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FOREWORD: JUDICIAL INDEPENDENCE

DAVID M. EBEL†

Because I'm a little concerned about whether you will find the topic of judicial independence very interesting, I thought back to one of my favorite authors, Mark Twain—Samuel Clemens. He went to Europe and wrote letters back to the bumpkins in America about what civilized life in Europe was like. Those letters were collected in a delightful book entitled, *Innocents Abroad*. One letter addressed what it was like to attend a Wagner concert. He started out his essay by saying, you know, "Wagner's music is not as bad as it sounds."

Similarly, I think I can assure you that the topic of judicial independence is not as boring as it sounds. The reason I can say that is because I have traveled all over the world on behalf of the American Judiciary to talk about judicial independence. I've been to developing countries, like Rwanda; Arab countries like the United Arab Emirates and Qatar; and modern well-developed countries like Canada and Russia. Everywhere I go, I find admiration and envy for the judicial independence that we have in America.

Those countries may not like our government, they may not like our president, they may not like our policies, but they all like and admire our judicial independence. And they want to know how we achieved it.

It's quite an interesting story—how we developed judicial independence. Of course, there are many chapters still to be written in this story, and you young law students will be writing some of those chapters. At the very end of this lecture, I have several suggestions I would like you to consider.

But first I want to define judicial independence. Then, I want to discuss our history and how we obtained judicial independence, because it turns out to be a very rare thing. I want to talk about some of the threats to judicial independence that we are facing today. Finally, I will discuss some things you can do to help preserve this almost unique asset we have in America.

So first, what is judicial independence?

When I go abroad people say, ah, it must be wonderful, you're a judge, you can do anything you want. You can order the president to do this or that. You can order people to come and go and they come and go.

† Judge, United States Court of Appeals for the Tenth Circuit. This Article is based on Judge Ebel's remarks delivered to students at the University of Denver Sturm College of Law.

You are really independent, and you have all this fabulous power. Nothing could be further from the truth.

From an institutional point of view we have almost no independence. We can't create our own budget. We can't fund ourselves, only Congress can do that. We can't appoint our own members, only the President with the consent of the Senate can do that—(this speech addresses the federal system, but much of what I say applies to the states as well). We can't remove our members. Only Congress can do that by impeachment. We can't even establish our own jurisdiction. Congress could eliminate all federal courts tomorrow under the Constitution—save only the Supreme Court. And Congress can limit the jurisdiction of what we can hear, and what we can decide at their will. Congress even can impose jurisdictional restrictions on the Supreme Court.

That doesn't sound like the judiciary is very independent.

And we can't even enforce our decrees when we issue an order because we have no army to ensure compliance. So institutionally, we lack independence and we are quite weak.

But what protects the judiciary is that the other branches are also weak in other ways. Our strength comes not from independence but rather from the co-dependency that each branch has upon the other branches of government. The judicial branch is the only branch that can definitively interpret the laws and resolve cases and controversies. The judicial branch can enforce constitutional limits on the other two branches and, of course, upon itself as well. Those are powerful tools.

So when people say that we have an independent judiciary, I say, no. The judicial branch is co-dependent on the other branches, but happily the other branches are co-dependent upon the judicial branch as well.

A better way to look at independence is not institutionally, but rather as independence in our decision-making process.

When we make judicial decisions, we make them free of anybody else interfering with our decision-making process, subject of course to our need to obey and be bound by the Constitution first, and the constitutional laws of the land.

In twenty-two years as a judge, no one has ever called me ex parte and tried to persuade me how to decide a case. I have never had a government official tell me what to do, or even suggest it. I have never had an offer of a bribe or intimation of a bribe. I have never had a politician, a legislator, or a president call me and say, this is the way we want you to decide the case. And that fact alone makes us nearly unique among the world's judiciaries.

When I went to another large and well-developed country, I asked the President of the bar of their major city about the independence of their judiciary. I asked, if you took their significant cases (putting aside the routine fender benders), what percentage of those cases were decided solely on the merits, and what percentage were, instead, decided or influenced by bribery or government interference?

You know what he told me?

He said that maybe ten percent of such cases are decided strictly on the merits, and about ninety percent are decided because the government has called the judge and told him how to decide the case or there was ex parte pressure or bribery involved.

Once that cancer sets into a country, it is almost impossible to excise it.

In America, if you get into a legal dispute, there is a place to go where nobody is going to be bribing or threatening or imposing ex parte influence or persuasion on the decision-making. That place is called the courts.

So I would define judicial independence as a judiciary that decides cases under the rules that are presented to it, under the evidence that is presented to it, where all the litigants have an equal and open opportunity to address the merits. Judicial independence really boils down to independence from outside influences in making judicial decisions. It may not be as grandiose or sexy as some of my envious friends in foreign countries imagine, but it is every bit as important and unique as they understand it to be.

Now, how did this judicial independence come about?

Many countries have similar constitutional guarantees of judicial independence, but it doesn't always play out in practice the way it has in America.

So let me talk a little bit about the history of our country, because how judicial independence came about is really interesting. Let's go back to the Declaration of Independence, July 4, 1776. It lists 25 reasons why we were going to break off from Great Britain. And of those 25 reasons, two explicitly talk about an independent judiciary. Isn't that interesting? Approximately one-tenth of the grievances that lead to our independence had to do with King George's interference with the independence of the judiciary.

One of those grievances complained that King George was exercising influence over our judges by threatening to fire them or by reducing their salaries. And the second complained that King George wouldn't let us set up our own judiciary.

Thus, an independent judiciary is on our birth certificate. It is part of who we are and why we became a separate country.

Next, let's turn to the Constitution. It addresses judicial independence in Article III. And it says: All judicial power is vested in the Courts. Then it defines judicial power to say: Judicial power is the right to resolve all cases arising under the Constitution, the statutes, or the treaties.

