, the United States Congress passed the Patient Protection and Affordable Care Act (hereinafter "ACA"[20]). One of the signature provisions of the ACA was that it mandated all US citizens and legal residents to maintain qualifying health care coverage. Unfortunately, the ACA was passed under party lines, and when President Donald Trump took office he vowed, along with a Republican majority in Congress, to completely repeal the ACA. Although to date that has not happened, President Trump was able to take steps to weaken this legislation and Congress removed the penalty for not having health insurance, essentially removing the mandate requiring all citizens and residents to have health insurance. Accordingly, the future of the ACA remains in doubt and only time will tell whether health insurance will be, in fact, compulsory for all Americans.

3 Obligatory insurance in Italy

3.1 Introduction

Obligatory general insurance (in acronym AGO[21]), in the Italian legal system, is a legal scheme that provides for its subscribers multiple forms of social protection through social insurance for the elderly, those suffering with disabilities, as well as those employees saddled with involuntary unemployment including craftsmen, traders, agriculture workers and other atypical workers, even workers of the Show (see more at Velliscig, 2019: 539–561). This insurance was established by Royal Decree Law.[22] It is the main institution of assistance and social security that implements Art. 38 of the Constitution. In Italy, the INPS is the social security institution that implements this insurance. Obligatory general insurance managed by INPS is also defined as a general scheme. Other entities manage obligatory social insurance on the basis of special laws, as provided for in article 1886 of the Civil

[20] 42 U.S.C. § 18001 (2010).
[21] Assicurazione Generale Obbligatoria.
[22] No. 636 of 14 April 1939 (OJ, No 105 of 3 May 1939). AGO was confirmed by the "Law 9/2009 and by successive laws of amendment and integration".

Code, and are defined as substitute regimes (e.g. INPGI[23] or exclusive INPDAP[24] schemes).

3.2 Social insurance

Article 38 of the Italian Constitution establishes the foundation of obligatory social insurance: "Workers have the right to be assured adequate means for their needs and necessities in the case of accidents, illness, disability, old age and involuntary unemployment." The Social Insurance System is financed by the contributions that are largely borne by employers and, to a lesser degree, by the workers themselves, whose share is retained by the employer, which is then paid into the Treasury's coffers as a substitute tax. The system of social insurance is managed by two institutes: the INPS[25] (National Institute of Social Security) and the INAIL[26] (National Institute of Occupational Insurance).[27]

The INPS was created in 1935 as an entity under public law in compliance with the insurance regulations for which insurance companies cannot be constituted except in the legal form of a mutual insurance company or institutes under public law. The main types of insurance provided by INPS are:

- Obligatory insurance due to disability and old age and for survivors. It guarantees three different types of pensions for workers and survivors: firstly, it guarantees a pension for workers who leave their jobs for age; secondly, to the workers who face reduction of work and hence income because of physical or mental infirmities; and, thirdly, assures those who survived the worker a pension in the event of the said worker's death;
- Social insurance against involuntary unemployment which allows the worker to maintain decent living conditions for himself and his family (see more at Franasti, 2018);

[23] Istituto Nazionale di Previdenza dei Giornalisti Italiani.
[24] Istituto Nazionale di Previdenza e assistenza per iDipendenti dell'Amministrazione Pubblica.
[25] Istituto Nazionale della Previdenza Sociale.
[26] Istitutonazionale Assicurazione Infortunisul Lavoro.
[27] Http://www.itctosi.va.it/orientagiovani/Capitolo%205.4.htm.

- The Guarantee Fund of the TFR[28] (End-of-Relationship Treatment) which assures the worker the payment of the TFR in the event of the employer's insolvency;
- The Cashier Checks for the household which consists of a cheque paid to the worker in order to supplement his or her salary in order to substantially guarantee to both the worker and his or her family a dignified existence as enshrined in the Italian Constitution;
- The Profit and Loss Fund, the purpose of which is to guarantee the worker a part of the salary in case of the interruption of the employment relationship either by the employer or by the will of the worker. The interventions are, essentially, of two fundamental types: the first consists of an ordinary intervention in case of temporary crises production failures of work or sudden declines of the demand. The second type of interventions is more articulated and complex, as it is addressed in particular to workers who have lost their jobs permanently due to company restructuring or similar interventions;
- Insurance to assist a worker suffering from disease, which allows the worker to receive a certain proportion of the daily wage in a manner inversely proportional to the time when the worker is suffering from a non-occupational disease;
- Maternity and paternity insurances that guarantee to the mother in particular or to the father some months of suspension paid by the employer immediately before (only for the mother) or immediately after the birth of the child (for both parents) so that the child is guaranteed the necessary care and assistance.

The National Institute of Accident Insurance at Work (INAIL) administers insurance resulting from accidents at work and occupational diseases. In the case of accidents at work or occupational diseases, the INAIL grants workers:

- Health Care that is provided by the ASL[29] with territorial competence;
- Daily Allowance for incapacity to work commensurate with the remuneration received before the occurrence of the accident or occupational disease;
- An annuity commensurate with any permanent inability to work due to physical impairments suffered by the worker;
- A monthly allowance for the duration of any assistance at home; and

[28] Trattamento di Fine Rapporto.
[29] Azienda Sanitaria Locale.

- A monthly annuity and a "one-off" cheque for survivors in the event of a worker's death due to occupational disease or accident at work.

3.3 Obligatory insurance for lawyers

The rules on obligatory insurance for lawyers (see more at Dosi, 2016) under professional law are set forth in article 12 of the Law no 247/2012. The Decree of the Ministry of Justice of 22 September 2016 establishes the essential conditions and minimum ceilings for insurance policies to cover civil liability and accidents arising from the exercise of the activity (O.J. N. 238 of 11 November 2016). The entry into force of the decree, initially set at 11 October 2017, was extended by one month (D. M. Giustizia 10/10/2017), coinciding with the news circulated by the CNF[30] of the conclusion of the national convention on the insurance of professional civil liability of the lawyer and of the liability and injuries "*ex lege*".

Here are the main innovations provided by the decree:[31]

- The insurance must cover the civil liability of the lawyer for all damages that the lawyer may cause, due to serious negligence, to customers and to third parties in the course of the professional activity.
- Any type of damage must be insured: patrimonial, non-patrimonial, indirect, permanent, temporary, future.
- The employees and family members of the insured are not considered to be third parties covered by the insurance.

In the case of the lawyer's joint liability with other persons, insured or not, the insurance must provide for the liability of the lawyer for the whole, except for the right of recourse against the solidarity debtors. Other provisions concern:

- the temporal effectiveness of the policy and the right of withdrawal: it must be envisaged, also in favour of the heirs, the obligatory unlimited retroactivity and the ultra-activity at least ten years for the lawyers that cease activity in the period of the policy's validity;

[30] Consiglio Nazionale Forense.
[31] Https://www.altalex.com/documents/news/2016/10/12/.

- the policy must exclude the insurer's right of withdrawal from the contract as a result of the complaint over a claim or of its compensation, during the duration of the contract or the period of ultra-activity;
- the decree also identified the minimum ceilings for coverage, separated by a risk range depending on the individual or associated form of the activity and the turnover of the last closed year.
- In the case of deductibles and uncovered claims, however, the insurer shall indemnify the third party for the entire amount due, except in the scope of the right to recover the amount of the deductible or the uncovered claims by the insured who has kept free from the claim for compensation of third parties.

The parties may also provide for premium adjustment clauses in the event of an increase in the current contract turnover. The insurance must be provided in favour of lawyers and their employees, practitioners and employees for whom INAIL compulsory insurance coverage is not operating. The coverage is extended to accidents during the course of the professional activity and due to or on the occasion of the accident, which causes death, permanent disability or temporary disability, as well as medical expenses.

The Minimum insured sums are:

- Capital case death: Euro 100,000.00;
- Capital permanent disability case: Euro 100,000.00;
- Daily allowance for temporary disability: Euro 50.00.

The conditions of obligatory insurance policies must be made available to third parties without any formalities at the order of membership and at the CNF, and published on their respective websites.

3.4 Health insurance

Health insurance (more at Caso, 1953: 132–134), also called sickness policy, has the function of covering costs and expenses related to health. Although it is not compulsory in Italy, the accident insurance policy is complementary and often an alternative to the National Public Health Service. With health insurance, Italian

citizens can obtain a policy providing either total or partial coverage for incurred medical expenses and, in case of accidents or damage to health, they can choose between three types of health insurance:

- The indemnity insurances that guarantee payment for the charges incurred during the hospitalization and for the days of convalescence consequent to a hospital stay
- Reimbursement insurances that recognise a partial or total indemnity for medical expenses arising from an accident or illness
- Policies for permanent disability where compensation is proportional to the degree of invalidity of the insured person.

In case of illness, the National Health Care System protects Italian citizens for all care. The sickness insurances, therefore, have a different purpose. Firstly, they compensate the insured for the loss of income which is caused by the disease. A second function is to compensate for expenses in case of admission to a private clinic or if specialist care is needed. When securing a sickness policy, the insured fills out a questionnaire and, responding to it, provides all the information related to the insured's health status that the insurance company considers necessary to make an informed evaluation of whether to conclude insurance with the subject in question. It is not advisable to give false answers, because if their non-authenticity is proven, this entails the loss of the right to any kind of compensation from the insurance company.

There are three types of health insurance policies available, each providing various types of compensation:

- The first possibility is compensation if the disease causes permanent disability. Generally, the percentage of permanent disability that is protected by the health insurance policies of Italian insurances is that for damages of more than 26 percent, as calculated from the tables of the Ministry of Health.
- The second type of compensation is on a daily basis, for hospitalization and also, in some cases, for the post-hospitalization convalescence.

– The third type of compensation that may be provided by the sickness policy is the reimbursement for medical expenses at private facilities, which can cover both hospitalization and surgery, or even just the latter.

Like civil liability insurance, sickness policies also provide for exclusion clauses, which allow the insurance company not to pay compensation to the insured under certain defined circumstances, including the following: malformation (at birth), voluntary abortions that are not therapeutic (abortions are considered therapeutic if they safeguard the health of the mother), dental care, illnesses of the psychic sphere, interventions of cosmetic surgery. Some optional clauses that are advisable not to be included in the policy are that of termination of the cover after the liquidation of the amount of the insurance for the first cause of illness, which allows the company to cancel the contract after the first opportunity in which a state of illness has been compensated. To obtain compensation for the illness, the insured must send all documentation to the insurance company in a registered parcel with a return receipt, enclosing copies of all available medical documentation including: certificates, medical records from clinics attended and receipts for which the compensations is sought.

Another type of clause that can be included into the accident insurance policy is one that allows the insurance company to disclaim coverage in circumstances in which the injury-causing incident was a result of negligence or gross negligence on the part of the insured. As regards the possible consequences of an accident, these may belong, according to insurance policies, in one of the three broad categories: temporary disability, permanent disability and death. Permanent disability occurs when the damage sustained due to the accident is not reversible and will indeed affect the entire future life of the insured, in particular by preventing the insured from being able to work. Temporary disability, on the other hand, is the loss of working capacity for a limited amount of time. Compensation generally provided for temporary disability is a daily allowance covering the days of work lost by the insured. This is, therefore, a particularly advisable compensation for those who carry out autonomous work activities, which do not provide for indemnification. Permanent disability is calculated with a percentage value corresponding to the type of physical or sensory impairment to which the damage corresponds, which in turn is based on special tables, prepared and constantly updated by Ania and Inail. In the case of partial impairments not explicitly provided in the tables, the insurance

company may arrange for an appropriate medical examination to assess them. The case of death by accident instead provides for compensation or an annuity for the beneficiary indicated in the accident insurance by the insured. In cases where the policyholder does not specify a beneficiary (in case of death) then the insurance carrier will divide the death benefits equally among the heirs.

3.5 Vehicles

Rail-free motor vehicles, including motorcycles and trailers, may not be placed in circulation on roads of public use or on areas comparable to them if they are not covered by the liability insurance (Cocci, 1960: 497–530) towards third parties provided in Article 2054 of the Civil Code and Article 91, paragraph 2, of the Road Code. The Regulation, adopted by the Minister for Productive Activities, upon a proposal by the IVABS,[32] identifies the type of vehicles excluded from the insurance obligation and the areas comparable to those of public use. The insurance shall include liability for damage caused to the transported person, irrespective of the title under which the transport is carried out. The insurance shall have no effect in the case of movement against the will of the owner, the usufructuary, the purchaser with a covenant of private domain or the lessee in the event of a financial lease, in accordance with Article 283, Paragraph 1(d)), starting from the day following the complaint lodged with the Public Security Authority. By way of derogation from the second subparagraph of Article 1896 of the Civil Code, the insured shall be entitled to reimbursement of the premium rate for the remainder of the insurance period, net of the tax paid and the contribution provided for in Article 334. The insurance shall also cover liability for damage caused in the territory of other Member States under the conditions and within the limits laid down in the national laws of each of those States concerning compulsory insurance of civil liability arising from the movement of motor vehicles.[33]

[32] Institute of Veterinary Animal and Biomedical Sciences.
[33]Https://www.altalex.com/documents/news/2014/10/20/assicurazione-obbligatoria-per-i-veicoli-a-motore-e-i-natanti#titolo.

3.6 Medical insurance

Currently, there is no compulsory liability for medical (see more at Pagni, 2018: 174–189) or ordinary negligence. Therefore, the need arises – even if there is no specific legal obligation – to contract insurance to cover injuries/damage stemming from acts of serious medical negligence. In theory, the obligation to take out insurance for civil liability would already be applicable to doctors who operate as free professionals by virtue of the so-called "Decree Balduzzi", which was originally set to enter into force in August 2013, but was then postponed to August 14, 2014. The aforementioned decree stipulates that while the criminal liability of physicians is limited to cases of gross negligence, they are still obliged to compensate for any physical and/or psychological damage caused to the victim. On the other hand, as regards the foundation of the obligation of insurance for the sanitary structures in which the medical professionals are to operate, the responsibility for any accidents arises from the rules of Civil Code regulating the fulfilment of contractual obligations.

The Gelli-Bianco Law (2017) provides:

- The physician is not liable if he or she has complied with the guidelines established by scientific societies or research institutes accredited with the Ministry of Health. This exception was added in an attempt to prevent the practices of "defensive medicine" which is a concern when physicians are faced with the threat of civil and/or criminal sanctions due to their negligence.
- With regard to civil liability, a differentiation is established between the type of premises responsibility (contractual) and that of the professional (non-contractual).
- The patient's legal claim may be filed against the institution for any type of damage and guilt, irrespective of its severity, but the action may only be filed against the professional in the case of gross negligence or, of course, intent.
- Compensation actions are extended to the obligation – currently foreseen for the reasons of Social Security benefits – to have a preventive technical assessment beforehand.
- It is foreseen that all public and private health facilities as well as the professionals shall be required to conclude insurance policy, the characteristics

of which must be governed by implementing decrees and which must nevertheless establish a very broad temporal coverage: the health benefits will have to be covered by insurance for the next ten years from their making, and also in the case of putting in quiescence of the professional or of death (in the latter case with civil responsibility of the heirs).

– A guarantee fund shall be established, as is the case for road-traffic compensation, which will cover damages exceeding the policy ceilings or those in respect of insuring companies in state of insolvency or forced liquidation.

4 Obligatory insurance in Aruba

4.1 Introduction

The reader may not be familiar with the small country of Aruba, and so here is a little background. As tiny as it can get, just 29 kilometres off the north coast of Venezuela, lies a 32 kilometres long and 10 kilometres wide island called Aruba. Aruba is located in the southern Caribbean Sea and is a constituent country of the Kingdom of the Netherlands. Aruba is not officially part of the European Union, but it is designated as a member of the Overseas Countries and Territories (OCT). This is important, as it means that Aruba receives support from the European Development Fund.[34]

As a constituent of the Kingdom of the Netherlands and autonomous country, Aruba enjoys the power to elect its own Parliament and Cabinet. However, Aruba is not a sovereign country in certain political aspects. Some of these aspects are defence and foreign affairs, which are handled by the Netherlands (Borman, 2012). This does not affect the fact that Aruba creates its own legislation, while adopting and adapting many laws of the Netherlands.[35] Obligatory insurance in Aruba is a very common topic, as in many other countries. It regulates security and harmonization among citizens with formal rules to protect the well-being of individuals. The main obligatory insurances discussed in this section are health insurance, vehicle and motor insurance, workers compensation insurance and company insurance.[36]

34 Aruba Department of Foreign Affairs (2011), Political Stability, 7 June 2011, available at: http://www.arubaforeignaffairs.com.
35 Aruba (2014) *Encyclopedia Britannica,* 10 August 2014, available at: https://www.britannica.com/place/Aruba.
36 European Union (2011) *Overseas Countries and Territories (OCI),* 6 June 2011, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:1105_1.

4.2 Obligatory vehicular insurance

To maintain the security amongst citizens that make use of public roads, the obligatory vehicular insurance was introduced in the country regulation of December 22, 2016 amending the Motor Vehicle and Motor Boat Tax Regulation (AB 1988 no. GT 23).[37] Motor vehicles must be registered at the Tax Authorities (*Departamento di Impuesto)*. This registration allows anyone who owns a motor vehicle to use it on public roads. For second-hand motor vehicles, citizens need to submit a valid inspection card and receive a motor vehicle registration certificate. This registration certificate is needed as proof in order to be able to pay the motor vehicle tax. The motor vehicle tax must be paid annually to the tax authorities. It can be fully paid at the beginning of the year or in multiple payments, namely half-yearly or quarterly. Making this payment allows the vehicle owner to receive the license plate with the first down payment and the check plate with the last down payment. Other obligatory documents need to be submitted along with the payments. One of these is the vehicle insurance certificate. If the owner of a vehicle is stopped for control and is not able to prove that the vehicle is insured, there is a high possibility of getting a fine. The fines for driving a vehicle without insurance consist of amounts from a minimum of 50 afl (+/- 25 euro) to a maximum of 800 afl (+/- 400 euro).[38]

4.3 Obligatory health insurance

Aruba has a basic health insurance scheme that is valid for each citizen of Aruba, the "*AlgemeneZiektekostenVerzekering*" (AZV) (Hamilton, 2001: 129–139). The National Ordinance of AZV was implemented by the AZV Implementing Body. This National Ordinance regulates the reimbursement of medical expenses from the general practitioner, specialist, physiotherapy, dentist, pharmacies and domestic hospitalization as well as for possible hospitalization abroad if the medical procedure that the patient requires cannot be undertaken in Aruba. Every resident of Aruba has the obligation to be registered at the Civil Registry Office (Hamilton, 2005). By completing this registration, the resident is also obligated to register at AZV. The citizen who is registered at AZV will be completely covered for medical expenses in

[37]Http://www.impuesto.aw/Portals/0/Wetten/MRB/AB%202016%20no%2077%20MB%20wijzigingen.pdf?ver=2017-01-12-154013-323.

[38] Http://www.omaruba.aw/boetes/overzicht-van-boetes/.

Aruba. A small fee of approximately 5 euros must be paid to receive the AZV insurance card.[39]

In 1990 the draft National Ordinance on General Health Insurance was submitted by the Oduber cabinet, which was the political party in office at the time. This draft was accepted in 1992 and opened the door to replacing a variety of statutory health insurance regulations through the AZV. These health insurance regulations benefit public employees, employees working for the government, government pensioners, and disabled people. The AZV entered into full force on 1 January 2001, after years of developing a social health insurance program that would benefit all citizens of Aruba. After the National Ordinance General Health Insurance entered into full force, Aruba became the first country, within the Kingdom of the Netherlands, to introduce a basic health insurance policy for the entire population.[40]

In 2006 a Health Insurance Act followed in the Netherlands. This law obligated citizens to take out health insurance with a private party, but they were not automatically and legally insured (Sens, de Pijper, Wildenburg (2007).

Citizens who are employed by the government, or a company that provides this additional insurance, enjoy the so-called AZV+ (AZV Plus). It functions in a manner similar to travel insurance. It covers the residual of what travel insurance does not cover, generally around 20 percent to 30 percent. This insurance is valid both for the employer and the employee's direct family, which means their husband or wife and children. This is not automatic insurance, because the traveling citizen must declare this before departure. If the citizen fails to declare this, then the additional coverage will not be valid. Besides working as additional insurance, the AZV + also covers extra costs and benefits for the dentist, specialist, psychologist and others, compared to the general basic insurance.[41] AZV insurance plays an important role in Aruba because it is obligatory to be insured in order to be employed or to attend school. Indeed, being insured is the most important requirement in order to be accepted as a student at any school.[42]

[39] History of AZV, available at: http://www.azv.aw/pap/tocante-azv/historia.
[40] History of AZV, available at: http://www.azv.aw/pap/tocante-azv/historia.
[41] Types of AZV Packages, available at: http://www.azv.aw/pap/pakete-azv.
[42] Https://www.skoa.aw/wp-content/uploads/2018/12/PREPARATORIO-2019-2020.xls-A-1.pdf.

AZV works in cooperation with all the care providers mentioned above. There are contracts between AZV and these care providers that regulate the reimbursement of fees associated with the procedures they perform for their patients. AZV collects the money to provide for this social service through the tax authorities, who are responsible for collecting the premium, the amount of which is tied to the employee's annual income. This premium is collected every month from the employee's salary and before the 15th of the month, this amount is then transferred to the tax collector's office. This premium is called the 'AZV premium'. The employer pays 8.9 percent and the employee contributes 1.6 percent of his salary. The total amount of the AZV premium amounts to 10.5 percent of the employee's annual income and reaches a maximum annual income of awg. 85,000 (+/- 42.500 euro's). A pensioner, on the other hand, is responsible for the complete premium payment. AZV also covers its costs through a government contribution and the direction levy BAZV (*Bestemmingsheffing AZV*). BAZV is a health tax of 1 percent, which is collected on every item or product that is bought in Aruba. This is a tax introduced by the government to decrease the government contribution to the AZV.[43] The AZV basic insurance is a social plan that has worked in a perfect way for Aruba and its citizens. This social plan advances the ideal of citizens' human rights as set forth in Article 25 of the United Nation's 1948 Universal Declaration of Human Rights. This makes Aruba a positive example for other countries.[44]

4.4 Obligatory workers' compensation insurance

The Social Security Bank, *Banco di Seguro Social (SVB),* has played an important role in Aruba since January 1986. This bank oversees a big part of the Aruban community. The bank makes sure that employees who are unable to work because of sickness receive a monthly payment for the days that the employee misses. The social bank also covers the pension of the pensioner, the widower's pension and orphans.

This insurance is obligatory for all those who are employed. It is also the duty of the employer to make sure that the employees are registered at SVB. Since July 2016 every employer must give the new employee a new form of SVB registration, giving

[43] Information services about Costs care and health insurance in Aruba, available at: https://www.overheid.aw/informatie- dienstverlening/kosten-zorg-en-zorgverzekering_3265/item/ziektekosten-op-aruba_815.html.
[44] Https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf.

the new employee the proper time and opportunity to complete it before starting work. The new employee is not allowed to work until the registration can be proven. If the employee does not comply with this obligation, SVB could fine the employer in an amount up to awg. 500.000 (+/- 250.000 euro's). The employee's right to compensation terminates when the employee is no longer in service. Aruban Law stipulates that the employee needs to be registered at SVB in order to have the right to the benefit of a health and accident insurance of SVB. If the employer has more than one employee, he or she will need to register each one (van Dijk, Nikkels-Agema, Winters, 2006).

4.5 SVB health insurance

SVB health insurance guarantees that the employee receives compensation for time missed from work due to sickness. This health insurance is not, however, available for all Aruban employees. Only employees that earn awg. 5.850 (+/- 2.925 euro's) or less per month are entitled to this health insurance. The insured employee has a right to compensation equal to 80 percent starting on the fourth day after the first day of sickness notification. SVB does not pay for the first three days. This right to compensation for the insured employee lasts for up to two years. After two years the employee no longer has the right to any further payment.

Female employees who are pregnant have the right to compensation before and after giving birth. During this maternity leave, the female employee has the right to compensation of 100 percent of the monthly salary. SVB compensates the maternity leave for up to 12 weeks. These 12 weeks can be divided between 4 to 6 weeks before giving birth and the rest of the 12 weeks after giving birth. SVB must be notified by the female employee three months before giving birth in order to receive this compensation. The employer must pay SVB a total of 2.65 percent of the employee's salary. It is against the law for the employer to take this amount out of the employee's salary.[45]

[45] SVB Health Insurance. Available at: www.svb.org.

4.6 SVB accident insurance

SVB accident insurance is an insurance of the Social Bank, which guarantees that an employee receives part of the monthly wage in case of not being able to work due to an accident that happened at work. If the employee passes away due to an accident at work, the Social Bank health insurance will manage all the rights of the spouse, children or another person who directly depended on the deceased for their living expenses. An accident at work can be considered an accident that happens during the working hours of the employee. The accident must be related to the execution of job duties, with the consequence that the employee becomes unable to work. This also applies in the case of an accident that happens when an employee is on the way to or from the workplace. The compensation for this situation starts from the second day that the employee notifies the employer of being unable to work and it compensates the employee with 100 percent of the salary for the first year. After the first year, the compensation is reduced to 80 percent of the worker's salary. In case the employee becomes permanently incapable to work, SVB will determine the level of incapacity of the employee, who will receive a certain percentage of his or her monthly salary after the second year. In order to receive this compensation, the employee must fill out an industrial accident form and deliver it to SVB within one year after the accident occurs. The premium of the accident insurance is between 0.25 percent and 2.5 percent of the employee's gross salary. This percentage varies based on the level of danger for the job. SVB will evaluate the level of danger and the percentage that must be paid by the employer.[46]

4.7 Compulsory insurance for medical professionals

In Aruba, it is not obligatory for medical professionals to have insurance. Medical professionals in Aruba provide medical services through the basic social health system of AZV. Medical professionals have a contract with AZV in order to work in Aruba. In the case of complaints about service or malpractices of these medical professionals, the patient must officially file their complaint with AZV. AZV will then deal with medical professionals internally. The patient will be covered by either getting paid by AZV or being sent abroad for further medical treatment to hopefully

[46] Https://www.overheid.aw/informatie-dienstverlening/ziekte-en-ongevallenverzekering_43175/.

resolve any condition caused by the negligent medical care that was provided in Aruba.[47]

5 Obligatory insurance in Poland

5.1 Introduction

Presently, insurance can be purchased to insure against almost every adverse occurrence imaginable. Common examples include insurance to protect against falling from a bicycle, damage stemming from an ice storm and damage to household appliances caused by adverse weather events (such as lightning), to name but a few. It is no different in Poland, where the insurance sector is very dynamic (Serwach, 2010; Kowalewski, 2004). It would not be hyperbole to say that in present-day Poland insurance can be purchased to insure nearly everything and everyone (Orlicki 2011). However, the purpose of this article is not to follow the growing tendency to insure people and objects, but to pay attention to those insurances which, after meeting certain conditions, various sectors of the Polish population are obliged to have. It must be mentioned at the outset that Poland, like Italy and the Kingdom of the Netherlands, is (unlike the United States) a unitary state and all obligatory insurance is valid in the entire territory of the Republic of Poland. The catalogue of compulsory insurance can be found in Art. 4 of the Act on Compulsory Insurance, Insurance Guarantee Fund and Polish Motor Insurers' Bureau:

> "Compulsory insurances:
>
> 1) civil liability insurance for motor vehicle owners for damages arising in connection with the movement of these vehicles, hereinafter referred to as "civil liability insurance of motor vehicle owners";
> 2) civil liability insurance of farmers in respect of owning a farm, hereinafter referred to as "farmers' civil liability insurance";
> 3) insurance of buildings belonging to the farm from fire and other fortuitous events, hereinafter referred to as "insurance of farm buildings";
> 4) insurance resulting from the provisions of separate acts or international agreements ratified by the Republic of Poland, imposing on specific entities an obligation to conclude an insurance contract.[48]"

[47] Http://www.azv.aw/en/about-azv/governance.
[48] Act of 22 May 2003 on Compulsory Insurance, Insurance Guarantee Fund and Polish Motor Insurers' Bureau, Journal of Laws No 473.

As we can see, the above catalogue is an open catalogue and the real number of compulsory insurance reaches even over one hundred (Kowalewski, 2013). Article 5 of the above- mentioned act is also very important, because it is binding for every type of obligatory insurance:

> Art. 5 [Conclusion of a compulsory insurance contract]
>
> 1. The insurer concludes a compulsory insurance contract with a selected insurance company that carries out insurance activities in the scope of this insurance.
> 2. An insurance undertaking authorized to carry out insurance activity in groups including compulsory insurance may not refuse to conclude a compulsory insurance contract if, as part of its insurance business, it concludes such insurance contracts.

5.2 Civil liability insurance of motor vehicle owners

5.2.1 Most important facts about civil liability insurance of motor vehicle owners in Poland.

The first compulsory insurance to be discussed is the civil liability insurance of motor vehicle owners. This is the starting point because this is the most common insurance for many people and it impacts the majority of Polish citizens, because this compulsory insurance should cover 28,678,674 vehicles (data from 2017).[49] The *ratio legis* of this insurance is universal practically all over the world, and it is designed to foster the goal of protecting the economic interests of both the perpetrator and the injured party. This section will focus on the most important issues regarding this insurance.

First of all, this insurance is, in principle, concluded for 12 months (in some cases it is possible to conclude this insurance for a period shorter than 12 months e.g. for owners of the historical cars). Motor vehicle insurance has the same scope regardless of the insurer (Krajewski, 2011). At present, guarantee sums amount to EUR 5 210 000 and EUR 1 050 000, respectively, in the case of damage to persons and property. The above amounts are guaranteed by law and no insurer who has them in its offer may reduce the value of individual benefits. Interestingly, insurance prices (even though this insurance always has the same minimal scope) very often differ drastically, often by several dozen percent.

[49] http://www.sejm.gov.pl/Sejm8.nsf/interpelacja.xsp?documentId=53DF1C3928200208C125812B004ABB4E.

Importantly, the insurance is renewed automatically, if for some reason the original agreement is not terminated in advance. In other words, the existing agreement is simply extended *ex lege* (Żółtko, 2018). In addition to this, it is also important to note that in the event of the transfer of ownership of a motor vehicle, whose holder has entered into an insurance contract for motor vehicle owners (civil liability insurance of motor vehicle), the holder of the vehicle onto which ownership was transferred, acquires the rights and obligations of the previous holder under this contract. As we can see, the transfer of ownership of a vehicle does not affect the validity of the contract. It is also important to note, especially for people traveling by car abroad, that Polish insurance is also valid in some foreign countries by virtue of the Multilateral Agreement, included in the Green Card system.[50]

5.2.2 Insurance Guarantee Fund and Polish Motor Insurers' Bureau

In the case of civil liability insurance of motor vehicle owners, it is worth mentioning two important authorities:

a) The Insurance Guarantee Fund (UFG) deals with the payment of compensation and benefits to parties injured in road accidents and collisions, caused by uninsured vehicle owners and uninsured farmers. UFG also pays compensations to people injured in road accidents when the perpetrator of the damage has not been determined. UFG also controls the fulfilment of the insurance obligation and punishes the uninsured who did not fulfil this obligation. Their mission is to ensure the integrity of the mandatory civil liability insurance system and to limit the number of uninsured vehicle owners traveling on Polish roads.

b) Polish Motor Insurers' Bureau (PBUK) is the organization of insurance companies, which offers civil liability insurance of motor vehicle owners in the territory of Poland for damages arising in connection with the movement of these vehicles. As part of its operations, PBUK deals with the organization of liquidation or direct liquidation of damages caused in Poland by owners of motor vehicles registered abroad. PBUK also deals with issuing insurance documents valid in other countries of the Green Card System, including border insurance valid in the EEA countries.

[50]https://www.pbuk.pl/system-zielonej-karty/o-systemie.

5.3 Health insurance

In Poland, health insurance is in principle obligatory and it covers the majority of citizens, including employees, farmers, people running a business and students. The basis for obtaining health care services is the premium paid to the National Health Fund (NFZ) in an appropriate amount and so, for example, the employer pays premiums for their employees and the self-employed persons must do so on their own. Being covered by compulsory health insurance entitles the insured to such services as, for example:

- primary health care;
- out-patient specialized health care;
- inpatient care;
- psychiatric care and addiction treatment;
- medical rehabilitation;
- nursing and care-related services as part of long-term care;
- dental treatment;
- health resort care;
- supply, at the request of an authorized person, and repair of medical devices referred to in Act on Reimbursement;
- emergency medical services.[51]

The number of people who are not covered by health insurance is 2.5 million on the basis of data from several years ago, which is a high number given that more than 38 million people reside in Poland, and further in light of the fact that health insurance is, in principle, compulsory. In fact, the Polish Constitution in Article 68 states that:

- Everyone shall have the right to have his or her health protected.
- Equal access to health care services, financed from public funds, shall be ensured by public authorities to citizens, irrespective of their material situation. The conditions for, and scope of, the provision of services shall be established by a statute.

[51] Act of 27 August 2004 on Publicly Financed Health Care Services, Journal of Laws No. 752.

– Public authorities shall ensure special health care to children, pregnant women, handicapped people and persons of advanced age.[52]

However, if a Polish citizen does not belong to a group covered by compulsory health insurance,[53] he or she can voluntarily insure on the basis of an application submitted to the National Health Fund.

5.4 Obligatory insurance for legal professionals

This section will describe the compulsory insurance for legal professionals. This is one of the insurances hidden in Art. 4 section 4 of the above-mentioned Act on Compulsory Insurance, Insurance Guarantee Fund and Polish Motor Insurers' Bureau: 4) insurance resulting from the provisions of separate acts or international agreements ratified by the Republic of Poland, imposing on specific entities an obligation to conclude an insurance contract. In Poland, this kind of insurance includes not only advocates and attorneys-at-law (in Poland these two professions, although very similar to each other, are still separate), but also tax advisors and bailiffs. However, in this section, we shall focus solely on the profession of advocate.

According to Art. 4 section 1 of the Act on the Advocates the profession of advocate consists in providing legal assistance, in particular in providing legal advice, drawing up legal opinions, preparing legal acts and appearing before courts and offices. The advocate is responsible for damages caused in connection with the activities referred to above. The minimum warranty period is specified in the regulation of the Minister of Justice and currently is 50,000 euros,[54] but there is no obstacle to the advocate voluntarily increasing the minimum sum of his or her insurance (Nowakowski, 2006). In the case of this insurance, it is worth noting that failure to contract insurance may result in a warning, a financial penalty or even expulsion from the bar. The *ratio legis* of the establishment of such insurance is, among others, increasing the credibility of the insured for his or her clients, providing a sense of security through

[52] The Constitution of the Republic of Poland of 2nd April, 1997. Journal of Laws No. 78 item 483.
[53] There are three primary reasons accounting for the majority of Polish citizens that are not covered by health insurance: (1) they are working illegally; (2) they are working on the basis of a contract to perform specified tasks and (3) they are unemployed and they are not registered in the Employment Office. In all three instances these persons do not have any other legal basis to qualify for insurance.
[54] Regulation of 11 December 2003 of the Minister of Finance on compulsory civil liability insurance for advocates, Journal of Laws No. 217, item 2134.

the possibility of paying the injured person due compensation and minimizing the risk associated with the professional activity.

5.5 Obligatory insurance for medical professions

The last obligatory insurance we would like to describe is compulsory insurance for medical professions. This insurance applies to: physiotherapists, nurses and doctors performing an activity in the form of individual medical practice. As mentioned earlier, compulsory insurance covers the above-mentioned professions, if they perform medical activities as an individual medical practice. People employed in hospitals are also covered, because their insurance is paid by the employer. The insurance covers damage resulting from the provision of health services or unlawful failure to provide health services. The amount of the guarantee sum varies from 30.000 euro to as much as 500.000 euro.[55]

In addition to compulsory insurance, there is also the possibility of voluntary insurance, which covers the majority of events that will not be included in compulsory insurance. Among them, we can find damages that may occur as a result of ad hoc assistance on the street or even when providing medical services outside of Poland, for example during a holiday trip. Among the additional insurance addressed to doctors we can also find HIV insurance; this insurance includes the reimbursement of medical expenses incurred as a result of contact with an infected person.

6 Conclusion

Insurance is a concept that has been around for centuries. As the world population has increased, and especially with the dawn of the Industrial Revolution, insurance has become increasingly popular so that, at present, insurance is available to protect nearly everyone from nearly every possible risk imaginable. A much more recent development, however, is the concept of mandatory or obligatory insurance. Whereas the purchase of insurance typically has been voluntary, and designed largely to protect the insured, increasingly some legislatures have required certain classes of persons or businesses to purchase insurance coverage as a condition precedent to

[55] Regulation of 22 December 2011 of the Minister of Finance on compulsory civil liability insurance for entities leading medical activities, Journal of Laws No. 293, item 1729.

engaging in certain defined activities. The authors have tried to discern any patterns, from country to country, regarding the situations in which legislators have seen fit to mandate insurance coverage.

The countries studied all have obligatory insurance designed to offer some degree of protection to workers injured on the job, and in the course and scope of their work, and to those involved in vehicular collisions. Given the sheer volume of injury-causing incidents incurred both by workers and by those operating or passengers in vehicles, these laws make eminent sense. Many drivers causing accidents will lack the financial resources to pay the injured person(s) for damages incurred in the accident. From a public policy standpoint this is a very undesirable situation and so legislating obligatory insurance is a form of social engineering. They help insure against the risk that the injured person will go uncompensated by providing a fund (i.e., insurance) that will be available to help make the injured person whole.

The other primary takeaway from our research is that, predictably, there is less obligatory insurance in the United States than in the other countries studied. We use the term "predictably" because, while the United States and Europe share much in common (democratic states, open markets, free elections etc.) there are still significant differences. On the one hand, European countries (in this study Poland and Italy) and Aruba (which is greatly influenced by the Netherlands) mainly adhere to strong socialist tendencies, which usually are enshrined in their state constitutions and EU laws and regulations. These socialist policies are seen most clearly in laws that provide free education, free and universal health care, strong family benefits, for example, generous time off and pay for those giving birth to children, etc. Citizens of these European countries see these benefits as being part of their contract with the state, and as rights. Obligatory insurance laws tend to advance these norms, by helping to insure that aggrieved persons have insurance available to pay for, or at least partially pay for, the injuries/damages they incur. Without such insurance, there will be many injured persons that are left uncompensated due to the wrongdoers being uninsured.

The United States, on the other hand, historically has had a much less socialistic approach. From its beginnings, the United States has set a course, framed in the Constitution, that limits governmental actions. Based on its colonial experience with

the British Crown, Americans have always distrusted government. Americans believe power and decision-making should largely reside with the people. As former President Ronald Reagan[56] once professed, when talking about a crisis he presided over, government is often the problem, not the solution. Many Americans hold fast to this mindset, and believe that it is incumbent on each individual, not the state or federal government, to care for themselves. Many Americans believe, for example, that health care is not a "right" bestowed by the government, but a matter each person needs to deal with on his or her own terms. This is clear from the debate over the Affordable Care Act. Also, along these same lines, many Americans despise governmental regulations of any kind, and so it follows they do not want the government telling them they need to purchase insurance in order to, for example, be a lawyer, a doctor, a farmer, etc. Accordingly, we have seen in our research that only a couple of American states require lawyers to carry malpractice insurance and less than half the states require physicians to either carry insurance or take steps to avail themselves of tort reform measures that inure to their benefit. In addition to a distaste for regulations generally, those opposed to obligatory insurance also point to the added cost and administrative burdens associated with having to purchase insurance in order to carry out business.

The purpose of this article was not to critique legislation requiring obligatory insurance, and it is obvious there are advantages and disadvantages to the government mandating that certain persons or businesses be insured. As with most legislation, there are winners and losers. Time will tell whether the trends we have seen in America and Europe regarding obligatory insurance will continue on the present path.

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[56] President Reagan also famously said, "Socialism only works in two places: Heaven where they don't need it and hell where they already have it." Reagan is still a disciple of the Republican Party and conservatives. He was beloved by many non-Republicans as well; it should be pointed out.

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THE CURRENT STATUS OF THE PRECLUSIVE EFFECTS OF JUDGMENTS IN THE FEDERAL COURT SYSTEM OF THE UNITED STATES OF AMERICA

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Res judicata law in the United States of America has a long, extensive and complex history. The aim of this paper is to provide at least a working summary of some of the most important aspects of the current res judicata law in the federal court system of the United States. The flexible discovery, pleading and joinder rules have given rise to more expansive res judicata law. The paper will discuss what exactly constitutes a judgment; how the federal courts deal with finality of judgments in multiple party and multiple claim cases; the final judgment rule; the form of judgments; the methods to enter judgments and significance of entry of judgments; together with a detailed overview of the doctrine of res judicata itself, including the separate, but related twin doctrines of claim preclusion and issue preclusion.

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1 Introduction

The aim of this article is to explore the status of the effects of a prior judgment in the federal court system of the United States of America (hereinafter: United States). Most judges and lawyers usually simply refer to this area of law as res judicata, although as will be discussed later in this paper, that is an oversimplification. This topic is broad enough as it is, and it would be completely unwieldly to try to further discuss each state's res judicata law, although to be sure there are many similarities between federal and state law on this topic.[1] As we shall see, the core aspects of federal res judicata law are fairly well-settled, with much having been written on the topic over the years, both by the courts and by commentators. Indeed, the subject matter was given scholarly consideration in the Restatement (First) of Judgments published in 1942[2] and as subsequently refined in the Restatement (Second) of Judgments published forty years later in 1982.[3] Further, the U.S. Supreme Court has issued a significant number of cases in which it not only has fully endorsed but also expanded the doctrine[4] to such an extent that some authors argue that the United States has the most expansive res judicata law in the world (Clermont, 2016: 68). *Wright, Miller* and *Cooper* also have published a widely-cited and definitive treatise on res judicata and related issues (Wright and Miller and Cooper, 1981).[5] Other scholarly articles and books abound.

[1] Federalism in the United States, as articulated in the United States Constitution, divides power between the federal government and the United States state governments. Article Three of the Constitution established the judicial branch of the federal government. The judicial branch consists of the Supreme Court as well as lower federal courts created by the Congress. The Constitution created only the Supreme Court, and left establishment of inferior courts to Congress. The first of such so-called "inferior" federal courts were established with the Judiciary Act of 1789 (ch. 20, 1 Stat. 73). Article IV of the federal Constitution presupposed the continued existence and operation of state courts. It requires that "full faith and credit [. . .] be given in each State to the [. . .] judicial Proceedings of every other State," thus regulating horizontal judicial federalism, and Article VI mandates that "the Judges in every State shall be bound" to recognize the supremacy of federal law, thus regulating vertical judicial federalism. See, U.S Constitution, Art. IV, sec. 1, and Art. VI, sec. 2.

[2] The American Law Institute's Restatement (First) of Judgments (1942) (hereinafter "Restatement First") was the seminal effort in the United States to fully and comprehensively analyze and consolidate the American law relating to res judicata and established the doctrines of bar, merger, and collateral estoppel. See Restatement First, §§ 47-48, 68.

[3] The Restatement (Second) of Judgments (1982) (hereinafter "Restatement Second") further discussed and refined res judicata jurisprudence and has heavily influenced both the federal and state courts as this area of the law has evolved and crystallized through the years. Courts and commentators alike frequently reference the Restatement as providing guidance.

[4] See e.g., Allen v. McCurry, 101 S. Ct. 411, 449 U.S. 90, 104-05, 66 L. Ed. 2d 308 (1980) (extending criminal to civil preclusion); Parklane Hosiery Co. v. Shore, 99 S. Ct. 645, 439 U.S. 322, 331-33, 58 L. Ed. 2d 552 (1979) (approving the use of offensive nonmutual collateral estoppel).

[5] Given the sheer breadth of this subject matter, and how concise, well-written, respected and oft-cited this treatise is, especially by the courts, a good deal of the current paper is drawn from this treatise. Indeed, the reader that seeks more information on this subject is urged to consult this treatise along with the Restatement Second, from which this paper also draws heavily.

As defined, refined and clarified throughout the years, American judges and lawyers have a firm grasp on the core aspects of the doctrine of res judicata. And, it is fair to say, given the relatively straightforward rules, bench and bar, at least in most of the usual fact patterns, are able to determine with reasonable certainty when a prior judgment should be given res judicata effect, although it also must be said that even today, and despite the extensive body of law and scholarly commentary, sometimes applying the rules in practice is not always easy. Furthermore, there are certain areas of the law where the doctrine continues to evolve.

The paper will first deal with the issue of exactly what constitutes a final judgment, which is a necessary but not sufficient requirement for the doctrine of res judicata to apply. It will then consider how federal courts deal with the issue of allowing entry of judgment, and thus appeals to be immediately taken, in multi-party and multi-claim litigation. It then will discuss the procedural issues dealing with both the form and entry of judgments. Res judicata includes two related and yet distinct concepts: claim preclusion and issue preclusion. The paper will discuss these twin concepts in turn, together with their necessary elements (Degnan, 1976: 741).[6]

2 What constitutes a judgement

The doctrine of res judicata concerns itself with the preclusive effects of a judgment. To have res judicata effects, there first must be a judgment and that judgment must be final.[7] Before turning to an in-depth discussion of res judicata law, we first need to address the age old questions of what exactly constitutes a judgment and when does it become final.[8] It is critical for litigants to understand with complete certainty not only what a judgment does and does not encompass but also what constitutes the actual entry of judgment, since the date of entry of final judgment triggers the time for making post-trial motions, appeals and executing upon judgments. These

[6] Res judicata legal theory is further complicated by virtue of the fact America has two systems of courts, state and federal. Due to space constraints, this paper will deal only with matters that could arise within the federal courts system. There is an entire body of law that deals with the resolution of issues concerning how preclusion laws apply when both systems are implicated.

[7] Restatement Second (see, n. 3, § 13).

[8] "There are no hard and fast rules for determining what is a judgment; past cases have set certain boundaries and announced generalizations, but essentially every case must be determined on its own facts." Associated Press v. Taft-Ingalls Corp., 323 F. 2d 114, 115 (C.A.6 1963); Cedar Creek Oil & Gas Co. v. Fidelity Gas Co., 238 F. 2d 298 (C.A.9 1956).

matters are governed by the Federal Rules of Civil Procedure (hereinafter "Civil Rules" or "Rule").[9]

First of all, regarding terminology, Rule 54(a) of the Civil Rules, in defining the word "judgment" states as follows: "'Judgment' as used in these rules includes a decree and any order from which an appeal lies." Before 1938, when the Civil Rules were adopted, and merged law and equity, a federal court sitting in equity rendered what was known as a "decree" while an action at law resulted in the entry of a "judgment." Since there is now only one form of action in the federal courts, there is no reason "in preserving any technical distinction between a 'decree' and a 'judgment'" (Wright and Miller and Kane, 1986: § 2651).[10] In other words, Rule 54(a) provides that a judgment at law and a decree in equity are to be treated the same. It is important to note, however, that various procedures or steps in a case occur that culminate in a judgment, as defined in the rule. These earlier steps in the litigation, called the adjudicative phase, result either in a verdict by the jury or a decision by the court. In other words, the terms "decision" and "judgment" are not synonymous.[11] For instance, in a trial heard by the judge, the decision consists of the court's findings of fact and conclusions of law, which are required under Rule 52.[12] In a case tried to a

[9] The Federal Rules of Civil Procedure govern court procedure for civil cases (rather than criminal cases, which are governed by the Federal Rules of Criminal Procedure) in United States Federal District Courts. Prior to 1938, federal courts had separate rules for civil cases in suits in equity and suits at law. The principal distinctions between law and equity are the panoply of remedies each offers together with the method by which the two are adjudicated. The most common civil remedy a court of law can award is monetary damages. Courts in equity, on the other hand, can enter injunctions or decrees directing someone either to act or to forbear from acting. The other principal difference is the unavailability of a jury in equity; in such cases the judge is the sole trier of fact. In 1938, the Supreme Court issued the current modern rules of civil procedure, abolishing separate rules for equity. The rules have continued to be amended over time.

[10] See also, U.S. v. City of Providence, 492 F. Supp. 602, 604 n. 1 (D.C.R.I. 1980) (An amended consent decree more properly should be called a judgment).

[11] "[T]he decision of the Court and the judgment to be entered thereon are not the same things under the Federal Rules of Civil Procedure. The decision is part of the procedure of the trial." Winkelman v. General Motors Corp., 48 F. Supp. 490, 494 (D.C.N.Y. 1942).

[12] A sample Findings of Fact and Conclusions of Law (hereinafter "FFCL") can be found on http://blog.pf.um.si/2020/12/05/judgements-in-the-united-states (accessed: 5. 12. 2020), referenced therein as Attachment A. Typically, each party will prepare their own proposed FFCL before trial begins so the trial judge can review them before and during trial. Each party's proposed FFCL reflect what that party expects the facts to show; what they contend the applicable law is; and, what they contend the conclusions of law that necessary follow from the facts proven are. When the judge announces his or her decision, the prevailing party then usually revises the proposed FFCL and sends them to the losing party for review. If the parties agree on the final proposed FFCL they are then submitted to the judge for review and signature. If, as is the more usual situation, the parties have some areas of disagreement in the FFCL, then a hearing is held to resolve those differences. Once resolved, any final changes are made and the judge then signs them. The content of the FFCL are critical for appellate and for res judicata purposes as they encapsulate the issues that were involved in the case; the exact facts the court found as true; and, the conclusions of law that flow from the facts as applied to the applicable law.

jury, the decision phase consists of the jury's verdict.[13] Critically, however, "the rendition of judgment is the pronouncement of [those] decision[s] and the act that gives [them] legal effect." (Wright and Miller and Kane, 1986: § 2651).[14]

A final judgment is a decision that ends the litigation on the merits and leaves nothing for the court to do but to execute the judgment. A judgment is final when it disposes of all claims, involving all parties to the action. Anything less is not a final judgment. The purpose of the final judgment rule is both to promote efficiency and prevent piecemeal appeals. In the United States, preclusive effect will not be given to rulings or decisions which are only tentative or contingent.[15] This rule also reflects the deference given to the trial court judges in overseeing trial court litigation. Whether a trial court's decision is final for purposes of appeal, even where no damages are fixed, is typically an *ad hoc* determination. Whether an order constitutes a final judgment depends on whether the judge has or has not clearly declared his intention in this respect. A final judgment for money must, at the least, determine, or specify the means of determining the amount. There is no finality where one must search the whole record to determine the amount or the facts necessary to compute the amount. A judgment is the final determination of an action and thus has the effect of terminating the litigation.[16]

3 Judgment upon multiple claims or involving multiple parties

3.1 Introduction and Text of Rule

Since their adoption in 1938, the Civil Rules have allowed for the liberal joinder of parties and claims, meaning that since that time many actions involve both multiple parties and a plethora of claims between those parties.[17] Rule 54(b) governs entry of judgments in situations where litigation involves multiple claims and/or multiple

[13] Rule 49 sets forth the rules regarding special verdicts; general verdicts; and, general verdict with answers to written questions. A sample Special Verdict form can be found on http://blog.pf.um.si/2020/12/05/judgments-in-the-united-states/ (accessed: 5. 12. 2020), referenced hereinafter as Attachment B. A sample Special Interrogatory Verdict form is also accessible on said source and referenced hereinafter as Attachment C.

[14] See also, Bowles v. Rice, 152 F. 2d 543, 544 (C.A.6 1946) ("Findings of fact and conclusions of law, necessary as they are, are but supplemental to an adjudication").

[15] See, Restatement Second (see, n. 3 at § 13 cmt. b § 14 cmt. a).

[16] Catlin v. U.S., 65 S.Ct. 631, 324 U.S. 229, 89 L. Ed. 911 (1945).

[17] See, Rule 13 (counterclaims and crossclaims); Rule 14 (Third-Party Practice); Rule 18 (Joinder of Claims); Rule 19 (Required Joinder of Parties); Rule 20 (Permissive Joinder of Parties); Rule 23 (Class Actions); Rule 24 (Intervention).

parties. The purpose of the rule is to permit the entry of judgments upon one or more but fewer than all the parties in an action involving more than one claim or party. Currently, the rule reads as follows. "When an action presents more than one claim for relief – whether as a claim, counterclaim, crossclaim, or third-party claim – or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."

As succinctly explained by *Wright* and *Miller*, "[The rule] was adopted because of the potential scope and complexity of civil actions under the federal rules, given their extensive provisions for the liberal joinder of claims and parties. The basic purpose of Rule 54(b) is to avoid the possible injustice of a delay in entering judgment on a distinctly separate claim or as to fewer than all of the parties until the final adjudication of the entire case by making an immediate appeal available" (Wright and Miller and Kane, 1986: § 2654). As the Supreme Court stated in *Dickinson v. Petroleum Conversion Corp.*, the liberalization of both pleadings, joinder of parties and claims permitted in one litigated case under the Civil Rules greatly increased the danger of hardship and denial of justice through delay if each issue had to await the determination of all issues as to all parties before a final judgment could enter.[18] Accordingly, Rule 54(b) attempts to strike a balance between the undesirability of permitting more than one appeal[19] in a single action while at the same time allowing for interlocutory review in multiple-party or multiple claim situations under narrowly defined circumstances.[20]

Appellate courts have cautioned the District Courts that they should use great care and restraint when issuing Rule 54(b) "certifications" that judgment should enter and there is no just reason for delay.[21] While the Rule is permissive in nature, the

[18] Dickinson v. Petroleum Conversion Corp., 70 S. Ct. 322, 324, 338 U.S. 507, 511, 94 L. Ed 299 (1950).
[19] Known as interlocutory appeals. Interlocutory appeals are generally frowned upon, as appellate courts greatly prefer, for sake of efficiency, to hear all appellate issues arising from a case at one time, not in piecemeal fashion.
[20] Various courts have explained this rationale. See e.g., Aetna Ins. Co. v. Newton, 398 F. 2d 729 (C.A.3 1968).
[21] See e.g., Larson v. Port of New York Authority (D.C.N.Y. 1955), 17 F.R.D. 298.

Supreme Court in *Curtiss-Wright Corporation v. General Electric Company*[22] held that in light of the fact the trial judge is in a superior position to assess when to grant Rule 54(b) certifications, the discretionary determination of the District Court should be given "substantial deference" and the reviewing court should disturb the trial court's assessment of the equities only if it can say that the judge's conclusion was "clearly unreasonable." Rule 54(b) applies to all cases governed by the Civil Rules, even admiralty, condemnation, and habeas corpus proceedings (Wright and Miller and Kane, 1986: § 2656). Additionally, a final judgment may be entered both on jury verdicts[23] as well as other decisions by the District Court judge, such as summary judgment orders.[24]

3.2 Multiple Claims for Relief or Multiple Parties Element

Three conditions must be met in order for Rule 54(b) to be invoked. As an initial matter, the case must involve either multiple claims for relief or multiple parties. While the issue of whether a case involves multiple parties is obvious, in practice it sometimes has proven more challenging to resolve the question of whether a case presents multiple claims. If claims presented in a case factually are separate and independent, then obviously multiple claims are present (Wright and Miller and Kane, 1986: § 2657).[25] However, in practice it often has proven difficult to tell whether a case involves multiple claims, so that Rule 54(b) applies, or only a single claim supported by multiple grounds, so that the rule does not apply (Wright and Miller and Kane, 1986: § 2657).[26] In 1956, the Supreme Court entertained two cases in which it had to consider the question of what constitutes multiple claims under Rule 54(b).[27] In *Sears, Roebuck & Company v. Mackey*, the complaint contained four counts. The first count sought damages under federal antitrust statutes arising out of alleged injury to three of his commercial ventures. The remaining three counts, on the other hand, sought recovery on common law grounds for the injury sustained by each of the ventures. The District Court judge dismissed the first two counts and certified them under Rule 54(b). The Supreme Court observed that the second count

[22] Curtiss-Wright Corporation v. General Electric Company, 100 S. Ct. 1460, 446 U.S. 1, 64 L. Ed. 2d 1 (1980).
[23] See e.g., Thompson v. Trent Maritime Co., 343 F. 2d 200 (C.A.3 1965).
[24] See e.g., Bushie v. Stenocord Corp., 460 F.2d 116, 118 n. 2 (C.A.9 1972).
[25] See e.g., Dunlop v. Ledet's Foodliner of Larose, Inc., 509 F. 2d 1387, 1388 (C.A.5 1975).
[26] See e.g., Tolson v. U.S., 732 F. 2d 998, 1001 n. 8 (U.S.App.D.C. C.A. 1984).
[27] The two cases are: Sears, Roebuck & Company v. Mackey, 76 S. Ct. 895, 351 U.S. 427, 100 L. Ed. 1297 (1956); Cold Metal Process Company v. United Engineering & Foundry Company, 76 S. Ct. 904, 351 U.S. 445, 100 L. Ed. 1311 (1956).

clearly was independent of counts three and four since it involved a separate business. However, the first count, although it rested on a different legal basis, involved some of the same facts as did the two counts that were not certified. The Court held that "there is no doubt that each of the claims dismissed is a 'claim for relief' within the meaning of Rule 54(b), so that their dismissal constitutes a 'final decision' on individual claims."[28] In *Cold Metal Process Company v. United Engineering & Foundry Company*, the Court held appealable a certified judgment on plaintiff's claim despite the fact a counterclaim, arising in part out of the same transaction as plaintiff's claim, remained to be tried.

According to *Wright*, *Miller* and *Kane*, although these two Supreme Court decisions failed to provide any significant guidance to answer the question what constitutes "multiple claims" under Rule 54(b), by for example not enunciating a clear test or standard, still, when read together, the Supreme Court at a minimum "repudiate[d] the notion that a separate claim for purposes of Rule 54(b) is one that must be entirely distinct from all the other claims in the action and arise from a different occurrence or transaction" (Wright and Miller and Kane, 1986: § 2657). On the other hand, numerous cases have held that every variation in legal theory does not necessarily constitute a separate "claim."[29] In the case of *Rieser v. Baltimore & Ohio R.R. Company*[30], the Second Circuit Court of Appeals set forth the following test: "The ultimate determination of multiplicity of claims must rest in every case on whether the underlying factual bases for recovery state a number of different claims which could have been separately enforced." According to *Wright, Miller* and *Kane*, this test, while in no way precise, is at least workable and is consistent with the Supreme Court's twin decisions in the *Sears* and *Cold Metal* cases (Wright and Miller and Kane, 1986: § 2657).

3.3 At Least One Claim or the Rights and Liabilities of at Least One Party Finally Decided Element

Having discussed the first prerequisite for invoking Rule 54(b), we now turn to the second, which is that at least one claim or the rights and liabilities of at least one party must be finally decided. This does not necessarily mean that the rights and

[28] Mackey, 78 S. Ct. at 900, 351 U.S. at 436 (per Burton, J).
[29] See e.g., Rabekoff v. Lazere & Co., 323 F. 2d 865 (C.A.2 1963).
[30] 224 F. 2d 198, 199 (C.A.2 1955), certiorari denied 76 S.Ct. 651, 350 U.S. 1006, 100 L. Ed. 868 (per Clark, C.J).

liabilities of a party or the claim must be decided on the merits. Accordingly, for example, the Seventh Circuit held in *Blair v. Cleveland Twist Drill Company*[31] that an order dismissing a cross-claim without prejudice under Rule 41 and relegating it to a separate action fell within the ambit of Rule 54(b). Furthermore, dismissals based on lack of subject matter or personal jurisdiction[32] may dispose of a claim completely, bringing them within the scope of the rule (Wright and Miller and Kane, 1986: § 2656). Basically, as the Supreme Court held in *Catlin v. U.S.*,[33] the standard for whether a decision is final is whether it is one which ends the litigation on the merits and leaves nothing for the court to do except to execute the judgment. In the summary judgment context, this means that a partial summary judgment that decides only some of the issues pertinent to a single claim is not final, but instead interlocutory, and therefore does not come within the scope of the rule[34] while conversely a decision granting summary judgment that completely disposes of one of several claims is final and can be appealed if the District Court judge issues the necessary certificate under Rule 54(b).[35]

3.4 No Just Reason for Delay Element

Finally, regarding the third prerequisite for the issuance of a certificate under Rule 54(b), the court must expressly determine that there is no just reason for delaying the appeal. The Supreme Court has explained that the District Court "is permitted to determine, in the first instance, the appropriate time when each 'final decision' upon 'one or more but less than all' of the claims in a multiple claims action is ready for appeal."[36] While the District Court judge has considerable discretion in deciding whether to issue a Rule 54(b) certificate, given that judge's familiarity with the intricacies of the case in the first instance,[37] a reviewing court may still nevertheless reverse the decision under an abuse of discretion standard.[38] At play in making the "no just reason for delay" determination are two competing interests. On the one hand, there is a strong federal policy against interlocutory appeals, that is, piecemeal reviews (Wright and Miller and Kane, 1986: § 3907). On the other hand, often there

[31] Blair v. Cleveland Twist Drill Co., 197 F. 2d 842, 845 (C.A.7 1952).
[32] See e.g., Tobin Packing Co. v. North Am. Car Corp., 188 F. 2d 158 (C.A.2 1951).
[33] Catlin v. U.S., 65 S.Ct. 631, 633, 324 U.S. 229, 233, 89 L. Ed. 911 (1945).
[34] See e.g., Wynn v. RFC, 212 F. 2d 953 (C.A.9 1954).
[35] See e.g., Bushie v. Stenocord Corp., 460 F. 2d 116, 118 n. 2 (C.A.9 1972).
[36] Sears, Roebuck & Co. v. Mackey, 76 S. Ct. 895, 899, 351 U.S. 427, 435, 100 L. Ed. 1297 (per Burton, J.).
[37] 76 S. Ct. 895, 900-901, 351 U.S. 427, 437, 100 L. Ed. 1297 (1956).
[38] See also, Curtiss-Wright Corp. v. General Elec. Co., 100 S. Ct. 1460, 446 U.S. 1, 64 L. Ed. 2d 1 (1980).

are compelling reasons that the parties should not have to suffer the hardships and injustices through delay that would be alleviated by immediate appeal.[39] There is no precise standard or test that has been enunciated to guide the District Court judges in making this sometimes admittedly difficult determination.[40] Accordingly, in determining whether there is any just reason for delay in certifying a decision as ready for immediate appeal, District Court judges are free to consider any factor or reason that is pertinent given the exigencies of the particular case. That said, there is a substantial body of federal case law that has developed that sheds light on what some of these factors are, and we turn to a discussion of those factors next.

One factor the court might consider is the independence between the adjudicated and unadjudicated matters.[41] This makes logical sense, of course, as requiring an appeals court to review the same facts following a Rule 54(b) certification that it will likely have to consider again if a subsequent appeal is brought after the District Court rules on the non-certified claims runs contrary to the policy against piecemeal appeals and efficiency of appellate court time. In a similar vein, District Court judges should exercise caution in issuing a Rule 54(b) certificate that would require the appellate court to determine questions that remain unadjudicated in the trial court in connection with other claims.[42] Another factor the courts have taken into consideration is whether future developments in a case might make the need for immediate appellate review moot. Questions regarding mootness have arisen especially with regard to claims involving impleader,[43] which entail questions concerning indemnification and contribution, and which accordingly might well be mooted where the defendant is exonerated from liability in the principal action.[44] Numerous courts have also held that in issuing a Rule 54(b) certification, the District Court judge must balance whether the benefits of permitting an immediate appeal on the adjudicated matter will outweigh the harmful or prejudicial effects of delaying resolution in the trial court of the unadjudicated issues. For instance, courts will examine whether allowing an immediate appeal on some issues will greatly simplify

[39] Campbell v. Westmoreland Farm, Inc., 403 F. 2d 939, 942 (C.A.2 1968).
[40] Curtiss-Wright Corporation v. General Electric Co., 100 S. Ct. at 1466, 466 U.S. at 10-11 ("because the number of possible situations is large, we are reluctant either to fix or sanction narrow guidelines for the District Courts to follow." Burger, C.J.).
[41] See e.g., Brink's Inc. v. City of New York, 528 F. Supp. 1084 (D.C.N.Y. 1981) (claim and counterclaim unrelated).
[42] See e.g., Zangardi v. Tobriner, 330 F. 2d 224, 225, 117 (U.S. App. D.C. 350 C.A. 1964) ("Since the two counts turn on the same question and ask what is for practical purposes the same relief, disposing of one count and leaving the other for future disposition complicates the case and serves no useful purpose.").
[43] See e.g., Thompson v. Trent Maritime Co., 343 F. 2d 200 (C.A.3 1965).
[44] See e.g., U.S. Fire Ins. Co. v. Smith Barney, Harris Upham & Co., 724 F. 2d 650 (C.A.8 1983).

and facilitate further trial court proceedings after the interlocutory appeal is concluded.[45] Clearly, utilizing Rule 54(b) to certify matters for immediate appeal, the resolution of which will likely avoid the need for further proceedings in the District Court or which will greatly simplify further trial court proceedings makes great sense, as doing so promotes judicial efficiency.[46]

Finally, the District Court may consider other practical, beneficial effects of permitting an immediate appeal. For instance, in the *Curtiss-Wright v. General Electric*[47] case, delay in being able to execute on a judgment may well result in prejudice to the judgment creditor. Accordingly, in situations where the District Court judge holds that a party is entitled to relief on one of multiple claims (for example on a summary judgment in favor of plaintiff under Rule 56), and the only unadjudicated claim is whether the plaintiff will be given additional relief on other claims, it may well be sensible and in the best interests of fairness and justice for the judge to certify the ruling under Rule 54(b) so that the plaintiff has the benefit of recovery that has been awarded, at least so long as doing so does not result in prejudice to the other party.[48]

Of course, the importance of Rule 54(b) in the context of res judicata jurisprudence is that it provides the means for the court to render a final judgment on part of a multiple-claim or multiple-party action, and consequently, once there has been a Rule 54(b) certification and a final judgment has been entered, the time for appeal then begins to run.[49] And most importantly as far as we are concerned in this paper, since res judicata principles are premised on the entry of final judgments, because a Rule 54(b) order is viewed as final, it has res judicata effect.[50, 51]

[45] See e.g., Santa Maria v. Owens-Illinois, Inc., 808 F. 2d 848 (C.A.1 1986).
[46] See e.g., Allen v. Colgate-Palmolive Co., 539 F. Supp. 57 (D.C.N.Y. 1981).
[47] 100 S. Ct. 1460, 446 U.S. 1 (1980).
[48] See, U.S. v. Kocher, 468 F. 2d 503 (C.A.2 1972), certiorari denied, 93 S. Ct. 1897, 411 U.S. 931, 36 L. Ed. 2d 390.
[49] See e.g., Burkhart v. U.S., 210 F. 2d 602 (C.A.9 1954).
[50] Republic of China v. American Express Co., 190 F. 2d 334 (C.A.2 1951) (Absent a "determination" under Rule 54(b), the District Court's order was not final and could not have any res judicata effect).
[51] A sample order Granting Motion for Rule 54(b) Certification can be found on http://blog.pf.um.si/2020/12/05/judgments-in-the-united-states (accessed: 5. 12. 2020), referenced therein as Attachment D.

4 Form of judgments

Prior to 1963, there was no statute or rule that specified the essential elements or form of a final judgment.[52] Consequently, in many instances there was considerable confusion and uncertainties under federal practice regarding whether various court rulings, such as a court's opinion or memorandum decision, constituted a judgment. Essentially, the resolution of the question whether a court's decision in these various formats should be given the effect of a judgment turned on the subjective intention of the judge, which sometimes could be difficult to discern.[53] This uncertainty, of course, was problematic for parties and their counsel in determining when a decision or ruling constituted "a judgment" with its attendant legal consequences. To bring some clarity to this conundrum, Rule 58 was amended in 1963 and sets forth the rules concerning both the proper form of judgments and the procedures for entering judgments. Rule 58(a) provides that "Every judgment and amended judgment must be set out in a separate document." Known as the separate document rule, a final order of judgment must be self-contained and not refer, for purposes of completeness of explanation, to other proceedings or other documents.[54]

The Rule does not prescribe the exact form the judgment should take. However, "it is now clear that if this requirement [of a separate document] is not followed, the courts will not look behind the existing papers to try to determine the court's intention and no judgment will exist. The Rule 58 requirement also makes clear that oral statements, until embodied in a writing, are not final judgments" (Wright and Miller and Kane, 1986: § 2652).[55] The rule contemplates "a simple form of judgment […] eschewing the lengthy recitals familiar in state practice" (Wright and Miller and Kane, 1986: § 2652).[56] However, Rule 58(a) must be read in connection with Rule 54(a), which further defines the forms of judgments, and which provides in its second sentence, "A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings."

[52] U.S. v. F. & M. Schaefer Brewing Co., 78 S. Ct. 674, 678, 356 U.S. 227, 233, 2 L. Ed. 2d 721 (1958).
[53] See, Forstner Chain Corp., 177 F. 2d 572 (C.A.1 1949).
[54] In civil law countries, judgments contain what is known as an Operative Part, which sets forth the bases for the tribunal's judgment. In U.S. federal courts, in order to discern the actual grounds for a decision, the inquiring person or appellate court needs to look beyond the four corners of the judgment to the FFCL in a trial to the judge and to the jury verdict form in matters tried to a jury, and perhaps even to other pleadings in the case record, such as the formal pleadings authorized by Rule 7, and perhaps other matters part of the official court record.
[55] See also, Pure Oil Co. v. Boyne, 370 F. 2d 121 (C.A.5 1966).
[56] U.S. v. Wissahickon Tool Works, Inc., 200 F. 2d 936, 938 (C.A.2 1952).

Prior to December 1, 2015 Rule 84 set forth official forms of documents, and the rule went on to provide that a judgment drawn pursuant to the Official Forms was valid. However, on that date Rule 84 was abrogated.[57] Nevertheless, a review of the now abrogated forms does provide guidance. Following the court caption, the document typically will be identified as a "Judgment in a Civil Action." The body of the document then will state, in simple terms, that the plaintiff either recovers an identified amount of money from the defendant, including prejudgment interest at the prevailing rate, which is identified in the judgment, along with costs; or, that the plaintiff recovers nothing from the defendant. If the civil judgment is for something other than or in addition to monetary damages, that relief will be included. The form of judgment also states whether the matter was tried to a jury, to the court, or whether the matters was decided by motion, such as summary judgment. The judgment is then signed by the Clerk of the Court and dated.[58]

5 Procedure for entry of judgment

We have discussed the judgment itself. A distinction must be made between the written judgment itself and the "filing" or the "entry" of that judgment. Whereas, the judgment itself is the final determination of an action and thus has the effect of terminating the litigation, it is the "entry" of the judgment by the clerk of the court pursuant to Rule 58 that is crucial to the effectiveness of the judgment and for measuring the time periods for appeal and the filing of various post-trial motions. Rule 58(b) sets forth the rules regarding how judgments are entered, with distinctions made between judgments entered by the clerk of the court without directions from the court[59] and those judgments which are entered only after court approval.[60] Regarding the former, the clerk of the court, without awaiting further direction from the court, must "promptly prepare, sign, and enter the judgment" under three circumstances: (A) "the jury returns a general verdict[61];" (B) "the court

[57] When the Civil Rules were adopted in 1938, they included Official Forms. In 2015, the Supreme Court ordered Rule 84 abolished, and so the Official Forms were abrogated. This followed work conducted by the Civil Rules Advisory Committee which concluded, on various grounds, that the Official Forms had outlived their usefulness. A good discussion of the history and ultimate abolishment of the Official Forms may be found in a work by Spencer, 2015: 1113-1140.

[58] This sample form can be accessed on the United States Courts web page, at uscourts.com (accessed 5. 12. 2020). The form discussed in the text of this article is Form Number: AO 450, entitled "Civil Judgment Forms" which had been effective on November 1, 2011.

[59] Rule 58(b)(1)(A), (B) and (C).

[60] Rule 58(b)(2)(A)(B).

[61] A general verdict is a verdict in which the jury decides which party should win the case, but without listing its specific findings on any disputed issue. Such forms are rarely used.

awards only costs or a sum certain" or (C) "the court denies all relief." Situations where the court's approval of the form of judgment is required are governed by Rule 58(b)(2)(A)(B). This rule states in part: "the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when: (A) the jury returns a special verdict[62] or a general verdict with answers to written questions[63]; or (B) the court grants other relief not described in this subdivision (b)."

Rule 58(c), entitled "Time of Entry" states that "judgment is entered at the following times: (1) if a separate document is not required, when the judgment is entered in the civil docket under Rule 79(a); or (2) if a separate document is required, when the judgment is entered in the civil docket under Rule 79(a) and the earlier of these events occurs: (A) it is set out in a separate document; or (B) 150 days have run from the entry in the civil docket."

Crucially for our purposes, a judgment in the United States becomes final when the judgment is rendered and the judgment by the rendering court remains the final judgment unless it is overturned by a higher court.[64] Furthermore, the time for taking an appeal following rendition of the judgment does not impact the judgment's finality. Indeed, a judgment remains final even throughout the time the parties have to seek a review of the judgment by way of a motion in the rendering court or appeal, and beyond that, remains final during the time of review.[65]

6 Stays of enforcement of judgments

Regarding enforcement of a judgment, it should be noted however, that Rule 62 governs stays of proceedings to enforce judgments. Rule 62(a) provides that in most cases[66] execution on a judgment and proceedings to enforce it are *automatically stayed*

[62] A special verdict is a verdict in which the jury gives its findings on factual issues in the case, without necessarily stating which party should win. The judge decides what questions the jury should answer, and the judge can draw legal implications from the jury's answers. See, Attachment B (see, n. 12).
[63] A general verdict with interrogatories refers to a general verdict accompanied by answers to written interrogatories (that is, questions) on one or more issues of fact that bear on the verdict. An interrogatory is submitted by the judge to a jury when the court asks for a general verdict and wants to know the bases of the jury's decision. See, Attachment C (see, n.13). Rule 49 governs procedures connected to special verdicts; general verdicts and questions. Obviously, it will be an easier task to determine what issues were actually decided in prior litigation when one can examine findings of fact/conclusions of law and special verdict forms.
[64] Restatement Second (see, n. 3, § 13 cmt. f).
[65] Id., § 14 and cmt. a.
[66] There are exceptions to the general rule in the case of injunctions, receiverships and patent accounting orders, where there is no automatic stay. See, Rule 62(c)(d).

for 30 days after its entry, unless otherwise ordered by the court. Rule 62(b) governs stays by securing a bond or other forms of security. The rule provides: "At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or other security."

7 Res judicata

7.1 Introduction, Terminology and Basic Principles

Res Judicata jurisprudence has evolved from judge made, common law, following the usual common law system of precedent and *stare decisis,* and not from legislative mandate (Wright and Miller and Cooper, 1981: § 4466).[67] Federal courts have developed an extensive body of res judicata law, while the various state courts have done the same thing. In many instances, the state courts have adopted rules that either mirror or closely resemble their federal court counterparts, although in some cases there are significant differences.[68] As stated at the outset of this paper, our discussion will remain limited to a discussion of federal law.

The preclusive effect of a judgment is determined by two related and yet distinct concepts: "claim preclusion" and "issue preclusion". Collectively, these two concepts comprise the doctrine known as "res judicata." Before turning to a detailed discussion of these two concepts, it is worth briefly noting the policies behind res judicata. In its *Parklane*[69] decision, the Supreme Court observed that res judicata "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." In the *Allen*[70] case, the Court put it a slightly different way: "[R]es judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent

[67] It is asserted that Congress has the power to shape federal preclusion rules through legislative action, by for example, enacting "a code of res judicata principles for federal judgments as part of its control over the creation, jurisdiction, and procedure in federal courts" but has chosen not to do so, although a small number of federal statutes in fact speak to issues pertaining to res judicata.
[68] Id. at § 4401.
[69] Parkland Hosiery Co. v. Shore, 99 S. Ct. 645, 649, 439 U.S. 322, 326, 58 L. Ed. 2d 552 (1970).
[70] Allen v. McCurry, 101 S. Ct. 411, 415, 449 U.S. 90, 66 L. Ed. 2d 308 (1980). In Brown v. Felsen, 99 S. Ct. 2205, 2209, 442 U.S. 127, 60 L. Ed. 2d 767 (1979) the Court also added that the doctrine frees the court time to "resolve other disputes."

decisions, encourage reliance on adjudication." By promoting consolidation, res judicata shields litigants from undue harassment and protects against the substantial time and expense associated with needless and repetitive litigation (Vestal, 1967: 1723).[71] The reduction of duplicative proceedings similarly promotes the goals of convenience, efficiency and judicial economy; the same trial court presides over unified discovery, all relevant motions, and a single, unified trial.[72] It also has been said that res judicata preserves the integrity of the courts by helping to foster finality and minimizing the risk of conflicting judgments, which serve only to undermine public confidence in the judicial process.[73] Commentators have said the doctrine forces both plaintiffs and defendants to take the first trial seriously "and acquit themselves well if there is to be no second chance" (Wright and Miller and Cooper, 1981: § 4403). However, repose and finality are the core values that res judicata principles seek to promote.[74] The doctrine applies and the initial judgment controls and is binding even if it was wrong (Currie, 1967: 281, 315).[75] Accordingly, res judicata applies even in situations where there was error in the initial judgment[76] and even despite intervening decisions that change the law[77] including matters taking on constitutional dimensions.[78] Indeed, principles of res judicata operate with nearly total disregard for what the truth is. To the contrary, they are premised on the belief that litigation must end at some point in time; otherwise, the system would become overwhelmed; judgments would not be stable and final; and, constant relitigation would be used as a tool for harassment.

In its brief on Writ of Certiorari to the United State Court of Appeals for the Second Circuit, counsel on behalf of respondent Marcel Fashion Group summarized its argument very eloquently and that summary is worth repeating here. "[Res judicata] serves the public policy that there be an end of litigation, those who have contested

[71] See, Taylor v. Sturgell, 128 S. Ct. 2161, 553 U.S. 880, 892, 171 L. Ed. 2d 155 (2008) (the Court rejected the opportunity to expand nonparty preclusion rules to include a virtual representation exception, noting that to adopt such an exception would recognize, in effect, "a common-law kind of class action" that would fail to have the procedural protections prescribed for Rule 23 class actions in order to satisfy due process. See detailed discussion of this case in section 7.4.2 of this paper.
[72] See, Allen v. McCurry, 101 S. Ct. 411, 449 U.S. 90, 94, 66 L.Ed.2d 308(1980); See also, Conway, M. D. (1993): Narrowing the Scope of Rule 13 [a], University of Chicago Law Review, Vol. 60, pp. 141, 156.
[73] See, Nevada v. United States, 463 U.S. 110, 128-129 (1983).
[74] Id.
[75] Id., *Brainerd Currie* noted that "the first lesson one must learn on the subject of res judicata is that judicial findings must not be confused with absolute truth."
[76] See e.g., Mitchell v. National Broadcasting Co., 553 F. 2d 265, 272 (C.A.2 1977) ("Otherwise, judgments would have no finality and the core rationale of the rule of res judicata – repose – would cease to exist.").
[77] See e.g., U. S. v. Moser, 45 S. Ct. 66, 266 U.S. 236, 69 L. Ed. 2d 262 (1924).
[78] Douglas-Guardian Warehouse Corp. v. Posey, 486 F. 2d 739, 742-743 (C.A.10 1973).

a dispute be bound by the result of the contest, and matters that were or could have been resolved in the suit be considered forever settled as between the parties. A contrary view would undermine the finality of judgments and drain party and judicial resources by inviting successive lawsuits."[79] As the Supreme Court stated in *Solimino*,[80] "[A] losing litigant deserves no rematch after a defeat fairly suffered."

In cases where res judicata applies, the question arises as how the doctrine is asserted, by the parties or by the court. Generally, the answer is that since the U.S. follows an adversarial system, the party invoking the doctrine must either raise it as an affirmative defense or suffer probable waiver.[81] Trial courts have, rarely, raised res judicata of their own accord.[82]

7.2 Claim and Defense Preclusion

7.2.1 Basic Principles

Claim preclusion broadly bars the parties or their privies from relitigating issues that were or could have been raised in the initial action.[83] The doctrine encompasses the law of both merger and bar. If the judgment in the initial action was in the defendant's favor, then the plaintiff's claim is said to be "barred" by the judgment.[84] If the judgment in the initial action was in the plaintiff's favor, the plaintiff's claim is said to "merge" in the judgment.[85] In other words, the doctrine of "merger and bar" preclude the relitigation of all claims falling within the scope of the judgment, regardless of whether or not those claims were in fact litigated (Wright and Miller and Cooper, 1981: § 1417).[86] As one court stated, "Once a claim is reduced to judgment, the original claim is extinguished and merged into the judgment; and a

[79] Lucky Brand Dungarees, et al., v. Marcel Fashion Group, Inc., In the Supreme Court of the United States, No. 18-1086, Brief for Respondent, at p. 16.
[80] Astoria Federal Savings & Loan Association v. Solimino, 501 U.S. 104, 107 (1991).
[81] See, Rule 8(c). Rule 8 governs the general rules of pleadings and subpart c thereof governs pleading affirmative defenses. Rule 8(c)(1) states: "In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense including: [. . .] res judicata." See also, Arizona v. California, 120 S. Ct. 2304, 530 U.S. 392, 412-13, 147 L.Ed.2d 374 (2000) (cautioning trial courts against raising res judicata *sua sponte*).
[82] See e.g., Disimone v. Browner, 121 F. 3d 1262, 1267 (C.A.9 1997).
[83] Cromwell v. County of Sac., 94 U.S. 351, 352, 24 L. Ed. 195 (1876).
[84] See, Restatement Second (see, n. 3, § 19).
[85] Id., § 18(1).
[86] See e.g., Migra v. Warren City School Dist. Bd. of Educ., 104 S. Ct. 892, 465 U.S. 75, 77 n. 1, 79 L. Ed. 2d 56 (1984); Monahan v. New York City Dept. of Corrections, 214 F. 3d 275, 285 (C.A.2 2000).

new claim, called a judgment debt, arises."[87] Or, as stated by *Wright, Miller* and *Cooper*: "Foreclosure of matters that never have been litigated has traditionally been expressed by stating that a single 'cause of action' cannot be 'split' by advancing one part in a first suit and reserving some other part for a later suit. The entire cause of action was said to 'merge' in a judgment for the plaintiff, leaving a new cause of action on the judgment, or to be subject to the 'bar' of a judgment for the defendant" (Wright and Miller and Cooper, 1981: § 4402). In the *Cromwell* case[88] the Supreme Court described the general rule of res judicata in the following terms: "The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment."[89]

Clermont, in one of his excellent essays on res judicata[90] provides the following pragmatic example of how the bar and merger rule works. "So, if P sues D for personal injury resulting from an automobile accident and later, after valid and final judgment, P sues D for property damage in the same accident, D can successfully plead claim preclusion under the transactional view."[91]

Just as a plaintiff cannot split her claims, a defendant must assert all available defenses in the initial action. The Supreme Court held in the *City of Beloit v. Morgan*[92] case that res judicata bars unlitigated defenses, "[a] party can no more split up defenses than individual demands, and present them by piecemeal in successive suits growing out of the same transaction."[93] By way of example, if a defendant has the

[87] Kotsopoulos v. Asturia Shipping Co., 467 F. 2d 91, 95 (C.A.2 1972).
[88] Cromwell v. County of Sac., 94 U.S. 351, 352, 24 L. Ed. 195 (1876).
[89] Commissioner v. Sunnen, 68 S. Ct. 715, 719, 333 U.S. 591, 597, 92 L. Ed. 898 (per Murphy, J.) (1948).
[90] Clermont, K. M. (2016): Res Judicata as Requisite for Justice, Rutgers University Law Review, Vol. 68, pp. 1107-1108.
[91] The "transactional view" mentioned by *Clermont* will be discussed in some detail further in this paper so as to bring his quoted example into context.
[92] 74 U.S. (7 Wall.) 619 (1868). See also, Cromwell v. County of Sac., 94 U.S. 351, 352-353 24 L. Ed. 195 (1876) ("defences [that] were not presented in [a prior] action," a "subsequent allegation of their existence" will not be heard in a successive case concerning the same subject matter, because "[t]he judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed.").
[93] City of Beloit v. Morgan, 74 U.S. (7 Wall.) at 623.

potential defenses of the applicable statute of limitations, release, and contributory negligence, all such defenses must be raised in the initial litigation. If such defenses are not raised, then the defendant is precluded from doing so in subsequent litigation under the doctrine of res judicata (Wright and Miller and Cooper, 1981: § 4414).[94]

7.2.2 Discussion of the Elements of Claim Preclusion

To establish claim preclusion, a party must establish: (1) a final, valid judgment on the merits; (2) identity or privy of parties; and (3) identity of claims in the two actions.[95] We shall address each of the elements in turn.

7.2.3 The Validity of the Prior Judgment

To qualify for preclusion, a judgment must be valid, final, and on the merits. The issue of finality has already been discussed in detail. Regarding the issue of "validity," the basic notion is that judicial actions must achieve a minimum "quality" in order to qualify for res judicata effects (Wright and Miller and Cooper, 1981: § 4427). According to *Wright*, *Miller* and *Cooper* in discussing the "validity" element, there are "only four major areas of potential invalidity" requiring examination (Wright and Miller and Cooper, 1981: § 4466). The first is whether a judgment entered by the court that lacked subject matter jurisdiction nevertheless has res judicata effects. In such situations, there are competing interests at play. Working against giving such judgments res judicata effects is that there is a strong public policy of ensuring courts act only within their proper limits of competence. On the other hand, if the parties to the initial action received a fair hearing, utilizing correct substantive rules that ensured full due process of law, with the only defect being the court lacked subject matter jurisdiction, the counter argument is that there is no fundamental unfairness in cloaking that procedure with res judicata effects (Wright and Miller and Cooper, 1981: § 4428). According to *Wright*, *Miller* and *Cooper* and as confirmed in case authorities, "Today, it is safe to conclude that most federal court judgments are res judicata notwithstanding a lack of subject matter jurisdiction" (Wright and Miller and Cooper, 1981: § 4428). These authors succinctly explain the rationale for this result: "A lack of subject matter jurisdiction does not of itself depreciate any of the

[94] See also, 46 Am. Jur. 2d Judgments § 481 (Am. Jur.) (collecting cases).
[95] See e.g., Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 91 S. Ct. 1434, 402 U.S. 313, 323-324, 28 L.Ed.2d 788 (1971); Chase Manhattan Bank, N.A. v. Celotex Corp., 56 F. 3d 343, 345-346 (C.A.2 1995).

central values of judicial finality. Whether the question is one of enforcing the judgment, applying claim preclusion, or forestalling belated defenses, the mere fact that the court wandered outside its proper orbit suggests less reason to distrust the judgment than application of wrong substantive rules or poor procedure, matters commonly swallowed up in res judicata."[96]

Regarding the second area of potential attack, "State judgments may prove somewhat more vulnerable than federal judgments to defeat in subsequent federal litigation" (Wright and Miller and Cooper, 1981: § 4428). By way of example, in the case of *Ultracashmere House, Ltd.*,[97] the court held that a state court default judgment entered in violation of an order staying the state proceeding was not entitled to res judicata effect. On the other hand, when the lack of subject matter jurisdiction is simply a matter of state law, the federal courts have given res judicata effects as dictated by state law (Wright and Miller and Cooper, 1981: § 4428).[98]

Regarding the third major area of potential attack, judgments resting on an unconstitutional statute or judicial ruling, the weight of authority holds that even then such rulings are binding and will be accorded res judicata status (Wright and Miller and Cooper, 1981: § 4429).[99] A leading case is *Chicot County Drainage District v. Baxter State Bank*[100] where the Court held that state courts were bound by a municipal debt readjustment accomplished by a federal court under a statute that was later held unconstitutional. The courts justify this outcome on the basis that to conclude otherwise would work an injustice and a hardship upon the previously prevailing party that lawfully acquired vested rights in the form of their state judgments.[101] "So long as the parties were afforded a fair opportunity to raise the question of validity, the judgment should be honored whether the question was not raised or was raised and resolved incorrectly" (Wright and Miller and Cooper, 1981: § 4429).

[96] See, also, Durfee v. Duke, 84 S. Ct. 242, 375 U.S. 106, 11 L. Ed. 2d 186 (1963); Disher v. Information Resources, Inc., 873 F. 2d 136, 140 (C.A.7 1989) (citing Wright Miller and Cooper) ("[A] court without jurisdiction can render a binding judgment on the merits if the judgment is allowed to become final, unless the lack of jurisdiction is so gross that the judgment is deemed void").
[97] Ultracashmere House, Ltd., 534 F. Supp. 542 (D.C.N.Y. 1982).
[98] See cases catalogued in fn. 33 thereof.
[99] See also cases cited therein.
[100] 60 S. Ct. 317, 308 U.S. 371, 84 L. Ed. 329 (1940).
[101] See e.g., Douglas-Guardian Warehouse Corp., v. Posey, 486 F. 2d 739, 742-743 (C.A.10 1973).

The last major area of attack on a judgment's validity is lack of personal jurisdiction, and it is this line of attack that is most well-settled. "Judgments entered without personal or property jurisdiction can be attacked if there was no appearance in the action, but ordinarily are valid if there was an appearance of any type." This rule was set forth by the Supreme Court in *Baldwin v. Iowa State Traveling Men's Association* (Wright and Miller and Cooper, 1981: § 4430).[102]

7.2.4 Meaning of On the Merits

We shall next address the requirement that to obtain res judicata status, the final, valid judgment must also be "on the merits." While this phrase has been used for a long time[103] and still is used today, as *Wright*, *Miller* and *Cooper* point out, the phrase is misleading, as it suggests that to have preclusive res judicata effects a judgment must rest on a complete examination of the substantive rights asserted in that matter (Wright and Miller and Cooper, 1981: § 4435). But while this often is true, such as after a full blown trial and verdict/decision, this is not invariably true. By way of example, Rule 41 governs dismissals of actions. Rule 41(a) sets forth the procedures for voluntary dismissals, and ordinarily voluntary dismissals do not preclude plaintiff from maintaining a second action.[104] However, under Rule 41(a)(1)(B) a dismissal may be with prejudice (and hence "on the merits") if the notice or order states it is. And significantly, "if the plaintiff previously dismissed any federal or state court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits."

Rule 41(b) governs what are known as involuntary dismissals. This rule authorizes the court, either on its own motion, or on a motion by the defendant, to dismiss an action where the "plaintiff fails to prosecute or to comply with these rules or a court order." So, for example, if a case lays stagnant for a year and plaintiff makes no effort to move the case forward, the court could dismiss the action under this rule. If a

[102] 51 S. Ct. 517, 283 U.S. 522, 75 L. Ed. 1244 (1931).
[103] See e.g., Hughes v. U.S. 4 Wall. (71 U.S.) 232, 237, 18 L.Ed. 303 (1866).
[104] See, Rule 41(a)(1)(A)(i)(ii) which provides in part that: "the plaintiff may dismiss an action without a court order by filing: (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or (ii) a stipulation of dismissal signed by all parties who have appeared." See also, Greenlee v. Goodyear Tire & Rubber Co., 572 F. 2d 273 (C.A.10 1978) (Holding that under applicable state law, a stipulation of dismissal signed by the parties when plaintiff discovered that an important witness would not be available for trial was without prejudice to instituting a second claim. Of course, any such second claim must be commenced within the period of time as prescribed by an applicable statute of limitations. Otherwise, defendant may interpose the expiry of the statute of limitations as an affirmative defense and seek dismissal of the re-commenced suit on that basis).

plaintiff fails, by way of another example, to comply with a discovery order the judge might dismiss the plaintiff's complaint as the ultimate sanction. The rule goes on to provide that unless the dismissal order states otherwise, a dismissal under Rule 41(b) "operates as an adjudication on the merits." Accordingly, such an order has res judicata ramifications.

Rule 41(b) also governs situations where the court dismisses actions based upon a lack of subject matter or personal jurisdiction or for improper venue. The rule is clear that such dismissals do not operate as an adjudication on the merits.[105] Rather, the rule permits plaintiff[106] to commence a second action on the same claim to rectify the deficiency found in the initial action. On the other hand, the judgment in the first action remains effective to preclude the relitigation of the jurisdictional issue that led to the initial dismissal (Wright and Miller and Cooper, 1981: § 4436).

One situation that occurs with some degree of frequency, is that a court will dismiss an action under Rule 41, essentially as being premature, where a claimant has failed to first exhaust available administrative remedies. In such situations, the courts have held that claim preclusion does not apply.[107] And as a general proposition, a second action on the same claim is not precluded by dismissal of a first action in situations where the first action is premature, or there is some other condition that must be undertaken as a precondition to suit.[108] "No more need be done than await maturity, satisfy the precondition, or switch to a different substantive theory that does not depend on the same precondition" (Wright and Miller and Cooper, 1981: § 4437).[109]

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[105] See, Rule 41(b). See also, e.g., Lindy v. U.S., 546 F. 2d 371, 373 (Ct. Cl. 1976) (Holding that dismissal of a claim because of jurisdictional limitations is not res judicata).

[106] Assuming the plaintiff has time to commence a second action under any applicable statutes of limitation.

[107] See e.g., Fujii v. Dulles, 259 F. 2d 866 (C.A.9 1958) (A second action for a declaration of nationality was not barred by dismissal of the first action for failure to allege adverse administrative action occurring prior to the date of filing the first action.) See also Price v. U.S., 466 F. Supp. 315, 316 (D.C.Pa. 1979) (Dismissal for failure to exhaust administrative remedies does not preclude second action upon exhaustion).

[108] Sometimes, for example, pursuant to statute or ordinance, a claimant, before commencing a legal action against a municipality or state, must first give the government notice of the claim, for example, at least 60-90 days before commencing action. These so-called "notice of claims" laws are designed so as to provide the governing body an opportunity to investigate the claim and perhaps resolve them short of litigation. See e.g., Revised Code of Washington § 4.92.100, requiring written notice of claim to state government after injury as condition precedent to later litigation. If the claimant files suit, without first providing the requisite notice, then the suit is subject to dismissal under Rule 41 as being premature, but can be refiled later, assuming the applicable statute of limitations has not expired.

[109] As an example, in Pfeiffer Co., v. U.S., 385 F. Supp. 367, 371, E. D. Mo. (1974), affirmed 518 F. 2d 124 (C.A.8 1975) the court held dismissal of a tax refund claim for failure to demand a refund first did not preclude a second action after a claim for refund had been filed.

Rule 19 governs the mandatory joinder of parties.[110] Rule 41(b) explicitly provides that dismissal for the failure to join an indispensable party under Rule 19 does not operate as an adjudication upon the merits, and therefore has no res judicata effects. This rule is in accord with the long-standing common law rule that the dismissal does not bar a new action that merely rectifies the deficiency of parties in the first action.[111]

Judgments by default result in claim and defense preclusion. The reason this is the case is well-stated in *Wright*, *Miller* and *Cooper* and so is worth recapitulating in full: "Valid default judgments establish claim and defense preclusion in the same way as litigated judgments, and are equally entitled to enforcement in other jurisdictions. This consequence follows from the basic functions of default judgments. In one aspect, default judgments afford an opportunity to surrender without incurring the costs of litigation, either because the claim is thought valid or because the cost of litigation seems greater than the probability and rewards of success. Plaintiffs could not afford to accept this surrender if the resulting judgment were not final" (Wright and Miller and Cooper, 1981: § 4442).

7.2.5 Meaning of Parties and Those Privy to a Party

Traditionally, it has been the rule that a judgment is binding and preclusion only applies to parties and persons in "privity" with them. Conversely, the general principle is that nonparties are not bound (Wright and Miller and Cooper, 1981: § 4448-4449). However, as will be discussed, there are numerous important exceptions to these general rules. This matter will be discussed later in this paper at section 7.4.

[110] Rule 19(a), dealing with mandatory joinder, provides that "A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in that person's absence may; (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest."

[111] See e.g., Hughes v. U.S., 4 Wall. (71 U.S.) 232, 237, 18 L.Ed. 303 (1866) (Dismissal of a prior action for defect of parties is not a judgment on the merits).

7.2.6 Identity of Claims

The third element required to establish claim preclusion is identity of claims in the two actions. The Supreme Court has not enunciated any precise test for determining whether there is an identity of claims, for purposes of claim preclusion, and nor have the lower federal courts applied any uniform standard.[112] Before the Civil Rules were adopted, courts adhered to "[t]he old theory of narrowing the issue down [. . .] to one single limited matter," thereby "forcing the parties to bring separate actions."[113] This procedure was awkward and inefficient, as it required litigation of claims in piecemeal fashion, and exalted the litigation of very narrow issues to the exclusion of more comprehensive proceedings.[114] In substantial part, this was due to the fact that before the Civil Rules were adopted in 1938[115] there were severe procedural restraints, such as rigid joinder and pleading rules which either severely restricted or prevented consolidation of claims.[116] This policy found support in the idea that "[a] defendant should not be required to assert his claim in the forum or the proceeding chosen by the plaintiff but should be allowed to bring suit at a time and place of his own selection."[117] In short, the old view defined the term "claim" extremely narrowly, and in terms of one single theory or substantive right. Additionally, the courts used the term "cause of action" and not "claim".[118] Accordingly, as a result of the courts so narrowly construing the concept of "claim," the effects of res judicata were in turn highly limited, and this resulted in piecemeal litigation and a low risk of preclusion.[119]

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[112] See e.g., Nevada v. United States, 103 S. Ct. 2906, 463 U.S. 110, 130 n. 12, 77 L. Ed. 2d 509 (1983); I.A.M. National Pension Fund, Benefit Plan A v. Industrial Gear Manufacturing Co., 723 F. 3d 944, 947-948 (D. DC. 1983).

[113] Williamson v. Columbia Gas & Elec. Corp., 186 F. 2d 464, 469 (C.A.3 1950).

[114] Restatement Second (see, n. 3, § 19).

[115] The adoption of the Federal Rules of Civil Procedure in 1938 replaced the earlier procedures under the Federal Equity Rules and the Conformity Act (28 USC 724 (1934)). The Conformity Act required that procedures in suits at law conform to state practice, usually the Field Code or a pleading system based on common law. Before the Civil Rules were established, common law pleading was more formal, traditional, and particular in its phrases and requirements. For example, a plaintiff bringing a trespass suit would have to mention key phrases in his complaint or risk having it dismissed with prejudice.

[116] Restatement Second (see, n. 3, § 24, cmt. A); See also, Williamson v. Columbia Gas & Elec. Corp., 186 F. 2d at 469.

[117] Restatement Second (see, n. 3, § 22, comm. A). At the time, the prevailing attitude was that defendant's rights to choose his or her own forum and time to bring counterclaims outweighed interests such as efficiency and judicial economy.

[118] Id., § 24, cmt. a.

[119] See, Williamson v. Columbia Gas & Elec. Corp., 186 F. 2d at 469.

Over time, however, the federal courts significantly expanded the old common law notion of what constitutes the same cause of action for purposes of claim preclusion. Therefore, the earlier common law rule favoring claim isolation and party autonomy has been supplanted by a new philosophy that limits the number of lawsuits possible over one controversy. Modern courts have done this by significantly broadening the notion of the scope of a "claim."[120] This evolution and expansion of the meaning of the term "claim" coincided with, and to a large extent was promoted by, the evolution of the modern federal court civil procedural rules, most of which have been discussed in this paper, namely joinder and pleading reforms that operate in conjunction to urge, if not require, consolidation of related claims into a single action.[121]

Rule 13 of the Civil Rules, not previously discussed, is important in this regard. Rule 13 governs the pleading requirements for counterclaims. It requires a defendant to plead certain related claims. Specifically, Rule 13(a) provides, in pertinent part, that a counterclaim is compulsory if it "arises out of the *transaction or occurrence* that is the subject matter of the opposing party's claim" (emphasis added). While the text of Rule 13(a) is silent on the consequences that will ensue for the failure to plead a compulsory counterclaim, it is well-accepted that a party who fails to plead a compulsory counterclaim is barred from raising that claim in a later action in federal court (Wright and Miller and Cooper, 1981: § 1417). This rule was designed "to flush out all possible counterclaims early in the litigation; in other words to prevent multiplicity of actions and to achieve a just resolution in a single lawsuit of all disputes arising out of common matters."[122] Rule 13 accordingly has a claim preclusive effect in federal court, providing an "independent basis" to bar claims that should have been presented in a prior action.[123] In sum, as the many procedural devices under the Civil Rules have broadened the scope of claims that either may or in some case must be litigated together, the scope of claims covered by res judicata has significantly widened.

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[120] See, Williamson v. Columbia Gas & Elec. Corp., 186 F. 2d at 469 ("[T]he meaning of 'cause of action' for res judicata purposes is much broader today than it was earlier."); See also, Restatement Second (see, n. 3, cmt. A) ("The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the variations in the evidence needed to support the theories or rights").

[121] See, Williamson v. Columbia Gas & Elec. Corp., 186 F. 2d at 469-470.

[122] Cyclops Corp., v. Fischbach & Moore, Inc., 71 F.R.D. 616, 619 (W.D.Pa 1976), citing 3 Moore's Federal Practice, 13.12 [1] (1974).

[123] Polymer Industrial Products Co. v. Bridgestone/Firestone, Inc., 211 F.R.D. 312, 318 (N.D. Ohio 2002), a*ff'd* 347 F. 3d 935 (Fed Cir. 2003 en banc).

Modern res judicata jurisprudence has called for a much broader standard for determining whether multiple claims, or claim(s) and a counterclaim, are the "same" for purposes of claim preclusion. In this regard, the clear trend has been towards the adoption of what is called a "transactional analysis."[124] As stated by the court in one case,[125] "[w]hether or not the first judgment will have preclusive effect depends in part on whether the same transaction or series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first." As stated by another court, "To ascertain whether two actions spring from the same 'transaction' or 'claim,'" courts look to "whether the underlying facts are 'related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.'"[126] In other words, "the question is whether the claim was sufficiently related to the claims in the first proceeding that it should have been asserted in that proceeding."[127] The Supreme Court has recently explained[128] that the question of whether the causes of action in successive suits are the "same" for purposes of res judicata depends on whether they concern a "common nucleus of operative fact." In other words, whether they concern the same "transaction, or series of connected transactions."[129]

A leading scholar on res judicata jurisprudence boils down the law regarding the identity of claims element succinctly and so his analysis is well worth repeating here in some detail (Clermont, 2016: 1107-1108). "America's new 'transactional' view is that a claim includes all rights of the plaintiff to remedies against the defendant on any theory with respect to the transaction from which the action arose [. . .] Still, a claim will be big enough to include: (1) different harms; (2) different evidence; (3) different legal theories, whether cumulative, alternative, or even inconsistent; (4) different rights and remedies, whether legal or equitable; and (5) a series of related events [. . .]. The transactional view rests on the idea that the plaintiff should in a single lawsuit fully litigate his or her grievances arising from a transaction,

[124] See, Wagner, ALR Fed. 829, § 2 [a]; Restatement Second (see, n. 3, §24, cmt. A).
[125] Monahan v. New York City Dept. of Corrections, 214 F. 3d 275, 285 (C.A.2 2000).
[126] Pike v. Freeman, 266 F. 3d 78, 91 (C.A.2 2001); See also, ex rel. Ross v. Board of Educ. of Tp. High School Dist. 211, 486 F. 3d 279 (C.A.7 2007).
[127] Pike v. Freeman, 266 F. 3d at 91.
[128] Currier v. Virginia, 138 S. Ct. 2144, 2154, 585 U.S. (2018).
[129] Restatement Second (see, n. 3, § 24(1)). Or, as stated by *Wright* and *Miller* and *Cooper*, 1981: 4407, "the question boils down to whether the 'gist' of the two actions is the same," so that "a different judgment in the second action would impair or destroy rights or interests established by the judgment entered in the first action." If they do, then the causes of action are the same and preclusion rules apply.

considering that under the modern and permissive rules of procedure the plaintiff may do so. This requirement increases efficiency, with an acceptable burden on fairness. Accordingly, the plaintiff must be careful to put any asserted claim entirely before the court, because judgment will not only preclude actual relitigation, but also preclude later pursuit of the claim's unasserted portion, that is, the part that could have been, but was not, litigated. Any plaintiff who asserts only a part of the claim is said to have impermissibly split the claim" (Clermont, 2016: 1107-1108).

7.3 Issue Preclusion

7.3.1 Introduction and Basic Rule of Issue Preclusion

Clermont's exposition on the rationale of issue preclusion, and how that doctrine differs from claim preclusion, is also particularly instructive. "Claim preclusion aims at limiting the number of lawsuits that may be brought with respect to the same controversy. If claim preclusion applies, a second lawsuit on the same claim will wholly terminate, regardless of what issues were or were not litigated in the first lawsuit. By contrast, U.S. issue preclusion concerns only repeated litigation of the same issues. Thus, issue preclusion would apply only if claim preclusion were inapplicable, either because an exception to claim preclusion applied or because a different claim was in suit. While the core of claim preclusion is necessary, issue preclusion in the United States is not a necessary doctrine, but rather the product of policy determinations in favor of finality (Clermont, 2016: 1114)."[130]

Wright, *Miller* and *Cooper* articulate the difference between claim and issue preclusion in the following helpful terms. "As compared to claim preclusion, the rules of issue preclusion do not purport to prohibit litigation of matters that never have been argued or decided. Whether the label applied be the modern term of issue preclusion, the still current phrases of collateral estoppel and direct estoppel, or more antique names, the principle is simply that later courts should honor the first actual decision of a matter that has been actually litigated" (Wright and Miller and Cooper, 1981: § 4416). These authors rightly and justifiably comment that the law in this area is so complicated and that so many limitations, caveats, and permutations exist that it is difficult and indeed nearly impossible to achieve any concise statement of the rule

[130] Citing Field, H. R., et al. (2014): 668.

"that is both graceful and complete" (Wright and Miller and Cooper, 1981: § 4416). Given that quite candid acknowledgment, and given further that the aim of this paper is to at least explain the fundamentals of preclusion jurisprudence in the United States federal courts in a fashion that is hopefully reasonably concise, so that the reader can at least appreciate the core principles of the law, this author has decided that utilizing the admittedly lengthy (and yet still succinct) summary of the doctrine of issue preclusion set forth by *Wright*, *Miller* and *Cooper* made the most sense.

"[I]ssue preclusion arises in a second action on the basis of a prior decision when the same 'issue' is involved in both actions; the issue was 'actually litigated' in the first action, after a full and fair opportunity for litigation; the issue was 'actually decided' in the first action, by a disposition that is sufficiently 'final,' 'on the merits,' and 'valid'; it was necessary to decide the issue in disposing of the first action, and – in some decisions – the issue occupied a high position in the logical hierarchy of abstract legal rules applied in the first action; the later litigation is between the same parties or involves nonparties that are subject to the binding effect or benefit of the first action; the role of the issue in the second action was foreseeable in the first action, or it occupies a high position in the logical hierarchy of abstract legal rules applied in the second action; and there are no special considerations of fairness, relative judicial authority, changes of law, or the like, that warrant remission of the ordinary rules of preclusion. Once these requirements are met, issue preclusion is available not only to defend against a demand for relief, but also in offensive support for a demand for relief. Issue preclusion, moreover, is available whether or not the second action involves a new claim or cause of action. If the second action involves the same claim or cause of action as the first, issue preclusion may be called direct estoppel. If a new claim or cause of action is involved, issue preclusion is commonly called collateral estoppel" (Wright and Miller and Cooper, 1981: § 4416).

Clermont states the rule and its elements in the following terms: "Outside the context of the initial action, a party (or privy) generally may not litigate the same issue of fact or law (or the same mixed issue of law and fact) that was actually litigated and determined therein if the determination was essential to a valid and final judgment. Indeed, U.S. issue preclusion applies in a second action brought on the same claim (direct estoppel) or on a different claim (collateral estoppel) [. . .] In brief, when claim preclusion does not apply, issue preclusion acts to prevent inappropriate relitigation

of essential issues. That is, issue preclusion reaches only the same issues that were actually litigated and determined, not those that were defaulted, admitted, stipulated, or consented; and issue preclusion reaches only essential determinations, not dicta or other asides. This doctrinal statement implies three requirements for application of issue preclusion: (1) same issue, (2) actually litigated and determined, and (3) essential to judgment" (Clermont, 2016: 1114-1115).[131] We shall now address each of these elements, in turn.

7.3.2 Discussion of Same Issue Element

Regarding the "same issue" element of issue preclusion, the Restatement Second of Judgments explain that under the modern view, the scope of what constitutes an issue should be viewed through the lens of the efficiency and fairness rationale of res judicata. The question whether a matter sought to be raised in a subsequent action constitutes the same issue as presented in the first action is a pragmatic question, turning on a variety of factors such as "the degree of overlap between the factual evidence and legal argument advanced with respect to the matter in the initial action and that to be advanced with respect to the matter in the subsequent action."[132] If a different legal standard applies in the second action or a change in the facts, then the issue is in fact different and issue preclusion does not apply.[133]

It should also be noted that differences in the burden of proof in the successive litigations may well result in a finding that the issues presented in both suits are not identical. This is so because, logically, if the burden of proof differs, there can be no assurance that the result would be the same in both actions and the requirements of collateral estoppel are designed to provide that very assurance. This issue arises often when there are criminal and civil actions that stem from the same incident, for example, a fight in a bar or a murder that gives rise to both a criminal action and tort action. In the United States in criminal suits the prosecution must prove each element beyond a reasonable doubt, whereas in civil actions the plaintiff need only establish the claim by a preponderance of the evidence, or, more probable than not. If, in this setting, an issue is established first under the stricter standard, then it may be given collateral estoppel effect in the later civil proceeding.

[131] Citing to Restatement Second (see, n. 3 at § 27).
[132] Id.
[133] Id.

7.3.3 Discussion of Actually Litigated and Determined Element

The second element of the doctrine, namely "actually litigated and determined" is taken quite literally. In practical terms, what this means is that the doctrine can result following a trial on the merits, or following a ruling on a motion (such as a motion for summary judgment under Rule 56, which typically is decided based on pleadings, affidavits/declarations, admissions, discovery responses etc.) decided on papers and perhaps oral argument, but issue preclusion will not follow from an admission or stipulation or from a default or consent judgment (Clermont, 2016: 1117).[134] Some courts have held that both judgments taken by default[135] or consent[136] satisfy the "actually litigated and determined" standard on the theory that "the truth of all the facts alleged by the plaintiff and necessary to the recovery are raised by plaintiff's pleading, and the defendant should not be able to escape the effect of judgment by waiving the right to contest them" in the case of a default judgment, or, by essentially agreeing to them in the case of a consent judgment (Clermont, 2016: 1117). *Clermont* takes issue with these rulings, observing that "these cases' approach is not only unfair and inefficient, but also fictional in treating as established many matters that were never decided. Although a default or consent judgment can have claim preclusion effect, it should not generate issue preclusion" (Clermont, 2016: 1117).

7.3.4 Discussion of Essential (Necessary) to Judgment Element

Issue preclusion attaches only to determinations that were necessary or essential to support the judgment entered in the first action (Wright and Miller and Cooper, 1981: § 4421). According to the Restatement Second "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action."[137] The flip side of the essential/necessary to judgment coin is that if a determination of fact or law in the prior action was merely incidental to that action, then there is no issue preclusion. While a mere reading of this rule itself may seem straightforward, in practice applying this rule has often caused great difficulty.

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[134] *Clermont* notes in his paper that some courts have in fact applied issue preclusion to default and consent judgments, but he argues the rationale used by such courts "is not only unfair and inefficient, but also fictional in treating as established many matters that were never decided. Although a default or consent judgment can have claim preclusion effect, it should not generate issue preclusion."

[135] See e.g., Lynch v. Lynch, 94 N.W. 2d 105, 109 (Iowa 1959).

[136] See e.g., Township of Washington v. Gould, 189 A.2d 697, 700-01 (N.J. 1963).

[137] Restatement Second (see, n. 3 at § 27).

However, the rationale for the rule is clear. It assures that the parties in the first action vigorously litigated the issue so that there is no unfairness in preventing the relitigation of that issue in a second action as there would be little likelihood that the results in the second action would be any different.

In some situations, it is clear that resolution of particular issues was not necessary to the judgment in a prior action. For example, a jury's special verdict may resolve matters of fact that are then found immaterial to the controlling legal issues in the second action. In such a case, the special verdict does not preclude the same matters of fact in later litigation.[138] In another clear situation, it often happens that a court will actually state that it is indulging in mere dictum that should not have preclusive effect in later litigation.[139] "In other settings, it may be necessary to undertake a more detailed inquiry to understand how specific findings came to be made and to determine whether they were necessary to the first judgment. If the inquiry reveals that the matters had 'come under consideration only collaterally or incidentally,' preclusion is denied" (Wright and Miller and Cooper, 1981: § 4421).[140]

Alternative grounds for a particular judgment may be given full preclusive effect. "The courts will not attempt to discern which ground was the necessary one when either would support the judgment. In this situation, it is presumed that the court fully considered all the issues raised and the losing party had a full incentive to obtain appellate review. Consequently, there is not the same concern about whether there was a full opportunity and incentive to litigate all the adverse findings" (Friedenthal, 1999: § 14.9).

7.4 Persons Bound by Prior Judgment

7.4.1 Introduction

Sections 7.1 through 7.3 explained the basic rules governing preclusion. With those rules in mind, the next important question focuses on the identification of persons affected by preclusion. In other words, who is bound by the judgment and who may take advantage of it. The most fundamental rule of preclusion asserts that parties to

[138] See e.g., Smith v. McCool, 16 Wall. (83 U.S.) 560, 21 L. Ed. 324 (1873).
[139] See e.g., In Parmelee Transp. Co. v. U.S., 351 F. 2d 619, 621 n. 1, 173 Ct. Cl. 139 (1965).
[140] Quoting from Norton v. Larney, 45 S.Ct. 145, 148, 266 U.S. 511, 517, 69 L. Ed. 413 (1925).

a prior action are bound while nonparties to the prior action are not (Wright and Miller and Cooper, 1981: § 4449). In the terminology of older cases, it was held that a judgment was binding only on parties and persons in "privity" with them. Further, the older case law held that "the principle of mutuality conferred the preclusion benefits of a favorable judgment only on persons who would have been bound by an unfavorable judgment, apart from special rules for derivative liability relationships" (Wright and Miller and Cooper, 1981: § 4449). However, the twin doctrines of "privity" and "mutuality" have both fallen out of favor in recent res judicata jurisprudence law. In their place, the courts have employed a more "functional analysis" so that, rather than examining whether parties are in privity, more recent court decisions instead focus the inquiry on the "reasons for holding a person bound by a judgment" (Wright and Miller and Cooper, 1981: § 4448). Since most of the problems resulting in substantial litigation have occurred with respect to nonparties, and the circumstances in which nonparties can be bound, despite the "general rule" that states they are not, the next section shall deal with that issue and will be explored in the context of a fairly recent Supreme Court decision that dealt with these problems.

7.4.2 Principal Situations in Which Nonparties May be Bound by Prior Judgment

In *Taylor v. Sturgell*[141] the Supreme Court discussed the doctrine of res judicata and in particular, addressed the question of when nonparties are bound by a prior judgment. The Court was asked to adopt a "virtual representation" exception to the claim preclusion rules. The facts of the case are as follows. Greg Herrick, an antique aircraft enthusiast seeking to restore a vintage airplane manufactured by the Fairchild Engine and Airplane Corporation (hereinafter "FEAC"), filed a Freedom of Information Act (hereinafter "FOIA") request asking the Federal Aviation Administration (hereinafter "FAA") for copies of technical documents related to the airplane. The FAA denied Herrick's request, based on FOIA's exemption for trade secrets. Herrick took an administrative appeal, but when respondent Fairchild, FEAC's successor, objected to the documents' release, the FAA adhered to its original decision. Herrick then filed an unsuccessful FOIA lawsuit to secure the

[141] 553 U.S. 880, 128 S. Ct. 2161, 171 L. Ed. 2d (2008).

documents.[142] Less than one month after that suit was resolved, petitioner Brent Taylor, Herrick's friend and an antique aircraft enthusiast himself, made a FOIA request for the same documents Herrick had unsuccessfully sued to obtain. When the FAA failed to respond, Taylor filed suit in the U.S. District Court for the District of Columbia.[143] Holding the suit barred by claim preclusion, the District Court granted summary judgment to the FAA and to Fairchild, as intervenor in Taylor's action. The court acknowledged that Taylor was not a party to Herrick's suit, but held that a nonparty may be bound by a judgment if s/he was "virtually represented" by a party. The D.C. Circuit affirmed,[144] announcing a five-factor test for "virtual representation." The first two factors of the D.C. Circuit's test – "identity of interests" and "adequate representation" – are necessary but not sufficient for virtual representation. In addition, at least one of three other factors must be established: "a close relationship between the present party and his putative representative," "substantial participation by the present party in the first case," or "tactical maneuvering on the part of the present party to avoid preclusion by the prior judgment." The D.C. Circuit acknowledged the absence of any indication that Taylor participated in, or even had notice of, Herrick's suit. It nonetheless found the "identity of interests," "adequate representation," and "close relationship" factors satisfied because the two men sought release of the same documents, were "close associates," had discussed working together to restore Herrick's plane, and had used the same lawyer to pursue their suits. Because these conditions sufficed to establish virtual representation, the court left open the question whether Taylor had engaged in tactical maneuvering to avoid preclusion.

The U.S. Supreme Court granted certiorari[145] to resolve the disagreement among the Circuit Courts of Appeal over the permissibility and scope of preclusion based on "virtual representation."[146] The Court began its analysis by observing, "It is a

[142] Herrick v. Garvey, 200 F.Supp.2d 1321 (D.Wyo.2000) (The District Court granted summary judgment in favor of the FAA.). On appeal, the Tenth Circuit affirmed the grant of summary judgment. See, Herrick v. Garvey, 298 F. 3d 1184 (C.A.10 2002).

[143] Taylor v. Blakey, U.S. Dist. Court of the District of Columbia (No. 03cv00173).

[144] Taylor v. Blakey, 490 F. 3d 965 (D.C. Cir. 2007).

[145] 552 U.S. 1136, 128 S. Ct. 977, 169 L. Ed. 2d (2008).

[146] The Court noted that the Ninth Circuit applies a five-factor test similar to the D.C. Circuit's. See Kourtis v. Cameron, 419 F.3d 989, 996 (2005). The Fifth, Sixth, and Eleventh Circuit, like the Fourth Circuit, have constrained the reach of virtual representation by requiring, *inter alia*, the existence of a legal relationship between the nonparty to be bound and the putative representative. See, Pollar v. Cockrell, 578 F. 2d 1002, 1008 (C.A.5 1978); Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 193 F. 3d 415, 424 (C.A.6 1999) (en banc); EEOC v. Pemco Aeroplex, Inc., 383 F. 3d 1280, 1289 (C.A.11 2004). The Seventh Circuit, in contrast, has rejected the doctrine of virtual representation altogether. See, Perry v. Globe Auto Recycling, Inc., 227 F. 3d 950, 953 (2000).

principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."[147] The Court also observed that in order to temper this basic rule, it had recognized several exceptions including, for example, class actions, where "a person not named as a party may be bound by a judgment on the merits of the action, if she was adequately represented by a party who actively participated in the litigation."[148] In the case before it, however, the Court was confronted with an issue of first impression, namely, whether there should a "virtual representation" exception to the general rule against precluding nonparties. Aside from the fact that the specific issue of virtual representation is interesting, the Supreme Court's analysis in Taylor is of particular helpfulness in this paper, as the Court did an excellent job not only of succinctly cataloguing the various (accepted) exceptions to the general rule of nonpreclusion to nonparties but also summarizing the general principles of res judicata jurisprudence in federal courts. The salient rules and principles articulated by the Court are set forth next.

Referring to its decision in *Semtek Int'l Inc. v. Lockheed Martin Corp.*,[149] the Court stated that the "preclusive effect of a federal-court judgment is determined by federal common law" and that [f]or judgments in federal-question cases – for example, Herrick's FOIA suit – federal courts participate in developing a 'uniform federal rules[s]' of res judicata, which this Court has ultimate authority to determine and declare."[150] The Court also observed that its federal common law dealing with preclusion is subject to the constraints of due process of law.[151] Claim preclusion and issue preclusion, which taken together comprise the doctrine known as *res judicata,* define the preclusive effect of a judgment.[152] "Under the doctrine of claim preclusion, a final judgment forecloses 'successive litigation of the very same claim,

[147] Taylor*,* supra 553 U.S. at 884, quoting Hansberry v. Lee, 311 U.S. 32, 40, 61 S.Ct. 115, 85 L.Ed. 22 (1940).
[148] Id.
[149] 531 U.S. 497, 507-508, 121 S. Ct. 1021, 149 L. Ed. 2d 32 (2001).
[150] Taylor, supra 553 U.S. at 891, quoting in part from Semtek, supra 531 U.S. at 508. The Court observed in fn. 4 that "For judgments in diversity cases in contradistinction to federal question cases], federal law incorporates the rules of preclusion applied by the State in which the rendering court sits."
[151] Id., citing, Richards v. Jefferson County, 517 U.S. 793, 797, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996).
[152] Id., 553 U.S. at 892. Discussing the often times difficult matter of terminology, the Court observed in fn 5 that "These terms have replaced a more confusing lexicon. Claim preclusion describes the rules formerly known as 'merger' and 'bar,' while issue preclusion encompasses the doctrine once known as 'collateral estoppel' and 'direct estoppel.'" Citing to, Migra v. Warren City School Dist. Bd. of Ed., 465 U.S. 75, 77 n. 1, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984).

whether or not relitigation of the claim raises the same issues as the earlier suit."[153] In contrast to claim preclusion, issue preclusion bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment."[154] This result obtains "even if the issue recurs in the context of a different claim."[155] "By 'preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate,' these two doctrines protect against 'the expense and vexation attending multiple lawsuits, conserve[s] judicial resources, and foster[s] reliance on judicial action by minimizing the possibility of inconsistent decisions.'"[156] In explaining the due process implications attendant to res judicata jurisprudence, the Court noted that persons not a party to litigation typically have not had a full and fair opportunity to litigate claims and issued resolved in that suit and consequently the doctrine of preclusion, whether claim or issue, "thus runs up against the 'deep-rooted historic tradition that everyone should have his own day in court.'"[157]

7.4.2.1 Primary Exceptions

Having thus set forth the basic rules of preclusion, and their due process implications, the Court then launched into a discussion of the six most widely recognized exceptions to the general rule against nonparty preclusion. The first such exception applies to persons that consent to be bound by the determination of issues in an action between others. In such situations, a party who consented is bound in accordance with the terms of his agreement.[158] The Court provided an illustrative example of when preclusion by consent might occur. "[I]f separate actions involving the same transaction are brought by different plaintiffs against the same defendant, all the parties to all the actions may agree that the question of the defendant's liability will be definitely determined, one way or the other, in a 'test' case" (Shapiro, 2001: 77–78).[159] Another example of parties agreeing to be bound by consent occurred in *Sampson v. Sony*,[160] where, in parallel patent litigation, the parties agreed by stipulation

[153] 553 U.S. 892, citing to New Hampshire v. Maine, 532 U.S. 742, 748, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001).
[154] Id.
[155] Id.
[156] Id., quoting, Montana v. United States, 440 U.S. 147, 153-154, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979).
[157] Id. 553 U.S. 892-893, quoting, Richards, 517 U.S., at 798, 116 S. Ct. 1761.
[158] Id. 553 U.S. 893, citing, Restatement Second (see, n. 3, § 40).
[159] California v. Texas, 459 U.S. 1096, 1097, 103 S.Ct. 714, 74 L. Ed. 2d 944 (1983) (dismissing certain defendants from a suit based on a stipulation that "each of said defendants [. . .] will be bound by a final judgment of this Court" on a specified issue."
[160] Sampson v. Sony Corp. of America, 434 F. 2d 312 (C.A.2 1970).

to be bound by the judgment in another designated action. Sampson later attempted to circumvent the stipulation on various grounds, but those attempts were rejected both by the trial judge and then the Second Circuit Court of Appeals. As stated by *Wright*, *Miller* and *Cooper* "[C]onsent is most likely to be given to avoid the costs of independent litigation, particularly in cases in which the absence of substantial factual disputes will enhance the stare decisis effect of the first judgment" (Wright and Miller and Cooper, 1981: § 4453).[161]

The second recognized exception to nonparty preclusion is justified on the basis of various pre-existing "substantive legal relationships" between the person to be bound and a party to the judgment (Shapiro, 2001: 78).[162] "Qualifying relationships include, but are not limited to, preceding and succeeding owners of property, bailee and bailor, and assignee and assignor. These exceptions originated 'as much from the needs of property law as from the values of preclusion by judgment'" (Wright and Miller and Cooper, 1981: § 4448).[163]

Thirdly, in *Taylor*, the Court observed that the Supreme Court has confirmed that "in certain limited circumstances" a nonparty may nevertheless be bound by a judgment if she was "adequately represented by someone with the same interests who [wa]s a party" to the former suit.[164] Representative litigation that might have "preclusive effect on nonparties include properly conducted class actions . . . and suits brought by trustees, guardians, and other fiduciaries."[165] In *Richards v. Jefferson County*,[166] a case involving a legal challenge to the county's occupation tax, the Court began its decision by citing its earlier decision in *Hansberry v. Lee*,[167] where the Court held that it would violate the Due Process Clause of the Fourteenth Amendment to

[161] See also, Westwood Chem., Inc. v. Johns-Manville Fiber Glass, Inc., 447 F. 2d 1160 (C.A.6 1973) (stipulation in parallel patent infringement setting in which several defendants in several independent actions were claiming infringement of the same patent; and where they agreed in the stipulation that the action as to one defendant should be tried first and that the final decision as to validity would be "final and binding upon all parties hereto to the same extent as if the defendant were a party to said case" upheld and given claim preclusive effect.)

[162] 553 U.S. 894, quoting Richards, 517 U.S. at 798, 116 S. Ct. 1761.

[163] In fn. 8 the *Taylor* Court explained that "The substantive legal relationships justifying preclusion are sometimes collectively referred to as 'privity.' See e.g., Richards, 517 U.S. 793, 798, 116 S.Ct. 1761, 135 L. Ed. 2d 76 (1996); Restatement Second (see, n. 3 at § 62, cmt a). The term 'privity,' however, has also come to be used more broadly, as a way to express the conclusion that nonparty preclusion is appropriate on any ground. See, Wright and Miller and Cooper, 1981: § 4449, "To ward off confusion, we avoid using the term 'privity' in this opinion."

[164] Id. 553 U.S. 894, quoting Richards, 517 U.S., at 798, 116 S. Ct. 1761.

[165] Id. 553 U.S. 894-895; citing to Martin v. Wilks, 490 U.S. 755, 762, n. 2, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989) (citing to Fed. Rule Civ. Proc. 23); and to Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 593, 94 S.Ct. 806, 39 L. Ed. 2d 9 (1974); and to Restatement First of Judgments § 41.

[166] 517 U.S. 793 (1996).

[167] 311 U.S. 32, 37 (1949).

bind litigants to a judgment rendered in an earlier litigation to which they were not parties and in which they were not adequately represented. In the course of its analysis, the *Richards* Court observed that the various due process concerns that implicate res judicata analysis "do not always require one to have been a party to a judgment in order to be bound by it. Most notably, there is an exception when it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier judgment. For example, a judgment that is binding on a guardian or trustee may also bind the ward or the beneficiaries of a trust."

Since class action litigation in America is prevalent, and has expanded to the EU, some additional discussion of res judicata in this area of law is warranted. As stated by *Mullenix*, "Americans seemingly love their class actions. The American class action has been a fixture in the federal procedural toolbox for over seventy-five years and has become a central feature of American procedural exceptionalism" (Mullenix, 2014: 399).[168] According to *Mullenix*, "This narrative of American procedural exceptionalism posits that the American justice system is not only the best in the world but that American procedural rules and its jury system are superior to comparative civil and common law systems abroad."[169] The class action mechanism, until recently, "was a uniquely American innovation, resisted (if not rejected) by most foreign legal systems."[170] Today, many European states in fact have laws and rules permitting class actions,[171] even if the rules are at substantial variance from those in the United States.[172]

As articulated by *Wright* and *Miller*, "Preclusion by representation lies at the heart of the modern class action developed by such procedural rules as Civil Rule 23. Rule 23(b) recognizes several distinct types of class actions. While the types vary, [t]he

[168] Citing Marcus, R. (2014); See also Mullenix, 2010: 41.
[169] Id.
[170] Id., citing, Cappalli and Consolo, 1992: 218-219 (documenting European resistance to and rejection of American style class action litigation, referring to it as a kind of Rube-Goldberg procedural contraption). For the uninformed, a Rube Goldberg machine, named after American cartoonist Rube Goldberg, is a machine intentionally designed to perform a simple task in an indirect and overly complicated way. To put it bluntly, these authors were not complimentary of the American class action mechanism by any stretch of the imagination.
[171] For an excellent and exhaustive study of collective actions in Europe, and the push for EU-wide collective actions, the reader is referred to, Nagy, C. I. (2019): European Models of Collective Actions in Collective Actions in Europe, A Comparative, Economic and Transsystemic Analysis. The authors state that the history of collective actions in Europe started approximately three decades ago, but gained significant momentum in the mid-1990s. Today, 17 out of the 28 EU Member States provide for collective actions and of that number 10 of them have a system, or partial system based on the opt-out principle as used in the United States.
[172] See, Class Actions in Europe and the United States, by Libralex E.E.I.G. Can be accessed at www.libralex.com (accessed 5. 12. 2020).

central purpose of each of the various forms of class action is to establish a judgment that will bind not only the representative parties but also all nonparticipating members of the class designated by the court" (Wright and Miller and Cooper, 1981: § 4455). Class action litigation advances a host of desirable judicial interests. It allows groups of litigants to pursue claims that any given individual or even several individuals could not afford to pursue. It avoids the multiplicity of actions and inconsistent adjudications. But as aptly observed by commentators, "Preclusion is appropriate, however, only if the class action provides a suitable substitute for individual litigation. The most important requirement of preclusion is that the named parties afford adequate representation. Any substantial divergence of interests defeats the ability of the named parties to represent absent class members, at least with respect to subjects touched by the divergence of interests. Even if there is no divergence of interests, the representatives must provide representation that is in fact adequate."[173]

In the *Hansberry*[174] case, the Supreme Court, after stating the general rule that a judgment binds only parties to an action, went on to observe that "there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it." Pursuant to Rule 23(c)(2) class members who properly avail themselves of an opportunity to "opt out" of the class action are not bound by the judgment or settlement.[175] Similarly, nonmembers of the class are not bound.[176]

Although class action preclusion is subject to all of the requirements that apply to both issue and claim preclusion in individual actions, as already discussed, it is important to note that there are "[n]otice requirements peculiar to class actions [that] may also defeat preclusion. Failure to provide notice required by the due process clause or court rule will defeat preclusion without more" (Wright and Miller and Cooper, 1981: § 4455).[177] Due process of law requires not only adequate notice, but

[173] Id.
[174] Hansberry v. Lee, 61 S. Ct. 115, 118, 311 U.S. 32, 41, 85 L. Ed. 22 (1940).
[175] See e.g., In re Transocean Tender Offer Securities Litigation, 427 F. Supp. 1211, 1217-1218 (D.C.Ill. 1977).
[176] See, Restatement Second (see, n. 3 at § 42, cmt. d, Illustration 7).
[177] Citing, Penson v. Terminal Transport Co., 634 F. 2d 989 (C.A.5 1981) (Once a District Court has determined to permit individual class members to opt out of a consent judgment approved in an action certified under Civil Rule 23(b)(2), it is obligated to provide notice of the right to opt out. A class member who had been provided inadequate notice thus was not precluded by the consent judgment from seeking individual relief in a subsequent action.

importantly, adequate representation, if principles of preclusion are to apply to a judgment entered in a class action case. The Supreme Court has held that there can be no preclusion to nonparties in situations where there was representation in the first action by parties that had interests hostile to the nonparties in terms that go to the very existence of a class.[178] Furthermore, as observed by *Wright* and *Miller,* "[p]roblems of adequate representation arise in part because the named plaintiffs in a plaintiff class initially nominate themselves to represent the class. Judicial confirmation, even according to careful criteria of adequacy, cannot always ensure good litigation [. . .] extraordinary care must be taken to ensure adequate representation. Beyond the obvious problems of reluctant representatives, substantially divergent interests may underlie apparently common positions" (Wright and Miller and Cooper, 1981: § 4455).

Given the many possible limitations on preclusion in the class judgment setting, it has been said that "the court conducting the [class] action cannot predetermine the res judicata effect of the judgment."[179] As observed by *Wright* and *Miller*,[180] "[e]ven though a court hearing a class action may at times undertake to reject an assertion that the judgment will not be binding on nonparticipating class members, final enforcement of preclusion ordinarily occurs only with the decision of the court hearing a later action. The class action court can easily defeat preclusion, however, either by adopting a narrow class definition to ensure adequate representation or by decertifying the class at the close of trial on the ground that the class was not adequately represented" (Wright and Miller and Cooper, 1981: § 4455).[181]

The fourth recognized exception to the general rule against nonparty preclusion involves cases where the nonparty "assumed control" over the litigation in which that judgment was rendered.[182] The rationale for this exception is that in such cases the nonparty who assumed control had "the opportunity to present proofs and argument" and accordingly already "had his day in court" notwithstanding the fact

[178] Hansberry, 61 S. Ct. at 119-120, 311 U.S. at 44-46.
[179] Gonzales v. Cassidy, 474 F. 2d 67, 74 (C.A.5 1973), quoted in Wright, C. A., Miller, A. R. & Cooper E. H. (1981): Federal Practice and Procedure: Jurisdiction § 4455. See also, Advisory Committee Note, Rule 23, 1966, 39 F.R.D. 69, 95, 106; Vol. 7A, § 1789.
[180] See, Wright and Miller and Cooper, 1981: § 4455, citing EEOC v. Datapoint Corp., 570 F. 2d 1264, 1268 (C.A.5 1978).
[181] Citing, Grigsby v. North Mississippi Medical Center, 586 F. 2d 457 (C.A.5 1978); Roman v. ESB, Inc., 550 F. 2d 1343 (C.A.4 1976).
[182] Id. 553 U.S. 895; citing, Montana, 440 U.S. at 154, 99 S. Ct. 970; Schnell v. Peter Eckrich & Sons, Inc., 365 U.S. 260, 262, n. 4, 81 S.Ct. 557, 5 L. Ed. 2d 546 (1961); Restatement First (see, n. 2 at § 39).

such nonparty was not in fact a formal party to the prior litigation.[183] Regarding the amount of control required on the part of the nonparty so as to be bound, and regarding common examples of relationships that most frequently arise in this setting, *Wright* and *Miller* observed, "The appropriate measure of control does not require that the named party or parties totally abandon control to the nonparty. Instead, it should be enough that the nonparty has the actual measure of control or opportunity to control that might reasonably be expected between two form coparties. Such relationships between a party and a nonparty are most often found when a liability insurer assumes control of a defense, an indemnitor participates in defending an action brought against its indemnitee, or the owners and officers of a closely held corporation control corporate litigation" (Wright and Miller and Cooper, 1981: § 4451).[184]

The fifth exception provides that a party bound by a judgment may not avoid its preclusive effect by attempting to relitigate by use of a proxy.[185] "Preclusion is thus in order when a person who did not participate in a litigation later brings suit as the designated representative of a person who was a party to the prior adjudication" (Wright and Miller and Cooper, 1981: § 4454).[186] In dicta, the *Taylor* Court also noted that while the Court had not yet had the occasion to squarely address the issue, "it also seems clear that preclusion is appropriate when a nonparty later brings suit as an agent for a party who is bound by a judgment" (Wright and Miller and Cooper, 1981: § 4449).

The final established category of exceptions consists of certain circumstances where a special statutory scheme may "expressly foreclose successive litigation by nonlitigants [. . .] if the scheme is otherwise consistent with due process."[187] Bankruptcy and probate proceedings are illustrative examples of such schemes along

[183] Id.
[184] See, fn. 9-12 and cases cited therein; See e.g., Hyman v. Regenstein, 258 F. 2d 502, 511-512 (C.A.5 1958) certiorari denied, 79 S. Ct. 589, 359 U.S. 913, 3 L. Ed. 2d 575 (litigation losses by a corporation precluded its president, who indirectly owned a majority interest and who had directed and controlled the earlier litigation.)
[185] 553 U.S. 895.
[186] Id. citing, Chicago, R.I. & P.R. Co. v. Schendel, 270 U.S. 611, 620, 623, 46 S.Ct. 420, 70 L. Ed 757 (1926).
[187] Id. quoting Martin, 490 U.S., at 762, n. 2, 109 S. Ct. 2180.

with *quo warranto*[188] actions or other suits that "under [governing] law, [may] be brought only on behalf of the public at large."[189]

7.4.2.2 Taylor Court Rejects Virtual Representation Theory

Having discussed the generally accepted exceptions to the rule against nonparty preclusion, the Court then turned its attention to whether it should uphold the D.C. Circuit's recognition of a broad "virtual representation" exception to the rule against nonparty exclusion. The D.C. Circuit purported to ground its doctrine in some prior Supreme Court's statements that, in some circumstances, a person may be bound by a judgment if she was adequately represented by a party to the proceeding yielding that judgment. However, the *Taylor* Court observed that the D.C. Circuit's definition of "adequate representation" strayed from the meaning the Supreme Court had attributed to that term. In the Richards case, for example, the Alabama Supreme Court had held a tax challenge barred by a judgment upholding the same tax in a suit by different taxpayers.[190] However, in that case the Supreme Court reversed, holding that nonparty preclusion was inconsistent with due process under circumstances where there was no showing (1) that the court in the first suit "took care to protect the interests" of absent parties, or (2) that the parties to the first litigation "understood their suit to be on behalf of absent [parties]." The *Taylor* Court concluded that in holding that representation can be "adequate" for purposes of nonparty preclusion even where these two factors are absent, the D.C. Circuit in the instant matter misapprehended *Richards.*[191]

Both Fairchild and the FAA advocated that the Supreme Court should abandon completely the attempt to delineate discrete grounds and clear rules for nonparty preclusion, and instead adopt an equitable and heavily fact-driven inquiry that would determine situations in which nonparty preclusion is appropriate. The *Taylor* Court

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[188] Historically, in both British and American common law, *quo warranto* (Medievel Latin for "by what warrant?") was a prerogative writ requiring the person to whom it was directed to show what authority they had for exercising some right, power, or franchise they claimed to have held. Today, in the United States, *quo warranto* usually arises in a civil case as a plaintiff's claim (and thus a "cause of action" instead of a writ) that some governmental or corporate official was not validly elected to that office or is wrongfully exercising powers beyond (or *ultra vires)* those authorized by statute of by the corporation's charter. In some jurisdictions that have enacted judicial review statutes, the prerogative writ of *quo warranto* has been abolished. See, discussion of *Quo warranto* at en.m.wikipedia.org (accessed: 5. 12. 2020).

[189] Id. quoting Richards, 517 U.S., at 804, 116 S. Ct. 1761.

[190] Id., at 795-797.

[191] Taylor, 553 U.S. at 897.

declined this invitation.[192] First, the Court noted that the proposed balancing test was at substantial odds with the constrained approach advanced by earlier Supreme Court precedent on the subject, such as Richards,[193] which sought to delineate discrete, limited exceptions to the fundamental rule that a litigant is not bound by a judgment to which she was not a party. Secondly, the Court reasoned that "A party's representation of a nonparty is 'adequate' for preclusion purposes only if, at a minimum: (1) the interests of the nonparty and her representative are aligned,[194] and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty."[195] Additionally, the *Taylor* Court noted, adequate representation may also require notice of the original suit to the persons alleged to have been represented.[196] The Court further observed that in the class-action context, these delineated limitations are insured by Rule 23 of the Federal Rules of Civil Procedure, and the various procedural safeguards contained therein.[197] The *Taylor* Court was concerned, however, that an expansive virtual representation doctrine would recognize a common-law kind of class action lacking the procedural safeguards embedded in Rule 23.[198] Additionally, the *Taylor* Court worried that a broad balancing test of the sort it was being asked to adopt for nonparty preclusion cases would likely complicate the already difficult task faced by the District Courts in deciding preclusion questions.[199]

Lastly, the FAA argued that nonparty preclusion should apply more expansively in "public-law" litigation than in "private-law" disputes. First, the FAA argued that the Richard's decision supported this view, when that Court acknowledged in that case that when a taxpayer challenges "an alleged misuse of public funds" or "other public action," the suit "has only an indirect impact on [the plaintiff's] interests" and that "the States have wide latitude to establish procedures [limiting] the number of

[192] Id. 553. U.S. at 898.
[193] Id.
[194] Id., 553 U.S., at 900 citing Hansberry, supra, 311 U.S., at 43.
[195] Id., citing Richards, 517 U.S. at 798, 116 S. Ct. 1761, at 801-802.
[196] Id., citing Richards, 517 U.S. at 798, 116 S. Ct. 1761, at 801.
[197] Id., 553 U.S. at 901.
[198] Id., The *Taylor* Court reasoned, "[V]irtual representation would authorize preclusion based on identity of interests and some kind of relationship between parties and nonparties, shorn of the procedural protections prescribed in Hansberry, Richards, and Rule 23. These protections, grounded in due process, could be circumvented were we to approve a virtual representation doctrine that allowed courts to 'create *de facto* class actions at will.'" Citing Tice v. American Airlines, Inc., 162 F. 3d 966, 973 (C.A.7 1998).
[199] Id., 553 U.S., at 901. Quoting from Bittinger v. Tecumseh Products Co., 123 F. 3d 877, 881 (C.A.6 1997), the *Taylor* Court stated: "'In this area of the law,' we agree, 'crisp rules with sharp corners' are preferable to a round-about doctrine of opaque standards.'"

judicial proceedings that may be entertained."[200] The *Taylor* Court disagreed, reasoning that in contrast to the public-law litigation contemplated in Richards, a successful FOIA action results in a grant of relief only to the individual plaintiff, rather than constituting a broad decree benefitting the public at large.[201] Furthermore, the Court observed that the *Richards* Court said only that, for the type of public-law claims there envisioned, States were free to adopt procedures limiting repetitive litigation.[202] The Court pointed out that while it is equally evident that Congress can adopt such procedures, it does not necessarily follow that the Court should proscribe or confine successive FOIA suits by different requesters.[203] Secondly, the FAA argued that, because the number of plaintiffs in public-law cases is potentially limitless, it is theoretically possible for several persons to coordinate a series of vexatious repetitive lawsuits. Again, the *Taylor* Court rejected this contention, stating that this risk does not justify departing from the usual nonparty preclusion rules. *Stare decisis,* the Court stated, will allow courts to dispose of repetitive suits in the same circuit, and even when *stare decisis* is not dispositive, "the human inclination not to waste money" should discourage suits based on claims or issues already decided (Shapiro, 2001: 97).[204] In summary, the *Taylor* Court disapproved of the virtual representation theory of preclusion.[205] "The preclusive effects of a judgment in a federal-question case decided by a federal court should instead be determined according to the established grounds for nonparty preclusion described in this [opinion]."[206]

[200] Id., 553 U.S., at 902 citing to 517 U.S. at 798, 116 S. Ct. 1761, at 803.
[201] Id., at 902-903.
[202] Id., at 903, citing to Richards, 517 U.S. at 798, 116 S. Ct. 1761, at 803.
[203] Id., 553 U.S., at 903.
[204] Id., 553 U.S., at 903-904.
[205] Id., 553 U.S., at 904. The remaining question in the case on appeal was whether the result reached by the courts below could be justified based on one of the six established grounds for nonparty preclusion. The Court noted that with one exception, those grounds had no application to this case. Respondents argued that Taylor's suit was a collusive attempt to relitigate Herrick's claim. The *Taylor* Court held that this argument justified a remand to allow the courts below the opportunity to determine whether the fifth ground for nonparty preclusion – preclusion because a nonparty to earlier litigation has brought suit as an agent of a party bound be the prior adjudication – applied to Taylor's suit. However, while remanding the case, the *Taylor* Court cautioned that courts had to be cautious about finding preclusion based on agency principles, and that a mere whiff of "tactical maneuvering" will not suffice; instead, principles of agency law indicate that preclusion is appropriate only if the putative agent's conduct of the suit is subject to the control of the party who is bound be the prior adjudication.
[206] Id.

8 Conclusion

One commentator remarked that the Civil Rules are "one of the greatest contributions to the free and unhampered administration of law and justice ever struck off by any group of men since the dawn of civilized law" (Carey, 1943: 507). While this unquestionably is exaggeration, still, now 82 years after their adoption (along with many amendments) it has to be said that the Civil Rules were an amazing accomplishment and completely transformed civil procedure in the federal (and most state) courts. The fact they created a uniform procedure that at the same time has made pleading simpler, joinder of parties and claims easier, amendments freer, and discovery broader has had a sweeping impact on civil practice. As we have seen in the first sections of this paper, these rules have helped shape the form and entry of judgments and have provided clarity and certainty regarding when judgments are final so as to give them preclusive effect. Furthermore, because the rules have made it easier and more cost effective to join parties and claims in singular actions, the federal courts have greatly expanded the preclusive doctrines of claim and issue preclusion, to the extent that America probably has the most expansive judgment preclusion in the world.

Judge *Charles E. Clark*, reputed to be one of America's greatest proceduralists, wrote in a 1945 dissenting opinion, "The defense of res judicata is universally respected, but actually, not very well liked."[207] But, that comment, shared by many at the time, was made only seven years after the adoption of the Rules. The tide has certainly shifted. In a 1981 decision in which a court of appeals had held that "simple justice" required that it should not hold a party barred by *res judicata*, Justice Rehnquist, writing for the Supreme Court, responded in a rebuke that "we do not see the grave injustice which would be done by the application of accepted principles of res judicata. 'Simple justice' is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case."[208]

[207] Riordan v. Ferguson, 147 F. 2d 983, 988 (C.C.A. 2d 1945).
[208] Federated Department Stores, Inc. v. Moitie, 101 S.Ct. 2424, 2429, 452 U.S. 394, 401, 69 L. Ed. 2d 103 (1981).

This "new attitude" toward res judicata has been shaped to a large extent (if not totally) by the modern procedural notions found in the Civil Rules, which, as we have discussed, moved away from the harsh pleading requirements pre-Civil Rules, toward a system that greatly expanded the opportunity to present all of the contentions a party has in a single action. In sum, "Modern procedure has expanded the scope of the initial opportunity to litigate and this has made inevitable the narrowing of the situations in which a second opportunity to litigate need be given" (Wright and Miller and Cooper, 1981: § 100A).[209]

The courts, however, continue to struggle with some of the outer contours of the preclusive effects of judgments, as has been demonstrated, for example, in the Taylor decision. In particular, there has been much litigation over preclusion in certain areas of the law, such as class action and intellectual property cases. And, the courts continue to struggle with striking an appropriate balance between, on the one hand, setting preclusive rules that are relatively clear to follow so that litigants and the courts have sound guidance concerning when judgments have preclusive effect and, on the other hand, allowing some degree of flexibility in the rules to allow the courts to (equitably) remedy situations where employing res judicata might be fundamentally unfair. Again, the *Taylor* Court had to grapple with this dichotomy, although the Court ultimately came down firmly on the side of sticking with preclusive rules that are easier to apply in practice. A reasonable, wise decision in the author's view.

As the Civil Rules reach their one-hundredth anniversary in 2038 it will be interesting to track further claim preclusion decisions in the federal court system to see not only whether the courts continue to expand claim and issue preclusion but also how the courts deal with these doctrines given the ever-increasing variety and complexity of cases in which the doctrines must be applied.

[209] Citing, Restatement Second, c. 1, at p. 10: "The rules of res judicata in modern procedure therefore may fairly be characterized as illiberal toward the opportunity for relitigation. Their rigor contrasts sharply with the liberality of the rules governing the original event, which is the theme of the Federal Rules of Civil Procedure and similar [systems]." That difference does not represent a contradiction or ambivalence in procedural policy. Rather, it reflects the relationship between rules of original procedure and rules of res judicata. Inasmuch as the former are now generally permissive, the latter are correspondingly restrictive."

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If at First You do Not Succeed: An Overview of Remedies Available in the United States Courts of Appeals

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In the United States federal court system, from a procedural standpoint, it has been the historic policy that appeals to the Courts of Appeal lie only from final decisions by the district courts. This policy, dubbed the final judgment rule, is designed to prevent a piecemeal approach to appellate practice, and to enhance efficiency and fairness. Applied overly strictly, the rule can often lead to unfair results, and even irreparable harm. This article catalogues the primary exceptions to the final judgment rule, and discusses those instances when interlocutory appeals may be taken short of district court rulings disposing of all issues as to all parties, that is, final judgments.

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1 Introduction

Being a trial court judge is an extraordinarily difficult and challenging job. Unlike their appellate brethren, who typically work in panels of three – at the intermediate appellate court level – or a group of nine – at the Supreme Court level – and who therefore can collectively work to share ideas and case load, the trial court judge, working as sole arbiter, is left to make decisions alone. Typically faced with an avalanche of cases and crushing dockets, and with too little support staff to offer meaningful assistance, these judges are overworked and often overwhelmed. They also must be legal jack-of-all-trades in the sense that presiding over cases filed in courts having broad jurisdiction they must deal with nearly every sort of civil case there is, not to mention criminal cases, at least in some courts. Furthermore, trial court judges, when presiding over trials, must rule on many difficult evidentiary issues instantaneously. While many legal issues coming before trial judges are routine, and do not require research, others are indeed very difficult, amorphous, and sometimes not informed by clear legal authority. Every working day, across the country, trial judges make thousands of decisions.

Some cases are disposed of quickly in the trial courts; others are not. Some are complex, involving protracted litigation with a multitude of pre-trial motions. Some trials, of course, are lengthy affairs, involving hundreds of exhibits, dozens of witnesses, complicated jury instructions, and legal issues that crop up that must be resolved by the trial judge in short order, often without the luxury of lengthy deliberations or supplemental briefing. As is the case with sports referees and officials, given the difficulty of their tasks, trial judges for the most part perform their jobs admirably, professionally, fairly, with great skill and aplomb, and are more often correct in their rulings than wrong. When they do make mistakes, many are harmless,[1] insignificant to the ultimate outcome of the litigation, and never are subject to review by an appellate court. On the other hand, some rulings are clearly wrong, have substantial significance on the outcome of the case, and require correction. Some rulings are at least arguably wrong, or involve matters of first impression, have importance to a wider public than merely the litigants before the court, and are so important that they must be reviewed by higher courts.

[1] Indeed, in the United States a harmless error is a ruling by a trial judge that, although mistaken, does not meet the burden for a losing party to reverse the original decision on appeal, or to warrant a new trial. This doctrine indeed is known as the harmless error rule.

The question becomes one of timing. Obviously, appeals courts cannot entertain review of every ruling made by their trial court brethren. If so, their dockets would be overwhelmed and cases would never get finally resolved. Justice delayed, goes the old saw, is justice denied. And, time is money. Furthermore, trial court judges are vested with substantial discretionary authority. This is rightly the case, as they are the judges closest to the action and they require a substantial degree of leeway in order to carry out their job as they deem fit, within the confines and parameters of the rules of course. Given this vast discretionary authority, and bearing in mind too that most interlocutory rulings made by trial court judges can be corrected as the case moves along through the adjudicative phase, the appellate courts cannot be in the position of overseeing and second-guessing every decision made by the lower court judges.

So as is the case in most areas of the legal system, a balance had to be struck. As will be discussed, there is a rich history that disdains a piecemeal approach to appellate practice. The preferred approach, in order to enhance efficiency and fairness, is to delay appeals until final judgment is entered as to all claims and all parties. This doctrine has a name in fact: *the final judgment rule*. This rule has a rich and glorious history dating to the infancy of the American judicial system. However, if rigidly applied, with no exceptions, the rule would wreak havoc and often result in irreparable harm to wronged litigants; an increase in litigation; more expensive litigation; and, ultimately waste and a disdain for the rule of law. But, the question is, how to fine-tune the final judgment rule so as to strike a fairer balance between competing goals and policy objectives

In order to temper the final judgment rule and harsh results that often would flow from it if there were no exceptions, the United States Congress has passed important legislation throughout the years allowing for exceptions to the final judgment rule, by authorizing appellate review of interlocutory orders emanating from the federal district courts.[2] This paper will discuss these exceptions.

[2] The United States has a vast judicial system. Under principles of federalism, as encapsulated in the United States Constitution, there is both a federal judiciary, that handles primarily federal matters, and a separate system of state courts.

The first section of the paper will provide an overview of the United States federal court judiciary. The bulk of appellate court activity is carried out by the courts of appeals.[3] Though obviously very important, beyond a brief description of the Supreme Court, this paper will focus on appeals taken from district court decisions to the courts of appeals. The paper then will discuss the final judgment rule. The balance of the paper will discuss the various methods for appellate review of interlocutory orders. In order, the paper will discuss trial court certifications under Civil Rule 54(b) in multi-party/claim cases; the collateral order doctrine as a method of appealing rulings prior to final judgment of all claims and parties; discretionary interlocutory appeals involving injunctions, relating to receivers, and decrees relating to admiralty cases under 28 U.S.C. §1292(a); discretionary interlocutory appeals under 28 U.S.C. §1292(b) – which is unique in its so-called "dual-gatekeeper" scheme; mandamus[4] as an avenue for interlocutory review in "exceptional" cases; appeals from orders granting or denying class-action certification under Civil Rule 23(f); miscellaneous situations when appeals are allowed prior to entry of final judgment; and finally, review of administrative determinations. The paper will then offer brief concluding remarks.

2 Overview of United States federal court system

The United States federal court system is comprised of a vast array of different courts. The basic structure has been in place since the late 1800's.[5] It consists of three tiers of courts with expansive civil, criminal, and bankruptcy jurisdiction:[6] (1) the trial-level district courts; (2) the appellate-level circuit courts of appeals;[7] and (3) the U.S. Supreme Court. Furthermore, Congress has established within the federal

[3] This is no slight to the US Supreme Court, itself a busy place. However, a detailed description of the work of that Court is beyond the scope of this paper.

[4] Pursuant to the Constitution of 1789, Congress has assumed, under the Necessary and Proper Clause, its power to establish inferior courts, its power to regulate the jurisdiction of federal courts, and its power to regulate the issuance of writs. Section 13 of the Judiciary Act of 1789 authorized the Supreme Court "to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." Mandamus is a judicial remedy in the form of an order from a court to any government, subordinate court, corporation, or public authority, to do (or to forbear from doing) some specific act which that body is obligated under the law to do (or refrain from doing), and which is in the nature of public duty, and in certain cases one of a statutory duty.

[5] See Judiciary Act of 1981, Act of March 3, 1891, ch. 517, 26 Stat. 826, commonly known as the Evarts Act or the Circuit Courts of Appeals Act.

[6] This paper will focus only on civil cases.

[7] This paper will largely focus on the circuit courts of appeals, since, for all intents and purposes, the vast majority of appeals from the district courts are heard here. The Supreme Court accepts less than one hundred cases a year for appeal.

judiciary a limited number of other courts with specialized, national jurisdiction, including the U.S. Court of International Trade, the U.S. Court of Federal Claims, and the U.S. Court of Appeals for the Federal Circuit.[8]

2.1 United States District Courts

There are 94 District Courts scattered throughout the country, with at least one district court in each state, and the District of Columbia. Four territories of the United States also have U.S. district courts that hear federal cases: Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands. Each district includes a U.S. bankruptcy courts as a unit of the district court. District courts are the federal system's trial courts; in European parlance, the courts of first instance. In the District Courts there are two types of federal judges: United States District Judges (confirmed by the Senate with life tenure); and United States Magistrate Judges[9] (appointed through a merit selection process for renewable, eight-year terms). There currently are 870 authorized district court judges. There currently also are 531 full-time Magistrate Judges in the district courts. When both sides to a civil case consent, magistrate judges are authorized to hear the entire dispute, rule on all motions, and preside at the trial.[10] Decisions by District Courts, although binding on the parties to that litigation, have no precedential effect; other district judges hearing similar cases are not bound by decisions made by other district judges.

[8] Congress has also created special courts outside the judiciary, including the U.S. Tax Court, the U.S. Court of Appeals for Veterans Claims, the military courts, and various bodies in the Executive branch presided over by administrative law judges.

[9] The Federal Magistrates Act of 1968 was enacted "to reform the first echelon of the Federal judiciary into an effective component of a modern scheme of justice." See H.R. Rep. No. 1629, 90th Cong., 2d Sess., 11 (1968). This statute created a large number of new judicial officers that would "cull from the ever-growing workload of the U.S. district courts matters that are more desirably performed by a lower tier" of federal judges. S. Rep. No. 371, 90th Cong., 1st Sess. 9 (1967).

[10] Magistrates are empowered to conduct a wide-range of activities in both civil and criminal cases. During the statistical year ended September 30, 2015, magistrate judges nationally disposed of 1,090,734 cases and proceedings. For an excellent discussion of the roles played by magistrate judges see McCabe, P. G. (2014) A Guide to the Federal Magistrate System: A White Paper Prepared at the Request of the Federal Bar Association, available at: www.fed.bar.org/wp-content/uploads/2019/10/FBA-White-Paper-2016-pdf-2 [accessed December 12, 2020]; see also Lee D. A., Davis T. E. (2016) "Nothing Less Than Indispensable": The Expansion of Federal Magistrate Judge Utilization in the Past Quarter Century, 16 NEV.L. J.

Combined filings in the U.S. District Courts for both civil cases and criminal defendants totaled 425,945 in 2020.[11] 332,732 of total filings involved civil cases.[12] Cases filed in the federal courts generally are of two types: those involving purely federal law or those arising from so-called diversity of citizenship (i.e., disputes between citizens of different states and/or between U.S. citizens and citizens of foreign nations, and where the amount in controversy exceeds the threshold limit of $75,000). In 2020, 140,812 of civil filings involved diversity of citizenship.[13] Many of those filings involved personal injury matters.[14] 148,976 of the civil filings involved federal questions.[15]

2.2 United States Circuit Courts of Appeals

There are thirteen U.S. Courts of Appeal. The 94 federal judicial districts are organized into 12 regional circuits, each of which has a court of appeals. There are eleven "numbered" circuits as well as the D.C. Circuit. These circuits are defined geographically. The 6th Circuit, for example, contains the following districts: the Eastern and Western Districts of Kentucky; the Eastern and Western Districts of Michigan; the Northern and Southern Districts of Ohio; and, the Eastern, Middle and Western Districts of Tennessee. The thirteenth court of appeal is the Court of Appeals for the Federal Circuit. This court has nationwide jurisdiction over certain types of appeals based on what the underlying legal case is about. A court of appeals hears challenges to district court decisions from courts located within its circuit, as well as appeals from decisions of federal administrative agencies. Additionally, the Court of Appeals for the Federal Circuit has nationwide jurisdiction to hear appeals in specialized cases, such as those involving patent laws, and cases decided by the U.S. Court of International Trade and the U.S. Court of Federal Claims. Federal circuit court judges are appointed for life and are paid approximately $179,500 annually.[16] At the age of 65, a federal judge may choose to retire with his or her full

[11] See Federal Judicial Caseload Statistics 2020, retrieved from: https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020 [accessed December 12, 2020].
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] See Ballotpedia, United States Court of Appeals, 2020, retrieved from https://ballotpedia.org/United_States_Court_of_Appeals [accessed December 12, 2020].

salary. Judges also may choose to go on senior status at age 65, if they have served actively for 15 years. There currently are 179 circuit court judges.[17]

The rules governing procedure in the court of appeals are the Federal Rules of Appellate procedure. In a Court of Appeals, an appeal is almost always heard by a panel of three judges. The judges are randomly selected from the available judges, including senior judges and judges temporarily assigned to the circuit. The American legal system, in the common law tradition, is based on precedent. Appeals court decisions, unlike trial court decisions, constitute binding precedent. This means that from the time a circuit court of appeals issues a decision, other courts in that circuit must follow that court's ruling in similar cases. However, other circuit courts are not bound by such a decision.

There was a total of 50,258 filings in the 12 regional courts of appeals in 2020.[18] Of that number, 27,500 (a little more than half) were appeals in civil cases.[19] In 2020 there were 6,356 appeals taken from administrative agency decisions.

2.3 The United States Supreme Court

Article III, Section 1 of the United States Constitution establishes the Supreme Court. The Constitution, while envisaging lower federal courts, left it to Congress to establish these, which it did through the Judiciary Acts. The Constitution states that the Supreme Court has both original and appellate jurisdiction. Its original jurisdiction is limited to cases involving disputes between the states or disputes arising among ambassadors and other high-ranking ministers. However, the vast majority of cases the Supreme Court hears are appeals from the Courts of Appeals.

The primary means to petition the Supreme Court for review is to ask it to grant a writ of certiorari. It is exceedingly difficult to obtain such a writ. Annually, the Court receives over 7,000 requests for review but grants writs in the range of 100 – 150.[20] The Court accepts for review only those cases involving issues holding national significance – typically social issues involving matters such as gun rights, religious rights, abortion – or to harmonize conflicting decisions in the federal Circuit courts.

[17] *Id.*
[18] See Federal Judicial Caseload Statistics 2020, found at uscourts.gov [accessed December 12, 2020].
[19] *Id.*
[20] See United States Courts, Supreme Court Procedures, available at: uscourts.gov [accessed December 12, 2020].

There are at present nine Justices that comprise the Court; one chief Justice and eight associate Justices. Nominated by the President then holding office when a vacancy arises, and upon the advice and consent of the Senate (only; not the House of Representatives), a Supreme Court Justice has life tenure. The Court has its own set of rules. According to its rules, four of the nine justices must vote to accept a case. Lower courts are obligated to follow precedent set by the Supreme Court. As of 2020, Associate Justices have a salary of $265,000 while the Chief Justice has a salary of $277,700.[21] A term of the Supreme Court begins, by statute, on the first Monday in October. Typically, Court sessions continue until late June or early July. The Term is divided between "sittings," when the Justices hear cases and deliver opinions, and intervening "recesses," when they consider the business before the Court and write opinions. Sittings and recesses alternate at approximately two-week intervals.[22]

3 The Final Judgment Rule

As a general proposition, from a procedural standpoint it has been the historic policy in the federal courts that appeals to the Courts of Appeal lie only from final decisions by the district courts. As the Supreme Court stated in *Andrews v. United States*[23] "The long-established rule against piecemeal appeals in federal cases and the overriding policy considerations upon which that rule is founded have been repeatedly emphasized by this Court. See*, e.g., DiBella v. United States, 369 U.S. 121; Carroll v. United States, 354 U.S. 394; Cobbledick v. United States, 309 U.S. 323*. The standards of finality to which this Court has adhered in habeas corpus proceedings have been no less exacting. See*, e.g., Collins v. Miller, 252 U.S. 364*. There, the Court said that the rule as to finality 'requires that the judgment to be appealable should be final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved.' 252 U.S. at 252 U.S. 370 (Wright, Miller, Cooper: Jurisdiction 2d §3906.)."

From a statutory standpoint, the final judgment rule, as it commonly referred to, had its origins in the Judiciary Act of 1789, and has been perpetuated ever since. The current Judicial Code gives the courts of appeals "jurisdiction of appeals from all

[21] *Id.*
[22] Supreme Court opinions, along with its docket and other interesting information can be found at the Supreme Court web page, supremecourt.gov [accessed December 12, 2020].
[23] 83 S.Ct. 1236, 1240, 373 U.S. 334, 340, 10 L.Ed.2d 383 (1963).

final decisions of the district courts…"[24] What exactly constitutes a final judgment? It has been said that "a 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[25] A judgment is final when it disposes of all claims, involving all parties to the action. Anything less is not a final judgment. The Supreme Courts has stated that a "final decision[n]" is typically one "by which a district court disassociates itself from a case."[26] The purpose of the final judgment rule is both to promote efficiency and prevent piecemeal appeals. A strict final judgment rule often "renders moot or nonprejudicial erroneous interlocutory decisions."[27] However, the Court has never been able to provide any iron-clad, red line definition of what actually constitutes a final judgment. While in the vast majority of cases it is clear when a judgment is indeed final, and hence ripe for appellate review, still the Court has readily acknowledged that "No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future."[28] As one authoritative treatise states, "The saving grace of the imprecise rule of finality is that in almost all situations it is entirely clear, either from the nature of the order or from the crystallized body of decisions, that a particular order is or is not final." (Wright, Kane, 2017 §109, p. 671).

[24] 28 U.S.C.A §1291. This statute applies both in civil and criminal cases; however, this paper is limited to a discussion of appellate remedies in civil disputes. It also is worth noting that in situations where a direct appeal lies to the Supreme Court, the appeal must be lodged there, and in such instances the courts of appeals lack jurisdiction to entertain the appeal. See *Donovan v. Richland County Ass'n for Retarded Citizens*, 102 S.Ct. 713, 454 U.S. 389, 70 L.Ed. 2d 570 (1982).

[25] *Catlin v. U.S.*, 65 S.Ct. 631, 633, 324 U.S. 229, 233, 89 L.Ed. 911 (1945); *see also*, *Lauro Lines S.R.L. v. Chasser*, 109 S.Ct. 1976, 1978, 490 U.S. 495, 497, 104 L.Ed.2d 548 (1989).

[26] *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995).

[27] Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code (1959) The Yale Law Journal, Vol. 69, p. 334, citing to *Perkins v. Endicott Johnson Corp.*, 128 F.2d 208, 212 (2d Cir. 1942), *aff'd*, 317 U.S. 501 (1943) ("Only the seriously prejudicial defects will be dignified by appellate attention [because] … many mistakes … will be seen to be trivial from the perspective of a final disposition of the case…."). A party may lose several interlocutory questions, but still win the law suit. *E.g., Countee v. United States*, 127 F.2d 761 (7th Cir. 1942) (defendant forced to proceed on erroneous burden of proof but won the case).

[28] *Eisen v. Carlisle & Jacquelin*, 94 S.Ct. 2140, 2149, 417 U.S. 156, 170, 40 L.Ed.2d 732 (1974).

4 Appellate Review of Interlocutory Orders

The final judgment rule eschews and is anathema to interlocutory appeals.[29] But as is true in most areas of the law, in order to avoid too harsh results, unfairness, prejudice, and sometimes irreparable harm to litigants, it often is necessary to temper rigid ideology with pragmatism. Over the years, the American federal judicial system has developed a set of appellate rules designed to strike an appropriate balance between, on the one hand, the efficiencies gained by adhering to the final judgment rule while, on the other hand, ameliorating the inevitable hardships that result from delaying immediate appeals.[30]

There are four primary avenues for appellate review of interlocutory orders in federal court that have been developed over the years: (1) certification of judgment under Rule 54(b) of the Federal Rules of Civil Procedure; (2) the collateral order doctrine; (3) discretionary certification under 28 U.S.C. §1292; and (4) a writ of mandamus under the All-Writs Act codified as 28 U.S.C. §1651 (2012). This article will discuss the principal procedural and substantive aspects of each of these four avenues in turn.

4.1 Judgment Upon Multiple Claims or Involving Multiple Parties

Prior to the adoption of the Federal Rules of Civil Procedure in 1938 [Civil Rules], a judgment was appealable only if it finally disposed of both all of the claims involved in the suit and all parties.[31] The Civil Rules, which abolished the strict rules of pleadings, greatly liberalized the joinder of parties and claims; simplified pleadings; and, greatly expanded the opportunity to conduct discovery. These mechanisms led to more multi-party and multi-claim suits. Consequently, it was no longer feasible or desirable to bar all appeals pending the final resolution of all claims and all parties. Civil Rule 54(b) was adopted in order to provide a mechanism for allowing

[29] See *Sierra Club v. March*, 907 F.2d 210, 212 (1st Cir. 1990) (as a general rule, "it has been a marked characteristic of the federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance." (Quoting *Director, O.W.C.P. v. Bath Iron Works Corp.*, 853 F.2d 11, 13 (1st Cir. 1988)). "'Interlocutory' in law, means not that which decides the cause, but that which settles some intervening matter relating to the cause." *Taylor v. Breese*, 163 Fed. 678, 684 (4th Cir. 1908).

[30] See *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152-53 (1964) (explaining that the finality rule requires the balancing of the competing considerations of "the inconvenience and costs of piecemeal appeal review on the one hand and the danger of denying justice and delay on the other" (quoting *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950)).

[31] *Collins v. Miller*, 40 S.Ct. 347, 252 U.S. 364, 64 L.Ed 616 (1920).

immediate appeals in situations where fewer than all parties or claims are resolved and where principles of fairness and justice dictate that an immediate appeal of such claims should be permitted. The purpose of the rule is to permit the entry of judgments upon one or more but fewer than all the parties in an action involving more than one claim or party. Currently, the rule reads as follows. "When an action presents more than one claim for relief – whether as a claim, counterclaim, crossclaim, or third-party claim – or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." By virtue of this provision, a partial disposition of a case is not final until and unless the court issues what is called a Civil Rule 54(b) certification (Wright, Miller and Kane: Civil 4th §2654). This salutary provision is of the utmost importance, since it places litigants clearly on notice of when an order is only interlocutory, so that a party need not appeal, and when the order is final, so that it must. Given the importance of Civil Rule 54(b), a few other issues of importance are discussed in the next subsection.

4.1.1 Further Commentary on Civil Rule 54(b) Certifications

It is critical to note that in the absence of the district court judge issuing the necessary certification, a partial disposition of the case is not final. It should also be noted that while the district court judge is given substantial deference as to the question of whether there was no just reason for delaying appeal on a given issue, still the reviewing court may reverse that ruling, dismiss the appeal, and remand the case in situations where the reviewing court concludes that the trial judge's conclusion in weighing the equities was clearly unreasonable (Wright, C.A; Miller A.R; Kane, M.K. Civil 4th §2659).[32] Whether a complaint actually presents multiple claims can present complex questions, which is why reviewing courts give such deference to trial judges, who are in a superior position to make such calls. "If the complaint presents only variants of a single claim, appeal cannot be taken from an order dealing with some

[32] See also *Curtiss-Wright Corp. v. General Elec. Co.*, 100 S.Ct. 1460, 446 U.S. 1, 64 L.Ed.2d 1 (1980).

of these variants, even though the order has been duly certified. The determination of whether there are multiple claims rests on whether the underlying factual bases for recovery state a number of different claims, not mutually exclusive, that could have been separately enforced (Wright, Kane, 2017: §101, p. 672)."[33]

To be appealable in a case falling within the parameters of Civil Rule 54(b), it is mandatory that the district judge include the requisite certificate in the judgment. The failure to do so will lead the Court of Appeals to dismiss the appeal for lack of jurisdiction.[34] Of course, in a situation where the District Court orders judgment on all claims and all parties, such that the case does not fall within the ambit of Civil Rule 54(b), then such a certificate is not required and an appeal must be taken without it.[35]

4.2 The Collateral Orders Doctrine

There are a small class of orders, secondary or subordinate to the principal litigation, that are appealable immediately after they are issued, irrespective of the status of the main litigation. These are known as collateral orders and might be viewed as an exception to the final judgment rule. In *Cohen v. Beneficial Industrial Loan Corporation*[36]defendant, in a stockholders' suit, unsuccessfully moved for an order for security for costs. The Supreme Court held the order was immediately appealable, stating such an order fell within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated….We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration of it."[37]

The First Circuit, in *U.S. v. Alcon Labs.*,[38] summarized the elements required for the collateral orders appealability doctrine to apply as "separability, finality, urgency, and importance." In *Coopers & Lybrand v. Livesay*[39] the Supreme Court held that a ruling

[33] And cases cited therein at fns. 18-19.
[34] See *Borne v. A & P Boat Rentals No. 4*, Inc., 755 F.2d 1131 (C.A.5th 1985).
[35] *Shafer v. Children's hosp.* Soc'y of Los Angeles, 265 F.2d 107 (C.A.D.C. 1959).
[36] 69 S.Ct. 1221, 337 U.S. 541, 93 L.Ed. 1528 (1949).
[37] 69 S.Ct. at 1225-1226, 337 U.S. at 546-547.
[38] 636 F.2d 876, 884 (C.A. 1st 1981), certiorari denied 101 S.Ct. 3005, 451 U.S. 1017, 69 L.Ed.2d 388.
[39] 98 S.Ct. 2454, 437 U.S. 463, 57 L.Ed.2d 351 (1978).

holding that a matter could not proceed as a class action did not fall under the collateral orders doctrine, and hence the ruling was not immediately appealable. The Court noted that the trial court's ruling was not final, as the trial court had the option to reconsider its ruling as the case proceeded and that the question of whether the case was suitable for class certification was intertwined with the underlying facts being litigated. Further, the issue could effectively be reviewed after final judgment by any party involved in the litigation. More specifically, the Court held: "To come within the 'small class' of decisions excepted from the final-judgment rule by Cohen, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment."[40]

In the case of *Firestone Tire & Rubber Co. v. Risjord*[41] the Supreme Court held, in the context of a civil action, that a lower court ruling refusing to disqualify opposing counsel was not appealable, under the third prong of the Coopers & Lybrand test, as the Court concluded that the ruling could effectively be reviewed after final judgment. In a series of fairly high-profile political cases, the Supreme Court has held that rulings by the trial court denying claims of immunity from prosecution satisfy the three-part test since, an immunity defense is irrevocably destroyed if a case is erroneously permitted to proceed to trial.[42]

In *Mohawk Industries, Inc. v. Carpenter*[43] a party moved to have certain information placed under seal, asserting the attorney-client privilege. The trial court denied the motion, rejecting the claim of confidentiality. The moving party sought an immediate appeal under the collateral order doctrine, but the Supreme Court reject6ed the appeal, holding that the question of privilege could be reviewed effectively at the end of the case: "In our estimation, post judgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege. Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by

[40] 98 S.Ct. at 2458, 437 U.S. at 468.
[41] 101 S.Ct. 669, 449 U.S. 368, 66 L.Ed.2d 571 (1981).
[42] See *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 556 U.S. 662, 173 L.Ed.2d 868 (2009) (qualified immunity meets the standard if it turns on an issue of law and the court reviewing the denial can pass on the sufficiency of plaintiff's complaint); *Mitchell v. Forsyth*, 105 S. Ct. 2806, 472 U.S. 511, 86 L.Ed.2d 411 (1985) (qualified official immunity*); Nixon v. Fitzgerald*, 102 S.Ct. 2690, 457 U.S. 731, 73 L.Ed.2d 349 (1982) (absolute official immunity).
[43] 130 S.Ct. 599, 558 U.S. 100, 175 L.Ed.2d 458 (2009).

vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence."[44]

The Court reasoned that in applying the doctrine, "we have stressed that is must 'never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered.'"[45] The Court went on to reason that its ruling "reflects a healthy respect for the virtues of the final-judgment rule. Permitting piecemeal, prejudgment appeals, we have recognized, undermines 'efficient judicial administration', and encroaches upon the prerogatives of district court judges, who play a 'special role' in managing ongoing litigation.'"[46] In sum, said the Court, "The justification for immediate appeal must therefore be sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes."[47]

4.3 Discretionary Interlocutory Appeals under 28 U.S.C. §1292

4.3.1 Discretionary Review Regarding Injunctions, Receiverships, Admiralty Cases 28 U.S.C. §1292(a)

There are three statutory situations in which the courts of appeals have jurisdiction to review interlocutory orders of the district court. Each arises under 28 U.S.C. §1292. The first deals with injunctions and provides that "**(a)** Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from: **(1)** Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District of Guam, and the District of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."

28 U.S.C. §1292 (a)(2) provides that courts of appeals have jurisdiction to review interlocutory orders of the district court appointing receivers or refusing orders to

[44] *Id.*
[45] *Id.,* quoting in part from *Digital Equipment Corp. v. Desktop Direct*, Inc., 511 U.S. 863, 868 (1994).
[46] *Id.*, quoting in part from *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981); *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 436 (19850) ("[T]he district judge can better exercise [his or her] responsibility [to police the prejudgment tactics of litigants] if the appellate courts to not repeatedly intervene to second-guess prejudgment rulings").
[47] *Id.*

wind up receiverships or to take steps to accomplish purposes of a receivership, such as directing sales or other disposals of property.

Finally, under 28 U.S.C. §1292 (a)(3) the courts of appeals have jurisdiction to review interlocutory decrees determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

A statute enacted in 1992 authorizes the Supreme Court to prescribe rules to provide for an appeal of an interlocutory decision that is not provided for in any of the three specific categories described in the preceding paragraphs. The Supreme Court utilized this statute in 1998 when it amended Civil Rule 23, concerning class actions, by adding subdivision (f) thereto. Under this provision, a court of appeals, at its discretion, may permit an appeal from an order either granting or denying class-certification. The rule is silent in terms of criteria that might inform the appellate court on when to accept appellate review from such an order and, accordingly, courts of appeal can establish those criteria they find appropriate to support granting interlocutory review.[48]

In Bodinger[49] the Supreme Court, in explaining the rationale of the various statutory exceptions from the long-standing and usual requirement of finality, stated that they "seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequence. When the pressure rises to a point that influences Congress, legislative remedies are enacted."

Regarding injunctions, orders either granting or denying permanent injunctions are appealable as a matter of right.[50] While orders either granting or denying preliminary injunctions are appealable,[51] at least traditionally orders involving temporary

[48] See *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288 (C.A.1st, 2000) (the court observed that the advisory committee's note accompanying Rule 23(f) states that "[t}he court of appeals is given unfettered discretion whether to permit the appeal." Relying on *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir. 1999), the Mowbray court concluded that if an of the following three factors exist, the appellate court should ordinarily exercise its discretion under Civil Rule 23(f) and permit appellate review: (1) when denial of class status effectively ends the case; (2) when the grant of class status raises the stakes of the litigation so substantially that the defendant likely will feel irresistible pressure to settle; (3) an appeal will lead to clarification of a fundamental issue of law. See *id.*, at 834-35.

[49] *Baltimore Contractors v. Bodinger*, 75 S.Ct. 249, 252, 348 U.S. 176, 181, 99 L.Ed. 233 (1955).

[50] *U.S. v. Bayshore Assocs.*, 934 F.2d 1391, 1395-1396 (C.A.6th, 1991); *EEOC v. Kerrville Bus Co.*, 925 F.2d 129, 132 (C.A.5th, 1991).

[51] *Deckert v. Independence Shares Corp.*, 61 S.Ct. 229, 311 U.S. 282, 85 L.Ed. 189 (1940).

restraining orders are not.[52] However, there have been recent cases that tend not to look merely at the label given to the order in determining whether an appeal should be allowed. According to this line of cases, the grant of appellate review is warranted even in the case of temporary restraining orders in situations where there is a strong showing of irreparable harm if immediate appellate review is denied.[53]

4.3.2 The Demise of the Enselow-Ettelson Doctrine

An interesting issue that has arisen with some degree of regularity is whether a district court order denying a motion to stay or dismiss an action when a similar suit is pending in state court is immediately appealable under either §1291 or §1292(a)(1). The Supreme Court resolved this issue in *Gulfstream Aerospace Corporation v. Mayacamas Corporation.*[54] Gulfstream sued Mayacamas in state court for breach of contract. Mayacamas did not exercise its option/right to remove the action to federal court but instead, one month later, filed a diversity action against Gulfstream in federal district court for breach of the same contract. Gulfstream moved the district court for an order to stay or, in the alternative, to dismiss the action before it, but the district judge denied the requests, finding that the facts of the case fell short of those necessary to justify the requested discontinuance under *Colorado River Water Conservation Dist. v. United States*,[55] which held that, in "exceptional" circumstances, a district court may stay or dismiss an action because of similar state-court litigation. The Court of Appeals dismissed Gulfstream's appeal for lack of jurisdiction, holding that neither 28 U.S.C. §1291, which provides for appeals from "final decisions" of the district courts, nor §1292(a)(1), which authorizes appeals from interlocutory orders granting or denying injunctions, allowed an immediate appeal from the district court's order.[56] The Court of Appeals also declined to treat Gulfstream's notice of appeal as an application for a writ of mandamus under the All Writs Act.[57]

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[52] *In re Chapman*, 895 F.2d 490, 492 (C.A.8th, 1990); see also 16 Wright, C.A; Miller, A. R; Cooper, E.H. Jurisdiction 3d, §3922.1 n. 4 and cases cited therein.
[53] See *e.g., Doe v. Village of Crestwood*, 917 F.2d 1476, 1477 (C.A.7th, 1990); *Religious Technology Center v. Scott*, 869 F.2d 1306, 1308-1309 (C.A.9th, 1989).
[54] 108 S.Ct. 1133, 485 U.S. 271, 99 L.Ed.2d 296 (1988).
[55] 96 S.Ct. 1236, 424 U.S. 800, 47 L.Ed.2d 483 (1976).
[56] See 806 F.2d 928 (C.A. 9th Cir. 1986).
[57] The so-called extraordinary writs of mandamus and prohibition are additional avenues of immediate appeal and will be discussed later in this paper.

The Supreme Court held that a district court order denying a motion to stay or dismiss an action when a similar suit is pending in state court is not immediately appealable under either §1291 or §1292(a)(1).[58] The Court reasoned that since the order in question did not end the litigation, but instead only ensured that it would continue in the district court, it was not appealable under §1291. Further, the order failed to fall within the collateral-order exception to §1291 because it did not satisfy the exception's "conclusiveness" requirement since it was inherently tentative and not made with the expectation that it would be the "final word" on the subject addressed. Given both the nature of the factors to be considered under the Colorado River case and the natural tendency of courts to attempt to eliminate matters that need not be decided from their dockets, a district court usually will expect to revisit and reassess an order denying a stay in light of events occurring in the normal course of litigation.[59]

Additionally, the Court concluded that since the order in question related only to the conduct or progress of litigation before the district court, it could not be considered an injunction appealable under §1292(a)(1). Furthermore, Gulfstream's claim that the order was appealable pursuant to the doctrine previously announced in the cases of *Enelow v. New York Life Ins. Co.*,[60] and *Ettelson v. Metropolitan Life Ins. Co.*,[61] under which orders granting or denying stays of "legal" proceedings on "equitable" grounds were considered to be immediately appealable injunctions, was rejected. The Supreme Court overruled the so-called Enelow-Ettelson doctrine because, in the Court's view, that doctrine was based on outmoded procedural differentiations and produced arbitrary and anomalous results in modern practice.[62] Justice Marshall wrote that the Enelow-Ettelson rule "is unsound in theory, unworkable and arbitrary in practice, and unnecessary to achieve any legitimate goals."[63] However, denial of an express request for an injunction is appealable, and appeal also can be taken if an order has the practical effect of granting or denying an injunction and threatens serious, perhaps irreparable consequence.[64]

[58] 485 U.S. at pp. 275-288.
[59] *Id.* at pp. 275-288.
[60] 55 S.Ct. 310, 293 U.S. 379, 79 L.Ed. 440 (1935).
[61] 63 S.Ct. 163, 317 U.S. 188, 87 L.Ed. 176 (1942).
[62] *Gulfstream v. Mayacamas*, 485 U.S. at pp. 279-288.
[63] 108 S.Ct. at 1140, 485 U.S. at 283.
[64] 108 S.Ct. at 1142-1143, 485 U.S. at 287-288.

The Court also concluded that Gulfstream had failed to satisfy its burden of showing that the district court's refusal to order a stay or dismissal of the suit before it constituted an abuse of discretion sufficient to warrant the extraordinary remedy of mandamus in the Court of Appeals. Further, the Court rejected Gulfstream's assertion that a party's decision to spurn removal and bring a separate federal-court suit invariably constitutes "exceptional" circumstances warranting stay or dismissal under the Colorado River doctrine.[65]

4.3.3 Discretionary Interlocutory Appeals Under 28 U.S.C. § 1292(b)

4.3.3.1 Text of Statute and Preliminary Considerations

The system of interlocutory review in federal court civil appeals underwent a major change with the passage of the Interlocutory Appeals Act of 1958.[66] This Act greatly modified and expanded the federal final judgment rule. The Judicial Conference of the United States recommended this statute as "a compromise between those who opposed any broadening of interlocutory review and those who favored giving the appellate courts discretion to entertain any interlocutory appeal they wished regardless of certification by the trial judge (Wright, Kane, 2017: §102, p. 683)."[67] The statute provides as follows: "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for any appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."[68]

[65] *Id.* at pp. 288-290.
[66] 28 U.S.C. §1292(b) (1958).
[67] Citing *Gottesman v. General Motors Corp.*, 268 F.2d 194, 196 (C.A.2d 1959).
[68] 28 U.S.C. §1292(b).

At the outset it is important to note that this statute does not supplant the various methods of securing interlocutory review addressed above; instead, the statute supplements them. It also should be noted that there could be interlap over when §1292(b) and Civil Rule 54(b) might be used. In that regard, Wright and Kane contend that "Although it is preferable to use Rule 54(b) rather than §1292(b) in those cases within the rule, an order that disposes of fewer than all of the parties or claims is interlocutory in the absence of a Rule 54(b) certificate. Thus, it is within the terms of the statute, and the appellate court can take the case if a §1292(b) certificate is made (Wright, Kane, 2017: §102, p. 684)."[69]

One of the most noteworthy aspects of this statute is that it requires both the district judge and court of appeals to agree to the appeal.[70] In other words, unlike interlocutory appeals sought under §1292(a) pertaining to injunctions, receivers and receiverships, and admiralty decrees, which can be taken as a matter of right, §1292(b) is discretionary, and in a dual fashion, as both the district judge and majority of the court of appeals must agree to hear the interlocutory appeal.[71] The statute does not set any time limit for when a party must seek certification from the district court judge, and the courts have not wholly agreed on when such a motion might come too late.[72] While some commentators believe district judges should have some degree of flexibility in terms of when to grant certification, based on the specifics of the case, other courts have held that unreasonable delay, or inexcusable dilatory requests, are grounds for denial of certification (Wright, 1991: §3929, 464-65)[73] The cautious practitioner is well-advised to move for certification sooner rather than later

[69] Citing, *DeMelo v. Woolsey Marine Indus*., Inc., 677 F.2d 1030 (C.A. 5th 1982); *Local P-171, Amalgamated Meat Cutters & Butcher Workmen of N. America v. Thompson Farms Co*., 642 F.2d 1065, 1069 n. 4 (C.A. 7th 1981); *Sass v. District of Columbia*, 316 F.2d 366 (C.A.D.C. 1963); and cases cited in Wright, C.A; Miller, A. R; Cooper, E.H. Jurisdiction 3d §3922.1 n. 34.

[70] See *Heddendorf v. Goldfine*, 263 F.3d 9 (9th Cir. 1959).

[71] *Heddendorf v. Goldfine*, 263 F.2d 887, 888 (1st Cir. 1959); see also *Armstrong v. Wilson*, 124 F.3d 1019, 1021 (9th Cir. 1997) (noting that interlocutory appeal under Section 1292(b) is by permission while interlocutory appeal under Section 1292(a) is by right).

[72] Some courts have denied certification in instances where the motion was not made for several months after the underlying order was issued. See *e.g., Scanlon v. M.V. Super Servant 3*, 429 F.3d 6,8 (1st Cir. 2005) (district court denied as untimely motion to amend to certify an interlocutory appeal filed more than four months after order issued); *Hypertherm, Inc. v. Am. Torch Tip Co*., No. 05-373, 2008 WL 1767062, at *1 (D.N.H. Apr. 15, 2008) (certification denied as untimely when five months had passed since underlying order had issued).

[73] Charles Alan Wright *et. al,* argue some "flexibility" should be given to the district judge in terms of when to certify an order because "[t]he wisdom of certification may extend in unexpected directions and that what is most important is the soundness of the certification at the time it is made, not an inquest into the comparative desirability of a vanished opportunity for earlier appeal." But some courts have disagreed. See *e.g.*, *Weir v. Propst*, 915 F.2d 282, 287 (7th Cir. 1990) (finding abuse of discretion when district court allowed motion to amend interlocutory order three months after the order was entered and no showing of any reason for delay).

in order to circumvent the possibility of having certification denied on the ground of dilatoriness.

It also is important to bear in mind that §1292(b) is separate and distinct from Civil Rule 54(b), which as discussed earlier, provides an avenue for permitting appeals for final judgments in multiple party/claims cases. As stated by Wright and Miller, "Rule 54(b) cannot be used to enter judgment on deciding claims closely related to claims that remain, in an effort to curtail the scope of appellate discretion as to interlocutory appealability, [n]or should §1292(b) be used on final disposition of a separate matter when there is no substantial ground for difference of opinion as to a controlling question whose present disposition will materially advance ultimate disposition of the case." (Wright, 1991: §3929, 477-78) Courts have held that district judges should not evade their exercise of discretion under §1292(b) by inappropriately entering judgment under Civil Rule 54(b) instead.[74] If the district judge agrees to certify the order, the party has ten days to file a petition with the appeals court.[75]

The appellate courts have held that §1292(b) should be used sparingly "and only in exceptional circumstances and where the proposed intermediate appeal presents one or more difficult and pivotal questions of law not settled by controlling authority."[76] There even are some cases which have held that it should be restricted only to protracted, drawn out cases including anti-trust or conspiracy cases, and eschewed in "ordinary litigation."[77] In any event, the dual gatekeeping function of the rule dictates that both district court judges and their court of appeals counterparts have separate discretion in whether to allow interlocutory appeals under this statute. It is the standards that underlie that discretion that we shall turn to next.

[74] See *Spiegel v. Trs. Of Tufts Coll.*, 843 F.2d 38, 46 (1st Cir. 1988) (holding that interrelationship between an adjudicated and un-adjudicated claim established that the district judge erred in entering judgment under Civil Rule 54(b) and observing that discretion of the appeals court to determine under 1292(b) cannot be so evaded).
[75] Fed. R. App. P 5(a)(2).
[76] See *Heddendorf v. Goldfine*, 263 F.2d 887, 888 (1st Cir. 1959) (quoting *Kroch v. Texas Co.*, 167 F. Supp. 947, 949 (D.C.S.D.N.Y. 1958)) (Section 1292(b) "should be used sparingly and only in exceptional cases)".
[77] *Cummins v. EG & G Sealol, Inc.*, 697 F. Supp. 64 (D.R.I. 1988) (citing *Fisons Limited v. United States*, 458 F.2d 1241, 1245 n.7 (7th Cir. 1972)).

4.3.3.2 First Criterion: Controlling Question of Law

First, it is immediately apparent from the text of Section 1292(b) that it does not have applicability to all cases that come before district judges. The statute does not apply, for example, to appeals of orders in criminal cases.[78] The statute does apply, however, to grand jury proceedings[79] up until such a time as formal charges are brought against the accused.[80] The statute also applies in a criminal action that has essential civil characteristics, such as an order regarding the return of monies deposited into a court registry.[81] Various courts have otherwise held that certain proceedings are essentially hybrid civil/criminal matters and fall within the ambit of the statute.[82]

For an order of the district judge to qualify as one he can certify as interlocutory under Section 1292(b) there are three criteria that must be satisfied. There must be (1) a "controlling question of law," (2) over which there is a "substantial ground for difference of opinion," and (3) an immediate appeal will "materially advance the ultimate termination of the litigation..." We shall consider each of these criteria in turn.

To constitute a "controlling question of law" the issue on appeal must be "serious to the conduct of the litigation either practically or legally"[83] and should materially advance the termination of the case.[84] Some courts have looked to whether the issue is pivotal or highly important, not only in the case at hand, but more broadly in the substantive area in dispute, to the public and to future litigation involving other litigants.[85] The issue certified must involve pure question of law, and not matters that lie within the sole discretion of the district judge.[86] As articulated by leading

[78] *United States v. Pace*, 201 F.3d 1116, 1119 (9th Cir. 2000), *United States v. Selby*, 476 F.2d 965, 967 (2d Cir. 1973).
[79] *In re Grand Jury Proceedings*, 580 F.2d 13, 17 (1st Cir. 1978).
[80] *Post v. United States*, 161 U.S. 583, 587 (1896).
[81] *United States v. Beach*, 113 F.3d 188, 189 n.3 (11th Cir. 1987).
[82] See *e.g. Bonnell v. United States*, 483 F. Supp. 1091, 1092-93 (D. Minn. 1979) (holding that grand jury proceedings are "hybrid" civil and criminal proceedings and fall within "civil action" intention of §1292(b)).
[83] *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974) (citing *Hearing on H.R. 6238, before Subcomm. No. 3 of the H. Comm. On the Judiciary*, 85th Cong., 2d Sess. 2 (1958), reprinted in 3 U.S.C.C.A.N. 5256 (1958)).
[84] See *Bank of New York v. Hoyt*, 108 F.R.D. 184, 188 (D.R.I. 1985) ("[A] legal question cannot be controlling if litigation would be conducted in much the same manner regardless of the disposition of the question upon appeal.").
[85] See *e.g. Greenwood Trust Co. v. Commonwealth of Mass.*, 971 F.2d 818, 821 (1st Cir. 19920 (holding that "in light of the pivotal importance and broad commercial consequences of the question, we accepted certification.").
[86] See *e.g. United Airline inc. v. Gregory*, 716 F. Supp. 2d 79, 91 (D. Mass. 2010); *White v. Nix*, 43 F.3d 374, 377-378 (8th Cir. 1994) (discovery order); *Herold v. Braun*, 671 F.Supp. 936 (D.C.N.Y. 1987) (discovery sanctions).

commentators, "Ordinarily a district court should refuse to certify such matters, not only because of the low probability of reversal, but also because the recognition of discretion results from a studied determination that appellate courts should not generally interfere. But the key consideration is not whether the order involves the exercise of discretion, but whether it truly implicates the policies underling §1292(b) (Wright and Kane, 2017: §102, p. 684)."[87]

Some courts have held that a controlling question of law is one that "the court of appeals [can] decide quickly and cleanly, without reviewing the record."[88] It also has been held that a reversal of the district judge's ruling that would either terminate the action or, at the least, significantly alter or lessen the scope of the case upon return of the matter to the district court, would be sufficient to constitute a controlling question of law.[89]

4.3.3.3 Second Criterion: Substantial Grounds for Difference of Opinion

The second requirement is that there must be "substantial grounds for difference of opinion" about the controlling question of law. One court held this means that there must be "one or more difficult and pivotal questions of law not settled by controlling authority."[90] A question arises as to whether this criterium is not met when there is clear precedent in the circuit court that has jurisdiction, but where other circuits adhere to differing views on the issue at hand. Although at least one court has held that certification under this prong is not appropriate and that certification therefore should be denied when the question is governed by clear precedent in its own circuit, even though five other circuits held to a contrary view,[91] a respected treatise states "The better view, however, is that a clear ruling in the local circuit is a strong reason for not certifying, but that this is cannot be dispositive. (Wright, Kane, 2017: §102, p. 685)."[92] Weigand (Weigand, 2014: p. 205-206)[93] states that "When the difference

[87] And cases and authorities cited in n. 110 therein.
[88] *Ahrenholtz v. Bd. of Tr. of Univ. of Illinois*, 219 F.3d 674, 676-77 (8th Cir. 2000).
[89] See *Arizona v. Ideal Basic Indust.*, 673 F.2d 1020, 1026 (9th Cir. 1982) (stating that all that must be shown in order for a question to be controlling is that resolution of the issue on appeal could materially affect the outcome of the litigation in the district court); *Bank of New York v. Hoyt*, 108 F.R.D. 184, 188 (D.R.I 1995) (defining "controlling" to mean "serous to the conduct of the litigation, either practically or legally").
[90] *Phillip Morris, Inc. v. Harshbarger*, 957 F. Supp. 327, 330 (D. Mass. 1997).
[91] *Berger v. U.S.,* 170 F.Supp. 795 (D.C.N.Y. 1959).
[92] Citing *Giglio v. Farrell Lines, Inc.*, 424 F. Supp. 927 (D.C.N.Y. 1977); *Corabi v. Auto Racing, Inc.*, 264 F.2d 784 (3rd Cir. 1959) (appeal allowed where other circuits held a contrary view to that of court allowing appeal on controlling question of law).
[93] Fns. 124-129 and authorities collected therein.

of opinion is substantial, there is usually significant uncertainty and conflict presented in the case law, 'marked room for varying opinion,' confusion, or a question of first impression. Some courts have noted that the 'touchstone' of the substantial ground prong is the likelihood of success on appeal.' This has been tempered by some courts to the extent that 'the purpose of the appeal is not to review the correctness of an interim ruling, but rather to avoid harm to litigants or to avoid unnecessary or repeated protracted proceedings.'"

Weigand[94] adds that "Additionally, a number of courts have noted that 'novelty' is not enough and that 'the issue must relate to the actual legal principle itself, not the application of that principle to a particular set of facts.' As such, Section 1292(b) certification does not necessarily arise when 'a court is called upon to apply a particular legal principle to a novel fact pattern.' Similarly, certification has been rejected where the argument for certification is reduced to the contention that the court misapplied settled law."

4.3.3.4 Third Criterion: Materially Advance the Termination of Litigation

Finally, the district judge must be of the view that immediate appeal "may materially advance the ultimate termination of the litigation." Interlocutory review under the statute has therefore been denied in situations where appeal was sought from orders dealing with sufficiency of pleadings, in view of the fact Civil Rule 15 permits liberal amendments, prior to, during, and even after trial.[95] There are other cases holding that this prong is be satisfied when the case must proceed to trial against other parties, even if the challenged ruling is likely wrong.[96] Wright and Kane (Wright and Kane, 2017: §102, p. 685)[97] sum up this criterion in the following terms "Generalizing from this statutory language, and from the legislative history of the statute, three is a good deal of authority for the proposition that §1292(b) should not be used in 'run-of-the-mill' cases and is intended for 'exceptional cases' in which appeal may avoid 'protracted and expensive litigation.' The Fifth Circuit, however, has expressly disapproved statements from other courts calling for a strict construction of §1292(b), or suggesting that it should be restricted to exceptional

[94] *Id*., at p. 208, fns. 137-139 and authorities collected therein.
[95] *City of Burbank v. General Elec*, Co., 329 F.2d 825 (9th Cir. 1964); *Urbach v. Sayles*, 779 F.Supp. 351, 364-365 (D.C.N.J. 1991). See also Civil Rule 15.
[96] *Bowling Machines, Inc., v. First Nat. Bank of Boston*, 283 F.2d 39 (1st Cir. 1960).
[97] Fns. 115-117 and authorities collected therein.

cases, though in later cases it has taken a narrower view of when the statute it properly used."

As previously noted, in cases where the district judge is satisfied that the criteria of Section 1292(b) have been met, the judge must state this in writing in his order and then within ten days of entry of the order the party wishing to appeal must also petition the court of appeals, again asking for leave to appeal. The court of appeals has discretion whether to permit the appeal and may deny the appeal for any reason.[98] In situations where the appellate court accepts review, it is free to consider any issue subsumed within the order being appealed, not just the question(s) the district judge has certified for appeal.[99]

4.4 Mandamus as Avenue for Interlocutory Review

Mandamus is another distinct avenue for seeking immediate appellate review of a district judge's order in the absence of a final judgment. Mandamus, however, has been described as a "drastic and extraordinary" remedy reserved for exceptional circumstances when the district court has committed a clear abuse of discretion or otherwise usurped its power.[100] The Supreme Court in *Will v. United States*[101] stated that, seldom granted, mandamus is one of "the most potent weapons in the judicial arsenal." While the precise standards for when a grant of a writ of mandamus should issue are somewhat amorphous, in *Cheney*[102] the Supreme Court stated that a petitioner must demonstrate that there is "no other adequate means to attain the relief he desires," that the right to the relief sought is "clear and indisputable" and that the writ is otherwise "appropriate under the circumstances."