Wow. Any case, any dispute involving the Constitution, statutes, or treaties, is vested in the judicial branch.

When I was in Malaysia I learned that about twenty years ago they had a similar provision in their constitution that all judicial power was vested in the Courts. But about twenty years ago Malaysia took that out of their Constitution. There is an effort now in Malaysia to try to restore the earlier provision back into their constitution.

With a specific nod to King George, we put another provision in our Constitution that said federal judges have life tenure and judges' pay can't be diminished during their lifetime.

But it took a lot more than these constitutional provisions to establish judicial independence in America. It took some very wise decisions by some very wise judges to slowly take a step forward on independence, and then maybe half a step back, and then a step sideways, and then two steps forward, and then a step back.

The route to judicial independence had to be earned. It wasn't just given to us full blown.

You all know the case of *Marbury v. Madison*, which was the case where Chief Justice Marshall declared that judges have the power to declare statutes unconstitutional.

We all remember the principle of that case. But you may not know how remarkable that principle was at the time. It may seem normal now. But it was shocking at the time because we were founded as a democracy. And the Constitution says all power comes from the people. There is undeniable tension between ultimate power residing in the people and their elected representatives and the power of the courts to strike down laws passed by those representations.

The people, through their elected representatives, can pass a law—that is the very embodiment of democracy. But the courts can set that law aside if it violates the Constitution. That was not a self-evident proposition, although now we have come to appreciate it as the embodiment of a "constitutional" democracy.

How did the other branches of government allow Chief Justice Marshall to come up with that rule that the courts can strike down legislation that is unconstitutional? The Constitution does not explicitly permit that action.

Well, what had happened was there was a sharply contested election between Jefferson and the incumbent President, John Adams. President Adams was running for re-election against Jefferson and Jefferson beat him.

But, before Jefferson could take office, John Adams tried to appoint his loyalist cronies to government positions wherever he could.

And one of the people he wanted to appoint to a magistrate judicial position was Marbury. So a judicial commission was issued for Marbury to become a judge, the Senate approved it, and Adams signed it.

But before he could deliver the commission to Marbury (which was required before it could become effective), Adam's term ended, and Jefferson became President. Jefferson said, I'm not going to deliver that commission to Marbury. So, Marbury sued.

But here's the twist. Marbury brought his suit directly in the Supreme Court. He didn't sue in the lower courts and let it work its way up on appeal. He sought the Supreme Court's direct original jurisdiction and asked the Supreme Court to issue a mandamus to Jefferson's Secretary of State, Madison, to force him to deliver the commission.

Everybody was scared to death about that case, because they knew that if the Supreme Court ordered Madison to deliver the mandamus to get Marbury seated as a judge, Jefferson wouldn't obey it. And it would provoke a terrific conflict. You can't have an independent judiciary if the executive branch won't enforce judicial decrees?

So Chief Justice Marshall did an amazing thing. He said, yes, Marbury should get his commission. But Marbury is seeking Supreme Court original jurisdiction to issue a mandamus forcing Madison to seat him. And that original jurisdiction to issue writs of mandamus comes only from a statute recently passed by the new Congress giving the Supreme Court original mandamus jurisdiction.

The Supreme Court then found that jurisdictional statute to be unconstitutional. The Constitution lists a couple of specific areas where the Supreme Court has original jurisdiction. But all of the rest of the cases have to come up to the Supreme Court through appellate jurisdiction. There are only a couple categories of cases listed in the Constitution that can be filed in the first instance in the Supreme Court. And a mandamus action is not one of them.

The Court ruled that when Congress tried to give the Supreme Court additional power to issue a mandamus as a matter of original jurisdiction, it exceeded the Supreme Court's constitutional authority and hence that statute was unconstitutional. And because the Supreme Court could not give Mr. Marbury the mandamus he wanted, they threw his claim out of court.

Ah, Jefferson was happy. The Supreme Court was not going to force him to seat Marbury as a judge. Congress was happy because to Congress this looked like a modest, self-effacing Supreme Court decision rejecting additional judicial authority that Congress tried to give to it. In this early jockeying for power, that seemed to satisfy the new two branches.

The other branches of government, therefore, accepted the decision, and yet we now understand that it announced, for the first time, the most powerful weapon that the judiciary has—the power to strike down laws that are unconstitutional.

I can talk about a lot of other cases that contributed to our current understanding of judicial independence, but the point I make is that judicial independence in our country wasn't just birthed fully clothed the day our country was created. It was slowly developed, step-by-step, by very astute judges.

I was next going to talk about the New Deal cases. There are some interesting stories there, but I don't have time. I'm going to skip that. I'm going to just jump forward to *Bush v. Gore*.

One of the things that *Marbury v. Madison* announced was the doctrine called political question abstention. That is, if a case presents essentially a political rather than a legal issue, the Court is not going to get involved. A political fight is kind of like punching a tar baby. If the courts weigh in on political fights, that will get mired in a morass.

Besides that, if the courts get involved in a political fight, the public is going to see the courts as political and partisan. And then the courts lose their indispensible asset of being viewed as neutral, objective, and above the fray.

So the Court announced in *Marbury* that political disputes between Adams and Jefferson were beyond the wisdom and jurisdiction of the Court. And the Court has followed the doctrine of political question abstention almost uniformly since then.

Twice we had contested presidential elections that were thrown into the Senate for resolution. One involved Rutherford B. Hayes and one involved the Jefferson/Adams election. And in both cases it was Congress that decided which delegates to seat, which electoral college votes to count, which ones not to count, which states to count, which ones to disallow.

So when *Bush v. Gore* came along I was very surprised that the Court took jurisdiction. I had predicted that it wouldn't.