It should be noted, therefore, that ordinarily if Section 1292(b) provides an avenue for interlocutory review, mandamus will not be available, since the statute provides an adequate means to obtain appellate relief. In the case of *In re Ford Motor Company*[103]

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[98] *Digital Equip. corp. v. Desktop Direct, Inc.*, 114 S.Ct. 1992, 2004 n. 9, 511 U.S. 863, 883 n. 9, 128 L.Ed.2d 842)1994); *Coopers & Lybrand v. Livesay*, 98 S.Ct. 2454, 2461, 437 U.S. 463, 475, 57 L.Ed.2d 351 (1978).
[99] *Yamaha Motor Corp., U.S.A. v. Calhoun*, 116 S.Ct. 619, 623, 516 U.S. 199, 205, 133 L.Ed.2d 578 (1996).
[100] *Cheney v. U.S. District Court for District of Columbia*, 124 S.Ct. 2576, 542 U.S. 367, 159 L.Ed.2d 459 (2004) (appellate court erred in not granting mandamus to review district court orders permitting discovery against Vice President and other senior officials in the Executive Branch).
[101] 88 S.Ct. 269, 389 U.S. 90, 107, 19 L.Ed.2d 305 (1967).
[102] 542 U.S. at 380-81.
[103] 344 F.3d 648, 654 (7th Cir. 2002).

the Seventh Circuit observed that litigants cannot circumvent the dual-gatekeeper structure set forth in Section 1292(b) by petitioning for a writ of mandamus to direct a district court judge to certify an order for appeal under that statute. "If someone disappointed in the district court's refusal to certify a case under §1292(b) has only to go to the court of appeals for a writ of mandamus requiring such a certification, there will be only one gatekeeper, and the statutory system will not operate as designed." On the other hand, in situations where a party moves for certification under Section 1292(b) and the request is denied, the aggrieved party may then pursue a mandamus petition, not for the purpose of compelling a Section 1292(b) certification, but rather to review the substance of the underlying order being challenged.[104]

In *Parr v. U.S.*[105] the Supreme Court summed up the doctrine in the following terms, "Such writs may go only in aid of appellate jurisdiction. 28 U.S.C.A. §1651. The power to issue them is discretionary and it is sparingly exercised. This is not a case where a court has exceeded or refused to exercise its jurisdiction, see Roche v. Evaporated Milk Ass'n, 63 S.Ct. 938, 941, 319 U.S. 21, 26, 87 L.Ed 1185, nor one where appellate review will be defeated if a writ does not issue, cf. *Maryland v. Soper*, 46 S.Ct. 185, 189, 270 U.S. 9, 29-30, 70 L.Ed. 449. Here the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction. The extraordinary writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals."

There are cases, however, where appellate courts have concluded that it would be futile for a litigant to seek certification under Section 1292(b), based on the district judge's prior refusal to reconsider decisions or certify orders for appeal, and therefore have not required Section 1292 (b) certification as a pre-condition for seeking mandamus.[106]

The Supreme Court had held a number of times that mandamus is an appropriate remedy to require a jury trial in instances where the right was improperly denied.[107]

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[104] *Id.* at 654. See also, *In re* Lott, 424 F.3d 446, 449 (6th Cir. 2005); *In re* U.S., 463 F.3d 1328, 1337 (Fed. Cir. 2006).
[105] 76 S.Ct. 912, 917, 351 U.S. 513, 520, 100 L.Ed. 1377 (1956).
[106] See *e.g., In re Chimenti*, 79 F.3d 534, 540 (6th Cir. 1996); *In re Briscoe*, 448 F.3d 201, 213 n.7 (3d Cir. 2006).
[107] See *e.g., Dairy Queen Inc. v. Wood*, 82 S.Ct. 894, 901, 369 U.S. 469, 480, 8 L.Ed.2d 44 (1962); *Beacon Theatres, Inc. v. Westover*, 79 S.Ct. 948, 957, 359 U.S. 500, 511, 3 L.Ed.2d 988 (1959).

In another case[108] the Court held mandamus was appropriate when a district court remanded a case removed from state court on improper grounds. In *In re Apple Inc.*,[109] the Eighth Circuit held that mandamus was a proper remedy when a district court refused to transfer a case to California from Arkansas, which "had no connection to the dispute," even though the defendant had not first pursued interlocutory review under Section 1292(b). It would appear from a review of the cases on mandamus that in trying to ascertain whether the failure to pursue an interlocutory appeal under Section 1292(b) might preclude issuance of a writ of mandamus, the appellate courts are strongly influenced by just how egregious the ruling being challenged is, and the extent of the harm it would cause petitioner. In most cases, it is wise for the party seeking interlocutory review to pursue all available options before seeking mandamus.

4.5 Class Action Certifications Under Civil Rule 23(f)

Class action litigation is, and has been for many years, prolific in the United States. 28 U.S.C. Section 1292 (e) provides that "The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d). Seizing upon this statutory authority, effective December 1, 1998, Civil Rule 23, the class action rule, was amended to allow discretionary interlocutory appeals of class certification decisions. The amendment, set forth in subdivision (f) of the rule, currently provides as follows: "(f) APPEALS. A court of appeals *may* permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit court within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a Unites States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders."[110]

[108] *Thermtron Prods., Inc. v. Hermansdorfer*, 96 S.Ct. 584, 423 U.S. 336, 46 L.Ed.2d 542 (1976).
[109] 602 F.3d 909, 911-12 (8th Cir. 2010).
[110] Civil Rule 23(e)(1), as referenced in Civil Rule 23(f), concerns notice requirements to class members regarding settlement, voluntary dismissal, or compromise.

Civil Rule 23(f) is therefore another interlocutory appeal exception to the final judgment rule. It is unique, however, in that it was created through rule (although upon statutory authority) as opposed to by statute, as is the case with the other avenues of interlocutory appeal previously discussed in this paper. As articulated by Gould (Gould, 1999: p. 310-311)[111] "The purposes of the new rule are severalfold: to provide a mechanism for needed appellate review of class certification orders that as a practical matter are unlikely to receive review; to afford a more regular means of appellate involvement in the class certification process; and to enable the courts of appeals to develop certification standards. Although the amendment may not appear of great consequence to those unfamiliar with class action litigation in the federal courts, the Chair of the Standing Committee on Rules of Practice and Procedure declared that rule 23(f) 'alone . . . might well prove to be the most effective solution to many of the problems with class actions.' If so, rule 23(f) will operate as an agent of change indirectly and gradually as the courts of appeals further develop the law applicable to certification of class action decisions."

Under this rule, the decision whether to allow an appeal rests within the sole discretion of the appellate court and the rule does not set forth any particular requirements to inform that discretion. Accordingly, courts of appeals can establish those criteria that they believe most appropriately support granting interlocutory review (Wright, Miller and Kane: Civil 3d §3926).[112]

4.6 Miscellaneous Exceptions Permitting Interlocutory Appeals in Absence of Final Judgment

Another exception to the final judgment rule "is that a judgment directing immediate delivery of physical property is appealable, if necessary in order to avoid irreparable injury, even though the court also has ordered an accounting that has not yet taken place (Wright and Kane, 2017: §101, p. 675)."[113] Additionally, "[c]ivil contempt orders against a person not a party to the case are considered final and appealable, since that person could not appeal a final judgment in the case. Criminal-contempt

[111] See fns. 5-6 and authorities referenced therein.
[112] See also *e.g. Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832 (7th Cir. 1999).
[113] Fn. 36 and authorities cited therein.

orders also are regarded as severable from the main action and appealable before final judgment in that action."[114]

4.7 Appellate Review of Administrative Determinations

In 1950, U.S. Congress passed legislation permitting review of orders issued by the many federal administrative agencies with the courts of appeals.[115] In order to obtain review, the aggrieved party must file a petition for review with the court of appeals for the circuit where the party or parties seeking review reside or have their principal office, or with the Court of Appeals for the District of Columbia.[116] "Review ordinarily will be on the record made at the hearing before the administrative agency, with the findings of fact by the agency accepted if they are supported by substantial evidence in the light of the whole record (Wright and Kane, 2017: §103, p. 687)."[117]

5 Conclusion

Appellate courts have existed for many millennia, as a system for correcting errors made by lower courts. During the dynasty of Babylon, Hammurabi and his governors served as the highest appellate courts in the land (Dellapena, Gupta, 2009). The United States first created a system of federal appellate courts in 1789, but a federal right to appeal did not exist in the United States until 1889, when Congress passed the Judiciary Act to permit appeals in capital cases. Two years later, the right to appeals was extended to other criminal cases, and the United States Courts of Appeals were established to review decisions from the federal district courts.[118]

As a general proposition, the vast majority of appeals from the district court to the courts of appeals occur after entry of final judgment as to all parties and all claims. Indeed, as we have seen, the final judgment rule dictates that the courts of appeals do not have jurisdiction to consider orders and judgments that are not final, at least absent a statute (or in limited cases rule, e.g., Civil Rule 23(f). As elsewhere in the

[114] *Id.*, fns. 37-38 and authorities cited therein.
[115] See H.Rep. No. 2122, 81st Cong., 2d Sess. 1950; 1950 U.S.Code Cong.Serv., pp. 4303, 4306. See also *D.L. Piazza Co. v. West Coast Line, Inc.,* 210 F.2d 947, 949 (2d Cir. 1954).
[116] 28 U.S.C.A. §§2342, 2343.
[117] Fns. 131-132 and authorities cited therein.
[118] See Act of February 6, 1989, ch. 113, §6, 25 Stat. 656; Act of March 3, 1891, ch. 517, §5; 26 Stat. 826, 827-28.

law, there are almost always exceptions to the general rule, developed out of necessity. Such is the case with the final judgment rule. In the United States federal court system, there are numerous, fairly well-defined situations where, by way of statutes passed by the Congress, interlocutory orders issued by the district judges can be reviewed by the courts of appeals. Most of this authority stems from 28 U.S.C.A. 1292 and its various subparts.

The adoption of Civil Rule 54(b) was a major development, and improvement in civil practice, as it allows the district judge to issue certifications that certain of its rulings should be considered final for purposes of immediate appeal, even though additional claims remain to be adjudicated. The adoption of this rule has proven to be very useful in multiple party/claims cases. This rule certainly promotes the ideals of speedy justice, judicial efficiency and cost savings.

Civil Rule 23(f) is a more recent example of a provision that has promoted efficiency in the class action arena, which comprises a substantial amount of litigation in the federal courts system. The district judge's decision on whether to certify a class is one of the crucial steps in class action litigation, and it certainly made great sense to carve out an exception to the final judgment rule in this important area of the law.

I believe it is fair to say that, for the most part, where the final judgment rule has proven too harsh, and inequitable, the Congress has stepped in to write legislation that has provided necessary and reasonable relief. Furthermore, for the most part, it would seem that the various vehicles for interlocutory review are reasonably straightforward and cover most of the areas that routinely occur in the law where immediate appellate review is necessary and desirable prior to entry of final judgment as to all claims and parties.

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How the Use of Fees, Fines and Bail Have Been Used to Criminalize Poverty: Can Reforms Help Put the Genie Back in the Bottle?

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The rallying cry of many American politicians is Law and Order. This tactic wins votes. As a result of its Wars on Crime, Drugs, and the Impoverished, America has the highest rate of incarceration in the world. This article explores how, over the past few decades, politicians have charged criminal defendants every imaginable fee and fine as they wind their way through the criminal justice system in order to fund the massive prison complex that the politicians do not want to tax Americans for. These tactics have criminalized poverty, as they disproportionately impact the most marginalized in American society. These abusive and unfair tactics have drawn scrutiny from policymakers in recent years, including the American Bar Association, which adopted stringent guidelines to help inform policymakers of this critical problem in an effort to reign in the abusive use of fees and fines. The paper discusses recent reforms, many at the urging of the Department of Justice, Office for Access to Justice, in conjunction with the ABA. It discusses the main Supreme Court cases that considered the Excessive Fines Clause of the Eighth Amendment.

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1 Introduction

Law and order. This is a phrase we hear repeatedly from politicians, policing agencies, and news reporters, among others. It broadly references the criminal justice system and acknowledges the fact that in a civilized society, there must be a set of laws, norms if you will, that regulate citizens' conduct to help ensure that our collective personal and property rights are protected. Without criminal laws and enforcement of those laws, society would be chaotic. Indeed, at any given time, there are pockets of the world where there is no meaningful law and order and where drug lords and gangs or terrorist organizations subjugate populations through intimidation. The recent situation in Port-au-Prince, Haiti's capital, is but one extreme example. There, since 2020, the Government of Haiti and Haitian security forces have struggled to maintain any semblance of law and order in the face of an ongoing gang war between two major criminal groups and their allies.

People in any country should rightly be concerned about the need for law and order. Ideally, no one should have to fear for their personal safety and protection of their property. And at the extreme, where lawlessness prevails, as in Haiti and, unfortunately, too many other places, chaos reigns. Fortunately, most countries in the Western world, including America, respect the rule of law and, while having their share of crime, live in relative peace. In other words, there is, in fact, law and order. Politicians, however, and some of those in the law enforcement community, too often use the law-and-order mantra as little more than a fear-mongering technique (or coded language) and pretext to secure votes and maintain their power (or the size of their budgets). There has never been any shortage of this strategy in American politics.

This article explores law and order in America from various perspectives. It starts by providing recent information on the nature and extent of criminal activity across America, addressing both violent and non-violent crime. It then delves into America's vast prison network, explaining the roles of public and private prisons and jails at both the federal and state levels. It next discusses the current rates of incarceration, addressing common myths about the impact that incarceration has on controlling crime, that is, on law and order. The paper then investigates the significant ways that the criminal justice system's imposition of fines and fees has shaped and informed the broader discussion of law and order. Here, the questions

addressed include the role that fines and fees play as forms of punishment for crimes. How fees and fines are used, not as forms of retribution, but rather as a funding mechanism to pay for America's vast prison complex. How fees and fines are used to keep people imprisoned, and to return them to prison once released. How fees and fines disproportionately impact the most vulnerable and marginalized members of society. The Eighth Amendment to the United States Constitution prohibits excessive fines. The article discusses that amendment and Supreme Court jurisprudence interpreting it. Serious reform efforts have been underway in recent years to claw back the criminal justice system's use of fees, fines and other forms of payment to fund the system, with many starting to realize the discriminatory and harmful nature of that approach. The article explores these reforms in depth and provides examples of measures that the states and local communities across America have taken to help rectify these long-standing abuses. The article ends with some conclusions and commentary from the author.

2 American Exceptionalism: First in the World in Prison Population

American exceptionalism has been defined as meaning that the United States of America is unique and even morally superior for historical, ideological, or religious reasons (Mendelson, 2023). Indeed, on many levels America can boast of exceptionalism. By a wide margin, the United States has the best economy in the world (Smart, 2024). In 2022, America's GDP exceeded that of China, the second leading economy, by a whopping 40 percent, and was five times greater than the next two largest economies, Japan and Germany (Smart, 2024). The United States has the world's strongest military (Business Insider, India 2021). The United States far outspends other countries on its military; has more aircraft carriers (10) than any other country; has the most aircraft (nearly 14,000 as of 2021) (Business Insider, India 2021); and the world's 2nd largest nuclear arsenal (ICAN, 2024). The United States is widely regarded as having one of the best educational systems, especially at the university level, in the world (US News & World Report, 2024). It boasts some of the top universities in the world, including Stanford, Harvard, Yale, and Massachusetts Institute of Technology, to name but a few. Millions of people from around the world immigrate to America, viewing it as the land of opportunity. Your author, indeed, was fortunate to have been born in America and to have benefited from its economic and educational opportunities, among other things.

While America can indeed be justly proud of its economic prowess and military might; its educational system; its beauty; the leadership role it has historically taken on in the (democratic) world, among other things, there are, unfortunately, other areas where it has the dubious distinction of being exceptional for the wrong reasons. A recent study among 65 high-income countries found that in countries with populations over 10 million, the United States ranks first for rates of firearm homicides (Leach-Kemon, Sirull & Glenn, 2023). The authors of the study found that age-adjusted firearm homicide rates in the United States are 33 times greater than in Australia and 77 times greater than in Germany (Leach-Kemon, Sirull & Glenn, 2023). Gun violence accounts for over eight percent of deaths in America among those under age 20 (Leach-Kemon, Sirull & Glenn, 2023). New Hampshire is one of the smallest states, with only around 1.3 million people. Homicide rates there are relatively low as well, with 1.1 per 100,000 residents. Still, while New Hampshire has the lowest rates of age-adjusted firearm homicides in the United States, the survey revealed this still is three times greater than the highest rate in Europe – Cyprus, with 0.36 deaths per 100,000 (Leach-Kemon, Sirull & Glenn, 2023).

America's high rate of gun violence should come as no surprise. According to Data Pandas, the United States, by a large margin, stands out as the country with the highest rate of civilian gun ownership worldwide, with an estimated 120.5 firearms per 100 people (Data Pandas, 2024). Yemen came in a distant second at 52.8 firearms per 100 people (Data Pandas, 2024). Slovenia, where the author currently lives, in stark contrast, has an estimated 15.6 firearms per 100 people (Data Pandas, 2024). The United Kingdom has a lower rate yet, with 5.1 firearms per 100 people while South Korea is tied for "last place" (or perhaps we might say "first place" depending on one's point of view), with the Solomon Islands with 0.02 firearms per 100 people (Data Pandas, 2024). Curiously, while Canada geographically is contiguous to the United States, its rate of gun ownership stands at only 34.7 per 100 people, reflecting differing legislative and societal attitudes towards firearms (Data Pandas, 2024). While America had the 28th-highest rate of deaths from gun violence in the world: 4.31 deaths per 100,000 people in 2021, that was more than seven times as high as the rate in Canada, which had 0.57 deaths per 100,000 people – and about 340 times higher than in the United Kingdom, which had 0.013 deaths per 100,000 (Aizenman, 2023).

America also has an extraordinarily exceptional record of imprisoning its citizens, especially the poorest in society. Although the United States has only five percent of the world's population, it houses 25 percent of the world's prisoners (Jahangeer, 2019). Jahangeer, writing for the American Bar Association, the largest and most influential volunteer bar association in the United States[1], reports that "in America approximately one in two adults has had an immediate family member incarcerated (for at least one night)" (Jahangeer, 2019). This translates to approximately 113 million people, or roughly one-third of the entire American population. Further, "[o]ne in seven adults has had an immediate family member spend at least one year in prison, and one in 34 adults has had an immediate family member spend 10 years or longer in prison. Today, an estimated 6.5 million people have an immediate family member currently incarcerated in jail or prison (1 in 38). There are currently more than 1.5 million people incarcerated in America" (Jahangeer, 2019). Between 1990 and 2014, incarceration rates increased by over 60 percent (Council of Economic Advisers Brief, 2015).

2.1 Mass Incarceration in the United States

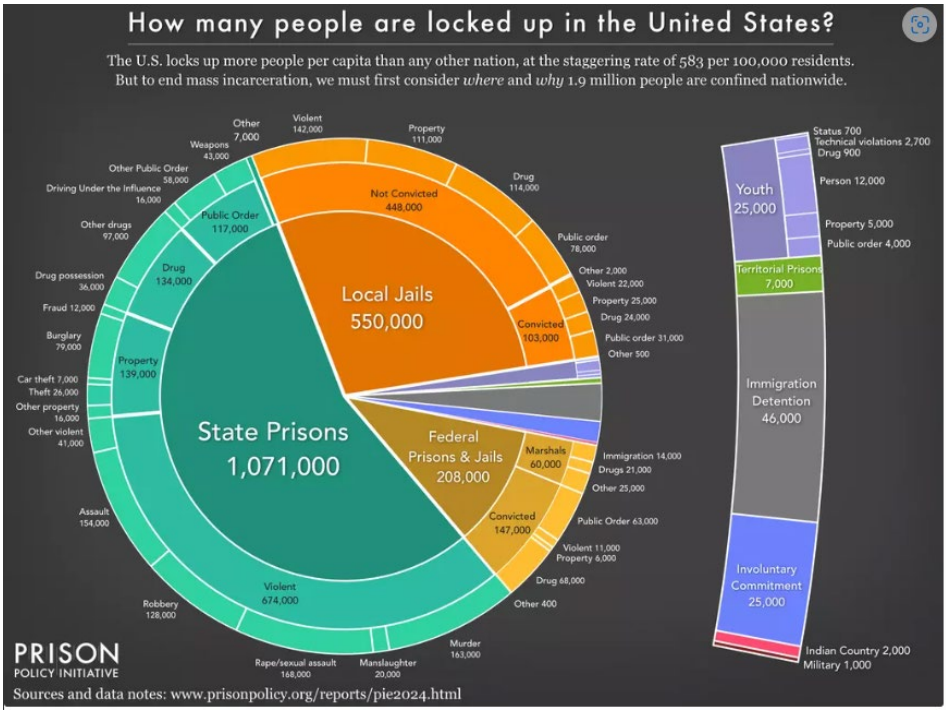
The following pie chart explains where prisoners are housed in the United States as of 2024, along with the reasons for their imprisonment (Sawyer and Wagner, 2024).

This pie chart (Picture 1) shows that the American criminal legal systems hold over 1.9 million people in 1,566 state prisons, 98 federal prisons, 3,116 local jails[2], 1,323 juvenile correctional facilities, 142 immigration detention facilities, and 80 Indian country jails, along with military prisons, civil commitment centers, and state psychiatric hospitals (Sawyer and Wagner, 2024). Many Americans hold a sense of moral outrage that drug use has been over-criminalized. The pie chart shows, however, that "only" 13 percent of those in state prisons are incarcerated for drug-

[1] In America, there are both voluntary and mandatory bar associations. To practice in a given state, in my case Michigan and Washington, lawyers are required to belong to the State Bar Association of that State. There are thousands of voluntary bar associations, most at the local levels: such as the Seattle-King County Bar Association in Washington State. The ABA is a nationwide, voluntary bar association. It sets policy for the American legal system; speaks on behalf of all American lawyers; helps with the continuing legal education of lawyers; sometimes submits Amicus briefs to courts in important cases, to name a few of its important functions.

[2] Prisons are facilities under state or federal control where people who have been convicted (usually of felonies) go to serve their sentences. Jails are city- or county-run facilities where a majority of people locked up are there awaiting trial (in other words, still legally innocent), many because they cannot afford to post bail. Your author was a civil, not a criminal lawyer. But he had to visit witnesses in jails on occasion. They are not pleasant places to be.

related crimes while 63 percent are incarcerated for various forms of violent crime. 13 percent are in state prisons for property-related crimes, while 11 percent are incarcerated for public order crimes such as driving under the influence and wrongful possession of weapons. What is interesting about the state local jail population is that nearly 82 percent of those prisoners have not been convicted. On any given day, only about one hundred thousand of those jailed have actually been convicted.



Picture 1: How many people are locked up in the United States?
Source: Sawyer and Wagner, 2024

Sawyer and Wagner, writing for the Prison Policy Initiative, have written about various myths surrounding the American correctional system in their article entitled "Mass Incarceration: The Whole Pie 2024" (MI 2024). There has been public outcry in some circles over the privatization of the correctional system. In recent years private prisons have been constructed throughout the country and some have blamed them for mass incarceration. However, only eight percent of incarcerated

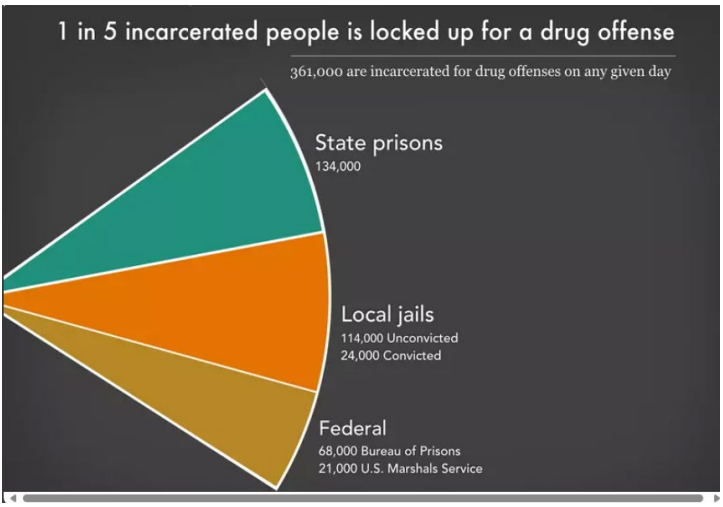
people are held in private prisons (MI 2024). Accordingly, they constitute a relatively small part of a mostly publicly-run correctional system.

MI 2024 does highlight a significant problem in the American correctional system, and one that correlates to the issue of the criminalization of poverty through fees and fines, which is the central issue in this paper. The Thirteenth Amendment of the United States constitution, ratified in 1865, abolished slavery and involuntary servitude. However, it contains what some have called the "slavery loophole," as there is an exception for "a punishment for crime whereof the party shall have been duly convicted." The correctional system has capitalized upon this loophole to force those imprisoned to either perform work for no wages or for unconscionably low wages. An author writing on this topic tells the following story: "when prison reformer Johnny Perez was incarcerated he made sheets, underwear and pillowcases working for Corcraft, a manufacturing division of New York State Correctional services that uses prisoners to manufacture products for state and local agencies. His pay ranged between 17 cents and 36 cents an hour" (Sainato, 2022). Sainato, referencing a June 2022 report from the American Civil Liberties Union (ACLU), reports that around 800,000 prisoners in both the federal and state correctional facilities are forced to work, "generating a conservative estimate of $11 billion annually in goods and services while average wages range from 13 cents to 52 cents per hour" (Sainato, 2022). Five southern states – Alabama, Arkansas, Georgia, Mississippi and Texas – force prisoners to work without pay (Sainato, 2022).[3] Many prisons actually charge their inmates for basic necessities such as personal hygiene items and medical visits. Accordingly, the small wages (if any) that these prisoners might receive end up going right back to the prison authorities (Sawyer and Wagner, MI 2024).

As the chart (Picture 2) shows, on any given day, over 360,000 persons are incarcerated in American prisons and jails for various drug-related offenses. According to the MI 2024 study, up until the Covid-19 pandemic, police were making over one million drug possession arrests per year. Many of those arrests led to convictions and sometimes prison sentences. Many drug arrests occur in so-called

[3] Colorado, Utah and Nebraska have amended their state constitutions to eliminate this prison-slavery loophole (Sainato, 2022). If rehabilitation earnestly is a goal of incarceration, then how does forcing those imprisoned to work either for free or for nominal sums advance that goal? Should the aim not be to better normalize those imprisoned so that when they are released into society they can function more effectively? It seems to your author that treating prisoners like animals is counter-productive to rehabilitation.

"over-policed communities," those where the marginalized reside. Those persons end up with criminal records, "hurting their employment prospects and increasing the likelihood of longer sentences for any future offenses" (Sawyer and Wagner, MI 2024). Historically in the United States, it has been common practice to make felons ineligible to vote, in some cases permanently.



Picture 2: 1 in 5 incarcerated people is locked up for a drug offence
Source: Sawyer and Wagner, 2024

According to the ACLU, "A patchwork on state felony disenfranchisement laws, varying in severity from state to state, prevent approximately 5.85 million Americans with felony (and in several states misdemeanor) convictions, from voting" (ACLU, undated). In approximately eight states, people with felony convictions cannot vote. In approximately twenty states, people in prison cannot vote. In many other states, people with felony convictions can vote only upon completion of their sentence (ACLU, undated).

The state of Florida presents an example, however, of how fines and fees are criminalized and weaponized to limit peoples' rights. According to the ACLU article on felony disenfranchisement laws, in Florida, those convicted of murder, or a felony sexual offense cannot vote and must still apply to the governor for restoration. Those convicted of other offenses have their voting rights automatically restored upon completion of their sentences (including parole and probation). However, in

2019, Governor DeSantis signed a law defining "completion of sentence" to include payment of certain restitution, fines, fees, and costs (ACLU, undated). Many poor, marginalized people who enter the criminal justice system do not have money. Their poverty is often what leads to their criminal activities. Once in the system they will most assuredly be assessed fines, fees and court costs. As we have seen, most of those incarcerated cannot make much, if any, money while in jail or prison. Therefore, it can often be impossible for some to repay those fines, fees and court costs. This may well land them back in jail or prison and, in Florida, prevent them from being able to vote. Of course, in a conservative state such as Florida, that is the goal.

Picture 3: Contrary to myth, people incarcerated for violent offences and released are least likely to be arrested again

Source: Sawyer and Wagner, 2024

In the course of performing research for this article, one of the matters I found particularly interesting was data pertaining to recidivism, which is the tendency of a convicted criminal to reoffend. Referring again to the MI 2024 study, the researchers

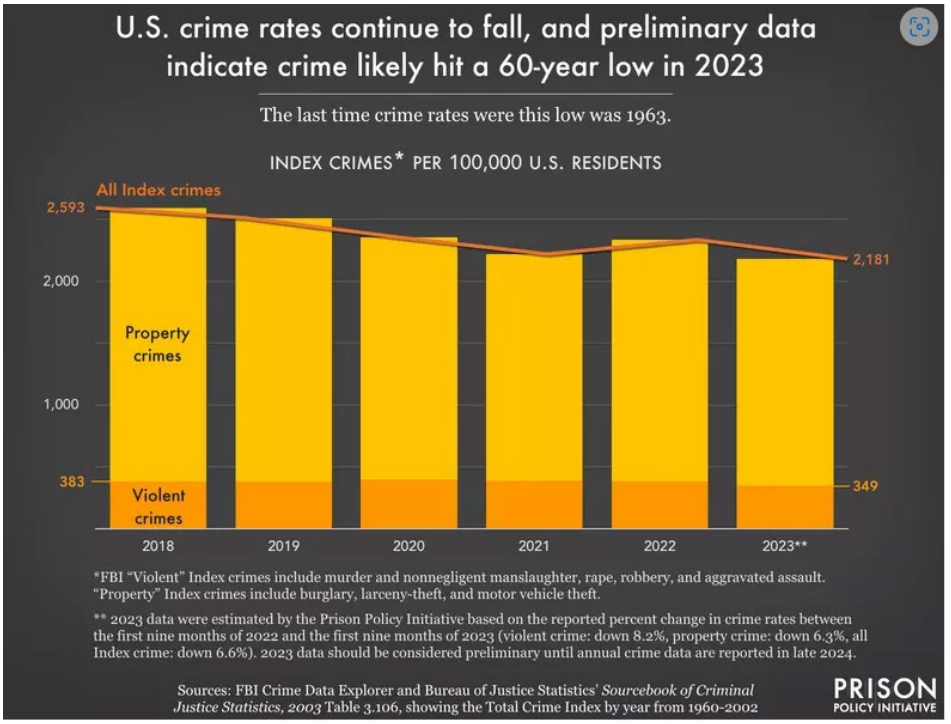
concluded that, "contrary to myth, people incarcerated for violent offenses and released are least likely to be arrested again" (Sawyer and Wagner, MI 2024). As the chart above shows, those convicted of the most violent crimes are the least likely to reoffend. They are the least likely to be rearrested for any offense; least likely to be convicted again; and least likely to end up back in the prison system. Drug offenders and those convicted of public order offenses are those most likely to reoffend. Sawyer and Wagner concluded that at least one reason for the lower rates of recidivism among people convicted of violent offenses is their age, which is one of the primary predictors of violence. "The risk for violence peaks in adolescence or early adulthood and then declines with age" (Sawyer and Wagner, MI 2024). The myth then, according to these authors, is that many people in prison for violent or sexual crimes are not too dangerous to be released, with the caveat that such determinations still must be made on a case-by-case basis.

2.2 The Mythical, Politically-Charged War on Crime

Ever since I was a teenager growing up in Detroit, Michigan, I have heard politicians, especially those on the right, talk about the "War on Crime" (including as a sub-category, the "war on drugs"). So, I have heard the constant drum-beating for sixty years. The talk intensifies every four years, when Americans go to the polls to vote for President (at least those not prevented from voting due to say, a previous drug or other conviction).

Citizens of course want law and order. We do not want to fear being mugged, or worse, when going outside. There are, in fact, places in America that are very dangerous. Typically, these are the poorest of the poor neighborhoods where there are street gangs dealing in drugs, usually as a way of making money, as they often have no other realistic prospects in life in a country where there are shockingly few safety nets (no guaranteed health care; no guaranteed education; no guaranteed housing or work; etc.). Another reality is, however, that many politicians pander to the fears of voters by exaggerating the extent of violent crime. According to MI 2024, "In general, violent crime has remained remarkably steady over the last 15 years; property crime has trended steeply downward and remains near historic lows (with the exception of auto theft). Overall, the crime rate appears to be the lowest it's been since 1963" (Sawyer and Wagner, MI 2024). This same study concludes that politics helps to explain the ever-increasing jail and prison populations, as "many in

law enforcement and on the right (and some Democrats, too) have rushed to blame recent reforms (such as bail reform, changes to police budgets etc.) for minor shifts in crime trends in an effort to resurrect the same 'tough on crime' policies that failed in the 1980s and 1990s" (Sawyer and Wagner, MI 2024). Interestingly, while those on the right espouse "Law and Order" the most, and claim that so-called Blue States (Democratic-run) are "soft on crime," evidence shows that murder rates were an average of 40 percent higher in Red States (Republican-run) compared to Blue States in 2000, and, more broadly, murder rates over the years 2000-2020 were 23 percent higher on average in Red States (Sawyer and Wagner, MI 2024). These authors conclude that "while crime rates remain near historic lows, what has actually changed most is the public's perception of crime, which is driven less by first-hand experience than by the false claims of reform opponents. These false claims are deliberately stoked to undo the hard-won, evidence supported, common sense reforms that have only begun to put a dent in mass incarceration" (Sawyer and Wagner, MI 2024).

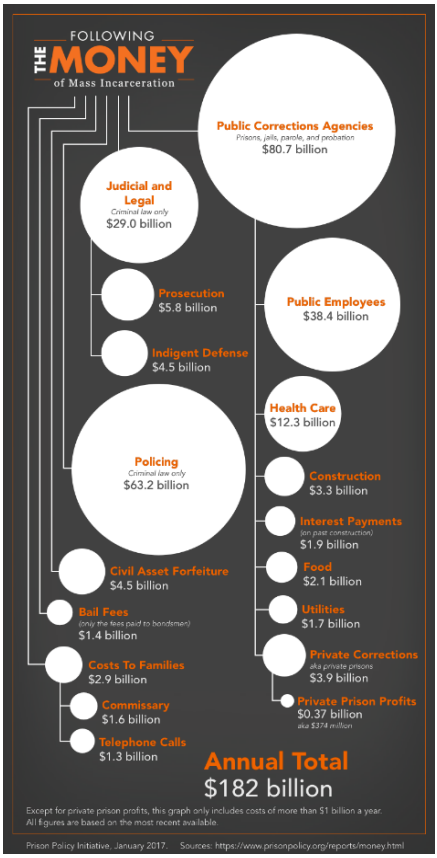


Picture 4: U.S. crime rates continue to fall, and preliminary data indicate crime likely hit a 60-year low in 2023

Source: Sawyer and Wagner, 2024

2.3 The Cost of Mass Incarceration

The costs associated with America's vast prison system are mind-numbing. A comprehensive study performed by the Prison Policy Initiative in 2017 found that America's system of mass incarceration costs the government at least 182 billion dollars a year (Wagner and Rabuy, 2017).[4] The following chart provides a breakdown of the various cost items.



Picture 5: Following the Money of Mass Incarceration
Source: Wagner and Rabuy, 2017

[4] The Council of Economic Advisers in its Brief dated December 2015 states this number is even higher. "Between 1993 and 2012, total real annual criminal justice expenditures grew by 74 percent from $157 to $237 billion, and local spending comprised approximately half of total expenditures. State corrections expenditures represent 7 percent of total State general funds on average, and 11 States spent more on corrections than higher education in 2013." (CEA, 2015, p. 2).

To give this number some perspective, the gross national product of Slovenia in 2022 was approximately $60 billion; in Croatia was approximately $70 billion; and in Slovakia was around $115 billion (The World Bank, 2024).

3 Court Fines, Fees and Costs – The Criminalization of Poverty

3.1 Introduction

For those in society that are either very well-off or relatively well-off, and have a decent job and a decent income, we do not give a second thought to walking into a café or restaurant and ordering a drink and something to eat. We can take our car to the petrol station and fill the tank up with fuel and perhaps throw in another ten dollars or so for a wash. We can pay with a credit card (most of us have one or more) if we do not happen to have cash on us. Or, we can go to the nearest bank machine and withdraw some funds. But the sad truth is that many in America do not fit into this category. For the value of money is different to those in different socio-economic strata.

The Census Bureau estimated that in 2021, 11.6 percent of Americans – roughly 38 million people – lived at or below the poverty level. That year, the poverty level threshold was $27,740 for a family of four and $13,788 for an individual (USA Facts, 2023). A Census Bureau survey conducted in July 2023 showed that over one-third of Americans found it somewhat or very difficult to pay for their usual household expenses (USA Facts, 2023). Many among the poorest American citizen's do not own a place to live, a car, have a savings account, a credit card, a television, a computer, a mobile phone and may not even have a job. The expression in America is they live hand to mouth. Theirs is a day by day, if not hour by hour, existence. Though it has been called the Land of Opportunity, the fact of the matter is that there are few social nets in America. America does not have an Economic Bill of Rights. Now, and for all of its history, despite its overall economic prosperity, there are too many people that live at the very margins of American society. Although former President Franklin Delano Roosevelt proposed an Economic Bill of Rights for all Americans, that never was adopted, there being too much opposition to it.[5]

[5] Roosevelt was America's 32nd President, serving from 1933 until his death in 1945. He is widely regarded as one of America's greatest presidents. Bernie Sanders, long-serving US Senator from Vermont, and past aspirant for the Democratic presidential nomination, has proposed an Economic Bill of Rights. He ran a strong campaign for the 2020 election, garnering widespread support for his progressive agenda, but in the end bowed out to give way for

Economic freedom in America is weaponized by politicians, as is the case with so many important issues, such as guns, abortion, immigration, crime etc. Many politicians and others look down upon social welfare. For these unfortunate members of society, ten or twenty dollars is a lot of money. The unfortunate truth, and I must say the sad and sorry state of affairs, is that politicians (and others) in the past and the present exploit the dire economic situation of these people to obtain and retain their grip on power.

The tactics often change. But the game is the same. Impose taxes, fees or fines on the marginalized in order to strip them of their rights. In the late 1800s, after the American Civil War, fought to end slavery, southern states across what was the former Confederacy imposed a variety of laws designed to restrict the civil liberties of the "newly-freed" African American population. Although the Fifteenth Amendment, passed in 1870, granted African American men the right to vote, lawmakers in the south passed legislation that restricted their right to vote. "One of the many discriminatory methods was the poll tax, which required voters to pay a fee in order to enter the polling places to cast their ballots. Due to the disproportionate levels of poverty among African Americans in the southern states, many of them – as well as poor Whites – were excluded from voting" (Ronald Reagan National Archives). In 1964, the Twenty-fourth Amendment was ratified, prohibiting both the federal Congress and the states from conditioning the right to vote in federal elections on payment of a poll tax or other types of tax.[6] Two years later, in 1966, the Supreme Court in *Harper v. Virginia State Board of Elections,*[7] held that poll taxes for any level of elections were unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment.

Just as politicians used the poll tax to effectively disenfranchise (mainly) poor Blacks, but also others living on the margins of American society, so too have they used fees, fines and costs in the criminal justice system to help fuel the mass incarceration discussed in Section One of this paper. These tactics are discussed next.

current President Joe Biden. For those interested in this topic I can recommend Sander's New York Times Bestseller book entitled *It's OK to be Angry About Capitalism.* (2023).

[6] At the time five states still retained a poll tax: Alabama, Arkansas, Mississippi, Texas and Virginia.

[7] *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

3.2 Tactics to Criminalize Poverty (and often to disenfranchise) and to pay for the Criminal Justice System (Law and Order)

"Throughout its history, the United States has criminalized low-level behavior, often in racist ways. Our criminal legal system was set up to enforce slavery and has been used ever since to over-police and over-arrest people of color, especially Black people." (Vera, undated).

Mass incarceration, as we have seen, is extremely costly. It is one thing to say, "we want more Law and Order." It is another to pay for it. I would posit the following theory. If we were to develop a questionnaire and ask respondents to state whether they agree that one of government's top priorities should be to ensure safety in society, that is, law and order, probably close to one hundred percent would agree. However, no one likes paying taxes, or having local levies enacted, such as to increase property taxes, so as to raise revenue for local spending. So, in our hypothetical questionnaire, if we were to ask respondents how government should spend revenues generated through tax and levy receipts, I have a strong suspicion a very low percentage would advocate spending more (or raising tax rates) to fund jails and prisons. Most people would rather see more "tangible" results from government's use of their tax money, such as better roads, better schools, better immigration control, better health care, etc.

The Council of Economic Advisers issued a Brief in December 2015, entitled "Fines, Fees, and Bail. Payments in the Criminal Justice System that Disproportionately Impact the Poor" (CEA, 2015). The CEA Brief succinctly describes the problem: "Crime imposes real costs on society in terms of both the harm done to victims and in resources that must be allocated to policing, prosecution and incarceration. Increases in criminal justice spending have put a strain on local criminal justice budgets and led to the broader use of fine penalties and itemized criminal justice fees in an effort to support budgets. However, this practice places large burdens on poor offenders who are unable to pay criminal justice debts and because many offenders assigned monetary penalties fall into this category, has largely been ineffective at raising revenues" (CEA, 2015: 1). The CEA Brief describes the three broad categories of monetary payments utilized in America's criminal justice system to help fund it.

The first type is fines, which are monetary punishments for infractions, misdemeanors or felonies. "Fines are intended to deter crime, punish offenders, and compensate victims for losses" (CEA, 2015: 1). Fees are itemized payments for court activities, supervision, or incarceration charged to defendants determined guilty of infractions, misdemeanors or felonies. Fee collections, the second category, are intended to support operational costs in the criminal justice system and may also be used to compensate crime victims for losses. Fees may also have a punitive and deterrent purpose (CEA, 2015: 1). The third type is bail, which is a bond payment for a defendant's release from jail prior to court proceedings. The majority of a bail payment is returned to a defendant after case disposition, assuming the defendant appears for the required court hearings. Bail payments are intended to incentivize defendants to appear at court and, in some cases, to reduce the criminal risk of returning a defendant to the community (CEA, 2015: 1).

According to the CEA Brief, the ever-rising criminal justice budgets motivated policymakers (especially starting in the early 1990s) to accelerate the use of fines and fees to help cover the escalating costs of the system (CEA, 2015: 2). They advanced the common-sense, if overly simplistic, argument that criminals, and not taxpayers, should bear the primary burden of covering these increasing costs, and that this policy would have a deterrent effect. Whether imposing fines and fees will deter criminal behavior is highly questionable. However, what is clear is that the system's use of these monetary payments fails to account for a defendant's ability to pay them "and instead are determined based on offense type, either statutorily or through judicial discretion" (CEA, 2015: 1). These payments are regressive, and more punitive for the poorest members of society, those that are most likely to be involved in the criminal justice system in the first place. And here is the crux of the problem with policymakers relying on these monetary payments to fund the criminal justice system. As succinctly stated in the CEA Brief, "The disproportionate impact of these fixed payments on the poor raises concerns not only about fairness, but also because high monetary sanctions can lead to high levels of debt and even incarceration for failure to fulfil a payment. In some jurisdictions, approximately 20 percent of all jail inmates were incarcerated for failure to pay criminal justice debts. Estimates indicate that a third of felony defendants are detained before trial for failure to make bail. High debt burdens for poor offenders in turn increases barriers to successful re-entry [into society] after an offense" (CEA, 2015: 1).

States have been very creative in the categories of financial obligations they impose. They seem to have adopted the model that financial institutions and airplane carriers use to squeeze every last dollar from their respective customers. Similar to airlines that now charge for any drinks or food during flight, or extra baggage, or overweight baggage, seats with more leg room, priority boarding, to have a spare seat next to you and the like,[8] financial obligations adopted by states "include charges for representation by a public defender, court appearances, room and board for jail and prison stays, parole or probation services, court-required drug testing, counseling or community service, and electric monitoring" (CEA, 2015: 3). Florida, which has been particularly aggressive, has added twenty new categories for financial obligations since 1996 (CEA, 2015: 3).

The State of Washington, which, on balance, is one of the more progressive states in the union, has not been immune from the race to adopt a menu of fines and fees to pay for its criminal justice system. There, "individuals with criminal justice debt are subject to an initial flat charge of $500 and an interest rate of 12 percent. Other States assess fees ranging from $25 to $300 for late payments, failure to pay fines or to set up a debt payment plan. In Florida, private collection agencies may add processing fees of up to 40 percent" (CEA, 2015: 3). A study from the State of Washington revealed criminal justice defendants owed an average of $1,406 in fines and fees. Non-violent drug offenders owed debts over one-and-a-half times greater than other offender groups, in part because drug offenders may be more likely to receive fines instead of incarceration sentences. With the twelve percent interest rate added, a Washington state offender paying $10 a month on the average debt would owe more than $15,000 in 30 years (Beckett, Harris & Evans, 2008: 19-25). Some fines and fees seem small at first glance, but they can add up quickly, and continue to mount when interest is added, and these charges can pose significant and sometimes overwhelming obstacles to poor offenders.

Jahangeer reports that in 44 States and the District of Columbia, defendants can be billed for a public defender. 41 States charge inmates room and board for jail and prison stays. 44 States bill offenders for their own probation and parole supervision.

[8] According to CNN travel (Macquire, 2013), baggage fees alone were worth more than $3.3 billion to the American aviation industry in 2012, while fees for reservation changes netted them 2.38 billion in 2011, according to the Bureau of Transportation Statistics that the CNN article cites.

All States except Hawaii and the District of Columbia bill defendants for electronic monitoring devices when they are ordered to wear them.

Teigen (2020: 2), citing Alabama research, which surveyed nearly 1,000 residents from 41 counties about their experience with court debt, found: 83 percent gave up necessities like rent, food, medical bills, car payments and child support in order to pay down their court debt; 50 percent had been jailed for failure to pay court debt; 44 percent had used payday loans to cover court debt; 38 percent admitted to committing a crime to pay off court debt; 20 percent were turned down for a diversion program like drug court because they could not afford it; and, 66 percent received money or food assistance from a faith-based charity or church that they would have not have had to request if it were not for their court debt.

3.3 These a' la Carte Menu of Charges are Regressive and Disproportionately Impact the Marginalized Members of Society.

The CEA Brief again states the problem particularly well. "While fines and fees serve different purposes in the criminal justice system, with the former intended as a direct form of punishment and the latter intended as a form of cost-sharing for operation of the system, they have a key similarity in the fact that both are typically assessed without consideration of the offender's ability to pay. These monetary penalties often place a disproportionate burden on poor individuals who have fewer resources available to manage debt. They also serve as a regressive form of punishment as the same level of debt presents an increasingly larger burden as one moves lower on the income scale" (CEA, 2015: 3).

In addition to the large, and often insurmountable financial burden they create, fines and fees also impose other insidious human costs on poor offenders. As with the poor family that must choose between food and clothing, "high fines and fee payments may force the indigent formerly incarcerated to make difficult trade-offs between paying court debt and other necessary purchases. Unsustainable debt coupled with the threat of incarceration may even encourage some formerly incarcerated individuals to return to criminal activity to pay off their debts, perversely increasing recidivism" (CEA, 2015: 4). The failure to pay a fine or fee is a criminal offense, adding to the offender's criminal record, making it more difficult to find work. The CEA Brief points out that its research revealed that many States surveyed

suspend driver's licenses[9] for nonpayment of criminal justice debt, making it even more difficult to find and maintain employment, and thereby "increasing the obstacles to paying off debt" (CEA, 2015: 4).

As both the usage and amounts of fines and fees charges have increased over the past few decades so has the use and amounts of bail bonds. This, too, has disproportionately impacted the poorest in society. The increased use and size of bail payments has resulted in the marginalized being detained for court hearings and trial more frequently. "For example, in New York City in 2010, only 21 percent of arrestees made bail at arraignment for bail amounts less than $500. Similarly, in Virginia in 2012, 92 percent of defendants were held on bail bonds set below $5,000" (CEA, 2015: 6). The CEA Brief found that regressive bail policies lead to "systematically higher levels of bail for Black defendants relative to White defendants, even when controlling for offense type and defendant characteristics" (CEA, 2015: 7). This is partly because, as with fines and fees, when setting bail, the courts usually fail to consider the defendant's ability to pay, which predictably disproportionately burdens low-income defendants. Theoretically, the purpose of bail bonds is to ensure the defendant who is let out of jail pending hearings returns for those hearings. If the judge, at the bond hearing, deems a defendant too dangerous to be set free in society, bail will be denied. These are reasonable policy goals. The problem is that the bail practices described above often result in courts detaining the poorest rather than the most dangerous or those that are unlikely to return to court for their obligations. This is not justice and is morally wrong.

3.4 The American Bar Association's Position on the use of Fees, Fines and Other Charges that Criminalize Poverty

The ABA has taken a leading role in shining a spotlight on what it calls this "National Crisis" (Jahangeer, 2019). Writing for the ABA, Jahangeer provides the following poignant examples of how the American criminal justice system has criminalized poverty. "In April of 2016, a 30-year-old woman from St. Louis was accused of stealing a tube of mascara from a Walmart and was arrested for shoplifting. She said that she threw away the package and forgot to pay the $8.74 for the mascara. She

[9] According to the Fines & Fees Justice Center, half of all States suspend, revoke or refuse to renew driver's licenses for unpaid traffic, toll, misdemeanor and felony fines and fees. As a result, millions of people are struggling to survive with debt-related driving restrictions just because they could not afford a court fine or fee or because they missed a court hearing. (FFJC, 2022).

served jail time, received a fine and was put on probation. When she did not appear at a probation hearing, she was sent back to jail. She fell behind on payments and was sent to jail again. Her board jail bill is now more than $10,000" (Jahangeer, 2019). What kind of system imposes these high levels of fines over a tube of mascara worth less than $10? Another example: "[A] Missouri woman was arrested for stealing nail polish from a Walmart. She pleaded guilty to a misdemeanor and was sentenced to 30 days in jail. The nail polish cost $24.29. After her jail time, she received a bill for $1,400 for room and board. She could not afford the board bill and was put in jail again – this time, the bill totaled $2,160" (Jahangeer, 2019). Then there is the story of a poor 61-year-old Black man in New Orleans who is trying to repay thousands of dollars in court costs and restitution for writing a bad check. He had to often shut off water and other utilities because his failure to make monthly payments to the court could send him back to jail, where he would incur yet more debt (Jahangeer, 2019).

Jahangeer reported that nearly two-thirds of American prisoners have been assessed court fines and fees. Most Americans going through the criminal justice system are not highly educated, with about 65 percent not having even graduated from high school. Somewhere between 15 to 27 percent of those released from incarceration have nowhere to call home and so are resigned to a homeless shelter, or worse.[10] And, as many as 60 percent remain unemployed a year after release (Jahangeer, 2019). If America really is morally exceptional, should it not do better than this?

In 2018, the ABA House of Delegates[11] formally adopted as policy that it called the *ABA Ten Guidelines on Court Fines and Fees* (ABA Guidelines, 2018: 1-15). The Guidelines were meant to provide practical direction for government officials, policymakers and others charged with developing, reforming and administering court fines and fees. The purpose of the Guidelines was to help ensure that fines and fees are fairly imposed and administered and that the justice system does not punish people for the "crime" of being poor. The following is a summary of these Guidelines.

[10] I have often heard politicians, members of the media, and others refer to people that have literally nowhere to go and are forced to sleep in parks, or on the side of the road as "sleeping rough." This makes it sound as if these unfortunate people are making a choice. They are not. A wealthy country such as America can certainly build housing for these people so that they do not have to live in the elements.

[11] The House of Delegates is the legislative body of the ABA. It formulates policy and adopts rules consistent with the ABA's Constitution and Bylaws. The ABA has many hundreds of delegates, that are elected from all of the American States.

Guideline One "Limits to Fees", provides in part that any fees imposed should never be greater than an individual's ability to pay or more than the actual cost of the service provided. Further, no law or rule should limit or prohibit a judge's ability to waive or reduce any fee, and a full waiver of fees should be readily accessible to people for whom payment would cause substantial hardship. The ABA opposes many such fees on the basis that "the justice system serves the entire public and should be entirely and sufficiently funded by general government revenue" (ABA Guidelines, 2018: 2). In connection with Guideline One, the official commentary states, "When an individual is unable to pay, courts should not impose fees, including fees of counsel, diversion programs, probation, payment plans, community service, or any other alternative to the payment of money. An individual's ability to pay should be considered at each stage of proceedings, including at the time the fees are imposed and before the imposition of any sanction for nonpayment of fees, such as probation revocation, issuance of an arrest warrant for nonpayment, and incarceration. The consideration of a person's ability to pay at each stage of proceedings is critical to avoiding what are effectively 'poverty penalties,' *e.g.,* late fees, payment plan fees, and interest imposed when individuals are unable to pay fines and fees" (ABA Guidelines, 2018: 2).

Guideline Two "Limits to Fines", provides that fines used as a form of punishment for criminal offenses or civil infractions should not result in substantial and undue hardship to individuals or their families. No law or rule should limit or prohibit a judge's ability to waive or reduce any fine, and a full waiver of fines should be readily accessible to people for whom payment would cause a substantial hardship. As with fees, fines should be calibrated to reflect the individual's financial circumstances, and the individual's ability to pay fines should be reassessed at every stage of the proceedings (ABA Guidelines, 2018: 3).

Earlier, we discussed how criminal courts have suspended or even revoked offenders' driver's licenses for nonpayment of fees and fines. Guideline Three addresses this vital issue. Its title reads, "Prohibition against Incarceration and Other Disproportionate Sanctions, Including Driver's License Suspensions" (ABA Guidelines, 2018: 3). The Guideline states that a person's inability to pay a fine, fee or restitution should never result in incarceration or other disproportionate sanctions. The commentary to Guideline Three states, "Despite the popular belief that 'debtors prisons' have been abolished in the United States, people are still

incarcerated because they cannot pay court fines and fees, including contribution fees for appointed counsel . . . Fines and fees that are not income-adjusted (*i.e.,* are not set at an amount the person reasonably can pay) are regressive and have a disproportionate, adverse impact on low-income people and people of color. For these and other reasons, incarceration and other disproportionate sanctions, including driver's license suspension, should never be imposed for a person's inability to pay a fine or fee" (ABA Guidelines, 2018: 4-6).[12]

The Fourth Guideline, "Mandatory Ability-to-Pay Hearings," advocates mandatory ability-to-pay hearings, stating that "Before a court imposes a sanction on an individual for nonpayment of fines, fees, or restitution, the court must first hold an 'ability-to-pay' hearing, find willful failure to pay a fine or fee the individual can afford, and consider alternatives to incarceration" (ABA Guidelines, 2018: 7). In its commentary, the report refers to *Bearden v. Georgia,*[13] where the U.S. Supreme Court ruled that courts may not incarcerate an individual for nonpayment of a fine or restitution without first holding a hearing on the individual's ability to pay and making a finding that the failure to pay was "willful."[14] The *Bearden* case followed a line of earlier cases[15] in which the Supreme Court had attempted to clarify that individuals who are unable to pay a fine or fee should not be incarcerated for that failure. The commentary points out that forty years after *Bearden* the problem persists (ABA Guidelines, 2018: 7-8).

Earlier in this paper, I highlighted how people incarcerated typically lose their right to vote, at least for felony convictions. Most States reinstate that right at some point after the sentence has been fulfilled. But here is the problem with some States' approach. Many legislators in so-called Red States are constantly exploring ways and means to prevent people (*i.e.*, Democratic-leaning people, often poor, people of

[12] The Commentary supports the ABA's position on the grounds that "People who are prohibited from driving often lose their ability to work or attend to other important aspects of their lives" which in turn "can lead to a cycle of re-incarceration" and its insidious consequences, such as mountains of additional debt and misery (ABA Guidelines, 2018: 6).
[13] *Bearden v. Georgia*, 461 U.S. 660 (1983).
[14] *Bearden v. Georgia*, 461 U.S. 660, 667-69 (1983).
[15] *See, e.g., Williams v. Illinois,* 399 U.S. 235 (1970 (holding that an Illinois law requiring that an individual who was unable to pay criminal fines "work off" those fines at a rate of $5 per day violated the Equal Protection clause of the Fourteenth Amendment because the statute "works an invidious discrimination solely because he is unable to pay the fine"); *Tate v. Short,* 401 U.S. 395 (1971) ("Imprisonment in such a case [of an 'indigent defendant without the means to pay his fine'] is not imposed to further any penal objective of the State. It is imposed to augment the State's revenues but obviously does not serve that purpose [either]; the defendant cannot pay because he is indigent.").

color etc.) from casting votes. Since the Twenty-Fourth Amendment abolished the poll tax, these States have had to derive alternative means to prevent people from voting. They have had no shortage of ideas, including gerrymandering of election districts; limiting voting hours and days; not backing mail-in ballots, but instead demanding in-person voting; limiting the number and places of polling stations; requiring proof of identity such as a driver's license (even though poor people often do not have such identification and cannot afford to drive) etc. The list of ideas is endless.[16] As I wrote earlier, Florida Governor DeSantis, always trying to "one-up" former President Donald Trump in the populism battle (AKA MAGA) in order to shill for conservative votes, helped pass laws extending the tails of when a sentence ends by making them include payment of all fines, fees and costs plus interest. Very clever, indeed. An ingenious "in-the-back-door" method of ensuring that many convicted offenders' sentences never really come to an end, and forever disenfranchising them. Think about the political consequences of mass incarceration, especially impacting the poor, those who often vote progressive, and then depriving those persons of the right to vote. We have seen how close national Presidential elections are in the United States. Disenfranchising millions of Americans using these tactics can easily impact the outcome of who becomes President; Senator; the next batch of Supreme Court Justices; and, inferior court federal judges.[17]

ABA Guideline 5 recognizes such tactics for what they really are: discriminatory and invidious. Titled, "Prohibition against Deprivation of other Fundamental Rights," this guideline states that the failure to pay court fines and fees should never result in the deprivation of fundamental rights, including the right to vote (ABA Guidelines, 2018: 8). The official commentary points out that States besides Florida, including Georgia, require payment of all outstanding court fines and fees before a person convicted of a felony can regain the ability to vote. In other States, reported

[16] According to the American Civil Liberty Union (2021), "in recent years more than 400 anti-voter bills have been introduced in 48 states. These bills erect unnecessary barriers for people to register to vote, vote by mail, or vote in person. The result is a severely compromised democracy that doesn't reflect the will of the people."

[17] The Presidential election between George W. Bush (Republican) and Al Gore (Democrat) in 2000 was one of the closest and most contentious in American history. There were vote tallying inconsistencies, especially in Florida and the matter ended up in the U.S. Supreme Court, where calls for a recount were rejected, handing the election to Bush, who won the electoral college with 271 votes to Gore's 266, but lost the popular vote by 500,000. In 2016, Donald Trump prevailed over Hillary Clinton with 304 electoral college votes to Clinton's 227. However, the popular vote told a different story, with Clinton winning almost 3 million more votes than Trump. In 1960, John F. Kennedy prevailed over Richard Nixon; barely. Kennedy won but with only 120,000 more votes.

nonpayment or willful nonpayment of fines and fees can lead to a revocation of voting rights[18] (ABA Guidelines, 2018: 9).

The ABA's Guideline 6 is Titled, "Alternatives to Incarceration, Substantial Sanctions, and Monetary Penalties," proposes that court's faced with people that are unable to pay fines or fees consider alternatives to (re)incarceration (ABA Guidelines, 2018: 10). Further, any alternatives imposed must be both reasonable and proportionate to the offense. The commentary argues that the goals behind fines, to punish and deter, often can be achieved by alternatives to incarceration and disproportionate sanctions like driver's license suspension. Referring to the *Bearden* decision, the commentary states, "Reasonable alternatives include: an extension of time to pay; reduction in the amount owned; and waiver of the amount owed. Frequently, the most reasonable alternative to full payment of a fine that a person cannot afford is a reduction of the fine to an amount that an individual can pay" (ABA Guidelines, 2018: 10).

Guideline 7 is Titled, "Ability-to-Pay Standard," and enunciates a multifactorial ability-to-pay standard which should be "clear and consistent and should, at a minimum, require consideration of at least the following factors: receipt of needs-based or means-tested public assistance; income relative to an identified percentage of the Federal Poverty Guidelines; homelessness, health or mental health issues; financial obligations and dependents; eligibility for a public defender or civil legal services; lack of access to transportation; current or recent incarceration; other fines and fees owed to courts; any special circumstances that bear on a person's ability to pay; and whether payment would result in manifest hardship to the person or dependents" (ABA Guidelines, 2018: 11). The commentary recommends that all actors in the criminal justice system should be trained in the standards used in their jurisdiction to determine ability to pay and the constitutional protections for people who cannot afford to pay court-ordered financial obligations (ABA Guidelines, 2018: 11).

[18] In Washington state, failure to make three payments in a twelve-month period can lead to a revocation of voting rights. The court can also revoke voting rights if they determine that a person has willfully failed to comply with the terms of payments. (ABA Guidelines, 2018: 9, fn. 28).

Guideline 8 "Right to Counsel" comprehensively deals with right to counsel and provides that "An individual who is unable to afford counsel must be provided counsel, without cost, at any proceeding, including ability-to-pay hearings, where actual or eventual incarceration could be a consequence of nonpayment of fines and/or fees. Waiver of counsel must not be permitted unless the waiver is knowing, voluntary and intelligent, and the individual first has been offered a meaningful opportunity to confer with counsel capable of explaining the implications of pleading guilty, including collateral consequences" (ABA Guidelines, 2018: 11).

Guideline 9 "Transparency" deals with transparency, and provides that information concerning fines and fees, including financial and demographic data, should be publicly available (ABA Guidelines, 2018: 13).

Finally, Guideline 10 is concerned with collection practices. It provides that any public or private entity authorized to collect fines, fees, or restitution should abide by the Guidelines and that any contract with collection companies should clearly forbid intimidation, prohibit charging interest or fees, mandate rigorous accounting, outlaw reselling, and otherwise incentivizing harmful behavior. Contracts awarded to collection agencies should include some mechanism for compliance with these prohibitions (ABA Guidelines, 2018: 14).

For the reader that wants more details about these Guidelines, and their importance to America's criminal justice system, I commend you to read the full Report that follows the actual Guidelines (ABA Report which follows the Guidelines, 2018: 1-6). In this article I have attempted to discuss most of the arguments and concerns that are set forth in this ABA Report. The ABA Guidelines are just what the name implies. They are aspirational and not binding. They do not have the force of law. They are designed to inform, to guide, policymakers and other stakeholders about the substantial harms that result from the now long-running policies by governments to impose fees, cost and bail to help finance the criminal justice system. As we shall see in Section 5 of this article, many States, counties, courts and others involved in the criminal justice system have, in very recent years, taken steps to adopt many of the ABA's Guidelines. Next, however, we turn to the federal constitution, and what it says about these issues, and also some key United States Supreme Court precedents.

4 The Eighth Amendment and Supreme Court Precedent Bearing Upon Excessive Fines

4.1 The Eighth Amendment to the Federal Constitution

Under the Eighth Amendment, adopted in 1791 along with the rest of the Bill of Rights, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[19] Taken together, these clauses "place parallel limitations" on "the power of those entrusted with the criminal-law function of government." *Browing-Ferris Industries of Vt., Inc. v. Kelco Disposal Inc.,* (1989).[20] Haight, in an excellent Law Review article analyzing how so-called Pay-to-Stay schemes can be legally challenged under the Excessive Fines Clause, observes that "United States courts have virtually ignored [this Clause] for the majority of the country's history" (Haight, 2020: 299).

In three cases, the Supreme Court has attempted to define what constitutes a "fine" under the Clause. In the *Browing-Ferris Industries*[21] case, not decided until 1989, the issue before the Court was whether a jury award of $6 million in punitive damages was unconstitutionally excessive.[22] At the time the Eighth Amendment was drafted, "fine" meant "a payment to a sovereign as punishment for some offense."[23] The Court also reasoned the purpose of the Clause was to limit governmental abuses, and so held that punitive fines in civil cases between private parties were outside the scope of the Clause's protection.[24] Clarifying this point, the Court held, "[T]he Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government."[25]

Four years later, the Court revisited the Excessive Fines Clause in *Austin v. United States* (1993).[26] After receiving a seven-year prison sentence for cocaine possession, the government filed a forfeiture action in federal court to compel Austin's forfeiture

[19] U.S. Const. amend. VIII.
[20] *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257, 263 (1989), quoting *Ingraham v. Wright,* 430 U.S. 651, 664 (1977).
[21] *Id.*
[22] *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.* 492 U.S. 257, 262 (1989).
[23] *Id.,* at 265.
[24] *Id.,* at 266-67, 275.
[25] *Id.,* at 268.
[26] *Austin v. United States,* 509 U.S. 602 (1993).

of both his business and mobile home. Austin defended on the basis that the forfeiture violated the Excessive Fines Clause.[27] The government argued that the Clause could not apply in civil cases. Affirming that "[t]he Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense,'" the Court held that the relevant question was not whether a fine or forfeiture was imposed in a civil versus a criminal proceeding. Instead, the Court reasoned, the crucial question is whether that fine is intended "at least in part as *punishment*."[28] The Court also held that even a fine with both remedial and punitive purposes would be sufficient to meet that standard.[29] Under that standard, the *in rem* forfeiture of Austin's property did constitute a "fine" under the Clause.[30] Accordingly, under the Excessive Fines Clause, a "fine" was indeed "payment to a sovereign as punishment for some offense," and, as such, an intent to punish was a necessary element of such fines in any proceedings.[31] According to Haight, following those cases it was "clear that a fine must be (1) paid to the sovereign, not to a private party; (2) in cash or in kind; (3) intended at least partially as punishment; and (4) imposed in either a criminal or civil proceeding.[32]

What those earlier Supreme Court cases did not answer, however, was the question of when is such a fine unconstitutionally excessive. The Court first attempted to do so in *United States v. Bajakajian* (1998).[33] Bajakajian and his family had been traveling through the Los Angeles airport when a United States customs agent discovered $357,1444 in one of their luggage bags. Bajakajian pled guilty to a federal charge of failing to report the currency.[34] Thereafter, the government sought forfeiture of that entire amount, more than thirty-five times the statutory minimum amount ($10,000). The Court determined the forfeiture did constitute a fine and that there was punitive intent for the fine.[35] Analyzing the crucial question of whether the fine was excessive, the Court observed that "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed

[27] *Id. at 605.*
[28] *Id., at* 610-11 (emphasis added).
[29] *Id.,* at 610.
[30] *Id.,* at 621-22.
[31] *Austin,* 509 U.S. at 622 (quoting *Browning-Ferris Indus. Of Vt. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989.
[32] Haight (2020) at p. 304.
[33] *United States v. Bajakajian*, 524 U.S. 321 (1998).
[34] 31 U.S.C §5316 (2012) codifies the reporting requirement.
[35] *United States v. Bajakajian,* 524 U.S. at 328-34 (1998).

to punish." Since the Court could not find any guidance from the history of the Excessive Fines Clause that would inform how to resolve the question of what is excessive, it relied on Eighth Amendment's Cruel and Unusual Punishment Clause case law. In attempting to derive a constitutional excessiveness standard, the Court first observed that the judiciary has limited discretion to determine whether a fine is disproportionate because judgments about the appropriate punishment for an offense belong in the first instance to the legislature.[36] Secondly, the Court observed that any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise. Therefore, both of these principles, reasoned the Court, counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense. Therefore, the Court decided to adopt the standard of "gross disproportionality" articulated in its Cruel and Unusual Punishment Clause precedents.[37] As Haight states, after *Bajakajian* "[c]ourts cannot strike down financial penalties imposed by the legislature – even disproportionate ones - unless those penalties are not merely disproportionate, but exceptionally so" (Haight, 2020: 305).

The Court held that the government's forfeiture, under this test, was grossly disproportionable and therefore unconstitutional. The Court did not, however, articulate any clear test for that would constitute a "grossly disproportional" fine. The Court did observe, however, that the statutory maximum penalties for the crime of failure to report were minimal (6 months in jail, $5,000 fine); and the harm caused to the government was slight.[38] But because the forfeiture was "larger than the $5,000 fine imposed by the District Court by many orders of magnitude, and it [bore] no articulable correlation to any injury suffered by the Government," it was unconstitutional."[39] [40]

Another Supreme Court case, *Timbs v. Indiana* (2019),[41] involved the question whether the Eighth Amendment's Excessive Fines Clause is an incorporated protection applicable to the States under the Fourteenth Amendment's Due Process

[36] *United States v. Bajakajian,* 524 U.S. at 336 (1998) (citing *Solem v. Helm,* 463 U.S. 277, 290 (1983) ("Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishment for crimes.")
[37] *United States v. Bajakajian,* 524 U.S., 321, 335 (1998).
[38] *United States v. Bajakajian,* 524 U.S. at 338-39.
[39] *United Staes v. Bajakajian,* 524 U.S. at 339-40.
[40] Congress superseded *Bajakajian* in 31 U.S.C. §5332, which requires a defendant to forfeit all property involved in concealing more than $10,000 in currency into or outside the United States.
[41] *Timbs v. Indiana,* 139 S. Ct. 682 (2019).

Clause. Tyson Timbs had pleaded guilty in Indiana State court to dealing in a controlled substance and conspiracy to commit theft. At the time of Timbs's arrest, the police seized a Land Rover SUV Timbs had purchased for $42,000 with money he received from an insurance policy when his father died. The State sought civil forfeiture of Timbs's vehicle, charging that the SUV had been used to transport heroin. Observing that Timbs had recently purchased the vehicle for more than four times the maximum $10,000 monetary fine assessable against him for his drug conviction, the trial court denied the State's request. The vehicle's forfeiture, the trial court determined, would be grossly disproportionate to the gravity of Timbs's offense, and therefore unconstitutional under the Eighth Amendment's Excessive Fines Clause. The Court of Appeals of Indiana affirmed, but the Indiana Supreme Court reversed[42], holding that the Excessive Fines Clause constrains only federal action and was inapplicable to State impositions. The United States Supreme Court granted certiorari.[43] The United States Supreme Court reversed, holding that the Excessive Fines Clause is a "safeguard [that] . . . is 'fundamental to our scheme of ordered liberty" and that it must apply to the States.[44]

In her article, Haight argues that following *Timbs*, prisoners in State jails and prisons have an increased opportunity to bring legal challenges to pay-and-stay fees, which she argues, are fines and are excessive (Haight, 2020: 306-323). She rightly discusses the grossly harmful nature of these practices, using the example of a man who spent three months in county jail following a misdemeanor conviction where he was charged thirty-five dollars a day for "room and board," saddling him with a $3,150 bill. The man's only income was a $600 per month disability payment, and over two years after his release from jail, he still owed the county more than half his bill. Being in default, the county put him back in jail and charged him an additional $2,275 in daily fees for the new jail time. When finally released, his debt was higher than it had been before he began paying it down. Eventually, the court told the man it would dismiss his bill, but only if he agreed to serve a second 90-day jail stay, which was double the time for his original crime (Haight, 2020: 288).

[42] *Timbs v. Indiana*, 84 N.E.3d 1179 (2017).
[43] Timbs v. Indiana, 585 U.S. (2018).
[44] *Timbs v.Indiana,* 139 S. Ct. 682, 686-87 (2019) (quoting *McDonald v. Chicago*, 561 U.S. 742, 767 (210).

4.2 State Constitutions and Other Rulings on Excessive Fines

Most, if not all States, have provisions in their constitutions that closely track the Eighth Amendment. For example, Article 1, Section 16 of the Michigan State Constitution provides, "Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained."[45]

Federal Appeals Courts have weighed in on the issue of what constitutes an excessive fine. One example is *United States v. Jose*,[46] where the First Circuit enumerated factors to be considered in making this determination. These include whether the statute in question was designed to punish the defendant; the amount of other authorized penalties; and the harm caused by the defendant. The court determined that the forfeiture of the entire $114,948 defendant used for bulk cash smuggling was not grossly disproportionate to the crime.

When calculating fines, courts must consider the defendant's financial resources and the burden of the fine to the defendant, as discussed in *United States v. United Mine Workers.*[47] There the court found that a $3,500,000 fine against a union was excessive, but that a $700,000 fine was not.

5 Is it Possible to Put the Genie Back in the Bottle?

5.1 Introduction

We have all heard of the phrase "the genie is out of the bottle," a metaphor used to describe something that has been released and is now impossible to contain. In many stories about genies, people would find lamps or bottles, pop them open, and a powerful spirit would be set free. Once emerged, the genie would not go willingly back into the bottle – they had to be forced, or more likely, tricked. This was usually the goal of the story, most of which originated centuries ago throughout the Arabic-speaking world, and which became famous worldwide when the Arabian Nights book appeared in Europe in the 1700s. Genies were known to be mischievous, even

[45] Mich. Constitution (1963) (Article 1, §16).
[46] *United States v. Jose*, 499 F.3 105 (1st Cir. 2007).
[47] *United States v. United Mine Workers,* 330 U.S. 258 (1947).

when they harmed those who freed them from the bottle, and once that spirit is set loose, nobody wants to deal with them.

In performing the research for this article, realizing the scope and gravity of the problem, along with some of the public outcry in at least some corners of the legal community calling for reform, such as the ABA, the Institute for Justice, among many others, the "Genie is out-of-the-bottle" metaphor came to my mind. Once governments[48] (or banks, or airline carriers to name a couple) find easy pathways to generate revenue, especially those that have a name other than taxes, which their constituents do not appreciate, those pathways usually widen, they do not narrow, and they frequently become nearly impossible to close[49]. And of course, the general public is not likely to get too provoked when the government imposes fees, fines, bails and other methods of payment on criminals (whether petty or otherwise). After all, they are the ones who broke the law in the first place. So, the question is this. Given the extent of the forward momentum of the "Fines, Fees and Bail" model that came into vogue several decades ago, can the momentum be stopped? Can the genie be placed back in the bottle? The next sections will try to address this question.

5.2 Reflections from the Institute for Justice

The Institute for Justice represented Tyson Timbs in his Supreme Court case against the State of Indiana. Sam Gedge, a Senior Attorney at the IFJ, wrote a short article in 2024 offering some insights (Gedge, 2024). Gedge wrote that, "The decision was a victory not only for IJ client Tyson Timbs – fighting for forfeiture of his $40,000 car for a crime involving a few hundred dollars – but for all Americans facing fines and forfeitures disproportionate to their offense. Unanimously, the Court held that the Eighth Amendment's ban on imposing excessive fines applies to cities and states, and not just the federal government" (Gedge, 2024). Attorney Gedge relates a case in Lantana, Florida on behalf of IFJ's client Sandy Martinez, a mother of three who works hard to get by. Local code enforcement fined Martinez over $100,000 because her car sometimes did not fit perfectly on her small driveway, and two of its wheels

[48] Not to mention financial institutions, airlines, internet providers, to pick on just a few that quickly come to my mind. These industries have at least one thing in common: they devise ala carte fees to enhance their revenue streams.

[49] Newton's First Law of Motion, also known as the Law of Inertia, also comes to mind in this context. Things in motion stay in motion and become difficult to slow down unless acted upon by an unbalanced force. Various activist groups in the American legal system have tried to slow down the runaway "Fines, Fees & Bail" train but the sheer weight of that locomotive means it will take a lot of time and effort to decelerate it.

rested on grass rather than asphalt. Lantana also fined her nearly $50,000 after a storm damaged one of her fences. The City fined her another $16,000 for cracks in her driveway that she could not afford to repair. Martinez is challenging these fines under the excessive fines clause in Florida's state constitution (Gedge, 2024).

Gedge relates another client story out of the Boston, Massachusetts area, this one involving Monica Toth, a grandmother that was fined $2.17 million by the IRS for failing to file a one-page foreign bank account form. "With governments ever hungry to profit by imposing huge fines, IFJ must also find and close any loopholes that governments try to open in our *Timbs* victory" (Gedge, 2024). "For the first time in its history, the Supreme Court in *Timbs* recognized that the Constitution's '[p]rotection against excessive punitive economic sanctions' is both 'fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and tradition.'" But for a fundamental right to be meaningful, courts must protect it. That is why cases like Sandy's, Allie's, and Monica's are so important: They invite the courts to build on the foundation laid by *Timbs* and construe the Excessive Fines Clause as a real-world check on the government's power to punish" (Gedge, 2024).

As for Tyson Timbs, following the United States Supreme Court ruling in 2019, he had to argue before the Indiana Supreme Court a second time. He had to defend himself at a second forfeiture trial in Marion, Indiana, where he prevailed. He then had to defend that trial court victory before the Indiana Supreme Court once again. His case ended in final victory in June 2021, when the Indiana Supreme Court applied a robust understanding of the Excessive Fines Clause to affirm that Mr. Timbs was entitled to recover his Land Rover.

The lesson from the IFJ is that lawyers around the country must be, as always has been the case, at the vanguard of the fight to ensure constitutional and statutory rights are protected. This means fighting the problems one case at a time. And that is not always terribly efficient. But each victory matters. I would offer the proposal that perhaps states should legislate fee shifting statutes that provide that in cases such as discussed in this paper involving litigation over excessive fines and fees, when the complaining person prevails, they should be able to collect their attorney's fees and costs from the defendant. This paradigm is contrary to the usual American Rule where typically both sides to litigation are responsible for their own counsel fees, win or lose (Heller, 2018: 45-66). However, fee-shifting statutes can help deter

abusive practices, encourage disadvantaged groups to enforce their rights and help foster fundamental change as those bringing suits under such legislation act essentially as assistant attorney generals that can help effectuate positive changes for those persons similarly situated.

5.3 United States Department of Justice, Office for Access to Justice, Fines & Fees Report 2023

In 2023, the Department of Justice, Office for Access to Justice[50], issued a report highlighting both the significant problems to the justice system and society as a whole associated with excessive fines and fees, and some of the recent gains that have been made (and which are ongoing) in ameliorating these problems (DOJ Report Fines & Fees, 2023). The body of the report consists of 53 pages (with another 16 pages of end notes). Given space limitations here, I will comment on several developments I found particularly interesting. For those readers with the time and inclination, I recommend the entire report (hereinafter: DOJ Report).

In introductory remarks, Associate Attorney General Vanita Gupta writes, "Legal system fines and fees can be devastating to individuals and their families when imposed without regard to circumstances. Individuals who are unable to pay court-imposed assessments often face dramatic penalties that can lead to escalating and inescapable cycles of debt, extended periods of probation and parole, drivers' license suspension, and repeated, unnecessary incarceration. They can lose their job, driver's license, home, or even custody of their children" (DOJ Report, Letter from Associate Attorney General Vanita Gupta). These are all themes discussed earlier in this paper. Striking a positive note, even if there is much work that remains undone, Gupta writes, "Many leaders, at all levels of government, have taken considerable and innovative steps to address these unintended consequences. As highlighted in this report, numerous jurisdictions and local leaders from across the country are working alongside advocates, impacted communities and experts to redress the often harmful and counter-productive impacts of fines and fees on the communities they serve. Those efforts deserve amplification and, in many instances, replication . . .

[50] The Office for Access to Justice is a standalone agency within the U.S. Department of Justice that plans, develops, and coordinates the implementation of access to justice policy initiatives of high priority to the Department and the executive branch. Its mission is to help ensure all communities have access to the promise and protections of the American legal systems. It attempts to advance this goal by working to ensure justice belongs to everyone, not only those with wealth or status. (DOJ Report, Letter from Director Rachel Rossi, p. 4).

Eliminating the unjust imposition of fines and fees is one of the most effective ways for jurisdictions to support the success of youth and low-income individuals, honor constitutional and statutory obligations, and reduce racial disparities in the administration of justice" (DOJ Report, Letter from Associate Attorney General Vanita Gupta).

In her remarks, Access to Justice Director Rachel Rossi adds, "We know the simple reality is that courts and government agencies have come to rely on fines and fees, for both revenue and punishment. We must offer alternatives, resources, and support as jurisdictions explore different approaches. We hope this report can assist to provide such support" (DOJ Report, Letter from Access to Justice Director Rachel Rossi).

Here are some of the steps, according to the DOJ Report, that states, counties, municipalities, courts, and district attorneys' offices throughout America have taken to decrease the total costs and categories of fees they are assessing against litigants. These "promising practices" have not and will not completely put the genie back in the bottle, but they are a good start and show that with hard work and resolve, even old bad practices can be curbed and reversed.

5.3.1 A Sampling of Recent Reform Measures Taken Across America to Reverse the Criminal Justice System's Long-Standing, Over-Reliance on Fines and Fees to Fund the System

5.3.1.1 Elimination of All or Many Fines and Fees

Some jurisdictions have taken steps to eliminate all or many categories of fines and fees that are in their discretion to waive (DOJ Report, 2023: 7-9). California has been very progressive. In 2023, the state legislature passed the "Families Over Fees Act,"[51] that eliminated 23 categories of criminal legal system fees such as those for public defenders and court-appointed counsel, arrest and booking fees, parole and probation supervision fees, home detention fees, certain electronic monitoring fees, fees for work release and work furlough programs, to name a few. The comprehensive legislation also forgave all outstanding balances on previously

[51] AB. 1869, 2019-2020 Reg. Sess. (Cal. 2020). For complete reference see fn. 10 DOJ Report, at p. 58.

assessed fees in those categories and appropriated to counties $65 million annually for five years to help make up for lost revenue. I was happy to read that the City of Seattle, Washington, where I practiced law for 30 years, has also been proactive. In 2020, following a study commissioned by the City of Seattle's Office for Civil Rights, which concluded that Seattle's criminal system fines and fees disproportionately burden people of color, Seattle Municipal Court judges voted unanimously to eliminate all discretionary fines and fees imposed in criminal cases. These included probation supervision fees, record fees, work crew fees and community service set-up fees.[52]

5.3.1.2 Elimination of Juvenile Fines and Fees

The DOJ report highlights how fines and fees are particularly harmful to the nation's youth, who most often are not able to pay court-issued fines and fees themselves, thereby burdening parents and guardians. Therefore, there are practical realities that make imposing fines and fees on youth particularly invidious (DOJ Report, 2023: 10-11). "[E]ight states[53] and multiple local governments and juvenile justice agencies have eliminated all juvenile fines and fees, while six states and a number of local governments and juvenile justice agencies have taken the intermediate step of eliminating all juvenile fees. A number of other jurisdictions have abolished certain categories of juvenile fees, such as fees for diversion programs and appointed counsel" (DOJ Report, 2023: 10). I began my career in southeastern Michigan, and practiced law there for several years. Macomb County is the third-most populous county in Michigan and is part of the northern Metropolitan Detroit region. So, I was also happy to read that in 2021, following a year-long study on juvenile court fees, the Macomb County Circuit Court[54] announced it would no longer assess discretionary juvenile court fees, including pay-to-stay fees, fees for court-appointed counsel and fees for probation supervision. The Court also discharged all related debts (DOJ Report, 2023: 11).

[52] For complete references, see fn. 20, DOJ Report, at p. 59.
[53] Delaware, Illinois, Maryland, Montana, New Jersey, New Mexico, Oregon, and Washington have eliminated all juvenile fines and fees. Arizona, California, Colorado, Louisiana, Nevada, and Texas have eliminated all juvenile fees. For complete references, see fn. 24, DOJ Report, at p. 59.
[54] In Michigan, the state county courts having general jurisdiction (trial courts of first instance) are called Circuit Courts. Other States call these Superior Courts. An oddity is that in New York the Supreme Court is the trial court of unlimited original jurisdiction.

5.3.1.3 Elimination of Fees for Requesting and/or Using a Public Defender

I must make a candid admission. Having practiced civil litigation over the course of my 35-year career, there obviously were aspects of criminal law and procedure I was unfamiliar with, even though, as a law student, I clerked in the Oakland County Michigan Circuit Court and watched many criminal trials. Since the Sixth Amendment provides, that indigent persons are entitled to legal counsel in criminal cases where they could not afford to pay their own lawyer, I was unaware that the courts could impose fees when defendant's exercised their Sixth Amendment rights. The DOJ Report enlightened me (DOJ Report, 2023: 12). It states there are two types of assessments commonly imposed on defendants attempting to access a public defender or court-appointed counsel. "The first is flat-rate application or appointment fees that some jurisdictions automatically impose on defendants that request court-appointed counsel. The second are recoupment fees that generally are imposed after disposition to recover the costs for representation. Research has shown that both categories of fees can chill the exercise of the Sixth Amendment right to counsel and undermine trust in the attorney-client relationship" (DOJ Report, 2023: 12). At least seven states: California, Delaware, Hawaii, Nebraska, New York, Pennsylvania, and Rhode Island, together with a number of counties[55], have abolished or do not authorize fees related to court-appointed counsel for indigent defendants (DOJ Report, 2023: 12).

5.3.1.4 Elimination of Fees for Diversion Programs

Diversion programs[56] are an alternative to traditional prosecution and allow participants to avoid criminal convictions, penalties and incarceration while providing rehabilitative or educational services. Unfortunately, some jurisdictions have required persons seeking to avail themselves of diversion programs to pay fees as a precondition or to satisfy other onerous conditions. "Eliminating fees associated

[55] Every state in America is subdivided into what are known as counties. There are a total of 3,143 counties in America. Michigan, for example, my birth-state, has 83. Detroit is located in Wayne County. Counties were established long ago to basically encourage growth and settlement. Their configuration have not changed much over the years.

[56] For a good article explaining what diversion programs are, and how they benefit defendants and society more generally, *see* "*Diversion Programs, Explained*," Vera, April 28, 2022. For Access: https://www.vera.org/diversion-programs-explained. In short, "Diversion" is a broad term referring to "exit ramps" that move people away from the criminal legal system, offering an alternative to arrest, prosecution, and a life behind bars. According to this article, "[D]iversion programs not only help improve long-term community safety and reduce crime but have also proven to be cost-efficient."

with diversion programs can help ensure that income does not determine access to diversionary programs" (DOJ Report, 2023: 13). The DOR Report provides an example of a case where such fees have been eliminated. In 2020, in Dane County, Wisconsin[57] the Board of Supervisors eliminated fees and associated debt for two diversion programs that provide alternatives to incarceration.

5.3.1.5 Elimination of Fees Related to Supervision

Probation and parole are fundamental aspects of the criminal justice system. Both are forms of supervision following a criminal conviction. Jurisdictions across America have imposed a multitude of fees attached to both forms of supervision, among them: generic "supervision" fees, electronic monitoring fees, fees for drug testing, fees for mandatory programming or counseling, among others. Some policymakers argued these fees are counterproductive and should be eliminated because they imposed "additional debt on individuals at [a] vulnerable juncture [and] can undermine the objectives [of probation and parole] and increase recidivism" (DOJ Report, 2023: 14). Over the past several years several jurisdictions have eliminated fees associated with supervision or with aspects of supervision, such as electronic monitoring. Oregon is one such example. There, in 2021, the Oregon General Assembly passed a bill eliminating the authority to assess probation supervision fees[58] (DOJ Report, 2023: 14).

5.3.1.6 Elimination of Carceral Fees[59]

Carceral fees are assessed against individuals while they are incarcerated and may include room and board (so-called "pay-to-stay" fees), fees for phone calls, emails, medical co-payments, mark-up on commissary[60] items, law library fees, and fees for accessing the money family members deposit into commissary accounts, among many others (DOJ Report, 2023: 16). These fees are particularly cruel because, as discussed elsewhere in this paper, those who are incarcerated are disproportionately poor to begin with, and while locked up earn an average of .52 per hour for any work they do, if they are paid at all. Simply put, these people cannot afford more

[57] Dade County, Wisconsin is the second-most populous county in Wisconsin, and the home of Madison, location of the University of Wisconsin and the state capital. Over one-half million people reside there.
[58] For complete references, see fn. 49, DOJ Report, at p. 61.
[59] Carceral is an adjective, meaning relating to or of the nature of a prison.
[60] A commissary is like a supermarket or store where the prisoners can buy various food items and other supplies.

debt to be accumulated while incarcerated, especially since they are also likely to have a difficult time finding gainful employment once they are free again. American states and counties have begun to eliminate specific categories of carceral fees. The County Board in Ramsey County, Minnesota[61] eliminated fees for diabetes supplies and over-the-counter medications for people in custody. The Board had already eliminated the County's jail booking fee in 2017[62] (DOJ Report, 2023: 16-17).

5.3.1.7 Elimination of Fees for Individuals Who are Acquitted or Whose Case is Dismissed

Responding to research showing that the failure to waive legal system fees upon dismissal or acquittal significantly erodes the public's trust in the justice system, most jurisdictions waive fees in such circumstances, and at least 10 states with municipal courts either ban or do not authorize courts to impose fees on a defendant who has been acquitted or whose charges have been dismissed (DOJ Report, 2023: 18).

5.3.1.8 Other Significant Reforms

At least six states[63] have passed legislation barring courts and municipalities from assessing new fees, or fees that exceed a certain aggregate threshold, without explicit authorization from the state legislature. An overwhelming majority of states have set caps on how much a defendant can be fined for violation of a local ordinance (DOJ Report, 2023: 19).

Many jurisdictions permit litigants to complete community service in lieu of paying a fine. Community service, however, exacts its own costs such as taking unpaid leave from the person's job, paying for childcare, etc. Some jurisdictions have made reforms to help mitigate these potential unintended consequences, including: ensuring no additional fees are associated with performing that community service; providing expansive definitions of what constitutes community service; allowing courts to tailor community service hours and location to an individual's circumstances; and, credit litigants at a reasonable hourly rate. California and New Mexico, for example, ensure community service is proportionate to the underlying

[61] Ramsey County is the second-most populous county in Minnesota. Its county seat and largest city is Saint Paul, also the state capital and the twin city of Minneapolis. St. Paul and Minneapolis are known as the Twin Cities.
[62] For complete references, see fns. 59, 60, DOJ Report, at p. 62.
[63] Those states are: Alabama, Arkansas, Kansas, Missouri, New Jersey, and Wisconsin.

offense by crediting litigants for the community service they complete at a fair hourly rate, such as twice the jurisdiction's minimum wage, to pay off the fine or fee amount (DOJ Report, 2023: 20-22).

Some jurisdictions have developed schemes allowing flexible payment options. Reforms that can make payment of fines and fees more equitable and effective include: penalty-free payment plans; opportunities for adjustment following changed circumstances; income-proportionate payment plans; allowing partial payments; enabling multiple methods of payment such as in person or online (DOJ Report, 2023: 30-32).

Over the last five years, 28 states and the District of Columbia have adopted legislation to eliminate or circumscribe the practice of debt-based driver's license restrictions. At least 17 states never place any restrictions on driver's licenses for failure to pay legal system fines and fees. Several additional states also prohibit driver's license restrictions for failure to appear for cases involving petty misdemeanors or fine and fees (DOJ Report, 2023: 36-37).

6 Conclusion

Over the past couple of decades, states and local governments have found myriad ways to increase the fees and fines imposed on criminal defendants to fund their court systems. The Supreme Court in *Timbs*[64] held that the Eighth Amendment's Excessive Fees Clause applies to the State's under the Fourteenth Amendment. Additionally, all American States have prohibitions in their State constitutions that prohibit excessive fines. And as we have seen in *Bajakajian*[65], the Supreme Cout held that grossly disproportionate fees are unconstitutional. Further, in *Bearden*[66] the Court held that courts may not incarcerate an individual for nonpayment of a fine or restitution without first holding a hearing on the individual's ability to pay and making a finding that the failure to pay was willful. Despite this case law, the "excessive fee and fines" defense has not been raised frequently enough with, as we have seen, horrible consequences for criminal defendants caught up in the criminal justice system.

[64] *Timbs v. Indiana,* 139 S. Ct. 682 (2019).
[65] *United States v. Bajakajian*, 524 U.S. 321 (1998).
[66] *Bearden v. Georgia*, 461 U.S. 660 (1983).

Recently, much has been written about this issue. This authorship has helped place a spotlight on this serious problem. As this article has highlighted, various groups have made many suggestions about how the criminal justice system can be reformed so as to curb, if not eliminate, the abusive use of fees and fines. As outlined in Section 5, substantial headway has been made. However, reform efforts are still in their early stages, and much work remains to be done. In short, the genie is still outside the bottle.

This article will close by relating key findings and recommendations from a research report conducted by the Brennan Center for Justice in 2019 (Menendez, Eisen 2019). The report, entitled "The Steep Costs of Criminal Justice Fees and Fines," was the culmination of the examination of 10 counties across Texas, Florida and New Mexico, as well as statewide data for those three states. According to the Report, the counties vary in their geographic, economic, political, and ethnic profiles, as well as in their practices for collecting and enforcing fees and fines. The ultimate conclusion was: "Court fees and fines unjustly burden people with debt just as they are re-entering society. They are also ineffective at raising revenue" (Menendez, Eisen 2019).

Key findings

A. Fees and Fines are Inefficient for Raising Revenue
B. Collecting Fees and Fines Detracts from Public Safety Efforts
C. Judges Spend Almost no Time in Court Determining Whether People Can Afford to Pay Fees and Fines
D. Jailing for Nonpayment is Costly and Irrational
E. The Amount of Uncollected Debt Continues to Grow
F. Jurisdictions Do Not Track Costs Related to Collecting Fees and Fines
G. Fees and Fines are a Regressive Tax on the Poor

Recommendations

A. States and Localities Should Eliminate Court-Imposed Fees
B. States Should Require Courts to Assess Fines Based on Ability to Pay
C. Courts Should Stop the Practice of Jailing and Failure to Pay

D. States Should Eliminate Driver's License Suspension for Nonpayment of Criminal Fees and Fines
E. Courts and Agencies Should Improve Data Automation Practices
F. States Should Pass Laws Requiring Purging of Old Balances That Are Unlikely to Be Paid

It will take much time and effort to reform the American criminal justice system, and to eradicate the injustices caused by the indiscriminate use of fees and fines to fund the system. The words of Martin Luther King come to mind. "Human progress is neither automatic nor inevitable. Every step toward the goals requires sacrifice, suffering, and struggle; the tireless exertions and passionate concern of dedicated individuals." As we have seen in the last sections of this article, many dedicated individuals across America have indeed begun taking the hard but necessary steps to eradicate the many abusive practices that have occurred in America's criminal justice system over the last several decades.

Acknowledgment

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An Overview of Medical Malpractice Law in the United States Including Legislative and the Health Care Industry's Responses to Increased Claims Authors

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Medical Malpractice claims are frequently asserted in the United States. At various time and places, an extraordinarily high number of claims and payouts led to what some have called medical malpractice crises. Consequently, in some geographical locations physicians either could not purchase malpractice insurance as carriers withdrew from the market, or, insurance became increasingly expensive and the overall costs associated with the delivery of health care continued to rise. Other undesirable consequences of these crises included a shortage of qualified physicians in certain parts of the country. Many of the states responded to these problems legislatively through a long series of tort reform measures. The health care industry itself has evolved in numerous ways. In particular, many health care providers have turned away from traditional private insurance models to self-insured models such as captives. Further, the industry has continued to consolidate, with fewer, but larger hospitals and clinics, and with an increasing number of physicians employed directly by hospitals and large clinics. The results of all of these changes have had mixed results.

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1 The Function of Tort Law and the Concept of Negligence.

The law of torts in the United States serves several important functions. First, it is meant to help deter and prevent accidents. In theory, this is due to the fact the wrongdoer, known as the "tortfeasor," can be held financially responsible (i.e. liable) for his or her accident causing behavior. In this sense, tort law is a form of social control as it is designed to promote good social conduct. That is, the threat of financial liability encourages safe behavior. Second, and as a corollary to the first factor, it provides compensation to accident victims and their families, as the injured parties have legal recourse against the tortfeasor and the tortfeasor's insurers (assuming the tortfeasor is insured for the injury-causing conduct) (Prosser et al., 1984).

On the other hand, tort law, as is the case with other substantive areas of the law, is concerned with fairness to all parties. Society will not long respect the legal system if it does not perceive it as fundamentally fair to everyone. In that respect, a counterbalance to the idea of tort law protecting "victims" of wrongful conduct is the notion that tort (and other) laws should not unduly burden productive activities. To some extent, the existence of liability insurance as something persons and entities can purchase to insure them in the event of liability-causing activities can help minimize, if not totally eliminate, catastrophic risk to the tortfeasor. Additionally, a fair and just legal system requires an efficient and effective legal process, that is, one that has standards that are understandable, and which therefore provide clear guidance to the bench and bar, and more widely, to the public. A legal system that provides reasonably speedy resolutions to legal disputes, and which is reasonably affordable to all, also promotes the public's confidence in the system.

One major sub-area of the law of torts is the law of negligence, which in its most basic sense provides that everyone has an obligation (known in the law as a "duty") to perform their actions with "ordinary" or "reasonable" care. In tort parlance, persons have to carry out their activities as would the so-called "reasonably prudent person." In effect, this requires a sliding scale of prudence of care, in the sense that the degree of care required is commensurate with the foreseeable risk of harm involved in the activity being carried out. Logically, the greater the risk of harm is in the act being carried out, the greater the care that must be taken. By way of example, working with explosives would require maximum care and preventative measures

while the mere act of walking around town would be correspondingly less. The general idea is that if a risk of harm is reasonably foreseeable (to the hypothetical reasonably prudent person), and the actor's actual conduct falls below the standard of reasonable care and injury or damage results, the actor can be held liable ("in tort") for all damages that proximately follow from the actor's negligence.

2 Introduction to Medical Malpractice Law in the United States

In present day, the average person seeks medical care many times over a life time, starting often before birth (as fetus in womb), and most typically from a host of providers, and in various settings, including medical clinics, hospitals and similar facilities. As of 2015, a typical person in the United States visited the doctor an average of 4 times per year (https://www.statista.com/statistics/236589/number-of-doctor-visits-per-capita-by-country/). The 2014 data from the Federation of State Medical Boards shows that as of that time there were over 916,000 licensed physicians in the United States (Young et al., 2014). According to statistics from the American Hospital Association, in 2017 there were over 5,500 registered hospitals in the United States; nearly 5,000 more community hospitals; nearly 3,000 nongovernmental not-for-profit community hospitals; over 1,000 investor-owned (for-profit) community hospitals; nearly 1,000 state and local government community hospitals; and, hundreds of other government hospitals, psychiatric hospitals, nonfederal long term care hospitals and prison and college (i.e., other) hospitals (American Hospital Association, 2016).

Given the number of encounters the average person has with medical professionals, and the extant numbers of physicians and hospitals, it should therefore come as no surprise that medical negligence does occur with some degree of regularity, and that the court system is called upon to adjudicate many of those claims. Claims for negligence against physicians, hospitals and other health care providers are one sub-component of tort (negligence) law, and such claims are referred to generally as claims for medical malpractice. As with other legal claims, the vast majority are resolved without the need for formal legal action (i.e., a lawsuit). However, when not resolved short of a lawsuit, medical malpractice claims are generally brought in state court (some are filed in the federal court system). Given the autonomy of the states to conduct their own affairs, the laws regarding medical negligence vary from state

to state. A comprehensive discussion of the differences in state laws is beyond the scope of this paper.

Generally speaking, however, under well-accepted principles of tort law, in order to prevail in a medical malpractice suit, the plaintiff ordinarily must establish each of the following legal elements: (1) the person or entity being sued owed plaintiff a legal duty; (2) there was a breach of that duty; (3) that breach proximately caused the plaintiff harm; and (4) the plaintiff sustained damages (Bal, 2009; Prosser et al., 1984).