Now, I have nothing to say about the outcome of the case—no comment on whether I thought it was a good outcome or a bad outcome or whether the merits were rightly or wrongly decided. I'm speaking only

about the question of jurisdiction, whether the case should have been taken at all by the Court. In my opinion, the "political question" doctrine strongly counseled that judges stay out of basic political fights. Those fights should be resolved ultimately by Congress.

I think my judge colleagues will mostly agree that the judiciary has paid a heavy price for *Bush v. Gore*. It has resulted in a loss of public confidence that the judiciary is politically neutral.

This loss of public confidence in the apolitical nature of the courts is exacerbated by the fact that, with two exceptions, the Republican justices, that is the justices that were appointed by a Republican president, supported Bush. All the justices appointed by the Democrats supported Gore.

If the public ever really comes to believe that the judicial branch is just another political branch of government, all is lost, because we have no armies, we have no budget, we have no constituents. Our authority ultimately rests on our reputation of neutrality and integrity.

Now, let me now speak about some of the current events that threaten to undermine judicial independence.

One of the threats to judicial independence goes to our competence. You see, the country will not continue to support judicial independence if they don't believe judges are competent. Why should it? I mean, if judges as a whole are not competent, of course the other branches would want oversight over us.

So we have to prove with every case, every day, that we're competent. And that is getting to be increasingly difficult, because the laws are getting increasingly complex. And the resources available to the judiciary are becoming increasingly scant.

Let me talk about how complex the laws are getting. Think of the last time you ate a hamburger at McDonald's. That may have been yesterday. How many separate laws do you think had to be complied with from the time that hamburger was born as a baby calf in Wyoming to the time you ate it?

Somebody with way too much time on their hands actually calculated that. And they counted, as a separate law, every statutory provision that had a different citation to it. So if there was a big statute that had 20 sections and 10 subsections, they would count each of those subsections that would apply as a separate statutory obligation.

How many different statutory obligations had to be satisfied? A hundred? Five hundred? The answer is 72,000; 72,000 ways that a federal judge could be involved in a judicial challenge to the making of a hamburger for your eating pleasure. The first ninety days I was a judge I had labor cases, tax cases, discrimination cases, environmental cases,

coal cases, capital punishment cases, bankruptcy, an assassination attempt on the President, and dozens and dozens of other issues. How could I possibly master all of those things?

And, unfortunately, judicial resources are dwindling. They're dwindling in the salaries paid to judges. They're dwindling in the resources that support us, research, and so forth. What do you think the percentage of the U.S. budget is that is allocated to the entire judicial branch? Of course, the judiciary does not aspire to thirty-three percent of the budget even though the judiciary is one of the three coequal branches of government. I mean, we would be happy with ten percent. Seems like a modest enough proposal. We don't even come close to ten percent.

Okay, I'm going to set my sights really low. I'll take one percent of the federal budget for our coequal branch of the government. We don't even get that. We get two-tenths of one percent of the U.S. budget to fund the entire judicial branch. That's less than is spent to fund a mid-sized administrative agency. It's less than it costs to build one aircraft carrier or three submarines. So the judicial budget is very tight.

That goes all the way from our support staff and our resources, to our salaries. I took a two-thirds pay cut to become a judge. And since then my judicial salary has fallen way below the inflation index.

In the last two years we've had two of our best active circuit judges on the Tenth Circuit leave for more lucrative private engagements. It's becoming a real problem.

And the funding problem is a hundred times worse in the states. I am not at all claiming sympathy for the federal judiciary, because any state court judge would say, my goodness, it is so much worse at the state level.

But just to describe our workload. We are now deciding, on the Court of Appeals, three times as many cases per judge per year as the Court of Appeals judges had to decide in 1960.

If you asked a judge in 1960, are you overworked? They would say, oh, man, am I overworked. And then if you said, we're going to fire two of your colleagues and you have to do the work of three judges. They would say, there is no way that is possible. Yet today each federal appellate judge decides three times as many cases as a single judge decided in 1960 on a yearly basis. Today I decide about 500 cases a year. Think of what a case involves, up to 125 pages of briefs, thousands of pages of record, precedent that has to be read and understood. And I have to decide about two of those every single day.

Another threat we face in the judiciary to independence goes to ethics. We have rules about ethics, what you can and can't do. I sat for many years on the national Ethics Advisory Committee. And I now sit on the National Appeals Committee for Ethical Changes. We do a good job

of enforcing judicial ethics. But some in Congress think they can do better.

And so there is periodically a bill introduced into Congress to establish an inspector general's office for oversight of the courts. Well, that would be disastrous to the concept of judicial independence because of the intimidation Congress could exert by such oversight over our daily decisions. If someone thinks we are being "activist"—whatever that means—they could start an investigation. And so, we have to convince Congress that we're doing a good job of policing ourselves. And that's hard to do, because much of our policing is done below the radar level.

We do occasionally recommend that a judge be impeached by Congress. But 99% of the time we can handle these matters more effectively under the radar. We must, somehow, convince the American public that we are serious about our own internal policing of compliance with judicial ethics rules.

Finally, let me suggest a few things that you can do to help preserve and advance judicial independence.

One thing you can do is to get involved with the Institute for the Advancement of the American Legal System. It is one of the premiere institutes in America devoted to the independence of the judiciary and the betterment of the Courts. It's located just across the street, and my dear friend, Rebecca Love Kourlis, a former State Supreme Court Justice, runs it. They are doing things all over the country to ensure the independence of judges, integrity, competence, resources—all of those things that I said you have to have to be independent.

You ought to find out about that institute. You ought to go over there and see if you can volunteer your time. I know they have a bunch of researchers, and I bet they could use more.

The second thing you can do is to be our constituency, because judges don't have constituencies. We're not elected. We don't have anybody to come to our defense. When we're accused of a bad decision or being an activist judge, often, at least when I know something about the decision under attack, the criticism is misinformed. You see, the political branches of government look at the world very differently from the way a judge looks at the world. The political branches look at the world largely by the end results. Did this decision advance abortion or did it advance pro-life? Did it advance the environment, or did it advance corporations? Did it advance the tenant or did it advance the landlord? That's what they look at. The political branches say, well, the judge was pro-tenant, pro-landlord, pro this, pro that, or whatever, based on the end result of the decision.

That's not the way judges look at things. Judges tend to focus on process and let the end result wind up wherever it may. Judges ask, what

are the rules? What does the statute say? What does the Constitution say? What is the precedent? What is the evidence? What is our standard of proof? Measure those things together. Once you get the ingredients together, the soup takes care of itself. I can't tell you how many times I tell my clerks, after we have gone through that ingredients analysis, that I may not personally like the end result of my own decision. But whether I personally like or dislike a result is not the criteria by which I decide cases.

I never issued a ruling because I'm pro this or pro that. Why? Because a judge cannot rule on the basis of the end result achieved without sacrificing neutrality and fairness and those are higher values in the judicial world.

We need people like you to spread the word that judging is different than the way the other two branches of government operate. The judiciary is not a result-oriented branch. It is a process-oriented branch. And the process is to ensure fair and objective trials—nothing more and nothing less.

If a decision is being criticized politically, we need you to review that case and then publicize your own legal analysis of the decision. Get involved and explain how judges work and how the law works. If the case is wrong, we deserve to be criticized. If it's right, tell people about the process that lead to the decision.

We had a case that Judge Henry, our recent Chief Judge, wrote years ago involving a prisoner in state prison that wanted estrogen treatment. She had gotten a transsexual operation and was now a transvestite woman, although she had started out life as a male. She wanted hormone treatments to support her new femininity. She sued the prison asking for hormone treatments. The district judge granted summary judgment for the prison without converting it to a summary judgment and without giving her a chance to put on evidence. Judge Henry looked at that and said, you can't grant a summary judgment without telling both sides that you're going to convert the matter to summary judgment and without giving the parties a chance to put on evidence. So he reversed summary judgment for the prison and sent it back for evidence so that both sides could put on their evidence and have their day in court.

What happened? There was a storm of criticism. Three or four congressmen threatened to introduce a Bill of Impeachment against Judge Henry as an activist judge because he was allegedly supporting transgender rights at the cost of taxpayers' money. And it wasn't until some law professors and some law students and some lawyers spoke up and said that every law professor in the country would have agreed with Judge Henry. It was a process case. Judge Henry had not decided that a prisoner had a right to estrogen treatment in jail; he had only decided that the plaintiff/prisoner had a right to her day in court to argue her case. The

politicians in both the executive and legislative branches do not think much about process. And you have to educate the public about that.

Well, very quickly, other things you can do. You can advocate for adequate funding for judges. And leave the federal judges out of it, because we are, by most standards, well paid, and we have life tenure. State judges really need money. They are woefully underfunded. Get active in urging adequate funding for the state judiciary.

Another thing you can do is file a complaint if you think a judge is acting unethically. You know, an ethics complaint does not require standing. It's the only court-like proceeding I know of that doesn't require standing. You don't need to be a lawyer in the case. You don't need to be a party in the case.

If you think a judge is acting unethically, the judge is biased, the judge belongs to biased clubs, the judge has been intemperate on the bench, the judge has acted improperly off the bench, the judge is arrogant, the judge is not listening, whatever, file a complaint and let us deal with it. We can only resolve the problem when complaints come in. We need to keep our own house clean and private complaints of judicial misconduct help us to spot problems so we can correct them internally.

And then the final thing for you to consider is that when you reach the ripe old age of mid-forties or early fifties, some of you should consider throwing your hat in the ring for a judicial career.

It is one of the most wonderful jobs I can imagine. But I don't think you should do it early in your careers, because you need a lot of experience first. And you need the strength of character that comes from years of battling in the mine fields in order to insist on judicial independence.

See, you see, hopefully, the topic of judicial independence is not as boring as it sounds.

"NO TAXATION WITHOUT REPRESENTATION": A BRITISH PERSPECTIVE ON CONSTITUTIONAL ARRANGEMENTS

THE RT HON LORD JUDGE†

Luck plays its part in all our lives. My mother gave birth to me in the tiny island of Malta in the middle of a bombing raid in which the hospital took a direct hit. At that time, Malta was the most bombed place on earth. Not so long ago my mother pointed out to me that she gave birth to me without there being any water or electricity, and that a bomb trajectory fifteen yards nearer to where she lay would have meant "no you, no me, and no daddy," because my father was in the Royal Air Force, serving King and country, in World War II, and had broken curfew to be with her. Luck plays its part in all our lives, sometimes for good, sometimes for bad.

My mother is Maltese, and the present Lord Chief Justice of England and Wales is only half English. I am proud of both my heritages, and proclaim them. I still have memories of childhood, when my mother, who was—and remains—a firm admirer of England, would nevertheless turn to us children, and point out that we were half Maltese, and that this was "the better half too." Or, when my father had annoyed her, when she would tell us that "we," meaning the Maltese, "were civilised when daddy was covered in woad"—that is war paint. My father was a lovely man, and even as a child I knew that she was exaggerating. My father had never worn woad in his life. But I venture to discuss these aspects of my background, not merely to give you a true impression of a wonderful and loving childhood, but to suggest that I have been offered the opportunity of the wider perspective that ought to follow from mixed nationality.