Concerning the duty element, the plaintiff must first establish that a "physician-patient" relationship existed (Kraljić, 2017; Unver, 2016). This element is usually met rather easily. Assuming such a relationship, then the physician (and/or health care facility) owes the plaintiff a duty to exercise reasonable care in providing the treatment.

The extent and scope of the duty owed relates to the so-called standard of care the physician/health care facility is required to follow. The standard of care has expanded over the years from a local to a national standard. The plaintiff must establish, almost always through expert testimony, what the standard is and that the care provided fell below that standard. As a general proposition, medical malpractice is defined as any act or omission by a physician during treatment of a patient that deviates from accepted norms of practice in the medical community. What exactly those accepted norms of practice are form issues at the crux of most contested medical malpractice cases.[1]

Thirdly, the plaintiff must establish, again nearly always through the use of expert testimony, that the sub-standard care provided actually caused, in a direct sequence (i.e., proximately caused), the complained of injury. That is, if the physician or health care facility was negligent in some way, but that negligent act did not actually (proximately) cause the injury complained of, then the physician or health care facility will not be held liable to the plaintiff.

[1] The general rule is that expert medical testimony is necessary to establish the relevant standard of care and causation in a negligence action against a health care provider. See, e.g., *Winkler v. Giddings*, 146 Wash. App. 387, 190 P.3d 117 (Div. 3 2008).

Lastly, the plaintiff must establish damages. The fact of some sort of damage is usually (though not always) easy to prove. What typically is disputed, in one or more ways, is the nature and extent of plaintiffs' damages, issues we turn to next in this paper.

3 Explanation and Types of Damages

The types of damages that might be awardable to a plaintiff in a medical malpractice case are similar to those available to plaintiffs in other personal injury cases. However, since the landscape in medical malpractice cases (discussed later in this paper) has focused largely on issues stemming from damages (and large damages awards), the types of damages are first discussed.

3.1 Economic Damages

The first broad category of available damages is known as economic damages. As this name implies, included are past and future medical bills; past and future loss of income, including loss of future earning capacity; past and future loss of services; damages stemming from the need for a future health care plan post-accident; past and future "other" out-of-pocket expenses (such as transportation costs to/from medical or other appointments), among possible other economic losses. Economic damages are subject to calculation, but often are the subject of disputed lay and expert testimony, sometimes from numerous disciplines such as medical doctors, economists, nurses, care planners, vocational rehabilitation specialists, among others.

3.2 General/Non-Economic Damages

The second broad category of damages is called "general" or "non-economic" damages. General damages include compensation for past and future pain and suffering; disfigurement; humiliation; aggravation; anxiety; fear of future injury; loss of companionship; etc. General damages are highly subjective in nature and are not readily subject to calculation.

In a jury case, and assuming the plaintiff otherwise establishes the elements to prove liability, the jury is given a special verdict form with which to calculate damages, with each of the above-mentioned categories of damages listed. The jury is free, based on the evidence, to award damages for any or all of these specific categories, by placing a dollar amount on the blank line next to each such category. Punitive damages are allowed in some states for essentially malicious or willful conduct.

4 The Medical Malpractice Crises and Where the Goals of Tort Law Clash

With this legal framework behind us, we can now move on to the core of this paper, which is, how have the various "stakeholders" involved in the medical malpractice arena (injured persons, physicians, medical clinics, insurers, the legal system, the broader public, the legislative system) in the United States responded when the multiple goals of the tort system, discussed at the very outset of this paper, have found themselves on a collision course. That is to say, what has occurred when there has been excessive strain placed on the medical profession (and their insurers) due to large volumes of medical malpractice claims and monetary payouts (settlements and judgments)? As mentioned earlier, tort law has principal aims of not only reasonably compensating injury victims, and employing the threat of claims/lawsuits to help promote safe practices, but also to foster notions of fairness and predictability, and to not unduly harm and hinder useful economic activities. It is fair to conclude that these multiple goals have collided in the medical malpractice arena. The remainder of this paper will focus on an overview of the recent history of medical malpractice claims; the substantial fallout from those claims; and, how the courts, various legislative bodies, insurers, physicians and medical clinics (that is, the primary stakeholders) have responded.

There is a substantial body of literature that has shown that the number of medical malpractice claims and lawsuits has occurred in waves over the last 50 years or so. Three periods of "crisis" leading to soaring medical malpractice costs occurred in the 1970's, the mid-1980's and into the 1990's and again in the mid-2000's (Stark, 2016). As one might expect in a country as broad, diverse and expansive as the United States, there has been considerable variability in the number of claims asserted; the amounts of settlements paid and judgments awarded; and, the costs of medical malpractice insurance from state to state and over time. According to the

National Practitioner Data Bank (NPDB), total payments for physician medical malpractice claims in the United States more than doubled between 1991 and 2003, rising from $2.12 billion in 1991 to $4.45 billion in 2003. During that same period of time, the average payout rose from somewhere between approximately 88% to 131%, or approximately $140,000 to $290,000 (US Dept of Health & Human Services, 2014).

Data gathered by the NPDB and the Physicians Insurers Association of America (PIAA) show that the number of paid claims for medical malpractice increased at a fairly moderate rate of approximately 7% to 12% between the years 1991 – 2003 (claims estimates of approximately 13,700 in 1991 to 15,000+ in 2003.) The NPDB and PIAA estimate that the average defense costs per claim also roughly doubled from 1991 to 2001 (for paid claims roughly $21,000 to $44,000) (US Dept of Health & Human Services, 2014). As indicated above, the number of claims asserted, and the amount of dollars paid per claim, varies significantly across the various states. A complete comparative analysis is beyond the scope of this paper.

5 Consequences of the Increases in Number of Claims and Payouts

That victims of medical negligence should be fairly compensated is unquestioned. Compensating victims of negligence, or other wrongful conduct, regardless of the setting in which injury occurs, is a bedrock principle of the United States system of justice. On the other hand, and as the extensive literature has pointed out, periods of time when there have been precipitous spikes in the number of medical malpractice claims (and unexpectedly high dollar payouts) have led to numerous undesirable consequences for the multiple stakeholders (Mello et al., 2005). For example, malpractice premiums for some physicians, and in particular those practicing in certain high-risk specialty fields (such as surgery or obstetrics), and for some physicians that have practiced in geographical regions of the United States that have been particularly hard hit by claims, such as the northeast, increased dramatically. Some insurance carriers withdrew from some of these high risk markets or would not insure physicians practicing in high-risk fields. As already discussed, tort law encourages persons and entities to purchase insurance (indeed, the law often requires persons or entities to have certain levels of insurance coverage as a condition of doing business/being licensed) and an overriding theme in the law and society is that persons and entities will, more often than not, have insurance to

protect victims of wrongdoing. Therefore, conditions leading to a lack of available insurance are, in general, not desirable from a public policy standpoint.

Other undesirable consequences of the spikes in medical malpractice claims and the lack of available (or reasonably affordable) insurance are that physicians decided not to practice is some regions of the United States or to practice in lower risk fields of medicine in regions where claims were prevalent. These decisions, in turn, led to shortages of competent physicians in certain parts of the country, and a shortage of certain specialists as well. Those decisions, reasonable from the point of view of physicians, were highly detrimental to the public.

Another adverse consequence of increased medical malpractice claims is that the medical profession began to engage in what is commonly referred to as "defensive medicine," namely prescribing (too?) many tests, making (too?) numerous referrals to other physicians (specialists) and the like. Much has been written on this topic, the details of which again are beyond the scope of this paper (U.S. Congress, Office of Technology Assessment, 1994). However, from a societal standpoint, a legitimate and important concern is that this practice of (overly) defensive medicine has needlessly and unreasonably driven up the cost of health care in the United States. The country in fact continues to grapple with the escalating and often disastrous consequences of exorbitant health care (Obama care; dissatisfaction in some quarters with Obama care; efforts to replace/modify Obama care; continued collapse of insurance markets, etc.).

6 Reasons Behind Spikes in Medical Malpractice Claims and High Costs for Medical Care

Others have analyzed the causes of the spikes in medical malpractice claims and fallout from same (The Council for State Governments, 2003). While perhaps not a complete list, a review of some of this literature leads to the following list of some of the most common causes identified for the increase in medical malpractice claims and high payouts to the patient victims. Some say there are too many plaintiffs, personal injury attorneys and extensive litigation. Others claim some of the jury verdicts and settlements are excessively high. Yet others argue that the law wrongly permits unqualified experts to testify on behalf of plaintiffs at the trial of medical malpractice cases. Other arguments include that the substantive and procedural civil

trial rules are too slanted in favor of plaintiff to the detriment of the medical profession. Still others point to a flawed medical malpractice insurance market. And, as discussed earlier in this paper, many argue that the risk of a medical negligence claim (and concomitant risk of losing insurance coverage; or maintaining coverage but paying high premiums; and, having ones professional reputation sullied) has backed physicians into a corner, forcing them to practice defensive medicine.

7 Responses by the States – Tort Reform

7.1 Introduction and Overview

As a consequence of these undesirable consequences, state legislatures around the country; physicians and health care facilities; and, the insurance industry, responded. We will first address actions taken at the state legislative level (Bal, 2009).

State legislatures have attempted to address some of the problems identified above in various ways, under the umbrella of what has been called "Tort Reform." While the judicial system in the United States has certainly faced significant challenges in dealing with various other mass tort litigation, such as the asbestos litigation, which is the longest mass tort litigation in the United States and which is still ongoing, and which also led to tort reform efforts, medical malpractice litigation has drawn particular attention when it has come to legislative efforts to reform the way the legal system works.

Tort reform in the medical negligence arena has occurred more or less continually over the last 40 years. Some states have been much more active than others, and a complete state be state discussion, or any attempt to discuss completely all of these legislative initiatives, is beyond the scope of this paper.

As might be expected in a democratic society, these reforms have largely been promoted by the health care and insurance industries, who have claimed reforms are necessary in order to help minimize the practices of defensive medicine; to encourage physicians to practice in all areas of the country and to practice in high risk areas of medicine such as surgery; to make insurance more readily available and affordable; and, in a global sense, to help drive down the overall cost of health care in the United States, making it more available to more people at a more affordable

cost. On the other side of the struggle, and again predictably, there are certain stakeholders that have generally opposed these legislative efforts, and who have advocated the status quo. These groups include plaintiff personal injury attorneys along with other patient advocacy groups. Their side of the argument holds that medical negligence exists; patient injuries and damages are real, and often devastating; and, that the goals of tort law are best met by applying long-standing, tried and true principles. After all, the argument would go, why should the medical industry be given any preferential treatment or "breaks?" Why should a person injured through the negligence of a health care provider be given different (i.e., worse) protections by the judicial system than a person injured, for example, through the negligence of a motorist? Physicians and the health care industry as a group are generally well-off financially and should be heard to fully answer for their acts of negligence. Additionally, nothing is more sacred and important than a human's health and safety when receiving medical attention. Therefore, if a person suffers injury at the hands of a negligent physician or medical facility, those persons and entities should shoulder the full blame. The injured patients should not be made less than whole when a legal claim is rightfully asserted, and, perhaps physicians and health care facilities will learn their lessons and correct poor practices after going through the crucible of the legal system, and for those who don't, seeing what negligent conduct is likely to lead to (malpractice claims and higher insurance premiums, among other negative consequences) they are likely to "up their game," a win for patient safety.

This author does not takes sides in this debate, other than to observe that as in most issues as complicated, nuanced and important as this, all sides have justifiable and credible concerns. The problems are not black and white; the solutions not simple. As imperfect as the United States legal system is, and as unfair as it may seem to some at times, at the end of the day the pulling and tugging; the rigorous, sometimes boisterous case by case nature of our legal system, has at least given all parties forums in which medical malpractice disputes can be resolved. The next part of this paper addresses some of the more important, specific aspects of tort reform; that is, the legislative and judicial responses to the so-called medical malpractice crises.

7.2 Caps on Damages

Some health care providers believe that jury awards of non-economic/general damages (e.g. pain and suffering, humiliation) are too often arbitrary, excessive, capricious and punitive in nature. That is, the belief in some physician/health care circles is that the amount of damages sometimes awarded go well beyond reasonable compensation, and that juries sometimes punish physicians because they have deep pockets. Indeed, awards of non-economic damages can in some cases be very significant, amounting to many millions of damages. Of course, very significant damages are often awarded to victorious plaintiffs in non-medical malpractice cases as well, so it is difficult to see where physicians and the health care industry are being singled out by juries for unfair, disparate treatment. Further, in situations where a defendant believes the jury returned an excessively high verdict, defendants have available to them the option to request a remittitur, that is, to file a post-trial motion requesting that the trial court judge reduce the amount of damages. Such motions are authorized under federal rules of civil procedure (FRCP) 59(e) and similar state analogues to the federal rule.

In any case, one significant tort reform measure is that many state legislatures have attempted through legislation to limit, i.e., place "caps" on the amount of non-economic damages that a jury can award. Those limits vary, for instance: $250,000, $500,000 or $1,000,000. State legislation has most typically sought to place caps on non-economic damages. Some states have placed caps on the amount of economic damages that a jury can award. Still fewer states have placed caps on total damages.[2]

Caps on damages have been challenged by plaintiffs and patient advocacy groups on various legal grounds, including that they violate the equal protection clauses in the states' constitution (for good discussion see Parson, 1987). Some state courts have, in fact, found legislative provisions placing caps on damages to be unconstitutional

[2] For a good, recent survey of caps by state, see Morgenstern, 2005. The author in this article states that the average cap per state was $626,650. As of the writing of that article, the author wrote that 31 states had damage caps. The lowest cap was $250,000. The types of caps varied significantly. For instance, Virginia's cap is set to increase $50,000 annually until it hits $3,000,000 in 2031. In the State of Indiana, any damages in excess of $250,000 for an individual health care provider is covered by the state. New Mexico's cap does not apply to punitive damages.

as a matter of their state laws.[3] Other courts, in some states, have upheld caps in the face of constitutional challenges (Parson, 1987).

7.3 Limitations on Attorney's Fees

Under the so-called "American Rule" as a general rule in civil litigation, all sides pay their own attorney fees (and for most but not all out-of-pocket costs, such as filing fees; court reporter fees; expert fees, etc.), win or lose. This is the case in the absence of a statute (known as a "fee-shifting" statute), a contract provision, or some recognized ground in equity. None of these exceptions to the usual American Rule typically apply in medical malpractice cases.

Plaintiffs' counsel in medical malpractice cases (and other personal injury matters) usually only receive an attorney fee if their client either prevails at the trial or achieves a monetary settlement after a lawsuit is filed or at the claims stage, before the actual filing of a lawsuit. This fee is therefore appropriately called a "contingent (on winning money) fee." The percentage of this contingent fee varies, but typically ranges from one-third to forty-percent (sometimes even higher), and hence can be substantial. The medical profession has pointed to excessive fees on the part of plaintiffs' counsel as a significant problem requiring reform, and as contributing to the high costs of delivering health care.

In response to this concern, and as a further tort reform measure, some states have restricted the attorney's contingent fee to no more than a specific percentage of the total award by the jury sometimes decreasing as the size of the award increases (e.g. California Business and Professions Code Sec. 6146). In Washington State, legislation was passed providing that the court shall determine the reasonableness of each party's attorney's fees (see RCWA 7.70.070).

[3] Missouri, Alabama, New Hampshire, Oregon, Washington, Illinois, and Georgia have all struck down legislation that attempted to place caps on damages, finding such legislation unconstitutional under those states' constitutions. (Lowes, 2012).

7.4 Reforms Concerning Expert Testimony

Practically all medical malpractice cases involve introduction of expert testimony to address issues of both liability (standard or care; breach of standard of care) and, causation. And as discussed earlier in this paper, both sides to the litigation typically will call experts from various disciplines to render opinions on matters pertaining to damages. Members of the health care industry, when lodging criticisms of the legal system, contend that the courts allow too many experts, and that some of the experts allowed to testify lack the proper qualifications to do so.

The trial of most civil cases, even outside the medical malpractice arena, involve substantial expert testimony. This is at least partially the case because under the applicable rules of evidence (both in federal and state courts), and case law interpreting those rules, the threshold requirement for the admissibility of expert testimony is quite low. As a general proposition, the courts will allow expert testimony on a given issue where: the testimony is relevant; the proposed expert testimony will "help" the jury in understanding the evidence or to determine a fact in issue; and, the expert is qualified by experience and/or training to offer the testimony/opinions (Rule 702 of the Federal Rules of Evidence and state court analogues thereto). In complicated cases, such as medical malpractice cases, where complex issues of medicine are at issue, it is easy to see where expert testimony would be helpful to the jury. Indeed, as discussed earlier, expert testimony is both necessary and essential, and without it, neither side could probably put on a case in most instances.

Secondly, the civil rules of procedure, civil rules of evidence, along with related substantive (case) law allows for parties that do not believe: (1) expert testimony is required in the particular case or relating to the particular issue upon which expert testimony is being proffered; or, (2) that the expert is not properly qualified; or, (3) that the proffered opinion(s) lack sufficient acceptance in the scientific community, to take appropriate action to request that the trial judge exclude such testimony. Indeed, trial judges have an important "gatekeeping function" to insure that the proffered "expert" indeed has the requisite expertise to be allowed to render opinions and, importantly, that the opinion testimony has general acceptance in the scientific community. Disputes over whether proffered experts should be allowed to testify, or to render specific opinions, are usually resolved in pretrial motion

practice, known commonly as motions *in limine*. Such motions are usually heard before the trial begins, and outside the presence of the jury.

Despite these existing procedures that can, and in fact are frequently used, to challenge the admissibility of expert testimony, some states nevertheless have passed specific legislation regarding the use of expert testimony in medical malpractice cases. For instance, some states require the experts to be of the same specialty as the physician being sued, and/or that the experts actually be practicing experts.

Further, some states have passed laws providing that the expert must practice or have training in diagnosing or treating the conditions similar to those of the plaintiff and must devote a certain percentage of his or her professional time to clinical practice or teaching in their field of specialty.[4]

7.5 Pre-Screening of Claims and Alternative Dispute Resolution

The health care industry also has registered the complaint that there are too many cases that proceed that lack any merit. The author would comment at this point that he practiced insurance defense law for over thirty years, representing scores of defendants that had been sued for a wide array of alleged transgressions. A high percentage of those clients registered the complaint, usually at the outset of the representation, and often as the matter progressed, that they believed the claims against them were meritless.

As is the case concerning experts whose opinion testimony is not really necessary for a fair adjudication of the case, and is also the case concerning excessively high damages awards, the law already contains mechanisms to weed out claims which totally lack merit. One traditional protection against such meritless claims is that the defendant can make a motion before trial to dismiss a case in what is known as a motion for summary judgment, under FRCP 56 and state analogues. The general idea is the court considers all facts and inferences therefrom (based on sworn deposition, declaration testimony and other admissions on file in the court record) in a light most favorable to the plaintiff. When applying those facts to the actual law,

[4] For example, West Virginia passed legislation requiring that the expert witness must practice or have training in diagnosing or treating conditions similar to those of the patient and must devote a certain percentage of his or her time to clinical practice or teaching in their field or specialty (Virginia Code Sec. 55.7B.7).

if the trial judge hearing the motion concludes no reasonable jury could find in favor of the plaintiff the case should be dismissed, as a trial would in such instance be a wasteful exercise. One admitted drawback of this procedure, however, is that sometimes cases can drag on for many months, or even years, and at substantial expense, before such a motion can be brought and considered by the court, and even if the motion meets with success, the defendant typically cannot recover attorney fees expended in defending. Further, it is true that many trial judges are reluctant, except in the very clearest of cases, to dismiss cases short of a full blown trial on the merits. Theoretically, however, the judge properly performing the gatekeeping function will dismiss the truly meritless lawsuit well before a trial.

Additionally, FRCP 11(b) and (c) provide the federal courts with the authority to sanction "any attorney, law firm, or party" that asserts claims (or defenses) that lack no basis in fact or law. In other words, the court may indeed penalize the lawyers and/or party's that file frivolous claims. The rule further provides that: "Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee." (see, FRCP 11 (c)(1)). Although the trial court is given latitude under the rule to impose various sanctions, the rule in part provides: "if (a sanction) is imposed on motion and warranted for effective deterrence, (the court may issue) an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation."[5]

In any event, as another element of tort reform, some states have passed legislation requiring the so-called "pre-screening of cases," meaning that medical malpractice cases have to be screened by a panel of experts or a mediator before the case can go to court. Some states require a plaintiff to show at the very outset of the case (i.e., when the case is instituted) that he/she has a qualified medical expert that will support (under oath) the claim being presented.[6]

[5] See, FRCP 11(4). State courts have similar rules and therefore, in appropriate cases an attorney filing a totally frivolous medical malpractice action faces the prospect of a possible motion for sanctions. Some state courts have other statutes that might also allow trial courts to order sanctions for the bad faith assertions of claims or defenses. See, e.g., Washington State provision RCWA 4.84.185 entitled, "Prevailing party to receive expenses for opposing frivolous action or defenses." This statutory provision provides, among other things, that the trial judge may require a party to pay the prevailing party's reasonable expenses and attorney fees for asserting a frivolous claim.

[6] In Washington State, the legislature enacted a requirement that in the filing of a medical malpractice action and related pleadings the responsible attorney must file an accompanying certificate stating that there is a good faith basis in law and in fact for the claims or defenses being asserted RCWA 7.70.160.

Various forms of Alternative Dispute Resolution (ADR), including mediation and arbitration, are used with a high degree of frequency in the United States in all types of civil litigation. However, in some states, legislation has been passed permitting health care providers to require that disputes with patients be resolved by arbitration rather than through the courts. In some states, arbitration is voluntary but arbitration clauses are enforced and sometimes the results of arbitration can be introduced in subsequent court trials. In Washington State, the legislature provided for the mandatory mediation of all claims arising from health care injuries.[7] Other states have initiated so-called Disclosure, Apology and Offering laws. Similar to early arbitration, these initiatives focus on early disclosure of mistakes, apologizing when appropriate, and offering up-front compensation in an effort to avoid costly, time consuming and uncertain litigation.[8]

7.6 Modifications to Joint and Several Liability Rule

One of the major tort reform initiatives centers around modifications to the joint and several liability rule that some states have traditionally used as a basis for allocating judgments. The question here focuses on how damages are assessed when there are multiple defendants (which is often the situation in medical malpractice cases) and who pays the damages awarded. To understand the rule, assume a case where there are four defendants: three physicians and a hospital. Following trial, the jury finds one physician 25% at fault; another physician 25% at fault; another physician 40% at fault; and, the hospital where the care was provided only 10% at fault. Total fault is 100%. These results would be submitted by the jury on what is known as a special verdict form, given to the court clerk by the jury foreperson following jury deliberations.

The law on how liability is assessed, and who can be forced to pay what, varies from state to state. However, to simplify, the traditional rule in tort law has been that any defendant who is found to have been responsible to plaintiff for any percent (even 1%) can be forced to pay the entire judgment. The law calls this "joint and several

[7] RCWA 7.70.100. In Washington, after unsuccessful mediation, the parties retain the right to a trial by jury. RCWA 7.70.120.

[8] See, e.g., RCWA 5.64.010(3). The author would note that he defended many civil cases where it became apparent that had the defendant either merely apologized for wrongful behavior or had the insurance carrier for the defendant paid the plaintiff's medical bills (with no other compensation) following a tortious event, the plaintiff would not have filed a lawsuit.

liability." The joint and several liability rule typically comes into play where one or more of the defendants found to be at fault lacks sufficient insurance or assets to satisfy the entire judgment. Under the joint and several rule, the plaintiff can decide to satisfy all of the judgment from one defendant. So in the example above, the hospital would be, under the traditional rule, "jointly and severally liable" and at risk for shouldering payment of the entire judgment, even though having been found only 10% at fault by the jury. (Note: the hospital in this example can attempt to force the other defendant(s) to reimburse it for the defendants' "share" it was forced by the plaintiff to pay.)

The traditional reason underpinning the joint and several rule is that it is more fair to require a negligent party to pay more than its fair share of a judgment than to deny full compensation to the plaintiff. In the medical malpractice setting, and indeed in tort litigation more broadly, defendants have come to see this traditional rule as being unfair and requiring reform. In particular, well-funded (and insured) defendants such as hospitals (or government defendants and large corporations in other civil litigation) argue the rule exposes them to liability well beyond their actual culpability, and therefore punishes them just because they have more insurance or collectible assets.

These concerns have led to modifications of the traditional joint and several liability rule. Some states limit the amount of damages from any defendant to the portion of the injury caused by that defendant (Kansas Statutes Sec. 60 -258a(d)). This rule is known as "several only liability." Legislation in other states provides that any defendant that is found responsible for 60% or more of an injury is jointly responsible for the entire amount, but defendants who are found liable for smaller "shares" of an injury are only responsible for their own share of the injury (See 42 Pa. Cons. Stat. Sec. 7012 (b.1)). Other states have enacted other laws that have ameliorated the harshness of the traditional joint and several liability rule. It is worth noting, however, that similar reforms have been made in tort liability not involving health care providers/medical malpractice.

7.7 Modifications to the Collateral Source Rule

Tort reform also has focused on modifications to the Collateral Source Rule. Let's assume that the plaintiff proceeds to trial and wins on liability. The plaintiff presents evidence of past medical bills of $30,000. The jury awards plaintiff those damages (on the special verdict form), along with other forms of compensation, such as general damages for pain and suffering, that is, non-economic damages. The jury was not informed of this, but as it happened, the plaintiff had various forms of health insurance coverage that already paid for the $30,000 in past medical bills. The traditional rule, known as the "Collateral Source Rule," provides that the successful plaintiff can collect the awarded $30,000 in medical bills even though those bills already were paid by some third party (e.g., typically a health insurance carrier)[9] The law typically shields the defendants from introducing evidence of payment of the bills from collateral sources. The health care industry, including insurers, argue the rule is unfair and has contributed to the rising cost of health care, and of malpractice premiums.

In response to the complaints, some states have passed legislation in medical malpractice cases that has modified the Collateral Source Rule. In particular, some state laws require medical malpractice awards to be reduced by collateral payments, and in other states the jury is informed of the collateral payments and can take them into account in deciding upon damages.[10] Other states have modified the traditional rule in yet other ways, to again attempt to limit the harshness of the hard and fast rule.

[9] It should be pointed out, however, that the entity that originally paid for the plaintiff's medical treatment/bills, i.e., an insurance carrier, will almost always have a contractual right, known as a subrogated interest or lien, to recover those payments out of any judgment or settlement, although often that carrier will agree to reduce the amount of its subrogated interest. The plaintiff's attorney typically will also be entitled to an attorney fee for assisting the carrier in helping to recoup on its lien. Given the fact the lienholder has to be re-paid out of a judgment or settlement, it is not accurate to say that under the traditional collateral source rule the plaintiff is completely "double-dipping."

[10] In Washington State, for example, the collateral source rule was restricted to permit introduction of evidence that the plaintiff received compensation from insurance paid for by the plaintiff or the plaintiff's employer (see RCWA 7.70.080). For other similar efforts in other states see also Florida Statutes Sec. 768.,76 and Tennessee Code Sec. 29-26-119.

7.8 Modifications to Statutes of Limitation

Statutes of limitation govern the length of time an injured person has to commence a legal proceeding against a defendant. Health care providers have argued some of the statutes are too long. These statutes are designed to insure that claims are not allowed to be asserted so long after the triggering event that evidence can no longer be found to defend the claim, i.e., to guard against "stale" claims. There are competing interests in cases involving medical injury. On the patients' side, sometimes injuries sustained as a consequence of poor/negligent care cannot be ascertained for many years after the care has been provided. Too short a statute of limitations can therefore in some instances be unfair to the injured patient. On the other side of the equation, a lack of clarity about when a claim might be asserted leads to uncertainty, sometimes lost evidence (including witnesses or documents), and therefore can be unfair to the medical profession. This can lead to increased medical malpractice premiums along with other undesirable consequences.

In response to these concerns, many attempts at tort reform have centered on the issue of the applicable statute of limitations in medical malpractice cases (Stark, 2016). Some states have shortened the statutory period. Other states have enacted legislation that starts the "time clock running" from the time an injury occurred, irrespective of whether it is apparent from that point in time or not, while others don't impose a time limit until the injured person had a reasonable period to discover the injury. This later concept is known as a "discovery rule" and various states across the United States have written laws that limit the time a plaintiff has to initiate a claim after discovering the injury and/or the negligence that caused it.

7.9 Patient Compensation Funds and Pre-Suit Notices of Claims

Some states have created patient compensation funds. The idea is to place some upper limit or cap on the amount of damages that a medical provider has to pay the injured patient, while at the same time insuring that the patient can be made whole by receiving additional funds from a state sponsored patient compensation fund.

Some states have passed legislation requiring a plaintiff, as a pre-condition of later filing a lawsuit, to first provide written notice to the potential defendant (health care provider) of the claim. The notice would have to include information such as the

particular negligence asserted, the damages being claimed and like information. A typical time limit would be at least 30, 60 or 90 days before filing suit. The idea here is to give the parties a chance to settle their dispute without the need for a time-consuming and costly lawsuit. Some of these laws have been struck down by the courts as being in violation of state constitutional law.[11]

7.10 Other Proposed Tort Reform Measure – Time for a No Fault Compensation Fund in Medical Malpractice Cases?

Some scholars have suggested that the state-by-state approach to resolving medical negligence claims in the traditional tort system is far too complicated, time consuming and expensive and therefore should be replaced entirely with a no-fault system that would offer certain compensation for injured patients (Flis, 2016). For instance, states all have industrial insurance laws that protect workers injured during the course and scope of their employment. Although these schemes vary from state to state, the common denominator underlying each is that when a worker suffers injury, that worker will recover defined benefits under the state's compensation laws, irrespective of whether anyone (i.e., the injured worker, or the employer, or a co-worker) was at fault in causing the injury. Defined benefits typically include payment of medical bills, loss of earnings, and a lump sum payment for any permanent, partial disability. These schemes are funded by ongoing contributions made by employees and employers.

From the author's experience and knowledge, it is difficult to see this proposal garnering the necessary support to ever become reality in the United States. Such an approach was attempted, for example, in the asbestos litigation, the longest running mass tort ever. As is true with health care providers, asbestos manufacturers and their insurers decried the handling of asbestos claims in the traditional tort system and for many years lobbied the United States Congress to establish an Asbestos Compensation Fund that would provide certain defined compensation to victims of asbestos-related disease. In fact, huge amounts of money were spent in transactional

[11] In Washington State, for example, the requirement in RCWA 7.70.100(1) that medical malpractice plaintiffs provide defendants with 90 days written notice of claim prior to filing suit was found to be unconstitutional in *Waples v. Yi,* 169 Wash. 2d 152, 234 P.3d 187 (2010), as applied to defendants other than the State of Washington (i.e., private parties) because of its failure to honor the separation of powers required by the state constitution. On the other hand, the Washington State Supreme Court found the statute constitutional regarding governmental entities under the doctrine of sovereign immunity. *McDevitt v. Harborview Medical Center*, 291 P.3d 876 (2011).

costs in these lawsuits (i.e., expert fees, attorney fees, depositions, records gathering, pre-trial and trial litigation, etc.) that could have been used to simply compensate the victims. If ever there had been a substantive area of the law where it would have made sense to provide injury victims with certain and defined compensation outside the traditional tort system, the asbestos arena was it. However, the plaintiffs' trial lawyers and other groups fought this proposal and in the end the United States Congress narrowly voted down the proposal, and so the tort litigation continues, for better or worse (Miller, 2006).

7.11 Has Tort Reform Made a Difference?

There is substantial debate over the extent to which tort reform measures have reduced medical malpractice costs and otherwise helped to alleviate the rising costs associated with the delivery of medical care (Belk, 2014). It would appear that some studies have concluded that in states where caps on damages are in place, medical malpractice premiums have in fact decreased. It has been stated that the cap on damages has been the most significant and effective tort reform measure in helping to reduce malpractice premiums. However, others have concluded that caps on damages might have no or little impact on malpractice premiums (Zeiler & Hardcastle, 2012). On the other hand, it would appear there is more debate over whether tort reform measures of all types have actually decreased physicians' practice of engaging in "defensive medicine" to help avoid malpractice claims, and whether these measures otherwise have assisted in lowering the overall cost of delivering health care in the United States and making health care more readily available (Zeiler & Hardcastle, 2012).

Reforms, especially caps on non-economic damages, seem to have worked in states including California, Colorado, Kansas, and Texas. Litigation in those states has decreased and malpractice premiums remain relatively low. Litigation is still very frequent and malpractice premiums are high in New York City, Washington D.C., New Jersey and Delaware, all of which have seen less meaningful tort reform. There is evidence that medical malpractice premium rates in average have decreased since 2008. However, some physicians practicing in high-risk specialties such as OBGYN's and surgeons pay annual premiums of $100,000 or more (Lowes, 2016).

Pre-law suit screening requirements, where instituted, also seem to have helped to limit litigation. Many studies have been undertaken which have tried to measure the impact of tort reform efforts on the costs of medical care and of costs associated with medical malpractice claims. However, there are so many confounding variables involved in these analyses that hard and fast quantifications have proved difficult. For example, there are some areas of the United States that are simply less litigious overall than other areas. Minnesota is one such state. Minnesota physicians pay some of the lowest malpractice premiums in the United States. There are fewer claims made against health care providers in that state. It seems doubtful that physicians in Minnesota are better trained and more careful than those in New York and Delaware where claims are typically higher (n.p., 2015). The conclusion, seemingly, is that the overall culture in any given state plays a role.

8 Responses by the Health Care Industry Outside the Legislative and Judicial Context

We have now discussed in some detail legislative and judicial responses to the problems of the high incidence of medical malpractice claims and the attending negative consequences of that high volume of claims. But how has the health care industry itself responded to the problem, aside from pushing its legislative and judicial agendas? The balance of this paper addresses that question.

Recall that at the outset of the paper, the point was made that the tort system itself is designed to achieve multiple policy objectives, which often come into conflict with one another, and the ongoing dilemma is striking an appropriate balance. To be sure, the law wants to compensate deserving victims of injury and to provide them appropriate redress. The law also wants to foster safe practices and to deter wrongdoing. At the same time the law wants to avoid policy that unduly stifles economic development and that places undue stress on commerce. Having available and affordable insurance also is an important policy objective.

8.1 The Traditional Model: An Overview – Solo or Small Group Physician Practices

Traditionally, many physicians practiced alone or in very small groups. Each doctor or small groups of doctors purchased their own medical malpractice insurance. These individual physicians also had to take it upon themselves to keep abreast of developments in medicine, such as best practices and standards of care. For some of the reasons discussed earlier, from time to time; from place to place; and, from specialty practice to specialty practice, malpractice insurance became very expensive to purchase, and sometimes not attainable at all. Physicians chose not to practice in geographical locations where they were most likely to have claims asserted against them. These consequences were and are undesirable not only to those in the medical field, but to the general public.

Furthermore, traditionally many physicians merely had privileges to practice at their local hospitals and were not considered "employees" but rather, as "independent contractors" and therefore may not have been covered by the hospitals' malpractice coverage, but rather by his/her own malpractice insurance. Traditionally hospitals and staff physicians were separate legal entities and different legal theories applied to each when it came to assessing their respective liabilities to a patient. Accordingly, a hospital might not have legal liability for a physician practicing there, since the hospital was not actually providing the treatment. Sometimes, however, special rules under the law of Principal and Agency (such as "Apparent Agency") were used by plaintiffs' attorneys and the courts to circumvent this problem.

Therefore, plaintiffs' attorneys that represent injured patients have always had to concern themselves about suing the "correct" legal entities. If, for example, they sued only the hospital where the care was provided, the hospital was likely to assert as a defense that the physician that performed the allegedly poor medical services was not an "employee" but rather only an "independent contractor" and therefore assert that the hospital itself was not legally responsible for that physician's conduct. Out of (legitimate) fear of attorney legal malpractice, the reasonably prudent plaintiff medical malpractice lawyer would typically join in the lawsuit both the hospital and all physicians that provided care to the injured patient/plaintiff. Sometimes the defendants would end up "pointing fingers" at each at the trial, a tactic that often plays right into the hands of the plaintiff, as the jury often then comes to the

conclusion that one or all of the defendants "must be at fault" given all of the finger pointing and infighting among defendants. These considerations added litigation expense to both the plaintiffs and defendants.

The traditional insurance models also were costly to the defendants, both the individual physicians and the health care facilities, both of whom had to purchase insurance at increasing costs to both, especially during the times of "crisis" as discussed previously.

8.2 The Move Toward Consolidation of the Health Care Industry

While the various legislative tort reform measures discussed earlier apparently have met with some success (but difficult to quantify, as mentioned earlier), the continued uncertainty regarding the availability of insurance and, when available, its cost, coupled with the desires to both improve the quality of the delivery of health care and to control costs, has led to certain systemic changes or trends in the health care system and the methods used to insure both individual physicians and medical facilities. The author practiced law in Washington State for many years (and received health care there) and hence some of the discussion here will focus on developments in Washington State, in particular, although these comments hold true as well for many places in the United States.

Over the past several decades, the trend has been toward the formation of larger and larger healthcare organizations and for hospitals to directly employ significantly more physicians (Karash, 2013). Along with the reasons discussed previously in this paper, these developments have been driven by the need to consolidate in order to have stronger bargaining position when negotiating reimbursement rates with first party health insurers. Indeed, some of the literature suggests this has been a primary driver of the trend toward greater consolidation in the industry. Furthermore, an increasing number of hospitals are owned by, and physicians are employed by, these large healthcare organizations. In Washington State, by way of example, there are very large institutions such as Virginia Mason, MultiCare, and the University of Washington, which directly employ very large numbers of physicians and other employees.[12] Although a complete discussion is beyond the scope of this paper,

[12] For a good discussion see article, Gaynor & Town, 2012. The authors state, regarding consolidation: "Increasing numbers of physicians are working as hospital employees and increasing numbers of physician practices are owned

apparently there are significant questions regarding whether this consolidation has actually led to improved quality of care and reduced costs.[13]

8.3 Alternatives to Traditional Insurance Models – Self Insurance

Following the first national spike in medical malpractice claims in the 1970's, many physicians could not find malpractice insurance or, if they could, the premiums were very high. As previously discussed, this led in turn to serious, adverse public health concerns, as physicians refused to practice in certain parts of the country, or to practice certain high risk specialties, thus resulting in shortages in necessary medical care to persons living in those areas of the country.

In response, and in addition to the trend in consolidation, both physicians and hospitals started to form their own risk pools or mutual insurance companies. In Washington State, for example, nearly 100 physician-owned insurance companies started up during this period to fill the void left by traditional carriers that left the marketplace. In 1982, physicians in Washington State, along with the Washington State Medical Association, banded together to form what is now called Physicians Insurance (a mutual company), which insurers about 80% of Washington physicians (Stark, 2015). Physician-owned companies insure more than half of United States physicians who buy their own insurance.

An overwhelming majority of hospitals now use the self-insurance model to provide liability coverage for their employed physicians. With many physicians now being directly employed by hospitals, they are now insured by the hospital (or other large healthcare facility) where they work. This model, among other benefits, at least theoretically should enable hospitals and health care facilities to promote uniformity in physician practices.

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by hospitals. The number of physicians working as employees grew from around 31% in 1996-97 to 36% in 2004-05 Another survey found that that the percentage of primary care physicians employed by hospitals rose from under 20% in 2000 to over 30% in 2008 and the percentage of specialists employed by hospitals rose from just over 5% to 15%. The percentage of physician practices owned by hospitals rose from around 20 % in 2002 to over 50 % by 2008."

[13] For example, Gaynor & Town, 2012 state: "[SUMMARY OF KEY FINDINGS] Physician-hospital consolidation has not led to either improved quality or reduced costs. Studies find that consolidation was primarily for the purpose of enhanced bargaining power with payers, and hence did not lead to true integration. Consolidation without integration does not lead to enhanced performance." See also Evans Cuellar & Gertler, 2015 - the authors conclude, in part, that hospital consolidation has resulted in more negatives than positives for consumers so far. They also state the evidence suggests that hospital system formation has primarily served to increase market power, not improve patient care quality or hospital efficiency, at least in the short run.

8.4 Group Captives as Modern Insurance Alternative

According to a recent study in the New England Journal of Medicine, only 1% of physicians account for almost one-third of paid medical malpractice claims. This study also found that just 6% of physicians had a paid malpractice claim during the study's time period, which was 2005 – 2014 (Dethlefs, 2016). Although those percentages overall are low, both physicians and other health care providers, such as hospitals, must insure themselves against the risk of a costly malpractice claim. Economic pressures have forced the healthcare industry to constantly search out new options to insure against those risks.

One such option the healthcare industry has turned to is a group captive (Dethlefs, 2016). In essence, a captive is an insurance company that is wholly owned and controlled by its insureds. Its primary purpose is to insure the risks of its owners, who also benefit from the captive insurer's underwriting profits. In a group captive, hospitals and other healthcare providers agree to share each other's risk of loss from professional liability and other exposures. This element of shared risk results in a requirement of greater accountability for each member. Group captive members can participate in collective and cooperative efforts, sharing best practices and identifying emerging trends and issues, in order to have a learning organization. Members of the captive can rely on one another to offer insights in order to improve patient safety and prevent medical errors from recurring. A further benefit of a captive is that as a consequence of these cooperative efforts at minimizing risks through the promotion of best practices and patient safety, the captive ideally will generate profits from favorable operating results.

Captives also allow the owners to draft custom-tailored insurance policies to fit their exact needs. This allows the owners to minimize, if not totally eliminate, exclusions found in the more typical insurance policies. Captives also allow owners to assign their own defense counsel when a claim is asserted, instead of having to use whatever legal counsel is assigned by the insurance company (Adkisson, 2013).[14] Furthermore, the owner can administer claims on its own terms, instead of the terms dictated by the traditional insurance carrier. Finally, a prime purpose of the captive is to save

[14] Additionally, this form of self-insurance allows the owners more self-direction in determining what cases to settle and which to litigate. Under more traditional insurance models, these decisions were often left to the insurance claims adjustors, who sometimes made decisions the physicians did not like.

money on the cost of insurance. By underwriting the insurance needs of the business, the captive can capture and retain the underwriting profits that would ordinarily be lost to the commercial carrier.

9 Conclusion

The delivery of quality, affordable, and universal health care is one of the most important public policy issues the United States (and obviously all countries) faces. Despite the best efforts of the medical profession, medical errors will always occur to some extent. As this paper has overviewed, over the last 40-50 years stakeholders have attempted both legislatively and non-legislatively to arrive at solutions to deal with the adverse consequences of the high volume of medical malpractice claims. There is considerable debate over the success of the efforts at tort reform.

The health care industry has undergone fundamental restructuring in the way medical care is delivered. Many physicians now practice in group settings. Many physicians now work as direct employees of hospitals. An increasing number of physicians and health care facilities are self-insured under various models, including group captives. Important objectives of these developments include sharing of best practices; creation of teaching organizations; uniformity of practice; and, hopefully, better overall patient safety (i.e., less medical negligence with fewer malpractice claims).

Returning once again to the objectives of tort law generally, the optimist would hope that silver linings from the earlier malpractice crises have been more diverse, healthier forms of delivery of medical services and insurance, which might benefit both patients and the medical providers that service them. Should that turn out to be the case, perhaps the natural consequences of the tort system might in the long run benefit patient safety in a way the tort reform measures discussed earlier in this paper could not. Some of the recent literature, however, suggests that the trend toward consolidation has meant a lack of competition, and therefore has contributed to both increased costs of medical care and without the increases in patient care and quality hoped for.

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VACCINES IMMUNIZE PEOPLE; LEGISLATION IMMUNIZES VACCINE MANUFACTURERS. LEGISLATION IN THE UNITED STATES REGULATING LIABILITY FOR THE MANUFACTURE, DISTRIBUTION AND ADMINISTRATION OF VACCINES

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Infectious diseases have caused widespread misery, and have wreaked havoc physically, mentally, economically, politically, and socially. Fortunately, in more recent years, scientists have developed vaccines. Vaccines are generally very safe, but cause side effects in a small percentage of cases. The United States Congress has passed two major pieces of legislation that provide sweeping tort immunity to vaccine manufacturers and others. In 1986 Congress passed the National Childhood Vaccine Injury Act (NCVIA) and in 2005 it passed the Public Readiness and Emergency Preparedness Act (PREP ACT). Both Acts were passed to encourage manufacturers to develop vaccines, particularly in times of public emergencies, in exchange for expansive liability protection. Both Acts established no-fault type compensation schemes to compensate those suffering injury or death from vaccines without having to resort to typical litigation. The author discusses both Acts in detail, in the context of the current Covid-19 crisis. The author discusses both Acts in detail, in the context of the current Covid-19 crisis.

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1 Introduction

1.1 Sooner or Later, Everything Old is New Again.[1] A Brief Timeline of Pandemics

Infectious diseases have plagued mankind for thousands of years. As observed by Huremovic (2019), the "[i]ntermittent outbreaks of infectious diseases have had profound and lasting effects on societies throughout history." They have caused widespread misery, and have wreaked havoc physically, mentally, economically, politically, and socially. They literally have toppled civilizations and ended wars. When epidemics spread beyond a country's borders, the disease becomes a pandemic. As civilization has evolved, and more especially in more modern times with the advent of mass transportation, including trains and airplanes, communicable diseases have been able to spread rapidly around the entire globe, impacting very large swathes of the population. Indeed, it is fair to say that in present times, a virus anywhere in the world can cause a problem everywhere.

The first recorded pandemic occurred during the Peloponnesian War, in Athens, in 430 B.C. The disease, thought to have been typhoid fever, passed through Libya, Ethiopia and Egypt and claimed the lives of as much as two-thirds of the population (Finns, 2020, Huremović, 2019; History.com Editors, 2020). This was followed, in turn, by the Antonine Plague (165 A.D.), the Cyprian Plague (250 A.D.), and the Justinian Plague (541 A.D.).[2] Europe suffered a serious outbreak of leprosy (leprosarium) in the 11th century (Bassareo et al., 2020). "A slow-developing bacterial disease that causes sores and deformities, leprosy was believed to be a punishment from God that ran in families. This belief led to moral judgments and ostracization

[1] It is not entirely clear who first coined this expression, whether an ancient author or the composers of the song by the same name. *See*, Peter Allen & Carole Bayer Sager (1974), *Everything Old is New Again*, on Continental American (A & M Records 1974). However, it struck me during this last year, as the world has struggled with this pandemic caused by Covid-19, that we were hardly the first in history to have endured the ravages, death, illness, economic destruction, inconveniences, etc. caused by this infectious process, though often we seem to act as if we are. In point of fact, assuming that the current vaccines work as largely expected by the experts, in terms of world-wide deaths anyway, we will have gotten off "relatively" easily. And, there will be more such pandemics in the future, since it is true that everything old is new again.

[2] The Justinian Plague first appeared in Egypt, and then spread through Palestine and the Byzantine Empire, and later throughout the Mediterranean. This plague is said to be "credited with creating an apocalyptic atmosphere that spurred the rapid spread of Christianity" while squelching Emperor Justinian's plans to reunite the Roman Empire. This plague, believed to be the first significant appearance of the bubonic plague, carried by rats and spread by fleas and causing enlarged lymphatic glands, recurred over the ensuring two centuries, leading to the deaths of around 50 million people, or 26 percent of the world population (Huremović, 2019; Eisenberg & Mordechai, 2019; History.com Editors, 2020).

of victims. Now known as Hansen's disease, it still afflicts tens of thousands of people a year and can be fatal if not treated with antibiotics." (History.com Editors, 2020). Leprosy spread and grew into a pandemic.

The Black Death, the second large outbreak of the bubonic plague, is believed to have possibly started in Asia and was transported west in caravans, entering the European continent through Sicily in 1347 when plague sufferers arrived in the port of Messina. The disease spread rapidly throughout Europe (Bassareo et al., 2020; History.com Editors, 2020). Responsible for the death of one-third of the world population, "England and France were so incapacitated by the plague that the countries called a truce to their war. The British feudal system collapsed when the plague changed economic circumstances and demographics. Ravaging populations in Greenland, Vikings lost the strength to wage battle against native populations, and their exploration of North America halted." (History.com Editors, 2020; Eisenberg & Modenchai, 2019).

Continuing on with our timeline, the next great event, or perhaps series of events, was the Columbian Exchange of 1492 (Bassareo et al., 2020; History.com Editors, 2020). When the Spanish arrived in the Caribbean, they brought with them and transmitted to native populations diseases including smallpox, measles and bubonic plague. Since people did not have the benefit of immunity from such diseases, they "devastated indigenous people, with as many as 90 percent dying throughout the north and south continents. Upon arrival on the Island of Hispaniola, Christopher Columbus encountered the Taino people, population 60,000. By 1548, the population stood at less than 500. This scenario repeated itself throughout the Americas." (Bassareo et al., 2020; History.com Editors, 2020). Smallpox destroyed the Aztec Empire in 1520, so weakening the population that it was not able to repel Spanish colonizers and left farmers unable to produce needed crops.[3]

The Great (bubonic) Plague of London in 1665 led to the deaths of about twenty percent of London's population. Believed to be the possible cause of the illnesses,

[3] Id. According to these authors, research from "2019 concluded that the deaths of some 56 million Native Americans in the 16th and 17th centuries, largely through disease, may have altered Earth's climate as vegetation growth on previously tilled land drew more CO_2 from the atmosphere and caused a cooling event." (History.com Editors, 2020).

cats and dogs were slaughtered *en masse*. The outbreak tapered off at around the same time as the Great Fire of London, which occurred in September 1666.[4] The first of seven cholera pandemics over the next 150 years broke out in Russia in 1817, where one million people died (Azizi & Azizi, 2010; History.com Editors, 2020).[5] Each year, cholera infects 1.3 to 4 million people around the world, killing 21,000 to 143,000 people according to the World Health Organization (History.com Editors, 2017). The Third Plague Pandemic started in China in 1855 before spreading to India and Hong Kong. The bubonic plague this time claimed fifteen million victims.[6] The Fiji Measles Pandemic took the lives of 40,000 people, one-third of Fiji's population, in 1875 (Shanks, 2016; History.com Editors, 2017).

We are all reasonably familiar with "the flu."[7] Influenza is a virus that attacks the respiratory system. Highly contagious, the flu is easily transmittable when an infected person coughs, sneezes or even talks. Respiratory droplets are generated and transmitted into the air, and can then can be inhaled by anyone nearby. The virus also can be transmitted when it lands on a surface and another touches that surface and the virus, and then touches his or her mouth, eyes or nose (Bassareo et al., 2020; History.com Editors, 2010). Called the Russian Flu of 1889, the first significant flu pandemic occurred in Siberia and Kazakhstan, and then traveled to Moscow, Finland, Poland, and the rest of the European continent. In 1890 the flu had made its way to North America and Africa. 360,000 died by the end of 1890 (Gregg, Hinman & Craven, 1978; History.com Editors, 2010).[8]

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[4] City records show that 68,596 Londoner's died as a result of this epidemic, although it is believed that the actual number probably exceeded 100,000 out of a total population of around 460,000. The outbreak was caused by *Yersinia pestis*, the bacterium associated with other plague outbreaks before and since the Great Plague of London (Morrill, 2016).

[5] Cholera is an infectious disease caused by a bacterium called *Vibrio cholerae*. This bacterium lives in waters that are somewhat salty and warm, including estuaries and waters along coastal areas. People contract *V. cholerae* after drinking liquids or eating foods contaminated with the bacteria, such as raw or undercooked shellfish (History.com Editors, 2017).

[6] India faced the most substantial casualties, and the epidemic was used as an excuse for repressive policies that sparked some revolt against the British. This pandemic was considered active until 1960 when cases dropped below a couple hundred (History.com Editors, 2017; see also Bassareo et al., 2020).

[7] Influenza remains a serious problem, despite vaccines developed to combat it. The Centers for Disease Control and Prevention estimates that in the United States, influenza has resulted in between 9 million – 45 million illnesses, between 140,000 – 810,000 hospitalizations and between 12,000 – 61,000 death annually since 2010 (Centers for Disease Control and Prevention, n.d.).

[8] Some researchers now believe "it's even possible that one of the cold-causing coronaviruses sparked" this serious outbreak "before fading into the litany of mild, commonplace human pathogens. Based on the spread of its family tree, researchers estimated in 2005 that the endemic coronavirus OC43 entered humans sometime in the late 19th century, likely the early 1890s. The timing has led some researchers to speculate that the original version of OC43 may have caused the 'Russian flu' pandemic of 1890, which was noted for its unusually high rate of neurological symptoms – a noted effect of COVID-19." (Greshko, 2021; Gregg, Hinman & Craven, 1978).

Dubbed the Spanish flu since the news outlets reported a flu outbreak in Madrid in the spring of 1918, this avian-borne flu, which travelled swiftly around the world at a time when there were no effective drugs or vaccines to treat this deadly strain, resulted in an astounding fifty million deaths worldwide. The flu largely disappeared in the summer of 1919, when most of the infected had either developed immunities or died (Martini et al., 2019; Huremović, 2019; History.com Editors, 2020). In 1957, the Asian flu spread throughout China, the United States and England. A second wave followed in early 1958, causing approximately 1.1 million deaths worldwide. A vaccine was then developed which was effective in containing this pandemic (History.com Editors, 2020).

The HIV/AIDS virus, which destroys a person's immune system, resulting in eventual death by diseases the body otherwise would be able to combat, was initially observed in gay communities in the United States. However, the scientific community believes this devastating virus originated first from a chimpanzee virus from West Africa in the 1920s (History.com Editors, 2020). The virus is believed to have travelled to Haiti in the 1960s, and then to New York and San Francisco in the 1970s. While the scientific community has successfully developed treatments that slow the progress of the disease, the virus nonetheless has claimed the lives of thirty-five million people worldwide and a total cure remains elusive (Huremović, 2019; History.com Editors, 2020).

Severe Acute Respiratory Syndrome (SARS), was first identified in 2003. Symptoms included dry cough, fever and head and body aches. Believed to have possibly originated in bats, and then spread to cats and ultimately humans in China, and then many other countries (e.g., Taiwan), SARS fortunately took the lives of a relatively modest 774 people (Huremović, 2019; Hsieh et al., 2006; History.com Editors, 2020). Quarantine strategies were highly effective in containing SARS and this disease has remained at bay ever since.

Our timeline concludes with the world's current crisis, COVID-19. The first case having been reported in the Hubei Province of China on November 17, 2019, and then spreading around the globe like wildfire, on January 30, 2020, the World Health Organization (WHO) declared COVID-19 a public health emergency of international concern. WHO officially characterized COVID-19 as a pandemic on

March 11, 2020 (WHO - Immunization, Vaccines and Biologicals, 2020). COVID-19 is caused by a novel coronavirus that had not previously been found in people. While many symptoms have been reported, the chief ones include respiratory problems, fever and cough, and pneumonia. As with SARS and influenza, the virus is spread through droplets from sneezes (WHO - Immunization, Vaccines and Biologicals, 2020). As of the finalization of this paper, COVID-19 has claimed 2.13 million lives worldwide and 99.2 million cases have been reported.[9] Fortunately, with scientists around the globe working nonstop and through the scientific community's herculean efforts, several vaccines have been developed that have been approved through various regulatory agencies.

The Amsterdam-based European Medicines Agency (EMA) is responsible for approving all new drugs and vaccines across the 27 EU Members states, Iceland, Liechtenstein and Norway. The EMA is roughly equivalent to the US Food and Drug Administration. The first vaccine the EMA recommended granting a conditional marketing authorization for was Comirnaty, developed by BioNTech and Pfizer. This vaccine was designed to prevent COVID-19 in people from sixteen years of age. Approval occurred just before Christmas 2000. In early January, 2021, the EMA gave the same authorization for COVID-19 vaccine Moderna. According to the EMA web page, "A very large clinical trial showed that CIVID-19 Vaccine Moderna was effective at preventing COVID-19 in people from 18 years of age."[10] (European Medicines Agency, 2021).

These have been strategically distributed throughout the world. The hope is that mass injections of these various vaccines (and perhaps others still to be developed) will eventually help contain the virus, although it is believed that, as is true with influenza, COVID-19 will not be eradicated, at least not in the near future.

1.2 The Role of Vaccines in Minimizing the Spread of Diseases

A vaccine is "a biological preparation that contains small amount of weak, dead, or modified disease-causing agents known as antigens, which can include viruses, bacteria, fractions of these agents, or the toxins they produce." Vaccines work to prevent illness in the following way: "Once introduced to the body, the antigen elicits

[9] Johns Hopkins Coronavirus statistics, retrieved from: https://coronavirus.jhu.edu/map.html (25 January 2021).
[10] https://www.ema.europa.eu/en (4 February 2021)

a response by the immune system creating antibodies and immune memory cells that prevent future infection from the same disease. The immune response from a vaccine is similar to the immune response from acquiring an infectious disease naturally; however, since the antigen in the vaccine is weakened or dead, the vaccine usually does not cause disease. In the case of vaccines made with weakened live attenuated viruses or bacteria, the vaccine may cause a form of the disease that is usually much milder than the actual disease. In addition, the immune response triggered by any vaccine may cause some symptoms in some patients."[11]

Public health can rightly claim that vaccines have been a huge success.[12] Vaccines have completely eradicated smallpox and nearly eliminated the polio virus. Furthermore, vaccines have dramatically decreased the number of people who experience preventable, infectious diseases such as measles, diphtheria, and whooping cough. However, it is crucially important, given that vaccines are administered so widely, that they are safe for public use. If they are not safe, then public confidence in them erodes and the public will become skeptical of the vaccines, and will not take them.[13] For example, a study in France showed that one-in-three respondents disagreed that vaccines are safe (Vanderslott, 2019). This in turn diminishes their efficacy to the public and also leads to litigation. Indeed, while the WHO and other health agencies recommend vaccinations in many instances, there is also a scientific consensus that vaccines cause illness and even death in some (limited number of) individuals, even when these vaccines are both properly manufactured and administered (WHO - Immunization, Vaccines and Biologicals, 2020). The balance that must be struck, then, from a public policy standpoint, is how best to promote the widespread use of vaccinations, that have been proven effective in, if not eradicating diseases, at least largely keeping them at bay, while at the same time ensuring that those unfortunate persons that have adverse reactions to the vaccines receive fair compensation.

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[11] Vaccine Safety in the United States: Overview and Considerations for COVID-19 Vaccines, Congressional Research Service, 2020: 3, citing CDC, "Principles of Vaccination," in *Epidemiology and Prevention of Vaccine-Preventable Diseases,* ed. Jennifer Hamborsky, Andres Kroger, and Charles Wolfe, 13th ed. (Washington, DC: Public Health Foundation, 2015). (can be accessed at https://crsreports.congress.gov R46593).

[12] *See* Centers for Disease Control and Prevention, 2011. Indeed, the death rates in the United States as a result of infectious disease are very low (Shemin, 2008).

[13] Much has been written and discussed on the issue of vaccine skepticism. For a short introduction to this topic Vanderslott, 2019.

This Article will address the legislation that has been enacted in the United States by the Congress to deal with these complicated issues, namely the 1986 National Childhood Vaccine Injury Act (NCVIA) (42 U.S.C. §300aa-1 to 34 (2012)); the 2005 Public Readiness and Emergency Preparedness Act (the PREP Act) (42 U.S.C. §247d-6d (2012)); as well as one of the key legal cases that has interpreted the legislation, in particular, the Supreme Court's ruling in *Bruesewitz v. Wyeth* LLC (131 S.Ct. 1068; 562 U.S. 223; 179 L.Ed.2d 1 (2011)) that interpreted the NCVIA. As we shall see, this legislation, when coupled with the judicial gloss to the NCVIA provided by the Court in Wyeth, affords vaccine manufacturers with broad tort immunity while creating administrative mechanisms for those injured or dying as a consequence of the side effects of vaccines to secure certain compensation through no-fault, worker's compensation type of mechanisms, long employed in the injured-worker setting. The Article will conclude with some general observations.

2 History of Federal Safety Regulations and Programs

2.1 Biologics Control Act of 1902

In the United States, the seminal federal law requiring premarket review of pharmaceutical products, including vaccines, was the Biologics Control Act of 1902 (P.L. 57-244, enacted July 1, 1902; see also Dudzinski, 2005: 147). This Act was passed in response to the many deaths stemming from the contamination of tetanus of the smallpox vaccine and diphtheria. This Act set forth requirements concerning the manufacturing and labeling of biological products ("biologics") and further mandated the inspection of manufacturing facilities as a condition for the issuance of a federal license for marketing such products. In 1944, the Public Health Service Act (PHSA) was enacted, leading to revisions and recodification of the Act. Currently, biologics are subject to regulation by the U.S. Food and Drug Administration (FDA) under the PHSA and the Federal Food, Drug, and Cosmetic Act (FFDCA).[14] Since the 1902 Act was enacted, the federal government has passed additional legislation dealing with vaccine safety, in an attempt to try to minimize

[14] Prior to 1972, biologics, including vaccines, were regulated by the National Institutes of Health (NIH, or its precursors) under the Biologics Control Act of 1902. In 1972, however, regulatory responsibility over biologics was transferred from NIH to the U.S. Food and Drug Administration (FDA). With the development of biotechnology, the FDA's Center for Biologics Evaluation and Research (CBER) has taken on an expanded role in reviewing and approving new biological products intended for medical purposes, including probiotics, xenotransplantation and gene therapy. See, about the FDA, 2021 - Center for Biologics Evaluation and Research (CBER) (www.fda.gov).

the adverse events that sometimes accompany the administration of vaccines. This additional legislation will be discussed next.

2.2 The National Childhood Vaccine Injury Act

Congress enacted the National Childhood Vaccine Injury Act (NCVIA) in November 1986 (42 U.S.C.A. §300aa-10 to -33 (West Supp. 1987). The NCVIA, passed following four years of deliberations, and as a compromise effort to balance the tripartite goals of victim injury compensation; a more stable vaccine supply; and, the creation of safer vaccines,[15] was adopted in response to a vaccine liability crisis described in Section 2.2.1 of this Article, and which had threatened the nation's supply of childhood vaccines. The NCVIA established a National Vaccine Injury Compensation Program (NVICP) which was designed to protect the nation's vaccine supply from the market instability that had occurred as a consequence of a high number of lawsuits filed due to injuries stemming from vaccines.[16] A co-founder of a group known as Dissatisfied Parents Together wrote: "Parents supported the concept that a federal compensation system would result in official recognition of the reality of vaccine deaths and injuries and would help make vaccine safety a priority in United States Health." (Coulter & Fisher, 1991: 213-214).

NCVIA is a federal, mandatory no-fault compensation scheme available for persons injured by vaccines routinely administered to prevent childhood illnesses: diphtheria, tetanus, pertussis (aka whooping cough), measles, mumps, rubella (so-called "German measles"),[17] and polio. It requires persons that received such a vaccine and who claim injury to fully adjudicate their claims through the federal compensation program as a condition precedent to fling a civil action in the courts (42 U.S.C.A. §300aa-II(2)(A) (West Supp. 1987). Families must file a claim in the NVICP within

[15] *See,* H.R. Rep. 99-908, at 1 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 6344.
[16] *See*, H.R. Rep. No. 908, 99th Cong., 2d Sess. 4-5 (1986) [hereinafter VACCINE HOUSE REPORT] *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 6344.
[17] Rubella, sometimes called "German measles" because it was first described as a separate disease by German physicians in 1814, is caused by a virus. The infection is usually mild with fever and rash, but if a pregnant woman gets infected, the virus can cause serious birth defects. The measles-mumps-rubella (MMR) vaccine is the best way to help protect against rubella. During the last major rubella epidemic in the US from 1964-1965: 12.5 million people contracted rubella; 11,000 pregnant women lost their babies; 2,100 newborns died; and, 20,000 babies were born with congenital rubella syndrome (CRS). Since the rubella vaccine became available in the US, the number of people infected with rubella dropped dramatically and currently less than 10 people in the US contract rubella each year. This is a true testament to the value of vaccines (National Foundation for Infectious Diseases (2021) Rubella (German Measles), retrieved from: https://www.nfid.org/infectious-diseases/rubella/(28 January 2021).

three years of the first manifestation of injury (42 U.S.C. §300aa-16(a)(2) (2012)).[18] Respondent in the NVICP is the Secretary of the U.S. Department of Health and Human Services and attorneys from the U.S. Department of Justice represent respondent. Vaccine manufacturers are not parties to this litigation and of course bear no liability (42 U.S.C.A. § 300aa-11(a)(3)). The NCVIA also restricts the kinds of actions that may be brought against the vaccine manufacturers in the event the claimant decides to reject the statutory compensation and chooses instead to pursue a tort claim through the courts.[19] Most significantly, the NCVIA eliminates manufacturer liability for a vaccine's unavoidable, adverse side effects. Awards are paid out of a fund created by an excise tax on each vaccine dose.

The NVICP has two parts. Part A creates a mandatory forum for the administration of claims by requiring individuals who seek compensation, including the injured party's legal representative, to file a petition in the United States Court of Federal Claims – i.e., the Vaccine Court (42 U.S.C.A. at §300aa-12). The U.S. Court of Federal Claims is tasked with overseeing the NVICP (42 U.S.C.A. at §300aa-12(c)). In line with this oversight obligation, this Court both appoints and removes the chief and associate special masters, who serve four-year terms (42 U.S.C.A. at §300aa-12(c)). Special masters manage and decide individual cases (42 U.S.C.A. at §300aa-12(d)). In general, special masters are lawyers and most of them have backgrounds in representing the U.S. government in various capacities.[20] Procedural and evidentiary rules are more relaxed in Vaccine Court as compared to the district courts (Colgrove, 2006: 215). Indeed, special masters have considerable discretion concerning how to hold hearings. For example, they can ask questions of witnesses, can hold hearings telephonically (or other means), and may permit prehearing discovery.[21]

A petitioner is entitled to recover if the affected person (1) received a vaccine covered by the Vaccine Act; (2) suffered a "covered" injury as set forth in the

[18] In *Cloer v. Secretary of Health & Human Services* (654 F.3d 1322, 1344-45 (Fed. Cir. 2011)), the U.S. Court of Federal Claims held that the three-year statute of limitations from the first manifestation of injury was not tolled when subsequent science demonstrated that injury was vaccine-related after the three-year window.
[19] Interestingly, the NCVIA also requires attorneys to advise clients that compensation may be available under the NVICP when consulted by a client regarding a vaccine-related injury or death (42 U.S.C.A. §300aa-10(b)).
[20] *See generally* Office of Special Masters, U.S. Court of Fed. Claims, Guidelines for Practice Under the National Vaccine Injury Compensation Program (2004).
[21] *See* 42 U.S.C. §300-aa-12(c)(1), (d)(2)(A) (2012). Section 300aa-12(d)(2)(A) states the guidelines for the VICP are to: "Provide for a less-adversarial, expeditious, and informal proceeding for the resolution of petitions."

Vaccine Injury Table;[22] and (3) that there is not a preponderance of the evidence that the illness, disability, injury, condition, or death described in the petition is due to factors unrelated to the administration of the vaccine described in the petition (42 U.S.C.A. §§300aa-11, 300aa-13). While in the usual tort case the burden of proof is met by expert testimony, in the Vaccine Court the burden is met utilizing a three-prong test: (1) the petitioner must present a biological theory of harm: (2) must demonstrate a logical sequence of events connecting the vaccine to the injury; and (3) must establish an appropriate time frame in which the injury occurred. The petitioner must also show that there is not another biologically plausible explanation for the injury (*Althen v. Secretary of Health and Human Services* (Fed. Cir. 2005)). Essentially, the NVICP relieves claimants from the burden of providing causation by creating statutory presumptions of causation for the various injuries and adverse events as set forth in the Vaccine Injury Table. Some of these adverse events include anaphylaxis, paralytic polio, encephalopathy,[23] and death. Accordingly, if a claimant meets the Table's requirements for a specified injury, then he/she is entitled to compensation and is not required to prove causation. A petitioner that suffers an off-Table, or non-covered, injury may still recover compensation by establishing affirmatively that the vaccine administered caused the injury complained of (*Grant v. Sec'y of HHS*, 956 F.2d 1144, 1148 (Fed. Cir. 1992)).[24] According to Engstrom (2015: 1702-1703), when the NVICP was in its infancy, around 74 percent of claims presented were resolved as on-Table injuries whereas presently 98 percent of cases are resolved off-Table meaning, a vast increase in litigation. The special masters review injury claims in two phases: the causation phase and the compensation phase.

Part B permits a petitioner to decline the result of the Vaccine Court and pursue a civil suit in state or federal district court, but only after a final judgment has been issued by the Vaccine Court (42 U.S.C.A. §300aa-21). Upon issuance of a Special Master's decision, each party has 30 days to file a motion to have the United States

[22] The NCVIA created the "Vaccine Injury Table," which sets forth the "vaccines, the injuries, disabilities, illnesses, conditions, and deaths resulting from the administration" of vaccines for which individuals may seek compensation. *Id.* at §300aa-14. For a complete list of covered vaccines and injuries (Human Resources and Services Administration, 2021).

[23] Anaphylaxis is a severe, potentially life-threatening reaction. Common triggers include certain foods, some medications, insect venom and latex (retrieved from: https://www.mayoclinic.org/diseases-conditions/anaphylaxis/symptoms-causes/syc-20351468 (23 January 2021).

[24] Petitioners whose claims do not fall within the Table have the burden of proving that a given vaccine's administration caused a specific injury by a preponderance of the evidence (§300aa-13(a)(1)).

Court of Federal Claims review the decision.[25] If there is no such motion, the clerk of the United States Court of Federal Claims shall immediately enter a judgment in accordance with the Special Master's decision. The parties may further obtain review of the judgment in the United States Court of Appeals for the Federal Circuit (§§300aa-12(e)-(f)). Once judgment has been entered by the United States Court of Federal Claims or by the Court of Appeals for the Federal Circuit, a petitioner may give notice to the court that it will file a civil action in a state or federal district court (§300aa-21(a)). Any such subsequent civil action is governed by state law, including the applicable statute of limitations, which is stayed pending the outcome of the suit filed in the Vaccine Court (§§300aa-22(a), 21(c), 16(c)). Even prior to the Supreme Court's ruling in Bruesewitz, which as we shall see in the next section foreclosed vaccine design defects as an available remedy in tort, it was extremely rare for claimants to reject awards issued by the NVICP, with fewer than 0.5 percent of successful claimants who received an award in the compensation program rejecting it. The reality therefore is, that while Congress perhaps did not intend this outcome, in reality the NVICP is nearly an exclusive remedy (Engstrom, 2015: 1673).

Section 300aa-22 places highly restrictive limitations on subsequent civil actions. 42 U.S.C.A. Section 300aa-22 (§22) provides:

(a) General Rule. Except as provided in subsections (b), (c), and (e) State law shall apply to a civil action brought for damages for vaccine-related injury or death.
(b) Unavoidable adverse side effects; warnings
(1) No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, *if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.* (emphasis added)
(2) For purposes of paragraph (1), a vaccine shall be presumed to be accompanied by proper directions and warnings if the vaccine manufacturer shows that it complied in all material respects with all requirements under the Federal Food, Drug, and Cosmetic Act [21 U.S.C. §§301 et seq.] and section 262 of this title (including regulations issued under such provisions) applicable to the vaccine

[25] However, reviewing tribunals give special masters' decisions a high level of deference. The reviewing courts may only reverse and remand a special master's decisions if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." For a person seeking review, this is an exceedingly high burden to meet (§300aa-12(e)(2)(B), (f)).

and related to vaccine-related injury or death for which the civil action was brought unless the plaintiff shows—

(A) That the manufacturer engaged in the conduct set forth in subparagraph (A) or (B) of section 300aa-23(d)(2) of this title, or

(B) By clear and convincing evidence that the manufacturer failed to exercise due care notwithstanding its compliance with such Act and section (and regulations issued under such provisions).

(c) Direct Warnings. No vaccine manufacturer shall be liable for civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, solely due to the manufacturer's failure to provide direct warnings to the injured party (or the injured party's legal representative) of the potential dangers resulting from the administration of the vaccine manufactured by the manufacturer.

(d) Construction. –[omitted]

(e) Preemption. No state may establish or enforce a law which prohibits an individual from bringing a civil action against a vaccine manufacturer for damages for a vaccine-related injury or death if such civil action is not barred by this part.

2.2.1 Discussion of Bruesewitz v. Wyeth LLC

In *Bruesewitz v. Wyeth, Inc.* (131 S.Ct. 1068; 562 U.S. 223; 179 L.Ed.2d 1 (2011)), the Supreme Court was faced with the issue whether Section 300aa-22(b)(1) provides a blanket immunity to vaccine manufacturers from tort actions filed in state or federal court by injured victims seeking compensation for injuries allegedly arising from defectively designed vaccines.[26] The unfortunate facts of the case are as follows. When Hannah Bruesewitz was six months old, on April 1, 1992, she received her third scheduled injection of the vaccine TRI-IMMUNOL ("DTP"), which had been manufactured by Wyeth. Shortly after this injection, Hannah began experiencing seizures, which persisted over a sixteen-day period over which her parents observed

[26] As a comparison of the majority and dissenting opinions in the case confirms, the language Congress used in the statute, as quoted in the text of this Article, is murky at best. Congress could have simply said that the statute bars any design defect claims. There is legislative history suggesting Congress did not intend to do so. The bill's sponsor, when presenting the bill to the full House of Representatives for vote, stated that civil claims for "inadequately researched" vaccines would be preserved. This is suggestive that design defect claims were to be preserved, not preempted (s*ee generally* H.R. Rep. No. 100-391(1), at 691 (1987), *as reprinted in* 1987 U.S.C.C.A.N. 2313-1, 2313-365).

some 126 seizures. These seizures resulted in Hannah being lethargic, developmentally stunted, and displaying autistic-like symptoms. Approximately eleven years later, one of Hannah's doctors diagnosed her with a residual seizure disorder and encephalopathy.[27] Consequently, Hannah's medical team testified that she likely would require lifelong medical care. Hannah had no pre-vaccine history of seizures. At the age of twenty months, Hannah was non-verbal and understood only simple commands (*Bruesewitz*, 562 U.S. 223).

Over the years, DTP had been very successful in reducing pertussis (or "whooping cough") infections. Hannah's parents contended, however, that Wyeth and other medical professionals and organizations knew of several adverse effects associated with the vaccine. Hannah's injection, in fact, had been drawn from a vaccine lot that had over sixty-five complaints of adverse reactions filed with the FDA and the Centers for Disease Control and Prevention ("CDC"). Of that total, thirty-nine resulted in emergency room visits, six in hospitalizations, and two in deaths. Hannah's parents contended that her injuries could have been avoided had Wyeth used an alternate design called ACEL-IMUNE ("DTaP). Although the FDA did approve DTaP in 1991, the approval extended to only the fourth and fifth injections following three scheduled injections of the DTP formula. It was not until 1996 that the FDA licensed DTaP for all five injections. Wyeth ceased distribution of DTP in 1998.

As required by the NCVIA, petitioners submitted their case to the Vaccine Court. After the hearing held in that forum, the Vaccine Court found that Hannah's residual seizure disorder and encephalopathy were not listed on the NCVIA Vaccine Injury Table entry for DTP, and that causation was not proven. As permitted under the NCVIA, petitioners then brought their case in Pennsylvania state court, contending that Wyeth was subject to strict liability and liability for negligent design under Pennsylvania common law. Wyeth then removed the matter to federal district court based on diversity of citizenship.[28] Wyeth subsequently moved for and was granted

[27] Encephalopathy means damage or disease that affects the brain. This occurs when there has been a change in the way the brain functions, or a change in the body that affects the brain. These changes lead to an altered mental state, and leaves the person confused and disoriented. It is not a single disease, but rather a group of disorders that can have several causes (Erkkinen & Berkowitz, 2019).

[28] Diversity jurisdiction is one of two methods for a federal court to acquire federal subject matter jurisdiction over a case – the other being federal question jurisdiction. Diversity jurisdiction is codified in 28 U.S.C.A. §1332(a). To have diversity jurisdiction, there are two requirements: (1) the jurisdictional amount exceeds $75,000

summary judgment on all counts, the district judge holding that the relevant Pennsylvania law was preempted by 42 U.S.C. §300aa-22(b)(1), which is quoted in full above. On appeal (561 F.3d 233 (3rd Cir. 2009)), the Third Circuit affirmed the district judge's grant of summary judgment, holding that Congress intended to preempt all design-defect claims in passing Section 22(b)(1) of the NCVIA. Petitioners subsequently appealed to the Supreme Court, which in turn granted a writ of certiorari.[29]

Writing for the majority of the Court,[30] Justice Scalia framed the issue as whether the preemption provision of the NCVIA set forth in 42 U.S.C. §300aa-22(b)(1) "bars state-law design-defect claims against vaccine manufacturers." (*Bruesewitz*, 562 U.S. at 226). The Court began its opinion by discussing the history of vaccines in the United States and noting that, in particular, while at the same time being "'one of the greatest achievements" 'of public health in the 20th century"[31] in the 1970's and 1980's the DTP vaccine (although overwhelmingly successful in preventing diseases) nevertheless was being blamed for causing disabilities and developmental delays in some of the children to whom the vaccine was administered, thus leading "to a massive increase in vaccine-related tort litigation" which in turn "destabilized the DTP vaccine market, causing two of the three domestic manufacturers to withdraw; and the remaining manufacturer, Lederle Laboratories, estimated that is potential tort liability exceeded its annual sales by a factor of 2000. Vaccine shortages arose when Lederle had production problems in 1984." (562 U.S. at 227 and fn. 7-8).

Destabilization of the vaccine market[32] was only one problem. The Court pointed out that many complained that efforts to obtain compensation for legitimate

and (2) there must be complete diversity, that is, no plaintiff shares a state of citizenship with any defendant. Both prongs were met in the instant case.

[29] A case cannot, as a matter of right, be appealed to the U.S. Supreme Court. A party seeking to appeal to the Supreme Court from a lower court decision must file a writ of certiorari. In the Supreme Court, if four Justices agree to review the case, then the Court will hear the case. This is referred to as granting certiorari. The Court entertains many thousands of requests to grant certiorari in a given year but grants writs in approximately 125 cases or less. The Court grants cert in cases involving significant public interest or to resolve conflicts of decisions from the 13 Courts of Appeals (there are 12 courts whose jurisdictions are geographically apportioned and the United States Court of Appeals for the Federal Circuit, whose jurisdiction is subject-oriented and nationwide).

[30] The Supreme Court affirmed the Third Circuit, 6-2. Justices Sotomayor and Ginsburg dissented. Justice Kagan took no part in the consideration or decision of the case.

[31] 562 U.S. at 226 *quoting* Centers for Disease Control & Prevention, 1999).

[32] Between 1980 and 1984, injured plaintiffs sought $3.5 billion in damages from vaccine manufacturers, causing six manufacturers to pull out of the market (Cantor, 1995: 1853, 1858; citing Subcomm. On Health and the Env't of the House Comm. On Energy and Commerce, 99th Cong., 2d Sess, Childhood Immunizations 72 (Comm. Print 1986) (presenting results of vaccine manufacturer survey).

vaccine-inflicted injuries through the traditional tort litigation system was both "too costly and difficult."[33] Additionally, a significant segment of society was becoming skeptical or fearful of the side-effects of the vaccine, and thus decided to decline vaccinating their children.[34] The Court also observed that public health officials became concerned about these troubling trends "since vaccines are effective in preventing outbreaks of disease only if a large percentage of the population is vaccinated."[35] It was against this backdrop that the U.S. Congress in 1986 decided to enact the NCVIA for the purpose of both stabilizing the vaccine market and making it easier for victims to secure compensation. In discussing how the no-fault system works,[36] the Court noted that when applying for benefits under the Act, the claimant who can show that one of the injuries listed in the Vaccine Injury Table first manifested itself at the appropriate time is "prima facie entitled to compensation. No showing of causation is necessary; the Secretary [of Health and Human Services/Respondent] bears the burden of disproving causation. A claimant may also recover for unlisted side effects, and for those specified in the Table, but for those the claimant must prove causation. Unlike in tort suits, claimants under the Act are not required to show that the administered vaccine was defectively manufactured, labeled, or designed."[37]

The compensation scheme established under the NCVIA was fairly generous and reasonably comprehensive. As the Court indicated, "Successful claimants receive compensation for medical, rehabilitation, counseling, special education, and vocational training expenses; diminished earning capacity; pain and suffering [up to $250,000]; and $250,000 for vaccine-related deaths. Attorney's fees are provided, not only for successful cases, but even unsuccessful claims that are not frivolous."[38]

The *quid pro quo* for this scheme, said the Court, designed to stabilize the vaccine market, was the Act's "significant tort-liability protections for vaccine manufacturers." (562 U.S. at 229). First, pursuant to Section 300aa-11(a)(2), a

[33] 562 U.S. at 227 *citing* Apolinsky & Van Detta, 2010: 550-551; Burke, 2002.
[34] 562 U.S. at 227 *citing* Mortimer, 1978: 902, 906.
[35] 562 U.S. at 227 *citing* Hagan, 1990: 477, 479.
[36] This already has been discussed to some extent earlier in the paper.
[37] 562 U.S. at 228-229 and fns. 18-20, citing to appropriate provisions of the NCVIA.
[38] 562 U.S at 229 and fns. 21-22, citing to appropriate provisions of the NCVIA. A serious shortcoming of the Vaccine Act is that the Congress has failed to step in to increase these limits. Government data shows that due to inflation, $250,000 in 1986 is equal to approximately $112,000 in 2017 dollars (*see* U.S. Bureau of Labor Statistics (2021) CPI Inflation Calculator, retrieved from: http://www.bis.gov/data/inflation_calculator.htm. (21. January 2021).

claimant must seek relief through this no-fault compensation program as a condition precent for filing suit for more than $1,000. Furthermore, the vaccine manufacturers are generally immune from liability for the failure to warn, so long as they have complied with all regulatory requirements, including but not limited to warning requirements, and so long as they have given the warning either to the claimant directly or to the claimant's physician (42 U.S.C. § 300aa-22(b)(2), (c)).[39] Additionally, manufacturers are immune from liability for punitive damages[40] absent failure to comply with regulatory requirements, fraud, intentional and wrongful withholding of information, or other criminal or illegal activity (42 U.S.C. § 300aa-23(d)(2)). And, as already discussed, and at the heart of the Court's decision, Section 300aa-22(b)(1) "eliminates liability for a vaccine's unavoidable, adverse side effects." (562 U.S. at 230).

Fundamentally, the parties disagreed on the meaning of the verbiage Congress used in Section 300aa-22(b)(1). Petitioners argued this section shields manufacturers against design-defect claims only when a vaccine's harmful side effects could not have been prevented through a safer design. Wyeth, on the other hand, contended that the section extends far broader protection, guarding vaccine manufacturers in absolute terms against all possible design-defect claims. Ultimately, the Supreme Court's majority sided with Wyeth, holding that the NCVIA preempts all design-defect claims against vaccine manufacturers. The Court ruled that the text of this section compels such a conclusion. According to the Court's analysis, if a manufacturer could be held liable for failure to use a different design, the phrase "even though" would have no purpose. Furthermore, the Court reasoned, a vaccine's side effects could always have been avoidable by use of a different vaccine not containing the harmful element. Therefore, the language of the provision suggests the design is not subject to debate in a tort action. Assuming that the manufacturer manufactures the vaccine safely and gives the proper warning, the statute establishes unavoidability as a complete defense with respect to the particular design. The Court supported its conclusion by noting that while product-liability theory provides for three well-established grounds for proving liability: defective

[39] However, the immunity does not apply in cases where the claimant can establish by clear and convincing evidence that the manufacturer was negligent, or was guilty of fraud, intentional and wrongful withholding of information, or other unlawful activity (*See*, §§300aa-22(b)(2), 300aa-23(d)(2)).

[40] The vast majority of states allow for an award of punitive damages, although a handful do not. For those that do, the standard of proof is typically clear and convincing evidence, although some require only a preponderance of the evidence (Wilson Elser, 2018).

manufacture; inadequate directions for use or warnings; and, defective design[41] – the NCVIA mentions only manufacture and warnings. Thus, the Act's failure to mention design-defect liability is "by deliberate choice, not inadvertence."[42]

Furthermore, the majority rejected petitioners' argument that the word "unavoidable" contained in Section 300aa-22(b)(1) was meant by Congress to be a term of art incorporating Restatement (Second) or Torts §402A,[43] Comment *k*, which exempts from strict liability rules "unavoidably unsafe products." Further parsing the language, and continuing its strictly textual analysis, the majority noted that "unavoidable" is a commonly used word and that legal authority interpreting comment *k* attach special significance only to the phrase "unavoidably unsafe products" and not to the singular word "unavoidable." Continuing its grammatical lesson, the Court stated that reading the phrase "side effects that were unavoidable" to exempt injuries caused by a flawed design would require treating the phrase "even though" as a coordinating conjunction linking independent ideas when it is a concessive, subordinating conjunction conveying that one clause weakens or qualifies the other.

The Court also observed that the structure of the NCVIA specifically, and of vaccine regulation in general, "reinforces" what the text of Section 300aa-22(b)(1) suggests: that design defects do not merit a single mention in either the Act itself or in Food and Drug Administration regulations that pervasively regulate the drug manufacturing process. According to the Court, this lack of guidance for design defects, when combined with the extensive guidance for the two other liability grounds specifically mentioned in the Act (i.e., failure to warn/direct and manufacturing defects), strongly suggests that design defects were not mentioned because they are not a basis for liability (562 U.S. at 237-238).

As further support for its conclusion, the Court reasoned that the Act's mandate provides for federal agency improvement of vaccine design and for federally prescribed compensation, which are other means for achieving the two beneficial

[41] Claims of design defect implicate an entire product line based on the theory that the risks the product poses to the consumer outweigh any utility the consumer would derive from using it (the so-called "risk utility" test). This is in contrast with construction or manufacturing defects, which usually involve aberrational departures from the product's intended design (*see* Geistfeld, 2006).
[42] 562 U.S. at 233 *quoting Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003).
[43] The various Restatements of the Law (whether of torts, property, contract etc.) are scholarly works generated by leading professors and other experts. While not binding on courts, they are highly persuasive and are often relied upon by the Courts, including the Supreme Court.

effects of design-defect based torts – prompting the development of improved designs, and providing compensation for inflicted injuries (562 U.S. at 238). Additionally, the Act's structural *quid pro quo* compels the same conclusion (562 U.S. at 239). The vaccine manufacturers fund an informal, efficient compensation program for vaccine-related injuries in exchange for avoiding costly tort litigation and the occasional disproportionate jury verdict. Taxing their product to fund the compensation program, while leaving their liability for design defect virtually unaltered, the Court reasoned, would hardly coax them back into the market (562 U.S. at 240).

Justice Sotomayor wrote a dissenting opinion that was extremely critical of the reasoning employed by the majority. She essentially accused the majority of merely adopting the policy preferences advanced by Wyeth instead of engaging in reasoned legal analysis. She wrote: "[T]he Court imposes its own bare policy preference over the considered judgment of Congress. In doing so, the Court excises 13 words from the statutory text, misconstrues the [Vaccine] Act's legislative history, and disturbs the careful balance Congress struck between compensating vaccine-injured children and stabilizing the childhood vaccine market. Its decision leaves a regulatory vacuum in which no one ensures that vaccine manufacturers adequately take account of scientific and technological advancements when designing or distributing their products." (562 U.S. at 250 (Sotomayor, dissenting)). She also wrote that the majority failed to carry out the Congressional intent "to leave the courthouse doors open for children who have suffered severe injuries from defectively designed vaccines. The majority's policy-driven decision to the contrary usurps Congress' role and deprives such vaccine-injured children of a key remedy that Congress intended them to have." (562 U.S. 275, n. 25).

2.2.2 Further Discussion of the National Vaccine Injury Compensation Program

The MMR vaccine is a vaccine against measles, mumps, and rubella (German measles). The first dose is generally given to children around nine months to fifteen months of age, with a second dose at fifteen months to six years of age, with at least four months between doses. Many petitioners filed claims in the Vaccine Court claiming autism was caused by MMR. In 2002, the Court instituted the Omnibus

Autism Proceeding in which plaintiffs were allowed to proceed with the three cases they considered to be the strongest before a panel of special masters. In each of the cases, the panel found that the plaintiffs had failed to demonstrate a causal effect between the MMR vaccine and autism (Abramson, Thomas & Safir, 2018: 9-23). Following this determination, the Vaccine Court has regularly dismissed such suits, finding no causal relationship between the MMR vaccine and autism (Maugh & Zajac, 2010).

As of November 2020, over $4.4 billion in compensation (not including attorney's fees and costs) have been awarded pursuant to the VICP.[44] Between the years 2006-2017 there were 3,454,305,356 vaccinations administered (the most for influenza: 1,518,400,000) and compensation was awarded in only 4,153 cases (the highest for influenza: 2,833) translating into on average 1.2 awards per million applications for vaccines.[45] Through 2020, there have been a total of 5,646 awards with the average award being approximately $456,113 (Health Resources and Services Administration, 2019).

The NCVIA, together with the Act's interpretation in Breusewitz, has been the subject of great debate, some lauding the legislation and the Court's endorsement of it, others decrying that the legislation struck an unfair balance in favor of vaccine manufacturers. Proponents point out that the twin goals of the NVICP – to protect the nation's vaccine supply (including stabilizing prices for same) while at the same time providing an easier non-litigation path to compensation for victims have largely been achieved. These advocates highlight that "Claimants going through the program receive many breaks compared to litigants in civil courts: 1) They do not have to provide evidence of design defect – or any defect; 2) Causation standards are less demanding than in civil courts 3) The rules of evidence are relaxed – claimants can use experts and bring in materials that would not be allowed in regular courts; 4) Fees and costs are covered even if people lose. No contingency fee: the whole award goes to the claimant." (Reiss, 2019). These advocates also point out that while claimants give things up, such as full discovery; a shortened statute of

[44] National Vaccine Injury Compensation Program Monthly Statistics Report. Health Resources and Services Administration (HRSA). U.S. Department of Health and Human Services, October 2019.
[45] Data and Statistics. Health Resources & Services Administration. Retrieved February 18, 2019.

limitations; and, the possibility of huge jury verdicts, "all in all, it's a favorable system."(Reiss, 2019).[46]

2.3 Public Readiness and Emergency Preparedness Act (PREP ACT)

2.3.1 Introduction

The most recent, and perhaps the most important, legislative enactment providing nearly blanket immunity to manufacturers, distributors and others of vaccines is the Public Readiness and Emergency Preparedness Act (42 U.S.C. §247d-6d) (hereinafter PREP Act). The PREP Act was passed by the United States Congress and signed into law by then President George W. Bush in December 2005. Vaccine manufacturers lobbied strongly for this legislation, asserting that they would not produce new vaccines unless this legislation was enacted. As we shall see, the Act preempts state vaccine safety laws in situations where the Secretary of Health and Human Services (HHS) issues an emergency declaration. During the legislative process, the proponents of the PREP legislation added it to the final version of a lengthy Department of Defense appropriations bill[47] while the bill was being negotiated between the Senate and the House of Representatives. The principal purpose of the PREP Act was to encourage the rapid and expeditious development and deployment of medical countermeasures (i.e., vaccines) to protect American citizens in the case of potential public health threats, such as viruses. The *quid pro quo* to the manufacturers (and others) is that they have secured nearly complete legal immunity (in both contract and tort) from any and all actions related to the manufacture, testing, development, distribution, administration and use of "medical countermeasures (i.e., vaccines) employed against chemical, biological, radiological and nuclear agents of terrorism, epidemics, and pandemics." The legislation protects drug manufacturer companies (and others) by removing financial risk barriers for any new vaccines that urgently need to be placed into the market to stem emergencies. The sole exception to PREP Act immunity is for death or serious physical injury caused by "willful misconduct." However, individuals who die or suffer serious injuries directly caused by the administration of covered

[46] For an insightful book on this topic Kirkland, 2016. Dr. Kirkland is an attorney and Associate Professor at the University of Michigan, in the Department of Women's and Gender Studies.
[47] H.R. 2863. Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006. United State Congress, December 30, 2005.

countermeasures may be eligible to receive compensation through the Countermeasures Injury Compensation Program (CICP). Under the PREP Act, the HHS Secretary has the primary responsibility for making decisions on whether or not to declare an emergency. The liability protections are triggered once such a declaration is issued.[48]

2.3.2 March 10, 2020 Emergency Declaration Under PREP Act and General Counsel's Office Omnibus Advisory Opinion of May 19, 2020

The NVICP, it will be recalled, applies only to the specific vaccines set forth in the Vaccine Injury Table (42 U.S.C. §300aa-11(b)(1)(A) (2012)). Accordingly, it does not apply to vaccines that are employed for use in declared public health emergencies[49] or to many vaccines used by adults, such as the shingles vaccine. The PREP Act provides for a much more exclusive and limited administrative remedy than does the NVICP. In addition to covering vaccines, the Prep Act also applies to antidotes, medications, medical devices, and other products used to respond to pandemics and biological chemical threats.[50] The PREP Act authorized the HHS Secretary to issue a Declaration to provide liability immunity to certain individuals and entities ("*Covered Persons*") against any claim for loss cause by, arising out of, relating to, or resulting from the manufacture distribution, administration, or use of certain medical countermeasures ("*Covered Countermeasures*"), except for claims involving "*willful misconduct*." In cases where the HHS Secretary declares a public health emergency, liability protection extends not only to manufacturers, but to all medical administrators of the covered countermeasures used to prevent, treat or mitigate an epidemic (U.S.C. §247d-6d(a)(2)(B)). The Secretary has absolute authority to declare a public health emergency, and the declaration is not reviewable by any court.[51] On

[48] The PREP Act was strongly opposed by consumers and various members of the U.S. Congress. The now late Senator Kennedy, long a progressive Democrat, joined by twenty of his Congressional colleagues, wrote a letter to the house Speaker and majority leader to repeal the PREP Act. *Sen. Kennedy, Colleagues Call on Majority Leader Frist, Speaker Hasert to Repeal 'Dead of Night' Vaccine Liability Provision, Enact Real Protections,* U.S. Fed. News, Feb. 15, 2006, 2006 WLNR 2705752. In their letter, they characterized the PREP Act as a "travesty of the legislative process," and stated that it could be "used to allow manufacturers of virtually any drug or vaccine to escape responsibility for gross negligence or even criminal acts." Furthermore, they accused the law's sponsors of creating "an empty shell of a compensation program for injured patients with none of the funding needed to make compensation a reality."

[49] Public Readiness and Emergency Preparedness Act, 42 U.S.C. §247d-6d (2012).

[50] *See Countermeasures Injury Compensation Program*, Health Resources & Servs. Admin. (Oct. 2017), https://www.hrsa.gov/sites/default/files/hrsa/cicp/cicpfactsheet.pdf

[51] *Id.* §247d-6d(b)(7) ("No court of the United States, or of any State, shall have subject matter jurisdiction to review, whether by mandamus or otherwise, any action by the Secretary under this subsection.").

March 10, 2020, the Secretary issued such a declaration, effective retroactively to February 4, 2020, for certain medical products to be used against COVID-19.[52]

On May 19, 2020, General Counsel Robert P. Charrow issued an Omnibus Advisory Opinion (hereinafter OAO) intended to "address most questions and concerns about the scope of PREP Act immunity during the Coronavirus disease 2019 (COVID-19) pandemic."[53] The OAO was written in response to various requests the General Counsel's office had received "from those donating goods and services, on whether various activities qualify for PREP Act immunity." (Advisory Opinion). In particular, General Counsel's office has had to respond to many questions about "whether a medical product is a covered countermeasure, whether a person is a covered person, and whether a specific activity qualifies as use or administration of a covered countermeasure." In view of the current pandemic, which is covered by the PREP Act in light of the Secretary's March 10, 2020 Declaration, and given further the thorough nature of the OAO, a significant portion of the balance of this Article will draw heavily upon the OAO in order to explain how the PREP Act works.[54]

2.3.2.1 Covered Countermeasures

Pursuant to the Secretary's March 10, 2020 declaration, covered countermeasures include any: "antiviral, any other drug, any biologic, any diagnostic, any other device, or any vaccine, used to treat, diagnose, cure, prevent, or mitigate COVID-19, or the transmission of SARS-CoV-2 or a virus mutating therefrom, or any device used in the administration of any such product, and all components and constituent materials of any such product." (85 Fed. Reg. 15,198, 15,202 (March 17, 2020); s*ee also*, Advisory Opinion, p. 3). Furthermore, "[a}ny drug, device, or biological product that is approved, cleared, or licensed by the FDA and is used to diagnose,

[52] *See* 85 Fed. Reg. 15,198,15,202 (March 17, 2020); *see also* Pub. L. No. 109-148, Public Health Service Act §319F-3, 42 U.S.C. §247d-6d and 42 U.S.C. §247d-6e. The HHS Secretary has declared numerous other public health emergencies under the PREP Act, including declarations for H1N1 pandemic flu vaccines, Ebola virus vaccines, and Zika virus vaccines. See U.S. Dep't of Health & Human Servs., *Public Readiness and Emergency Preparedness Act,* Pub. Health Emergency (May 10, 2017), https://www.phe.gov/preparedness/legal/prepact/pages/default.aspx.
[53] Advisory Opinion on the Public Readiness and Emergency Preparedness Act and the March 10, 2020 Declaration Under the Act April 17, 2020, as modified on May 19, 2020 at p. 1. (hereinafter Advisory Opinion).
[54] Advisory Opinions authored by the General Counsel of HHA are just that: advisory opinions. These are nonbinding and lack the force of law. However, they are significant and may inform the judicial interpretation of the PREP Act if courts find their reasoning persuasive.

mitigate, prevent, treat, cure, or limit the harm of COVID-19 is a covered countermeasure." (Advisory Opinion, p. 3). The Coronavirus Aid, Relief, and Economic Security (CARES) Act amended the PREP Act to add respiratory protective devices to the list of covered countermeasures, assuming they are approved by the National Institute for Occupational Safety and Health and are also determined by the Secretary to be a priority for use during a public health emergency. Covered countermeasures expansively include, among other things, a "qualified pandemic or epidemic product." (42 U.S.C. §247d-6d(i)(1)(A)). The term "qualified pandemic or epidemic product" means: "a drug … biological product … or device [as]defined … [in] the Federal Food, Drug, and Cosmetic Act … that is (A) (i) a product manufactured, used, designed, developed, modified, licensed, or procured _ (I) to diagnose, mitigate, prevent, treat, or cure a pandemic or epidemic; or (II) to limit the harm such pandemic or epidemic might otherwise cause; (ii) a product manufactured, used, designed, developed, modified, licensed, or procured to diagnose, mitigate, prevent, treat, or cure a serious or life-threatening disease or condition caused by a product described in clause (i); or (iii) a product or technology intended to enhance the use or effect of a drug, biological product, or device described in clause (i) or (ii); and (B) (i) approved or cleared under chapter V of the Federal Food, Drug, and Cosmetic Act…" (Advisory Opinion, pp. 3-4).