And that brings me to the more important points. Where I touch on the affairs of the U.S., I offer my thoughts with due humility, apologising in advance with the inevitable—but I assure you, unintended—errors or insensitivities. And, having listened to the entire conference so far, for—perhaps—picking up the wrong end of a particular discussion. No offence is intended. What follows are my personal thoughts, as an outside observer—an admiring outside observer certainly—but no expert. I am profoundly aware that the true experts on your constitutional arrangements are here, among you.

† Lord Chief Justice of England and Wales. This Article is based on the Lord Judge's remarks delivered to the Tenth Circuit Bench & Bar Conference in August of 2010. Publication of this Article would not have been possible without the efforts and support of Judge Neil M. Gorsuch.

I was called to the Bar of England and Wales at the Middle Temple in London. So was the man credited with coining one of the most historic and symbolic phrases ever coined: "no taxation without representation," John Dickinson. He also wrote the Liberty Song in 1768:

"Then join hand in hand, brave Americans all,

By uniting we stand, by dividing we fall."

Five American lawyers from the Middle Temple signed the Declaration of Independence.[1] The Americans were publicly supported, among many others, by Edmund Burke, a Middle Templar, and all were greatly influenced by William Blackstone, another. We know that the father of the great Chief Justice Marshall, to whom I shall come, subscribed to his own edition of Blackstone, and the Chief Justice referred to it in his seminal decision in *Marbury v. Madison*. Just to be clear that men of action as well as men of thought were involved, it was a Middle Templar, John Laurens, who fought at the battle of Yorktown and negotiated, as George Washington's representative, the surrender of the British forces. And when Washington was appointing his first justices to the Supreme Court, two were Middle Templars. Two of that hugely impressive line of justices from their day to this happened to have been with us. And it is indeed a privilege that Justice Ginsburg and Justice Sotomayor have been here.

Mrs. John Adams, the wife of the second President, would have approved. Her letters show how determined she was that the founding fathers should have recognised that half the human race was female. And what a tribute to John Adams himself that such a remarkable and wonderful woman should have loved him as she did. There must have been something very special about him, and indeed in my view there was.

Dickinson's first journey to England in 1753, in what was not much more than a wooden tub, took 59 days, 2 months. And he wrote home to his mother that he had been sea sick on 35 of them. My wife, Judith, and I arrived here after 9 hours in an aeroplane. But Dickinson, and hundreds like him, braved the elements. A lot of them rather enjoyed their visit to London, although according to Charles Carroll, perhaps a rather toffee-nosed young man from Maryland, there were "few young gentlemen . . . to be found of sound morals." Well no doubt, for young men then—as for young men always—wine, women, and song did not lack their attractions. The President of the first Continental Congress, who preceded the first President of the United States as the titular head of the infant Republic, was a Middle Templar. This was Peyton Randolph. So were two of the following Presidents of the Congress. Thomas McKean and Cyrus

1. I am indebted to Judge Eric Stockdale from England and Justice Randy Holland from Delaware whose illuminating work, the *Middle Temple Lawyers and the American Revolution*, sets out this fascinating story.

Griffin. So were four drafters of the Articles of Confederation, so were seven of those who signed the Constitution.

I am not drawing your attention to these facts for the purposes of decoration. They matter to me personally because I believe that the rule of law which we all espouse comes from deep within the roots of our national histories. That is why they merit examination. The deeper the roots go, the more entrenched they become in the unconscious as well as the conscious soul of the nation. In our communities, the citizen does not merely hope for justice based on the rule of law, but expects and demands it. We live in happier lands just because these roots go so deep, and my thesis is that your roots did not begin in 1776, and you should not assume that they did.

One of the problems with history is that when we look back at what happened, we assume that what happened would inevitably have happened. I mean no disrespect, but even if the American War of Independence was destined to succeed, those who took part in it had no particular reason to believe that it would. It took great courage to sign up to it. As a Middle Templar, I am proud of my forebears who had the courage to take their stand of principle at an uncertain time when, if they had been unsuccessful, they would undoubtedly have been hanged. That was a point, I believe, explained by John Adams at one of the early Congress meetings when the chubby, future President pointed out to one of his skinnier colleagues that it would take him longer to die because he did not weigh so much. Benjamin Franklin made the same point. If they did not hang together, they would be hanged separately. That is something we can laugh at now, but for them it was not a joke. The risks were huge.

Of course, for the reasons given by Thomas Paine in *Common Sense*—that great seminal work—independence was bound to happen: but not necessarily then, not necessarily as an outcome of their particular struggle. Moreover, this particular war divided both nations. It was in truth a civil war. That is why William Pitt, who only a few years earlier had been the Prime Minister in London when the Colonists—that was what they were called then—fought side by side with British soldiers in the Seven Years War with France, was able, during the course of the conflict, in a speech in the House of Lords, to assert that America could not be conquered, and that he would seek to invoke what he described as the "genius of the constitution." Edmund Burke, who was responsible for one of my favourite sayings, that the rule of law demanded the hearing of disputes before the "cold neutrality of an impartial judge," confessed in *On Conciliation with America*, that he did not know "the method of drawing up an indictment against a whole people." These were great Englishmen, who understood and spoke out in favour of the justice of the Colonist position.

Here, as we have seen, Peyton Randolph was the first President of Congress, a Middle Templar, but his brother John took a different view

of the struggle, and he went to live and eke out his days in sad exile in England. Yet his son, Edmund, became an aide to George Washington, and his first Attorney General. But if you want to understand that this was indeed a civil war, look no further than Benjamin Franklin himself. His achievements were manifold. But in view of the discussion here this week, perhaps I should point out that he changed Jefferson's mellifluous style in the first draft of the Declaration of Independence from "we hold these truths to be sacred and undeniable," to the much briefer, but the inescapable and ultimately incontrovertible words which echo to us down the ages: "we hold these truths to be self-evident." One word, or perhaps two, are always better than three, and the one he chose put the issue beyond argument. Returning to my theme, his son took the opposite side to his father. They never fought in battle, but except on one occasion to resolve the payment of a debt, I believe that they never spoke again. His son's son, that is his grandson, took the same view as Benjamin Franklin himself. Thus are the tribulations of civil strife imposed as a burden on contemporaries who have to live through it. For you, of course, an even greater civil war was to come. And by then we had had our own civil war.

These considerations enable me to suggest to you that some of the documents of English history which matter greatly to me, continue to matter greatly to you, and should be seen as part of the foundation of your nation. They include the Magna Carta of 1215, the Petition of Right of 1626, the Grand Remonstrance of 1641, and the Bill of Rights of 1689. Your constitutional roots include a civil war which culminated in the execution in 1649 of a monarch who proclaimed the Divine Right of Kings, and the removal of another in 1688 when he sought to subvert the constitutional changes consequent on the execution of his father. All these events influenced the thinking of the Colonists, and the constitutional arrangements which they were seeking to uphold. It was part of their history, as it is of our history. And that is why I respectfully suggest that it remains part of your history. But notice for the future: our civil war was a war brought about in a struggle about the rule of law. Could it possibly be that, in the Latin, *rex est lex* or *rex est lex loquens*? It was lawyers—not exclusively lawyers, but many of the most influential members of Parliament—who challenged the concept of the Divine Right were lawyers. By the end of the Civil War, there was a public trial of a monarch for waging war on his subjects. And we have the record. The King argued that the Court had no jurisdiction to try him. In constitutional theory, it was an arguable point. In practical terms, however, it was doomed to failure. And his execution demonstrated the reality of the 17th century observation, "be ye never so high, the law is above you."

May I go back: Sir Walter Raleigh, a man who saw a great future in the potato as well as tobacco, was a Middle Templar. I am not here on behalf of the Middle Temple to receive a writ in a class action. He re-

ceived a charter which enabled him to explore the east coast of America, which is now Virginia. Less important, his nickname was "Swisser Swatter." You may wonder how that came about. We are told that he was engaging in very close social exchanges with a pretty young lady in court, who began by saying "oh sweet Sir Walter," but who, as her rapture increased found herself confined to uttering "Swisser Swatter." And to think, that we thought that the joys of sex had only been discovered in the last century.

One of the ships which explored Virginia, and settled a small number on Roanoke Island, was captained by Phillip Amadas, another Middle Templar. His efforts were met by a fine by the Benchers on the basis that he was absent for longer than he should have been without permission. They presumably failed to understand that in those days timetables across the Atlantic were not very efficient.

Another link is Sir Francis Drake, who sailed the Golden Hind around the world, and in his circumnavigation explored the west coast of America, now California. Our records show that his "happy return" was greeted with much joy and acclamation at the Middle Temple. Francis Drake is famous in English history for his determination, when the news of the great Spanish Armada was approaching the coast of England in 1588, to finish his game of bowls, before returning to what became the great sea battle. If the Armada of 1588 had prevailed, the history of the U.S. would have been very different. There would have been no license to the Pilgrim Fathers. The common law, and its principles, would have been extinguished before they ever left the shores of England. Francis Drake did make one observation, which I offer you as still encapsulating a principle of life: "There must be a beginning of any great matter, but the continuing unto the end until it be thoroughly finished, yields the true glory."

When you are called to the Bar at the Middle Temple you sign the book, and I did, and so many of your forebears did, on a table made from a gun hatch of the Golden Hind itself.

Interesting as these considerations all are, one of the great heroes for us all, and that includes you, is Sir Edwin Sandys, who drafted the first Royal Charter granted to the Virginia Company in April 1606. Sandys was no supporter of the Divine Right of Kings. He was one of those who questioned and opposed it. He found himself in the Tower for his beliefs. But in 1618 he succeeded in obtaining the "Great Charter" for Virginia. This charter established the right of settlers, and any of their children born in the new colonies and plantations, to "have and enjoy all liberties, franchises, and immunities to all intents and purposes as if they had been abiding and born within this our realm of England." This language was later to be repeated as other colonies were established, including Maryland (1632), Maine (1639), Connecticut (1662), Carolina (1663 and 1665), Rhode Island (1663), and Massachusetts Bay (1691). And

these words, hardly surprisingly, led those with trained legal minds to question the constitutionality, or the legality, of the efforts of Parliament in London in the Eighteenth Century to curtail or diminish what they believed were their now longstanding rights. And the Virginia Charter similarly provided guarantees for the Colonists of "self government, freedom of speech, equality before the law, and trial by jury." Thus, it is that 1776 was not about abstract rights. It was about the preservation of what were believed to be existing rights.

One of the major complaints against the Stamp Act of 1765 was the deprivation of those charged with contravening its provisions of trial by jury. Another Middle Templar, Robert Goldsborough of Maryland, spoke of "acts and legislative aggression by the mother country." And here was the context in which Dickenson's great phrase, "No taxation without representation" was coined. And, echoing the dictum of Sir Edward Coke—one of my great predecessors—who, in 1616, was deprived of his office and hurled into the Tower because he responded to the King's belief that judges should be lions *under* the throne, that the judges would do what it was appropriate for the judges to do, and who had suggested in *Bonham's Case* that statute was not always supreme. James Otis of Massachusetts urged that "an act against natural equity was void." And John Adams himself told a judge who was doubtful about the possible nullity of an Act of Parliament, "tell the jury the nullity of acts of Parliament . . . I am determined to die of that opinion."