According to the OAO, "in order to meet the definition of a qualified pandemic or epidemic product, a product (1) must be used for COVID-19; and (2) must be (a) approved, licensed, or cleared by the FDA; (b) authorized under an EUA; (c) described in Emergency Use Instruction; or (d) used under either an Investigational New Drug (IND) application or an Investigational Device Exemption (IDE)." (*See* Advisory Opinion, p. 4). The OAO goes on to state that currently the number of products that have been approved, licensed, or cleared to deal with COVID-19 are very numerous (Advisory Opinion, p. 4).[55]

In light of the expansive definition of covered countermeasures and "Given the broad scope of PREP Act immunity, Congress did not intend to impose a strict-liability standard[56] on covered persons for determining whether a product is a covered countermeasure. Instead, we believe that a person or entity that otherwise meets the requirements for PREP Act immunity will not lose that immunity – even

[55] Footnote 2 of the Advisory Opinion provides a link where the list of approved products may be accessed.
[56] Strict-liability meaning liability without fault.

if the product is *not* a covered countermeasure – if that person or entity reasonably could have believed that the product was a covered countermeasure. *See, e.g.,* 42 U.S.C. § 247d-6d(a)(4)(B) (applying the 'reasonably-could-have-believed' standard to predicate requirements for PREP Act immunity not involving the actual use and administration of covered countermeasures). For example, FDA has issued EUAs for certain COVID-19 tests and PPE. A covered person purchases 500,000 tests or respirators that appear to be authorized under an EUA. The covered person has taken reasonable steps – under the current, emergent circumstances – to substantiate the authenticity of the products. But it turns out that some or all of the products are counterfeit. Under those circumstances, we believe that the person would be immune against a claim arising out of the use of a counterfeit test or respirator." (Advisory Opinion, p. 4-5).

2.3.2.2 Covered Persons

A "covered person" has immunity under the PREP Act for certain activities (*e.g.,* manufacturing, distributing, using, or administering) involving a "covered countermeasure," as defined in the PREP Act and as delineated in a PREP Act declaration issued by the Secretary. The term "covered person," when used with respect to the administration or use of a covered countermeasure, means: (A) the United States; or (B) a person or entity that is: (i) a manufacturer of such countermeasure; (ii) a distributor of such countermeasure; (iii) a *program planner* of such countermeasure; (iv) a *qualified person* who prescribed, administered, or dispensed such countermeasure; or (v) an official, agent, or employee of a person or entity described in clause (i), (ii), (iii), or (iv) (42 U.S.C. §247d-6d(i)(2)).

Program planners (2 U.S.C §247d-6d(i)(6)) include Indian Tribes, state governments, and local governments who supervise programs that dispense, distribute, or administer covered countermeasures, or provide policy guidance, facilities, and scientific advice on the administration or use of such countermeasures.[57]

[57] Under the Secretary's declaration, "[A] private sector employer or community group or other 'person' can be a program planner when it carries out the described activities." (85 Fed. Reg. at 15,202).

Qualified persons (42 U.S.C. §247d-6d(i)(8)). include licensed health professionals and other individuals authorized to prescribe, administer, or dispense covered countermeasures under state law, as well as other categories of persons identified by the Secretary in a PREP Act declaration. Employees and agents of all these persons and entities are also covered persons. With respect to this category, the Secretary, through Section V of his declaration, has determined that qualified persons also include: "[a]ny person authorized in accordance with the public health and medical emergency response of the Authority Having Jurisdiction, as described in Section VII below, to prescribe, administer, deliver, distribute or dispense the Covered Countermeasures, and their officials, agents, employees, contractors and volunteers, following a Declaration of an emergency[.]" (85 Fed. Reg. at 15,202; s*ee also* Advisory Opinion, pp. 5-6).

General Counsel Charrow indicated that a common question often received in his office centered on the circumstances under which a person is a "covered person" under the PREP Act. Therefore, the following section of his OAO is particularly informative and worth quoting in its entirety:

"[A]n Authority Having Jurisdiction has broad powers to extend PREP Act immunity to additional individuals as part of a public health and medical emergency response. The Authority Having Jurisdiction does so by authorizing 'any person' to 'prescribe, administer, deliver, distribute or dispense the Covered Countermeasures.' Section VII of the declaration explains that '[t]he Authority Having Jurisdiction means the public agency or its delegate that has legal responsibility and authority for responding to an incident, based on political or geographical (e.g., city, county, tribal, state, or federal boundary lines) or functional (e.g., law enforcement, public health) range or sphere of authority.' *Id.* As the lead federal public-health agency that has legal responsibility and authority for responding to the COVID-19 emergency, HHS is an Authority Having Jurisdiction, but it is not the only Authority Having Jurisdiction to respond to the COVID-19 emergency.

"The following is an example of a qualified person under Sections V and VII of the declaration. In response to the COVID-19 emergency, the HHS Office of the Assistant Secretary for Health (OASH) issued guidance for licensed pharmacists to order and administer COVID-19 tests, including serology tests, that the FDA has authorized. Such tests are covered countermeasures under the declaration. Thus,

under Sections V and VII of the declaration, such pharmacists are covered persons. Specifically, they are qualified persons, as they are acting in accordance with guidance from HHS – an Authority Having Jurisdiction to respond - following a declared emergency by the Secretary. The pharmacists are covered as qualified persons (and hence as covered persons) even if they may not be licensed or authorized by the State to prescribe the tests pursuant to § 247d-6d(i)(8)(A), because they fit within the alternative definition of 'qualified persons' pursuant to paragraph § 247d-6d(i)(8)(B), as provided by the Secretary in the declaration.

"As with covered countermeasures, an entity or person that otherwise meets the requirements for PREP Act immunity will not lose that immunity – even if the entity or person is *not* a covered person – if that entity or person reasonably could have believed, under the current, emergent circumstances, that the person was a covered person (s*ee, e.g.,* 42 U.S.C. § 247d-6d(a)(4)(B)).

"For example, a pharmacy allows its licensed pharmacists to order FDA-authorized, self-swab COVID-19 tests pursuant to OASH guidance. Notwithstanding the pharmacy's reasonable-compliance measures to ensure current licensure, it turns out that one of the pharmacists had inadvertently allowed his license to expire. Under those circumstances, the pharmacy would still be immune against a lawsuit relating to the COVID-19 test prescribed by that pharmacist." (Advisory Opinion, pp. 6-7).

2.3.2.3 Reasonable Precautions and Scope of Immunity

Immunity under the PREP Act has been described as both sweeping and broad (Advisory Opinion, p. 7). PREP Act immunity extends to "all claims for loss" under both state and federal law. "*Loss* is broadly defined to mean 'any type of loss,' including (i) death; (ii) physical, mental, or emotional injury, illness, disability, or condition; (iii) fear of such injury including medical monitoring costs; and (iv) loss of or damage to property, including business interruption loss. This language seemingly includes, at a minimum, most state law tort, medical malpractice, and wrongful death claims arising from the administration of covered countermeasures." (Congressional Research Service, 2020: 2 (hereinafter Legal Sidebar)).

Assuming that a claim falls within the PREP Act's scope, a "covered person" is generally immune from legal liability. "The 'sole exception' to liability to immunity is when a covered person proximately causes death or serious physical injury to another person through willful misconduct. A *serious physical injury* must be life threatening, permanently impair a body function, permanently damage a body structure, or require medical intervention to avoid such permanent impairment or damage. *Willful misconduct* requires that the covered person acted (i) intentionally to achieve a wrongful purpose; (ii) knowingly without legal or factual justification; *and* (iii) in disregard of a known or obvious risk that is so great as to make it highly probable that the harm will outweigh the benefit." (Emphasis in original text) (Congressional Research Service, 2020: 3; *see also*, 42 U.S.C. §247d-6d(c)(3)).

However, despite the sweeping nature of this legislative grant of immunity, the civil liability of covered persons is further protected in yet additional ways. Before being able to file a lawsuit claiming willful misconduct, injured persons must first exhaust their administrative remedies by filing a claim through the Countermeasures Injury Compensation Program (hereinafter CICP) (see discussion in section 2.3.2.4 below) and they cannot bring a civil suit if they elect to receive compensation awarded pursuant to the CICP (Congressional Research Service - Legal Sidebar, 2020: *supra* note 137, p. 3). Civil suits that allege an exception to immunity for covered persons may only be brought before a three-judge court in the United States District Court for the District of Columbia. There is no right there to a jury trial (42 U.S.C. §247-d-6d(e)(1), (5)). In the United States, the plaintiff in a typical personal injury/medical malpractice case, has the burden of proving the elements of his/her claim by a simple preponderance of the evidence. However, in civil suits brought under the PREP Act, a plaintiff, in order to prevail, must establish by clear and convincing evidence that the willful misconduct alleged proximately caused death or serious injury (42 U.S.C. §247d-6d(c)(3)).

As observed by the General Counsel in his OAO, even assuming the plaintiff can meet this high bar, "certain acts or omissions [still] remain immune from suit" under 42 U.S.C. §247d-6d(c)(4), namely: "Notwithstanding any other provision of law, a program planner or qualified person shall not have engaged in 'willful misconduct' as a matter of law where such program planner or qualified person acted consistent with applicable directions, guidelines, or recommendations by the Secretary regarding the administration or use of a covered countermeasure that is specified in

the declaration under subsection (b), provided either the Secretary, or a State or local health authority, was provided with notice of information regarding serious physical injury or death from the administration or use of a covered countermeasure that is material to the plaintiff's alleged loss within 7 days of the actual discovery of such information by such program planner or qualified person." (Advisory Opinion, p. 7. *Quoting* 42 U.S.C. §247d-6d(c)(4).

The OAO refers to yet other statutory provisions that shield covered persons from liability. "[U]nder 42 U.S.C. § 247-d-6d(c)(5), certain acts or omissions by a manufacturer or distributor and 'subject to regulation by this chapter or by the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 301 *et seq*.]' will not constitute willful misconduct if (1) 'neither the Secretary nor the Attorney General has initiated an enforcement action with respect to such act or omission' or (2) 'such an enforcement action has been initiated and the action has been terminated or finally resolved without a covered remedy.'

"Nevertheless, HHS encourages all covered persons using or administering covered countermeasures to document the reasonable precautions they have taken to safely use the covered countermeasures.

"For example, consider a distributor of medical products that sources PPE from a new supplier abroad in a good-faith attempt to quickly deliver PPE to American communities affected by COVID-19. Among other things, that distributor assesses the supplier's facility to confirm that the supplier actually manufactures the PPE. The distributor also confirms that the supplier has quality-control processes in place.

"Under those circumstances, the distributor may wish to make available to the purchaser information about the reasonable efforts that the distributor had taken to safely use the covered countermeasures. Purchasers such as hospitals would then be able to make more informed decisions about how best to use the PPE. Overall, this would provide greater transparency in implementing the PREP Act." (Advisory Opinion, p. 7-8).

On December 3, 2020, the Secretary issued a fourth amendment to the HHS Declaration. This amendment states that the HHS Declaration "must be construed in accordance with" the HHS advisory opinions, which are expressly "incorporate[d]" into the Declaration (85 Fed. Reg. 79190). The fourth amendment makes several changes to expand the scope of the PREP Act immunity, including "mak[ing] explicit" that the HHS Declaration (1) covers "all qualified pandemic and epidemic products" within the meaning of the statute; and (2) may apply to claims based on *not administering* a covered countermeasure, such as when the countermeasure is in short supply. The fourth amendment also creates a new category of "qualified persons" to cover health care providers using telehealth to order or administer covered countermeasures across state lines; adds a third covered means of distribution to extend liability protections to "additional private distribution channels"; and clarifies the licensing requirements for pharmacists to administer routine pediatric vaccinations under the Third Amendment, while expanding this category to expressly include FDA-authorized COVID-19 vaccines as well.

2.3.2.4 Additional Office of General Counsel Advisory Opinions on the PREP Act

On October 23, 2020, the HHS OGC issued two additional Advisory Opinions, No. 20-03 and 20-04. Advisory Opinion 20-03 addressed three vaccination-related issues. The following are the issues and the advisory opinions regarding each:[58]

1. Whether the PREP Act preempts pharmacy-related state licensing laws that are less stringent than federal standards under the Third Amendment to the Secretary's March 2020 Declaration.[59] The HHS OGC notes that relevant state-licensing laws that are less stringent than those in the Declaration are not preempted.

[58] *See*, www.oig.hhs.gov

[59] The Third Amendment identifies, as Qualified Persons covered under the PREP Act, certain state-licensed pharmacists and state-licensed or registered pharmacy interns acting under the supervision of a state-licensed pharmacist. The Amendment authorizes those pharmacists to order and administer, and authorizes those pharmacy interns to administer, any vaccine that the ACIP recommends for ages 3 through 18, according to ACIP's standard immunization schedule. The Amendment clarifies that "the category of disease, health condition, or threat for which [the Secretary] recommends the administration or use of the Covered Countermeasures includes not only COVID-19 . . . but also other diseases, health conditions, or threats that may have been caused by COVID-19 . . . including the decrease in the rate of childhood immunizations, which will lead to an increase in the rate of infectious diseases."

2. Whether a state may require a pharmacist to enter into a collaborative-practice agreement with a licensed physician as a condition of administering vaccines recommended by the Advisory Committee on Immunization Practices (ACIP) for children between ages 3 and 18. The HHS OGC states that "any state of local law requiring a pharmacist to enter into a collaborative-practice agreement would be preempted if that requirement prohibits or effectively prohibits a pharmacist from ordering and administering vaccines as set forth in the Third Amendment and related issuances."

3. Whether epinephrine, when used to treat a severe acute vaccine reaction, is a "covered countermeasure" as defined in the PREP Act. HHS OGC indicates that epinephrine is a "covered countermeasure" under the PREP Act when used to treat severe acute reactions to an ACIP-recommended vaccine.

Advisory Opinion 20-04 focuses on the question of who qualifies as a "program planner" under the PREP Act and the Secretary's March 10, 2020, Declaration, as amended, and the activities authorized by an "Authority Having Jurisdiction." The Opinion, which again served to re-emphasize the breadth of PREP Act immunity, states that any individual or organization can potentially receive PREP Act coverage as a "program planner" when they act in accordance with the PREP Act and the Secretary's Declaration. Private businesses may so qualify (and thus fall into the category of "covered persons") when performing certain functions. Concerning what activities are authorized by an Authority Having Jurisdiction, this Advisory Opinion expands upon examples provided in an earlier Opinion with additional manners in which activities might be authorized and notes that all of the examples may collectively be considered as guidance. The Opinion also provides some examples of how a program planner may or may not qualify for PREP Act immunity when local, state, and/or federal Authorities Having Jurisdiction issue conflicting guidance. Taken cumulatively, these two additional Advisory Opinions express the General Counsel's view of the broad, sweeping immunity Congress intended to grant under the PREP Act.

2.3.2.5 The Countermeasures Injury Compensation Program (CICP)

Persons that have either been seriously injured or died as a direct result of a covered countermeasure administered or used under a declaration may seek compensation through the CICP. The CICP, as is the case under a typical workers' compensation scheme or the National Vaccine Injury Compensation Program, "substitutes a no-fault, speedy compensation system in place of expensive and uncertain litigation." (Advisory Opinion, p. 8). The CICP has only a one-year statute of limitations.[60] The claimant has the right to retain a lawyer to provide legal assistance, but in contradistinction to the NVICP, the CICP does not allow for the recovery of attorney fees.[61] Furthermore, under the CICP there are no hearings or appeals available from the CICP decisions with the exception that a claimant may request reconsideration of a claim within sixty days in situations where the CICP originally rejected the claim.[62] As stated by Holland (2018: 415, 448): "There are no published records of CICP's compensation decisions, so it is impossible to analyze them. CICP's website lists medical expenses, lost employment income, and survivor death benefits as possible compensation, but it is unclear whether or to what extent CICP has paid them, as there are no published decisions.

"As of September 2015, HHS adopted a final rule regarding compensation through the CICP (42 C.F.R. §110.30-33). The rule includes a Covered Countermeasures Injury Table (Countermeasures Table), which contains presumptive injuries from pandemic flu vaccines and, specifically, the pandemic flu vaccine for the 2009 HINI virus, as well as antiviral drugs to treat pandemic flu (42 C.F.R. §110.100). The Countermeasures Table creates presumptions of causation in the event of anaphylaxis within zero to four hours after administration of a pandemic flu vaccine or the onset of Guillain-Barre Syndrome from three to forty-two days after vaccine administration (42 C.F.R. §110.100).

[60] *See* Health Resources & Services Administration, 2017: "[Y]ou have ONE (1) YEAR from the date that the covered countermeasure was received to file for CICP benefits . . . ."), Health Resources & Services Administration (Oct. 2017) Frequently Asked Questions, retrieved from: https://www.hrsa.gov/cicp/faq (22 December 2020)
[61] Health Resources & Services Administration (Oct. 2017) Frequently Asked Questions. https://www.hrsa.gov/cicp/faq (22 December 2020)
[62] See previous.

"HHS has created these presumptions based on 'compelling, reliable, valid, medical and scientific evidence.'[63] The Countermeasures Table creates a rebuttable presumption of injury causation for people who meet its criteria, but HHS still has the right to contest eligibility in individual cases. In addition, if an individual alleges injuries that do not fall within the Countermeasures Table, she may still pursue her claim, but she must demonstrate that 'the covered countermeasure directly caused the injury' by 'compelling, reliable, valid, medical and scientific evidence.' [64]

General Counsel Charrow succinctly describes benefits available under the CICP in the following terms:

"A serious injury generally means a physical injury that warranted hospitalization (whether or not the person was actually hospitalized) or that led to a significant loss of function or disability. 42 U.S.C. § 110.3(z). CICP pays reasonable and necessary medical benefits. CICP also pays lost wages to eligible recipients. Death benefits may also be available to certain survivors of eligible individuals who died as a direct result of the administration or use of a covered countermeasure. CICP is payer of last resort. So benefits are reduced by the amounts payable by other public and private third-party payers (such as health insurance and workers' compensation). The regulations implementing the CICP are at 42 C.F.R. pt. 110.

"Compensation for injuries is more limited than the liability afforded under the PREP Act. As described above, the PREP Act provides immunity for all claims for loss. But CICP will provide compensation only for eligible claims of serious physical injury or death. CICP will not compensate claims related to emotional injury, fear of injury, business losses, or other types of claims for which immunity is provided. Information about this program can be found at http://www.hrsa.gov /cicp/about/index.html or by calling 855-266-2427." (Advisory Opinion, p. 8).[65]

[63] Ctrs. for disease control & prevention, U.S. Dep't of Health & Human Servs., at pp. D-9.
[64] Countermeasures Injury Compensation Program: Pandemic Influenza Countermeasures Injury Table, 80 Fed. Reg. 47,411, 47,412 (Aug. 7, 2015) (codified at 42 C.F.R. §110.30) ("[T]his Table creates a rebuttable presumption of causation for eligible individuals . . . .").
[65] *See* Advisory Opinion, *supra* note 119, at p. 8.

3 Final Remarks

As we are all acutely aware, the various governments around the world have struggled mightily in trying to manage the current COVID-19 pandemic/crisis. Trying to understand new viruses and then developing countermeasures in an effort to control, if not eradicate them, creates severe challenges even for the best medical/scientific minds in the world. As we all have seen, scientists and medical experts from all corners of the world have worked full-time, literally around the clock, since the pandemic erupted trying to find effective and safe vaccines to place into public use. We can all agree that the medical/scientific community has performed admirably under the most difficult of circumstances.

We also each have seen, in real time, the conflicting interests that government/society must try to balance and manage during a pandemic. The quarantines, travel restrictions, business closures, work-at-home rules, school closures (and on-line learning) and other governmental measures have been imposed in an attempt to control the spread of the virus. While necessary and effective, they have come at significant costs. The economic fall-out from this pandemic will be felt for years to come. Many businesses will never return.[66] Many will go bankrupt. Students are losing valuable classroom time, that can never be effectively restored. Hospitals and those in any way connected to the medical profession are literally overwhelmed. The COVID-19 virus has and will continue to claim many lives, and there is the distinct possibility that those that caught the illness may suffer symptoms (currently unknown) in the future.[67]

It has been repeated over and over that effective vaccines are the only way out of the crisis. Fortunately, the world's great scientists have now developed number of them. As we have all seen, these have been vetted. All went through numerous clinical trials. They also were approved by various regulatory bodies before being approved for large-scale use. And this all was done in record time. Many literally await taking their vaccine injections "with open arms." Others are skeptical, and the

[66] Your author listened to a Sky News report on or about January 18, 2020 indicating that the British Government forecasts that as many as one-third of the nation's businesses will never return.
[67] Mayo Clinic (2020) COVID-19 (coronavirus): Long-term effects, retrieved from: https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-long-term-effects/art-20490351 (12 January 2021).

sheer speed with which these vaccines have come to market fuel the skepticism that a substantial segment of the public has. While the clinical trials of the vaccines have shown them to have a high degree of efficacy with few (mild) side- effects, it also is likely, as with other vaccines, that a small percentage of the inoculated population will sustain more severe injuries.

As we have seen, in recent years the United States Congress enacted two major pieces of legislation designed to encourage the speedy development and distribution of vaccines (countermeasures) and to help ensure that the American public can receive vaccines in times of medical emergencies such as being caused by the current COVID-19 crisis. The first was the 1986 National Childhood Vaccine Injury Act and the second was the 2005 Public Readiness and Emergency Preparedness Act. Both Acts provide manufacturers and distributors of vaccines with substantial protection from the usual tort/contract liability. Indeed, it is fair to say that both create plenteous, almost insurmountable barriers to justiciability for those who are injured by vaccines and who would attempt to pursue a traditional remedy through the court system. In lieu of these traditional remedies, Congress made institutional value judgments that persons sustaining defined, injurious effects as a consequence of vaccines should have recourse through administrative-type tribunals, not the courts.

This author is not necessarily opposed in principle to the kind of no-fault schemes Congress has crafted in the area of vaccines. Both the NVICP and the CICP have their virtues. After all, the traditional litigation model is not without its negative consequences. It is expensive. It is time-consuming. It often yields inconsistent results. There are winners. There are losers. Any additional substantive area of litigation burdens already-crowded courts. Litigation takes a heavy physical and emotional toll on its participants. The costs associated with litigation can put businesses into bankruptcy. And in the case of vaccine manufacturers, history revealed that many were afraid of staying in the business if they had to fear traditional litigation. The schemes developed by Congress incentivized companies to continue to develop vaccines.

This author devoted a significant portion of his legal career to representing companies that either manufactured or sold products containing asbestos. The asbestos litigation is the longest running mass tort litigation in the history of the world. In the 1970's – 1990's in particular, thousands of asbestos personal injury cases flooded both the federal and state courts. This litigation was responsible for compelling well over one hundred large companies to file for bankruptcy protection.[68] Some of these companies, along with their insurers, and others, had extensively lobbied the Congress to pass legislation that would have resolved claims administratively and not through the courts. In 2005, Congress considered but did not pass legislation entitled the "Fairness in Asbestos Injury Resolution Act of 2005 (FAIR)." FAIR would have established a $140 billion trust fund in lieu of litigation. The transaction costs of asbestos litigation will by some estimates reach $275 billion.[69] The many companies that filed for bankruptcy protection typically have been required to fund special "bankruptcy trusts." Claimants (usually through counsel) can apply to these trusts, managed by administrators, to receive compensation. Sometimes that compensation is substantial and the process is much quicker and cheaper than the traditional tort system. Additionally, claimants often can also pursue traditional remedies against solvent companies.

While the many lawyers and others[70] that have benefitted financially from the asbestos litigation would undoubtedly disagree with me, from my firsthand perspective I have reached the conclusion that on balance most claimants, businesses, insurers, and society as a whole would have benefitted had Congress passed legislation along the lines of FAIR and had it done so in the 1980's, before many companies went bankrupt. There are similarly no-fault worker's compensation schemes in place both at the state and federal level, and they generally work well.

The purpose of this Article was not to critically examine the wisdom of the two Acts mainly discussed, but rather to explain them, as it is my belief that many Americans probably do not even know they exist, let alone how they work. As indicated a few

[68] Asbestos bankruptcy trusts (United States), retrieved from: https://en.wikipedia.org/wiki/Asbestos_bankruptcy_trusts_(United_States) (15 December 2020). For a list of (asbestos) companies filing for bankruptcy protection from 1982 – 2020 (approximately 140) see https://www.crowell.com/files/20201007-List-of-Asbestos-Bankruptcy-Cases-Chronological-Order.pdf accessed January 19, 2021).

[69] Asbestos and the Law, retrieved from: https://en.wikipedia.org/wiki/Asbestos_and_the_law (19 January 19 2021).

[70] Records gathering/production entities; court reporters; experts; jury/litigation consultants, etc.

paragraphs earlier, however, I am not opposed in principle to such no-fault schemes as a philosophical matter, although I also have no doubt that my many friends "on the other side of the table" in the courtroom would disagree with me.[71] However, the devil, as they say, is always in the details. As we have seen, the NVICP is the more generous of the two schemes. However, I would argue that the $250,000 statutory limit for pain and suffering is woefully low, especially given inflationary factors. I would argue in favor of, at minimum, amending the legislation to substantially increase that limit.

The remedies available under the CICP are even more limited and the jurisdictional requirements for claimants to avail themselves of those remedies are, in my judgment, unfairly one-sided in favor of business. While I am mindful of the circumstances faced by manufacturers (and others) when they are under such time pressure to develop countermeasures, and while I am sympathetic in general to their fears of litigation, and the distinct possibility that any extensive litigation can put them out of business, I also am sympathetic to those relatively few that sustain substantial harm due to their decision to take a vaccine, especially when health authorities and governments urge them to do so for the greater good of society. Again, it is beyond the scope of this Article to analyze these matters in detail and indeed that is beyond my purview. However, I do think a more appropriate balance can be struck legislatively and as a society we should be sure that anyone that has a significant, serious injury (or death) stemming from a vaccine receives fair compensation.

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Althen v. Secretary of Health and Human Services (Fed. Cir. 2005).
Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003).

[71] By tradition, the party with the usual burden of proof, a plaintiff in a civil case, sits at the table closest to the jury box. Hence, my plaintiff counsel colleagues sat closest to the jurors, while I sat at the "other table."

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Abortion From Countries A to U: A Comparative Analysis of Abortion Laws and Attitudes in America and Uzbekistan

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This paper compares and analyses abortion laws in the United States, one of the world's oldest democracies, to those in Uzbekistan, an ancient middle Asian country that gained its independence from the Soviet Union in 1991. The authors examine both the United States and Uzbekistan constitutions and other laws regulating abortion and other reproductive rights. Regarding the United States, it tracks key abortion decisions from the Supreme Court. The authors also explore general attitudes about abortion and reproductive rights in both countries.

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1 Introduction

Abortion has a long history, dating back to Ancient Civilization. Indeed, perhaps the original evidence of induced abortion can be found in the Egyptian Ebers Papyrus in 1550 BCE (Potts & Campbell, 2009). Defined as the deliberate termination of a pregnancy, the practice of induced abortion, in contrast to a spontaneous abortion, which refers to a naturally occurring condition that ends a pregnancy[1], has always been a contentious issue, with attitudes concerning it shifting throughout time and across cultures (Potts & Campbell, 2009). Sentiments toward abortion are often correlated to religious beliefs, with some religions tolerant of the practice and others strongly opposed to it.

Much has been written on the topic of abortion. This article explores it in a limited way. Specifically, we have analyzed it in a comparative fashion, from the reasonably extensive experience of the United States, one of the world's oldest democracies,[2] to that in Uzbekistan, which gained its independence from the Soviet Union on September 1, 1991, a mere 33 years ago.

The article analyzes the federal constitutions of both countries, applicable legislation and case authorities (in the case of the United States), to determine how they regulate and shape abortion practices. With that background as a foundation, the article also analyzes how the public in both countries view abortion and the impact that the abortion laws have on the people in America and Uzbekistan. The article then concludes with observations.

2 The Abortion Experience in the United States of America

2.1 Brief Timeline of the History of Abortion

According to Winny (2022), "Until the mid-19th century, the U.S. attitude toward abortion was much the same as it had often been elsewhere throughout history: It was a quiet reality, legal until 'quickening' (when fetal motion could be felt by the

[1] A spontaneous abortion is also known as a miscarriage. The Cambridge Dictionary defines a miscarriage as "an early, unintentional end to a pregnancy." This article focuses solely on induced abortions.
[2] Historically, the first democracy dates to Ancient Athens. The oldest democracy, by number of continuous years, is the United States (223), followed by Switzerland (175) and New Zealand (166) (World Economic Forum, 2019).

mother)."[3] Citing Joanne Rosen, JD, MA, a senior lecturer in Health Policy and Management who studies the impact of law and policy on access to abortion, 'Abortion has existed for pretty much as long as human beings have existed' and in the eyes of the law the fetus wasn't a 'separate, distinct entity until then' but rather an extension of the mother" (Winny, 2022). Winny (2022) goes on to explain that, perhaps contrary to popular belief or intuition, the tide toward anti-abortion was fueled not by moral or religious concerns, as is largely the case today, but rather by the United States "physicians on a mission to regulate medicine" (Winny, 2022). As Winny (2022) explains, before then, abortion services routinely were mainly carried out by midwives who sold abortifacient plants and who used various "methods passed down through generations, from herbal abortifacients and pessaries – a tampon-like device soaked in a solution to induce abortion – to catheter abortions that irritate the womb and force a miscarriage, to a minor surgical procedure called dilation and curettage (D & C), which remains one of the most common methods of terminating an early pregnancy" (Winny, 2022).

In 1857, ten years after it had been established, the American Medical Association (AMA), which at that time excluded women from its ranks and which was trying to earn its spurs as leader of the medical profession, squarely targeted the midwives as being quacks that were unqualified to provide reproductive services such as abortion, contrasting them of course to the eminently qualified (male) physicians that belonged to the AMA. In short, the AMA was incentivized to put the midwives out of business to the economic advantage of its male members. The AMA's plan was straightforward. It lobbied state lawmakers to pass legislation to ban the practice of abortions. According to Winny, "To make their case, [the AMA] asserted that there was a medical consensus that life begins at conception, rather than at quickening" (Winny, 2022).

Between 1860 and 1880, as a result of the AMA's letter-writing campaign, many anti-abortion laws were passed at the state level (Winny, 2022). Abortion, therefore, was illegal in nearly all states. The tide changed once again, however, during the Great Depression era of the 1920s and 1930s. Dr. Fissell found that, although illegal, doctors performed abortions anyway to spare women the hardship of raising

[3] This is significant, as it undercuts the central tenet of the Supreme Court's 2022 *Dobbs* decision, overruling *Roe* and holding the United States Constitution does not protect the right to abortion at any stage of pregnancy. The majority claimed that abortion was not "deeply rooted" in American history. The majority was egregiously wrong.

unwanted children during such harsh economic times (Winny, 2022). But in the ebb and flow of the abortion debate, the tide again shifted against abortion after World War II, when Americans, on the whole, wanted to settle down and have families. Therefore, at least in the eyes of men, the woman's job was to stay home and raise children while the man worked. Abortion was antithetical to this vision. Physicians were prosecuted for performing abortions. This meant, predictably, that abortions were performed "underground" illegally. According to the Guttmacher Institute, "Estimates of the number of illegal abortions in the 1950s and 1960s ranged from 200,000 to 1.2 million per year" (Benson Gold, 2003). In 1965, 17% of reported deaths attributed to pregnancy and childbirth were associated with illegal abortion (Benson Gold, 2003). But a rubella outbreak in the mid-1960s turned the tide once again, and states responded with more liberal abortion laws (Winny, 2022). As Winny states, "Catching rubella during pregnancy could cause severe birth defects, leading medical authorities to endorse therapeutic abortions. But the safe, legal abortions remained largely the preserve of the privileged" (Winny, 2022). Fissel added, "Women who are well-to-do have always managed to get abortions, almost always without a penalty. But God help her if she was a single, Black, working-class woman" (Winny, 2022). According to Winny, in the late 1960s and early 1970s, women who had the financial means to do so brought lawsuits to gain the right to have abortions performed in hospitals. In other instances, physicians offered proof that their pregnant patients required abortions to protect their physical and/or mental health or even their life (Winny, 2022). In 1973, 17 states had laws making abortions legal, at least under some circumstances (Winny, 2022).

2.2 Supreme Court Jurisprudence Before the Abortion Cases

2.2.1 The Right to Privacy and Substantive Due Process

It is difficult to understand and analyze the Supreme Court cases on abortion without a basic understanding of its jurisprudence bearing on the abortion cases that preceded those cases. The discussion in this section is designed to help put the abortion cases in historical context. There is perhaps no more confusing area of constitutional law than substantive due process.[4] The Fifth Amendment includes a

[4] Constitutional law scholar Erwin Chemerinsky has written that, "There is no concept in American law that is more elusive or more controversial than substantive due process. Substantive due process has been used in this century to protect some of our most precious liberties. Still, there are now and have always been Justices of the Supreme Court who believe there is no such thing as substantive due process." (Chemerinsky, 1999, p. 1501).

due process clause stating that no person shall "be deprived of life, liberty, or property, without due process of law."[5] The Fourteenth Amendment was enacted in 1868, 77 years after the Fifth Amendment. It has five sections, but section one is the most consequential and litigated and lies at the heart of many of the Supreme Court's landmark cases.[6] Section 1 of the Fourteenth Amendment provides in part that "No State shall make or enforce any law which shall abridge the privileges or immunities[7] of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process[8] of law; nor deny to any person within its jurisdiction the equal protection[9] of the laws."[10]

When we think of the phrase "due process", most of us probably associate it with procedural due process: the fundamental rights to be given notice of a crime or civil action brought against a person, the right and opportunity to be heard, the right to a fair and open trial, etc. These rights deal with the administration of justice itself. The due process clause is a check or safeguard against the government's arbitrary denial of life, liberty, or property. In *Ohio Bell Telephone*,[11] the Supreme Court described due process as "the protection of the individual against arbitrary action."[12]

While it is true that the due process clauses provide procedural protections, they also offer substantive protections. In this article, as it relates to the Supreme Court's abortion decisions, we are concerned with the latter. According to Professor Chemerinsky, although the Supreme Court has never provided any precise definition of substantive due process, it "asks whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose. Procedural due process, by contrast, asks whether the government has followed the proper procedures when it takes away life, liberty, or property. Substantive due process

[5] The Fifth Amendment to the United States Constitution creates several constitutional rights, limiting governmental powers focusing on criminal procedures. It was ratified, along with nine other amendments, in 1791, as part of the Bill of Rights. The Supreme Court has extended most, but not all, rights of the Fifth Amendment to the state and local levels. The Court furthered most protections of this amendment through the Due Process clause of the Fourteenth Amendment.
[6] *See, e.g.*, *Brown v. Board of Education*, 347 U.S. 483 (1954) (regarding racial segregation); *Bush v. Gore*, 531 U.S. 98 (2000) (regarding the 2000 presidential election); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (regarding same-sex marriage).
[7] The privileges and immunity clause.
[8] The due process clause.
[9] The equal protection clause.
[10] Fourteenth Amendment to the United States Constitution, Section 1.
[11] *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292 (1937).
[12] *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 302 (1937).

looks to whether there is a sufficient substantive justification, a good enough reason for such a deprivation" (Chemerinsky, 1999, p. 1501).

Space limitations preclude an extensive discussion of the history of substantive due process. Suffice it to say that in the early part of the twentieth century, substantive due process was used extensively to protect economic liberties from government interference. *Lochner v. New York*[13] was a seminal case concerning the so-called economic substantive due process. The Supreme Court routinely used the *Lochner* doctrine to invalidate legislation regulating business. However, it became discredited and effectively ended abruptly with the Supreme Court's holding in *West Coast Hotel Co. v. Parrish*, which upheld the constitutionality of state minimum wage legislation.

Although the Court abandoned economic substantive due process restrictions on legislation after the *West Coast Hotel* case, the Court has continued to recognize substantive due process rights concerning non-economic legislation that affects intimate issues such as bodily integrity, marriage, religion, childbirth, child-rearing, and sexuality. In *U.S. v. Carolene Products*,[14] the Supreme Court held that substantive due process would apply to "rights enumerated in and derived from the first Eight Amendments to the Constitution, the right to participate in the political process, such as the rights of voting, association, free speech, and the rights of 'discrete and insular minorities.'" After *Carolene Products*, the Court has determined that fundamental rights protected by substantive due process are those deeply rooted in American history and tradition, viewed in light of evolving social norms. Such rights, although not explicitly enumerated in the Bill of Rights, are instead 'penumbra' of certain amendments that refer to or assume the existence of such rights. Accordingly, the Court has found that various personal and relational rights, as opposed to merely economic rights, are fundamental and, therefore, protected.

[13] *Lochner v. New York*, 198 U.S. 45 (1905), *overruled in part*, *Ferguson v. Syrups*, 372 U.S. 726 (1963). In *Lochne*r, the Supreme Court struck down a New York law that limited the maximum number of hours that bakers could work, holding that freedom of contract was a fundamental right under the right of "liberty" contained in the due process clause and used a strict scrutiny standard of review. Strict scrutiny is the most stringent standard of review and gives little deference to legislatures passing laws. Consequently, according to Professor Chemerinsky, over the next 30 years hundreds of state laws of a similar nature were invalidated (see, Chemerinsky, 1999, p. 1503).
[14] *Products U.S. v. Carolene*, 304 U.S. 144, fn. 4 (1938).

2.3 Some of the Important Supreme Court Cases Invoking Substantive Due Process to Protect Various Fundamental Rights

In 1879, Connecticut passed legislation banning the use of any drug, medical device, or other instrument in furthering contraception. Estelle Griswold, the head of Planned Parenthood in Connecticut, and Lee Bruxton, a gynecologist at the Yale School of Medicine, opened a birth control clinic in New Haven, Connecticut. Planning to use the clinic to challenge the constitutionality of the statute under the Fourteenth Amendment, they were both arrested and convicted of violating the law. Their convictions were affirmed in the Connecticut state court system. As they planned, the case ended up before the Supreme Court in *Griswold v. Connecticut*.[15] The principal question in the case was whether the Constitution protects the right of marital privacy against state restrictions on a married couple's ability to be counseled in the use of contraceptives. The Court held that it does because a right to privacy, though not explicitly enumerated anywhere in the Constitution, nevertheless can be inferred from several amendments in the Bill of Rights, and this right, in turn, prevents states from making the use of contraception by married couples illegal.

Justice William Douglas, who authored the majority opinion, was faced with the practical problem of trying to overcome objections by the dissenting Justices[16] that since the Constitution does not explicitly mention a right to privacy, the Court should not usurp legislative authority and read one into the Constitution. Referring to quite a number of earlier Supreme Court decisions, dating as far back as 1925 in the case of *Pierce v. Society of Sisters*,[17] Douglas maintained that so-called penumbras[18] or zones surround many of the constitutional amendments, which, taken together, establish a right to privacy. Douglas argued that any other interpretation would render the enumerated rights fairly meaningless. In particular, he argued that the First, Third, Fourth, and Ninth Amendments create a right to privacy in marital

20. *Griswold v. Connecticut,* 381 U.S. 479 (1965).
21. Ruling was 7-2, with Justices Black and Stewart dissenting. In a concurring opinion, Justice Goldberg, joined by Justices Warren and Brennan, argued that the right to privacy can be found in the Ninth and Fourteenth Amendments. Justice Harlan II, who also wrote a separate concurring opinion, found that the Due Process Clause of the Fourteenth Amendment protects the right to privacy. The dissenting justices were left unpersuaded by any of the arguments.
[17] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).
[18] A penumbra is defined by the Meriam-Webster Dictionary as a space of partial illumination (as in an eclipse) between the perfect shadow on all sides and the full light; a shaded region surrounding the dark central portion of a sunspot; a surrounding or adjoining region in which something exists in a lesser degree: fringe.

relations.[19] Citing earlier cases, Douglas reasoned that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.[20] Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen."[21]

Eisenstadt v. Baird[22] is the second case of note. William Baird gave a woman a contraceptive foam at the close of his lecture to students on contraception to deal with over-population.[23] Baird ultimately was convicted of a felony under a Massachusetts law prohibiting anyone from giving away a drug, medicine, instrument, or article for the prevention of conception to unmarried men or women. Under the law, only married couples could obtain contraceptives, and only registered doctors or pharmacists could provide them. Baird was neither. The First Circuit Court of Appeals held that the statute prohibited contraception per se, and conflicted "with fundamental human rights" under *Griswold.*[24] In a 6-to-1 decision,[25] the Supreme Court struck down the Massachusetts law, holding that the law's distinction between single and married individuals failed the "rational basis test" applied under the Fourteenth Amendment's Equal Protection Clause.[26] The Court reasoned that since married couples were entitled to contraception under the Court's ruling in *Griswold*, withholding the same right to single persons without any rational basis for drawing such a distinction was fatal to the constitutionality of the law.[27]

Justice Brennan wrote the majority opinion. He made the following observation. "If the right to privacy means anything, *it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. See Stanley v. Georgia*, 394 U.S. 557 (1969).

[19] *Griswold v. Connecticut*, 381 U.S. 482-486.
[20] *Poe v. Ullman*, 367 U.S. 497, 367 U.S. 516-522 (dissenting opinion).
[21] *Griswold v. Connecticut*, 381 U.S. 484.
[22] *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
[23] *Eisenstadt v. Baird*, 405 U.S. 438 (1972)
[24] *Eisenstadt v. Baird*, 429 F.2d 1398 (1970).
[25] Justices Powell and Rehnquist took no part in the consideration or decision in the case.
[26] *Eisenstadt v. Baird*, 405 U.S. at 443, 446-454. To pass the rational basis test, the statute under review must have a legitimate state interest, and there must be a rational connection between the statute 's means and goals. Rational-basis review is the most deferential form of appellate court scrutiny and appellate courts rarely invalidate legislation under this standard. Strict-scrutiny review, on the other hand, is the least deferential standard of appellate review, and statutes are often invalidated by appellate courts under this test.
[27] *Eisenstadt v. Baird*, 405 U.S. at 443, 446-454.

[Footnote 10] See also Skinner v. Oklahoma." (Emphasis in the text added).[28] The Court's reference to *Stanley* and *Skinner* is noteworthy. In *Stanley v. Georgia*[29] the Court held that the First Amendment, as made applicable to the states by the Fourteenth Amendment, prohibits making the private possession of obscene material (pornography) a crime.[30] What is instructive about *Stanley*, as pertaining to the Supreme Court's abortion cases trilogy, is that the First Amendment says nothing about pornography. In other words, the right to have possession of pornography is not an enumerated right in the Constitution. Justice Marshall wrote the following in support of the Court's holding. "This right to receive information and ideas, regardless of their social worth, see *Winters v. New York,* 333 U.S. 507, 333 U.S. 510 (1948), is fundamental to our free society. Moreover, in the context of this case – a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home – that right takes on an added dimension. *For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.*" (Emphasis added)[31]

Expanding on the idea that the founders of the Constitution sought to protect American citizens' right to privacy vigilantly, and for Americans to be left free from unwarranted government intrusion, themes certainly relevant to the abortion debate, and which the majority in Dobbs ignored, Justice Marshall, quoting from *Olmstead v. United States*[32] elaborated. "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, thoughts, emotions, and sensations. *They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized man."* (Emphasis added)[33]

[28] *Eisenstadt v. Baird*, 405 U.S. at 453.
[29] *Stanley v. Georgia*, 394 U.S. 557 (1969).
[30] *Stanley v. Georgia*, 394 U.S. 560-568 (1969).
[31] *Stanley v. Georgia*, 394 U.S. 564 (1969). The U.S. Constitution contains very few enumerated rights, as compared to many European Constitutions. Instead, it contains many broad terms, such as "due process," "equal protection," "liberty" etc.
[32] *Olmstead v. United States*, 277 U.S. 438, 277 U.S. 478 (1928) (Brandeis, J., dissenting).
[33] *Stanley v. Georgia*, 394 U.S. at 564.

Skinner v. Oklahoma,[34] another case referenced by Justice Brennan in *Baird*, involved a constitutional challenge to an Oklahoma criminal statute[35] that provided for the sterilization, by vasectomy or salpingectomy, of habitual criminals, which the statute in question defined as "any person who, having been convicted two or more times, in Oklahoma or in any other State, of felonies involving moral turpitude". The Petitioner had been convicted three times, once for stealing chickens, and twice for robbery while using a firearm.[36] In 1936, the Oklahoma State Attorney General brought proceedings against the Petitioner under the statute. Petitioner answered the complaint by arguing the statute was unconstitutional under the Fourteenth Amendment. The trial judge instructed the jury that the three crimes Petitioner had committed were felonies involving moral turpitude and that the only question it was to answer was whether the operation of vasectomy could be performed on Petitioner without detriment to his general health.[37] The jury found it could be, and judgment was entered directing that a vasectomy be performed. The Oklahoma Supreme Court affirmed the judgment.[38]

The United States Supreme Court struck down the Oklahoma statute as violative of the Equal Protection Clause of the Fourteenth Amendment, holding that the right to procreation is a fundamental right, and as such a State cannot require the sterilization of criminals convicted of certain crimes.[39] In so holding, Justice Douglas stated, "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race…. Any experiment that the State conducts is due to his irreparable injury. He is forever deprived of a basic liberty."[40] At the very outset of his opinion, Justice Douglas asserted that, "This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race the right to have offspring."[41] Thus, at several different points of its opinion, the Court described procreation as a "fundamental right," and as "one of the basic civil rights of man," and as a "basic liberty." These basic rights are not enumerated in the Constitution [just as the word

[34] *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).
[35] Oklahoma Habitual Criminal Sterilization Act, Okla.Stat.Ann. Tit. 57, §§ 171, *et seq*; L. 1935, pp. 94 *et. seq*.
[36] *Skinner v. Oklahoma*, 316 U.S. at 537.
[37] *Skinner v. Oklahoma*, 316 U.S. at 537.
[38] *Skinner v. State ex rel. Williamson*, 189 Okla. 235, 115 P.2d 123 (1941).
[39] *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. at 538-543.
[40] *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. at 541.
[41] *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. at 536.

abortion is not]; rather, they derive from broad terms that are set forth in the Constitution such as "liberty."

In *Loving v. Virginia*,[42] a unanimous Court invalidated state laws banning marriage between individuals of different races, holding that these so-called anti-miscegenation statutes violated both the Due Process and the Equal Protection Clauses of the Fourteenth Amendment. Chief Justice Earl Warren noted that, "These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." [Emphasis added][43] Chief Justice Warren concluded the opinion by stating, "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. *Skinner v. Oklahoma*, 316 U.S. 536, 316 U.S. 541 (1942) (see also *Maynard v. Hill,* 125 U.S. 190 (1888)). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive to the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual, and cannot be infringed by the State."[44]

2.4 The U.S. Supreme Court's Abortion Rulings Trilogy: Roe (1973), Casey (1992) and Dobbs (2022)

2.4.1 Roe v. Wade (1973)

Roe v. Wade[45] was the seminal abortion case that the Supreme Court considered. Roe involved a Texas woman named Norma McCorvey. In 1970, she sought to terminate her pregnancy but was prevented from doing so under Texas state criminal law, which provided that it was a crime to "procure an abortion" or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the

[42] *Loving v. Virginia*, 388 U.S. 1 (1967).
[43] *Loving v. Virginia*, 388 U.S. 12 (1967).
[44] *Loving v. Virginia*, 388 U.S. 12 (1967).
[45] *Roe v. Wade*, 410 U.S. 113 (1973).

purpose of saving the life of the mother."[46] McCorvey, who already had two children she was unable to care for, alleged that she could not afford to travel to another state in order to have an abortion under safe conditions.[47] She claimed that the Texas statutes were unconstitutionally vague and that they violated her right to personal privacy protected under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.[48]

Justice Harry Blackmun delivered the opinion for the 7-2 majority of the Court. Fundamentally a substantive due process case, Justice Blackmun explained that the "right of privacy,[49] whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[50] The opinion went on to state that a statute "that excepts from criminality only a lifesaving procedure on behalf of the mother, without regard to pregnancy stage and recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment."[51] Although the Court concluded this fundamental right to privacy protects a woman's choice whether to have an abortion, this right must be balanced against the government's interests in protecting women's health and protecting "the potentiality of human life." The Court reasoned that the relative weight of each of these interests varies over the course of pregnancy, and the law must account for this variability.

In an attempt to strike this balance, and referring extensively to the medical and scientific literature, the Court held that in the first trimester, the state may not regulate the abortion decision; only the pregnant woman and her attending physician

[46] *Roe v. Wade*, 410 U.S. 117-118 (1973). As the Court notes in its opinion, at the time of Roe, the majority of the States had criminal statutes similar to the Texas statute at issue. For the sake of clarity, we will refer to plaintiff "Roe" in this article as McCorvey.
[47] *Roe v. Wade*, 410 U.S. 121 (1973).
[48] *Roe v. Wade*, 410 U.S. 121 (1973).
[49] Justice Blackman acknowledged that the Constitution does not explicitly mention (enumerate) any right of privacy, but then discussed in some detail the cases (and others) discussed in Section 3.2 of this paper (*Roe v. Wade*, 410 U.S., 152-153).
[50] *Roe v. Wade*, 410 U.S., 153. The Ninth Amendment, ratified in 1791, states that, *"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.*" The purpose of the Ninth Amendment was to assert the principle that the enumerated rights set forth in the Constitution are not exhaustive and final and that the listing of certain rights does not deny or disparage the existence of other rights. The problem always has been that what rights were protected by the amendment was never made clear.
[51] *Roe v. Wade, 410 U.S.,* 164.

can make that decision. In the second trimester, the state may impose regulations on abortion that are reasonably related to maternal health. In the third trimester, once the fetus reaches the point of "viability" (traditionally known as quickening), a state may regulate abortions or even prohibit them entirely, so long as the laws contain exceptions for cases when abortion is necessary to save the life or health of the mother.[52] Furthermore, the majority found that strict scrutiny[53]was the appropriate standard of appellate review when reviewing state restrictions on abortion, since it is part of the fundamental right of privacy.[54]

Viewed as a sweeping victory for women's reproductive rights at the time, foreshadowing the bitter judicial fights that would take place in future years regarding the abortion controversy, it is noteworthy that the Justices in *Roe* could not themselves agree on any unified source of a woman's right to abortion. Concurring in the result, Justice Douglas, using a more forceful tone than Blackmun, contended the Fourteenth Amendment, not the Ninth Amendment, is the more appropriate source of the right to privacy. In his concurrence, Justice Stewart argued that the right to privacy was explicitly rooted in the Due Process Clause of the Fourteenth Amendment. Quoting from *Board of Regents v. Roth*[55] Stewart said, "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Board of Regents v. Roth*, 408 U.S. 564. 572. The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights."[56] Justice Burger, while concurring, believed that two physicians instead of one should be required to agree to a woman's right to an abortion. Justices White and Rehnquist dissented. Rehnquist, an originalist, traced Nineteenth-century laws on abortion and the status of abortion both when the Constitution and the Fourteenth Amendment were ratified and concluded that state restrictions on

[52] *Roe v. Wade, 410 U.S.,* 164-165.
[53] Strict scrutiny is the least deferential standard of appellate review when the appeals court evaluates the state legislation at issue (*Roe v. Wade, 410 U.S.,* 155).
[54] Right to privacy law began to develop in the United States in the late Nineteenth and early Twentieth Centuries. Justice Louis Brandeis, prior to becoming a Supreme Court Justice [he served as an Associate Justice from 1916 to 1939], co-authored a seminal law review article titled »The Right to Privacy« in the 1890 Harvard Law Review. This influential essay, written primarily by Brandeis, is widely regarded as the first publication in the United States to advocate a right to privacy. In it, Brandeis and Samuel D. Warren II articulated that right primarily as a »right to be let alone.« In the early 1900s, New York then passed one of the first state laws regarding the right to privacy.
[55] *Board of Regents v. Roth*, 408 U.S. 564, 572.
[56] *Roe v. Wade*, 410 U.S.,168 citing a litany of cases including *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-239; *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535; *Meyer v. Nebraska*, 262 U.S. 390, 399-400.

abortion were considered valid so that the drafters could not have contemplated creating rights that conflicted with it.[57]

Praised by progressives, who believe the Constitution is a "living document" whose general terms such as "Due Process," "Equal Protection," "Liberty," etc., were specifically utilized by the framers of them to allow future judges and Justices to shape the law to meet changing times, the *Roe* decision was derided by others, who argued and still argue that the Constitution and its Amendments must be read literally. They contend that liberal, activist Justices make rulings that are not true to the original text and meaning of the Constitution and that such judges and Justices act as super legislators, usurping the general rights of the people, who act through their elected representatives.[58]

2.4.2 Important Abortion Rulings Between 1973 and 1991

In the memorable opening lines of the majority, plurality opinion authored by Justice Sandra Day O'Connor[59] in *Casey*,[60] O'Connor wrote, "Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, *Roe v. Wade*, 410 U.S. 113 (1973), that definition of liberty is still questioned."

Justice O'Connor was referencing the fact that among conservatives and the Pro-Life movement, *Roe* was not well received, to say the least. In many of the now so-called "Red States," those where conservative values are particularly high, mainly in mid-America, the state legislatures continually passed legislation specifically designed to test *Roe's* boundaries. At the same time, they waited for the Supreme

[57] *Roe v. Wade*, 410 U.S., 170-178 (Rehnquist, J., *dissenting*).
[58] Originalists argue that the meaning of the constititutional text is fixed and that it should bind constitutional actors. Living constitutionalists contend that constitutional law can and should evolve in response to changing circumstances and values. Lawrence B. Solum wrote an excellent article on this subject entitled, »Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate, 113 Northwestern University Law Review, 1243 (2019). Mr. Solum is an American legal theorist known for his work in the philosophy of law and constitutional theory. He is a Professor of Law at the University of Virginia School of Law and was previously a Professor of Law at Georgetown University Law Center.
[59] Sandra Day O'Connor was sworn in as an Associate Justice of the Supreme Court in September 1981. Nominated by President Ronald Reagan, a conservative Republican, O'Connor had previously served as the first female majority leader of a state senate as the Republican leader in the Arizona Senate. By the time of her appointment to the Court, the Court itself had turned decidedly conservative. O'Connor did frequently side with the Court's conservative bloc, but often demonstrated the ability to side with the Court's liberal members as well. The *Casey* case was a prime example of the latter.
[60] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 844 (1992).

Court to turn far enough to the right where *Roe's* very existence could be attacked and overruled. That day came, as we shall see later in this paper. But before reaching that point, we will briefly summarize just some of the many major abortion rulings issued by the Supreme Court after *Roe* and before the *Casey* case in 1992.

In *Planned Parenthood of Central Missouri v. Danforth*,[61] the Court struck down a law requiring spousal consent for abortion. In *Maher v. Roe*,[62] a sharply divided Court held that states may exclude abortion services from Medicaid coverage.[63] In *Colautti v. Franklin*[64] the Court, in a 6-3 decision, struck down as unconstitutionally vague a Pennsylvania law that required physicians to try to save the life of a fetus that might have been viable. In *Harris v. McRae*[65] the Court, again along mainly conservative/liberal lines, upheld the constitutional validity of the Hyde Amendment. This federal law proscribed federal funding for abortions except when necessary to preserve life or as a result of rape or incest. In his dissenting opinion, Justice Marshall stated that, "The legislation before us is the product of an effort to deny to the poor the constitutional right recognized in *Roe v. Wade*, 410 U.S. 113 (1973), even though the cost may be serious and long-lasting health damage."[66]

In *H.L. Matheson*,[67] the Court, in a 6-3 ruling, upheld a Utah law requiring parental notification for an abortion when the patient is a minor living with her parents. Justices Marshall, Brennan and Blackmun dissented. Writing for the dissenters, Justice Marshall wrote, "Many minor women will encounter interference from their parents after the state-imposed notification. In addition to parental disappointment and disapproval, the minor may confront physical or emotional abuse, withdrawal of financial support, or actual obstruction of the abortion decision. Furthermore, the threat of parental notice may cause some minor women to delay past the first trimester of pregnancy, after which the health risks increase significantly. Other pregnant minors may attempt to self-abort or obtain an illegal abortion rather than

[61] *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). There were several other issues involved in the case as well.
[62] *Maher v. Roe*, 432 U.S. 464 (1977).
[63] America does not provide universal health care to its citizens. Health is not considered a fundamental right. Medicaid is the nation's public health care program for people with low income. The Medicaid program covers more than 1 in 5 Americans, including many with complex and costly needs for care. The program is the principal source of long-term care coverage for people in the United States (see, Rudowitz et al., 2023).
[64] *Colautti v. Franklin*, 439 U.S. 379 (1979).
[65] *Harris v. McRae*, 448 U.S. 297 (1980).
[66] *Harris v. McRae*, 448 U.S. 297 (1980), Marshall, J., *dissenting*.
[67] *H.L. Matheson*, 450 U.S. 398 (1981).

risk parental notification. Still, others may forsake an abortion and bear an unwanted child, which, given the minor's probable education, employment skills, financial resources and emotional maturity, . . . may be exceptionally burdensome."[68] Marshall decried the fact that this law was a "state-imposed obstacle to the exercise of the minor woman's free choice" under the Fourteenth Amendment.[69]

In *City of Akron v. Akron Center for Reproductive Health*,[70] in a 6-3 decision, the Court invalidated a host of limitations that Ohio law placed on abortions, such as a waiting period, parental consent without judicial bypass, and a ban on abortions outside of hospitals after the first trimester. In her dissenting opinion, Justice O'Connor, with whom Justices White and Rehnquist joined, stated that the *Roe* trimester framework was essentially untenable and should be abandoned.[71] She pointed to, among other things, changes in medical science since the *Roe* decision.[72]

In *Thornburgh v. American College of Obstetricians and Gynecologists*,[73] the Court, in a 5-4 ruling, invalidated a Pennsylvania law that required informed consent to include information about fetal development and alternatives to abortion. Writing for the majority, Justice Blackman wrote, "In the years since this Court's decision in *Roe,* States and municipalities have adopted a number of measures seemingly designed to prevent a woman, with the advice of her physician, from exercising her freedom of choice. *Akron* is but one example. But the constitutional principles that led this Court to its decisions in 1973 still provide the compelling reason for recognizing the constitutional dimensions of a woman's right to decide whether to end her pregnancy."[74]

In *Webster v. Reproductive Health Services*[75] a sharply divided Court, in a majority opinion written by Chief Justice Rehnquist, upheld rules requiring doctors to test for viability after 20 weeks and blocking state funding and state employee participation in abortion services. Justice Antonin Scalia, participating in his first abortion case since

[68] *H.L. Matheson*, 450 U.S. 398 (1981), 439-440, Marshall, J., *dissenting.* [Citations omitted].
[69] *H.L. Matheson*, 450 U.S. 398 (1981), 421. [Citations omitted].
[70] *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983).
[71] *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983), 453-460, O'Connor, J., *dissenting.*
[72] *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983), 453-460.
[73] *Thornburgh v. Amer. Coll. of Obstetricians*, 476 U.S. 747 (1986).
[74] *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983).
[75] *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

becoming a Supreme Court Justice,[76] wrote in dissent that he would reconsider and explicitly overrule *Roe,* and that avoiding the "*Roe* question" by deciding the case before it in a narrow a manner as possible is not required by precedent and not justified by policy. Scalia expressed his view that abortion was a political, not a judicial issue.[77]

The next major abortion case was *Rust v. Sullivan.*[78] In a 5-4 ruling, the Court upheld a federal law banning certain federal funds being used for abortion referrals or counseling. Justice David Souter was now on the Supreme Court bench, having been placed there upon the nomination of President George H. W. Bush, a Republican, to fill a seat that Justice Brennan had vacated. By this time, Justice Anthony Kennedy, a President Reagan nominee, was also on the bench. Justice Kennedy joined in the majority in this case.

2.4.3 Planned Parenthood of Southeastern Pennsylvania v. Casey (1992)

In 1988 and 1989, when Robert Casey was the Governor, Pennsylvania amended its abortion laws to place substantial restrictions on a woman's right to obtain an abortion. Those restrictions required a woman seeking an abortion to obtain parental consent, for a married woman to notify her husband of her intended abortion, and that clinics provide certain information to a woman seeking an abortion and wait at least 24 hours before performing the abortion. Several abortion clinics and physicians challenged these provisions. The United States Court of Appeals for the Third Circuit upheld all of these provisions except for the husband notification requirement.[79]

As the Supreme Court was now considerably more conservative than was the case when *Roe* was decided in 1973, the Pro-Life activists (who had clamored politically for a conservative Court and the reversal of *Roe)* hoped the Court would finally overturn *Roe,* and return the matter of whether to allow abortions to the States. They were disappointed. In a plurality opinion written by Justice O'Connor, and joined in

[76] Justice Antonin Scalia was nominated to the Court by President Ronald Reagan. He assumed role as Associate Justice in 1986. Scalia was described as the intellectual anchor for the originalist and textualist position of the Court's most conservative wing.
[77] *Webster v. Reproductive Health Services*, 492 U.S. 490, 532-537, Scalia, J., *dissenting.*
[78] *Rust v. Sullivan*, 500 U.S. 173 (1991).
[79] *Planned Parenthood of Southeastern Pa. v. Casey*, 947 F.2d 682 (1991).

by Justices Kennedy and Souter, the Court affirmed the "essential holding" of *Roe*, that women have a right to obtain an abortion prior to fetal viability. However, citing advances in medical knowledge, the Court rejected *Roe's* trimester-based approach for allowing states to curb the availability of abortion in favor of a more flexible medical definition of viability. "After considering the fundamental constitutional questions resolved by *Roe,* principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed."[80]

A critical aspect of the plurality's decision is its discussion of *stare decisis*, which. the Court devoted an astounding 15 pages to.[81] There are established factors the Supreme Court analyzes to determine whether *stare decisis* mandates that previous precedent be followed or whether a precedent should be overruled. The Court exhaustively analyzed each element, and concluded none of them justified overruling *Roe*. The Court concluded its discussion of *stare decisis* by stating the following [which showed remarkable concern about the institutional integrity of the Court were it to reverse *Roe*]: "If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court but for the sake of the Nation to which it is responsible. *The Court's duty in the present case is clear*. In 1973, it confronted the already-divisive issue of governmental power to limit personal choice to undergo abortion, for which it provided a new resolution based on the due process guaranteed by the Fourteenth Amendment. *Whether or not a new social consensus is developing on that issue, its divisiveness is no less today than in 1973, and pressure to overrule Roe's essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is, therefore, imperative to adhere to the essence of Roe's original decision, and we do so today*." [Emphasis added][82]

Significantly, however, the Court revised the test that courts use to scrutinize laws relating to abortion, moving away from a strict scrutiny standard [application of which will often result in laws being held invalid] to an "undue burden" standard: a law is invalid under this standard if "it has the purpose or effect of placing a

[80] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 845-846 (1992).
[81] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 853-869 (1992).
[82] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 868-869 (1992).

substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[83] Justices Scalia and Rehnquist wrote dissents and both stated that they would have used this case as an opportunity to overrule *Roe*, and they would have upheld the constitutionality of all of the provisions at issue in the case.[84]

2.4.4 Important Abortion Rulings Between 1992 and 2022

At issue in *Hill v. Colorado*[85] was, as Justice Stevens framed it, the "constitutionality of a 1993 Colorado statute that regulates speech-related conduct within 100 feet of the entrance to any healthcare facility.[86] In a 6-3 decision[87] the majority of the Court upheld the law, thereby limiting protest and leafletting close to an abortion clinic. The Court held that valid time, place, and manner regulations under the First Amendment must be designed to serve a significant and legitimate purpose, contain content-neutral restrictions, and be narrowly tailored so that ample alternative avenues of communication remain available.[88]

In *Stenberg v. Carhart*[89] the Court, in a 5-4 decision, held that Nebraska's statute criminalizing the performance of a partial birth abortion violates the U.S. Constitution, as interpreted in both *Casey* and *Roe*.[90] More specifically, the Court held that under the Fourteenth Amendment, a state cannot pass an anti-abortion law that does not include an exception for the health of the mother. It also cannot pass a law that criminalizes partial-birth abortions unless it is thoroughly clear that it does not extend to other forms of abortion.[91] In his dissenting opinion, joined by Chief Justice Rehnquist and Justice Scalia, Clarence Thomas again expressed his view that the *Roe* "decision was grievously wrong."[92]

[83] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 877 (1992).
[84] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 944-1002 (1992), Scalia, J., and Rehnquist, J., *dissenting.*
[85] *Hill v. Colorado*, 530 U.S. 703 (2000).
[86] *Hill v. Colorado*, 530 U.S. 707 (2000).
[87] The composition of the Court continued to change, with recent appointments turning it ever more conservative. At the time of this decision, Justices David Souter, a George H.W. Bush appointment in 1990, and Justice Clarence Thomas, also appointed by the first President Bush, were now both on the bench.
[88] *Hill v. Colorado*, 530 U.S. 703, 719-725.
[89] *Stenberg v. Carhart*, 530 U.S. 914 (2000).
[90] *Stenberg v. Carhart*, 530 U.S. 924-946 (2000).
[91] *Stenberg v. Carhart*, 530 U.S. 924-946 (2000).
[92] *Stenberg v. Carhart*, 530 U.S. 980 (2000), Thomas, J., *dissenting.*

2.4.5 Dobbs v. Jackson Women's Health Organization (2022)[93]

The case arose in 2018, when the Mississippi state legislature adopted the Gestational Age Act, which prohibited almost all abortions after 15 weeks of pregnancy, well before the point of fetal viability, which usually occurs at about 24 weeks. Jackson Women's Health Organization, the only licensed abortion clinic in Mississippi, filed suit in federal district court, challenging the constitutionality of the law and requesting a temporary restraining order, which was issued the following day. Based on *Roe* and *Casey*, the district court granted the TRO and also summary judgment, finding the law unconstitutional. The Fifth Circuit Court of Appeals affirmed the ruling. The Supreme Court agreed to hear the case, though it limited the issues to be decided to the single question of whether all bans on pre-viability abortions are unconstitutional.

The Court's decision, authored by Justice Samuel Alito, Jr., and issued on June 24, 2022, upheld (6-3) Mississippi's prohibition of pre-viability abortion and took the further step of overruling (5-4) both *Roe* and Casey. Alito wrote that *Roe* and *Casey* had to be overruled because they were "egregiously wrong" and "deeply damaging" because they limited the options of people opposed to abortion. In support of these conclusions, Alito wrote that the Constitutional text itself provides no right to abortion. Further, abortion was not protected as a fundamental "liberty" right because the right to abortion was not "deeply rooted" in English or U.S. common law; in 1868, when the 14th Amendment was adopted, the majority of states criminalized abortion, and it was not relevant that the motives for the bans may have been to enforce women's "natural maternal role" and increase white middle- and upper- class birthrate in response to increased immigration. *Roe* and *Casey* were also "egregiously wrong" because the viability line is a legislative judgment, and how to balance the interests of a fetus against the interest of a mother is also a legislative, not a judicial, judgment. Alito claimed that *Roe* and *Casey* "inflamed national politics and proved to be unworkable because lower courts and Supreme Court Justices have differed on applying the "substantial burden" standard in differing factual situations. He discussed the principle of *stare decisis* at length but, in the end, dismissed the extensive analysis the *Casey* Court had engaged in on this matter, concluding that

[93] *Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).*

stare decisis is not an "inexorable command" and is at its weakest when the Court interprets the Constitution.

Justices Breyer, Sotomayor and Kagan wrote a joint dissent. "Whatever the exact scope of the coming laws, one result of today's decision is certain: the curtailment of women's rights and of their status as free and equal citizens." The dissent states, "After today, young women will come of age with fewer rights than their mothers and grandmothers had. The majority accomplishes that result without so much as considering how women have relied on the right to choose or what it means to take that right away." Further, "Most threatening of all, no language in today's decision stops the Federal Government from prohibiting abortions nationwide, once again from the moment of conception and without exceptions for rape and incest." Striking an even more ominous note for the future of all American's future rights, the dissent stated, "And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone."

2.5 Discussion and Commentary Post- Dobbs Ruling[94]

A complete dissection of the *Dobbs* ruling is beyond the scope of this article.[95] However, your American author believes that the majority's decision, using Justice Alito's inflammatory rhetoric, was both "egregiously wrong" and "deeply damaging"[96] for numerous reasons, some of which I will discuss below.

What explains the *Dobb's* majority rejecting 50 years of abortion law jurisprudence and over 60 years of privacy law jurisprudence? Let me be clear. It is because in my view the religious far right, a very small sliver of the United States population,[97] with

[94] The views and comments expressed in this section are those of the American author, only.
[95] For an excellent legal analysis of why the majority ruling was wrong, see Center for Reproductive Rights, 2023.
[96] Used in this context, the words "egregiously" and "deeply" are called intensifiers. An intensifier is a "linguistic element used to give emphasis or additional strength to another word or statement." Merriam-Webster's Dictionary of English Usage, 1994, pp. 555-556. Other commonly used intensifiers include blatantly, certainly, clearly, obviously, undoubtedly etc. Paradoxically, a fairly recent law review article suggests that using intensifiers in legal briefs is a bad idea. In a study of United States Supreme Court briefs, the authors found that increased intensifier use was correlated with losing, especially for appellants (Long & Christen, 2008, p. 180; see also, Schiess, 2017, pp. 48-51). Johnson (2021) agrees. "[Intensifiers] may appear to add emphasis but often come across as a sign of weakness, a substitute for compelling argument." Alito's use of intensifiers, I contend, are indeed hyperbole used to mask the weakness in his legal arguments. He knows, however, that this language plays well to Pro-life crowd and others that do not understand legal theory.
[97] According to the Public Religion Research Institute's 2020 Census on American Religion, in 2006, almost a quarter of the American population identified as white evangelical while only 14.5% of the population does so today. Evangelical is an umbrella category within Protestant Christianity. They recognize the Bible as the ultimate

an oversized influence in the increasingly hard right Republican party, fought tooth and nail over the last five decades to help elect presidents that vowed to nominate ever-increasingly conservative Supreme Court Justices that signaled before going on the Supreme Court bench they would overrule *Roe* and *Casey*. Although this trend dates back to the Ronald Reagan presidency, it speed-warped leading up to Donald Trump's election in 2016. Evangelicals and Donald Trump. Talk about odd bedfellows.

Hanna Rosin is an Israeli-born American writer and journalist. In a recent piece for Radio Atlantic (Rosin, no date), Rosin interviewed Tim Alberta, also a political reporter at the Atlantic and the son of a pastor at a prominent mega-church in Michigan. Alberta explains the chronology of the evangelical movement in America and, in particular, how leading Evangelical leaders, despite their disdain for Trump, "not exactly a paragon of Christian value," (Rosin, no date) eventually struck a Faustian bargain with him.[98] When Trump seized the Republican nomination, Trump soon understood he needed the evangelical voters to win, and they realized Trump could deliver what they wanted most: Pro-Life Supreme Court Justices.[99] Trump strategically chose Mike Pence as his Vice-Presidential running mate[100] to provide him with evangelical bona fides. Alberta explains that "[The evangelicals] understood exactly the relationship they were entering into with Donald Trump. They were under no illusions that God's hands were on him. They didn't believe any of that. They didn't even bother trying to sell that to their flocks. Really, what they said was: Look, this is a crummy situation. We've got a binary choice. There are multiple Supreme Court justices hanging in the balance here. And if you care about abortion –which is the number-one issue for a lot of these folks – then you have an obligation to vote for this person, no matter how gross and wretched we find his personal conduct to be." (Rosin, no date). And so it happened. The religious right

authority. They are staunchly against abortion, same-sex marriage and support other so-called "family values." They overwhelmingly support the Republican party and authoritarian leaders, such as Donald Trump (Shoemaker, 2021).

[98] Many articles have emerged that secretly Trump holds the religious right in contempt and mocks them (and worse). (see e.g., Coppins, 2020).

[99] My discussion in this section is not mere hyperbole. It is factual. For those readers interested in how the anti-abortion supporters elected Republican politicians that would deliver on their promises to reshape the federal judiciary to overturn *Roe/Casey*, an excellent piece by Planned Parenthood (no date) entitled "Timeline of Attacks on Abortion: 2009-2021" is a must read. "When former President Trump reshaped the federal courts, the efforts of abortion opponents shifted into high gear. Their tactics became even more deceptive and extreme than before Trump came to office." According to the timeline, October 19, 2016, was the date "Trump promises to nominate judges who would 'automatically' overturn *Roe v. Wade*."

[100] Pence refers to himself as a born-again Evangelical Catholic (McFarlan Miller & Winston, 2016).

voted for Trump; Trump eventually became president; and, during his four-year tenure he appointed three Supreme Court Justices: Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett, the most by anyone-term president since Herbert Hoover, who was the president from 1929-1933.

What is egregiously wrong is that the religious right has been allowed to use the judiciary, which is supposed to be an apolitical institution, as its vessel to thrust its moral views, particularly its biblical (non-scientific) view that life begins at the moment of conception, on all American women.[101] What is egregiously wrong is that the *Dobbs* majority jettisoned fifty years of abortion law precedent and sixty years of constitutional privacy law precedent to reach its strained result. As succinctly and correctly stated [in this author's view] by the dissent in *Dobbs*, "The Court reverses course today for one reason and one reason only: because the composition of this Court has changed."[102] Rejecting the storied principle of *stare decisis*, "Today, the proclivities of individuals rule. The [majority] departs from its obligation to faithfully and impartially apply the law."[103] Justice Brennan was surely correct in *Eisenstadt,* when he stated, "If the right to privacy means anything, *it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."* It is ironic, to say the least, that under usual conservative dogma people should have the right to be left alone and that any governmental intrusion into people's lives is unacceptable, and yet when it comes to abortion these same people want to impose their religious and moral views on others. They believe the Bible, not the United States Constitution, should govern the abortion debate. This is certainly the crux of the situation. This, too, is egregiously wrong.

[101] The religious far-right likes to assert that "life begins at the moment of conception" as the basis for their anti-abortion stance. This is a belief people of some religions hold which stems from the Bible, not science (see, Paulson, 2022). I find this very troubling indeed because in reality government, through a group of evangelicals, is in essence endorsing their religious beliefs and foisting them on all Americans. I believe this violates at least the spirit of the First Amendment, which provides in part "Congress shall make no law respecting an establishment of religion. …" While Protestant evangelicals and others may believe whatever they want when it comes to religions and morals [under the free exercise clause of the First Amendment], the government has no business elevating judges to the bench that they know will foist those views on others [actually the vast majority of Americans] that do not hold such religious views, and that actually place greater reliance on science and reasoning than on biblical stories.

[102] *Dobbs v. Jackson Women's Health Organization*, Dissenting opinion, p. 6.

[103] *Dobbs v. Jackson Women's Health Organization*, Dissenting opinion, p. 6.

The *Dobbs* ruling is egregiously out of step with what the majority of Americans want. The Pew Research Center [PRC] has exhaustively examined public opinion on abortion in America. In a 2022 paper (Pew Research Center, 2022), PRC found that 61% of Americans believe that abortion should be legal in all or most cases.[104] This percentage stayed relatively constant between the years 1995 and 2022 (Pew Research Center, 2022).[105] The PRC also found that nearly three-quarters of White evangelical Protestants think abortion should be illegal in all or most cases. In contrast, a stunning 84% of religiously unaffiliated Americans say abortion should be legal in all or most cases, while 66% of Black Protestants, 60% of White Protestants who are not evangelical, and even 56% of Catholics hold the same views (Ranji, Diep & Salganicoff, 2023). 63% of women and 58% of men, significant majorities, believe that abortion should be legal (Ranji, Diep & Salganicoff, 2023). "Majorities of adults across racial and ethnic groups express support for legal abortion. About three-quarters of Asian (74%) and two-thirds of Black adults (68%) say abortion should be legal in all or most cases, as do 60% of Hispanic adults and 59% of White adults" (Ranji, Diep & Salganicoff, 2023). Younger Americans, those that are most likely to bear the consequences of abortion laws, overwhelmingly say abortion should be legal in all or most cases: 74% of adults under age 30; 62% of adults in their 30s and 40s. However, more than 50% of older Americans, those in their 50s, 60s and even older, express support for legal abortion (Ranji, Diep & Salganicoff, 2023). 61% of Americans believe that Dobbs was wrongly decided (Murray, 2023).

The *Dobbs* ruling is also deeply damaging for a plethora of reasons. Blatant judicial partisanship will ultimately destroy the public's confidence in the judicial system and undermine the rule of law. The *Dobbs* ruling has been, and will continue to be, deeply damaging to many American women. The ruling has relegated women to second-class citizens. As noted in What *Dobbs* Got Wrong (Center for Reproductive Rights, 2023), "Every pregnancy entails risk to a pregnant person's health or life, and pregnancy and childbirth involved significant and comparably greater risks than abortion." The Human Rights Watch [hereinafter HRW] organization issued an extensive paper in April 2023, documenting in detail the extreme harms that have

[104] Pew Research Center (2022) – 37% say it should be illegal in all or most cases.
[105] Interestingly, the number of abortions performed in America had generally steadily *decreased* in the decade before *Dobbs*, and paradoxically, the number of abortions nationwide actually *increased* in the year following *Dobbs* (Ranji, Diep & Salganicoff, 2023).

occurred as a consequence of *Dobbs*.[106] According to HRW, following *Dobbs*, approximately 22 million women live in states having abortion laws where abortion access is either totally inaccessible or heavily restricted (Human Rights Watch, 2023). In its Executive Summary, HRW states, "The consequences of the *Dobbs* decision are wide ranging. Restrictions on access to healthcare places women's lives and health at risk, leading to increased maternal mortality and morbidity, a climate of fear among healthcare providers, and reduced access to all forms of care. *Dobbs* also enables penalization and criminalization of healthcare, with providers, patients, and third parties at risk of prosecution or civil suit for their involvement in private healthcare decisions. … [T]he harms of *Dobbs* violate principles of equality and non-discrimination; they fall disproportionately on marginalized populations including Black, indigenous, and people of color; immigrants; and those living in poverty" (Human Rights Watch, 2023).[107] Black women, in particular, will suffer the most as a consequence of the absurd ruling in *Dobbs*.[108]

Indeed, this is perhaps the most deleterious impact of *Dobbs*. As the dissent [referring to *Dobbs*] aptly notes, "In States that bar abortion, women of means will still be able to travel to obtain the services they need. It is women who cannot afford to do so who will suffer most. These are the women most likely to seek abortion care in the first place. Women living below the federal poverty line experience unintended pregnancies at rates five time higher than higher income women do, and nearly half of women who seek abortion care live in households below the poverty line."

[106] Human Rights Watch is a large, international organization consisting of country experts, lawyers, journalists, and others that work to protect people, especially the most vulnerable, from various abuses. In April 2023, it wrote an extensive 44-page paper entitled: Human Rights Crisis: Abortion in the United States After *Dobbs*. This section of our paper will refer to that paper, but for those interested in a comprehensive analysis of the adverse consequences caused by Dobbs, we highly recommend that article to you (Human Rights Watch, 2023).

[107] According to an American Progress article in June 2023, "14 states [in the Midwest and deep south] have near-total abortion bans during any point in pregnancy in effect, and six states have implemented abortions bans with other limits from 6 to 20 weeks after a person's last menstrual period. These bans have some differences but, overall, contain only the narrowest exceptions, which have jeopardized patient safety in myriad ways. Most bans are enforced through criminal penalties and jail time for providers; however, some states, including Idaho and Oklahoma, have passed 'bounty hunter' abortion bans… [which] permits any individual to sue those who perform an abortion or simply help someone secure care" (see Damante & Jones, 2023).

[108] *See,* Cineas, 2022. This article contains jarring statistics on the disproportionate impact *Dobbs* is having on Black women. Black women are nearly four times more likely than White women to seek abortions. They are more likely to live in so-called contraception deserts and less likely to have access to health care. 60% of pregnancies involving Black women are unintended, as compared to 42% for White women. A majority of women seeking legal abortion services live in states with bans. Black women are three times more likely to die from pregnancy-related causes than White women. Black women are disproportionately victims of sexual violence. Perhaps most catastrophic of all, abortion restrictions will trap Black women in a cycle of poverty. "Nearly one in four Black women lives in poverty and, though they make up only 12.8% of all women in the US population, represent 22.3% of women in poverty. The gender wage gap, the gender wealth gap, and segregation into low-paying jobs all limit their employment opportunities."

(Human Rights Watch, 2023). The harsh realities of *Dobbs* are that "[I]n States where legal abortions are not available, [women] will lose any ability to obtain safe, legal abortion care. They will not have the money to make the trip necessary; or to obtain childcare for that time; or to take time off work. Many will endure the costs and risks of pregnancy and giving birth against their wishes. Others will turn in desperation to illegal and unsafe abortions. They may lose not just their freedom, but their lives." (Cineas, 2022).

What is particularly cruel and pernicious about this is that, according to Whitehurst et al. (2022) many states with the toughest abortion laws have the weakest social programs to help the women that are forced to have children and to support those children once born.[109] According to an analysis of federal data by The Associated Press, some states such as Mississippi and Texas, that have extremely harsh abortion laws, also are among the hardest places to raise a healthy child, especially for the poor, which as we have seen, are the women and girls being forced to give birth to children they do not want and cannot afford.[110] Citing legal historian Mary Ziegler at Florida State University's law school, "The pro-life movement has made its political bones by relying on the GOP [i.e., the Republican party] [which] has not been in favor of expanding the social safety net for young children and pregnant people, and the pro-life movement, which may have otherwise wanted to do that, is not willing to expend political capital on that because its priority is abortion, basically, and nothing beyond it" (Whitehurst et al., 2022).

A recent Washington Post Article (Joyce & Tierney, 2022) provides revealing information on the shocking lack of support that states that ban abortion provide to mothers and their children, both during pregnancy and after birth. In general, America ranks poorly on a number of measures related to maternal support and outcomes. "While child care tends to be more affordable in states with bans, the rates of uninsured women and maternal deaths are among the highest in the country; no state with a ban has legislation in place to guarantee paid leave, which helps women recover from giving birth without losing income." (Joyce & Tierney, 2022).

[109] (Whitehurst et al., 2022); Social programs weak in many states with tough abortion laws, 2022.
[110] (Whitehurst et al., 2022); "Mississippi has the nation's largest share of children living in poverty and babies with low birth rates, according to 2019 data from the U.S. Census Bureau and the Centers for Disease Control" while "Texas has the highest rate of women receiving no prenatal care during their first trimester and ranks second worst for the proportion of children in poverty who are uninsured."

Women living in states where abortion rights have been rescinded earn lower salaries than women in other states (Joyce & Tierney, 2022). To make matters worse, most states with abortion bans contain a high percentage of women who do not have private or public health insurance (Joyce & Tierney, 2022).[111] "Maternal mortality has been on the rise in the United States, with Black women dying at nearly three times the rate as White women in 2020. The number of deaths or pregnant and new mothers in states with abortion bans are among the highest." (Joyce & Tierney, 2022).

What kind of society, or more precisely, segment of society, forces the most vulnerable women in society to have children against their will, and then fail to provide them with the support required to raise them?[112] This is both deeply damaging and just plain cruel.[113]

Baron warns that in this era of extreme climate change, limiting access to abortion will be even more devastating, especially to those already living in the margins. "In a time when we are experiencing more intense, disruptive climate impacts, the consequences of [*Dobbs*] will be even more harmful and deadly, with Black people and low-income people bearing the worst" (Baron, 2022). Baron points out that even before *Dobbs,* the reproductive health system in America was "shaky at best" and structed upon "long-standing racial health disparities" with the States being "a dangerous place to be pregnant and give birth, especially for BIPOC [Black,

[111] "The maternal death rate in states with abortion bans is 42% higher than in states with wider access." (Joyce & Tierney, 2022). The poor states in the deep south, including Louisiana, Alabama, Georgia, Arkansas and South Carolina have significantly higher rates of death related to pregnancy, birth and post-pregnancy.

[112] United Nations experts report that abortion bans approved by *Dobbs* "could lead to violations of women's rights to privacy, bodily integrity and autonomy, freedom of expression, freedom of thought, conscience, religion or belief, equality and non-discrimination, and freedom from torture and cruel, inhuman and degrading treatment and gender-based violence." Further they warn, "Women and girls in disadvantaged situations are disproportionately affected by these bans, referring to "women and girls from marginalized communities, racial and ethnic minorities, migrants, women and girls with disabilities, or living on low incomes, in abusive relationships or in rural areas." (see, United Nations, 2023).

[113] A recent article by The Commonwealth Fund describes how limiting abortion access for American women impacts health and economic security. The authors compared the U.S. to other western nations. The authors concluded abortion is both more accessible and affordable in other high-income countries. America does a much poorer job than other countries in reproductive care that is part of a continuum of comprehensive primary care and robust social services (Seervai et al., 2023). US News (2024) reports that the Republicans in the United States House of Representatives have proposed budget cuts to the 2024 budget that would eliminate the Department of Health and Human Services' "Healthy Start" program, which aims to attack high rates of mortality for pregnant women and their unborn children. According to US News (2024), "Around 60% of women participating in this program are Black, according to a 2020 analysis done for the department by Abt Associates. The Centers for Disease Control and Prevention said in a 2021 survey that the maternal mortality rate for Black women was 2.6 times the rate for white women."

Indigenous, and people of color] groups" (Baron, 2022). She explores in depth how environmental burdens such as increasing temperatures [and heat waves], air pollution, unsafe drinking water fall disproportionately on women and BIPOC groups and negatively impact their reproductive lives.

Returning again to the HRW paper, the authors concluded that because of *Dobbs,* in conjunction with restrictive state laws on abortion, America "is in violation of its obligations under international law, codified in a number of human rights treaties to which it is a party or a signatory. These human rights obligations include, but are not limited to, the rights to: life; health; privacy; liberty and security of person; to be free from torture and other cruel, inhuman, or degrading treatment or punishment; freedom of thoughts, conscience, and religion or belief equality and non-discrimination; and to seek, receive, and impart information" (Human Rights Watch, 2023). In my view, it is both shocking and disingenuous for America to lecture other countries about their social policies that are harmful to the human and civil rights of their citizens, when too many American politicians, at both the state and federal level, espouse views and promote legislation, and nominate judges, such as anti-abortion laws that deprive Americans, especially the most vulnerable Americans, of those very rights.[114] Shame on them.[115] Finally, if we are to accept the rationale that the *Dobbs* majority used to overrule *Roe* and *Casey*, then all of the privacy rights that

[114] Anti-feminists want to control, alter and delete women's rights. They want to take America back to a patriarchal society. Eliminating the rights to abortion is one such method of doing so. A recent Blog by the National Women's Law Center recounted a rally in Dallas, Texas in June 2023, in which multiple speakers from a right-wing group Turning Point USA told college and high-school age women and girls that they should give up on their careers and become wives and mothers instead. "June 24 [2023] marks one year since the Supreme Court took away our constitutional right to abortion. The gender justice movement has always known that this decision wasn't only about abortion – but really about the role of women in our society. It's just that, before the Supreme Court decision, extremists made concerted efforts to disguise their real agenda." (*see*, Graves, 2023; Sanders and Jenkins, no date). According to these authors, "The Trump administration even refused to agree to a UN Security Council Resolution safeguarding the reproductive health of women raped during armed conflict."

[115] There has been some good news post-*Dobbs*. Shoenthal reports on the business impact *Dobbs* has had a year later. A positive development is that major companies including Apple, Starbucks, Microsoft and many others, have spoken out against *Dobbs,* and more importantly, have promised "protections for their workers including travel reimbursement for employees seeking reproductive care no longer accessible in the state where they reside" and increasing or expanding other workplace benefits to help demonstrate that abortion access is about the health, safety and well-being of their workers as well as gender equality in the workplace. Companies have developed creative methods of ensuring employees have access to contraceptives (Shoenthal, 2023). Further, when the issue of abortion rights is actually put to the people of the various states, many following *Dobbs* have passed initiatives enshrining the right to abortion and in some cases contraceptives, in their state constitutions. California, Michigan, Ohio and Colorado are among the states that have so voted in 2022-2023. In Kansas, in August 2022, voters rejected a ballot measure that would have stripped the right to abortion from that state's constitution. Therefore, as can be seen, when Americans are actually given the choice in ballot measures whether to provide abortion and other reproductive rights as a matter of state constitutional law, many are resoundingly voting yes. For a comprehensive breakdown of state laws on abortions as of 2023 (Sherman & Witherspoon, 2023).

the Supreme Court historically protected over the years in cases including *Obergefell v. Hodges, Griswold v. Connecticut, Lawrence v. Texas* and others, discussed in section 2.2.1, are at risk. In other words, this radical right Supreme Court is not done rolling back civil rights that Americans have enjoyed as a matter of federal constitutional law for many decades (Cittadino, 2022).[116]

The *Dobb's* decision has not decreased the overall number of abortions in the United States. According to a report by #WeCount, a research project led by the Society of Family Planning, there were about 2,200 more abortions in the year following the decision. (McPhillips, 2023). *Dobbs* has had a big impact on where abortions are now being performed. "There were about 115,000 fewer abortions in the 17 states with total or six-week bans in effect, plummeting 98% in banned states and dropping 40% in those with 6-week gestational limits, according to the new report. About a third of the overall decline can be attributed to Texas." (McPhillips, 2023). There were nearly 117,000 more abortions, a 14 % year-over-year increase, in the remaining 33 states where abortion remains legal, along with the District of Columbia. (McPhillips, 2023). Data suggests that much of the increase in abortions in states where abortion remains legal were among patients who traveled from states with bans or restrictions. (McPhillips, 2023). Further, "An increasing share of abortions are provided by virtual-only telehealth providers, . . .up from an average of about 4,000 a month before Dobbs to nearly 7,000 a month afterward." (McPhillips, 2023).

While *Dobbs* has fundamentally changed when and where pregnant women get abortions, it also has altered the method used for their abortions. Mifepristone is a commonly used abortion pill. It was first approved by the FDA in 2000. Initially, the FDA required the drug to be prescribed in person, over three visits to a doctor. Since 2016, the FDA has eased that regimen, allowing patients to obtain prescriptions through telemedicine appointments and to get the drug by mail. In 2015, the FDA approved a change in the dosing regimen that allowed the drug to be used for up to 10 weeks of pregnancy, instead of the earlier seven weeks (Calfas, 2024). A Wall Street Journal article, citing a new Guttmacher Institute report [a research group that

[116] In its 2024 term, the Supreme Court will issue rulings concerning the constitutionality of more state laws that further restrict abortion access. The Court has granted *certiorari* to consider whether abortion bans in Idaho and Texas mean hospitals do not have to perform abortions in medical emergencies, such as when someone giving birth experiences severe bleeding or preeclampsia. It also will decide whether women should continue to have legal access to the pill mifepristone, a medication commonly used to help end a pregnancy through 10 weeks of gestation. (Thornton & Santucci, 2024).

supports abortion rights], states that medication abortions have dramatically increased, accounting for "nearly two-thirds of abortions in the U.S. in 2023" (Calfas, 2024). "In 2020, medication abortion, a two-drug regimen approved to terminate pregnancies up to 10 weeks of gestation, accounted for 53%" of all abortions in America (Calfas, 2024). Guttmacher found more than 642,000 medication abortions in 2023 were performed through formal healthcare providers. "Access to medication abortion has grown with policy changes including the expansion of telehealth abortion services" (Calfas, 2024).

The Alliance for Hippocratic Medicine (Alliance), a Pro-Life group, argues that the FDA exceeded its administrative authority when it made mifepristone more accessible, and it claims the drug is unsafe. In April 2023, a Texas U.S. Federal District Court Judge, at the urging of the Alliance, imposed a nationwide ban on the drug, ruling the FDA improperly approved the drug 23 years ago. Within minutes, a Washington State U.S. Federal District Judge issued a contrary ruling. The United States Supreme Court granted a *writ of certiorari* to hear the case.[117] The Alliance and other anti-abortion groups want the Supreme Court to ban the drug, claiming that it is "unsafe" despite its long safety record. These groups argue the FDA acted arbitrarily and capriciously. The FDA estimates that 5.6 million Americans have used mifepristone to terminate pregnancies since it was approved in 2000 (France24, 2023). The US government has argued that the decision on whether to allow the drug should be left to the FDA, not the judicial branch. The government, along with multiple Amicus parties, contend the drug has been deemed safe and effective since 2000 and that the FDA has updated the drug's approved conditions based on updated scientific evidence and experience including the over five million patients that have successfully used it. The government and the Amicus parties maintain the Alliance's only real disagreement with the FDA is that it (and others in the Pro-Life movement) oppose all forms of abortion. The conservative members of this Supreme Court have in general signaled a desire to limit administrative agency powers, especially to interpret their rules, believing instead that these are tasks more suitable to the judicial branch. The Court is faced with an initial question of whether plaintiffs have standing to have the case heard. The government maintains they lack standing. The Court might rule against the plaintiffs on that procedural ground.

[117] No. 23-236. *Food and Drug Administration v. Alliance for Hippocratic Medicine; Danco Laboratories, L.L.C. v. Alliance for Hippocratic Medicine*. SCOTUS granted *writ of certiorari* December 13, 2023, and consolidated the cases for oral argument scheduled for March 26, 2024. A decision is expected by the end of June 2024.

However, should the Court conclude the plaintiffs do have standing, and reach the merits of the question whether the FDA exceeded its legal authority respecting rules it issued concerning mifepristone, your author would not be at all surprised if the conservative majority of the court rules against the government in these consolidated cases.

The Pro-Life movement, although obviously happy with the *Dobbs*' ruling, is continuing to push harder to make abortion even more difficult across America. The Susan B. Anthony Pro-Life America is promoting a national ban on abortions at 15 weeks of pregnancy (Associated Press, 2024). Reports have surfaced recently that Republican presidential candidate and former President Donald Trump is considering whether to back the plan and will make a decision soon (The Hill, 2024). According to a report in Politico (Ollstein, 2024), although anti-abortion groups might not yet have completely persuaded Trump to commit to signing a national ban should he be reelected to the White House, "those groups are designing a far-reaching anti-abortion agenda for the former president to implement as soon as he is in office." The report goes on to state, "In emerging plans that involve everything from the EPA [Environmental Protection Agency] the Federal Trade Commission to the Postal Service, nearly 100 anti-abortion and conservative groups are mapping out ways the next president can use the sprawling federal bureaucracy to curb abortion access." (Ollstein, 2024). Since Republicans will not have enough votes in the United States Senate and House of Representatives to be able to enact Congressional anti-abortion legislation, the Pro-Life groups are mapping out plans and strategies that do not require congressional approval, and that instead can be enacted through either executive order or administration action. These groups are "drafting executive orders to roll back Biden-era policies that have expanded abortion access, such as making abortions available in some circumstances at VA [Veteran Administration] hospitals. They are also collecting resumes from conservative activists interested in becoming political appointees or career civil servants and training them to use overlooked levers of agency power to curb abortion access" (Ollstein, 2024).

The Heritage Foundation's 2025 Presidential Transition Project, according to President Biden's campaign manager Julie Chavez Rodrigues, has "laid out an 887-page blueprint that includes, in painstaking detail, exactly how they plan to leverage virtually every arm, tool and agency of the federal government to attack abortion

access. Trump's close advisers have actual plans to block access to abortion in every single state without any help from Congress or the courts" (Ollstein, 2024). For example, the plan would rescind all of the policies President Biden enacted that expanded access to both abortion pills and surgical abortions "including funding for military members who must travel across state lines for an abortion, the provision of abortions at VA clinics, the expansion of HIPPA privacy rules to cover abortions, and the availability of abortion pills by mail and at retail pharmacies" (Ollstein, 2024). SBA Pro-Life America wants the FDA to "reimpose the requirement – lifted by the Biden administration – that abortion pills only be dispensed in-person by a doctor, and investigate non-fatal complications reported by patients who take the drugs. Others want the [FDA] to go further and strip the two-decade-old approval of the pill, banning its sale nationwide" (Ollstein, 2024).

Much is at stake in the 2024 Presidential election. One thing is for certain: The debate about abortion rights in America will rage on for the indeterminate future.

3 The Abortion Experience in Uzbekistan

3.1 The Constitution of the Republic of Uzbekistan

The Uzbekistan Constitution consists of six parts and 155 Articles. As with the U.S. Constitution, it does not mention abortion. However, a common theme throughout the Uzbekistan Constitution is the State's staunch commitment to human rights and freedom, the ideals of democracy, equality for all citizens, and social justice.[118] Part Two is entitled "Basic Human and Civil Rights, Freedoms and Duties."[119] It consists of six sections and 45 Articles. Continuing the themes mentioned above, Article 19 provides, in part, that "Everyone shall enjoy human rights and freedoms from birth."[120] The following paragraph of Article 19 is an analogue to the U.S. Equal Protection Clause contained in the Fourteenth Amendment, "All citizens of the Republic of Uzbekistan shall have equal rights and freedoms, and shall be equal before the law, without discrimination by sex, race, nationality, language, religion,

[118] Republic of Uzbekistan Constitution. See, e.g., Articles 1, 13 and 14. Article 13, for example, provides: "Democracy in the Republic of Uzbekistan shall rest on the principles common to all mankind, according to which the ultimate value is the human being, his life, freedom, honor, dignity and other inalienable rights."
[119] Republic of Uzbekistan Constitution, Part Two.
[120] Republic of Uzbekistan Constitution, Part Two, Chapter 5 [General Provisions], Article 19. It is interesting the authors chose the phrase "from birth."

social origin, convictions and social status." Chapter 7 is entitled "Personal Rights and Freedoms." The first paragraph thereof provides that "The right to life is an inalienable right of every human being and shall be protected by law. Infringement against human life shall be regarded as the gravest crime." (Republic of Uzbekistan Constitution, Chapter 7, Article 25).

Article 31 provides that, "Everyone shall have the right to inviolability of private life, personal and family secrets, protection of honor and dignity." (Republic of Uzbekistan Constitution, Chapter 7, Article 31). The Fourth paragraph of Article 31 states, "Everyone shall have the right to inviolability of the house." (Republic of Uzbekistan Constitution, Chapter 7, Article 31). Therefore, unlike the U.S. Constitution, the Uzbekistan Constitution specifically enshrines a right to privacy.[121] It is also noteworthy that the Constitution protects family secrets.

Article 48 provides universal, State paid health care. "Everyone shall have the right to health and qualified medical care. Citizens of the Republic of Uzbekistan shall have the right to receive a guaranteed, extensive medical assistance in the manner prescribed by law at the expense of the state." (Republic of Uzbekistan Constitution, Chapter 7, Article 48). In contrast, the United States does not have universal healthcare. Health is not considered a basic right. Through a patchwork of legislation, many Americans are covered by various forms of governmental health insurance, but many people are not. Those people are left to secure health insurance on their own (Schultz, 2019, p. 17-38).

3.2 Law on Protection of the Reproductive Health of Uzbekistan Citizen's

The Republic of Uzbekistan has national legislation specifically dedicated to its citizen's reproductive health, including expressly abortion.[122] Adopted in 2019, the Law on Protection of the Reproductive Health of Uzbekistan Citizen's [PRHC] comprehensively regulates all spheres of its citizen's reproductive health (Article 1, PRHC). Many aspects of this Law serve to advance the rights as enumerated in the

[121] As discussed in Sections 1 and 2 of this article, the right to privacy in the United States has developed through the common law, statutory law and the Supreme Court's interpretation of the Fourteenth Amendment to the Constitution.

[122] Law of the Republic of Uzbekistan on Protection of the Reproductive Health of Citizens [PRHC]. Adopted by the Legislative Chamber on February 15, 2019, and approved by the Senate on February 28, 2019.

Constitution. Article 2, PRHC provides that to the extent Uzbekistan is signatory to an international treaty that contains provisions at odds with those contained in Uzbek legislation regarding protection of reproductive health, "then the rules of the international treaty shall be applied." Article 3, PRHC broadly defines the term "reproductive health" to include a person's "state of physical, mental and social welfare . . . related to their reproductive system, its functions, life processes that determine the ability of a person to give birth to a child."

As it pertains to the subject of our paper, Article 3, PRHC lists the general protections that it provides for Uzbek citizen's reproductive health including "safe induced termination of pregnancy, which helps to prevent possible complications and consequent malfunctions in the reproductive system" and "acquisition of information about methods of contraception and access to them."

Article 4, PRHC defines the basic principles of the legislation in the sphere of Uzbek citizen's reproductive health as being humaneness; the equality of men and women; the government's non-intervention in the private lives of its citizens, including the non-disclosure of personal and family secrets; ensuring accessibility and quality of medical services; and, ensuring the scope of services guaranteed by the State.

Article 10 enumerates the reproductive rights of all Uzbek citizens. All citizens have the right to make their own decisions on issues related to giving birth to their children with the use of safe and efficient reproductive technologies; to obtain full and accurate information; to use medical preventive services and be protected from substances and procedures that may be harmful to their health, including from scientific experiments; to receive medical and social, as well as psychological, assistance and information; and, to use assisted reproductive technologies. All such information is confidential and may not be disclosed by legal entities or individuals.

Article 11 lists protections specifically intended for the reproductive health of women. Along with rights previously enumerated in earlier articles, such as the right to full and accurate information and access to medical services and consultations, "[A] woman shall have the right to receive social support from the State and undergo fertility treatment, have her reproductive health protected before pregnancy, during pregnancy, in labor and postpartum, with the use of modern methods of treatment." Article 11 goes on to stipulate that "During the period of pregnancy, medical

interventions shall be allowed upon written consent of both spouses, in case of absence of a husband – upon consent of a woman, or upon consent of parents or other legal representatives in situations with minority status or disability."

Article 11 concludes with the following, "In case of refusal of medical interventions with indication of possible consequences, it shall be registered in medical documents and confirmed in writing by a pregnant woman, if it is impossible – by her husband or her relatives, and if it is impossible to obtain the written refusal or medical intervention – by the conclusion of the case conference. A woman shall not be compelled to pregnancy, induced termination or pregnancy or contraception."[123]

Crucially, Article 18 is entitled "Induced termination of pregnancy" and provides in full as follows: "Induced termination of pregnancy shall be done: upon the will of a woman during the first twelve weeks of pregnancy; under medical indications endangering the life of a pregnant woman – at any time regardless of the gestation age. Medical institutions shall inform the woman, who decided to terminate her pregnancy or refuses to do a therapeutic abortion, about possible negative consequences of her health."

3.3 June 2020 Order on Approval of the Regulations on the Procedure for Carrying out Artificial Termination of Pregnancy

Abortion in Uzbekistan is legal, accessible and declining.[124] In contrast to the situation in America, all Uzbek women [including girls] have always had access to safe and free abortion. In America, issues surrounding abortion have been hotly debated in politics and religious circles, especially since the Court's seminal ruling in *Roe*. This has not been the case in Uzbekistan and other Central Asian countries. Article 18 of The Law on Protection of the Reproductive Health of [Uzbekistan] Citizens, dated February 15, 2019, provides a woman "upon her will" with the right to an induced abortion "during the first twelve weeks of pregnancy." Although it is true that is a relatively short period of time, the same Article stipulates that "under

[123] Article 19 concerns confidentiality matters. Article 20 is entitled "Dispute resolution" and provides that "Disputes arising in the sphere of protection of the reproductive health of citizens shall be resolved according to the procedure, stipulated by the legislation."

[124] This indeed is the title of an article written by Niginakhon Saida for The Diplomat, 2022. Some of the content of this section of our article is taken from this article, and we thank the author for her research and work.

medical indications endangering the life of a pregnant woman [induced abortion is legal] at any time regardless of the gestation age."

An Order issued by the Minister of Health of the Republic of Uzbekistan in June 2020, entitled Order on Approval of the Regulations on the Procedure for Carrying out Artificial Termination of Pregnancy [2020 Order], establishes the specific procedures and conditions that implement the February 2019 Law. Chapter 1 [General rules] of the 2020 Order stipulates that induced abortion must be carried out by an obstetric and gynecological institution with the written consent of the husband and wife, the consent of the woman herself or the parents in the absence of the husband or on the basis of an application for the voluntary consent of other legal representatives to the use of artificial termination of pregnancy. A woman cannot be forced to undergo an induced abortion. The applicable medical institution is obligated to notify a woman who has either decided to have an induced abortion or who refuses to terminate a pregnancy of the possible negative health consequences of those decisions.

Chapter Two of the 2020 Order governs the procedures for how induced abortions are performed. The pregnant woman must contact a registered primary health care institution in the applicable district where she resides for consultation on the condition of the fetus and to undergo a medical examination. Depending on the duration of the pregnancy, an examination is performed by either a general practitioner or an OB-GYN who conducts the necessary examinations "in accordance with established standards." If necessary, specialists may be consulted in order to provide their assessments. These medical examinations and consultations are utilized to determine whether "medical indications [exist] that pose a threat to the life of [the]pregnant woman" in accordance with a list set forth in an Appendix to the 2020 Order.

Appendix 2 to the 2020 Order contains 86 such "life-threatening conditions" including: tuberculosis of internal organs; asthma; tumors requiring chemical or radiation therapy; blood diseases such as leukemia, lymphomas, aplastic and hemolytic anemia; diabetes mellitus; chronic and persistent hereditary and degenerative mental disorders and mood disorders; sleep disorders including catalepsy and narcolepsy; diseases involving the eye and those of the circulatory system; inflammatory diseases of the central nervous system, epilepsy, multiple

sclerosis; congenital heart defects and myocardial diseases; chronic hepatitis, cirrhosis of the liver; various respiratory diseases; various vascular diseases; etc. One of the risk factors is young age, and as such, girls under 14 are allowed access to abortion.[125]

Abortion in late pregnancy is performed exclusively in gynaecological departments at obstetric and gynaecological institutions.

If such a life-threatening condition is believed to exist, then on the basis of an order by the head of the multidisciplinary polyclinic of the central district (i.e. city) where the pregnant woman resides, a consultation is organized before a "Council" consisting of the head of the department working in the polyclinic, an OB-GYN, a GP, a neonatologist, an ultrasound doctor and other specialists as necessary (even to include a lawyer) (Order 2000), Chapter Two, Paragraph 20). This Council then determines, based on the condition of both the pregnant woman and her fetus, whether induced abortion is advisable (Order 2000, Chapter Two, Paragraph 20). Chapter 21 governs the procedures for providing notice to the "pregnant woman, her parents in the absence of her husband, her spouse, as well as other legal representatives if the pregnant woman is a minor or incapacitated" concerning the outcome of the examinations.

The examined woman is then sent to an obstetric and gynecological institution, at the location of permanent or temporary residence, for the induced abortion (Order 2000, Chapter 11) which is performed using either a medical or surgical method (Order 2000, Chapter 12). Although the medical team is under obligation to advise the woman concerning the methods of induced abortion (Order 2000, Chapter 13), the woman has the discretion to choose this method based on a variety of factors, including the stage of her pregnancy, her general medical conditions and other

[125] Saida, 2022. It is interesting that the Minister of Health decided to specifically enumerate the physical and mental health conditions that qualify as life threatening. It is unclear what discretion the reviewing Council has in deciding when a condition is life threatening, especially if the pregnant woman is found to have a mental or physical condition that does not fall squarely into one of the 86 conditions on the list. It also is not clear what legal recourse a pregnant woman has if she disagrees with the conclusion reached by the reviewing Council. At least in Anglo Saxon law, a court trying to interpret the meaning of legislation (i.e. legislative intent) is guided in its task by various rules of statutory construction, one being: *Expressio unius est exclusio alterius*, a Latin phrase meaning "to express or include one thing implies the exclusion of the other, or of the alternative." Therefore, an Anglo-Saxon court reviewing such a matter might well conclude that if a pregnant woman's mental or physical condition does not squarely fit into one of the 86 listed conditions, then the Minister meant that she does not qualify for a post 12-week abortion as she does not suffer from a "life threatening" condition.

medical indications (Order 2000, Chapter 14). The question of where the induced abortion takes place depends on a variety of factors. When the procedure is carried out up the twelve-week period, it is done in primary outpatient clinics, unless surgery is required, in which case it is performed in an outpatient clinic at obstetric and gynecological institutions. However, if the woman has high-risk concomitant diseases or life-threatening medical indications, and the period of gestation is still less than twelve weeks, the procedure, regardless of the method, must be performed in a hospital's gynecological department (Order 2000, Chapter 16). Induced abortion from twelve to twenty-two weeks of pregnancy, regardless of the method of termination used, is carried out in the gynecological or obstetric department of a medical institution (Order 2000, Chapter 17). Subsequent Chapters of the 2002 Order regulate such matters as how methods of anesthesia are used; how records concerning decision-making are maintained; steps medical providers are required to take in cases where the pregnant woman refuses the offer of artificial termination of pregnancy, and who receives notice of this decision etc. (Order 2000, Chapter 18). Once the pregnancy is terminated due to one of the life-threatening conditions set forth in Appendix 2, the "couple or woman" are directed to local screening centers for examinations until the next pregnancy (Order 2000, Chapter 24).[126] Finally, Chapter 3 states that "Persons guilty of violating this Order shall be liable in accordance with the law."[127]

3.4 Criminal Law Implications in Sphere of Induced Abortions

According to Saida, "The criminal code of Uzbekistan envisions administrative or criminal liability only for those who force a woman to abort a child or who carry out abortion illegally, but a woman herself is not liable for terminating a pregnancy under any circumstances" (Saida, 2022). Saida goes on to state: "[A]bortion and the delivering of babies have long been among nine types of medical practices that cannot be performed by private medical entities, along with organ transplants, blood donation, providing medical-forensic examinations and other similar medical services. Such services are restricted to the government in part as an effort to prevent

[126] Chapter 25 provides that all materials such as the placenta and fetal egg, obtained during the inducement procedure, are sent to appropriate laboratories for testing while Chapter 26 stipulates that after the procedure, women with Rh-negative blood are immunized with human immunoglobulin antirhesus Rho(D) for 72 hours.
[127] According to Justia (no date), in addition to abortion being permitted during the first 12 weeks of pregnancy, *"It is [also] permitted afterward based on certain economic, social, or medical grounds, such as saving the life of a pregnant woman, preserving her physical or mental health, fetal impairment, inadequate financial resources, and cases of rape and incest.*"

the sale of children and the illegal documentation of births and deaths. Local private clinics can lose their licenses by illegally performing abortions or delivery services" (Saida 2022). And while "the government approved allowing private institutions to engage in childbirths in 2019, the presidential decree does not allow private clinics to perform abortions" (Saida, 2022).

Chapter III of the Criminal Code of the Republic of Uzbekistan [CCRU], regulates crimes dangerous to life and health. Article 114 of the CCRU concerns "Criminal abortion" and provides that induced abortion "by an obstetrician or gynecologist outside the medical institution or in the presence of medical contraindications is punishable by a fine of up to twenty-five minimum wage or deprivation of a certain right for up to three years of correctional labor for up to one year. Abortion by a person who does not have the right to do so is punishable by a fine of twenty-five to fifty minimum wages or correctional labor from one to two years or arrest for up to three months." This Chapter goes on to state that when the acts set forth above were performed negligently, leading to the death of the victim or other "grave consequences," the person perpetrating these actions is subject to "correctional labor from two to three years or imprisonment for up to five years" (CCRU, Chapter Three, Article 114, subparts a) and b)).

The CCRU defines medical contraindications for abortion as including acute and subacute gonorrhea; acute and subacute inflammatory processes of the genital organ; purulent foci regardless of their location as well as other [unspecified] acute infectious diseases, for a period of more than 12 weeks (CCRU, Chapter Three, Article 114, subparts a) and b)). Article 114(4) of the CCRU provides abortion is also illegal when performed outside a medical institution "when it is known to be criminal regardless of medical evidence." Article 114(5) of the CCRU provides that the criminal crime of abortion is completed "from the moment of the beginning of the commission of actions aimed at the artificial termination of pregnancy."

On November 8, 2019, Uzbekistan's President issued Decree No. PQ-4513 "On Improving the Quality and Further Expanding the Scope of Medical Care Provided to Women of Reproductive Age, Pregnants and Children." The Decree states, in part, that "Some types of medical activities that are prohibited for private medical organizations and involve a high level of risk to the life, health and sanitary-epidemiological peace of the population." A List of such activities follows that

general proclamation. The list of services that private medical entities cannot perform includes organ transplants, blood donations, abortion and the delivering of babies (Item No. 4).[128] According to Saida, the reason that some medical procedures are reserved for the "government is to help prevent the sale of children and the illegal documentation of births and deaths" (Saida, 2022).

3.5 Further Discussion Regarding Abortion in Uzbekistan

Saida postulates that the Uzbekistan abortion laws are premised on the government's concern about overpopulation, as Uzbekistan is the most populous country in Central Asia (Saida, 2022). In 2000, 24 million people resided in the country, but that figure ballooned to over 35 million by 2021 (Saida, 2022).[129] Indeed, as we have seen in section 3.2, Uzbekistan has made a strong commitment to family planning and induced abortion, and the availability of contraceptives without restrictions seems to be part of a grand strategy to prevent unwanted pregnancies and perhaps keep the overall population somewhat in check.

Still, despite the availability of abortion, Uzbekistan has seen the number of abortions decrease from 42,682 in 2007 to 35,449 in 2021.[130] Saida reports that a reasonable explanation for this decrease in abortions is the overall improvement in the quality of life in Uzbekistan. Traditionally, Uzbeks have had very large families, often with as many as five to seven children. Due to the global economic problems in the mid-2000s, many Uzbek families could not afford so many children and resorted to abortions to limit the size of their families.[131] According to Saida, in the early 2000s, good quality contraceptives were expensive and since abortions were and still are provided in public facilities either at no or very low costs, abortions were a reasonable alternative (Saida, 2022). She also postulates that religion, in particular "the increasing influence of Islam in the community," may play a role in the decrease in the rates of abortion.[132]

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[128] According to the American College of Obstetricians and Gynecologists, induced abortion is safe and although there are risks with any medical treatment, major complications are rare (see The American College of Obstetricians and Gynecologists, 2022).
[129] Saida, 2022, citing the Republic of Uzbekistan Statistics Agency.
[130] Saida, 2022, further, the number of abortions per 100 births fell from 7.4 in 2007 to 4.1 in 2021.
[131] Saida, 2022, referencing VOA News Article, entitled, Abortion is a Fatal Condition Among, Young People in Uzbekistan, 2016.
[132] Saida, 2022, states, "Islamic leaders exhort Muslims against [abortion], especially after the first 120 days of pregnancy."

The use of contraceptives in Uzbekistan also has been decreasing. "In 2007, 51.1% of women aged 15 to 45 were using IUDs while another 5.3% were on hormonal pills, but as of 2021, only 46.9% of women use contraceptives (44.1% IUDs and 2.8% hormonal pills). But because hormonal birth control pills are available everywhere and women do not have to register with local health institutions to acquire them (unlike IUDs), it is safe to assume more women are on hormonal pills than is officially reported" (Saida, 2022).

In conclusion, Saida states, "Uzbekistan remains one of the safest countries for women to terminate unwanted pregnancies. Not only are women not punished for choosing an abortion, but the wider society also does not condemn or confront them for their choices. Still, women often share their experiences in their inner circles only, and abortion is not widely discussed in public" (Saida, 2022). Uzbek women who opt for abortions apparently still prefer to do so secretly.

In 1998, Westoff et al. performed a comprehensive study of the replacement of abortion by contraception in Kazakhstan, Uzbekistan, and the Kyrgyz Republic. The study, which consisted of surveys completed by large cohorts of women in each country, was conducted during the summer and fall of 1995, 1996, and 1997 (Westhoff et al., 1998, p. 3). The study concluded that the percentage of pregnancies that end in abortion is 38 in Kazakhstan, 14 in Uzbekistan, and 27 in the Kyrgyz Republic (Westhoff et al., 1998, p. 5, Table 2.1.). According to the report, the lower abortion rate in Uzbekistan "is at the same level as that for the United States, but there the majority of abortions are among young, unmarried women, while in Uzbekistan and the other countries in this region, abortions are almost entirely among married women." (Westhoff et al., 1998, p. 6). The principal conclusion derived from the study was that "There is ample evidence that abortion is declining and that contraceptive use is increasing" in all three Republics studied (Westhoff et al., 1998, p. 45). The authors explained this trend was likely the result of the fact that "abortion was the principal method of birth control in the former Soviet Union both because of the unavailability of modern contraceptive methods and because of negative attitudes on the part of the medical establishment, particularly regarding oral contraceptives" (Westhoff et al., 1998, p. 45). However, contraceptive use has increased rapidly in all three countries (Westhoff et al., 1998, p. 46). Our discussion in Section 3.2 bears this out.

3.6 State Support for Expectant Mothers, Babies and Children of Early Age

In October 2019, Uzbekistan enacted legislation Supporting Breastfeeding and Requirements for Food for Babies and Children of an Early Age.[133] Chapter Two, Article Four of this legislation provides that the main directives of state policy in this sphere are to protect the "rights, freedoms and legitimate interests of expectant mothers, nursing mothers, babies and children of early age[134] on breastfeeding; support and promotion of breastfeeding; providing babies and children of early age with high-quality and safe food; state control in the sphere of support of breastfeeding and providing food for babies and children of early age." This legislation directs the Ministry of Health to develop and realize state programs to further this sphere by, among other things, assisting state bodies and public authorities to carry out this mandate; to interact with non-state and non-profit organizations and other institutes of civil society to implement the legislation; to establish health regulations, regulations and hygienic standard rates on production, transportation, storage and sales of products of food for babies and children of early age; to establish requirements for the quality and quantity characteristics, production, transportation, storage and sales of food products for babies and children of early age, etc.

3.7 Labour Code Provisions Supporting Women Giving Birth

The Labour Code of the Republic of Uzbekistan (Labour Code) contains various provisions providing pre- and post-partum benefits to women who give birth to children.[135] Maternity protection provisions include maternity leave for women working in Uzbekistan 70 days before and 56 days after childbirth.[136] On completion of maternity leave, women are also granted childcare leave, which may be used entirely or partially by the child's father, grandmother and grandfather or by another

[133] Law of the Republic of Uzbekistan of October 23, 2019 No. ZRU-574 About support of breastfeeding and requirements to food for babies and children of early age. As amended by the Law of the Republic of Uzbekistan of 26.04.2021 No. ZREU-685. Accepted by Legislative house on October 9, 2019; Approved by the Senate on October 11, 2019.
[134] Children of early age is defined in Chapter 1, Article 3 as "children aged from one year up to three years."
[135] Labour Code of the Republic of Uzbekistan dated December 21, 1995; as amended December 6, 2008. See also, International Labour Organization TRAVAIL, Conditions of Work and Employment Programme web page.
[136] LCRU, §§ 3, 233 and 238. Entitlement to maternity leave also cover a father or tutor, grandmother, grandfather or other relative who actually takes care of the child, in cases when the mother's care for the child is absent (for example in case of death or long stay in a medical establishment).

relative who actually takes care of the child. This parental leave extends until the child reaches the age of two years, with an allowance for this period. At the mother's request, she shall also be granted a complementary leave without pay to care for the child until the child reaches the age of three years (Labour Code, §§ 345-235). The Labour Code also guarantees pregnant women the right to work part-time upon their request (Labour Code, §§ 228, 234, 238). The Labour Code also has provisions for maternity leave benefits (Labour Code, §§ 282, 284), parental leave benefits (Labour Code, §§ 232, 234 and 238), and the right to nursing breaks when their children are under the age of two, in addition to breaks for taking rest and meals at least every three hours, 30 minutes each. Breaks to feed a child shall be counted in working time and paid at the rate of the average monthly wage (Labour Code, §§ 236, 238). Uzbekistan women who are pregnant and who have children under the age of 14 (for handicapped children 16) cannot be compelled to work at night or overtime without their consent (Labour Code, §§ 228, 238). Upon written advice of their doctor, pregnant women are entitled to have their usual workplace output reduced, given lighter job tasks, provided with adaptive work conditions, and be transferred to more suitable posts consistent with their medical condition (Labour Code, §§ 226, 227). The Labour Code also protects pregnant women against having to perform arduous work, such as manual lifting, carrying, pushing or pulling loads, as determined by the Ministry of Labour and Council of the Trade Union Federation (Labour Code, §§ 225). Finally, the Labour Code protects pregnant women from discriminatory practices and wrongful termination (Labour Code, §§ 6, 224).

4 Concluding remarks

The juxtaposition between America and Uzbekistan on how abortion is viewed politically, socially and legislatively could not be more pronounced. Before the 1970s, abortion in America was not nearly the political and social firestorm that it is today. However, the Supreme Court's *Roe* decision in 1973 seemed to serve only to galvanize a small but vocal portion of the population around abortion. Over the last fifty years, the Republican party has courted the far-right and, in states where it has legislative control, has enacted legislation that has either outlawed abortion entirely or has significantly restricted it. Further, the anti-abortionists have been able to infuse the judicial system, including most significantly the United States Supreme Court, with like-minded Justices willing to discard all notions of precedent and *stare*

decisis to carry out their work by providing a judicial imprimatur on their religious anti-abortion sentiments.

Paradoxically, while the world's oldest democracy has thereby stripped women of their privacy rights and right to choose, one of the world's youngest democracies, Uzbekistan, has enshrined a right to abortion in its laws. While it is true that the twelve-week limitation on the right to abortion is indeed restrictive, and some women may not even know they are pregnant when that time expires, at least abortion is universally allowed in Uzbekistan, as opposed to America, where many women are completely deprived of the right. Furthermore, while abortion rules across the American states are often confusing, and in nearly constant flux, those in Uzbekistan are both uniform and clearly spelled out. The rules governing abortion in Uzbekistan apply equally to all women, while the patchwork of state laws now in existence in America are disparate, and the evidence clearly shows they have an egregiously negative impact on the most marginalized women in the country, namely the poor and usually women of color. The straightforward rules in Uzbekistan help ensure that women can experience safe abortions. Not so in America. This is a disgrace.

Furthermore, the rules in Uzbekistan clearly enumerate the circumstances where a pregnant woman can have an abortion after twelve weeks. The 86 exceptions would seem to provide a woman with ample opportunity for an abortion beyond twelve weeks. It is not entirely clear to our authors whether the Councils deciding on abortions have discretion to grant them after 12 weeks for reasons not set forth in Appendix 2 to the Uzbek 2020 Order. While in America, many states have tried to severely restrict the use of contraceptives as a means of birth control, Uzbekistan encourages them as a matter of state policy, both as an alternative to abortion and as a part of the grand family planning scheme. Consistent with many countries of the European Union, Uzbekistan also has legislation that helps pregnant mothers both pre- and post-partum both in the workplace and by helping to ensure that infants and young children receive adequate nutrition. It is difficult to square the fact that so many in America's Pro-life movement want to force women to have unwanted babies, on the one hand, but then reject the idea of providing those women and their babies with any state support, instead deriding the idea of providing tax money for these purposes as "European socialism."

It is not hyperbole to state that the issue of abortion has become so polarizing that it has torn at the fabric of American society. Abortion, along with gun violence, has come to define America to the world. In Uzbekistan, on the other hand, the abortion landscape is quiet. Uzbekistan seems to have legislation regulating abortion that most members of the public are satisfied with, and which has struck an appropriate balance.

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Povzetek v slovenskem jeziku

Ta članek primerja in analizira zakonodajo o splavu v Združenih državah Amerike, eni izmed najstarejših demokracij na svetu, z zakonodajo v Uzbekistanu, starodavni srednjeazijski državi, ki je svojo neodvisnost od Sovjetske zveze pridobila leta 1991. Avtorji pregledujejo ustave tako Združenih držav Amerike kot Uzbekistana in druge zakone, ki urejajo splav in druge reproduktivne pravice. V tem oziru analizirajo nekatere ključne odločitve Vrhovnega sodišča Združenih držav Amerike o splavu. Avtorji prav tako raziskujejo splošna stališča o splavu in reproduktivnih pravicah v obeh državah.

English Is Difficult: Modest Proposals That Can Drastically Improve the Quality of Legal English Composition

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Composing legal English text poses challenges for all writers, especially for non-native English speakers. Historically, legal English was comprised of difficult to understand language replete with jargon and what derisively has been called legalese. The plain English movement has attempted to rectify this, but changing the legal profession's attitudes and long-held habits about how to effectively communicate in writing with our audiences has proven challenging. It is imperative that English legal text be written clearly, concisely, completely and correctly. These objectives can be achieved by following a number of relatively easy strategies. As with architects, composers and artists, authors of legal texts must first conceive a well thought out and organized plan. They must, above all else, consider the specific needs of their audiences. Authors should employ a simple and direct style that makes consuming their work a pleasure not a chore. This can be achieved through a number of mechanisms including using everyday language and preferring the familiar word to the obscure and complex; by preferring the short word and short sentence to the long; by preferring the active voice to the passive; by avoiding foreign phrases to the extent possible; by preferring the single word to the circumlocution; by preferring positive words over the negative; by eliminating pronominal adverbs and other vestiges of legalese; and, by mastering the proper use of English articles. Plain talk should prevail over stilted language. Both vigorous and diligent planning and editing hold the keys to drastically improving the quality of English legal writing.

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1 Introduction

The English language is difficult. An internet search on nearly any topic will inevitably direct the reader to lists. For example, the top ten burger joints in Manhattan or the best sushi restaurants in Tokyo. There are also lists of the so-called easiest and most difficult languages to learn. In fact, some governments publish formal rankings of these languages. For example, the Defense Language Institute (DLI), which is a United States Department of Defense educational and research institution, has established four categories of languages classified by their level of difficulty. Those in category one supposedly are the easiest to learn with those in category four the hardest.[1] Many of these lists rank Spanish, French, Italian and Portuguese as among the so-called easiest while Arabic, Mandarin Chinese, Japanese, and Korean are the most difficult.[2]It objectively is true that some languages are more difficult than others. On the other hand, the difficulty in learning a particular language, especially for non-native speakers of that language, depends on a host of factors such as innate talent, motivation, the ability to regularly engage in oral discourse with others in that language, available learning resources, and perhaps most importantly, how closely related the language being learned is to the languages already learned.[3] Marian argues, for example, that the relative ease or difficulty of learning a new language depends upon such factors as whether the language already known and the one being studied share common vocabularies, grammar and pronunciation.[4]

While few lists classify English as one of the more difficult languages to master, there are undoubtedly many aspects of the language that are challenging. Learning basic vocabulary is probably the single most important aspect of learning a language. Knowing the meaning of words must be the starting point. One must also know a critical number of words in order to be able to communicate. According to the Oxford English Dictionary, there are an estimated 171,146 words currently in use in the English language, along with another 47,156 obsolete words. Stuart Webb, professor of applied linguistics at the University of Western Ontario, determined that native speakers typically know approximately 15,000-to-20,000-word families,

[1] See, Defense Language Institute Foreign Language Center web page, <www.dliflc. edu>.
[2] What are the Hardest Languages to Learn? <www.lingholic.com>.
[3] See, Comparison of Difficulty of Different Languages, by Jakub Marian, <www. jakubmarian.com>.
[4] Id.

or lemmas, in their first native language.[5] Professor Webb found that people who have studied languages often struggle to learn more than 2,000 to 3,000 words even after years of study. In addition to the sheer volume of words comprising the English language, the Oxford Royale Academy points to the "Innumerable examples of conundrums" or "contradictions" in English, which are confusing and illogical to non-native speakers. The Academy gives the following two examples. "There is no ham in hamburger. Neither is there any apple nor pine in pineapple. 'Overlook' and 'oversee' have opposite meanings, while 'look' and 'see' mean the same thing.'"[6] Your authors would add another. We "left" our law faculty today and immediately made a "right" turn to head to lunch. Even the simple word "left" has two meanings. It has a directional meaning but also means depart. The word "right" has a directional meaning as well and also means correct. The words "right" and "write" are also homophones (yet another major complicating factor in English). Homophones are words that sound the same, but spelled differently, and have different meanings. Consider how confusing the following additional examples must be to a non-native English speaker. "**A bandage is wound around a wound** ('wound', pronounced 'wowned' is the past tense of 'wind', as well as an injury when pronounced 'woond'). **The door was too close to the table to close** (the first 'close' is pronounced with a soft 'S' and means 'near', while the second is pronounced with a hard 'S' and means 'shut')."[7] Some homophones that exist in the English language have has many as seven different meanings.

The Oxford Royale Academy points to the many exceptions to the general rules that exist in English. "A good example is the rule for remembering whether a word is spelt 'ie' or 'ei': 'I before E except after C'. Thus, 'believe' and 'receipt'. But this is English – it's not as simple as that. What about 'science'? Or 'weird'? Or 'seize'? There are loads of irregular verbs, too, such as 'fought', which is the past tense of 'fight', while the past tense of 'light' is 'lit'. So learning English isn't just a question of learning the rules – it's about learning the many exceptions to the rules. The numerous exceptions make it difficult to apply existing knowledge and use the same principle with a new word, so it's harder to make quick progress."[8]

[5] How many words do you need to speak a language? By Beth Sagar-Fenton & Lizzy McNeill, BBC News. 24 June 2018, <www.bbc.com>.
[6] Why is English So Hard to Learn? Oxford Royale Academy, <www.oxford-royale.com>.
[7] Id.
[8] Id.

Word order also poses many problems. Native English speakers have the rules drilled into them from an early age and "intuitively know what order to put words in."[9] As with other languages, with experience, the native speaker is able to choose the right word order without giving it much thought. As the Oxford Royale Academy states, to the native speaker the correct word order "just sounds right."[10] However, learning the correct word order is extremely difficult for those learning English as a second language, especially when the person's native language employs fundamentally different grammatical rules. For example, in German, at least depending on the tense involved, the verb often goes at the end of the sentence.

Synonyms present enormous challenges as well. A synonym is generally defined as a word or phrase that means exactly or nearly the same as another word or phrase. Choose any English word and look it up in either a thesaurus or any online search engine and you usually will find long lists of synonyms. As a drastic case, one search engine lists 5,596 synonyms for the four-letter word idea.[11] Defined as something created or imagined in the mind, Wordhippo lists some synonyms for the word idea as including the words concept, notion, belief, theme, and thought among the options. The reality is that most of the time each "synonym" has a slightly different meaning, making it extremely difficult for the non-native English speaker to choose the best alternative. Just referring to the thesaurus or other search engine and picking an alternative word will not work.

One of your authors is a native English speaker who practiced law for over 35 years in the United States and now is an Adjunct Professor and Senior Lecturer in Slovenia. In that capacity, he has edited thousands of pages of legal articles written or translated into English by non-native English speakers/writers. He also lectures on topics pertaining to Legal English Terminology. Your other author is a native Uzbek who has studied pedagogy and lectures at the most prominent law faculty in Uzbekistan. Together, your authors have identified many of the recurring problems that they have observed in legal English writing. This article modestly aims to provide concrete strategies to eliminate these problems. Despite the many problems in mastering English, only some of which have been identified in this Introduction,

[9] Id.

[10] Id.

[11] See <www.wordhippo.com>.

we believe that utilizing these tips will help any person writing legal English to drastically improve their work.[12]

2 Follow the four c's: how to write clearly, concisely, completely and correctly.

It is widely accepted that effective writing is clear, complete, concise, and correct. This stylistic formula is referred to as the four C's of effective writing.[13] Following this prescription for persuasive writing is easier said than done. If this were not the case then everyone would be a proficient writer.[14] In many ways, these four hallmarks of effective writing are both intertwined and conclusory. Simply telling someone to follow the four C's and expecting them to deliver well written materials is much like telling a novice driver to drive safely, without teaching the new driver how to operate a vehicle and what exactly is required to drive safely.

Strunk and White, in *The Elements of Style,*[15] explain that, "Vigorous writing is concise. A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts. This requires not that the writer make all sentences short or avoid all detail and treat subjects only in outline, but that every word tell."

Since the aim of this article is to provide legal writers with modest proposals to write in accordance with the four C's it obviously does not canvass all aspects of English grammar. Your authors suggest that reading *The Elements of Style* and referring to it often when writing in English will prove invaluable. Osbek[16] likewise has written an excellent law review article on the Plain Language Movement in the law, and what constitutes good legal writing. Our paper is inspired by Osbek's work, which we also

[12] The modest recommendations we propose in this article apply to all writers of legal English, native and non-native English speakers alike. Writing simply, however, and using very common words and short sentences (a primary theme of our article), should prove especially helpful to non-native English speakers that have a limited English vocabulary. After all, using mostly simple, everyday words when writing has the dual benefits of allowing the author to write clear and understandable legal English text even with a relatively limited English vocabulary.
[13] See, e.g., Purdue Global University, <www.purdueglobalwriting.center>.
[14] The Economist reports that in 2017 only 48 percent of Americans are proficient readers. It follows that if so few Americans are able to read at a proficient level they can hardly be expected to write proficiently. Correlatively, this highlights challenges that non-native English speakers face when trying to master English writing. *See*, The reading wars, The Economist, 12–18 June 2021, pp. 31–32.
[15] William Strunk, Jr., and E.B. White, The Elements of Style, Fourth Edition, p. 10.
[16] Mark Osbek, What is "Good Legal Writing" and Why Does it Matter? University of Michigan Law School Scholarship Repository (2012), <https://repository.law.umich.edu/ articles/938>.

strongly suggest you read. The balance of this paper is designed to provide the reader with concrete tips on how to write clearly, concisely, completely and correctly. Or, to use Osbek's terminology, what makes for "Good Legal Writing?"

2.1 Know Your Audience

All writers must first consider their audience. Novelists write to entertain. Biographers meticulously chronicle a person's life story. Lawyers have multiple audiences depending on the situation. When lawyers write legal briefs, they are writing to educate judges, arbitrators or mediators in order to inform and persuade these readers in the justness and correctness of their client's cause. Legal professionals must carefully structure their writing so as to meet the needs of these particular readers. Trial judges are extremely busy and have limited time to read and perform extensive research. It is therefore best to keep trial court briefs (memoranda) as short as possible. Courts of Appeal, on the other hand, are more deliberative bodies and have more time to read and consider briefs written to them. While this reality does not mean a lawyer should violate the rule of being concise simply because the audience is different, it does mean the lawyer is justified in writing briefs with more detail and which are more nuanced. Writing to mediators presents special problems. Mediation memoranda generally should inform the mediator of both the strengths and weaknesses of the client's case, so as to promote the goal of mediation, which is case resolution through honest negotiations. The process generally does not work when the lawyers for the respective parties do not candidly acknowledge weaknesses in their client's case. Lawyers write to clients to inform and explain to them the status of their case and to provide legal options and advice. How the lawyer writes to a corporate client will differ from the way the lawyer writes to an unsophisticated client. Law professors and others writing articles on the law have yet another audience. Whatever the specific purpose of your writing, your primary goal should be to determine the specific needs of your audience and to take pains to satisfy those needs. Sometimes your audience will require more detail while at other times it will require less. While the audience will vary, the constant in every case is that the message imparted must be clear, concise, complete and correct.

2.2 Have a Well-Constructed Plan and Provide Road Maps

Having a well thought out plan before writing is crucial. Preparing a formal outline, with both main topics and subtopics, is key in this process. Just as a well-constructed building requires meticulous planning by an architect, so does an informative piece of legal prose require diligent groundwork by the lawyer. Having a solid plan at the outset will help bring organization and clarity to the final work product. The degree of planning and organization will necessarily vary depending on what is being written. An appellate brief, or legal periodical meant for a journal, will require more planning than a letter to a client or opposing counsel. But in all cases, the work product should be structured in a coherent and logical fashion so that the reader can easily understand the document without having to labor through it, or read it several times to understand the import of its content. Everyone is busy. In the internet age this is even more true. Your readers do not have time to pour over your writing multiple times to determine what you are saying.

Road maps are headings and subheadings. Crucially, these instantly highlight for the reader what the critical information is in your writing and where it is located. Well-constructed headings and subheadings should fully encapsulate your principal points, so that all the reader is left to do is to read what comes after those headings for the detailed reasoning that supports those main contentions. Road maps can be helpful in correspondence, especially lengthier correspondence, as well as in trial and appellate briefs, arbitration memoranda, mediation submittals and settlement demand letters. Again, the key is to consider your audience. In structuring writing, one size does not fit all. For example, in writing a detailed opinion letter or status update letter to a client it often is helpful to start with what is known as an executive summary.

The executive summary should succinctly and clearly spell out your ultimate conclusion and recommendation. The balance of the letter can then serve to provide the detailed reasoning supporting the executive summary. Providing executive summaries is a desirable method of informing your audience of your bottom line so that, if the reader does not have the time initially to read the entire document, the reader at least will understand your ultimate conclusion and recommendation. The reader then can return to the document at a later time for the details.

In a trial, appellate court or arbitration memorandum the headings and subheadings should set forth your client's ultimate position that you want the tribunal to adopt. Planning these road maps can be painstaking work and require skill and diligence. However, they are essential to effective writing. The same holds true for academic writing. Just as clear roadway signs enable travelers to easily get to their ultimate destination, providing your reader with easy-to-follow roadmaps makes it easy for your audience to understand your messages.

2.3 Remember the Primacy and Recency Effects

Especially when writing advocacy pieces, or scholarly articles, it is critical to remember the importance of the so-called primacy and recency effects. Psychologists have determined that people will better remember the first thing they saw or read and the last.[17] They do not remember as well what is buried somewhere in the middle. This principle plays a major role in both litigation (trial advocacy) and in writing in general.[18] While excellent writing should follow the 4's throughout, it is critically important to start and to end strong.

Written in 1859 by Charles Dickens, A Tale of Two Cities is a historical novel set in London and Paris during the French Revolution. Dickens opens his book with the following: "It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way- in short, the period was so far like the present period, that some of its noisiest authorities insisted on its being received for good or for evil, in the superlative degree of comparison only."

A Tale of Two Cities is a novel and not a legal work. However, as legal writers there is a good deal we can learn from Dickens. His strong opening lines, which paint such a marvelous picture, and which set the stage for the remainder of his book, grip the reader and compels us to read on. Especially when writing legal briefs or academic

[17] See, Dirk D. Steiner and Jeffrey S. Rain, Immediate and Delayed Primacy and Recency Effects in Performance Evaluation, Journal of Applied Psychology, Vol. 74, No. 1, 136–142 (1989), <www.researchgate.net>.
[18] See, Bill Kanasky, The Primacy and Recency Effects: The Secret Weapons of Opening Statements, <www.courtroomsciences.com>.

articles, it is important for legal writers to give particular effort to the beginning of the work product. This is, of course, important under the primacy effect. Additionally, a solid opening will compel the reader to continue on.

It is equally important, under the recency effect, to conclude strong. The conclusion of the written work is the final opportunity the author has to make a lasting impact on and to persuade the reader to the author's point of view. Do not waste that opportunity. Especially readers of this article that have children may recall E.B. White's enchanting novel Charlotte's Web, which tells the story of a livestock pig named Wilbur and his friendship with a barn spider named Charlotte. When Wilbur is in danger of being slaughtered by the farmer, Charlotte writes messages praising Wilbur (such as "He is Some Pig") in her web in order to persuade the farmer to let him live. White ends his delightful novel with the following memorable line, "It is not often that someone comes along who is a true friend and a good writer. Charlotte was both."

Where the Wild Things Are, another children's story, by Maurice Sendak, tells the story of a little boy and main character of the story, named Max. After his mother sends him to bed without dinner, Max falls asleep and his room immediately transforms into a moonlit forest surrounded by a vast ocean. Sendak ends his novel with a line as memorable as that of White, "Max stepped into his private boat and waved goodbye and sailed back over a year and in and out of weeks and through a day and into the night of his very own room where he found his supper waiting for him – and it was still not."

As legal professionals, especially those of us that work in the litigation arena, we too are storytellers. True, our stories have to be told within the confines of both the legal substantive laws and the rules of evidence. But those strictures allow plenty of leeway to craft our clients' stories in both compelling and memorable ways. This is called (great) advocacy. While lawyers and other legal professionals do not write in flowery prose the way fictional authors do, nevertheless we should learn from greats such as E.B. White and Sendak. What we say last leaves the final impression on the audience. Make every word count. Amen!

2.4 Haste Makes Waste

There is the story of the lawyer that hands the judge a hurriedly written brief and while doing so apologizes, "I am sorry your Honor. If I only had more time, I would have written less." This story highlights a truism: it takes more time, effort and planning to construct writing that is clear and concise. The effort is worthwhile, however, since well-organized and structured legal writing has the power to both inform and persuade. Writing that is rambling, repetitive and disorganized, or which uses language that is difficult to comprehend, quickly loses the reader's attention and is ineffective. The client, judge, arbitrator, mediator or opposing counsel reading poorly written text will not think highly of such a lawyer.

Winston Churchill is best remembered as the British prime minister whose speeches rallied Britain under a relentless Nazi onslaught in World War II. Churchill won the Nobel Prize in Literature in part because of his masterful speechmaking. According to Andrew Roberts, author of a history of World War II called *The Storm of War*, "Winston Churchill managed to combine the most magnificent use of English – usually short words, Anglo-Saxon words, Shakespearean. And also this incredibly powerful delivery. And he did it at a time when the world was in such peril from Nazism, that every word mattered." In one famous speech, Churchill proclaimed: "You ask, what is our aim? I can answer in one word; victory. Victory at all costs. Victory in spite of all terror. Victory, however long and hard the road may be, for without victory there is no survival."

In modern times, most politicians have speech writers that do most of the work for them. Not so with Churchill. He wrote every word of many of his speeches and he said he spent an hour working on every minute of a speech he made.[19] As legal writers, especially practitioners, it is unrealistic to think we have as much time as Churchill did to craft our written product. Lawyers do not have that luxury of time, and even if they did, the clients would not pay for the time. Still, as legal writers we do well to bear in mind that taking our time to put hard effort into what we say matters. Indeed, in our everyday writing each word does, indeed, still matter.

[19] Tom Vitale, Winston Churchill's Way With Words, National Public Radio History, 14 July 2012, <www.npr.org>.

2.5 Plain Talk is Best – How to Simplify and Hone Your Message

Warren Buffett is one of the world's most famous and successful investors. He also is a masterful writer. Buffett wrote the preface in the *Plain English Handbook,* published in August 1998 by the U.S. Securities and Exchange Commission. There Buffett offered great advice, not only for those drafting SEC disclosure documents, but to all writers. For example, Buffett suggests to "Write with a specific person in mind." The so-called Oracle of Omaha, Nebraska also stated that "When writing Berkshire Hathaway's annual report, I pretend that I'm talking to my sisters. I have no trouble picturing them: though highly intelligent, they are not experts in accounting or finance. They will understand plain English, but jargon may puzzle them." Further, "My goal is simply to give them the information I would wish them to supply me if our positions were reversed. To succeed, I don't need to be Shakespeare; I must, though, have a sincere desire to inform."

The SEC's *Plain English Handbook* puts it this way: "A plain English document uses words economically and at a level the audience can understand. Its sentence structure is tight. Its tone is welcoming and direct. Its design visually appealing. A plain English document is easy to read and looks like it's meant to be read." Or as Bryan Garner states, "A lawyer should keep in mind that the purpose of communication is to communicate, and this can't be done if the reader or listener doesn't understand the words used."[20]

John Ernst Steinbeck was an American author and in 1962 won a Nobel Prize in literature. He authored 33 books. The Pulitzer Prize-winning *The Grapes of Wrath (1939)* is considered his masterpiece and is one of the greatest books ever written. In the first 75 years after it was published, it sold 14 million copies. The novel is about a poor Midwest family forced off their land. They travel to California, en route staying in what were called Hoovervilles[21] in the hope of finding a better life, suffering the misfortunes of the homeless in the Great Depression. Consider the

[20] Bryan A. Garner, The Redbook: A Manual on Legal Style 183 (2d ed. 2002).

[21] During the Great Depression, which began in 1929 and lasted approximately a decade, shantytowns appeared across the United States as unemployed people were evicted from their homes. As the Depression worsened in the 1930s, causing severe hardships for millions of Americans, many looked to the federal government for assistance. When the government failed to provide relief, President Herbert Hoover (1874-1964) was blamed for the intolerable economic and social conditions, and the shantytowns that cropped up across the nation, primarily on the outskirts of major cities, became known as Hoovervilles. See, Hoovervilles, History.Com Editors. The original article was published 5 March 2010 and updated 2 November 2018, <www.history.com>.

following quote from the opening chapter of the novel which describes the Oklahoma landscape as the drought settles over it: "In the last part of May the sky grew pale and the clouds that had hung in high puffs for so long in the spring were dissipated. The sun flared down on the growing corn day after day until a line of brown spread along the edge of each green bayonet. The clouds appeared, and went away, and in a while they did not try any more. The weeds grew darker green to protect themselves, and they did not spread any more. The surface of the earth crusted, a thin hard crust, and as the sky became pale, so the earth became pale, pink in the red country and while in the gray country."

Wealthy investors such as Buffett and literary icons such as Steinbeck do not grow on trees. Yet, there is much that the rest of us can learn from their writing styles. Note that both of them write similarly. Both used ordinary, everyday words to impart their messages. In Steinbeck's opening lines the most complicated word he used was dissipated. As was his literary style, Steinbeck used simple words all of his readers could understand to paint very vivid pictures. Likewise, we as legal writers should strive to use, whenever possible, plain and simple words to convey our messages to our audiences.

2.5.1 Eliminate Pronominal Adverbs

As a starting point, lawyers must avoid the use of what is called legalese. Pergjegii[22] describes legalese as, "The archaic legal language or in other words expressions of old times, considered as bizarre in the modern English language, that are still in use in legal papers since their meaning is widely acknowledged in this environment. The core vocabulary of this distinguished jargon consists of Latin, French and Old English words that are not in use in the everyday language and that are used only among lawyers, words like aforementioned or hereinafter are hardly every used outside the context of the legal sentences or documents." Thomas Jefferson, one of the Founding Fathers of the United States, and also the third U.S. President, a lawyer, diplomat, philosopher, architect, and statesman, said that one writes like a lawyer "by making every other word a 'said', or 'aforesaid,' and by saying everything over two or three times, so that nobody but we of the craft can untwist the diction." More recently, Will Rogers, an American actor, humorist, newspaper writer said,

[22] Greta Pergjegii, Modern Tendencies and Characteristics of Legal Writing in English for Specific Purposes, Journal of Education and Practice, Vol. 9, No. 3, 2018, <www.core. ac.uk>.

"The minute you read something that you can't understand, you can almost be sure that it was drawn up by a lawyer."

We encourage our students, and we encourage you, to think of yourselves as sanitation engineers when writing: to eliminate and throw in the trash bin pronominal adverbs including hereof, thereof, whereof, hereinafter, hereinbefore, hereby, said, heretofore etc.[23] The English language unfortunately is littered with these, and the fact is that even most native English speakers would struggle to know what these words mean and when to properly use them. They traditionally have been used primarily in legal writing. However, since the law is for ordinary people and should be understandable to ordinary people, these outdated, confusing words should be eliminated from legal (indeed all) writing.[24]

2.5.2 Whenever Possible Eliminate Foreign Phrases

Several years ago, your American author was lecturing on English legal terminology to Erasmus students. The lecture concerned the four C's. Your author suggested strongly that students avoid using foreign phrases when possible. At that point a Portuguese student raised her hand and stated, Professor, I disagree with you. At our Faculty in Lisbon, we receive more points on exams and papers when we use foreign phrases. This comment gave your author pause, but only momentarily.

We urge legal writers to avoid foreign phrases such as Latin, French and German whenever possible. It is admittedly true that there are certain foreign phrases that have been used for so long, have such distinctive meaning, and have such universal understanding in the legal community (across legal systems, civil and common law alike), that they are nearly unavoidable and will most likely be used forever. Included in this category are the Latin phrases res judicata, ad hoc, ex post facto, ab initio, res ipsa loquitur, caveat, in rem, de novo, in personam, pro se, etc. However, your authors urge restraint in such usage. For the same reason that it is difficult and often

[23] English pronominal adverbs are English adverbs that are formed by combining a pronoun with a preposition.
[24] We direct you to Osbeck's excellent article referenced in fn. 16, What is "Good Legal Writing" and Why Does it Matter? At page 430, Osbek quotes a passage from Judge Cardozo's opinion in the landmark case Palsgraf v. Long Island Railroad Co., 162 N.E. 99,99 (N.Y. 1928). Palsgraf is a leading case discussing the doctrine of proximate cause. All American law students have read this case in their first year Torts class. Judge Cardozo masterfully summarized the "complicated events that led to the plaintiff's injuries in a lucid and succinct fashion." Indeed, Cardozo's masterful statement of the facts at the beginning of the opinion is a lesson in how to use simple, concrete writing and everyday words to convey information.

annoying to read text that constantly uses the largest and most obscure words (that the author likely hunted for in the thesaurus), the author that seemingly goes out of the way to use foreign phrases at every opportunity violates the four C's by unnecessarily increasing the complexity and difficulty of the text. Writing that decreases instead of increases clarity is poor writing. It does not impress your audience, it depresses it. Write in English.

2.5.3 Use Everyday Words

Many judges, lawyers and other legal writers in years past, but unfortunately still too many at present, have employed writing styles that seem to suggest that they believe their educations will have been wasted if they do not use the longest and most obscure words whenever and as often as possible. How often have you decided to read a book, only to be disappointed by the difficulty of the text, made arduous by the frequent use of words you have never heard of, and which require a trip to Google to decipher. Good legal writing is the opposite. The author's intent should be easy to glean. The text should be economical. Use of complicated words should be the exception and not the rule. If you must use technical terms, and sometimes that is the case, explain them on the first reference. Do not force your reader to perform research to understand the meaning of the word. The goal should be to impress the reader through English syntax that easily and persuasively informs the reader. Just as the talented footballer makes the sport seem easy, the skilled legal writer should make reading a pleasure, not a difficult chore.

Persons that learn English as a second language often are overwhelmed by the vast vocabulary. These writers often resort to the thesaurus or Google to locate synonyms to locate what the writer thinks is a good choice. This is a reasonable strategy. However, we suggest that a useful guide is that you use the simpler synonym whenever possible. As suggested in The Plain English Handbook,[25] "Surround complex ideas with short, common words. For example, use *end* instead of *terminate, explain* rather than *elucidate,* and *use* instead of *utilize*. When a shorter, simpler synonym exists, use it." (Italics in original).

[25] See, A Plain English Handbook at page 31.

The following are examples of simple alternatives to complex words used in the legal and business world:

Complex word	Everyday alternative
Close proximity	near
Consolidate	combine
Convene	meet
Disseminate	send
Necessitate	cause
Promulgate	issue
Remuneration	payment
Commence	start
(it is) Compulsory	(you) must
Endeavor	try

The Elements of Style[26] cautions writers to avoid fancy words. "Avoid the elaborate, the pretentious, the coy, and the cute. Do not be tempted by a twenty-dollar word when there is a ten-center handy, ready and able." You are not writing to show off the extent of your vocabulary. Instead, impress your audience by how well you can convey your message in understandable terms. Be respectful of their time. In sum, when you write, follow Warren Buffett's sage advice. Do not use words that you would not use when engaged in every day discussions with family and friends. You will find that you do not need a huge English vocabulary to write effectively.[27] U.S. Supreme Court Justice Benjamin Cardozo, one of America's great jurists, proved just how effective simple, everyday English can be used in his famous Palsgraf opinion.[28] Educated at Ivy League Columbia University, Justice Cardozo showed off his high-priced private education by writing simply and clearly, imparting his messages in a fashion his readers could easily comprehend. We can all learn valuable lessons in writing from Justice Cardozo.

[26] See fn. 14, supra, at page 73.

[27] An excellent reference source is The A – Z of alternative words. This source can be accessed at www.plainenglish.co.uk. This site provides hundreds of plain English alternatives "to the pompous words and phrases that litter official writing." As stated in the introduction to this source, "on its own the guide won't teach you how to write in plain English. There's more to it than just replacing 'hard' words with 'easy' words, and many of these alternatives won't work in every situation. But it will help if you want to get rid of words like 'notwithstanding', 'expeditiously' and phrases like 'in the majority of instances' and 'at this moment in time'. And using everyday words is an important first step towards clearer writing." [28] See fn. 25, supra.

2.5.4 Omit Superfluous Words

Omit unneeded words. Words are superfluous when they can be replaced with fewer words that mean the same thing. The following useful list is taken from *A Plain English Handbook*, discussed earlier:[28]

Superfluous words	Single word alternative
In order to	to
In the event that	if
Subsequent to	after
Prior to	before
Despite the fact that	although
Because of the fact that	because, since
In light of	because, since
Owing to the fact that	because, since
In the absence if	without
In the near future	soon
In view of the fact that	as/because
On numerous occasions	often

Be considerate of your reader's time. Consider the following word choices. "An exact replication of the Power of Attorney is annexed hereto and incorporated by this reference as if fully restated herein." This is a classic example of legal jargon. Is it not more concise and clear to simply state, "A copy of the Power of Attorney is attached." Legalese states in twenty-one words what can more clearly be stated in nine. Consider the following in a client status letter. "After having performed considerable legal research, I was able to ascertain that your legal claim is almost certainly precluded under the doctrine known as res judicata." A clearer, more concise way of stating this would be as follows. "The court will likely not allow your claim because of res judicata, a Latin term which means it already had been litigated in an earlier case."

2.5.5 Omit Doublets and Triplets

Another peculiarity of English, and which adds to confusion and wordiness, is its use of what is known as doublets and triplets. Doublets are two synonyms used together while triplets are three synonyms used together. Historically, doublets and triplets have been used in legal writing, adding to the problem with legalese.

[28] See, A Plain English Handbook at page 25.

However, it is not only legal writing that is weighed down with this linguistic style as doublets and triplets are used in ordinary writing as well.[29] Alliteration is a literary device in which a series of words begin with the same consonant sound. This device is used to emphasize something important that a writer or speaker would like to express. In the business world, companies make effective use of alliteration so that the public will remember their names. For example, Bed Bath & Beyond, Lulu Lemon, Chuck E. Cheese. Doublets are often found in ordinary English writing. Common examples include 'fame and fortune,' 'part and parcel,' safe and sound.'

Although this particular form of wordiness is not constrained to legal writing, traditionally is has plagued legal English and has contributed greatly to the overall problem of legalese. Some claim the problem dates to 1066 and William the Conqueror.[30] The following is a particularly egregious example. "The Lessee covenants with the Lessor to observe and perform the terms, covenants and conditions contained in the Land Use Right and on the Lessor's part to be observed and performed in the same manner in all respects as if those terms, covenants and conditions, with such modifications only as may be necessary to make them applicable to this Lease, had been repeated in full Lease as terms covenants and conditions binding on the lessee in favour of the Lessor." In addition to the triplet used above, terms, covenants and conditions, the following is a list of some of the more common legal doublets, together with the single word that can be used in their place to simplify and clarify your English legal writing:

Doublet	single word
Cease and desist	stop
Covenant and agree	agree
Deem and consider	consider
Due and payable	to be paid
Fit and proper	legitimate/fit
Null and void	void
Part and parcel	part of
Perform and discharge	to do
Signed and sealed	signed
Sole and exclusive	exclusive rights
Terms and conditions	terms
Will and testament	will

[29] For a detailed discussion of doublets and triplets see Hovels, Jens Peters. Characteristics of English Legal Language (2006); Cao, Deborah. Translating Law. Toronto: Multilingual Matters. Ltd. (2007).
[30] Myers, Sean. Confused By Legal Phrases Like "Null and Void"? Thank William the Conqueror. www.writingcooperative.com

2.5.6 Omit Meta-Discourse

We frequently observe the following needless phrases in both oral discourse and writing. As they fail to add value to the message we are trying to impart to our already busy audience, these so-called throat clearing phrases[31] or metadiscourse should be eliminated:

- It is important to note that (if it has a home in your writing it is important)
- It should be noted/pointed out that (do you not want your reader to note everything in your article?)
- As previously (already) discussed earlier/above/hereinabove (you said it once)
- As will be discussed hereinbelow (later) in this paper (you will get to it!)
- It is clear that (maybe it's clear to you; leave this up to your reader)

The defendant would respectfully draw the court's attention to the fact that (do not worry, the court will be attentive, but statements such as this detract from your message)

These are examples of flabby sentence openers that attempt to manufacture emphasis but instead just postpone getting to the point. These phrases, and others such as them, are no more than space-fillers that fail to convey meaningful information and waste the reader's time. Eliminate them from your writing and oral discourse.

2.5.7 Use Positive Instead of Negative Words

Using positive instead of negative words or phrases not only strengthens your writing but makes it more concise and easier to understand. Using positive words makes it much more likely the reader will not have to go back and read the sentence a second time due to ambiguities that often result from using negative verbiage. The following examples are taken from A Plain English Handbook.[32] You will note that the positive, single word alternative replaces the negative phrase, and so has the benefit of using fewer words to express the same meaning.

[31] See, Linda H. Edwards, Legal Writing: Process, Analysis and Organization at 27980 (5th ed. 2010); Veda R. Charrow et. al., Clear and Effective Writing at 163–165 (2007).
[32] See page 27, A Plain English Handbook.

Negative compound	single word
Not able	unable
Not accept	reject
Not certain	uncertain
Not unlike	similar, alike
Does not have	lacks
Does not include	exclude, omits
Not many	few
Not often	rarely
Not the same	different
Not … unless	only if
Not … except	only if
Not … until	only when
Not honest	dishonest
Did not remember	forgot
Did not pay attention to	ignored

Consider the following example that illustrates how much easier it is to understand ideas when positive language is used and negative compounds are omitted. **Before**: persons other than the primary beneficiary may not receive these dividends. **After**: Only the primary beneficiary may receive these dividends.[33] Avoiding negative words and phrases will make your writing more powerful and clear.

2.5.8 Use short sentences

Just as using everyday common words, avoiding jargon, and limiting your use of foreign phrases leads to clear and concise writing, so does using shorter sentences and paragraphs. It is difficult for the reader to grasp the meaning of ideas when the author constantly uses long sentences, especially ones containing complex and negative words. We again do well to follow Warren Buffett's advice. When we speak to our family and friends we usually do not speak in long sentences. Our writing form, whenever possible, should mimic how we talk. The problem with sentences that are routinely too long is that the writer's idea easily can get lost among the verbiage. As a reader, it is frustrating to have to read a sentence a second or third time to figure out what the writer is trying to say.

It is often difficult to explain complicated legal subjects to our audience in writing. This article has offered various tips to assist in the process. Still, the writing process is difficult. Finding the correct words, and then placing them in the correct order,

[33] Example taken from, A Plain English Handbook, p. 27.

using correct grammar to express the central idea can at times be overwhelming. Your authors have observed that when editing legal text that is difficult to understand, a common method of making the text easier to understand is to break the original long sentence down into two or occasionally even three new, shorter sentences. Try this when you write and you will be surprised how employing this technique will simplify and clarify your writing.

2.5.9 Use the active voice

In general, it is better to use the active voice whenever possible. While it is not "wrong" to use the passive voice, active voice sentences usually require fewer words, are clearer, more concise, and more powerful. As stated by The Writing Center at the University of Wisconsin - Madison[34] "In a sentence written in the active voice, the subject of [the] sentence performs the action. In a sentence written in the passive voice the subject receives the action. **Active**: The candidate believes that Congress must place a ceiling on the budget. **Passive**: It is believed by the candidate that a ceiling must be placed on the budget by Congress. **Active**: Researchers earlier showed that high stress can cause heart attacks. **Passive**: It was earlier demonstrated that heart attacks can be caused by high stress. **Active**: The dog bit the man. **Passive**: The man was bitten by the dog." On the other hand, there are instances where using the passive voice is not only acceptable but even preferable. This is the case, for example, when the emphasis of the sentence should not be on the actor but rather on what was, is, or will be done. For example, **Passive**: Explosives must be handled with extreme care. **Active**: You must handle explosives with extreme care. **Passive:** Your order for a new mobile phone has been received. **Active**: We have received your order for a new mobile phone.

3 Mastering the articles: when and how to use the, an and a

English has two articles: **the** and **a/an**. Articles are adjectives. Like adjectives, articles modify nouns. Properly using articles is one of the trickiest and most difficult aspects of writing in English. The reason for this difficulty is that many languages do not have articles, and those that do (such as German) apply different usage rules. The Slavic languages do not use articles. For persons that speak a Slavic language as

[34] Can be accessed at: www.writing.wisc.edu.

their first language, learning when and how to use English articles is particularly challenging. Indeed, the correct usage of articles is confusing even to native English speakers. We observe both in our teaching English and reviewing written work, that non-native English speakers struggle with when and how to use English articles. Correctly using articles will, therefore, greatly enhance the quality of your written work. Our goal, is to provide the basic rules of how and when to use English articles.[35]

3.1 General Rules regarding definite and indefinite articles: the, a, an

There are two types of articles: **the** is a definite article while **a** and **an** are indefinite articles. Knowing the two types of articles is the starting point. The following are the general rules of when to use articles. First, place the article before the noun. For example: the judge, the courtroom, the lawyer's theory of the case; or, a lawsuit, a verdict, a judgment. Secondly, place the article before the adjective when the noun is modified by an adjective. For example: the congested docket, the complicated lawsuit, the impressive lawyer, the fair judge; or, a short opening statement, a brilliant closing argument, an open case. Proper placement of the article is important. Accordingly, it is incorrect to state: the docket congested a statement short.

Possessive pronouns are: my, his, her, our, their. Demonstrative pronouns are: this, that. Do not include any article when the nouns have either a possessive or a demonstrative pronoun. For example: my law firm, her brief, that attorney, this motion. Applying this rule, it would be incorrect to state: the my law firm or the this motion.

3.2 Definite Article: the

As stated by the Bracken Business Communications Clinic (BBCC), the following rules apply when using the definite article the.

[35] The basic grammar surrounding the use of English articles as discussed in this section is taken largely from a primer prepared by the Bracken Business Communications Clinic (BBCC), Montana State University, <www.montana.edu>. Your authors found this primer particularly helpful because it did an excellent job of simplifying what is a complex topic. However, your authors modified the examples for legal writing, using common legal terminology in place of the everyday examples provided in the BBCC article.

- "Use *the* to identify specific or definite nouns: nouns that represent things, place, ideas of persons that can be identified specifically.
- Use *the* with both singular and plural definite nouns. e.g., the house the houses the business the businesses
- Use *the* to identify things, places, ideas, or persons that represent a specific or definite group or category. E.g., The students in Professor Smith's class should study harder. The automobile revolutionized travel and industry. (*the automobile* identifies a specific category of transportation)"

3.3 Indefinite Article: *a* or *an*

The BBCC states the following rules regarding the use of the indefinite articles, **a** or **an**.

- "Use *a* or *an* to identify nouns that are not definite and not specific. Think of *a* and *an* as meaning *any* or *one among many. e*.g., a book (any book) a dog
- (any dog) a cat (one cat) a house (one among many houses) – Use *a* or *an* only for singular nouns.
- Do not use an article for a plural, indefinite noun. Think of a plural, indefinite noun as meaning *all.* e.g., Students should study hard. (All students should study hard.)

When to use *a* and when to use *an*

- Choose when to use *a* or *an* according to the sound of the noun that follow it. E.g., a book a dog.
- Use *a* before a sounded *h,* a long *u,* and *o* with the sound of *w.* e.g., a hat a house a union a uniform a one-hour appointment
- Use *an* before vowel sounds (except long *u).* e.g., an asset an essay an index an onion an umbrella
- Use *an* when *h* is not sounded. e.g., an honor an hour"

Admittedly, mastering the use of English articles is challenging. And that is an understatement. The harsh reality is that native English speakers learn these rules in elementary school. They are drilled into students daily until their use becomes

second nature. When and how to use the articles becomes a matter of what sounds right. The actual rules have long sense been forgotten, even to your American author. However, your authors hope that this brief explanation will help with your use of English articles.

4 Edit, edit, edit

We cannot stress enough the important role that disciplined editing plays in crafting clear and concise writing. Once you have prepared a draft of your work, it is a good idea to set the draft aside for at least a day before returning to it. This break will give you time to mentally (and perhaps physically) reset. When reviewing your draft, stay objective. Review the draft as if you were an editor seeing the work for the first time. Ask yourself the following questions. Above all else, are the main contentions of the work clear. Is the work well-organized and easy to follow. Are there redundancies that should be eliminated. Are there words or phrases that can be eliminated because they do not add anything to the work. Have you failed in your initial draft to fully explain or flesh out your arguments? If so, you may well need to add language to the initial draft (we find that providing examples to be useful) in order to ensure your audience will fully understand your contentions. In sum, during the editing process keep in mind that your ultimate goal is to produce a final work product that is clear, concise, complete and correct.

5 Conclusion

Your authors promised to provide modest proposals for improving your legal English composition. Accordingly, this short article does not cover all of the rules of English syntax and grammar. To assist you with those rules we have provided several reference sources which we urge you to refer to when necessary. The primary aim of this article was to identify some of the main culprits that stand in the way of generating solid legal English composition and to provide specific strategies for writing that is clear and concise.

As is true with constructing a building, composing a piece of music or generating art work, the first step in laying the foundation for a solid piece of writing is to conceive a well-designed plan. Preparing an outline is always time well spent. An outline will

help you organize your thoughts and assist you in developing written work product that logically flows and is understandable to your audience.

One of the principal elements of planning is understanding the needs of your particular audience. Your primary objective must be to communicate your message to your audience as clearly, concisely, completely and correctly as possible. This can be a daunting task in legal writing, since the subject matter often is difficult and technical and the competences of your audience will vary, meaning that as the author you will need to tailor your writing from project to project. Whoever the audience, be respectful of their time. Remember, you are not a novelist. You are not writing with a literary flare.

Haste makes waste. Be deliberate in your writing. Your audience will become frustrated if your writing fails to flow logically and if it is too difficult to understand. In many instances you will be more knowledgeable about the subject matter than your reading audience. You may be more highly educated. Do not write in a style that forces your audience to read your work several times in order to understand it. Do not force your audience to keep a dictionary nearby when reading your work. If the written work is written clearly and concisely your audience should be able to peruse your work product and understand it.

Remember Justice Benjamin Cardozo, the Columbia University trained jurist or President Thomas Jefferson. Both highly educated and brilliant men, they managed to dazzle with the crispness and clarity of their writing. Remember, too, the lessons we have learned from other great writers (all intellectuals by the way) such as Warren Buffet, Winston Churchill and John Steinbeck. Use language that your audience can easily relate to. Write in a manner as if you were having an oral conversation with them. Often in legal (or other technical) writing the author cannot avoid some degree of complexity in words chosen. Sometimes it is not possible to use everyday words and to always have short sentences. However, we do urge you to always be mindful of constructing your work in a fashion that is as simple and direct as possible.

Use the more familiar word to the complex and obscure. People usually understand and remember familiar words and may fail to comprehend sophisticated or complex words. Eliminate all superfluous words. The use of doublets and triplets defeats writing in plain English. The use of meta-discourse and other throat clearing

expressions and jargon merely wastes your audience's time and therefore is disrespectful to your reader. Use positive words and eliminate the negative. Remove pronominal adverbs from your writing. Use foreign phrases only when absolutely necessary. Prefer the active voice to the passive and shorter paragraphs and sentences to lengthy ones. Remember the psychology of primacy and recency. Start strong and end strong.

To write in a manner consistent with our recommendations requires discipline. It also requires you to be a ruthless editor and self-critic. It will require you to carefully parse your draft work and weed out the clutter and the ambiguities. Just as travel is fatal to bigotry,[36] careful and disciplined editing is fatal to a poor writing style.

Naslov v slovenskem jeziku

Angleščina je težka: skromni predlogi, ki lahko drastično izboljšajo kakovost pravnih angleških besedil

Povzetek v slovenskem jeziku

Priprava pravnih angleških besedil je izziv za vse pisce, še zlasti za tiste, ki jim angleščina ni materni jezik. Zgodovinsko gledano je pravno angleščino tvoril težko razumljiv jezik, poln žargona in tistega, kar je bilo zaničljivo poimenovano pravniški žargon. Gibanje za preprosto angleščino se je trudilo to popraviti, vendar je bila sprememba odnosa in dolgoletnih navad pravne stroke glede učinkovitega pisnega sporazumevanja z našimi ciljnimi skupinami zahtevna.

Angleščina je težka. Spletno iskanje o skoraj katerikoli temi bo bralca neizogibno usmerilo na sezname. Na primer deset najboljših hamburgerjev na Manhattnu ali najboljše restavracije s sušijem v Tokiu. Obstajajo tudi seznami tako imenovanih najlažjih in najtežjih jezikov za učenje. Pravzaprav nekatere vlade objavljajo uradne lestvice teh jezikov. Inštitut obrambe za jezik (*Defense Language Institute* – DLI), ki je izobraževalna in raziskovalna ustanova ministrstva za obrambo Združenih držav Amerike, je vzpostavil štiri kategorije jezikov, razvrščenih glede na stopnjo zahtevnosti.[37] Tisti v prvi kategoriji se menda najlažje učijo, tisti v četrti pa najtežje. Številni od teh seznamov uvrščajo španščino, francoščino, italijanščino in portugalščino med tako imenovane najlažje, arabščina, mandarinščina, kitajščina, japonščina in korejščina pa so najtežji.[38]

Objektivno je res, da so nekateri jeziki težji od drugih. Na drugi strani pa je težava pri učenju posameznega jezika, zlasti za nematerne govorce tega jezika, odvisna od množice dejavnikov, kot so prirojeni talent, motivacija, sposobnost rednega ustnega pogovora z drugimi v tem jeziku, učni viri, ki so na voljo, in morda najpomembnejše, kako tesno je jezik, ki se ga posameznik uči, povezan z že naučenimi jeziki.[39] Marian na primer trdi, da je relativna preprostost ali težavnost učenja novega jezika

[36] Mark Twain, a famous American author and philosopher, famously wrote, "Travel is fatal to prejudice, bigotry, and narrow-mindedness, and many of our people need it sorely on these accounts. Broad, wholesome, charitable views of men and things cannot be acquired vegetating in one little corner of the earth all one's lifetime."
[37] Glej spletno stran <www.dliflc.edu>.
[38] What are the Hardest Languages to Learn? <www.lingholic.com>.
[39] Glej primerjavo zahtevnosti različnih jezikov, Jakub Marian, na <www.jakubmarian.com>.

odvisna od dejavnikov, kot je, ali imata jezik, ki ga že poznamo, in tisti, ki ga preučujete, skupen besednjak, slovnico in izgovorjavo.[40]

Čeprav le malo seznamov uvršča angleščino med jezike, ki jih je težje obvladati, je nedvomno veliko vidikov jezika, ki so izziv. Učenje osnovnega besedišča je verjetno najpomembnejši vidik učenja jezika. Izhodišče mora biti poznavanje pomena besed. Človek mora poznati tudi kritično število besed, da se lahko sporazumeva. Po Oxfordskem angleškem slovarju (*Oxford English Dictionary*) je v angleškem jeziku trenutno v uporabi približno 171.146 besed, skupaj s še 47.156 zastarelimi besedami. Stuart Webb, profesor uporabne lingvistike na Univerzi v Zahodnem Ontariu, je ugotovil, da domači govorci običajno poznajo približno 15.000 do 20.000 besednih družin ali lem v svojem prvem maternem jeziku.[41] Profesor Webb je ugotovil, da se ljudje, ki so študirali jezike, pogosto težko naučijo več kot 2.000 do 3.000 besed tudi po letih študija. Nujno je, da so angleška pravna besedila napisana jasno, jedrnato, popolno in pravilno.

Tako temeljito načrtovanje kot tudi vztrajno urejanje sta bistvena za drastično izboljšanje kakovosti angleškega pravnega pisanja. Eden od glavnih elementov načrtovanja je razumevanje potreb vaše ciljne skupine. Vaš primarni cilj mora biti posredovati svoje sporočilo občinstvu čim bolj jasno, jedrnato, popolno in pravilno. To je lahko zastrašujoča naloga pri pravnem pisanju, saj je tema pogosto težka in tehnična, kompetence vašega občinstva pa se razlikujejo, kar pomeni, da boste morali kot avtor svoje pisanje prilagajati od projekta do projekta. Ne glede na to, kdo je občinstvo, spoštujte njihov čas. Ne pozabite, da niste romanopisec. Ne pišete z literarnim žarom.

Naglica poraja odpadke. Pri pisanju bodite premišljeni. Vaše občinstvo bo razočarano, če vaše pisanje ne teče logično in če je pretežko za razumevanje. V številnih primerih boste o zadevi bolje seznanjeni kot vaše bralsko občinstvo.

Morda ste bolj izobraženi. Ne pišite v slogu, ki vaše občinstvo prisili, da večkrat prebere vaše delo, da bi ga razumelo. Ne silite občinstva, naj ima pri sebi slovar, ko bere vaše delo. Če je pisno delo napisano jasno in jedrnato, mora biti vaše občinstvo sposobno prebrati vaš delovni izdelek in ga razumeti.

Tako kot arhitekti, skladatelji in umetniki morajo tudi avtorji pravnih besedil najprej pripraviti premišljen in organiziran načrt. Predvsem morajo upoštevati specifične potrebe svojih ciljnih skupin. Avtorji naj uporabljajo preprost in neposreden slog, ki omogoča, da je branje njihovega dela užitek in ne trud. To je mogoče doseči z uporabo vsakdanjega jezika in dajanjem prednosti znanim besedam pred zapletenimi in nejasnimi; z dajanjem prednosti kratkim besedam in stavkom pred dolgimi; z dajanjem rednosti aktivnemu glagolskemu načinu pred pasivnim; z izogibanjem tujim frazam, kolikor je to mogoče; z dajanjem prednosti enojnim besedam pred besedičenjem; z dajanjem prednosti pozitivnim besedam pred negativnimi; z odpravljanjem prislovnih zaimkov in drugih ostankov pravniškega žargona; ter z obvladovanjem pravilne uporabe angleških členov. Preprost govor naj prevlada nad težkim jezikom.

Ključne besede v slovenskem jeziku

Pisanje pravnih angleških besedil, preprosta angleščina, jasno in jedrnato pisanje, primat in aktualnost v pravnem angleškem pisanju, urejanje pravnih angleških besedil.

[40] Prav tam.

[41] Beth Sagar-Fenton in Lizzy McNeill: How many words do you need to speak a language? v: BBC News. 24. junij 2018; <www.bbc.com>.

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LIGHTS, CAMERA, ACTION: THE POWER OF VERBS. WRITING STRATEGIES TO ENSURE YOUR ACTION WORDS ARE NOT WEAKENED BY SLOPPY AND CARELESS DRAFTING

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The parts of speech form the backbone of English discourse and writing. They consist of nouns, adjectives, verbs, adverbs, pronouns, articles, prepositions, conjunctions and interjections. This article focuses on verbs, which are generally action words. Verbs bring oral discourse and writing to life. Careless use of verbs does a major disservice to writing. It weakens writing and accordingly diminishes the overall vitality of the written word. The authors analyze the principal ways in which verbs are misused. They offer easy to understand, concrete examples of how to avoid the pitfalls of misusing verbs to ensure any subject, but particularly legal writing, will be as powerful and easy to understand as possible. Using verbs correctly is an important component of the Plain English Movement, whose goal has been to stamp out legalese.

Keywords:
plain legal English, verbs, nominalization, legal writing, legalese

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1 Introduction

According to Karen Nelson-Field, "Legend has it that one day in the golden age of Hollywood, frustrated on set and running out of time, an influential filmmaker named David Griffith started shouting at the crew 'lights, camera, action'. " Crucially, in order to make a movie, there has to be adequate lighting. Cameras have to be positioned correctly. Actors must take their correct marks. The director then shouts this command and the magic begins. Of the various genres, most people adore action movies. The reasons are obvious. Action movies are thrilling. They are fast-moving. They appeal to our senses. They easily hold our interest. A two-hour action thriller seems to pass by in the blink of an eye. Who can forget some of the opening action scenes of a James Bond 007 movie? Or a motorcycle chase scene from a Jason Borne movie? Or John Wick, the retired hitman who returns to his old ways after his beloved dog is killed? The action is compelling. Hollywood directors churn these movies out as they know movie-going audiences will flock to see them. Sporting events provide a parallel. We are drawn to sports because they, too, are action packed. Sixty thousand fans stand and applaud the footballer that heads the ball into the goal off a set piece corner kick.

Lawyering has surprising similarities to moviemaking. Lawyers, especially those involved in litigation, but others as well, including all of us that write, are storytellers. Lawyers, working with the facts of the case as presented to them in a concrete situation, have to weave those facts together in order to develop a compelling story to tell to a judge, a jury, an arbitrator or a mediator. So do lawyers or professors that write professional articles. A difference is that moviemakers use both words and pictures in their craft. Lawyers, on the other hand, have to rely solely upon words. As Weihofen[1] states,

"Especially in presenting arguments, a lawyer will want to make the impact of his or her words strong and indelible. […] In speaking we can use certain devices to gain emphasis, such as pauses, gestures or raising the voice. These cannot be reproduced in type." This is where verbs come in.

As writers we each develop our own style from myriad sources such as former teachers, professors, our favorite writers, and even advertisements. Marketers are

[1] H. Weihofen, op. cit., p. 319.

particularly savvy in their use of language, as they are forced to both grab our attention and convey their message in short order. One of your authors recently was walking in the business area of the local neighborhood. The photography shop has a simple ad reading: Look, think, shoot! (together with a photo depicting a hand dropping plastic canisters of film—even though hardly any of us in the digital age using smart phones need film anymore to take photos!). *Look, think and shoot* are examples of three strong, memorable verbs that convey a lasting message about taking photographs. These are the types of strong verbs that we, as legal professionals, must incorporate into our own writing.

One of our favorite examples demonstrating the masterful use of verbs is the marketing campaign used by Vitality Health and Life Insurance, a United Kingdom-based company offering private health and life insurance to the UK market. Most of us like cute and cuddly dogs. In 2016, Vitality's marketing department introduced the public to its mascot, Stanley the Dachsund. Stanley is shown in most of Vitality's advertisements out with its owner engaged in some kind of healthy activity such as *walking*, *running* or *biking* (note, these are each strong verbs). Vitality's business model is to provide its customers with price discounts for healthy living. The healthier the customer the larger the discounts. Stanley also appears in Vitality's sponsorship advertisements for Sky News, including Premier League football. One memorable advert, on a football pitch, shows Stanley striking a soccer ball and placing it perfectly into the upper corner of the goal while proclaiming, "*Score*!!! I *spotted* an opportunity. I *found* the space. And I *slotted it* through. It's what I *do*!" This Vitality add is very short, only seconds long. Of course, a dog playing football has nothing to do with buying insurance. That is not the point. Vitality knows that insurance is a boring topic. Having Stanley as its mascot helps make insurance seem less mundane and more fun. The verbal message that accompanies Stanley stays imbedded in our minds because the wording is forceful, fueled by the strong verbs: *spotted, found, slotted* punctuated by a short, final sentence: It's what I do! Marketing departments, as with filmmakers, have the advantage of using both strong words and images to convey their messages. We in the legal profession do not have this binary option and instead are restricted to words. It is imperative, to overcome this inherent disadvantage, that we make every word count. Again, this is where verbs come into play.

Using strong, often short verbs to convey messages is not new. Those in ancient times employed the same strategy. The Latin phrase *veni, vidi, vici* when translated into English means: I *came*, I *saw*, I *conquered*. It is used to refer to a swift, conclusive victory. The phrase is popularly attributed to Julius Caesar, a Roman general who led Roman armies in the Gallic Wars, who supposedly used the phrase in a letter to the Roman Senate around 47 BC, after he had achieved a quick victory in the short war waged against Pharnaces II of Pontus at the battle of Zela, in modern-day Zile, Turkey.

As legal writers, we can also gain valuable insights and lessons about the value and power of using strong verbs from some of the famous speeches made over the years, by politicians and others. Sir Winston Churchill provides one outstanding example. Sir Winston Leonard Spencer Churchill was a British statesman, soldier, writer, painter, and philosopher who twice served as Prime Minister of the United Kingdom, most famously from 1940 to 1945 during the Second World War. Churchill wrote his own speeches and is renowned for having labored over every word. He understood the value and power of words, which he used to rally the British public through the sustained days of the Nazi Blitz from September 1940 until May 1941, and then through the balance of the war until Nazi Germany and its allies were ultimately defeated by the Allied forces. An icon of great speech writing, one of his most famous speeches took place in 1940 when Churchill declared to British citizens that

"we shall *defend* our island, whatever the cost may be, we shall *fight* on the beaches, we shall *fight* on the landing grounds, we shall *fight* in the fields and in the streets, we shall *fight* in the hills; we shall never surrender, and even if, which I do not for a moment believe, this island or a large part of it were subjugated and starving, then our Empire beyond the seas, armed and guarded by the British Fleet, would *carry on the struggle*, until, in God's good time, the New World, with all its power and might, steps forth to the rescue and the liberation of the old."

The speech is powerful, in large measure, because Sir Winston uses strong, active verbs like "defend" and "fight" to motivate and arouse his audience. Although the thrust of our article relates to the use of verbs, Churchill's use of repetition is remarkable. Repeating the phrase "we shall" adds force and boldness, as if Churchill

was literally willing his audience to resist the Nazis and win the war. The use of repetition is another tool that we legal writers should keep handy in our toolbox, for it, too, has its place in our writing.

William Shakespeare[2] was an English playwright, poet, and actor. He is widely regarded as the greatest writer in the English language and the world's pre-eminent dramatist. Shakespeare wrote some 39 plays, 154 sonnets among other things. He remains arguably the most influential writer in the English language, and his works continue to be studied and reinterpreted. William Shakespeare's writings also have much to offer legal writers.[3] Here is a sample from Henry V, Act 3, Scene 1, from the "Once more unto the breach speech".

"Once more unto the breach, dear friends, once more; Or close the wall up with our English dead. In peace there's nothing so becomes a man As modest stillness and humility: But when the blast of war blows in our ear. Then imitate the action of the tiger; Stiffen the sinews, summon up the blood, Disguise fair nature with hard-favour'd rage."

Those of us in the legal profession have been taught in our law schools to write logically and to avoid writing in the style of what we might call literary flare. Accordingly, most of us became very boring writers. It does not have to be that way. Shakespeare, in the lines above, uses orders and imperative verbs[4] to give the speaker a sense of command and authority. These tools, along with Shakespeare's use of repetition (a device also used by Sir Winston Churchill) makes this such a great, rousing battle speech.

Johnson[5] wrote not specifically about verbs, but rather the importance of those in the legal profession writing clearly and effectively. "The most important tool in a consummate lawyer's toolbox is the ability to communicate effectively, both orally and in writing. Whether the person receiving one's communication is a judge, juror,

[2] William Shakespeare lived from April 1564 to April 1616.
[3] S. Greenblatt, op. cit., p. 11.
[4] An imperative verb is an action a speaker or writer wants someone else to do. These are sometimes also called "command words". "Open the door" is an example of an imperative sentence, with the imperative verb being open. Imperative verbs can also be used to give directions or instructions such as: "Go to the first stop sign and turn left." They can be used to provide a warning: "Watch out!" Or, "Look to your left!" They can be used to give or offer advice: "Order the lobster." [5] J. Johnson, op. cit., pp. 42–43.

or opposing counsel,[5] the message should be precise, clear, trustworthy, and engaging. Writing differs from oral expression because it creates a permanent record. Persuasive legal writing involves knowing precisely what one wants to say—and saying it—clearly and simply. Long sentences, for instance, are usually the product of the failure to think through what one wants to say and how to say it. Short sentences can be powerful and persuasive: *this is a case about a broken promise*. Aim for an average of about 20 words a sentence."

Is what Johnson preaches easier said than done? And what does this have to do with the main subject of this paper, verbs? The answer is this: verbs have everything to do with writing in a manner that enables legal professionals to write persuasively. Yes, we need nouns, and pronouns, and adjectives and articles, but to be truly effective writers we need to pack our toolbox with power verbs and we must use them correctly. Otherwise, our writing, at worst, is doomed to failure, but at a minimum will create a "permanent record" (in the words of Johnson) that is suboptimal. Johnson goes on to state "The ideal style is clear, forceful, precise, attention grabbing, and so elegant that the reader has no choice but to adopt the writer's view of the law."[6] We will explain how using verbs correctly can help you achieve this goal.

1.1 The Problem and Why Verbs Are So Important

Throughout history many of us trained in the law have been plagued with poor writing. We do not set out to be poor writers and of course, writing poorly is not solely the domain of lawyers. Many people, even those highly educated, do not write effectively. However, because lawyers are such notoriously terrible writers, we have the dubious distinction of having been given a special name for our writing: legalese. Much has been written on the topic of legalese and methods to rectify the problems associated with it. Your authors wrote one such article a couple of years ago.[7] The present article builds upon the earlier article, which focused on the so-called Four C's of writing: writing clearly, concisely, completely and correctly. Legalese might be viewed as the very antithesis of writing utilizing the Four C's. Such writing is often

[5] We would add others to this list: clients, mediators, arbitrators, students, educators, and any others consuming written legal work product.
[6] J. Johnson, op. cit., p. 43.
[7] T. Heller and D. Zoyirova, op. cit., pp. 281–326.

ambiguous, imprecise, redundant, long-winded, difficult to understand, unduly complex, and uses unnecessarily long words, sentences and paragraphs.

Judge Painter (2010),[8] writing for the Michigan Bar Journal, summarized the problem with legal writing succinctly:

"In law school, I don't remember any professor telling us to 'write like a lawyer.' Maybe 'think like a lawyer,' but not write like one: take all strong verbs out of your sentences; make every sentence at least 200 words, with as many clauses as possible; have your paragraphs go on from page to page; use words and phrases such as *pursuant to, whereas, heretofore, prior to*, and *provided that*. And of course, use two, and perhaps three or four, words when one would do: *rest, residue, and remainder*; *free and clear; null and void*. None of these lawyerisms are necessary, and all are distracting and confusing—not only to the public, but also to judges and lawyers. The problem is that we read cases by old dead judges who were not good writers when they were alive. Certainly, there were good judicial writers—Holmes, Cardozo, Jackson—but they did not write on every issue to be covered in a casebook. So the casebook editor had to pick dull cases. And even after editing, they were still badly written. So we read stilted, backward, and downright clumsy language that had been passed down for generations – and internalized it. When we got out of law school, we thought that's how judges and lawyers write, so I should write that way too. Thus, the tradition of bad legal writing continued."

During the primary school years, in addition to learning other grammar, we gradually increased our vocabulary. In addition to verbs, we learned about nouns: the name of a person, place, animal, thing, or idea. We learned about pronouns: a word used in place of a noun, such as him, her, she, they, we, it, etc. We learned about adjectives, which are words that modify or describe a noun or pronoun: The old man bought a *sturdy* cane. We learned about adverbs, which modify or describe a verb, an adjective, or another adverb. Examples include words such as gently, extremely or carefully. We also learned about prepositions, conjunctions and interjections, which together round out the parts of speech.

8 M.P. Painter, op. cit., pp. 54–55. Judge Painter served as an Ohio trial and appellate court judge for 27 years before being elected to the United Nations Appeals Tribunal. He has written many hundreds of nationally published opinions and books, including The Legal Writer: 40 Rules for the Art of Legal Writing. He frequently lectured all over the world on the subject of legal writing.

But our focus here is upon verbs. As we proceeded with our education, and life in general, we continually filled our vocabulary toolbox with an ever-increasing number of verbs. The verbs got longer and more complex. As we moved on to high school and then to university, and for us lawyers to law school, our writing became ever more complex. Writing about complex or complicated issues, however, is not the problem. The problem with much of our writing, and lawyers and law professors are particularly guilty of this, is that over the years we can develop some very bad writing habits. We do not do this intentionally. We do so perhaps, as Judge Painter suggested in an excerpt from him, we quoted in the preceding section, because we read text from others that is poorly written and unfortunately incorporate those bad habits into our own writing. And then once we write poorly, we simply repeat the same bad habits time and again. This is a variation of the same problem that might plague a golfer that develops a bad habit when swinging the golf club. Repeating the same bad habit swing after swing only serves to engrain the problem in the golfer's brain and body mechanics, making correction of the bad habit all the more difficult to overcome. The same is true with writing. Bad habits can be challenging to overcome without first realizing the nature and extent of the problem and then practicing the correct way to overcome the problem(s). We also tend to write poorly because we write too fast. Too often we do not take the time to critically edit our work and to write with concision.[9] Often, of course, we do not receive feedback about our writing, as we sometimes did while in school (at least if we were taking a writing class). Some of us might feel that our educations would be wasted if we do not use the longest, most complicated words (including verbs) we can find. Sometimes we simply are too lazy to ensure we are not weakening the verbs we use.

These bad habits, cumulatively, have many unintended and undesirable consequences. Nothing will undercut the Four C's more than misusing verbs. Their misapplication will instead lead to writing that is vague, wordy and incomplete. The goals of our paper are simple: we will identify the principal misuses of verbs in legal writing and we will offer concrete strategies on how to use verbs so that your writing will be clearer, more concise, more engaging and highly persuasive. Many readers will probably be surprised to learn what these misuses are. This is because you have been conditioned over the years to misuse verbs in your own writing and because

9 The noun concision means briefness or brevity. In writing concision means to write with economy and to express our ideas with as few words as possible. We will discuss concision further in Section 7.

you have read so much text misusing verbs. We can guarantee you that following these strategies will also drastically improve the overall quality of your writing and will help eliminate legalese.

Let's get started! Lights, camera, action!

2 The Basics of Verbs

A verb is a part of speech used to describe motion or convey a subject in action. Verbs are at the heart of every sentence. They signify actions, states, or occurrences. Verbs are to sound writing what actor John Wick is to action thrillers. As Hey (2023)[10] aptly notes,

"Welcome to the vibrant world of verbs, the action-packed heroes of the English language! If nouns are the actors, then verbs are undoubtedly the directors, dictating the action and steering the narrative. Their significance in communication is unparalleled; they breathe life into our sentences and stories, turning static words into dynamic tales."

Verbs are a critical part of speech because without them a sentence cannot exist. Consider the following: *It took Tom two months to his paper*. This is an incomplete sentence because it is missing the action verb "*write*." There are five types of verbs that help make a sentence. Action verbs express an action that is either physical (talk, run, fall, write etc.) or mental (think, hope, choose etc.). Linking verbs link the subject of a sentence to another word: appear, be, feel, grow, look, remain, seem, smell, sound, stay, taste etc. Auxiliary or helping verbs changes the tense (when something happened), voice (relation of the subject to the verb and is either active or passive), or mood (a statement of fact, what might or could be, or give a command or plea): be, do, have, can, may, shall, was, will etc. Transitive verbs transfer the action from one noun to another and always has an object that receives the action of the verb or completes the meaning of the verb, for example: *Tom took the job*. Intransitive verbs do not transfer action so they do not have an object, for example: *The computer broke*. We will focus in this paper on the importance of action verbs.

[10] R. Hay, op. cit.

Verbs are awesome! Consider this: A verb is the only part of speech that can be a sentence by itself, with the subject in most cases you, implied, such as: Go! Drive! Sing! Run!

Verbs are not only critical to writing complete sentences, they are indispensable to writing forcefully, clearly, exactly, crisply and economically. Strong verbs make for excellent writing and bring written discourse to life. They add punch to any writing. Remember when we were small children and learning how to safely cross the street? Our parents and teachers told us to "*Stop, look, and listen*." We were told to *stop* to make sure nobody was coming into our path, to *look* both ways, and to *listen* for other people or cars or cycles. *Stop, look* and *listen* are all short, strong verbs. We remember this phrase our entire life in good measure because these verbs are powerful. Your reading audience will similarly remember what you write better and longer when you use as many strong verbs as possible.

3 Mind the Gap!

"Mind the gap" or sometimes "watch the gap" is an audible or visual warning phrase issued to rail passengers to take caution while crossing the horizontal, and in some cases vertical, spatial gap between the train doorway and the station platform edge. The phrase was first introduced in 1968 on the London Underground in the United Kingdom. It is popularly associated with the United Kingdom among tourists because of the particularly British word choice (this meaning of the verb *mind* has largely fallen into disuse in the United States where the term "watch your step" is more commonly used). For our purposes, the key principle when minding the gap in our writing is to strive to keep the subject of the sentence and the verb close together, preferably near the beginning of the sentence, and to avoid separating them with words or phrases (i.e. the gap) that will probably create confusion. The reason this is good practice is because your readers expect the verb, a word that describes an action, to be near the subject of the sentence. The problem is simple. When the author instead inserts text, in some cases a lot of text, between the subject and the verb, by the time the reader eventually reaches the verb they will have forgotten what the subject was. This forces the reader to go back to the beginning of the sentence for clarification of the subject. Writing is not clear and concise if the reader is forced

to read your text more than once to understand what you are saying. In short, avoid or mind the gaps between the subject and verb. Here are several examples.

The *injured plaintiff's back and neck pain*, following three weeks of physical therapy and rest, *had decreased* by about fifty percent. By minding the gap, a clearer and more forceful version of this sentence reads as follow. The *injured plaintiff's back and neck pain had decreased* by about fifty percent following three weeks of physical therapy and rest.

Blackwell (2018), writing for the San Francisco Bar Association, states that because "Fast and easy comprehension by the reader should be every legal writer's goal," the writer must "Make sure the subject, verb, and object do not stray too far from each other." In the sentence, "The defendant filed a motion for summary judgment," defendant is the subject, filed is the verb, and motion for summary judgment is the object." Blackwell, citing Wydick's Plain English for Lawyers, 5th ed., provides an example of a sentence where the subject and verb are too far apart, leading to confusion. "A claim, which in the case of negligent misconduct shall not exceed $500, and in the case of intentional misconduct shall not exceed $1,000, may be filed with the Office of the Administrator by an injured party." In this example, the "gap" or distance between the subject (claim) and the verb (filed) is 22 words. Wydick closes (or minds) the gap by placing the intervening words between the subject and verb into a separate sentence.

"Any injured party may file a claim with the Office of the Administrator. A claim must not exceed $500 for negligent misconduct, or $1,000 for intentional misconduct."

Blackwell (2018) proposes making sentences with smaller gaps between subject and verb easier to understand by moving the intervening words (between the subject and verb) to either the front or end of the sentence. She provides the following two examples employing this sensible strategy. "This agreement, unless revocation has occurred at an earlier date, shall expire on November 1, 2012" becomes, when narrowing the gap, "Unless revoked sooner, this agreement expires on November 1, 2012." "The sentence, 'The defendant, in addition to having to pay punitive damages, may be liable for plaintiff's costs and attorney fees' becomes, 'The

defendant may have to pay plaintiff's costs and attorney fees in addition to punitive damages.'"

Lastly, Blackwell (2018) references another example from Wydick. The following sentence contains a 21-word gap between the verb (gives) and the object (cause of action).

"The proposed statute *gives* to any person who suffers financial injury by reason of discrimination based on race, religion, sex, or physical handicap a *cause of action* for treble damages."

The intent of this sentence becomes much clearer when the intervening words are placed at the end of the sentence. Here is a much-improved sentence once we mind the gap:

"The proposed statute *gives a cause of action* for treble damages to any person who suffers financial injury by reason of discrimination based on race, religion, sex, or physical handicap."

Pedestrians that are rushing to get on or off a subway might suffer serious injury when they trip and fall because they failed to mind the gap. Similarly, legal writers that fail to mind the gap by distancing the subject and verb with many intervening words will do serious damage to their text. They will confuse their reader, waste their reader's time by forcing them to labor over their text, and weaken the arguments or points they are trying to convey. When writing, always remember to mind the gap!

4 Do Not Be Passive; Get Active!

4.1 Understanding the Difference Between Active and Passive Verb Tense

All texts relating to English grammar implore writers to use the active instead of the passive voice. As an adjective, active means energetic; moving vigorously or frequently; characterized by being busy or lively.[11] In grammar, the active voice

[11] Oxford Languages Dictionary. [13] Oxford Languages Dictionary.

denotes a voice of verbs in which the subject is typically the person or thing performing the action and which can take a direct object (e.g. *she loved him* as opposed to the passive form *he was loved*). Passive is the opposite of active. The dictionary defines passive, as an adjective, as accepting or allowing what happens or what others do, without active response or resistance (e.g. the women were portrayed as passive victims)[13]. Synonyms of passive include indifferent, quiet, sluggish, disinterested. In short, active verbs strengthen writing. Constantly using the passive voice of verbs does indeed make writing ambiguous and sluggish. Furthering our action movie analogy, us legal writers using the passive voice leads to weak verbs and has the same impact on our readers as James Bond taking time out of his action scene for a cup of coffee at the cafe!

Your American author was born, raised and educated in Michigan. He was a member of the Michigan bar for many years and practiced there several years before relocating to Washington, where he practiced in the area of litigation for 30 years, before retiring and moving to Slovenia, where he teaches legal English as a Senior Lecturer. The Michigan Bar Association publishes the *Michigan Bar Journal* monthly. For decades it has included "Plain Language" columns as a regular feature. Over the years, your American author always looked forward to reading the *Plain Language* columns, which have had as their purpose to improve the clarity of legal writing and the public opinion of lawyers by eliminating legalese.[12] In 2005, Mark Cooney, who teaches legal research and writing at the Thomas M. Cooley Law School in Michigan, wrote two articles for *Plain Language* entitled Stay Active! Part 1 and 2. We have found no better articles discussing this topic specifically in the sphere of legal writing, and since the examples Cooney provides are legal examples, this section of our article draws heavily on his contributions. We have used multiple other contributions from the Michigan Bar Journal to discuss the proper (and improper) use of verbs.

Here is how Cooney (2005) simply describes the fundamental difference between the active and passive voice.

[12] Joseph Kimble is the longtime editor of *Plain Language*. A graduate of the University of Michigan Law School in 1972, Professor Kimble is a Distinguished Professor Emeritus at Thomas Cooley Law School in Michigan. He has published dozens of books and articles on legal writing. His Cooley Law School biography states, "I think no reform would more fundamentally improve our profession and the work we do than learning to express ourselves in plain language." Your American author would like to express his gratitude for the substantial efforts Professor Kimble has made to the Plain Language movement in the legal profession. I have no doubt many of my colleagues share my sentiments and I know my writing is much improved thanks to his works.

"Active voice means that the subject is 'doing' the action in the verb instead of following the verb and being 'done to.' But let's keep it simple and think of active voice as the actor (or agent) doing the action. That's move vivid. We can look at the model of a typical sentence to illustrate this and to see the difference between active and passive voice: *Active* =

Actor (Subject)		Action (Verb)	Object
The attorney *Passive* =		argued	the motion.
Object		Action (Verb)	Actor (Subject)
The motion		was argued by	the attorney."

Admittedly, sometimes it can be difficult to spot the passive voice when reading text. To some extent it's like driving a vehicle in the wrong gear. When you do so the vehicle is not quite operating to its capacity. You can first feel the problem and then you realize what the problem actually is and what you need to do to fix it. When you shift to the correct gear then the vehicle runs much smoother. The same is true concerning use of the passive voice. When you read text using the passive voice it does not quite sound right. It sounds a bit awkward and weak.

Cooney[13] provides several additional examples.

"*Passive:* The privilege has been consistently *extended* to quasi-legislative proceedings by Michigan's appellate courts. The actors are Michigan's appellate courts. Their action is extending. So, move 'Michigan's appellate courts' up to the front and make them do the action: *Active: Michigan's appellate courts have consistently extended* the privilege to quasi-legislative proceedings. Another example: *Passive:* The treatment was provided to Ms. Smith for two weeks by the hospital's cardiac team. *Active: The hospital's cardiac team treated* Mr. Smith for two weeks. Which style would you rather read over the course of a 20-page brief? Sometimes the 'actor' doing the action will be an inanimate thing rather than a person: *Passive:* Recovery is prohibited by the statute if the injured person has not given timely notice to the insurer. The actor in the main clause of that sentence is the statute. Move it up front, and let it do its thing: *Active: The statute prohibits* recovery if the injured person has not given timely notice to the insurer."

[13] M. Cooney, op. cit. (2005).