Am I the only person here who is moved by the thought that as long ago as 1618, a tiny band of individuals believed that concepts like freedom of speech and trial by jury actually mattered? At a time when such concepts would have been beyond the comprehension of any other contemporary society of which I am aware. And we all still believe it. Your constitutional arrangements—and ours—seek above all to ensure equality before the law. And in particular the concept that no one is above the law or may break it with impunity was established by our civil war: self government—what is now called democracy—should always be at work in our constitutional arrangements: freedom of speech as a matter of right, what President Roosevelt identified as "the first freedom"; and trial by jury, that no one should be liable to imprisonment for a serious crime unless he or she has publicly admitted it, or sufficient evidence has been produced to enable twelve of his fellow citizens to be convinced of his guilt. As Lord Devlin once memorably put it, trial by jury is the "lamp by which we know that freedom lives." These venerable and venerated concepts are an ineradical part of the fabric of both our societies, and our constitutional arrangements are there to preserve and uphold the rule of law. Not, of course, rule by lawyers or by judges, but the rule of law itself.

In the United States you have a written constitution. Contrary to popular myth, we in Britain also have a constitution that is written. The

main difference is this: your constitution is embodied in a single document to which—as needs must—amendments or additions have been made over the years. Our constitution is not. It is largely, but not exclusively (but that would take a lecture of its own) to be found in statute, in legislation enacted in Parliament. In our system, Parliament is sovereign. It may—and in relation to all the great nations that were once part of the British Empire, like Canada, Australia, New Zealand and India—it ceded its theoretical sovereignty to another body: to a very limited extent it ceded some of its sovereignty to the European Court of Justice in relation to affairs arising in the European Economic Community. But ultimately in the United Kingdom it is sovereign. Our recent constitutional changes were produced by the Constitutional Reform Act of 2005. It had many facets, but notice the first and most significant is that it is an Act of Parliament. That process could not have happened in the U.S. Your constitution would have forbidden it.

The process for change began with an announcement by the Prime Minister that the Lord Chancellor's office would be abolished. In other words 1300 or 800 years (whichever it was, a very very long time) of history would be wiped out. The initial proposal was met with severe opposition in the House of Lords. The fact was that you could not abolish the office. No less than 400 statutes provided for the existence of this office. In the result the office of Lord Chancellor survived, but with radically altered powers. He is no longer the Speaker of the House of Lords, nor President of the Courts of England and Wales, nor the Head of the Judiciary, nor able to sit as a judge. Many of the responsibilities of the Lord Chancellor were devolved to the Lord Chief Justice. Thus the Lord Chief Justice is the Head of the Judiciary of England and Wales and President of its courts. He is responsible for representing the views of the judiciary to Parliament, to the Lord Chancellor, and to Ministers of the Crown as, and when, necessary. He is required to maintain appropriate arrangements for discipline, welfare, training, and guidance of judges—within the resources made available by the Lord Chancellor—as well as maintaining arrangements for the deployment of judicial office holders throughout the courts of England and Wales. He must negotiate with the Lord Chancellor a budget for the efficient administration of justice. But, above all, and I speak entirely personally, he must sit as a judge. For me that remains his primary responsibility.

All that may lead you to understand why I spoke with the passion that I did the other day about the need to manage time. I asked Judith's permission to refer you to Andrew Marvell's poem *To His Coy Mistress*. When I was a teenager I knew all the naughty bits, but now I cannot remember how long he intended to adore each of her breasts. I only remember that all around him he could hear "times wingéd chariot hurrying near."

This leads me on to point about which there was much discussion at the conference. Another major change of our new constitutional arrangements was the creation of an independent Judicial Appointments Commission ("JAC"). Effectively, the Lord Chancellor and the executive is deprived of involvement in judicial appointments. The Lord Chancellor is not a member, nor is he represented among the members of the JAC. In constitutional theory, every judge at every level is appointed by the Queen. So the Commission recommends the appointment to her. Perhaps I can tell you of the system for my appointment as Lord Chief Justice. The selection was made by a Commission consisting of two senior judges, the senior Law Lord and the Master of the Rolls, together with the Chairman of the JAC and her nominee, who could not be a judge. They did not present a slate of candidates from which the Lord Chancellor or Prime Minister could choose one. They put forward one name. The Prime Minister is entitled to decline to recommend that name to the Queen, provided he gives public reasons for doing so. If he does so, that would have been a veto on my appointment. But the nuclear option could be fired once: if it had been fired, the Commission would then have met again, and the Prime Minister would then have had no option but to put that name forward to the Queen for appointment. Similar processes follow for all the senior Heads of Division and the members of the Supreme Court. Although for appointment to the Supreme Court—which is the final court for Scotland and Northern Ireland as well as England and Wales—the head of the JAC for each of those countries forms part of the selection panel.

I like to think that the selection of our judges and in particular the senior judiciary is now as immune from the political process as it is possible to be in a democratic society.

Another change related to the removal of Lords of Appeal in Ordinary from the House of Lords, and the creation of the new Supreme Court of the United Kingdom. The previous members of the Appellate Committee of the House of Lords became the first members of the Supreme Court, and the Senior Law Lord became its first President. This provision consolidated, in constitutional theory, the separation of the judiciary from the legislature at the highest level. I hasten to add that it did not turn a group of twelve lambs into lions: for years there has been government complaints about the way in which—putting it shortly—the Law Lords had failed to implement government policy, and frustrated exclamation by politicians about judges frustrating the will of Parliament. The old Law Lords were lions alright. And they did not change when they moved premises. Nevertheless the new Supreme Court has not been vested with any additional power to the jurisdiction and authority enjoyed by the Appellate Committee of the House of Lords: and there has been no diminution in its powers either.

The result is that the final court in Britain, the Supreme Court, does not enjoy the constitutional authority of the Supreme Court of the U.S. It cannot strike down, and has never yet sought to strike down, legislation properly enacted. There is a developing theory that any legislation which can properly be said to be "unconstitutional" may be open to question, but this is being tentatively explored in judgments. It has nothing to do with the Constitution Reform Act itself.