4.2 Benefits of Using the Active Verb Tense

The before and after examples discussed in the last subsection illustrate that writing in the active voice leads us to use strong verbs which in turn strengthens our writing. Therefore, "argued" is preferable to "the argument was made by." As we have discussed, verbs are action words. Action words bring punch to our writing. Jason Borne, right in the middle of a chase scene, does not suddenly halt the action to smoke a cigarette. Doing so would diminish the entire scene. In your legal writing, do not dilute action verbs by using the passive voice.

There are other benefits to using the active voice. Professor Kimble wrote an article for *Plain Language* in 2002 entitled The Elements of Plain Language. This article was a recast of a law review article he had written on this topic in 1992.[14] One of his principal guidelines for effective legal writing is to prefer short and medium-length sentences over longer ones. Kimble recommends, "As a guideline, keep the average length to about 20 words."[15] Cooney (2005) observes that "Active-voice sentences tend to be shorter. It usually takes extra words to write in the passive voice. And good, strong verbs are lost: *Passive: The argument was made* by the hotel's attorneys that the Commerce Clause could not be extended so far. *Active:* The hotel's attorneys *argued* that the Commerce Clause could not be extended so far."[16] The first sentence, using the passive voice, consists of 18 words while the second, using the active voice, states the same thing, only more forcefully and economically, using only 13 words. True, both sentences are within Professor Kimble's general guidelines for trying to limit the average length of sentences to about 20 words. And you might say that using the active voice in this example "only" saved five words. However, over the course of a long legal memorandum or article all of these word savings add up. Here is another example. The statute was applied by the court. Changing the sentence to the active voice, The court applied the statute, condenses the sentence from seven to five words and makes the statement more forcefully.

[14] J. Kimble, op. cit. (1992).
[15] J. Kimble, op. cit. (2002), p. 44.
[16] M. Cooney, op. cit. (2005), p. 38

Your authors spend a significant amount of time editing legal manuscripts. It is always interesting to observe the number of words a manuscript has at the beginning of the editing/proofreading process compared to the number at the end. We find that writers that improperly use verbs (and nominalizations, discussed in Section 5) tend to be verbose. The word count for such authors typically is significantly reduced once edits are completed and unnecessary words removed. Effective writing is concise. It eliminates unnecessary words. It gets to the point without wasting the reader's time. Utilizing the active voice is one technique for dramatically increasing precision in your writing.

The failure to use the active voice can lead to unintended adverse legal consequences. Professor Cooney has provided numerous examples of the courts issuing adverse rulings against parties that failed to adequately express their intent by sloppily using the passive voice. Here we will provide two examples. "The Seventh Circuit questioned the sufficiency of evidence supporting a prisoner's conviction for possessing a sharpened weapon where the prison guard's report was 'written largely in passive voice and never identifie[d] which inmates either received the razors or returned the razors without blades.'"[17] In another case, "A juvenile court's written findings of fact were not an adequate basis for terminating parental rights when 'the juvenile court's use of the passive voice obscure[d] its conclusion regarding the identity of the abuser or abusers.'"[18]

5 Nominalization – A Verb's Lament[19]

5.1 Nominalization Explained – Converting Verbs Into Nouns

Perhaps the single largest error we see in legal writing is authors' converting verbs into nouns. It is not clear to us why lawyers and legal professors develop this bad habit, but there is no denying they do. Doing so violates the four C's of writing because it makes writing less clear and less concise. Nominalizing verbs—transposing strong verbs into nouns—takes the "action" out of verbs. Think back to our opening analogy of how action movies can relate to legal writing. As

[17] *Ibidem,* quoting from *Castro v. Hastings,* 74 Fed. Appx. 607, 609 (CA 7, 2003).
[18] *Ibidem,* quoting from *In re MJB,* 140 SW3d 643, 656 (Tenn. App. 2004) (The court affirmed termination on other grounds).
[19] M. Cooney, op. cit. (2006), p. 40.

moviegoers we do not want to see action scenes in any way diluted. We want nonstop action. We also do not want to sit through long movies that could be shortened by prudent editing. Just as movie editors have to remove any unnecessary clips of film that do not add to the overall plot, so as not to bore the audience, legal writers must engage in this same process. Legal writers that nominalize verbs do a great disservice to their writing and hence their reading audience. As we will see, nominalizing verbs lengthens our writing. It forces our readers to spend more time ploughing through our text than is necessary.

Many have written on this topic. However, we believe that the one written by Professor Cooney is one of the best and most interesting. A verb and legal writer (author) meet in a tavern and discuss what the nominalization of verbs is by presenting concrete (and actual) examples from the legal realm. Verb explains to author, in a humorous and memorable way, why nominalization of verbs constitutes poor writing. We have decided to reproduce his article in whole because it left such a favorable impression on us. And we believe it will do so on you as well. The name of Professor Cooney's article is *A Verb's Lament*.

"On a hunch, I stepped into a bar around the corner from an office building filled with law firms. B.B. King riffs filled the smoky room. And there it was: Sitting at the bar, with its head hung over a Scotch and water, was a verb. Author: Why so glum? Verb: You know, just the usual stuff. Author: What usual stuff? Verb: Well, it's those lawyers again. A lot of them just don't seem to like me. They make me feel so … so … well … *nominalized.* Author: Buddy, I'm no psychiatrist. What do you mean? Verb: I'm a nice, simple verb, but they aren't satisfied with that. They try to change me into some highfalutin, abstract noun with a bunch of extra words. Author: Give me an example: Verb: Sure. Suppose a lawyer wants to say that a statute 'protects' a certain class of people. That's just fine the way it is. But many lawyers inflate simple verbs like *protects* to make them sound more impressive: 'The statute *provides protection for* workers who are discriminated against because of their age.' That took three words to say what one simple verb said better. They … they do it to me all the time. [The author hands the verb a tissue.] Author: Does nominalizing a verb always add extra words? Verb: I can't see how it wouldn't. Sometimes it takes three, four, even five words to say what one little verb says just fine. Check these out: Example: The defendant *made the argument* that the plaintiff's lawsuit was untimely. Better: The

defendant *argued* that the plaintiff's lawsuit was untimely. Example: The parties *engaged in a discussion over* the possibility of a settlement. Better: The parties *discussed* the possibility of settlement.

Author: I see the improvement. Verb: Some writing experts call nominalized verbs 'buried' verbs. A writer who nominalizes a verb has killed the poor thing, so it might as well be buried. It's verbicide! Author: Settle down, fella. Is this really that big a deal? Verb: Imagine being forced to read these wordy, lifeless nominalizations page after page in a long brief. Which style do you think a busy judge would rather read? Author: Okay, okay, I get it. But what makes you think that lawyers are the culprits? Verb: Don't get me started on letters to clients, with all that *we have effectuated service on* junk instead of *we served.* I see it in briefs all the time. Author: Prove it. Verb:

Okay, smart guy. Here are some real-life examples:

Brief: 'This event . . . *caused an interruption in the* flow of their testimony.' Better: This event *interrupted* the flow of their testimony. Brief: 'Neither she nor any other individual had *made an assessment of* [the] attachment.' Better: Neither she nor anyone else had *assessed* the attachment. Brief: 'APHIS then *undertook an investigation into* the cause of the larvae finds.' Better: APHIS then *investigated* the cause of the larvae finds.

Author: You've certainly done some digging. Verb: You and your lawyer friends will impress judges, judicial clerks, and clients far more if you just give us verbs a chance. Author: Yeah, well, I guess now we've come to an understanding about each other. Verb: You mean, now *we understand* each other. You're all hopeless. Bartender!"

5.2 Use Strong Base Verbs – Eschew Nominalization; Further Legal Examples

Wing also recommends that legal writers use strong base verbs, to the exclusion of derivative nouns. He is quite right to state,

"Strong sentences require strong base verbs, words that tell what people do. Offerors revoke. Attorneys represent. Verbs breathe life and action into the sentences. Lose them and the sentences are dead."[20]

By now you might have noticed some striking parallels between the use of the passive voice instead of the active and nominalizing verbs into mushy nouns. Any writing, but particularly legal writing, to be effective and simple for the reader to understand, must be crisp and concise. It must be strong and to the point. Using active verbs and avoiding nominalizing them is not difficult because nominalizations are easy to locate because they usually end in the following ways: -ion, -ment, -ance, -ence, -ancy, -ency, -ant, -ent, -al. Further, verbs that have been nominalized are usually accompanied by wordy prepositional phrases. Here is another before and after example. The nominalized sentence reads: There was quite a bit of *disagreement* between the judges on the high court *over the decision* whether to offer the judicial assistant position to the graduate from Oxford Law School or Harvard Law School. Converting this wordy sentence (35 words) to the active verb sentence we now have this sentence: The judges on the high court *disagreed* considerably whether to hire the Oxford or Harvard law school graduate for the judicial assistant position. (23 words).

Here is a list of some common nominalizations and how to properly use them as active verbs:

NOMINALIZATION	ACTIVE VERB
Took notice	Noticed
Provides responses	Respond
Interpretation	Interprets
Made a decision	Decides or decided
Suggestion	Suggest
Destruction	Destroy
Gave a report	Reported
Gave or Made a statement	Said
Result in delay	Delayed
Conduct an examination	Examine
Caused confusion	Confuse
Reaction	React
Movement	Move
Have knowledge of	Know
Reliance	Rely

[20] F. G. Wing, op. cit., p. 150.

NOMINALIZATION	ACTIVE VERB
Revocation	Revoke
Is binding on/upon	Binds
Tendency	Tend
Statement	State
Conclusion	Conclude
Performed a search on	Searched
Make or made a payment	Pay
Was in conformity with	Conformed
Made application	Applied
Reached a conclusion	Concluded
Involved in a collision	Collided
Take action	Act

Wing (1989) states "Sentences built around derivative nouns are often longer than need be. It simply takes more words to hold the sentence together."[21] Wing used two of the base words set forth in the list above – revoke and conclude – and used one of the common word endings -ion to nominalize the verbs into nouns in the following two examples:

Nominalized sentence: There has been a revocat*ion* of our offer. (8 words).

Active (root) verb sentence: We revoke our offer. (4 words).

Nominalized sentence: The conclus*ion* that I have reached is that the terms of the contract are fair. (15 words).

Active (root) verb sentence: I conclude the terms of the contract are fair. (9 words). Judge Painter (2010)[22] in his article on Writing Smaller, when discussing nominalizations, offers the following examples:

"Do not write *filed a motion* unless the filing itself has some significance. *Filed a motion* conjures up in readers' minds someone walking up to the clerk's counter and having a pile of papers stamped. Write (instead) *moved. Smith moved for summary judgment.* Nominalization is taking a perfectly good verb, such as *examine,* and turning it into a

[21] *Ibidem.*
[22] M.P. Painter, op. cit., p. 54–55. Painter provides a useful list of common nominalizations used in legal writing. We have used several of them in our list.

noun, *examination*. Then you need a verb, which is always a weak one, in this case *make*. *Make an examination of* is four words, three of them useless."

"The preposition *of* is sometimes a marker for nominalizations. Always question any *ofs* in your writing – they may mark not only nominalizations, but also false possessives. Write *Ohio Supreme Court,* not *Supreme Court of Ohio*. There is nothing wrong with the possessive. Write *the court's docket,* not the *docket of the court*. Recently I read *upon motion of Harmon*. Why not *on Harmon's motion?* Somewhere, someone told lawyers not to use possessives, maybe because *docket of the court* sounds more formal. Or maybe we got confused by someone banning contractions from legal writing (another error) and the possessive apostrophe got unjustly maligned. Whatever the error's genesis, the *of* construction is clutter. And much harder to read."

6 To Be or Not to Be – That Is the Question

In William Shakespeare's play Hamlet, Hamlet famously says, "To be, or not to be, that is the question: Whether 'tis nobler in the mind to suffer the slings and arrows of outrageous fortune, or to take arms against a sea of troubles." Hamlet's soliloquy ponders the age-old issue of mortality, and whether one is better off alive or dead. Hamlet is thinking about his own mortality while also considering whether or not he should kill his uncle, King Claudius, who had killed the old King Hamlet. Many of us read and/or watched the play and know the main plot. But you might now be asking yourself what (if anything) this has to do with the proper use of verbs so as to improve the overall quality of our legal writing. The answer follows as "the night the day."[23]

Jacobson,[24] writing a column for the Oregon State Bar, does a superb job of explaining not only why "to be" verbs are weak and so dilute our writing but also how to solve the problem with their use. He offers the sound advice to use *to be* verbs only for definition, description or status. The problem, according to Jacobson,

[23] Since we are using William Shakespeare and his famous play Hamlet to make an important point about verbs, here is another famous line from the same play. King Claudius' chief minister, Polonius, as part of a speech where he is giving his son, Laertes, his blessing and advice on how to behave while at university, says "This above all: to thine own self be true, And it must follow, as the night the day, Thou canst not then be false to any man." To conclude our analogy of verbs to Polonius's speech, by correctly using verbs it must follow, as the night the day, we trained in the legal profession will help strike out legalese and please our reading audiences! Amen!

24 S.M.H Jacobson, op. cit.

is that *to be* verbs along with the words *is, am, are, was, were, be, been* and *being* fail to convey action, and thus are weak. These words only convey what exists rather than action. Eliminating them makes writing stronger and crisper because this strategy eliminates "weak subject/verb combinations, such as *there* and *it is* when *there* does not refer to a place and *it* does not refer to a thing."[25] Jacobson offers several examples of how to deal with the problem of *to be* verbs in our legal writing, and explains why doing so helps achieve writers' goals of shortening our writing, avoiding the passive voice and strengthening our message.

"Example: *There is a requirement that the court receive the petition within 70 days.* In this sentence, the *to be* verb is gratuitous (unnecessary) because the sentence includes two other verbs, *require* (in the form of a nominalization) and *receive.* Eliminating the *to be* verb and combining the two action verbs leaves a much stronger (and shorter) sentence: 'The court must receive the petition within 70 days. Eliminating the use of *to be* verbs has another delightful side effect: it eliminates nearly all passive voice. Passive voice occurs when you put the object of a sentence in the subject. The subject should contain the actor and the verb should contain the action of the sentence. When that does not occur, the reader has to interpret a sentence to determine who the actor is and what action occurred. If the sentence does not include the actor, the sentence becomes ambiguous and the reader may not understand what the writer meant to say. Passive voice involves a *to be* verb plus a past participle (verb + ed). Therefore, editing for unnecessary *to be* verbs will also help to eliminate passive voice. Example: *Both issues were determined by the jury in favor of the plaintiff.* In this sentence, eliminating the *to be* verb will eliminate the passive voice: 'The jury determined both issues in favor of the plaintiff.'"

The phrase well-oiled machine is a metaphor for something that operates effectively, whether that be an organization or in our case legal writers. We should strive to produce work product that will have our audiences believing we are well-oiled writing machines. Eliminating *to be* verbs whenever possible will help advance this goal. Noone can deny Shakespeare's brilliance, but while Hamlet's famous *To be or not to be* speech has made for great reading and play watching over the centuries, we legal writers are not Shakespeare. So, the answer to the question posed in subtitle 6 of this article is now obvious.

[25] *Ibidem.*

7 Use Verbs Like a Pro!

A common theme in our paper is that the proper use of verbs makes our writing more concise. This section demonstrates another strategy for tightening up our legal writing, making it both more forceful and easier to digest. Schiess,[26] in his excellent article on editing for concision, recommends that we use proverbs and elided verbs. These are two terms that even most native English speakers may not be aware of so let us first define them. A *pro-verb* is a verb that replaces a noun, and is parallel in meaning to a pronoun. Schiess states that the most common pro-verbs are *do* and *do so*. Elide[27] means to leave out or strike out. To elide something is to omit it or get rid of it. Politicians are frequently asked questions about their policies and what we can expect from them if they are elected or reelected to office. Skilled politicians will almost always elide certain topics that are too controversial or negative, and will elide data or information that they are too uncomfortable acknowledging.

Schiess provides examples of how to employ the pro-verbs *do* and *do so* to strengthen and tighten your writing. His two examples substitute *do so* for *order a new trial*. Example 1: "The court has the authority to order a new trial, but it should not order a new trial for three reasons." Here is the revised sentence using the pro-verb: "The court has the authority to order a new trial, but it should not do so for three reasons." Use of the pro-verb saves two words, but more importantly, prevents repetition.

Schiess, in Example 2, demonstrates how legal writers can also "elide verbs" where they are understood in order to further shorten the sentence while making it even more forceful. He does this by further removing words from the second verb phrase: *should not do so* becomes simply *should not:* "The court has the authority to order a new trial, but it should not for three reasons." In conclusion, by using both pro-verbs and elided verbs to improve concision, the original sentence, which consisted of 21 words, has been pared down to 17 words. This may not seem like a huge savings on words. But it is. When writing always be considerate of your audience and their precious time. Your readers will appreciate the effort you put into your writing and your messages will have more profound impact when stated as directly as possible.

[26] W. Schiess, op. cit., p. 36.
[27] The word elide comes from the Latin *elidere*, meaning to strike out or force out.

8 In Praise of Phrasal Verbs

We suspect that, as is the case with pro-verbs and elided verbs, discussed in the previous section, many reading this paper, and indeed even many native English speakers, do not know what a phrasal verb is, although they use them all the time. A phrase is defined as a small group of words standing together as a conceptual unit. Accordingly, phrasal verbs are phrases which consist of a verb used together with another word or words, usually a preposition or an adverb.[28] For example, if we consider *speak* as the basic verb together with the preposition *up,* we might form the following sentence (spoken by the judge in court): Please *speak up* so that the jury can hear you. This sentence means to speak loudly. In short, phrasal verbs are multi-word verbs that, like singleword verbs, convey action of the body or mind (e.g, *speak up, figure out*, the latter which means to determine something) or occurrences (e.g, *turn up*, which means something will show up).

Phrasal verbs bear a similarity to idioms[29] in the sense that the latter also consist of a phrase (two or more words) that has a unique meaning that cannot be deciphered by defining the individual words. Non-native English speakers often are curious about idioms and enjoy learning them, although they can be bedeviling for the very reason that the phrase conceptually can be very confusing. For example, the idiom *over the moon* has nothing whatsoever to do with the moon. Rather, it means being very happy or delighted. If your friend is *beating around the bush* they are not talking about gardening or bushes! Further, no one is taking a beating! Instead, they are avoiding speaking with you about something directly. The problem with phrasal verbs, as with idioms, is that they often have different meanings from the basic verbs that they use. We have already seen this with the example of *speak up*. Interpreted literally, this phrase would mean to talk while looking up. In reality, as a phrasal verb it means to speak loudly.

Why are phrasal verbs important? The answer is multifactorial. First, as with other idioms, they are used with frequency and so it is important to know they exist and to try to learn them. If you see a verb together with a preposition or adverb, and you are confused about the meaning, you will now be alert to the possibility you are

[28] Phrasal verbs are sometimes aptly called 'two-part verbs' and 'three-part verbs.'
[29] The word *idiom* is derived from the ancient Greek word idioma, which means a peculiar phraseology.

encountering a phrasal verb. They are extremely common both in legal writing and oral discourse and that makes them essential to mastering the language. Using them will help you express yourself with more ease. In fact, sometimes using a phrasal verb is the only way to express an idea. The following are some phrasal verbs that you will frequently encounter in legal writing and discourse.

The phrasal verb *carry out* means to perform. Standing alone, the words would mean to carry something (as in groceries) out from the store to the car and home. In legal parlance, as agent of the client, the lawyer is expected to *carry out* the client's instructions. *Depart from* would ordinarily mean to leave from Point A (e.g. Paris) to go to Point B (e.g. London). Indeed, at any train station we can hear announcements about: The train to London now departing from Platform 8. All aboard! However, as a phrasal verb *depart from* means to behave or act in a manner that is different or at variance from what is usual or expected. For example, the unfortunate attorney appearing before the disciplinary board for failing to *carry out* their client's specific instructions is now being reprimanded: Counsel, we have determined based on all evidence presented that you *departed from* the instructions you were specifically provided by your clients. Accordingly, we are placing you on probation for one year and you are ordered to take 10 additional hours of continuing legal education in the area of professional responsibility. You are also being fined $10,000.

Ordinarily, we might think of the phrase *enter into* as connoting movement, such as walking into or entering a building. However, in legal terms, this phrasal verb means to begin or become involved in a formal agreement. For example: The City of London and a group of developers *entered into* a Memorandum of Understanding that the project would move forward on the terms and conditions set forth in the document. As another example: Following the successful mediation session, the parties *entered into* a binding agreement that contained the terms of the settlement. The parties went to court and placed the agreement reached *on the record*. On the record in this context is simply an idiom, meaning into the court's official proceedings record (as opposed to a musical record).

Here is one final example. *Fall apart*. A non-native English speaker might not have the slightest idea what this means. And with good reason! The word fall is clear enough[30]. Such as in: Robert suffered a *fall* and was badly injured. Or using the past tense: Robert fell off of his skateboard and broke his leg. But then there is that tricky second word: *apart*. Apart means to one side or away from each other. For example, The two shops were about a mile apart from each other. However, as a phrasal verb *fall apart* means to break down. As an example: The parties negotiated all day and were very close to a resolution of the case. But at the last minute the negotiations *fell apart* over the issue of attorney fees and costs.

Most of the guidance we have offered in this article might be considered as positive steps you can take with verbs to improve your writing. Our discussion of phrasal verbs might be considered more negatively. In other words, as a general rule, since legal writing is formal, we caution against using phrasal verbs or other idioms as they are often considered too informal or colloquial. Nevertheless, they do have their place in legal writing and most certainly in legal oral discourse and it is imperative that you understand them.

9 Conclusion

Hey (2023)[31] provides a wonderful summary of the importance of verbs in our writing, and her conclusion applies to those of us in the legal profession as well.

"Verbs are the backbone of English sentences, a kaleidoscope of actions and states that give depth and dynamism to our language. Whether you're stringing a simple sentence or weaving a complex narrative, mastering the different kinds of verbs is essential. They're the conductors of clarity, the architects of articulation, and the essence of expression. Embrace the intricacies of verbs, and watch your writing transform from monochrome to a burst of technicolor brilliance."

[30] Well, not really. Fall also has a seasonal meaning, being synonymous with the word autumn. Homonyms are words which sound alike or are spelled alike but have different meanings. Homonyms are frequent in many languages, English included, adding to the difficulty in learning any language fluently. Principal and principle is another common example, with both words having distinct legal meanings. In agency law, the client is the principal and the attorney the agent. Principal also means the headmaster of a school. A principle of law means a rule or an idea.
[31] R. Hay, op. cit.

We have attempted to provide a concrete list of the most important strategies to help ensure your action words are not diluted through careless, lazy or sloppy writing. Here is a recap of those strategies:

1. Be sure to always Mind the Gap! To do this, make sure the subject, verb, and object in your sentences do not stray too far from each other.
2. Do not be Passive. Get Active! Remember Stanley, the Vitality Insurance mascot that encourages us all to Get Active! Staying active will help us live longer and will make our legal writing more forceful and memorable.
3. Nominalization is a Verb's Lament. Nouns are important but do not weaken your action verbs by converting them into further nouns. Doing so undercuts your writing by making it verbose and rambling. Think of that poor verb sitting in the tavern. In our writing let's help us cheer that poor guy (eh hem, Verb) up!
4. To be or not to be. That is the question posed by Hamlet in his famous soliloquy. We hope we have given you convincing reasons to eliminate, whenever possible, *to be* verbs along with the words *is, am, are, was, were, be, been* and *being* because they fail to convey action, and thus are weak. These words only convey what exists rather than action. As with action moviemakers, we legal writers want to keep our stories moving too, regardless of our specific audience. Using action words will keep our readers hanging on our every word. Should that not be the goal of our writing?
5. Use Verbs Like a Pro! Use pro-verbs and elided verbs whenever possible. A central theme of our article is to write with concision by properly using strong verbs. Using pro-verbs and elided verbs helps eliminate weaker nouns and will condense your legal writing. Your readers will appreciate having to spend less time consuming your message to them.
6. And please do not forget phrasal verbs. Just as you need to be mindful of the gap, you do need to be equally mindful of not littering your legal writing with informal words and phrases. On the other hand, there will be occasions where phrasal verbs will be necessary and it is important that you know what they are and how to recognize them.

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Naslov v slovenskem jeziku

Dilsuz: Luči, kamera, akcija: moč glagolov. Pisne strategije za zagotovitev, da vaši glagoli ne bodo oslabljeni zaradi površnega in nepazljivega pisanja

Povzetek v slovenskem jeziku

Besedne vrste so hrbtenica angleškega govora in pisanja. Sestavljajo jih samostalniki, pridevniki, glagoli, prislovi, zaimki, členi, predlogi, vezniki in medmeti. Ta članek se osredinja na glagole, ki so običajno besede dejanja. Glagoli oživijo govor in pisanje. Nepazljiva uporaba glagolov pisanje močno prizadene.

Oslabi ga in s tem zmanjša živahnost pisane besede. Avtorja analizirata glavne načine nepravilne rabe glagolov. Hkrati podata lahko razumljive, konkretne primere, kako se izogniti pastem nepravilne rabe glagolov. Pravilna raba glagolov je namreč pomembna

Ključne besede v slovenskem jeziku

Preprosta pravna angleščina, glagoli, nominalizacija, pravno pisanje, pravniški žargon.

HOMELESSNESS IN THE U.S.: WHY THE SUPREME COURT'S RULING IN CITY OF GRANTS PASS V. JOHNSON ALLOWING THE CRIMINALIZATION OF HOMELESSNESS IS BOTH CRUEL AND COUNTER- PRODUCTIVE

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Homelessness is a serious problem worldwide. Once fairly rare, it now is an urgent problem in the United States, where the homeless population has surged to record levels in 2023, especially in several western states, including California and Oregon. Root causes can be traced primarily to mental health issues, addictions, low incomes and especially the lack of affordable housing. Men are more often homeless than women. People of American Indian, Alaskan Native, or Indigenous descent, as well as people of Black, African American, or African descent, also experience higher rates of homelessness than the overall population. Residents of communities where homelessness has surged have urged politicians to take steps to curb the problem. To reduce encampments or tent cities and to appease their voting constituents, cities have enacted ordinances that allow for both civil and criminal penalties for those sleeping out of doors. These laws have been challenged in the courts, especially in the Pacific Northwest. The homeless found sympathetic judges in the federal Ninth Circuit Court of Appeals, which in several cases held anti-camping ordinances violative of the Cruel and Unusual Punishments Clause of the Eighth Amendment. At the end of the 2024 term, the conservative block of the United States Supreme Court reversed the Ninth Circuit in City of Grants Pass v. Johnson, thus allowing these ordinances to stand. The author believes, as did the dissenters in this case, that penalizing the homeless is counter-productive and a better, less expensive, and more compassionate long-term solution is for cities to adopt Housing First policies, such as those in Finland and other European countries.

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1 Introduction

As Shapiro[1] writes, "Home is everything. It's where we shelter from the world, take our first steps, and learn about life. Home shapes who we are, and then we shape it to reflect who we have become. Home runs deep in our identity as hu- man beings. It is the refuge where we sleep and dream. And, our home largely determines our health. The water we drink, the air we breathe, the security we feel all start at home. For the fortunate, home is where we thrive. For others, home is a roomful of risks or a memory carried on the streets."

There are many idioms relating to the concept of home. For example, East- West, home is best. This simple phrase connotes the idea that wherever one goes, their home is the place where they can come back and find peace and comfort. Another phrase "There's no place like home," also reflects the sentiment that one's own home is a special and unique place, unmatched by any other location.[2] Most of us always have had the good fortune, and indeed one that we have probably taken entirely for granted, of having a home to live in. Perhaps the home was large, medium-sized, or even small. Perhaps the home was an apartment. Or a dormitory when we were away at university. Or perhaps we have had temporary shelter in a hotel while away on holiday or for work purposes. But whether our home was or is extravagant or modest, it is our place of refuge.

Think of all the things that those of us having a home take for granted. The home shelters us from the weather: it provides cooling from the heat and sun, warmth during the cold months of winter and keeps us dry from the rain and snow. It is a place to store our food, prepare our meals and eat. It is a place where we can bathe, go to the bathroom and otherwise take necessary steps to maintain proper hygiene. It is a place where we can store our personal belongings so they are protected from the elements and theft: our clothing, electronic devices, books, keys, personal identification, sports gear etc. It's a place where we can relax and perhaps watch television and listen to music. It's a place where we can congregate with family members, friends and colleagues. It's a place where we can study. Where we can recuperate when we are ill. And, it's a place where we can sleep and get proper rest.

[1] S. Shapiro, *op. cit.*
[2] This phrase gained popularity through its association with the famous line spoken by Dorothy in the classic film "The Wizard of Oz."

Two things most of us probably take for granted are our health and our home. One day we are healthy and active without a care in the world. The next day we come down with the flu and are bedbound for a week. Or worse, we receive a devastating diagnosis such as cancer from our doctor. But as we shall see in reading this paper, we also take having a home–a place to live–for granted. And as we shall also see, issues of health, physical and mental, and home are intertwined.

Homelessness is a serious problem worldwide. This paper will tackle the is- sue of homelessness from various angles. The focus will be the United States. I shall start by discussing the scope of the problem. This section will include a statistical analysis concerning the number of homeless in America and how, alarmingly, this number has increased over time. This section will also discuss where in America the problem is particularly acute, along with a discussion of which members of American society are impacted the most, by gender, race, age, and other demographics.

The paper will then explore the myriad causes of homelessness. It is easy for most of us who will never experience the humiliation of being without shelter to judgmentally conclude that those living on the streets–on a park bench or a piece of cardboard on the stoop of a public building–must have "done something wrong." We might think, for example, that they just failed to stay in school. Or, they are just lazy and do not want to go to school or work. Or, using the derisive language we have heard from former US President Donald Trump, they are losers. Scientists and researchers have extensively examined the root causes of homelessness. The paper will share their findings.

There always have been homeless people, and I suspect there always will be. So, you might ask, why write this paper now? And what does this have to do with the law? I will be completely forthright upfront. I was trained as a lawyer and spent 35 years practicing law: first in Detroit, Michigan and later in Seattle, Washington. In Michigan, I experienced firsthand the good and bad aspects of capitalism. Some of the largest corporations[3] and some of the wealthiest people in America live in Michigan, while it also is the home to some of the poorest and downtrodden cities

[3] Major corporations in Michigan include Ford Motor Company, General Motors, Bosch USA, The Dow Chemical Company, Kellogg, to name just a few.

in America.[4] Michigan has its share of homeless. Seattle, on the other hand, is a very wealthy city, home to corporations such as Starbucks, Boeing, Microsoft, and Amazon, to name but a few. The Pacific Northwest region of America, which includes Washington, Idaho and Oregon, has many homeless people, in part because there are relatively mild weather conditions year round, and those unfortunate souls without a roof over their heads at least will not die from the weather. Many cities in the Pacific Northwest have turned to passing legislation[5] that has criminalized the status of being homeless. Penalties for breach of these criminal ordinances include fines and even jail time. These legislative enactments, deemed necessary by local communities and other actors to clean up the streets and neighborhoods from blight caused by the homeless, have come under attack by other groups that have tried to intervene in support of the homeless. These competing groups have found themselves embroiled in litigation over the constitutionality of these legislative enactments. As we shall see, the Ninth Circuit Court of Appeals has issued several rulings holding that legislation enacted by certain cities in Oregon is unconstitutional under the Eighth Amendment's Cruel and Unusual Punishments Clause. However, in the recently decided case of *City of Grants Pass v. Johnson*,[6] in a 6-3 ruling, the Supreme Court reversed the Ninth Circuit and held that the ordinances in question did not violate the Cruel and Unusual Punishments prohibition. The majority decision, written by Justice Gorsuch, was joined by all of Gorsuch's conservative Justices. Justice Sotomayor wrote a scathing dissent, joined by her two liberal colleagues, Jus- tices Kagan and Jackson. The dissenters would have affirmed the Ninth Circuit Court of Appeals. My paper will analyze both the earlier Ninth Circuit rulings bearing on this topic as well as the Supreme Court jurisprudence in question.

The paper will also briefly discuss some of the treaties and international instruments bearing on the question of homelessness and the legal obligations that States have to ensure their citizens have shelter. It also will briefly discuss why the United States, at least those States that do not provide their residents with proper shelter, may be in violation of those treaties and international instruments. It also will discuss strategies employed by other countries and some American States to utilize long-term progressive strategies, in particular so-called Housing First schemes, rather than

[4] Grosse Pointe, Grosse Pointe Farms and Bloomfield Hills are among the wealthiest while cities such as Flint ad River Rouge are among the poorest.
[5] Legislation at the local level (i.e., cities, towns, villages etc.) are called ordinances.
[6] *City of Grants Pass v. Johnson*, 603 U.S. _____ (2024)

short-term civil and criminal sanctions, to combat the issue of homelessness. The article will conclude with my personal commentary.

2 The Scope of Homelessness

2.1 Homelessness Worldwide

"The problem of homelessness knows no barriers and countries all over the world struggle to combat this awful problem."[7] A 2024 comprehensive study by Homeless No More8[8] states that "[E]stimates suggest that approximately 150 million people are homeless worldwide, with as many as 1.6 billion lacking ade- quate housing."[9] This same study points out that since the global population sur- passes seven billion, "The percentage of the world's population that is homeless, therefore, hovers around 2%, a figure that underscores the urgency of address- ing this humanitarian crisis."[10] According to Filipenco,[11] Nigeria has the world's highest number of homeless people. With a population of 218.5 million, Nige- ria's homeless population is 24.4 million. Accordingly, over 9 percent of Nigerian people are homeless. Nigerians often migrate from rural areas to large cities in search of shelter, money, and opportunity, but many have trouble adjusting to city life for a variety of factors. These include the high cost of living, lack of social support, challenges in securing work, abuse, and hazardous jobs performed for low wages.[12] Filipenco states that Syria has the world's highest homeless rate, with one-third (6.56 million), or about 29.6 percent, of the country's 22 million population being homeless.[13] The largest factor behind the homelessness situation in Syria is its long-standing war, which has left 90 percent of the population in poverty. The Syrian infrastructure has largely collapsed.[14]

[7] World Population Review.
[8] Understanding Global Homelessness: A Comprehensive Analysis, in Homeless No More, *op. cit.*
[9] *Ibidem*, citing <https://www.homelessworldcup.org/homelessness-statistics>.
[10] *Ibidem.*
[11] D. Filipenco, *op. cit.*
[12] *Ibidem.*
[13] *Ibidem.*
[14] *Ibidem.*

According to Filipenco, numerous factors contribute to homelessness, many of which are interconnected, although a given country's homelessness rate will depend on its unique situation. In general, however, principal factors driving homelessness include: conflicts (whether civil or other wars) which lead people to lose their homes (with many not being able to secure shelter); natu- ral calamities that destroy homes, leaving families without a place to live; the absence of affordable housing, which is often exacerbated when a person be- comes unemployed due to layoffs, physical or mental problems; people who simply do not earn enough to be able to cover rent or a house payment.[15]

Striking a more positive note, Filipenco points out that at least some countries can boast of very low rates of homeless people. Iceland, Finland, and Japan have the lowest number and rate of homeless people.[16]

> "Iceland, with only 349 persons per night, has the lowest homeless population on the European continent and one of the lowest in the world. In 2018, the nation announced that tackling homelessness was a priority, with one of the goals being to build homes for homeless people."[17]

Finland is also on this notable list. Finland's Housing First policy has dramatically reduced homelessness in the Nordic country. "The latest data shows that 3,950 homeless people were living in Finland at the end of 2021, a decrease of 390 compared to the previous year."[18] Finland's homelessness rate is a remark- able 0.08 percent.[19] I will discuss Finland, and other European countries employing a Housing First strategy to tackle homelessness in Section 5.0.

Japan can boast of the world's lowest rate of homelessness. There is only one homeless person per 34,000 residents, a rate of 0.003 percent.[20] This is truly remarkable since Japan has a population of around 125.7 million people. Filipenco states that the Japanese government has carried out an assessment for the last twenty years tracking the number of homeless. The number has steadily decreased from

[15] *Ibidem.*
[16] *Ibidem.*
[17] *Ibidem.*
[18] *Ibidem.*
[19] *Ibidem.*
[20] *Ibidem.*

around 26,000 in 2003 to less than 3,500 in 2022. The steady decline can be attributed to initiatives undertaken by local authorities and regional NPOs.

> "Japan's diverse strategy to reduce homelessness involves giving those who lack housing access to resources, permanent shelter, and community assistance."[21]

2.2 Rates of Homelessness in the United States

2.2.1 Introduction

For all of the successes it can boast of, particularly its economic prowess, the United States nevertheless has a significant homelessness problem. This is a paradox that, upon consideration, is difficult to come to grips with or to explain under any rational basis. How can the leading democracy in the world, home to roughly 800 billionaires in 2024,[22] and over 24 million millionaires, the world's epicenter of innovation, a country that many foreigners aspire to immigrate to, have a homelessness crisis that is worsening? People who only read about America, or perhaps know it from Hollywood movies, are often shocked when they actually visit America and witness the stark contrast between the shockingly rich and equally shockingly poor. Let me give you but two examples.

Several years ago, while living in Seattle, Washington, my family was at the airport awaiting a plane to take us to Europe. As it happened, also in the waiting area was a young family from Scandinavia that had just finished their visit to North America, including British Columbia, Canada, and the west coast of the United States, including California. This family had two primary school- age children. Making casual conversation, I inquired about their impressions of their journey. The father said this. While they enjoyed the many beautiful sights and attractions, they were shocked by the amount of poverty, blight and homelessness they observed. They simply had not realized this was such a problem in the United States. Both parents also told me that their young children were also very surprised.

I visited Las Vegas on many occasions, primarily because my legal work took me there for seminars pertaining to asbestos litigation, which was one of my longstanding areas of defense practice. It is the gambling and entertainment capital

[21] *Ibidem.*
[22] D. De Vise, *op. cit.*

of the United States. Nowhere in America is the dichotomy between wealth and poverty greater than in this city of opulence. Inside the Bellagio Casino or many other casinos, you will find throngs of patrons literally throw- ing away thousands upon thousands of dollars on every imaginable gaming table, and using their credit cards to pay hundreds for a seat at one of the many concerts and shows. There are vast food buffets and the alcohol flows. Las Vegas is a beehive of activity 24 hours a day, 365 days a year. There are no quiet times in Sin City or the City of Lights, as it is variously known as. Yet, meander just a few blocks off the so-called Strip, and one quickly notices what that family from Scandinavia observed during their visit to America. Down- trodden souls, clinging on to grocery carts that hold their life possessions: a few items of clothing, perhaps a blanket, and some cardboard to sit and sleep on. These persons walk the Vegas streets looking for leftover McDonald's food or perhaps pizza in garbage cans and dumpsters. Some beg tourists for some spare change. Homelessness in America is widespread. It knows no boundaries. It persists from coast to coast, and north to south. And as I will discuss in the following sections, the problem is worsening.

2.2.2 America's State of Homelessness 2024–Key Facts

This section of my paper draws heavily upon a publication from the National Alliance to End Homelessness, entitled State of Homelessness: 2024 Edition [hereinafter SOH 2024]. This publication uses data collected by the U.S. Department of Housing and Urban Development (HUD), particularly its 2023 Annual Homeless Assessment Report to Congress (AHAR).[23] It analyzes data on homelessness for 2023 and over time. SOH 2024 first provides an overview of key facts and data points, while the remainder of its report fleshes out these key findings in detail. I will start by restating the key findings and then will discuss what I consider to be some of the more salient underlying data, which I think the reader of this paper might find the most interesting.

A record-high 653,104 people experienced homelessness on a single night in January 2023.[24]

[23] State of Homelessness: 2024 Edition, National Alliance to End Homelessness, op. cit. In the text I will refer to this publication as SOH 2024.
[24] The SOH 2024 explains this measurement, known as a 'Point-in-Time Count.' The PIT is a count of sheltered and unsheltered people experiencing homelessness on a single night in January. HUD requires that a group known

This is more than a 12.1 percent increase over the previous year. More people than ever are experiencing homelessness for the first time. From 2019 to 2023, the number of people who entered emergency shelters for the first time increased by more than 23 percent.[25] There are record-high numbers of people living unsheltered, especially among individuals. In 2023, a record-high 256,610, or 39.3 percent of all people experiencing homelessness, were unsheltered. More than 50 percent of individuals experiencing homeless- ness were unsheltered.[26] A severe housing cost burden is on the rise. The num- ber of renter households paying more than 50 percent of their income on rent increased dramatically, rising over 12.6 percent between 2015 to 2022. People who identify as Native Hawaiian/Pacific Islander, Black, Hispanic, Asian or 'Some Other Race' are more greatly impacted.[27] After years of declines due to targeted assistance, the number of veterans and chronically homeless[28] in- dividuals experiencing homelessness are both rising again, with a seven per- cent and twelve percent increase, respectively, since the previous year.[29] Finally, while the homeless response system continues to add more temporary and permanent beds each year, it increasingly serves more people, and accordingly needs more resources to combat the nationwide affordable housing crisis.[30]

2.2.3 Where Do People Experience Homelessness?

Homelessness, although having no borders and being widespread, is an acute problem in seven states: California, New York, Florida, Washington, Texas, Oregon and Massachusetts.[31] The following chart shows statistics for those seven states.[32]

Cumulatively, these seven states account for 410,015 homeless people. They account for 62.8 percent of the total homeless population in the United States. It probably is

as Continuum of Care (CoC), of which there were around 385 in 2023, spread across the country, conduct an annual count of people experiencing homelessness who are staying in CoC-provided temporary shel- ter and permanent housing on a single night. CoCs also conduct a count of unsheltered people experiencing homelessness. Each count is planned, coordinated, and carried out by local staff and volunteers.

[25] State of Homelessness: 2024 Edition, National Alliance to End Homelessness, *op. cit.*

[26] *Ibidem.*

[27] *Ibidem.*

[28] The SOH 2024 defines 'chronic homelessness' as the status of being homeless for at least a year—or on at least four separate occasions in the past three years—while ex- periencing a disabling condition, such as a physical disability, serious mental illness, or substance use disorder.

[29] State of Homelessness: 2024 Edition, National Alliance to End Homelessness, *op. cit.*

[30] *Ibidem.*

[31] *Ibidem.*

[32] *Ibidem.*

not too surprising that some of the most populous states–California and New York in particular—have large homeless populations. It is more surprising that less populated states, including Oregon, Washington and Massachusetts, also account for many of the nation's homeless. SOH 2024 concludes that people experiencing homelessness are increasingly concentrated in cities. "In 2007, 51 percent of people experiencing homelessness were concentrated in urban areas. In 2023, 59 percent of people experiencing homelessness lived in urban areas."[33] Ending or severely reducing homelessness is tied to the lack of affordable housing. The Report concludes that

> "Solving the affordable housing crisis in the nation's major cities, including ensuring that urban areas have enough deeply affordable housing and emer- gency housing resources, would significantly reduce homelessness."[34]

The Report also points out, however, that some smaller states have large num- bers of homeless people relative to their populations. For example, from 2022 to 2023, homelessness in New Hampshire and New Mexico increased by more than fifty percent. Additionally, Vermont, Maine, Montana, Colorado, and Alaska all have experienced very high rates of homelessness relative to their small populations. Vermont, for example, has seen a nearly 109 percent in- crease in homelessness per 10,000 people since 2015. Maine, another sparsely populated state, has seen a nearly 71 percent increase since 2015.[35]

Table 1: Homelessness in the selected states (2024)

State	Number of homeless	% us homeless population	State pop: % of total US Population
California	181,399	27.8 %	11.6 %
Oregon	20,142	3.1 %	1.3 %
New York	103,200	15.8 %	5.8 %
Florida	30,756	4.7 %	6.8 %
Washington	28,036	4.3 %	2.3 %
Texas	27,377	4.2 %	9.1 %
Massachusetts	19,141	2.9 %	2.1 %

Source: XXXXX

[33] *Ibidem.*
[34] *Ibidem.*
[35] *Ibidem.*

2.2.4 Who Experiences Homelessness?

Just as from a geographical standpoint, homelessness has no boundaries. Simi- larly, homelessness afflicts many different people. The SOH 2024 Report states that 71.5 percent of homeless persons are individual adults. 51.2 percent of these individuals experienced unsheltered homelessness.[36] 28.5 percent are people living in families with children.[37]

As is true in other areas of American society, such as the criminal justice system and access to reproductive rights, to name just two areas, people of color are almost always on the short end of the stick, and the same is unfortunately true with respect to homelessness. The SOH 2024 Report summarizes the problem as follows.

> "Homelessness is a racial justice issue. Historical and contemporary discrimination from housing, education, employment, and wealth-building have excluded Black, Indigenous, and People of Color (BIPOC) from financial resources and housing opportunities. This has made it more difficult for BIPC to access safe, stable housing. BIPOC renters experience extremely high rates of severe housing cost burden and are less likely than the overall population to own their homes. The nation's safety net has also failed to dis- tribute resources in ways that meaningfully address the impacts of systemic and individual discrimination and exclusion. This is reflected in high, and growing, rates of overall homelessness and unsheltered homelessness among BIPOC. Native Hawaiians and Pacific Islanders are the racial/ethnic group that is most likely to experience homelessness. People of American Indian, Alaskan Native, or Indigenous descent, as well as people of Black, African American, or African descent, also experience higher rates of homelessness than the overall population. Since 2015, these rates have increased for most groups of color. They increased most rapidly among the following groups: Asian (91 percent increase); Hispanic or Latino (59 percent increase); American Indian or Alaskan Native (53 percent increase); Native Hawaiian or other Pacific Islanders (21 percent increase)."[38]

It may come as no surprise that the majority of people that experience home- lessness are men (61 percent).[39] Homelessness among women, however, is on the rise, with a 12.1 percent increase since 2022 and an 11.4 percent increase since 2015,

[36] HUD considers a person "unsheltered" if they are sleeping in a place not ordinarily used as a regular sleeping accommodation. Examples of unsheltered sleeping situations include tents, train stations, structures like sheds or garages, vehicles, sidewalks, or other locations unfit for human habitation.
[37] State of Homelessness: 2024 Edition, National Alliance to End Homelessness, *op. cit.*
[38] *Ibidem.*
[39] *Ibidem.*

with the largest increase involving individual women. For every 15 women who experience homelessness, 24 men do. The SOH 2024 Report observes that

> "While fewer women experience homelessness than men, this increase is concerning for many reasons. One prominent reason is that women are more likely to experience harassment and assault. Living outside can exacerbate this risk."[40]

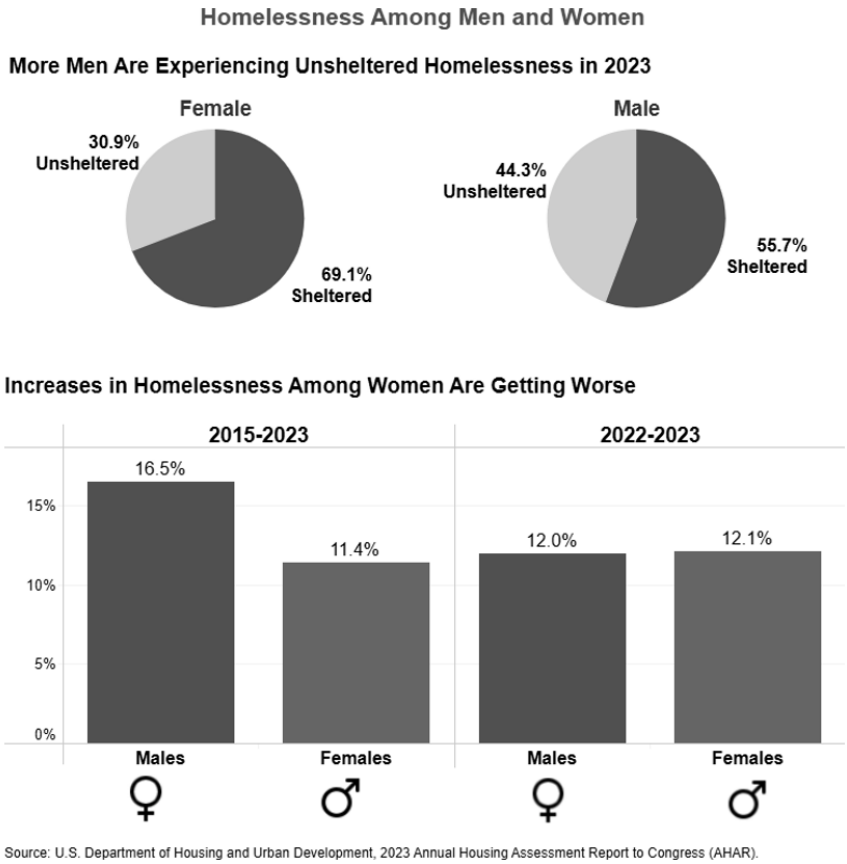


Figure 1

HUD data gathering has also shown that the number of disabled people experiencing long-term or recurring homelessness is also increasing. HUD considers people who have experienced homelessness for at least a year–or multiple times

[40] *Ibidem.*

totaling a year while having a disabling condition such as a physical dis- ability, a mental difference or while experiencing a challenge with substance abuse—as chronically homeless. For years, chronic homelessness declined due to a well-supported and sustained effort to direct housing and supportive ser- vices to this population. However, funding for deeply subsidized housing and services has not met this population's needs. Disabled people are often paid subminimum wages and benefits, excluded from economic opportunity, experience housing discrimination, and face a high risk of eviction. This has led to increases in homelessness beginning in 2016.[41] "Nearly two times (154,313) as many people experienced chronic homelessness in 2023 than in 2016, when chronic homelessness reached a record low due to targeted support. 62 percent of these people are unsheltered, compared with 39 percent of the total popula- tion. 36 percent (more than a third) of people in shelters experiencing chronic homelessness were older adults in 2021. Older adults are at increased risk of experiencing a disabling condition."[42]

The number of older adults (defined as over 55) experiencing homelessness is also growing rapidly. In 2023, 20 percent of all people experiencing home- lessness were older than 55, totaling 127,707 older adults who experienced homelessness in the United States.[43] Another way to look at this is that 13 out of every 10,000 older adults in America experience homelessness. As is the case with disabled persons and women, discussed in the preceding paragraphs, older people, too, have particular vulnerabilities that make their homelessness particularly difficult. As the SOH 2024 Report points out,

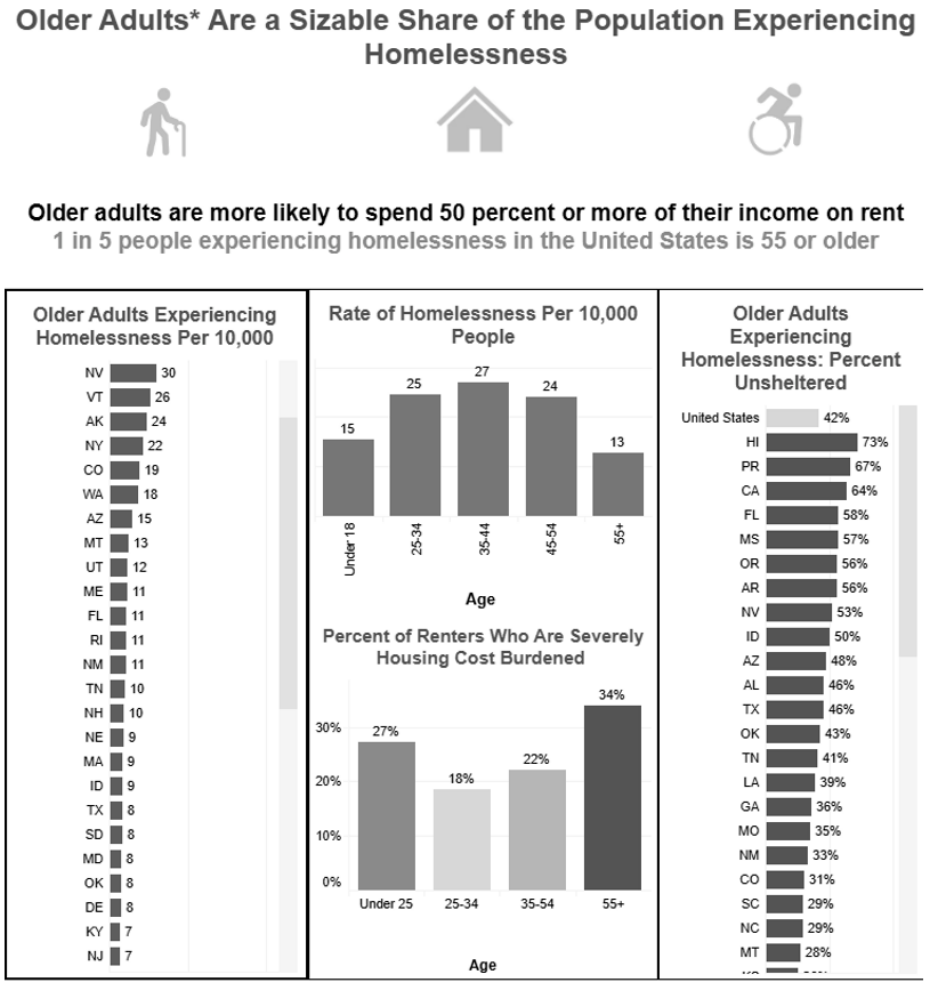
> "Older adults have more complex and acute health and housing needs. 34 percent of older adult renters spent 50 percent or more of their income on rent in 2021, higher than any other age group. Renters aged 75 and older were the most likely age group to be severely housing cost burdened."[44]

The Report recommends these solutions:

> "Communities must prevent older adults from entering into homelessness and ensure that they can access permanent housing. At minimum, this means increased

[41] *Ibidem.*
[42] *Ibidem.*
[43] *Ibidem.*
[44] *Ibidem.*

coordination between homeless service systems, health ser- vices, and aging networks; more robust income supports (given that these people are retired and on fixed incomes) including social security; and intentional outreach to ensure that all older adults receive the services that they need."[45]



Source: U.S. Department of Housing and Urban Development (HUD), 2023 Annual Homeless Assessment Report to Congress, U.S. Census Bureau, 1-Year American Community Survey and American Housing Survey; NAEH analysis
*Older Adults are 55 years or older.

Figure 2

[45] *Ibidem.*

Survivors of domestic violence are also at high risk for homelessness. The SOH 2024 Report, referencing the Centers for Disease Control and Prevention, shockingly states that 41 percent of women and 26 percent of men will experience violence from an intimate partner during their lifetimes and that this domestic violence is a cause of homelessness, particularly for women and families.[46] Historically, Veterans in America also have experienced high rates of homelessness. The SOH 2024 Report discusses the Ending Veteran Home- lessness Initiative, started in 2009 by the U.S. Department of Veterans Affairs, in collaboration with HUD, to implement specific services to help veterans experiencing homelessness. The Report discusses how this initiative has significantly driven down homelessness involving America's many Veterans.[47]

2.2.5 Conclusions From SOH 2024 Report

The Report concludes that various programs have been put in place and communities have demonstrated that homelessness is a problem that is solvable. The short conclusion and recommendations are worth quoting in full.

> "Homelessness is not an intractable problem. While much in this report depicts rising trends in homelessness, local progress and coordinated efforts demonstrate that there are solutions. Local, state and federal policy makers must recognize the urgency of the situation and direct legislative actions and resources to proven solutions to make progress. At a minimum, they can and should: Expand housing production that is affordable for extremely low-income households. Ensure access to emergency housing for everyone who needs it by drastically increasing funding for homelessness assistance grants. Reform existing services like mental health care, physical health care, and substance abuse use treatment to make them extremely affordable for people with the lowest incomes. Everyone should have access to the services they need to thrive. Provide robust income support to ensure that housing is stable and secure for everyone. The United States can end homelessness. Policymakers can invest in these solutions through legislation. Communi- ties can implement them and connect everyone with a safe place to sleep. Investing in housing and services will move the nation to a future where all our neighbors are housed and where everyone can fully contribute to buil- ding a productive, safe and sustainable society." (Emphasis in original text)[48]

[46] *Ibidem.*
[47] *Ibidem.*
[48] *Ibidem.*

2.3 The Causes of Homelessness

Howell, writing for the Harvard Gazette, states that there is a general consensus among scholars, healthcare workers, and homeless advocates that poverty and lack of affordable housing are two major causes of homelessness. Home- lessness is also rooted in psychiatric issues, many of which date to a person's childhood when they suffered physical or mental abuse at the hands of a parent, uncle, teacher, priest, etc. Of course, homelessness is also often tied to substance-use disorders, which in turn also may have their genesis in underlying abusive relationships, chronic unemployment, etc. Powell explains these constellations of factors lead those who work with the unhoused to refer to what they do as "the long game," "the long walk." or "the five-year-plan," as they seek avenues and strategies to address the multifactorial traumas that people living on the street face.[49] In other words, each homeless person has their own, unique story. Oftentimes there are variations on a common theme: rape or abuse when young; untreated physical or mental trauma; growing up with a single parent or parent(s) that are themselves drug addicts or alcoholics; psychiatric issues such as schizophrenia, bipolar disorder, post-traumatic stress disorders, etc. But, each person suffering from one or more of these conditions faces their own challenges and their treatment requires an individualistic approach. There are no quick fixes. Often, such persons go years and even decades without adequate treatment. Or the treatment is sporadic. Progress in treating such persons is not linear. One step forward and two back.

Citing Katherine Koh, who earned her medical degree from Harvard Medical School, and who is a practicing psychiatrist at the Boston Health Care for the Homeless Program and Massachusetts General Hospital, Howell writes that

> "Though homelessness has roots in poverty and a lack of affordable hou- sing, it also can be traced to early life issues. The journey to the streets often starts in childhood, when neglect and abuse leave their marks, interfering with education, acquisition of work skills, and the ability to maintain he- althy relationships. A major unaddressed pathway to homelessness, from my vantage point, is childhood trauma. It can ravage people's lives and min- ds, until old age. For example, some of my patients in their 70s still talk about the trauma that their parents inflicted on them. The lack of affordable

[49] *Ibidem.*

> housing is a key factor, though there are other drivers of homelessness we must also tackle."[50]

Horowitz, Hatchett & Staveski,[51] writing for the Pew Charitable Trust in 2023, highlighted how dramatically increasing housing costs have driven up the amount of homelessness.

> "A large body of academic research has consistently found that homelessness in an area is driven by housing costs, whether expressed in terms of rents, rent-to-income ratios, price-to-income ratios, or home prices. Further, changes in rents precipitate changes in rates of homelessness: homelessness increases when rents rise by amounts that low-income households cannot afford. Similarly, interventions to address housing costs by providing ho- using directly or through subsidies have been effective in reducing home- lessness. That makes sense if housing costs are the main driver of homeles sness, but not if other reasons are to blame. Studies show that other factors have a much smaller impact on homelessness."[52]

These authors go on to state that in the United States rents have reached all- time highs with half of renters spending at least thirty percent of their income on rent and a quarter spending at least fifty percent. This was not the case "As recently as the 1970s, when rents as a share of income were far lower, [and] homelessness was rare in the United States."[53] Homelessness in low in some parts of America, such as Mississippi, for one of two main reasons. Either those places have low-cost housing readily available, or they have made concerted efforts to rapidly "reduce the ranks of residents without homes."[54]

Seattle, Washington, is one of the wealthiest cities in America. It is home to a relatively young, highly educated population. Nestled on beautiful Lake Washington and the Puget Sound, it is a desirable place to live and work. Seattle also has a significant homeless population. Many homeless live in tents under the busy I-5 freeway that runs from Vancouver, British Columbia, Canada, to the north and Portland, Oregon, to the south. Many others live on benches in the historic Pioneer Square part of the downtown core. For some years, when I was practicing law in the

[50] *Ibidem.*
[51] A. Horowitz, C. Hatchett, A. Staveski, *op. cit.*
[52] *Ibidem.*
[53] *Ibidem.*
[54] *Ibidem.*

Seattle area, I volunteered for the Knights of Columbus[55] by periodically serving meals to homeless men temporarily living in a shelter in downtown Seattle, in the shadows of the large, sparkling arenas where the local professional baseball, football and soccer teams played, and also near the large office towers where lawyers such as myself, accountants, bankers and other professionals worked. This volunteer work to me was an eye-opening experience. I never had the chance to formally interview any of these poor souls, though I wanted to. Each one most certainly had a heart-wrenching story about how they ended up in that shelter, sleeping on a cold floor and eating the sandwiches and small servings of hot food me and my fellow Knight volunteers were serving them. There is an old saying, "There but for the grace of God, go I." While gazing at these downtrodden men, sizing them up, some- times engaging in small talk that I hoped might be somewhat uplifting, and while serving them as they stood in line with plates thrust toward me, this phrase often came to my mind. I do not know what life circumstances led these men to that shelter. Most of them looked, for lack of a better word, normal. They could have been my neighbor, or an uncle, or a friend. I often wondered whether any were professionals such as myself. Had any studied at and secured degrees from the University of Washington or some other such institution. Surely, some were addicts. Some were alcoholics. Or both. Some might have been employed a month earlier with a good job but were suddenly laid off and ended up on the streets with little in the way of a safety net. These thoughts brought me back to this old saying, "There but for the grace of God, go I."

3 Does Criminalizing Homelessness Constitute Cruel and Unusual Punishment–A Review of American Jurisprudence

3.1 Introduction

I am always somewhat amused–perhaps that is not the correct word–maybe confused or even aggravated are more descriptive terms–when I listen to British (and other) news reporting, and they refer to homeless sleeping without adequate

[55] The Knights of Columbus (K of C) is a global Catholic fraternal service order founded by the Blessed Michael J. McGivney in 1882. Membership is limited to practicing Catholic men. The organization is named after the explorer Christopher Columbus. The K of C is dedicated to the principles of charity, unity, fraternity, and patriotism. It supports priests, people with intellectual and physical disabilities and others in need of monetary and physical assistance, including, as discussed in this text, the homeless.

shelter, typically on the streets of a town or city on a park bench, or on a street or sidewalk on a piece of cardboard or blanket–as "sleeping rough." In my mind, at least, this terminology overly dignifies the problem. This phraseology almost makes it sound as if the homeless person's decision is one of choice: I think tonight, and even for the foreseeable future, I will forego sleeping somewhere with a roof over my head; where I have a bed; where I have running water; where I have a commode; where I can bathe; where I can cook and eat a meal; where I have heat in the winter and cooling in summer; where I can dress and undress; where I can store my personal belongings; where I can do my laundry, etc. Instead, I think I will just "rough it" tonight and these next nights, and for perhaps the indeterminate future, and try to find some place on the streets where I can survive and suffer the personal indignities of being scorned by the public and by the authorities. Where I can place a paper cup or my hat on the ground and beg for money. Where I can urinate and defecate in public. Where I can scrounge around for food in dumpsters. Where I can place my personal safety at risk. Yes, this has always been on my bucket list of things I want to definitely try before I die.

But, of course, there is a flip side to this problem, and it is one I do not take lightly. It is surely true that residents of a community and visitors coming to a given community where there are homeless do not particularly like witnessing the homeless. It can be unsettling, even an eyesore. And yes, public safety issues are associated with people living on the streets. The shopping carts are full of clothing. Empty beer cans and other trash use. Drug use. An increase in criminal activity. Granville and Hayes, writing for the BBC,[56] and discussing issues associated with homelessness, state:

> "Many US cities have been wrestling with how to combat the growing crisis. The issue has been at the heart of recent election cycles on the West Coast, where officials have poured record amounts of money into creating shelters and building affordable housing."

Scout Katovich, an attorney who focuses on these issues for the American Civil Liberties Union, told the BBC that,

[56] S. Granville, C. Hayes, *op. cit.*

> "It's not easy, and it will take time to put into place solutions that work, so there's a little bit of political theatre going on here. Politicians want to be able to say they're doing something."[57]

That "something" is that communities have recently passed laws allowing law enforcement officials to issue fines, or even jail sentences for repeat offences, to unhoused people sleeping or camping in public. Enacting and then enforcing these measures provides political "cover" to politicians. Katovich and other advocates for the homeless argue that arresting or fining the homeless will only worsen the problem. "This tactic simply kicks the can down the road. Sure, you might clean up a street, but the people you arrest will surely be back."[58]

3.2 *Martin v. City of Boise*–Ninth Circuit Court of Appeals Jurisprudence

In *Martin v. City of Boise*,[59] the United States Court of Appeals for the Ninth Circuit considered

"whether the Eighth Amendment's prohibition on cruel and unusual punishment bars a city from prosecuting people criminally for sleeping outside on public property when those people have no home or other shelter to go to. We conclude that it does."[60]

Plaintiffs-appellants were six current or former residents of the City of Boise,[61] who were homeless or who had recently been homeless. The plaintiffs alleged that between 2007 and 2009 they had been cited by the Boise police for violating one or both of two city ordinances. The first was Boise City Code § 9-10- 02 (the so-called "Camping Ordinance"), that made it a misdemeanor to use "any of the streets,

[57] *Ibidem.*
[58] *Ibidem.*
[59] *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018).
[60] *Ibidem, at page 1035.*
[61] Boise is the capital and most populous city in the U.S. state of Idaho. Nearly a quar- ter of a million people live there. In the federal court system, 94 District Courts are orga- nized into 12 circuits, or regions. Each circuit has its own Court of Appeals that reviews cases decided in U.S. District Courts within the circuit. The U.S. Court of Appeals for the Federal Circuit (in Washington D.C.) brings the number of federal appellate courts to 13. The 9th Circuit Court has appellate jurisdiction over the U.S. District Courts in the following western and northwestern states: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington.

sidewalks, parks, or public places as a camping place at any time."[62] The Camping Ordinance defined "camping" as "the use of public prop- erty as a temporary or permanent place of dwelling, lodging, or residence."[63] The second, Boise City Code § 6-01-05 (the so-called "Disorderly Conduct Ordinance"), banned "[o]ccupying, lodging, or sleeping in any building, struc- ture, or public place, whether public or private […] without the permission of the owner or person entitled to possession or in control thereof."[64]

The Court began its discussion by noting that a similar issue had come before a different panel of the 9th Circuit in 2006. In *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007), a panel of the 9th Circuit concluded that "so long as there is a greater number of home- less individuals in Los Angeles than the number of available beds [in shelters]" for the homeless, Los Angeles could not enforce a similar ordinance against homeless individuals 'for involuntarily sitting lying, and sleeping in public.' *Jones* is not binding on us, as there was an underlying settlement between the parties and our opinion was vacated as a result. We agree with *Jones's* reason- ing and central conclusion, however, and so hold that an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against home- less individuals for sleeping outdoors, on public property, when no alternative shelter is available to them."[65]

The case came to the 9th Circuit ("Court") on appeal from a ruling by the dis- trict court granting summary judgment[66] to the City on all claims. Discussing the record that was before the trial court, the Court stated that Boise has a "significant and increasing homeless population" and that according to a study

> "conducted by the Idaho Housing and Finance Association there were 753 homeless individuals in Ada County—the county of which Boise is the seat—in January 2014, 46 of whom were 'unsheltered,' or living in places unsuited to human habitation such as parks or sidewalks."[67]

[62] *Martin v. City of Boise*, 902 F.3d at 1035.
[63] *Ibidem.*
[64] *Ibidem.*
[65] *Ibidem.*
[66] Fed. R. Civ. P. 56 provides that when there are no genuine issues of material fact, the trial court may grant summary judgment in favor of the moving party. The rule is frequently invoked and is designed to prevent useless trials. Appellate courts reviewing grants of summary judgment do so *de novo*, giving no deference to the trial court.
[67] *Martin v. City of Boise*, 902 F.3d at 1036.

The Court observed that, in view of methods used to determine the number of homeless, known as a Point-in-Time Count,[68] these numbers likely were underestimated.[69] The record revealed that at the time, there were three home- less shelters in Boise offering emergency shelter services, all run by private, nonprofit organizations.[70] Due to its limited capacity, one of the shelters fre- quently had to turn away homeless people seeking shelter. In 2014, it was full for men, women, or both on 38 percent of nights. A second shelter was only available for men while the third was only available for women and children.[71] One of the shelters stipulated that there were limits to the number of days the homeless person could stay there. Two of the shelters were operated by a Christian nonprofit organization, and had "programs" for the homeless staying there called the Emergency Services Program and the New Life Discipleship Program. Homeless persons who did not join these overtly religious programs could be denied shelter. These shelters also had other fairly stringent prerequisites for staying at them.[72]

All six plaintiffs were homeless individuals who had lived in or around Boise since at least 2007. Between 2007 and 2009, each was convicted at least once of violating the Camping Ordinance, the Disorderly Conduct Ordinance, or both.[73] With one exception, all plaintiffs were sentenced to time served for all convictions.[74] In their suit in the District Court, plaintiffs alleged that their citations under both ordinances violated the Cruel and Unusual Punishments Clause of the Eighth Amendment, and sought damages for those alleged viola tions under federal statutory law. As stated earlier, the District Court granted the City's motion for summary judgment.[75]

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[68] In Section 2.2.2, I discussed the 2024 State of Homelessness Report. The Depart- ment of Housing and Urban Development (HUD) also uses the so-called Point-in-Time Method to measure homelessness. Basically, HUD picks one random night in the winter and then at various points around the country measures the number of homeless people on that one given night. While providing valuable data, obviously measuring in this lim- ited fashion can only provide a snapshot at best. The City of Boise uses a similar mea- surement tool. *See also*, fn. 1 to *Martin v. City of Boise*, 902 F.3d at 1036 where the Court discusses the Point-in-Time (PIT) Count Method in detail.
[69] *Martin v. City of Boise*, 902 F.3d at 1036.
[70] *Ibidem.*
[71] *Ibidem.*
[72] *Ibidem.*
[73] *Martin v. City of Boise*, 902 F.3d at 1037.
[74] *Ibidem.*
[75] The District Court ruled on various procedural matters, unrelated to the Eighth Amendment, but for the purpose of this paper I am omitting them, as they add unneces- sary detail to this paper. The interested reader is invited to read the entire opinion. *Martin*
v. City of Boise, 902 F.3d at 1038–1046.

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[76] As Stevenson and Stinneford note,

> "This amendment prohibits the federal government from imposing unduly harsh penalties on criminal defendants, either as the price for obtaining pre- trial release or as punishment for crime after conviction."[77]

These authors, both renowned professors, note that

> "The Cruel and Unusual Punishments Clause is the most important and controversial part of the Eighth Amendment. In some ways, the Clause is shrouded in mystery. What does it mean for a punishment to be 'cruel and unusual'? How do we measure a punishment's cruelty? And if a punishment is cruel, why should we care whether it is 'unusual'?"[78]

In discussing the history of the Clause, they also note that while it

> "clearly prohibits 'barbaric' methods of punishment […] once we get bey- ond [that], there are many areas of passionate disagreement concerning the meaning and application of the Cruel and Unusual Punishments Clause."

Areas of disagreement, they explain, include what standard the Court should "use in deciding whether a punishment is unconstitutionally cruel" and whether the "Clause only prohibits barbaric methods of punishment" or whether it also "prohibits punishments that are disproportionate to the offense. For example, would imposing a life sentence for a parking violation violate the Eighth Amendment?"[79] This "disproportionality question" goes to the heart of the ordinances civilly and criminally punishing homeless persons.

The *Martin* Court explained, to begin its substantive analysis of the principal issues before it, that the Cruel and Unusual Punishments Clause [hereinafter the "Clause"] circumscribes the criminal process in three distinct ways. Citing to *Ingraham v. Wright*, 430 U.S. 651, 667 (1977), the Court stated that "First, it limits the *type* of punishment

[76] *U.S. Const. Amend. VIII.*
[77] B. Stevenson, J. Stinneford, *op. cit.*
[78] *Ibidem.*
[79] *Ibidem.*

the government may impose; second, it pro scribes punishment '*grossly disproportionate*' to the severity of the crime; and third, it *places substantive limits on what the government may criminalize. Id.* It is the third limitation that is pertinent here."[80] The Court acknowledged that cases construing substantive limits on what the government may criminalize are rare, observing that in *Ingraham*, the Supreme Court stated this third limitation is "one to be applied sparingly."[81] However, the Court then discussed *Robinson v. California*,[82] which it stated was

> "the seminal case in this branch of Eighth Amendment jurisprudence, [and which] held a California statute that 'ma[de] the 'status of narcotic addic- tion a criminal offense' invalid under the Cruel and Unusual Punishments Clause. 370 U.S. at 666, 82 S.Ct. 1417. The California law at issue in *Robin- son* was 'not one which punishe[d] a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration'; [rather] it punished addiction itself. *Id.* Recognizing narcotics addiction as an illness or disease—'apparently an ill- ness which may be contracted innocently or involuntarily'—and observing that a 'law which made a criminal offense of […] a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment,' *Robinson* held the challenged statute a violation of the Eighth Amendment. *Id.* at 666-67, 82 S.Ct. 1417."[83] The *Martin* Court further noted that the Su- preme Court in *Robinson* stated that, "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[84]

The *Martin* Court stated that although the Supreme Court in *Robinson* "did not explain at length the principles underpinning its holding,"[85] it did so in *Powell v. Texas*,[86] a case decided six years later. *Powell* involved the constitu- tionality of a Texas statute that made public drunkenness a criminal offense. Justice Marshall, who wrote the plurality decision of the Court, reasoned the Texas law on public drunkenness differed from the California law in *Robin- son* because the Texas statute criminalized not a person's *status* of being an alcoholic, but rather, *conduct*; namely, appearing in public while intoxicated. Justice Marshall wrote,

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[80] *Martin v. City of Boise*, 902 F.3d at 1046. [Emphasis added].
[81] *Martin v. City of Boise*, 902 F.3d at 1046, *quoting Ingraham*, 430 U.S. at 667.
[82] *Robinson v. California*, 370 U.S. 660 (1962).
[83] *Martin v. City of Boise*, 902 F.3d at 1047, *quoting Robinson*, 370 U.S. 660 at 666–667.
[84] *Martin v. City of Boise,* 902 F.3d at 1046, *quoting Robinson,* 370 U.S. 660 at 667.
[85] *Martin v. City of Boise,* 902 F.3d at 1047.
[86] *Powell v. Texas*, 392 U.S. 514 (1968).

> "[A]ppellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in *Robinson*; nor has it attempted to regulate behavior in the privacy of his own home."[87]

The Court thus upheld the Texas laws in question.

Four Justices dissented from the Court's holding in *Powell.* Justice White con- curred in the result alone. His reasoning bears discussion here. Justice White noted that many chronic alcoholics are also homeless, and that for those indi- viduals, public drunkenness may be unavoidable as a practical matter.

> "For all practical purposes the public streets may be home for these un- fortunates, not because their disease compels them to be there, but beca- use, drunk or sober, they have no place else to go and no place else to be when they are drinking. […] For some of these alcoholics, I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk."[88]

The *Martin* Court also pointed out that the four Justices that dissented in *Pow- ell* nevertheless

> "adopted a position consistent with that taken by Justice White: that under *Robinson,* 'criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change,' and that the defendant, 'once in- toxicated, […] could not prevent himself from appearing in public places.' *Id.* at 567, 888 S.Ct. 2145 (Fortas, J., dissenting). Thus, five Justices gleaned from *Robinson* the principle 'that the Eighth Amendment prohibits the sta- te from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being.' *Jones,* 444 F.3d at 1135; *see also United States v. Robinson*, 875 F.3d 1281, 1291 (9th Cir. 2017)."[89]

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[87] *Powell v. Texas,* 392 U.S. 514 at 532.

[88] *Powell v. Texas,* 392 U.S. at 551 (White, J., concurring in the judgment).

[89] *Martin v. City of Boise,* 902 F.3d at 1047, quoting *Powell v. Texas*, 392 U.S. 514, 567 (Fortas, J., dissenting) and *Jones v. City of Los Angeles,* 444 F.3d 1118, 1135 (9th Cir, 2006), *vacated,* 505 F.3d 1006 (9th Cir, 2007). In *Jones,* another panel of the 9th Circuit, in decid- ing a case similar to that before the case in *Martin*, concluded that "so long as there is a greater number of homeless individuals in Los Angeles than the number of available beds [in shelters]' for the homeless, Los Angeles could not enforce a similar ordinance against homeless individuals 'for involuntarily sitting, lying, and sleeping in public.' The panel in *Martin* held that, "*Jones* is not binding on us, as there was an underlying settlement between the parties and our opinion was vacated as a result. We agree with *Jones's* reason- ing and central conclusion, however, and so hold that an ordinance violates the Eighth Amendment insofar as it imposes

Accordingly, relying on the Supreme Court's decisions in both *Robinson* and *Powell*, and the Ninth Circuit's 2006 ruling in *Jones*, the *Martin* Court held as follows.

> "[These principles] compel the conclusion that the Eighth Amendment pro- hibits the imposition of criminal penalties for sitting, sleeping, or lying out- side on public property for homeless individuals who cannot obtain shelter. As *Jones* reasoned, '[w]hether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human.' *Jones*, 444 F.3d at 1136. Moreover, any 'conduct at issue here in in- voluntary and inseparable from status – they are one and the same given that human beings are biologically compelled to rest, whether by sitting, lying or sleeping.' *Id.* As a result, just as the state may not criminalize the state of being 'homeless in public places,' the state may not 'criminalize con- duct that is an unavoidable consequence of being homeless – namely sitting, lying, or sleeping on the streets,' *Id.* at 1137."[90]

The *Martin* Court was careful to point out that its holding was narrow, as was the holding by the *Jones* panel in 2006. Quoting from *Jones*,

> "'we in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets […] at any time and at any place.' *Id.* at 1138. We hold only that 'so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters],' the jurisdiction cannot prosecute homeless individuals for 'involuntarily sitting, lying, and sleeping in public.' *Id.* That is, as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter."[91]

The *Martin* Court, once again referencing the now-vacated *Jones* decision, placed still further restrictions on its holding.

> "Naturally, our holding does not cover individuals who do have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it. Nor do we suggest that a jurisdiction with insufficient shelter can never criminalize the act of sleeping outside. Even where shelter is unavailable, an ordinance prohibiting sitting, lying, or

criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them" *Martin v. City of Boise*, 902 F.3d at 1035.

[90] *Martin v. City of Boise,* 902 F.3d at 1048, *quoting* from *Jones v. City of Los Angeles*, 444 F.3d at 1136-1137, *vacated*, 505 F.3d 1006 (9th Cir. 2007).

[91] *Martin v. City of Boise,* 902 F.3d at 1048, *quoting* from *Jones v. City of Los Angeles*, 444 F.3d at 1136-1137, *vacated*, 505 F.3d 1006 (9th Cir. 2007).

> sleeping outside at particular times or in a particular location might well be constitutionally permissible. *See Jones*, 444 F.3d at 1123. So, too, might an ordinance barring the obstruction of public rights of way or the erection of certain structures. Whether some other ordinance is consistent with the Eighth Amendment will depend, as here, on whether it punishes a person for lacking the means to live out the 'universal and unavoidable consequences of being human' in the way the ordinance prescribes. *Id.* at 1136."[92]

In 2019, the United States Supreme Court declined to hear an appeal of the *Martin* decision, leaving the precedent intact in the nine Western states under the jurisdiction of the Ninth Circuit.[93]

3.3 City of Grant's Pass, Oregon v. Gloria Johnson, et. al.–U.S. Supreme Court, 24 June 2024[94]

3.3.1 Facts and Procedural History–District and Court of Appeals Rulings

Five years after refusing to take up the issue of whether the Eighth Amendment's Cruel and Unusual Punishments Clause prohibits laws such as those discussed in the previous section that the City of Boise had enacted, the Supreme Court changed course and granted the city of Grants Pass, Oregon's petition for a writ of certiorari to review its similar laws. Grants Pass, located in southern Oregon, has a population of approximately 38,000, and of that population, somewhere between 50 and 600 persons are unhoused.[95] Though the exact number of unhoused persons in unclear, what is clear is that the number of such persons exceeds the number of available shelter beds, requiring at least some of them to sleep on the streets or in parks or other public places. Grants Pass adopted three Ordinances that make it unlawful to sleep anywhere in public, even in a car. The Ordinances prohibit "[c]amping" on

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[92] *Ibidem.* The *Martin* Court referenced several other decisions in support of its hold- ing. "We are not alone in reaching this conclusion. As one court observed, 'resisting the need to eat, sleep or engage in other life-sustaining activities is impossible. Avoiding public places when engaging in this otherwise innocent conduct is also impossible. […] As long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them for something for which they may not be convicted under the [E]ighth [A]mendment – sleeping, eating and other innocent conduct.' *Pottinger v. City of Miami*, 810 F.Supp. 1551, 1565 (S.D. Fla, 1992); *see also Johnson v. City of Dallas*, 860 F.Supp. 344, 350 (N.D. Tex. 1994) (holding that a 'sleeping in public ordinance as applied against the homeless is unconstitutional'), *rev'd on other grounds*, 61 F.3d 442 (5th Cir, 1995)." *Martin v. City of Boise,* 902 F.3d at 1048-1049.

[93] *Martin v. City of Boise,* 920 F.3d 584, cert, denied, 589 U.S. _____ (2019).

[94] *City of Grant's Pass, Oregon v. Gloria Johnson, et. al*, 603 U.S. _____ (2024).

[95] *Ibidem, 603 U.S. at 10.*

"any sidewalk, street, alley, lane, public right of way, park, bench, or any other publicly-owned property or under any bridge or viaduct."[96] A "[c]ampsite" is defined as

> "any place where bedding, sleeping bag, or other material used for bedding purposes, or any stove or fire is placed, established, or maintained for the purposes of maintaining a temporary place to live."[97]

The definition of "campsite" includes sleeping in "any vehicle."[98] The Ordinanc- es also prohibit camping in public parks, including any vehicle's "[o]vernight parking".[99]

> "The City enforces these Ordinances with fines starting at $295 and incre- asing to $537.60 if unpaid. Once a person is cited twice for violating park regulations within a 1-year period, city officers can issue an exclusion order barring that person from the park for 30 days. See §6.46.350. A person who camps in a park after receiving that order commits a criminal trespass, whi- ch is punishable by a maximum of 30 days in jail and a $1,250 fine. Ore. Rev. Stat. §164.245 (2023); see §§161.615(3), 161.635(1)(c)."[100]

The plaintiffs were two longtime residents of Grants Pass who are homeless and who slept in their cars. They sued on behalf of themselves and all other involuntarily homeless people in the City, seeking an injunction to block the enforcement of the Ordinances. The federal District Court, where the case was filed, relying on the Ninth Circuit's *Martin* decision, certified a class and grant- ed summary judgment to the plaintiffs (respondents in the Supreme Court).

The District Court found that

> "the only way for homeless people to legally sleep on public property within the City is if they lay on the ground with only the clothing on their backs and without their items near them."[101]

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[96] *Ibidem, 603 U.S. at 8, Sotomayor, J., dissenting, quoting Grants Passs, Ore. Municipal Code § 5.61.030 (2024).*
[97] *Ibidem, 603 U.S. at 8, Sotomayor, J., dissenting, quoting Grants Pass, Ore, Municipal Code § 5.61.010(B).*
[98] *Ibidem.*
[99] *Ibidem, quoting Grants Pass, Ore. Municipal Code § 6.46.090(B).*
[100] 603 U.S. at 9, Sotomayor, J., dissenting.
[101] *Ibidem.*

The District Court issued a "narrow injunction" summarized by Justice Soto- mayor in her dissent. The injunction

> "concluded that Grants Pass could 'implement time and place restrictions for when homeless individuals may use their belongings to keep warm and dry and when they must have their belonging[s] packed up.' *Id.,* at 199a. The City could also 'ban the use of tents in public parks,' as long as it did not 'ban people from using any bedding type materials to keep warm and dry while they sleep.' *Id.,* at 199a-200a. Further, Grants Pass could continue to 'enforce laws that actually further public health and safety, such as laws re- stricting littering, public urination or defecation, obstruction of roadways, possession or distribution of illicit substances, harassment, or violence.' *Id.*, at 200a."[102]

Grants Pass appealed the lower court's ruling to the Ninth Circuit Court of Appeals. Before turning to the Ninth's Circuit's ultimate ruling, which substan- tially upheld the District Court, I want to highlight some of the facts discussed by the Ninth Circuit in its opinion.[103] The Court noted that

> "Since at least 2013, City leaders have viewed homeless persons as cause for substantial concern. That year the City Council convened a Community Ro- undtable ("Roundtable") 'to identify solutions to current vagrancy problems.' Participants discussed the possibility of 'driving repeat offenders out of town and leaving them there.' The City's Public Safety Director noted police officers had bought homeless persons bus tickets out of town, only to have the person returned to the City from the location where they were sent. A city counci- lor made clear the City's goal should be to 'make it uncomfortable enough for [homeless persons] in our city so they will want to move on down the road.' The planned actions resulting from the Roundtable included increased enforcement of City ordinances, including the anti-camping ordinances."[104]

The Court first analyzed issues pertaining to standing and mootness, questions that are crucial to whether the Court had the jurisdiction in the first instance to entertain the appeal. The Court concluded it did.[105] The Court also rejected the City's argument that the trial court had erred in certifying a class under the Federal Rules of Civil Procedure pertaining to class certifications.[106] The Court then turned to the

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[102] 603 U.S. at 10, Sotomayor, J., dissenting. The references 199a and 200a are to the District Court record in the case, which the Supreme Court reviewed.
[103] *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2022).
[104] *Ibidem,* at page 876.
[105] *Ibidem,* at pages 881-885.
[106] *Ibidem,* at pages 885-889

merits of the case. The City first argued that its system of imposing civil fines cannot be challenged as violating the Cruel and Unusual Clause because that clause provides protection only in criminal proceedings, after an individual has been convicted.[107] Second, the City argued that *Mar- tin* does not protect homeless persons from being cited under the City's anti camping ordinance, which prohibits the use of any bedding or similar protection from the elements. The Court noted that the

> "City appears to have conceded it cannot cite homeless persons merely for sleeping in public but the City maintains it is entitled to cite individuals for the use of rudimentary bedding supplies, such as a blanket, pillow, or slee- ping bag 'for bedding purposes'".[108]

The Court rejected both contentions.

Regarding the City's first contention, the Court conceded that,

> "Usually, claims under the Cruel and Unusual Clause involve straightfor- ward criminal charges. For example, the situation in *Martin* involved home- less persons allegedly violating criminal ordinances and the opinion identi- fied its analysis as focusing on the 'criminal' nature of the charges over ten times."[109]

Grants Pass, on the other hand, "adopted a slightly more circuitous approach" by issuing civil citations, followed by an exclusion order in the event of two violations of the ordinance, followed by a citation for criminal trespass if the person is found in a park following issuance of the exclusion order.[110] The Court stated that, "The holding in *Martin* cannot be so easily evaded" just because Grants Pass uses this nuanced protocol.[111] The Court relied in part on a 2019 case from the Fourth Circuit[112] arising from a Virginia law which allowed a state court to first issue a civil order identifying an individual as a "habitual drunkard," which in turn subjected the individual to "incarceration for the mere possession of or attempt to possess alcohol, or for being drunk in public."[113] The Court observed that,

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[107] *Ibidem,* at pages 888-889.
[108] *Ibidem*, at page 889.
[109] *Ibidem*, at pages 889-890.
[110] *Ibidem.*
[111] *Ibidem.*
[112] *Manning v. Caldwell for City of Roanoke,* 930 F.3d 264 (4th Cir. 2019)(en banc.).
[113] *Johnson v. City of Grants Pass*, 72 F.4th 868, 890, *quoting Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 268-269.

> "Using reasoning very similar to that in *Martin*, the Fourth Circuit found [Virginia's] statutory scheme unconstitutional because it provided puni- shment based on the plaintiffs' status.[114] Of particular relevance here, the Fourth Circuit reasoned the fact that Virginia's 'scheme operate[d] in two steps' did not change the analysis. *Id.* 283. Issuing a civil order first, followed by a criminal charge, was a 'two-pronged statutory scheme' potentially 'less direct' than straightforwardly criminalizing the status of alcohol addicti- on. *Id.* But the scheme remained unconstitutional because it 'effectively criminalize[d] an illness.' *Id.* The fact that Virginia 'civilly brands alcoholics as 'habitual drunkards' before prosecuting them for involuntary manifesta- tions of their illness does nothing to cure the unconstitutionality of this sta- tutory scheme.' *Id.*"[115]

The Court, therefore, rejected the City's first argument, holding that, "The same reasoning [as in *Manning*] applies here. The anti-camping ordinances prohibit Plaintiffs from engaging in activity they cannot avoid. The civil cita- tions issued for behavior Plaintiffs cannot avoid are then followed by a civil park exclusion order and, eventually, prosecutions for criminal trespass. Im- posing a few extra steps before criminalizing the very acts *Martin* explicit- ly says cannot be criminalized does not cure the anti-camping ordinances' Eighth Amendment infirmity."[116]

The Court also rejected the City's second contention, namely that it consti- tutionally revised its anti-camping ordinances [in line with *Martin*] to allow homeless persons to sleep in City parks. The Court referred to the City's con- tention as "an illusion" pointing out that,

> "The amended ordinance continues to prohibit homeless persons from using 'bedding, sleeping bag, or other material used for bedding purpo- ses,' or using stoves, lighting fires or erecting structures of any kind. GPMC 5.61.010. The City claims homeless persons are free to sleep in City parks, but only without items necessary to facilitate sleeping outdoors."[117]

The Court then proceeded to explain the City's contention.

> "The discrepancy between sleeping without bedding materials, which is permitted under the [City's] anti-camping ordinances, and sleeping with bedding, which is not, is

[114] The *Manning* case was filed by a group of homeless alcoholics who claimed, among other theories, that Virginia's "habitual drunkard" scheme violated the Cruel and Un- usual Punishments Clause. In the plaintiffs' view, the scheme resulted in criminal pros- ecutions based on their "status," i.e., alcoholism.
[115] *Johnson v. City of Grants Pass*, 72 F.4th 868, 890 (9th Cir. 2022).
[116] *Ibidem.*
[117] *Ibidem.*

> intended to distinguish the anti-camping ordinan- ces from *Martin* and the two Supreme Court precedents underlying *Martin*, *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962) and *Powell v. Texas*, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed 2d 1254 (1968). Under those cases, a person may not be prosecuted for conduct that is in- voluntary or the product of a 'status.' *See Martin*, 920 F.3d at 617 (citation omitted). The City accordingly argues that sleeping is involuntary conduct for a homeless person, but that homeless persons can choose to sleep wi thout bedding materials and therefore can be prosecuted for sleeping *with* bedding."[118]

The Court agreed that the District Court was correct in rejecting the City's second argument. The Court concluded that,

> "The only plausible reading of *Martin* is that it applies to the act of 'sleeping' in public, including articles necessary to facilitate sleep. In fact, *Martin* expres- sed concern regarding a citation given to a woman who had been found slee- ping on the ground, wrapped in blankets. 920 F.3d at 618. *Martin* noted that citation as an example of the anti-camping ordinance being 'enforced against homeless individuals who take even the most rudimentary precautions to protect themselves from the elements.' *Id. Martin* deemed such enforcement unconstitutional. *Id.* It follows that the City cannot enforce its anti-camping ordinances to the extent they prohibit 'the most rudimentary precautions' a homeless person might take against the elements. The City's position that it is entitled to enforce a complete prohibition on 'bedding, sleeping bag, or other materials used for bedding purposes' is incorrect."[119]

In sum, following the holding of *Martin*, and the U.S. Supreme Court deci- sions on which *Martin's* holding was premised namely, *Robinson and Powell,* the Court concluded that it had to adhere to the rule stemming from those cases: "a person cannot be prosecuted for involuntary conduct if it is an un- avoidable consequence of one's status."[120] The Court, in reviewing the trial court record, noted that the "undisputed evidence" revealed that both Gloria Johnson, the named plaintiff, along with the other class members, were "in- voluntarily homeless" as there was no secular space available to them.[121] Since these plaintiffs were not voluntarily homeless, the anti-camping ordinances were unconstitutional as applied to them.

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[118] *Johnson v. City of Grants Pass*, 72 F.4th 868, 891 (9th Cir. 2022).
[119] *Ibidem.*
[120] *Johnson v. City of Grants Pass*, 72 F.4th 868, 893 (9th Cir. 2022).
[121] *Ibidem.* The beds at Grant's Pass's charity-run shelter did not qualify as "available" in part because that shelter has rules requiring residents to abstain from smoking and to attend religious services.

However, the Court also noted that beyond prohibiting bedding, the ordinanc- es also prohibited the use of stoves or fires, as well as the erection of any struc- tures. The Court observed that the record below did not establish that these prohibitions "deprive homeless persons of sleep or 'the most rudimentary pre- cautions' against the elements. Moreover, the record does not explain the City's interest in these prohibitions. Consistent with *Martin,* these prohibitions may or may not be permissible. On remand, the district court will be required to craft a narrower injunction recognizing Plaintiffs' limited right to protection against the elements, as well as limitations when a shelter bed is available."[122]

The Court concluded its discussion by noting that its decision was "narrow" in the sense that, as in *Martin*, it was holding "simply" that it is "unconstitutional to punish simply sleeping somewhere in public if one has nowhere else to go." It also noted that "sleeping" in the context of *Martin* includes sleeping with rudimentary forms of protection from the elements, and that its holding "reaches be- yond *Martin* slightly" because, whereas *Martin* applies to civil citations only, in the present case, "the civil and criminal punishments are closely intertwined."[123] Finally, the Court concluded with the following additional caveats: "Our decision does not address a regime of purely civil infractions, nor does it prohibit the City from attempting other solutions to the homelessness issue."[124]

3.3.2 Ruling by U.S. Supreme Court

As has frequently been the case in recent years in matters before the Supreme Court involving some of the greatest, and most contentious social issues of our times including guns, religion, abortion, immigration, government regulation and the like, the Grants Pass case was resolved along ideological lines, with the staunchly conservative block, which now has six members following the Trump presidency (2016–2000) voting to reverse the Ninth Circuit. Justice Gorsuch, a Trump appointee, wrote the majority opinion, which was joined by Justices Roberts, Thomas, Alito, Kavanaugh and Barrett.[125] The "liberal wing" of the Court would

[122] *Johnson v. City of Grants Pass*, 72 F.4th 868, 895 (9th Cir. 2022).
[123] *Ibidem.*
[124] *Ibidem.*
[125] Clarence Thomas was nominated by George H.W. Bush and assumed office in 1991. Chief Justice Roberts was nominated by George W. Bush and assumed office in 2005. Samuel Alito was also nominated by George W. Bush

have upheld the Court of Appeals. Justice Sotomayor wrote a scathing dissent, joined by fellow liberals Kagan and Jackson.[126] Justice Thomas wrote a concurring opinion, in which he stated that he would have gone even further and overruled the 1962 *Robinson* decision. I will discuss the majority, concurring and dissenting opinions in that order.

3.3.2.1 Majority Opinion

Justice Gorsuch started his analysis by explaining that the Eighth Amendment's Cruel and Unusual Punishments Clause ["Clause"] has historically focused

> "on the question of what 'method or kind of punishment' a government may impose after a criminal conviction, not on the question whether a government may criminalize particular behavior in the first place or how it may go about securing a conviction for that offense. *Powell,* 392 U.S., at 531-532."127[127]

Additionally, according to the Court, the criminal punishments imposed un- der the Grant Pass ordinances in question do not

> "qualify as cruel and unusual" since an initial offense may only trigger a civil fine; repeat offense may trigger an order temporarily barring a person from camping in a public park; and those that violate an order like that may only face a criminal punishment of up to 30 days in jail couple with perhaps a larger fine. Relying on *Bucklew v. Precythe*, 587 U.S. 119, 130 (2019), the Court concluded that none of these sanctions are unusual, "because similar punishments have been and remain among 'the usual mode[s]' for punishing offenses throughout the country. […] In fact, large numbers of cities and States across the country have long employed, and today employ, simi- lar punishments for similar offenses."[128]

The Court reasoned that the California law at issue in the 1962 *Robinson* decision was "nothing like" the public camping ordinances at the heart of the present case because,

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and assumed office in 2006. Brett Kavanaugh and Amy Coney Barrett were both nominated by Donald Trump. Kavanaugh assumed office in 2018 while Barrett assumed office in 2020.

[126] Sonia Sotomayor was nominated by Barack Obama and assumed office in 2009. Elena Kagan was also appointed by Barack Obama and assumed office in 2010. Ketanji Brown Jackson, the first black woman to serve on the Supreme Court, was nominated by Joe Biden and assumed office in 2022. Supreme Court Justices, as with most other federal judges, have lifetime appointments.

[127] *City of Grants Pass v. Johnson*, 603 U.S. 16 (2024).

[128] *City of Grants Pass v. Johnson*, 603 U.S. at 17.

> "Rather than criminalize mere status, Grant Pass forbids actions like 'occupy[ing] a campsite' on public property 'for the purpose of maintaining a temporary place to live. Under the city's laws, it makes no difference whether the charged defendant is homeless, a backpacker on vacation passing through town, or a student who abandons his dorm room to camp out in protest on the lawn of a municipal building. In that respect the city's laws parallel those found in countless jurisdictions across the country. And because laws like these do not criminalize mere status, *Robinson* is not implicated."[129]

In a footnote, the Court states that the dissent mistakenly suggests that the ordinances at issue, and others like them, apply only to the homeless. In the same footnote, the Court states that perhaps the dissent is really suggesting that some cities, such as Grants Pass, engage in a system of "selective enforcement" of such ordinances again homeless persons, while giving others a pass. If so, the Court states, then a possible remedy might lie, not under the Clause, but rather perhaps under the due process clause and other precedents regarding selective prosecution.[130]

The Court declined to accept plaintiffs' invitation to extend *Robinson* to prohibit enforcement of laws that proscribe certain acts that are in some sense "involuntary," because some homeless individuals cannot help but do what the law forbids. The Court reasoned that the Supreme Court had already rejected such an extension in *Powell v. Texas*, the case discussed earlier, where the Court confronted a defendant who had been convicted under a Texas statute making it a crime to get drunk or be found in a state of intoxication in a public place. There, Powell argued that his drunkenness was an "involuntary byproduct" of his status as an alcoholic. The Court noted that in *Powell*, Justice Marshall, writing for the plurality, rejected that contention, writing that *Robinson* did not curtail a State's authority to secure a conviction when the accused has com- mitted some act society has an interest in preventing. Justice Marshall further reasoned that that remained true even if the defendant's conduct might, in some sense, be described as involuntary or occasioned by a particular status.[131]

[129] *City of Grants Pass v. Johnson*, 603 U.S. at 20-21 (citations and other references omitted).
[130] *Ibidem*, at fn. 5.
[131] *City of Grants Pass v. Johnson*, 603 U.S. at 22-23 (citations and other references omitted).

Next, the Court argued that expanding *Robinson's* narrow holding would risk turning the judiciary into the ultimate arbiter of criminal responsibility across diverse areas of law, a role for which the Eighth Amendment provides no guidance.[132] This, in turn, "would interfere with 'essential considerations of federalism' that reserve to the State primary responsibility for drafting their own criminal laws.[133] Furthermore, the Court wrote at length about how expanding *Robinson* would and had led to many practical difficulties as cities have faced numerous challenges in determining who qualifies as "involuntarily" homeless and what constitutes "adequate shelter" under *Martin*. "Posing the questions may be easy; answering them is not. Is it enough that a homeless person has turned down an offer of shelter? Or does it matter why? Cities routinely confront individuals who decline offers of shelter for any number of reasons, ranging from safety concerns to individual preferences. How are cities and their law enforcement officers on the ground to know which of these reasons are sufficiently weighty to qualify a person as 'involuntarily' homeless?"[134] The Court concluded that the judicially created standard from the Ninth Circuit proved unworkable and has interfered with local efforts to address homelessness, ultimately undermining the democratic process and federalism principles.

> "Homelessness is complex. Its causes are many. So may be the public policy responses to address it. At bottom, the question this case presents is whether the Eighth Amendment grants federal judges primary responsibility for as- sessing those causes and devising those responses. It does not."[135]

Clarence Thomas concurred in the Court's result, but wrote separately to say that in his view *Robinson* had been "wrongly decided,"[136] and that he would overrule it. Thomas argued that *Robinson's* holding conflicted with the plain text of the Cruel and Unusual Punishments Clause along with its history and that the Court in that case relied too much instead upon contemporary public opinion which, in Thomas' view "is not an appropriate metric for interpreting [the Clause] or any provision of the Constitution for that matter."[137] Thomas' concurrence comes as no surprise. Throughout his long tenure on the Court, he has been a Justice that, perhaps more

[132] *City of Grants Pass v. Johnson*, 603 U.S. at 24-25 (citations and other references omitted).
[133] *City of Grants Pass v. Johnson*, 603 U.S. at 25 (citations and other references omitted).
[134] *City of Grants Pass v. Johnson*, 603 U.S. at 26.
[135] *City of Grants Pass v. Johnson*, 603 U.S. at 34.
[136] *City of Grants Pass v. Johnson,* 603 U.S. 1 (2024), Thomas, J., concurring.
[137] *City of Grants Pass v. Johnson,* 603 U.S. 2 (2024), Thomas, J., concurring.

than any other, has been willing to reject the principle of precedence and stare decisis and to overrule previous high court rulings he believes are "demonstrably erroneous."[138] Thomas, along with other so-called "textualists," such as the now deceased Antonin Scalia, hold the view that the text of the Constitution has a "fixed" meaning and that the Court should not take into account the Nation's "evolving standards of decency" when interpreting it.[139]

3.3.2.2 Dissenting Opinion

Justice Sotomayor starts her dissenting opinion as follows,

> "Sleep is a biological necessity, not a crime. For some people, sleeping out- side is their only option. The City of Grants Pass jails and fines people for sleeping anywhere in public at any time, including in their cars, if they use as little as a blanket to keep warm or a rolled-up shirt as a pillow. For people with no access to shelter, that punishes them for being homeless. This is unconscionable and unconstitutional. Punishing people for their status is 'cruel and unusual' under the Eighth Amendment. See *Robinson v. California*, 370 U.S. 660 (1962.)"[140]

The dissent framed the issue before the Court as "whether the Constitution permits punishing homeless people with no access to shelter for sleeping in public with as little as a blanket to keep warm."[141] At the outset of the opinion, Justice Sotomayor accused the majority of focusing "almost exclusively on the needs of local governments and leaves the most vulnerable in our society with an impossible choice: Either stay awake or be arrested."[142] She cautioned that the Court must protect the rights of all Americans, "rich and poor, housed and unhoused […] even when, and perhaps especially when, doing so is uncomfortable or unpopular."[143]

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[138] J. Stempel, op. cit. In his article, Stempel points out that in a variety of cases, includ- ing gun cases, libel cases, and abortion cases, Thomas has used his textualist or original- ist judicial philosophy to argue in favor of abandoning concepts of precedent and stare decisis.
[139] *City of Grants Pass v. Johnson,* 603 U.S. 2 (2024), Thomas, J., concurring.
[140] *City of Grants Pass v. Johnson*, 603 U.S. 1 (2024), Sotomayor, J, dissenting.
[141] *Ibidem.*
[142] *Ibidem.*
[143] *City of Grants Pass v. Johnson*, 603 U.S. 603, 2 (2024), Sotomayor, J, dissenting.

A good portion of the dissent focuses on the causes of homelessness, some- thing addressed in section 2.3 of this paper.[144] It also highlights, as I also have in 2.2.4 of this paper, that homelessness tends to impact the most vulnerable in society, such as,

> "[P]eople already in precarious positions with mental and physical health, trauma, or abuse [who] may have nowhere else to go if forced to leave their homes [along with] [v]eterans, victims of domestic violence, teenagers, and people with disabilities."[145]

Women and American Indians are also particularly vulnerable.[146]

The dissent argues that criminalizing homelessness is counterproductive. It results in a "destabilizing cascade of harm" because,

> "Rather than helping people to regain housing, obtain employment, or access needed treatment and services, criminalization creates a costly revolving door that circulates individuals experiencing homelessness from the street to the criminal justice system and back."[147]

It highlights that when a homeless person is arrested their most personal possessions, including "personal documents needed for accessing jobs, housing, and services such as IDs, driver's licenses, financial documents, birth certificates, and benefit cards" not to mention clothing, tools and computers are separated from them.[148] The dissent presents real life examples of how, "incarceration and warrants from unpaid fines can also result in the loss of employment, benefits, and housing opportunities."[149]

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[144] *City of Grants Pass v. Johnson*, 603 U.S. 603, 3-4 (2024), Sotomayor, J, dissenting. "People become homeless for many reasons, including some beyond their control. '[S]tag- nant wages and the lack of affordable housing' can mean some people are one unexpected medical bill away from being able to pay rent. Every '$100 increase in median rental price' is 'associated with about a 9 percent increase in the estimated homelessness rate. Individ- uals with disabilities, immigrants, and veterans face policies that increase housing insta- bility. Natural disasters also play a role, including in Oregon, where increasing numbers of people 'have lost housing because of climate events such as extreme wildfires across the state, floods in the coastal areas, [and] heavy snowstorms. Further, 'mental and physical health challenges,' and family and domestic 'violence and abuse' can be precipitating causes of homelessness." [References and citations omitted].

[145] *City of Grants Pass v. Johnson*, 603 U.S. 603, 4 (2024), Sotomayor, J, dissenting.

[146] *Ibidem.*

[147] *City of Grants Pass v. Johnson*, 603 U.S. 603, 5 (2024), Sotomayor, J, dissenting. [References and citations omitted].

[148] *City of Grants Pass v. Johnson*, 603 U.S. 603, 6 (2024), Sotomayor, J, dissenting. [References and citations omitted].

[149] *Ibidem.*

Penalizing homelessness, the dissent argues, does not deter people from living out of doors. Deterrence is one of the objectives of criminal sanctions. How- ever, the dissent points to a study finding that "91 % of homeless people who were surveyed 'reported remaining outdoors, most often just moving two to three blocks away' when they received a move-along order."[150]

Turning to its Eighth Amendment analysis of the Grants Pass anti-camping ordinances, the dissent launched into a discussion of *Robinson*, which it stat- ed the Supreme Court has "repeatedly cited […] for the proposition that the 'Eighth Amendment […] imposes a substantive limit on what can be made criminal and punished as such."[151] In a footnote,[152] the dissent chided the majority for taking, "unnecessary swipes at *Robinson*, but not overruling it," and "mistakenly treat[ing] it as an outlier," while also observing that the ma- jority did not "cast doubt on this Court's firmly rooted principle that inflict- ing 'unnecessary suffering' that is 'grossly disproportionate to the severity of the crime' or that serves no 'penological purpose' violated the Punishments Clause. *Estelle v. Gamble*, 429 U.S. 97, 103, and n. 7 (1976)."[153] In the dissent's view, the majority was wrong in believing that the case before it required an extension of the holding in *Robinson.*[154]

At the bottom, the majority and dissent disagreed over whether the Ordinanc- es in question punished mere status [as opposed to conduct]. The majority ar- gued they did not.[155] The dissent vigorously argued they did just that, claiming that, "Every shred of evidence points [that way]" and that "The Ordinances' purpose, text, and enforcement confirm that they target status, not conduct."[156] In support of this reasoning, the dissent pointed to the Ordinances' purpose and the fact, as enforced, they were "intended to criminalize being homeless." The dissent, as evidence to support this conclusion, pointed to the trial court record, which I previously highlighted in Section 3.3.1, where the Ninth Cir- cuit Court of Appeals in this case referred to the "Roundtable discussions" of the City Council, and its desire to

[150] *Ibidem.*
[151] *City of Grants Pass v. Johnson*, 603 U.S. 603, 12 (2024), Sotomayor, J, dissenting. [References and citations omitted].
[152] *Ibidem., fn. 2*
[153] *City of Grants Pass v. Johnson*, 603 U.S. 603, 12 (2024), Sotomayor, J, dissenting.
[154] *Ibidem.*
[155] *City of Grants Pass v. Johnson*, 603 U.S. at 21.
[156] *City of Grants Pass v. Johnson*, 603 U.S. 603, 13 (2024), Sotomayor, J, dissenting.

essentially "ban" the homeless from its jurisdiction by busing them out of town to some other jurisdiction.[157] "This idea was deterrence, not altruism," wrote Justice Sotomayor, who followed this up with quotes from Grants Pass council members that had stated in a public hearing, "'[m]aybe they aren't hungry enough or cold enough […] to make a change in their behavior.' *Id.*, at 122. The council president summed up the goal succinctly, '[T]he point is to make it uncomfortable enough for [homeless people] in our city so they will want to move on down the road.'"[158]

The dissent also asserts that the text of the Ordinances singles out homeless people. It points to the definition of "campsite" as "any place where bedding, sleeping bag, or other material used for bedding purposes" is placed "for the purpose of maintaining a temporary place to live."[159] The dissent then takes is- sue with the majority's claims that it "makes no difference whether the charged defendant is homeless," by arguing "the Ordinances do not apply unless bed- ding is placed to maintain a temporary place to live."[160] Therefore, quoting from the Brief for Criminal Law and Punishment Scholars as *Amici Curiae* 12, "'what separates prohibited conduct from permissible conduct is a person's intent to 'live' in public spaces. Infants napping in strollers, Sunday afternoon picknickers, and nighttime stargazers may all engage in the same conduct of bringing blankets to public spaces [and sleeping], but they are exempt from punishment because they have a separate 'place to live' to which they presumably intend to return.'"[161]

The dissent offers a roadmap of sorts to similarly-situated homeless persons who will seek to bring claims against localities that have ordinances similar to those in Grants Pass. The dissent points out that future challenges might be brought on the basis that such ordinances violate the Eighth Amendment's Excessive Fines

[157] *Ibidem.*
[158] *City of Grants Pass v. Johnson*, 603 U.S. 603, 13-14 (2024), Sotomayor, J, dissenting. [References omitted]. As I read these comments from Grants Pass elected officials, I am acutely reminded of the scheme the Torries hatched in England, and which they poured millions of pounds into, to transport illegal immigrants from England to Rhwanda, also to supposedly deter those immigrants crossing the English Channel from France in "small boats" from coming to England in the first place. The new Labour Government scrapped that scheme, although now other European Governments, including Germany, are considering the same scheme.
[159] *City of Grants Pass v. Johnson*, 603 U.S. 603, 14 (2024), Sotomayor, J, dissenting. [Citations to underlying Ordinance provisions omitted].
[160] *Ibidem.*
[161] *City of Grants Pass v. Johnson*, 603 U.S. 603, 14-15 (2024), Sotomayor, J, dissenting.

Clause;[162] the Due Process Clauses of the Fifth and Fourteenth Amendments;[163] assertions that some vagrancy laws are unconstitutionally vague;[164] along with a variety of other perhaps less-well known attacks.[165] The dissent concluded that section of its opinion with these words,

> "The Court's misstep today is confined to its application of *Robinson*. It is quite possible, indeed likely, that these and similar ordinances will face more days in court."[166]

Justice Sotomayor ended her opinion as follows,

> "Homelessness in America is a complex and heartbreaking crisis. People experiencing homelessness face immense challenges, as do local and sta- te governments. Especially in the face of these challenges, this Court has an obligation to apply the Constitution faithfully and evenhandedly. The Eighth Amendment prohibits punishing homelessness by criminalizing sleeping outside when an individual has nowhere else to go. It is cruel and unusual to apply any penalty 'selectively to minorities whose number are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer through it would not countenance general application of the same penalty across the board.' *Furman v. Georgia*, 408 U.S. 238, 245 (1972) (Douglas, J., concurring)."[167]

Finally,

> "I remain hopeful that someday in the near future, this Court will play its role in safeguarding constitutional liberties for the most vulnerable among us. Because the Court today abdicates that role, I respectfully dissent."[168]

4 International Law Regarding the Right to Adequate Housing

A comprehensive discussion of this complicated subject is beyond the scope of this paper. However, I do want to touch upon it briefly.

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[162] *City of Grants Pass v. Johnson*, 603 U.S. 603, 26-27 (2024), Sotomayor, J, dissenting.
[163] *City of Grants Pass v. Johnson*, 603 U.S. 603, 27-28 (2024), Sotomayor, J, dissenting.
[164] *Ibidem.*
[165] *City of Grants Pass v. Johnson*, 603 U.S. 603, 28-29 (2024), Sotomayor, J, dissenting.
[166] *City of Grants Pass v. Johnson*, 603 U.S. 603, 29 (2024), Sotomayor, J, dissenting.
[167] *Ibidem.*
[168] *City of Grants Pass v. Johnson*, 603 U.S. 603, 30 (2024), Sotomayor, J, dissenting.

4.1 Special Rapporteur on the Right to Adequate Housing

The Special Rapporteur, speaking about the subject of homelessness and hu- man rights, and in particular the right to adequate housing,[169] states,

> "Homelessness is a profound assault on dignity, social inclusion and the ri- ght to life. It is a prima facie violation of the right to housing and violates a number of other human rights in addition to the right to life, including non-discrimination, health, water and sanitation, security of the person and freedom from cruel, degrading and inhuman treatment."

Further,

> "Homelessness has emerged as a global human rights violation even in Sta- tes that have adequate resources to address it. It has, however, been largely insulated from human rights accountability and has rarely been addressed as a human rights violation requiring positive measures by States to prevent and eliminate it. Homelessness not only indicates a State failure to guarantee access to safe, affordable and adequate housing for all, it violates as well a number of other human rights:
>
> - For example, being exposed to homelessness impairs strongly the health of those affected undermining their right to the highest attainable stan- dard of health.
> - Homelessness causes, every year several thousand premature and preven- table deaths, indicating as well a failure of States to protect the right to life adequately. In addition, it must be noted the right to life entails in itself more than mere survival, as it encompasses the core notion that everyone has the right to enjoy her or his life in dignity.
> - Homelessness is *stigmatized and often addressed with criminalization, vi- olence, and aggressive policies that violate, rather than safeguard, the rights of the persons involved.*
> - Persons experiencing homelessness are also discriminated on the basis of their housing status or due to their lack of official address, affecting their political, economic and social rights, such as their right to participate in elections, their right to work, or their right to access certain social bene- fits." [Emphasis added].[170]

The Special Rapporteur Report goes on to state that,

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[169] Special Rapporteur, *op. cit.,* A/HRC/43/43, para 30.
[170] *Ibidem.*

> "Homelessness violates the principle of human dignity enshrined in articles 1 and 22 of the [1948] Universal Declaration of Human Rights and in the [1966] International Covenant on Civil and Political Rights and Economic, Social and Cultural Rights."[171]

Further,

> "States have recognized in Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights the right of everyone to an adequate standard of living, including to food, clothing and housing and to the conti- nuous improvement of living conditions. Article 12 states that everyone has the right to the highest attainable standard of health. States must furthermo- re guarantee according to Article 2 (2) that all economic, social and cultural rights 'are exercised without discrimination of any kind as to […] national or social origin, property, birth of other status', the latter includes as well housing status."[172]

4.2 Do These Apply in the United States?

The National Law Center on Homelessness and Poverty, in exploring this is- sue, states that presently, the United States has signed but not ratified the Inter- national Covenant on Economic, Social and Cultural Rights (ICESCR), which is a binding document that recognizes the human right to adequate housing as a government obligation, and does not recognize the human right to housing as defined in international law.[173] The National Law Center Fact Sheet points out, however, that

> "[T]he United States has signed international treaties on racism, civil and political rights, and refugee status, all of which mention the right to housing."[174]

The National Law Center Fact Sheet references an "Economic Bill of Rights" proposed by President Franklin D. Roosevelt in 1944 which, among other things, advocated that every family should have a right to a decent home.[175]

This idea was aspirational only and has never had the force of law. In recent times, long-time Vermont Senator and two-time Presidential candidate Bernie Sanders ran on a similar platform first in 2016 and then again in 2020. Sanders garnered much

[171] *Ibidem.*
[172] *Ibidem.*
[173] Right to Housing Fact Sheet in the United States, *op. cit.*
[174] *Ibidem.*
[175] *Ibidem.*

support from Democrats and left-leaning Americans, but he eventually ended his bids for President and threw his support first to Hillary Clinton and then to President Joe Biden in 2020.[176] Conservative politicians paint Sanders and others that hold views similar to his as being "socialist," "radical left," "communist," and, in general, "out of touch."

In 2014, the National Law Center on Homelessness & Poverty, in conjunction with the National Coalition for the Homeless, and Southern Legal Counsel, as the US Human Rights Network CAT[177] Homeless Working Group, drafted a document entitled "Criminalization of Homelessness in the United States of America, Report ["Report"] to the United Nations Committee Against Torture."[178] Endorsed by various state chapters of the American Civil Liberties Union and other advocacy groups, the Report concluded that the criminalization of home- lessness constitutes cruel, inhuman, and degrading treatment. The Report argues that such criminalization across America constitutes "violations of the Convention Against Torture" and affects "more than 3.5 million people who experience homelessness in the United States of America annually."[179] The Report argues that "Criminalizing homelessness and its associated activities when people have nowhere else to go constitutes cruel, inhuman, and degrading treatment (CIDT) in violation of Article 16 [of CAT]."[180] Further, the Report notes that,

> "On March 27, 2014, the U.N. Human Rights Committee condemned the criminalization of homelessness in the United States as CIDT in violation of Article 7 of the International Covenant on Civil & Political Rights, and called upon the U.S government to abolish criminalization and take corrective action. On August 29, 2014,

[176] For those interested in this topic, I commend a recent book by Sanders entitled It's OK to be Angry About Capitalism. (2024) In his book, Sanders discusses that while the U.S. Constitution and Bill of Rights (collectively, the first ten Amendments to the Consti- tution) guarantee the right to vote, to express opinions, to assemble, and other important political rights, "they do not guarantee us the right to a decent job, health care, education, food and shelter. They do not guarantee us the right to basic necessities that allow hu- man beings to live decent and secure lives." After then referencing President Roosevelt's proposed Economic Bill of Rights, and his proclamation that, "True individual freedom cannot exist without economic security and independence," Sanders goes on to state, "Roosevelt was right when he made that statement almost eighty years ago, and the principle remains true today. Economic rights are human rights, and true individual freedom cannot exist without those rights." *Ibidem,* pp. 11–12.

[177] CAT is an acronym for the Convention Against Torture.

[178] Criminalization of Homelessness in the United States of America, A Report to the U.N. Committee Against Torture. o*p. cit.*

[179] Criminalization of Homelessness in the United States of America, A Report to the U.N. Committee Against Torture. o*p. cit.* p. 1.

[180] Criminalization of Homelessness in the United States of America, A Report to the U.N. Committee Against Torture. o*p. cit.* p. 2.

> the U.N. Committee on the Elimination of Racial Discrimination echoed this concern and called for abolition of criminalization of homelessness. Numerous Special Rapporteurs and inter- national authorities have similarly condemned criminalization of homelessness as CIDT in both mission reports on the U.S. and in thematic reports on penalization of poverty and stigmatization. These statements reflect a growing consensus."[181]

The Report paints a bleak picture of what homeless people face when trying to survive in communities that have ordinances such as those in Boise and Grants Pass, which we have examined through the prism of leading Constitutional law cases.

> "Once arrested, unaffordable bail means that homeless persons are nearly always incarcerated until their trials occur – or until they agree to waive their trial rights in exchange for convictions. In a survey of homeless persons, 57% stated that bench warrants had been issued, leading to their arrest. 49% of homeless people report having spent five or more days in a city or county jail. In 87% of cases with bail of $1000 or less in New York City in 2008, defendants were not able to pay and were incarcerated pending trial. The average length of pretrial detention was 15.7 days. This means homeless persons could spend more than two weeks in detention for crimes as minor as sitting on the sidewalk or littering. More than that, pretrial confinement leads to a higher likelihood of conviction. Confinement, or the threat of confinement, prompts defendants to plead guilty and give up their right to trial. Eight in 10 convicted misdemeanor arrestees receive sentences that do not include jail time – meaning that if they were detained pre-trial, it was unwarranted."[182]

The Report also underscores the financial costs to society of criminalizing homelessness; costs that could and should be better directed to making more public housing available to these people–a scheme that would go a long way to actually solving the problem.

> "Criminalization prolongs homelessness, and creates a correctional-system-to-homelessness cycle with astronomical costs to governments. Crimina- lization also misdirects state resources away from more effective (and cost-effective) short- and long-term solutions such as shelters and transitional housing, as well as permanent supportive housing and affordable housing programs, all of which are more likely to reduce the number of people living on the streets. Thus, policies in many parts of the

[181] *Ibidem.*
[182] Criminalization of Homelessness in the United States of America, A Report to the U.N. Committee Against Torture. o*p. cit.* pp. 4–5.

> United States increase homelessness and exposure to cruel, inhuman, and degrading conditions rather than working to reduce them."[183]

Tars,[184] Legal Director for the National Homelessness Law Center, echoes what the Report discussed above chronicled.

> "Criminalization policies are ineffective and, in fact, make homelessness harder to exist. Because people experiencing homelessness are not on the street by choice but because they lack choices, criminal and civil punishment serves no constructive purpose. […] Criminalization is the most expensive and least effective way of addressing homelessness and wastes scarce public resources on policies that do not work. A growing body of research com- paring the cost of homelessness, including the cost of criminalization, with the cost of providing housing to homeless people shows that ending home- lessness through housing is the most affordable option in the long run."[185]

Tars references a study in Charlotte, North Carolina, which concluded that the city saved $2.4 million over a year after creating a Housing First facility. The study also found that this strategy led to tenants spending over 1,000 fewer nights in jail; nearly 300 fewer days in hospital; and nearly 650 fewer visits to hospital emergency rooms. In conclusion,

> "With state and local budgets stretched to their limit and the threat of ad- ditional federal cuts on the horizon, rational, cost-effective policies are nee- ded, not ineffective measures that waste precious taxpayer dollars."[186]

5 Housing First in Finland is Drastically Reducing Homelessness

Finland's government introduced a "Housing First" policy in 2008, aimed at eradicating long-term homelessness. Whereas the United States has witnesses a sharp rise in homelessness, according to Morales,[187]

[183] *Ibidem.*
[184] E. Tars, *op. cit.*, 6–37.
[185] *Ibidem.*
[186] E. Tars, *op. cit.*, 6–37 and 6–38.
[187] L. Morales, *op. cit.*

"[F]rom 2008 to 2022, the number of individuals experiencing long-term homelessness in Finland decreased by 68 percent."[188] Morales goes on to state that there were 18,000 homeless persons in 1987, when the government began its effort to address the problem, and that as of 2018, that number dropped to 5,482. Finland's policy is a human rights-based strategy built upon four principles:

1. Everyone is entitled to a settled place to live, regardless of circumstances, reversing traditional homeless aid approaches. Having stable living conditions makes it easier to look for a job and work on psychological and health problems. Homeless people can get an apartment without any preconditions. Being in a more secure position and having social worker support make it easier for them to find a job and take care of their physical and mental health.
2. The framework respects choice and autonomy, allowing individuals to select treatments and services. Individuals are not required to solve social and health issues beforehand, like completely giving up alcohol and drug use. Moreover, support is tailored to the needs of the person, and this is made possible due to the high standards of public social services.
3. Empowerment of residents and building trust with the staff.
4. Support people's integration into their community.

> Housing First solves long-term homelessness by gradually reducing and abandoning the use of conventional short-term shelters and converting them into affordable rented accommodation units."[189]

The Housing First strategy in Finland has worked through partnerships be- tween the state, cities, municipalities, and local non-governmental organiza- tions. The Finnish government funds the program by funneling money to the municipalities, who in turn can either spend the funds themselves or partner with other organizations that provide social services.

> "Between 2008 and 2019, the [Finnish] Government had spent over EUR 270 Million (approximately USD 293 million). Costs are shared between the central government and municipalities. Apartments bought on the private market are funded through the Finnish Lottery."[190]

[188] *Ibidem.*
[189] *Ibidem.*
[190] *Ibidem.*

Morales points to research showing, "that on average 80 percent of homeless people have accessed housing through the programme."[191] Finally,

> "The current government has committed to completely eradicating home- lessness by 2027 through measures both targeted at the homeless popula- tion and preventative programs. In the capital of Helsinki, homelessness is to be eradicated by 2025. This stands in sharp contrast to the rest of Europe [and the United States], where the number of people lacking stable housing has surged dramatically."[192] [193]

6 Conclusion and Commentary

The traditional objectives of the criminal justice system are to prevent the occurrence of crime, punish criminals, rehabilitate criminals, and provide retribution. The American criminal justice system, both at the federal and state levels, always seems to be fighting some kind of war on crime. For example, the war on drugs. The war on gang violence. The war on illegal immigrants. Fund- ing these "wars" has been expensive for the American taxpayer. They have also resulted in more prisons and more persons being imprisoned. America has the highest prison population in the world.[194] The federal government has so many criminal laws [apparently over 5000] that no one can accurately count them all. Governments have enacted three strikes and you're out legislation. They have enacted legislation making criminal penalties harsher. The sad truth is that most of these policies have failed and failed miserably. The other unfortunate truth is these policies disproportionately impact the most vulnerable and marginalized in society.[195] As usual, these people almost always end up drawing the short straw.

The homelessness situation in America is worsening. As we have seen from the examples in Charlotte, North Carolina and Finland, this outcome is not inevitable. Rather, it is because of [bad] deliberate choices made by American politicians and others looking for a quick fix. A theme repeated in this article is that the causes of homelessness are complex. There generally are no "quick fixes" in life for complex

[191] *Ibidem.*
[192] *Ibidem.*
[193] Many European countries have robust Housing First policies. For those readers interested in this subject, I commend you to read, Housing First in Europe, An Overview of Implementation, Strategy and Fidelity, *op. cit.*
[194] T. Heller, *op. cit.*
[195] *Ibidem.*

problems. On the contrary, they generally require long-term solutions that demand adequate and sustained funding, patience, hard work, diligence, cooperation, creativity, and dedication. Unfortunately, these principles are antithetical to short political election cycles. To try to win votes, and hence elections, and hence to gain power, politicians (way too often anyway) focus not on long-term solutions but rather on policies through which they can claim fast victories. Therefore, it is almost always easier for politicians to run on "law and order," and "tough on crime" policies than long-term plans such as the Housing First program in Finland. Many people, certainly many people in America, would rather cast their vote for a politician who promises to crack down on homelessness through civil and criminal penalties than the alternative politician who proposes using taxpayer revenue actually to solve the problem. Why? Because many people, certainly many Americans, want to see some instant results. It's human nature to want instant instead of deferred gratification.

In my view, it is very unfortunate that the Court in *Grants Pass* ruled as it did. Sure, politicians, law enforcement agencies and others hail the ruling. They argue that the Court has restored one of the "tools in their toolbox" to supposedly fight the problem of homelessness. But is that really what the majority in *Grants Pass v. Johnson* did? Let me posit this question. How does punishing a homeless person, who by definition has no or little money, either civilly or criminally, help achieve any of the traditional objectives of the criminal justice system? Will issuing these unfortunate souls fines or jailing them deter them from sleeping out of doors where they have no other place to go? Will doing so in some fashion rehabilitate them? Or, as I suspect, does doing so just make some of us feel better that local governments and policing agencies are "doing something?"

I will make a candid admission here. I am not a constitutional law scholar. I have studied constitutional law. And I made a career out of practicing law. And I have thoroughly read the cases analyzed in this article. One can engage in endless pettifoggery over the meaning of "voluntary" and "involuntary" as the majority did in *Grants Pass*. But, in my view at least, it's difficult to conclude that punishing a person for being homeless is not cruel and unusual punishment. Should we, as a society, punish a person for their status of being men- tally ill? Many of the homeless are mentally ill, or have lifelong psychological problems leading to homelessness, stemming from childhood abuses etc. So, is punishing them the answer? Will

punishing them in any way resolve the problem? Or, is this just a quick fix to make some people feel better that "those people living in tents and blighting our neighborhood" are being given their just desserts by the authorities?

Justice Sotomayor, in her dissent, enumerated other possible legal challenges to the types of ordinances that have been the focus of this paper, such as the due process clause, etc. She wrote there will be more legal challenges in the years to come. She is correct about one thing: there will be more litigation. Lots of it. There will be think tanks on both sides looking for ways to either enact further anti-camping legislation or, on the other side, to attack that legislation using the Sotomayor road map. And these cases will clog the courts, taking up valuable judicial resources. And taxpayers will spend a lot of money on their local governments to have endless meetings over the best ways to criminalize the homeless; and on law enforcement strategies, etc. And what will any of this truly accomplish? It will not solve the problem. And I dare predict that if any of these alternate legal challenges were to end up in front of this Supreme Court again, they would suffer the same fate as the challenge under the Eighth Amendment's Cruel and Unusual Punishments Clause. In my judgment, the conservative block of this Supreme Court, which will be intact for many years to come, is not likely to view such alternative challenges with any more sympa- thy than it did the Eighth Amendment challenge. Increasingly, the conservative block, notably the Donald Trump appointees, seemingly following the lead of Clarence Thomas, are more willing to ignore principles of precedent and stare decisis, and to overrule cases that have been considered settled law for years, often decades. Its abortion ruling in 2022 in *Dobbs v. Jackson Women's Health,*[196] where the conservative block of the Court overruled the fifty-year-old precedent *Roe v. Wade*[197] which had held that the Constitution protects a woman's right to have an abortion, is but one example. Principles of stare decisis and precedent[198] lend legitimacy to the court and provide stability in the law. In my judgment, the current Court's willingness to cast away long-standing precedents on the grounds it feels all of these cases were just "wrongly decided" is damaging to the Court's legitimacy and undermining the rule of law.

[196] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).
[197] *Roe v. Wade*, 410 U.S. 113 (1973).
[198] *Stare decisis* is a Latin term meaning "let the decision stand" or "to stand by things decided." Simply put, this doctrine holds that courts and judges should honor precedent—the decisions, rulings, and opinions from prior cases. Respect for precedents gives the law consistency and makes interpretations of the law more predictable and less seemingly random.

If I have learned anything in my life, kicking the proverbial can down the road is usually a poor, self-defeating strategy. Instead, why not be proactive? Why not instead employ a strategy that has been proven to work? Perhaps it is time for America to take a hard look at Finland. Or even closer to home: Charlotte, North Carolina. Finland will have largely eradicated the homeless problem there in the relatively short span of twenty years. Isn't a longer-term plan with a positive outcome better than the endless war on homelessness? It is also more compassionate.

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Naslov v slovenskem jeziku

Brezdomstvo v Združenih državah Amerike: Zakaj je sodba Vrhovnega sodišča ZDA v zadevi City of Grants proti Johnsonu, ki dopušča kriminalizacijo bezdomstva, tako kruta in protiproduktivna

Povzetek v slovenskem jeziku

Brezdomstvo ne pozna meja in države po vsem svetu uporabljajo različne pri- stope pri njegovem reševanju. Število brezdomcev v ZDA je v letu 2023 do- seglo rekordne ravni, zlasti v več zahodnih zveznih državah, med drugim v Kaliforniji in Oregonu. Brezdomstvo v ZDA je tudi vprašanje rasne pravičnosti, saj nesorazmerno prizadene različne manjšinske skupine in ljudi, ki so v kapitalistični družbi z razmeroma šibkimi socialnimi varnostnimi mrežami že tako ali tako potisnjeni na rob. Brezdomstvo pogosteje prizadene moške, čeprav se število žensk nedvomno povečuje. Še ena ranljiva skupina so starejši ljudje. Stroški stanovanj v ZDA so astronomsko narasli.

Presenetljivo je, da veliko Američanov živi bodisi pod pragom revščine ali komaj nad njim. Revščina in pomanjkanje cenovno dostopnih stanovanj sta dva glavna vzroka za brezdomstvo. Toda brezdomstvo ima tudi številne druge vzroke, med drugim psihiatrične težave, zlorabo prepovedanih substanc, alkoholizem, nasilna razmerja, brezposelnost, kronične zdravstvene težave in telesne omejitve. Ker različne oblasti skupnosti brezdomnim prebivalcem niso zagotovile ustreznih zavetišč, so se ljudje zatekli v parke in postavili tako imenovana šotorska mesta. To je med drugim povzročilo tudi pomisleke glede javne varnosti z vidika pojavnosti kaznivih dejanj, na primer tatvin v trgovinah, odprtega uživanja drog in alkohola ipd.

Z namenom politične rešitve tega problema in zaradi pomiritve dela prebivalstva, ki si v svojih skupnostih ne želi brezdomcev, so lokalne oblasti sprejele odloke, ki policiji omogočajo, da brezdomne kaznuje z denarnimi ali prosto strogimi kaznimi. Zagovorniki brezdomnih so sprožili sodne postopke proti tem odlokom in trdijo, da se jim krši osmi amandma k ameriški ustavi, ki prepoveduje okrutno in nenavadno kaznovanje. Argumenti temeljijo predvsem na sodbi Vrhovnega sodišča ZDA iz leta 1962 v zadevi Robinson proti Kaliforniji. V njej je sodišče razveljavilo kalifornijski zakon, ki je že golo dejstvo, da je nekdo odvisen od mamil, obravnaval kot kaznivo dejanje, namesto da bi kaznoval uporabo, prodajo ali posedovanje mamil. Sodišče je namreč menilo, da kaznovanje nekoga le zaradi njegovega statusa pomeni okrutno in nenavadno kaznovanje. V nizu nedavnih primerov je Zvezno prizivno sodišče za deveto okrožje, ki se je pretežno oprlo prav na sodno prakso iz zadeve Robinson, razveljavilo tako imenovane protitaboriščne odloke v zveznih državah Oregon in Idaho, ker naj bi kršili klavzulo o prepovedi okrutnega in nenavadnega kaznovanja.

Potem ko je Vrhovno sodišče ZDA leta 2019 zavrnilo obravnavo odločb Zveznega prizivnega sodišča, je Vrhovno sodišče ZDA, ki je danes v precej bolj konservativni sestavi, vnovič obravnavalo to pereče vprašanje v zadevi City of Grants Pass, Oregon proti Johnsonu. Junija 2024 je s šestimi glasovi proti trem sodna večina razveljavila odločitev Zveznega prizivnega sodišča za deveto okrožje in navedla številne argumente v podporo ugotovitvi, da se kalifornijski zakon iz zadeve Robinson razlikuje od odlokov, ki jih je sprejel Grants Pass, ter da ti odloki ne kršijo osmega amandmaja o prepovedi okrutnega in nenavadnega kaznovanja. Sodniška manjšina je so v svojem odklonilnem ločenem mnenju zapisala, da je spanje človekova biološka nuja in ne kaznivo dejanje. Za ljudi brez dostopa do zavetja po njihovem mnenju ti odloki pomenijo kaznovanje zgolj zaradi statusa brezdomca. Trdijo, da to krši prepoved okrutnega in nenavadnega kaznovanja po osmem amandmaju. Primer so izenačili s kaznovanjem osebe zgolj zaradi odvisnosti, kar je po njihovem mnenju primerljivo s kaznovanjem osebe zgolj zato, ker je brezdomna. Ti sodniki bi na podlagi zadeve Robinson iz leta 1962 odloke mesta Grants Pass razveljavili.

Različne mednarodne pogodbe in sporazumi priznavajo pravico do ustrezne- ga bivališča kot človekovo pravico. Posebni poročevalec Združenih narodov o pravici do ustreznega bivališča (angl. the Special Rapporteur on the Right to Adequate Housing) je pripravil številna temeljita poročila o tej temi. Čeprav Združene države niso ratificirale Mednarodnega pakta o ekonomskih, socialnih in kulturnih pravicah, ki priznava pravico do ustreznega bivališča kot obveznost oblasti, različne organizacije za pomoč brezdomnim v ZDA, kot je National Law Center on Homelessness and Poverty, trdijo, da kriminalizacija brezdomstva pomeni okrutno, nečloveško in ponižujoče ravnanje ter krši Konvencijo Združenih narodov proti mučenju. Prav tako to vpliva na več kot 3,5 milijona Američanov, ki se vsako leto v ZDA spopadajo z brezdomstvom.

Veliko evropskih držav, vključno s Finsko, je drastično zmanjšalo število brezdomcev z uporabo pristopa »najprej stanovanje« (angl. Housing First), ki priznava, da ima vsakdo pravico do stalnega bivališča, ne glede na druge okoliščine v posameznikovem življenju. Pristop »najprej stanovanje« uspešno uporablja tudi v nekaterih delih ZDA, na primer v mestu Charlotte v Severni Karolini. Brezdomstvo v ZDA je neupravičeno in ni nerešljiva težava. Kriminalizacija brezdomcev je kontraproduktivna. Ne služi nobenemu od splošno priznanih ciljev kazenskega pravosodja. Naložiti še eno denarno kazen osebi, ki nima kam iti in nima denarja, da bi kazen plačala, ali pa jo poslati v zapor za nekaj dni ali tednov, ne bo rešilo problema. Ti isti nesrečniki se bodo v nekaj dneh vrnili na iste ulice ali na ulice v kakem drugem mestu. Za mesta, kot je Grants Pass, bi bilo dolgoročno bolje, če bi se odrekla kazenskim rešitvam in namesto tega pri reševanju krize brezdomstva sprejela načelo »najprej stanova- nje«. Tako bi tudi dolgoročno prihranili denar. Ta pristop bi bil sočuten.

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Criminal Procedure-Wire Intercep-Tion-the Requirement of Minimiza-Tion Under Section 2518(5) of Title III of the Omnibus Crime Control and Safe Streets Act of 1968[1]

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Appellant was indicted for various narcotics offenses based on in- formation gathered through the use of a court authorized wiretap.[2]1 The initial court order required the agents to conduct the wiretap in such a way as to minimize interception of non-narcotics related calls in accordance with Title III of the Omnibus Crime

[1] Note: First published at Wayne Law Review. HELLER, Thomas Allan. (1979). Criminal procedure - wire interception - the requirement of minimization under section 2518(5) of title III of the Omnibus Crime Control and Safe Streets Act of 1968: casenotes. Wayne Law Review. Nov. 1979, vol. 26, iss. 1, pp. 239–262. ISSN 0043-1621. https://heinonline.org/HOL/Page? handle=hein.journals/waynlr26&id=241&collection=jo urnals&index=

[2] This court order was authorized under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, § 802, 18 U.S.C. § 2518 (1976) [hereinafter TitleIII]. Scott v. United States, 436 U.S. 128, 130 (1978).

Control and Safe Streets Act of 1968.[3] A pretrial suppression hearing revealed that government agents intercepted virtually every call during the thirty day surveillance period.[4] Primarily on the grounds that the agents in- tercepted almost all of appellant's phone calls and that sixty percent of the intercepted calls were not narcotics related, the district court found a violation of the minimization requirement and ordered suppression of all the evidence.[5] The court of appeals vacated the order and remanded,[6] but in an unreported decision the district court again ordered total suppression in light of the monitoring agents' "knowing and purposeful" failure to comply with the minimization requirement.[7] On appeal, the court of appeals reversed, holding that suppression should be based not on whether the agents subjectively in- tended to minimize their interceptions but on whether the actual interceptions were reasonable.[8] On remand from the court of appeals appellant was found guilty of selling and purchasing narcotics not in the original stamped package[9] and the court of appeals affirmed the conviction.[10] On appeal to the United States Supreme Court, *held,* af- firmed. In evaluating the extent of compliance with the minimization requirement the appropriate standard of review requires a purely ob- jective assessment of the reasonableness of the actual interception viewed in the context of the particular circumstances underlying the investigation, without consideration of the subjective motives or intent of the officers or agents. *Scott v. United States,* 436 U.S. 128 (1978). The offensiveness of overly-broad warrants, dubbed general war- rants, was first noted in *Entick v. Carinngton.*[11] Indeed, Britain's prac- tice of giving customs officials blanket authority to conduct general searches for goods imported to the Colonies in violation of the

[3] Title III in pertinent part reads: "Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of com- munications not otherwise subject to interception under this chapter "(emphasis added). 18 U.S.C. § 2518(5) (1976).

[4] Monitoring was disrupted only when agents were connected to the wrong telephone line. Scott v. United States, 436 U.S. 128, 133 n. 7 (1978).

[5] United States v. Scott, 331 F. Supp. 233, 247 (D.D.C. 1971), rev'd, 516 F.2d 751 (D.C. Cir. 1975), affd, 436 U.S. 128 (1978).

[6] United States v. Scott, 504 F.2d 194, 199 (D.C. Cir. 1974).

[7] Scott v. United States, 436 U.S. 128, 133-34 (1978).

[8] United States v. Scott, 516 F.2d 751, 756 (D.C. Cir. 1975), affd, 436 U.S. 128 (1978). The court of appeals, with four judges dissenting, denied rehearing en banc, 522 F.2d 1333 (D.C. Cir. 1975), and the United States Supreme Court denied certiorari, 425 U.S. 917 (1976). Justices Brennan and Marshall dissented; Justice Powell would grant certiorari.

[9] Appellant was convicted pursuant to a provision of the Internal Revenue Code no longer in force. Internal Revenue Code of 1954, eh. 39, § 4704, 68A Stat. 550 (repealed 1970).

[10] United States v. Scott, 551 F.2d 467 {D.C. Cir.) (unreported decision) cert. granted, 434 U.S. 888 {1977).

[11] How. St. Tr. 1029 {1765).

Crown's tax laws was a motivating factor behind the Declaration of Independence.[12] In response to this colonial experience the new nation enacted, as a crucial part of the Constitution, the Bill of Rights. The fourth amendment was aimed at protecting against invasions of the sanctity of a man's home and the privacy of one's life by roving com- missions of officers searching under indiscriminate, general authority.[13] The warrant requirement was essential to this scheme as it required notice to the citizen of the scope of the search as well as the officer's authority to search. The United States Supreme Court only recently has undertaken to apply these general notions; of searches and the warrant requirement to the specific question of electronic eavesdropping.

In the benchmark decision of *Berger v. New York*[14] the United States Supreme Court declared a New York state eavesdropping statute[15] unconstitutional. The Court held that conversations are protected by the fourth amendment and that the use of electronic surveillance to seize them is a search within the meaning of that amendment.[16] Furthermore, the Court identified a number of defects within the statute which caused it to be an overly broad intrusion into a constitutionally protected area and thus violative of the fourth amendment. Identification of these shortcomings provides a structural framework for evaluating the constitutionality of a law.

As written, the statute authorized various judges and magistrates to issue ex parte eavesdropping orders upon the oaths of specified law enforcement personnel that they had reasonable grounds to believe that evidence of a crime could be obtained through wiretaps and where they particularly described the person or persons whose com- munications would be recorded and the purpose thereof. The first defect was that an order could issue even where there was no belief that a particular offense was being committed.[17] Secondly, the statute failed to require the applicant to describe with particularity the com- munications to be seized.[18] Thirdly, it permitted a series of intrusions over a sixty day peiod upon one showing of probable cause,

[12] Berger v. New York, 388 U.S. 41, 58 {1967).
[13] Warden v. Hayden, 387 U.S. 294, 301 {1967).
[14] 388 U.S. 41 {1967).
[15] 1958 N.Y. Laws, eh. 676 (repealed 1970).
[16] 388 U.S. at 51.
[17] *Id.* 54-55.
[18] *Id.* 59.

thereby avoiding prompt execution, even though the required conversations could be seized long before expiration of sixty days.[19] Fourthly, it per- mitted extensions on the sixty day period absent renewed showing of probable cause.[20] Finally, the statute provided no requirements for notice nor any showing of exigent circumstances to obviate the need for notice and it contained no demand for return of the warrant.[21] Consequently, because the New York statute gave those responsible for executing the order overly-broad discretion in seizing any and all con- versations, the Court found it in the .nature of a general warrant, repugnant to the Constitution.[22]

If the *Berger* decision was a rough draft outlining the substantive requirements of a constitutional wiretapping statute, then a decision by the Supreme Court the following term was the final draft. In *Katz v. United States*[23] the Court reaffirmed the principles and guidelines established in *Berger.*[24] The petitioner was convicted of interstate gambling violations by the use of evidence gathered by FBI agents who had placed a "bug" upon the outside of a public telephone booth from which petitioner had placed calls. The Court reversed the conviction holding that failure to obtain prior judicial approval for the bug was fatal regardless of the fact that the procedural guidelines established in *Berger* had otherwise been satisfied.[25] The significance of the case is its holding that the fourth amendment protects people rather than places, and its overturning of an older line of cases tha.t made physical

[19] *Id.*
[20] *Id.*
[21] *Id.* 60.
[22] *Id.* The Senate Repon on Title III observed that in the course of the ma- jority opinion in Berger the Court found several provisions of the New York Statute unconstitutional. Some of those defects were its lack of:
(1) Particularity in describing the place to be searched and the person or thing to be seized.
(2) Particularity in describing the crime that has been, is being, or is about to be committed.
(3) Particularity in describing the type of conversation sought.
(4) Limitations on the officer executing the eavesdrop order which would (a) prevent his searching unauthorized areas, and (b) prevent further searching once the property sought is found.
(5) Probable cause in seeking to renew the eavesdrop order.
(6) Dispatch in executing the eavesdrop order.
(7) Requirement that the executing officer make a return on the eavesdrop order showing what was seized.
(8) A showing of exigent circumstances in order to overcome the defect of not giving prior notice.
S. REP. No. 1097, 90th Cong., 2d Sess., reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, 2161-62 [hereinafter LEGISLATIVE HISTORY].
[23] 389 U.S. 347 (1967)
[24] See note 21 *supra.*
[25] 389 U.S. at 354-55.

penetration into the area bugged the dispositive concern.[26] *Katz* aban- doned the trespass doctrine, holding that the presence or absence of a physical intrusion into any given enclosure is no longer controlling.[27] Additionally, although the surveillance in *Katz* was so narrowly cir- cumscribed as to comply with the requirements enunciated in *Berger,* it was nonetheless constitutionally impermissible because the govern- ment bypassed the requirement of prior judicial approval. Yet, the broader significance of the decisions in *Berger* and *Katz* was to be found in their message to Congress and the states that a wiretap statute, carefully drawn to conform to the criteria enunciated therein, could pass constitutional muster.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (the Act) was an attempt to respond to the constitutional criteria for electronic surveillance delineated in *Berger* and *Katz.*[28] The con- gressional task in Title III was to draft a statute giving law enforce- ment agencies the necessary flexibility to combat increasingly sophisticated criminal enterprises which utilize the telephone as a means of communication, while at the same time preventing the widespread invasion of individual privacy inherent in an unsupervised, unregulated wiretap.[29] Therefore, as the legislative history indicates, the Act was written with a dual purpose: (1) to protect the privacy of electronic and oral communications, and (2) to provide a constitu- tional standard for the authorization of wiretaps.[30] Congress strived to achieve these goals and safeguard against the evils of unnecessarily recording conversations extraneous to the investigation by mandating in express terms that each wiretap order contain a provision requiring surveillance to be conducted in a manner that would minimize the in- terception of "innocent" conversations.[31]

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[26] Id. 352-53. In Katz the government contended that the activities of its agents should not have been tested by the fourth amendment since the surveillance of the telephone involved no physical penetration of the telephone booth from which the petitioner placed his calls. This contention was supported by ar. older line of cases making physical penetration, a trespass, the dispositive concern. Olmstead v. United States, 277 U.S. 438 (1928); Goldman v. United States, 316 U.S. 129 (1942).

[27] 389 U.S. at 353.

[28] LEGISLATIVE HISTORY, supra note 21, at 2113, 2l53. "This proposed and legislation conforms to the constitutional standards set out in Berger v. New York ... and Katz v. Untited States "Id 2113 (citations omitted).

[29] See generally LEGISLATIVE HISTORY, supra note 21, at 2153-63. The legislative report accompanying Title III quoted from the President's Crime Commis- sion, in their report, The Challenge of Crime in a Free Society (1967), which discussed the telephone's role in organized crime: [C]ommunication is essential to the operation of any business enterprise. In legitimate business this is accomplished with written and oral exchanges. In organized crime enterprise, however, the possibility of loss or seizure of an in- criminating document demands a minimum of written communication.... The telephone remains an essential vehicle for communication. Id. LEGISLATIVE HISTORY, supra note 21, at 2159.

[30] *Id.* 2153.

[31] 18 U.S.C. § 2518(5) (1976). See note 2 *supra.*

Because Title III nowhere defined "minimization,"[32] the courts felt free to develop their own standards of review for measuring the ex- tent of compliance in a given situation. The importance of this burden has been underlined by one court's observation that the degree of strictness with which the minimization clause is interpreted by the judiciary will determine its ultimate effectiveness in safeguarding the individual's right to privacy outlined in Berger and Katz.[33] In one ex- ample of such an interpretation of the clause, it was stated that government agents performing wiretap surveillance are required to discontinue recording once it is clearly established that a given conversation lies outside the scope of the order's authorization.[34]33 A number of lower federal courts have found that approach unmanageable, however, and prohibit only the most patently non-criminal interceptions, thus severely limiting the protection of the minimization clause.[35]

The rationale of proponents of the latter viewpoint is that a strict interpretation of the minimization requirement would render ineffec- tive this important law enforcement tool provided by Congress.[36]

Another court espousing this viewpoint, while admitting that an ex- tremely high percentage of the calls were not pertinent in the case presented to it, nevertheless condoned their interception on the ground that detailed screening instructions which could have effectively minimized the interception of innocent conversations, would have been difficult to devise.[37]

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[32] The statute itself fails to define "minimization" and the analysis section of the legislative history on Title III does little more than paraphrase the actual provi- sion, thus offering no clues of what Congress had in mind with the minimization clause. See LEGISLATIVE HISTORY, *supra* note 21, at 2192.

[33] 32. United States v. Scott, 331 F. Supp. 233, 248 (D.D.C. 1971), rev'd, 516 F.2d 751 (D.C. Cir. 1975), affd, 436 U.S. 128 (1978). Giving the clause a strict inter- pretation Judge Waddy noted: If this court were to allow the government agents to indiscriminately in- tercept every conversation made and to continue monitoring such calls when it becomes clear that they are not related to the 'authorized objectives' of the wiretap and in violation of the order such order would become meaningless verbiage and the protections to the right of privacy outlined in Berger and Katz would be illusory.

[34] *Id.*

[35] See, e.g., United States v. Manfredi, 488 F.2d 588, 593 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974); United States v. Bynum, 360 F. Supp. 400,409,413 (S.D.N.Y. 1973), aff'd, 485 F.2d 490 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903 (1974).

[36] United States v. Bynum, 360 F. Supp. 400, 419-20 (S.D.N.Y. 1973). "The important law enforcement tool provided by Congress and carefully tailored to meet exacting constitutional standards should not be dulled by uncompromising ad- ministration to a point of practical ineffectiveness." *Id.*

[37] United States v. Manfredi, 488 F.2d 588, 600 (2d Cir. 1973).

Judicial tension over the proper application of the minimization requirement exists because of the imprecise nature of wiretapping as opposed to the more clear-cut nature of ordinary search and seizure law.[38] Courts familiar with fourth amendment search and seizure law have consistently preferred to analogize wiretap law to search and seizure law, applying the same standards in both contexts. Yet, the analogy breaks down upon careful scrutiny. The typical search war- rant dictates what is to be seized as well as when and from where it is to be taken, with very little or no discretion left to the executing of- ficer.[39] Incontrast to this tightly structured investigative tool is the in- herent indefiniteness found in the typical wiretap situation. It is often impossible to decide whether a conversation is relevant until the con- versation has been terminated. In this regard one district court opinion noted: "[M]onitoring agents are not gifted ... to know in advance what direction the conversation [will] take."[40]

The minimization issue has been widely litigated in the lower federal courts,[41] and in the course of this litigation the minimization clause has undergone a "maturation period."[42] At infancy, section 2518(5) cases were decided in a very cursory fashion.[43] For example, the trial court in the principal case found a breach of the minimiza tion requirement based primarily on the fact that the ratio of pertinent to non-pertinent calls intercepted was forty percent to sixty per- cent. Most courts now agree that, while percentages of pertinent to non-pertinent calls may be one factor, because of the vast array of factual settings present in wiretapping cases, each section 2518(5)

[38] *See Note, Post-Authorization Problems in the Use of Wiretaps: Minimization, Amendment, Sealing; and Inventories,* 61 CORI\ELL L. REV. 92, 96 (1975).

[39] Marron v. United States, 275 U.S. 192 (1927). "The requirements that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another ... no discretion [is] left to the officer." Id. 196.

[40] United States v. LaGorgia, 336 F. Supp. 190, 196 (W.D. Pa. 1971); ac-cord, United States v. Cox, 462 F.2d 1293, 1301 (8th Cir. 1972), cert. denied, 417 U.S. 918 (1974).

[41] See, e.g., United States v. Clerkley, 556 F.2d 709 (4th Cir. 1977); United States v. James, 494 F.2d 1007 (D.C. Cir. 1974), cert. denied, 419 U.S. 1020 (1975); United States v. Tortorello, 480 F.2d 764 (2d Cir. 1973), cert. denied, 414 U.S. 866 (1973).

[42] This term is borrowed from another author. Note, *Minimalization In Search of Standards*, 8 SUFFOLK L. REV. 60, 72 (1973).

[43] *See, e.g.*, United States v. Scott, 331 F. Supp. 233 (D.D.C. 1971) *rev'd*, 516 F.2d 751 (D.C. Cir. 1975), *affd*, 436 U.S. 128 (1978), where the court found that the minimization clause had been breached relying almost totally on the fact that the ratio of pertinent to non-pertinent calls intercepted was forty percent to sixty percent. The instant case rebuffs this reasoning. "[B]lind reliance on the percentage of nonpertinent calls intercepted is not a sure guide to the correct answer." Scott v. United States, 436 U.S. 128, 140 (1978).

case has to be dealt with on a case-by-case basis.[44] Indeed, the legislative history indicates that Congress intended each case to rest on its own facts. Jn analyzing section 2518(5), the Senate Report enunciated the principle that compliance with the requirements stated therein would have to be a "question of fact in each case."[45]

Nonetheless, one can glean from the case law several factors which courts have held to be determinative of whether or not the government has "reasonably minimized."[46] One of the essential considerations in the determination of reasonableness is the scope of the criminal enter- prise under investigation.[47] A minor investigation, involving only a few people, will cause the courts to view the minimization clause very strictly.[48] Where the purpose of the, wiretap investigation is to uncover a far-flung conspiracy, however, the courts have permitted agents greater leeway and have found a broader range of calls to be pertinent.[49] The government's reasonable expectation as to the content of and parties to the conversation is also an essential factor.[50] When the wiretap is initiated, if the government knows those persons who are suspected of the criminal offense, it is expected to tailor its minimization efforts to avoid monitoring calls involving non-suspects. Similarly, if the government knows- during what time of the day the telephone will be used for criminal activity, it must avoid intercepting calls at other times. This approach is consistent with the congressional desire to draft a statute in accord with the *Berger* and *Katz* decisions. The *Katz* majority was quick to point out the narrow factual situations before it, leaving the impression that factual situations substantially different from the one it faced might give rise to contrary results.[51]

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[44] *Accord*, United States v. Clerkley, 556 F.2d 709 (4th Cir. 1977); UnitedStates v. Armocida, 515 F.2d 29, 42 (3d Cir. 1976), cert. denied sub nom., 423 U.S. 858 (1975); United States v. James, 494 F.2d 1007, 1018 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1020 (1975).

[45] See LEGISLATIVE HISTORY, supra note 21, at 2192. Discussing section 2518(5) the Congress concluded that: "The provision is intended to recognize that each case must rest on its own facts." Id.

[46] "The more important of these factors ... are: continued judicial supervi- sion; the knowledge of the surveillance officers of the contents of the order; the type of offense under investigation; and, various elements of the communications themselves including, inter alia, the type of offense under investigation, and the use of 'under-world' vernacular." *Note, Minimization: In Search of Standards*, 8 SUFFOLK L. REV. 60, 72 (1973).

[47] *Accord*, United States v. James, 494 F.2d 1007, 1019 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1020 (1975).

[48] *See, e.g.*, United States v. George, 465 F.2d 772 (6th Cir. 1972) (simple in- vestigation involving only a few suspects and a pay telephone); United States v. Sklaroff, 323 F. Supp. 296 (S.D. Fla. 1971), *aff'd*, 506 F.2d 837 (5th Cir. 1975) (suspect operating single bookmaking operation).

[49] United States v. Bynum, 485 F.2d 490 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974). The court characterized the drug operation as "massive" and as "not limited to drug peddling, but included larceny, robbery and murder among its ingredients." *Id.* 500.

[50] United States v. James, 494 F.2d 1007, 1020 (D.C. Cir. 1974), *cert. denied,* 419 U.S. 1020 (1975).

[51] Katz v. United States, 389 U.S. 347 {1967). For example, although Katz's conviction was reversed on the ground that the agent had failed to receive prior judicial approval, the Court otherwise approved of the scope of

Whether electronic surveillance is employed within constitutional limits seems therefore to depend upon the particular circumstances surrounding each individual case including the type, size and scope of the enterprise under investigation.

A second factor commonly turned to by courts in gauging the reasonableness of minimization is the location and use of the tapped telephone.[52] The principal distinction has been between phones located in the headquarters of a person thought to be involved in a conspiracy[53] and phones which are public or residential in nature.[54] The Supreme Court held in *Katz* that the fourth amendment protects a person's reasonable expectation of privacy. In concurrence, Justice Harlan enunciated the now well-known test that such an expectation "must be one that society is prepared to recognize as reasonable."[55] That standard is applied in the wiretap context to evaluate whether the government has improperly intruded into a citizen's privacy. Thus, where a phone is located in a place serving no residential purpose and which is used exclusively to conduct illegal business, agents are given almost unbridled authority to intercept virtually all calls.[56] The reasoning is that users of such phones ought not have the kind of ex- pectations of privacy which society is willing to accept as reasonable in other contexts. Therefore, the courts find less stringent minimization standards reasonable in such cases.[57] As to public or residential phones, the probability is higher (as in *Katz)* that persons will utilize the phone under surveillance for other than criminal purposes. Since the subject matter

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the search and safeguards employed by the government. The Court was impressed that the electronic surveillance was not begun until after the investigation of petitioner's activities had established a strong probability that he was using the telephone in violation of federal law to transmit gambling information. The electric surveillance was limited both in scope and duration, and to the specific purpose of establishing the contents of petitioner's unlawful telephonic communications. In short, the agents confined their surveillance to the brief periods in which he used the phone, taking great care to record only the conversations made by petitioner himself.
Only six conversations were overheard, and on the single occasion when the statements of another person were inadvertently intercepted, the agents refrained from listening to them. The scrutiny with which the Court viewed the factual setting presented to it in *Katz,* seems to indicate that a deviation in any factor, such as the scope of criminal enterprise or location and use of the phone, may have caused a different result.

[52] United States v. James, 494 F.2d 1007, 1020 (D.C. Cir. 1974), *cert. denied,* 419 U.S. 1020 {1975).

[53] *Id.* 1021-23.

[54] *See, e.g.,* United States v. George, 465 F.2d 772 {6trJ. Cir. 1972); United States v. Sisca, 361 F. Supp. 735 (S.D.N.Y. 1973), *aff'd,* 503 F.2d 1337 {2d Cir.), *cert. denied,* 419 U.S. 1008 {1974). One author gives the explanation that users of family telephones have a greater expectation of privacy and that executing officers must therefore take greater care to minimize when such a phone is tapped. Note, *Post- Authorization Problems in the Use of Wiretaps: Minimization, Amendment, Sealing, and Inventories,* 61 CORNELL L. REV. 92, 111 {1975).

[55] 389 U.S. 347, 361 (1967)(Harlan, J., concurring).

[56] *See* United States v. James, 494 F.2d 1007, 1020 (D.C. Cir. 1974), *cert. denied,* 419 U.S. 1020 (1975).

[57] United States v. Bynum, 360 F. Supp. 400 (S.D.N.Y. 1973) (apartment phone used exclusively for criminal enterprise).

of these calls is likely to be immaterial to the subject matter of the investigation, stricter governmental procedures must be devised to limit these non-illicit calls from being overheard. Under such circumstances, society is willing to recognize a citizen's reasonable expectation of privacy. Statutory minimization violations are thus most likely to occur when purely residential or public telephones are tapped.[58]

Another factor affecting whether the agent acted reasonably in screening out non-pertinent calls is the presence or absence of "coded" language.[59] Courts have recognized that the use of specialized codes and criminal jargon may make it exceedingly difficult for agents to minimize the interception of innocent calls.[60] Likewise, co- conspirators may engage in innocent conversation as a preliminary to the discussion of criminal activities.[61] Consequently, courts compen- sate here by giving agents greater leeway in monitoring what may later turn out to be innocuous calls.[62]

Similar consideration is given to the point during the surveillance at which the interception is made. As one court observed, if at the outset the government thinks none of the calls is innocent, it can monitor all calls for a reasonable time. But as a pattern of innocent calls develops, it must cease monitoring that group of calls.[63] Thus, an interception of an innocent call at the outset of the surveillance may be reasonable while the interception of that same call at a later point in the investigation might be unreasonable.

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[58] *See, e.g.,* United States v. LaGorga, 336 F. Supp. 190 (W.D. Pa. 1971) (minimization violated where home phone tapped and many of the intercepted calls were "innocent"); Berger v. New York, 388 U.S. 41 (1967) (constitutional violation found in continuous tap of legal business phone).

[59] *See, e.g.,* United States v. Clerkley, 556 F.2d 709, 717 (4th Cir. 1977);
United States v. James, 494 F.2d 1007, 1019 (D.C. Cir. 1974), *cert. denied,* 419 U.S.
1020 (1975); United States v. Bynum, 485 F.2d 490, 501 (2d Cir. 1973), *vacated on other grounds,* 417 U.S. 903 (1974).

[60] *See, e.g.,* United States v. Clerkley, 556 F.2d 709, 717 n.5 (4th Cir. 1977), and cases cited therein.

[61] *See, e.g.,* United States v. Manfredi, 488 F.2d 588, 592-93 (2d Cir. 1973), *cert. denied,* 417 U.S. 936 (1974), where the defendants used coded language and where what seemingly were innocent calls turned out to be drug-related. *Id.* 600. Under those circumstances the court did not see how any minimization plan could be established which would screen out non-illicit phone calls.

[62] *See, e.g.,* United States v. Quintana, 508 F.2d 867 (7th Cir. 1975), *citing* United States v. Focarile, 340 F. Supp. 1033 (D. Md.), *aff'd sub nom.,* United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), *rev'd on other grounds,* 416 U.S. 505 (1973).

[63] *See, e.g.,* United States v. James, 494 F.2d 1007, 1021 (D.C. Cir.), *cert. denied,* 419 U.S. 1020 (1974); United States v. Bynum, 485 F.2d 490, 501 (2d Cir. 1973), *vacated on other grounds,* 417 U.S. 903 (1974).

Finally, the lower federal courts agree that the degree of judicial supervision by the judge authorizing the wiretap order is a significant factor.[64] Where competent testimony shows the judge actively super- vised the surveillance, great deference will be given to his decision as to whether minimization has been achieved.[65] The courts have fre- quently indulged in lengthy statistical debates breaking down the percentage of pertinent to non-pertinent calls intercepted.[66] While statistical details are rarely the determinative factor, in *United States v. Armocida*[67] the court noted that they provide a starting point for the court's analysis.[68]

Another issue which emerged from the judiciary's efforts to define the requirements of the minimization clause was whether the subjec- tive intent of the government's agent in carrying out the investigation was to be a consideration in determining the reasonableness of his con- duct. Many lower federal courts have incorporated such a subjective component in their determination of reasonableness, intimating that the minimization requirement is satisfied if, on the whole, the agents act in "good faith" and show a high regard for the privacy rights of others.[69]

Under the construction of this test formulated *by* the District of Columbia Circuit in *United States v. James,*[70] the duty to minimize was satisfied if "on the whole the agents have shown a high regard for the right of privacy *and* have done all they *reasonably* could to avoid unnecessary intrusion."[71] Under this standard, an initial inquiry was made into the intercepting agent's subjective intent-his motives-to minimize the interception of innocent calls. Only after this hurdle was met, under the *James* formulation, was an objective determination made as to whether the agent could

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[64] When a judge receives regular reports and closely supervises the surveillance, the rights of affected individuals are most likely to be safeguarded. United States v. Bynum, 360 F. Supp. 400, 410 (S.D.N.Y.), *aff'd,* 485 F.2d 490 (2d Cir. 1973), *vacated on other grounds,* 417 U.S. 903 (1974). *Accord,* United States v. Sisca, 361 F. Supp. 735 (S.D.N.Y. 1973), *aff'd,* 503 F.2d 1337 (2d Cir.), *cert. denied,*
419 U.S. 1008 (1974).

[65] *See, e.g.,* United States v. Armocida, 515 F.2d 29, 43 (3d Cir.), *cert. denied,* 423 U.S. 858 (1975); United States v. Bynum, 360 F. Supp. 400, 425 (S.D.N.Y.), *aff'd,* 485 F.2d 490 (2d Cir. 1973), *vacated on other grounds,* 417 U.S. 903 (1974).

[66] 515 F.2d 29 (3d Cir.), *cert. denied,* 423 U.S. 858 (1975).

[67] *Id.* 43.

[68] United States v. James, 494 F.2d 1007, 1018 (D.C. Cir. 1974), *cert. denied,*
419 U.S. 1020 (1975); United States v. Clerkley, 556 F.2d 709, 716 (4th Cir. 1977).

[69] 494 F.2d 1007 (D.C. Cir. 1974).

[70] *Id.* 1018, *citing* United States v. Tortorello, 480 F.2d 764, 784 (2d Cir.),
(emphasis added) *cert. denied,* 414 U.S. 866 (1973).

[71] *Id.*

reasonably have believed that all of the calls in fact intercepted were likely to be pertinent.[72] Objective reasonableness depends upon an application of the factors distilled above: the scope of the criminal enterprise, the location and operation of the subject telephone and the degree of judicial supervision. Fur- thermore, while none of the lower federal court decisions were found to have framed the issue directly in terms of whether a subjective or objective test should apply, the implication of many decisions is that an officer's intent should play an important role.[73] Although these courts have applied slightly different tests, one group examining whether the officer made a "good faith" attempt to minimize[74] and the other whether the officer exhibited a "high regard" for the privacy rights of individuals,[75] the important point is that both courts chose language that places heavy emphasis on the officer's underlying inten- tions.

The precise legal rationale of the courts adopting a subjective ele- ment in their determination of reasonableness has not been clearly ar- ticulated in any of the cases. A reasonable guess is that the majority of federal judges reject using strictly hindsight analysis, an analysis that considers only the end result in terms of how many calls are crime related and how many are not, in demonstrating that particular calls were not conspiracy related.[76] Accordingly, the only reasonable way of determining compliance with the minimization requirement is through a consideration of the problems confronting the officers as of the time of the investigation (using the objective factors listed above), as well as motive.[77]

Such reasoning does not, however, comport with the general tenor of fourth amendment case law which proscribes only "unreasonable" searches and seizures[78] with the reasonableness generally being deter- mined by applying an objective standard.[79] Thus, a police officer may normally exercise his or her power within

[72] *See, e.g.,* United States v. Manfredi, 488 F.2d 588, 599-600 (2d Cir. 1973), *cert. denied,* 417 U.S. 936 (1974); United States v. Clerkley, 556 F.2d 709, 716 (4th Cir. 1977).
[73] *See, e.g.,* United States v. Clerkley, 556 F.2d 709, 716 (4th Cir. 1977); United States v. Armocida, 515 F.2d 29, 42 (3d Cir.), *cert. denied,* 423 U.S. 858 (1975).
[74] *See, e.g.,* United States v. Tonorello, 480 F.2d 764, 784 (2d Cir.), *cert. denied,* 414 U.S. 866 (1973).
[75] United States v. Chavez, 533 F.2d 491, 494 (9th Cir.) (hindsight evaluation not proper test), *cert. denied,* 426 U.S. 911 (1976).
[76] *See, e.g.,* United States v. Vento, 533 F.2d 838, 853 (3d Cir. 1976).
[77] *See* Terry v. Ohio, 392 U.S. 1, 21-22 (1968).
[78] *See* Terry v. Ohio, 392 U.S. 1, 21-22 (1968).
[79] *See* Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349, 373 (1974). Thus, for example, in United States v. Robinson, 414 U.S. 218 (1973), the Supreme Court upheld the search of an arrestee incident to a

objectively defined limits, if the surrounding circumstances can later be said to have justified such an exercise of power, and courts ordinarily will not inquire into the propriety of his or her motives.[80] Fourth amendment law indicates that particular intrusions may be justified when officers prove "specific and articulable facts" that reasonably warrant the intrusion.[81] The re- quirement of an objective determination is warranted by the recogni- tion that inquiries into subjective good or bad faith alone is insuffi- cient to uphold fourth amendment protections.[82] Illustrative is *Beck v.* Ohio[83] where the Court reversed petitioner's conviction, holding that the arrest was void under the fourth amendment, even though made in good faith, since there were no articulable facts demonstrating prob- able cause' to make the arrest.[84]

Although the tenor of these decisions is that the subjective state of the agent's mind, even though at odds with the legal justification for his actions, will usually not invalidate his actions if the existing facts and circumstances in the particular case can justify them, there are cases to the contrary, holding that, "if an officer's conduct would be lawful in pursuit of one purpose but unlawful in pursuit of another, it is unlawful when directed to the wrong pursuit."[85] The First Circuit, in *Commonwealth of Massachusetts v. Painten*,[86] for example, granted a writ of habeas corpus, holding that evidence seized by police was in- admissible where, although the petitioner had a suspicious character, he was in no way connected with the crime under investigation. Thus, the officers acted in contravention of the fourth amendment when they set out to arrest him and search his apartment in the hope that incriminating evidence would tum up.[87]

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lawful arrest against a claim that the motivation for the search did not coincide with the legal justification for the search incident-to-arrest exception by observing that the *very fact* of custodial arrest gave rise to the authority to search and it was immaterial that the officer had no subjective fear of the arrestee. It was of no legal significance that the of- ficer did not suspect that the arrestee was armed. *Id.* 236.

A threshold issue the instant Court had to resolve was, to what extent fourth amendment cases turn upon subjective as well as objective considerations affecting police conduct. Professor Amsterdam dubbed this an "exceedingly vexatious" problem to which the Supreme Court has not established hard and fast guidelines. Amsterdam, *supra,* at 372. Amsterdam also submits that current law handles the problem "incon-, sistently in different contexts." *Id.*

[80] Terry v. Ohio, 392 U.S. 1, 21 (1968).

[81] Beck v. Ohio, 379 U.S. 89, 96 (1964).

[82] *Id.*

[83] *Id.* 97.

[84] Amsterdam, *supra* note 79, at 373.

[85] 368 F.2d 142 (1st Cir. 1966).

[86] *Id.* 143-44.

[87] See note 7 *supra.*

Justice Brennan, dissenting from the original denial of certiorari in the principal case,[88] voiced grave doubts as to the wisdom of the cir- cuit court's denigration of the importance of the agent's good faith in determining the reasonableness of the minimization effort.[89] His chief concern with the purely objective formulation was that it would retroactively validate a fourth amendment search on the basis of what was uncovered by the search.[90] Given the district judge's findings of total non-compliance with the minimization requirement, Justice Brennan could not justify refusing to review a probable breach of a statutory command which was fashioned primarily to protect the con- stitutional interest in privacy.[91]

Judge Robinson, dissenting from the denial of a rehearing en banc in an intermediate stage of the principal case,[92] was also critical of the circuit court's abandonment of the subjective test, and his well- reasoned criticisms were probably a determining factor in the Supreme Court's eventual grant of certiorari. His primary complaint was that the circuit court decision was "seriously inconsistent" with the earlier decision *in James*[93] and *United States v. Tortorello,*[94] both of which employed the two-pronged analysis.[95] Like Justice Brennan, Judge Robinson questioned the vitality of the minimization requirement itself in the absence of a subjective component.[96] His chief concern was that reasonableness would be determined solely on the basis of "hindsight evaluations" of evidence uncovered by wiretaps.[97]

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[88] Scott v. United States, 425 U.S. 917, 924 (1976) (Brennan, J., dissenting).
[89] *Id.*
[90] *Id.*
[91] United States v. Scott, 522 F.2d 1333 (D.C. Cir. 1975) (Robinson, J.,dissenting).
[92] See note 69 *supra.*
[93] 480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973).
[94] United States v. Scott, 522 F.2d 1333 (D.C. Cir. 1975) (Robinson, J., dissenting). See note 7 & accompanying text *supra.*
[95] *Id.*
[96] *Id.* 1334.
[97] Scott v. United States, 436 U.S. 128, 138-39 (1978). Two additional issues were raised by the instant case, but the Court did not have to reach these issues due to its disposition of the case. These issues remain unresolved and are included here only to give the reader historical background since they have been analyzed extensively elsewhere. The first issue is the constitutionality of Title III. Since its enactment Title III has come under heavy attack as being unconstitutional. *See* LEGISLATIVE HISTORY, *supra* note 21. A number of Senators expressed grave doubts as to the constitutionality of Title III. In fact, the rhetoric of resistance against passage of these new surveillance standards was often vehement. Senators Hart and Long, in particular, while questioning the Act on constitutional grounds, attacked it on pure policy grounds. They found Title III "repugnant to our concepts of justice and fair play for all, guilty and innocent alike." *Id.* 223.
Most have argued that it violates first amendment freedom of speech, fourth amendment protection from unreasonable searches and seizures and the general right to privacy. *See* United States v. Scott, 331 F. Supp. 233, 238 (D.I>.C. 1971), *rev'd,* 516 F.2d 751 (D.C. Cir. 1975), *aff'd,* 436 U.S. 128 (1978). The overwhelming resistance that contention has met indicates, at least, the core concept of Title III is constitu· tional. Constitutional attacks on Title III have met overwhelming resistance in every circuit that has faced the issue. *See, e.g.,* United States v.

The question of the selection of the proper criterion (objective, subjective or some workable combination thereof) for evaluating whether a particular wiretape or similar instance of electronic surveillance was reasonable under the minimization clause, and within constitutional limits, was the principal issue with which the instant Court had to grapple. Attempting to establish guidelines for evaluating compliance with the minimization requirement, the instant Court rejected the subjective test advocated by petitioner and adopted by the district court.[98] Whether the agents subjectively intended to minimize their interceptions was deemed essentially irrelevant. In the majority's opinion, the proper test was an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time irrespective of his personal motives or intent.[99] The Court reached this result on two grounds. The first was through a cur- sory examination of the word "conducted" in the statute.[100] The ma- jority reasoned that Congress specifically chose the word "conducted" because it intended the focus to be on the agent's actions and not on his personal motives.[101]

Cox, 4fi2 F.2d 1293 (8th Cir. 1972), *cert. denied,* 417 U.S. 918 (1974). Most of the constitutional scrutiny Title III has received since its enactment has occurred in the lower federal courts where the question has been raised, and quickly disposed of, in conjuction with problems relating to the interpretation of specific clauses within the Act. Most courts have upheld Title III on the theory that if it conforms to the requirements of *Katz* and *Berger,* which most courts say it does, then it is constitutional since it provides ade-quate judicial supervision and protective procedures. As such, the Act conforms with the reasonableness requirement of the fourth amendment. Assuming that the intercepting agents are found to have violated the minimiza- tion requirement of the interception order, a thorny problem arises as to whether all conversations, or only the improperly intercepted calls, should be suppressed. The for- mulation of a proper remedy has varied from court to court, commentator to com- mentator. Among the many excellent articles analyzing the minimization clause from a remedial standpoint, the following is especially noteworthy; Note, *New Jersey Elec- tronic Surveillance Act,* 26 RUTGERS L. REV. 617 (1973). *See also* Note, *Minimization of Wire Interception: Presearch Guidelines and Postsearch Remedies,* 26 STAN. L. REV. 1411 (1974). Most courts have concluded that the statute requires supression of improperly intercepted communications only. *See, e.g.,* United States v. Cox, 462 F.2d 1293, 1301-02 (8th Cir. 1972), *cert. denied,* 417 U.S. 918 (1974); United States v. Sisca, 361 F. Supp. 735, 746-47 (S.D.N.Y. 1973), *aff'd,* 503 F.2cl 1337 (2d Cir.), *cert. denied,* 419 U.S. 1008 (1974); United States v. King, 335 F. Supp. 523, 543-45 (S.D. Cal. 1971), *cert. denied,* 417 U.S. 920 (1973). Several courts, on the other hand, have required total suppression of the inadequately minimized surveillance evidently on the ground that deterrence would not otherwise be achieved. *See, e.g.,* United States v. Focarile, 340 F. Supp. 1033, 1047 (D. Md.), *aff'd sub nom.,* United States v. Gior- dano, 469 F.2d 522 (4th Cir. 1972), *rev'd on other grounds,* 416 U.S. 505 (1974);
United States v. Scully, 546 F.2d 255, 262 (9th Cir. 1976), *cert. denied,* 430 U.S. 970
(1977). Given the instant Court's disposition of the principal ca;e, it was unnecessary for it to reach the issue regarding the proper scope of the suppression remedy in event of a violation of section 2518(5). *See generally* Note, *Minimization of Wire Intercep- tion: Presearch Guidelines and Postsearch Remedies,* 26 STAN. L. REV. 1411 (1974); Note, *Minimization: In Search of Standards,* 8 SUFFOLK L. REV. 60 (1973).

[98] 436 U.S. 128, 137 (1978)

[99] *Id.* 139

[100] *Id.*

[101] *Id.*

As an alternate basis for its decision, the majority relied on the legislative history of Title III and concluded that Congress did not in- tend the minimization clause to be pressed beyond present search and seizure law.[102] Consistent with previous fourth amendment case law, the instant Court chose to focus upon actions rather than thoughts. The majority reasoned that the existence of a number of objective circumstances underlying the investigation would be determinative of whether the particular agent's actions were reasonable. The percent- age of non-pertinent to pertinent calls intercepted would not be the sole guide, as the presence of certain other factors might justify the in- terception of a relatively high percentage of non-pertinent calls.[103] Ac- cording to the majority, other factors which should be used in deter- mining the reasonableness of the interceptions are the scope of the criminal enterprise, including the number of co-conspirators, the location and use of the telephone, and the point during the authorized wiretap period at which the interception was made.[104] Conspicuously absent among this list was the degree of judicial supervision by the judge authorizing the wiretape order, a factor employed by virtually every court that had heretofore decided minimization cases.[105]

Applying these factors to the facts in the principal case, the instant Court found no impropriety in permitting the interception of virtually every conversation made during the investigation.[106] The instant Court was impressed most by the fact that it would have been very difficult for the agents to have determined a pattern of innocent calls. Many of the calls were very brief, such as wrong numbers and calls to the weather service, lasting only a minute or two.[107] Many others were "one time only"[108] or involved ambiguous language. The Court found it would have been unreasonable for the agents not to have recorded these calls.[109] The instant Court characterized the operation under surveillance as a far-flung conspiracy involving a large number of par- ticipants, thus justifying the interception of a broader spectrum

[102] *Id.* 140
[103] *Id.* 140-44.
[104] *See, e.g.,* United States v. Clerkley, 556 F.2d 709, 718 (4th Cir. 1977).
[105] Scott v. United States, 436 U.S. 128, 142-44 (1978).
[106] *Id.* 141-42.
[107] "One time only" conversations apparently means the following. Where, hypothetically, Jones calls Smith for the first time on a given day, never to call again, such calls do not give the agent an opportunity to develop a category of innocent calls which should not be intercepted. Therefore, the instant Court did not consider the in- terception of this category of calls wrongful or unreasonable.
[108] *Id.* 141
[109] *Id.* 140

of calls than would be permitted in a more narrowly confined criminal enter- prise.[110] It was of no moment that the conspiracy eventually turned out to be primarily intrastate in nature.[111]110 From an objective point of view, it was not unreasonable for the agents to believe, at the time of the interceptions, that the conspiracy was extensive and interstate in dimension.[112]

Mr. Justice Brennan, with whom Mr. Justice Marshall joined, dissented. He feared that the Court's decision would vitiate the strict guidelines and limitations established by Congress for the use of wiretaps, thus severely limiting Title III's effectiveness as a serious obstacle to government infringement of individual privacy and at the same time permitting electronic surveillance to develop into the "abhorred general warrant."[113] He reasoned that the minimization clause had not been satisfied in light of the district judge's findings that the agent conducting the surveillance knew of the minimization requirement but made no attempt to comply with it. Brennan inter- preted the "shall be conducted in such a way as to minimize" language of section 2518 as requiring the agent to exercise good faith judgment as to which calls should be intercepted, rather than relying on the less exacting, post hoe conjectures of the government in analyzing how the agent might have acted had he exercised his judgment.[114] Brennan was also critical of the majority's discussion of "reasonableness" under the fourth amendment, of searches and seizures in the context of elec- tronic surveillance. He noted that Congress intended Title III to deal with the "discrete problems of wire interceptions" and the wording of the minimization command should be the chief guide of interpreta- tion, not general fourth amendment principles.[115]

An important collateral argument raised by Brennan was the deci- sion's apparent inconsistency with a prior high Court decision, *United States v. Kahn.*[116] The Court there ruled on another of Title III's limiting provisions, the requirement that a

[110] Rebuffing petitioner's contention that the agents failed to minimize since the scope of the conspiracy ended up being smaller in dimension than was originally anticpated, the Court responded: "That certainly has no bearing on what the officers had reasonable cause to believe at the time they made the interceptions…"Id1. 42 n.15.
[111] *Id.*
[112] Scott v. United States, 436 U.S. 128, 143-44 (1978) (Brennan, J., dissent- ing).
[113] *Id.* 144-45
[114] *Id.* 146
[115] 415 U.S. 143 (1974).
[116] 18 U.S.C. § 2518(4)(a) (1976). The relevant part of Title III construed in *Kahn* reads as follows: "(4) Each order authorizing or approving the interception of any wire or oral communications shall specify-(a) the identity of the person, if known, whose communications are to be intercepted."

wiretap application and order specify the identities of the persons, if known, whose corn-munications are to be intercepted.[117] The issue in that case was a federal wiretap order, under Title III, covering calls of a named in- dividual and "others as yet unknown." The Court held this language to include calls by and to the named individual's wife, Mrs. Kahn.[118] The *Kahn* decision permitted these conversations to be admitted into evidence, thus authorizing the interception of conversations other than those between parties listed in the order. The Court held this did not amount to the approval of a general warrant since the minimization requirement was viewed by the majority as an adequate safeguard to prevent such results.[119]

Justice Brennan raised serious doubts as to the constitutionality of Title III due to what he termed the judiciary's "myopic, incremental denigration of Title III's safeguards."[120] He saw the instant Court's opinion as undercutting the reasoning in *Kahn,* unravelling the statutory protections Congress embodied in Title III and violating the constitutional guidelines established in *Berger* and *Katz.*[121]

The instant Court ignored the reasoning employed by several other courts which had implied that the intentions of the officer and ex- istence of a good faith effort to minimize intrusions upon the in- dividual's right to privacy are important considerations in defining compliance with the minimization requirement. In effect, an agent can now act with the worst of intentions without any effort to institute minimization procedures and yet the actual interceptions may be found to have been entirely reasonable.[122] In dismissing considerations of underlying subjective motivation as a factor to be considered in determining reasonableness, the instant Court has gone one step fur- ther than the court of appeals.[123] The court of appeals recognized the two-pronged test of *James,* but concluded that although the agent's at- titude "is a relevant factor to be considered . . . the decisive factor is the second element-the objective reasonableness of the interceptions."[124] The impact of that

[117] 116. The government attempted to introduce into evidence, and petitioner moved to suppress, calls from Mr. Kahn to Mrs. Kahn at their home, and two calls made by Mrs. Kahn from the "target" phone to a "known gambling figure." 415 U.S. 143, 147 (1974).
[118] *Id. 154*
[119] Scott v. United States, 436 U.S. 128, 148 (1978) (Brennan,]., dissenting).
[120] *Id.* 147-48
[121] *See* Scott v. United States, 436 U.S. 128, 137-39 (1978).
[122] United States v. Scott, 516 F.2d 751 (D.C. Cir. 1975), *aff'd*, 436 U.S. 128 (1978).
[123] *Id.* 756 n. 12.
[124] Scott v. United States, 436 U.S. 128, 135-36 (1978). The Court did note, by way of a footnote, that motive may play an important role in the suppression remedy. If the Court is going to be consistent in applying fourth

watered-down standard alone could have relegated intent to a position of secondary importance, overshadowed by an objective analysis in the ultimate determination of reasonableness. The instant Court's opinion refused even to con- cede, however, that the presence or absence of good faith is one of the factors to be taken into account in assessing whether the congressional- ly mandated minimization requirement has been satisfied.[125] This reasoning was directly attributable to the unqualified analogy the in- stant Court drew between traditional fourth amendment search and seizure law and modern electronic surveillance. As Brennan's dissent indicates,[126] however, there are "discrete problems" posed in any in- stance of electronic surveillance. As other commentators have pointed out, a conventional search and seizure serves a different function than does a wiretap.[127] The former will often be the culmination of a long investigation while the latter may serve as an investigatory tool in and of itself. There is a clear danger that, in applying only an objective, after the fact standard, agents will seize the conversation now and ra- tionalize their behavior later. In the typical search and seizure case, ef- fectuated by a warrant, that approach is not feasible since the warrant must describe with particularity when, where, and at what time the search is to occur.

Even if the minimization requirement does demand that fourth amendment principles apply, there are numerous cases approving the use of a subjective standard, in addition to an objective one, in fourth amendment analysis.[128] Furthermore, even cases such as *Beck v. Ohio*[129] which enunciate an objective standard explicitly recognize that post hoc determinations are subject to hindsight evaluations and are thus inherently suspect. Since the test established by the majority

amendment standards in the area of wiretapping, then we can look for the Court to apply the same suppression remedy to wiretap cases as it does in search and seizure cases. In the area of search and seizure law, that means that "[o]n occasion, the motive with which the officer conducts an illegal search may have some relevance in determining the propriety of applying the exclusionary rule." *Id.* 139 n.13. The Court cited as an example United States v. Janis, 428 U.S. 433, 458 (1976), where the Court ruled that evidence seized in violation of the constitution by state police could be introduced in federal tax proceedings because "the imposition of the exclusionary rule . . . is unlikely to provide significant, much less substantial, additional deterrence."

[125] Scott v. United States, 436 U.S. 128, 146 (1978) (Brennan, J., dissenting).

[126] Note, *Post-Authorization Problems in the Use of Wiretaps: Minimization, Amendment, Sealing, and Inventories,* 61 CORNELL L. REV. 92, 103 (1975).

[127] See notes 84-85 & accompanying text *supra.*

[128] 379 U.S. 89 (1974). "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Id.* 96. The standard enunciated by the instant Court is subject to the same criticisms since the focus will now be centered on post wiretap justifications.

[129] Scott v. United States, 436 U.S. 128, 139 (1978). See note 2 *supra.*

will place greater emphasis on hindsight evaluations, the standard enunciated therein stands as dubious protection to the privacy rights of individuals.

The second means by which the instant Court justified the adop- tion of an objective standard was through its interpretation of the significance of the legislature's use of the word "conducted."[130] With little explanation of the grounds upon which its particular interpreta- tion was justified, the Court reasoned that by the use of the word "con- ducted" Congress in fact intended to focus on the agent's actions and not upon his subjective motives or intent.[131] It is equally possible, however, that the clause "shall be conducted" was intended to mean that the investigating authorities, *at the time of the actual intercep- tion,* must make a good faith effort to minimize the interception of non-pertinent calls.

It is submitted that Congress chose the word "conducted" in the minimization clause because it wanted the focus to be on the good faith efforts of the·agent while he was conducting the investigation rather than on an after the fact analysis of the content of the wiretap transcripts. This interpretation is supported by section 2518(6), which allows continual judicial supervision of the interception of wire com- munications in order to protect the privacy of innocent persons.[132] This specific, congressionally mandated scheme of ongoing checks on an agent's activities supports the proposition that Title III wiretaps are to be administered in good faith. The emphasis is on continually supervising the agent to insure that he is acting in good faith rather than on post hoc determinations of reasonableness. Any other inter- pretation will destroy the safeguards promulgated by Congress and in- tended to satisfy the constitutional requirements of *Berger* and *Katz.* The instant Court erred in failing to consider section 2518(5) as it relates to the other provisions in Title III. The minimization clause is but one provision in an elaborate statutory scheme established by Con- gress to safeguard individual rights, and its scope and purpose cannot be understood without looking to, and harmonizing it with, the others. The instant

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[130] *Id.*

[131] 18 U.S.C. § 2518(6) (1976) reads:
Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

[132] Scott v. United States, 436 U.S. 128, 139 (1978), *quoting* S. REP. No. 1097, 90th Cong., 2d Sess. 96 (1968) (emphasis added).

Court viewed section 2518(5) in a vacuum and consequently severely restricted its protective usefulness.

The Court's analysis is flawed on still another ground. Looking to the legislative history, the majority concluded that section 2518(5) re- quired an objective standard because it was not intended "generally to press the scope of the *suppression remedy* beyond present search and seizure law."[133] That language was used by Congress in analyzing the remedial issue and not the minimization issue[134] and referred to the congressional intent that the attenuation rule be applied in the wiretap context. No such language is found in the part of the analysis dealing with the minimization issue. Had Congress wanted to include such a statement in discussing section 2518(5) it surely would have. Since in discussing the minimization standard Congress did not explicitly say that its intent was to adhere to present fourth amendment law, the sole guide is the language in the statute. As indicated above, the word "conducted" when combined with the option of continual judicial supervision as contained in section 2518(6) strongly suggests that subjective intent was to be a critical factor in determining the reasonableness of the minimization effort. Therefore, the Court was on weak ground when it blindly relied on "general" fourth amendment principles. To the contrary, Title III was intended to be "reform setting"[135] in that it was patterned after *Berger* and *Katz* (both wiretap cases) and not general "search and seizure" case law.

Another weakness in the instant Court's opinion was its failure to take into account the findings of the district court concluding that the degree of judicial supervision by the authorizing judge was inadequate to justify total interception.[136] The legislative history indicates that one of the primary means of structuring laws providing for electronic surveillance in compliance with the requirements of *Berger* and *Katz* was to establish a procedure permitting judicial supervision during the period of surveillance. Under this scheme, reports were to be utilized to show "progress ... toward achievement of the authorized objective and ... need for continued interception."[137] The policy behind the requirement was twofold. First,

[133] See LEGISLATIVE HISTORY, *supra* note 21, at 2185.
[134] *Id.* 2156.
[135] United States v. Scott, 331 F. Supp. 223, 247-48 (D.D.C. 1971), *rev'd,* 516 F.2d 751 (D.C. Cir. 1975), *affd,* 436 U.S. 128 (1978).
[136] See LEGISLATIVE HISTORY, *supra* note 21, at 2192-9:1.
[137] *Id.*

the provision was a check on the need for continued surveillance. Second, the requirement would insure that surveillance was not "undertaken lightly."[138] The district court made a finding of fact that although reports were made to the authorizing judge every five days, he was never informed that the agents were making no attempt to minimize.[139] This appears to be a violation of the requirement that the authorizing judge should be informed of all matters pertinent to the ongoing wiretap. Appellant's brief to the Supreme Court also alleged that the reports made no attempts to in- form the authorizing judge that the conspiracy was of smaller dimensions than originally anticipated, a factor which would justify limiting the scope of the surveillance.[140] In sum, the supervising judge was denied information which was crucial in determining the continued need for electronic surveillance. This is especially true since the federal courts which had previously ruled on minimization questions had consistently included the degree of judicial supervision as acritical factor.[141] Failure to report accurately to the supervising judge was a serious violation of Title III and the instant Court's failure to even discuss it casts doubt upon the correctness of the decision.

By ignoring the marked absence of meaningful judicial supervision in this case, the instant Court obfuscates the teaching of *Katz.* The Court held in *Katz,* citing *Beck v. Ohio,*[142] that bypassing a neutral predetermination by a judicial officer would circumvent the safeguards provided by an objective predetermination, and substitute in its place the "far less reliable" procedure of an after the .fact justification, a situation, said the Court, "too likely to be subtly influenced by the familiar shortcomings of hindsight judgment."[143]142 Title III's reliance on close judicial supervision was intended to enhance the protection of individual rights.[144]

Furthermore, the instant Court's opinion failed to apply the facts of the principal case to its holding that the type of use to which a phone is put, and its location, may have a bearing on the extent of miminization required.[145] Unlike the case of *United*

[138] 331 F. Supp. at 248.
[139] Brief for Appellant at 29, Scott v. United States, 436 U.S. 128 (1978).
[140] *See, e.g.*, United States v. Clerkley, 556 F.2d 709 (4th Cir. 1977).
[141] 379 U.S. 89 (1964).
[142] *Id.* 96.
[143] nited States v. Bynum, 360 F. Supp. 400,410 (S.D.N.Y.), *aff'd,* 485 F.2d 490 (2d Cir. 1973), *vacated on other grounds,* 417 U.S. 903 (1974).
[144] Scott v. United States, 436 U.S. 128, 140 (1978).
[145] 494 F.2d 1007 (D.C. Cir. 1974), cert. denied, 419 U.S. 1020 (1975).

States v. James,[146] where the phone was used primarily for illegal business purposes,[147] the phones involved in the principal case were located in a residence, and thus entitled to greater protection.[148] Nevertheless, the Court failed to mention this fact in its analysis, and in so doing weakened the probity of its conclusion that the minimization requirement was satisfied.

Finally, as the dissent in the principal case indicates,[149] the Supreme Court's "incremental denigration" of Title III's safeguards raises serious questions whether, as judicially enforced, Title III may now be vulnerable to constitutional attack for violation of the fourth amendment standards embodied in such decisions as *Berger* and *Katz*. In *United States v. Kahn,*[150] the Supreme Court relied upon the minimization requirement as providing adequate safeguards to pre- vent unlimited invasions of an individual's privacy.[151] The instant Court, however, has diluted the minimization clause's, effectiveness as a safeguard keeping electronic surveillance from becoming the "abhorred general warrant."

The instant Court has seriously eroded the dual purposes Title III was to serve: the privacy of wire communications except in narrowly defined circumstances, and uniformity of wiretap law. As to the privacy interest, an argument advanced by Judge Robinson, dissenting from the denial of a rehearing en banc when the principal case was in the court of appeals for the second time[152] is pertinent. His argument is that

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[146] *Id.* 1022.
[147] Brief for Appellant at 28, Scott v. United States, 436 U.S. 128 (1978).
[148] Scott v. United States, 436 U.S. 128, 143 (1978) (Brennan, J., dissenting).
[149] 415 U.S. 143 (1974).
[150] The *Kahn* decision held that "Title III requires the naming of a person in the [wiretap] application or interception order only when the law enforcement authorities have probable cause to believe that the individual is 'committing the offense' for which the wiretap is sought." *Id.* 155. To reach the conclusion that the failure of the order to specify that Mrs. Kahn's conversations might be subject to interception "hardly left the executing agents free to seize at will every communication that came over the wire," (even though her name was not on the wiretap order), and to support its holding above against attacks that such a holding would. approve of general warrants, the Court fell back on the protection provided by the minimization clause. *Id.* 154-55.
[151] 150. 522 F.2d 1333 (D.C. Cir. 1975) (Robinson; J., dissenting from denial of a rehearing and a rehearing en banc).
[152] *Id.* To illustrate my point, one troubling aspect of the Court's disposition of the facts involved the interception of seven calls placed between one Jenkins, the person in whose name the target phone was registered, and her mother. In a footnote the Court says: "The application and subsequent court order iden1ified the subscriber as Geneva Thornton, but that was apparently an alias." Scott v. United States, 436 U.S. 126, 131 n.2 (1978).
The Court justified the interception of the first four on the ground that they oc- curred at the beginning of the surveillance, before the agents could discern a pattern of them being innocent. *Id.* 142. In the course of the remaining conversations the mother tangentially referred to a "business." The Court justified their interception on primarily that basis. *Id.* It was not unreasonable to intercept these calls even though, as it turned out, they were not material to the investigation. *Id.* 143.

a purely objective test will impinge on privacy rights through the use of post facto evaluations or reasonableness. Without a subjective test to "keep the agents honest" the strong temptation will be to wiretap first and evaluate the evidence uncovered by the wiretap later, in an effort to justify the interceptions as reasonable.[153] The potentially detrimental impact of the instant Court's decision upon the law enforcement agent's conduct while engaging in wiretap surveillance can- not be overlooked. Requiring agents to act in good faith is at least some assurance that they will honor the privacy rights of citizens who are not privy to criminal activity.[154] This argument is, of course, subject to overkill and assumes all agents act in bad faith in reckless disregard for the privacy rights of others. That assumption is untrue. In most cases when a pattern of innocent calls develops, the agents are careful not to intercept them.[155] The instant Court's decision, however, makes it easier for the agent who does act in bad faith. To that rare agent the incentive is removed to respect the individual's right to privacy and the door is thus opened for him to disregard any obligation he might otherwise feel to pay respect to an existing duty to make a good faith effort to minimize.

It is equally questionable whether the standard enunciated by the principal case ·will aid in delineating in a uniform manner the circumstances under which wire communications may be subject to interception. The Court has emasculated the uniformity goal by reading the minimization requirement too narrowly. No strict

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The interception of these calls is troubling because, as the district court noted, none of the calls between Jenkins and her mother were narcotics related and the calls themselves gave no indication that the mother was involved in the conspiracy. 331 F. Supp. at 247. Had Jenkins and her mother been known conspirators, it may have been reasonable for the agents to have intercepted these calls, even if the conversations turned out to be innocent. The facts show, however, that Jenkin's mother was not a suspect and that Jenkins herself was mentioned in the affidavit only "as a subscriber to the tapped telephone." *Id.*

Applying a good faith standard, and had the authorizing judge been made aware of these calls in the periodic reports, it would be difficult to justify the interception of these calls. Nevertheless, through the use of a post facto evaluation, the Court concluded that these interceptions were valid since some statements could have been interpreted as having some bearing on the conspiracy. Scott v. United States, 436 U.S. 126, 142 (1978). Under a fair reading of the legislative history of Title III one would have to question whether these conversations were relevant and whether their interception was an invasion of privacy. One commentator noted that the instant case "provides an excellent example of communications which were unlawfully intercepted." Note, *Minimization: In Search of Standards,* 8 SUFFOLK L. REV. 60, 80 (1973). Indeed, if the conversations in the present case can be seized without violating the minimization clause, it is hard to imagine any situations where calls may not be intercepted.

[153] United States v. Scott, 522 F.2d 1333, 1334 (D.C. Cir. 1975) (Robinson, J. dissenting from denial of rehearing and rehearing en banc).

[154] *See, e.g.,* United States v. Doolittle, 507 F.2d 1368 (5th Cir.), *cert. denied,* 423 U.S. 1008 (1975); United States v. Rizzo, 492 F.2d 443 (2d Cir.), *cert. denied,* 417 U.S. 944 (1974).

[155] See note 21 & accompanying text *supra.*

standards are established. Perhaps, due to the peculiar nature of electronic surveillance, no strict standards are possible. Nevertheless, it is indefensible for the Court to impair the effectiveness of the requirement even further with a holding that can serve only to broaden the class of permissible interceptions.

The principal case is at the same time a significant development and decline in the area of minimization. Because minimization is left undefined in the statute and essentially unanalyzed in the legislative history, the judiciary has acted to supply its own interpretation. Generally, the federal courts prior to the principal case had adopted a case-by-case approach taking all factors into account, and requiring

Collected Papers of Thomas A. Heller

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