Be all that as it may, as things stand, the role of your Supreme Court in what in truth are social questions is, to British eyes, quite remarkable. Let me take one example: the question of termination of pregnancy, issues of life and death, and the dignity and autonomy of women. The attitude of the law to these questions tells us much of what sort of a country we are. For us, the issue of abortion was resolved by an Act of Parliament, the Abortion Act of 1967. For you, the issue has been resolved by the Supreme Court. Am I wrong to understand that a five to four vote of unelected judges represents the law which governs "we, the people"? This is not a criticism. I am merely identifying an important difference. And I shall offer my own theory for the difference in a moment.

This question of judicial voting in your Supreme Court led to an element of the discussion at the conference which troubled me. I hate the word "ideology" to be applied to any judge. Surely every judge applies the law as he or she conscientiously analyses it.

Any politicisation of the process is fraught with danger. Judges are not politicians. They are independent of the political process. And the appointment of judges should not give anyone the opportunity for political posturing, let alone political preference. I recognise that within your constitution the functions of the Supreme Court are fundamental, whereas if our Supreme Court reaches a decision of which Parliament does not approve, Parliament can enact whatever amending provision it likes. Nevertheless if the process of appointment to your Supreme Court were the process in England and Wales I should be immensely troubled, and for this reason. The more we allow the appointment of judges to become part of the political process, the quicker the judiciary will become subsumed in it. And what price then, judicial independence?

But how has all this come about? In my view—but I do not claim any scholarship— the differences are a consequence of the circumstances which obtained in the 1770s, and the very early days when the new republic was working out its own destiny. My thesis is that in England we granted ultimate sovereignty to Parliament because it was through Parliament that we sought to curb the divine right of kings, first in consequence of the ancient arrangements which prohibited the imposition of taxation without parliamentary consent—"no taxation without representation" indeed—and then, as the claim for privileges and protection grew when Parliament refused to endorse the King's request for additional taxation without some concession from him, and ultimately by going to

war. In other words, in our arrangements the potential for tyranny was gradually removed by insisting on the parliamentary legislative process, and victory in battle. In your situation, many years later—as we have seen from Goldsborough, and Otis, and Adams, and perhaps most important of all, from Jefferson's first draft of the Declaration, which directly attacked Parliament— Parliament was undoubtedly perceived to be integral to the problem. Central to your grievances was the Stamp Act, an Act of Parliament, not simply the diktat of a monarch, like the demand for ship money was. Your ancestors were claiming the same right not to be taxed unless they were represented which had been established, as they believed, in their constitutional affairs for years: now it was being taken away. And if that was being taken away, so could all the other immunities and privileges and principle, such as trial by jury, and so on. In the 1760s and 1770s, Parliament in London appeared to be unwilling or unable to see that the position of the Americans was entirely consistent with established constitutional principles. For you a sovereign Parliament was the problem. It could therefore not be the solution.

Consciously or unconsciously, the founders of the Constitution decided on a method of limiting or controlling not only the executive, but the legislature. For these purposes, the principle of separation of powers provided the answer—at any rate in the sense of expressed constitutional theory by John Locke at the end of the 17th century—formulated when we in England were enmeshed in the development of a constitution based on our own Bill of Rights. The celebrated French philosopher Montesquieu, who examined the English constitutional system in the 18th century in the context of contemporary France: where the king was untrammelled by the equivalent of Parliament, and enjoyed dictatorial powers, perhaps best encapsulated in the—to our eyes—repugnant *letters de cachet.* He, like Voltaire, believed that the solution to the dangers of an absolute monarch had been achieved in England and attributed them to a concept of a separation of powers which did not, and never had—and indeed never has—existed in England. All this shows that you should never doubt the value to lawyers of a legal or political theory which perfectly appears to address what their instincts tell them is needed. But so it was, that the separation of powers assumed such crucial importance in your arrangements.

The world does not love lawyers. It never has and it never will. Sometimes the world is right, of course, but sometimes it is wrong. In his early years, William Shakespeare wrote the history of the reign of King Henry VI in three parts. These are blood infused offerings: that is what his audiences wanted. In the whole of these three plays there is but one joke. A rebellion led by Jack Cade comes into London, intent on trouble. And when the rebels are mingling among themselves and asking how they should begin, Shakespeare offers the immortal line "let's begin by killing all the lawyers." And indeed in historical fact they did attack and

destroy much of what is now the Temple, where the lawyers were already congregating. In the theatre everyone laughs. And it is a good joke, but that rebellion is followed by the most terrible bloodshed. I shall come back to it.

But what I suggest is striking about your revolution—and ours—is this. Of course it was war. Men died and were maimed. There was much suffering and much heroism. But when it was over, it was over. After the execution of the king, I do not for a moment suggest that life was comfortable for his supporters, but when the fighting ended, they were not rounded up and killed after a series of ritual trials. After your War of Independence, those who supported the defeated king and Parliament were allowed to leave if they wished. Again there was no rounding up and series of ritual trials. Contrast that with the French Revolution which occurred less than 20 years later than your own, or the Russian Revolution and the pogroms which followed them and the slaughter of different classes of citizens. Is it too utterly fanciful to believe that these truly were wars intended to establish legal principles by which the country should be governed, and that the participants were genuinely not after power for its own sake, and certainly not after absolute power, but for power to be exercised within constitutional restraints? I think so, and both our communities are indebted to this focus on legality.

After your war was won, one critical constitutional issue and one critical social issue remained unresolved. The role of the judiciary did not require to be addressed in those very early days, when a war had to be fought and the peace properly secured. But when the issue did come to be resolved, what was at heart was the success, or otherwise, of Jefferson's campaign against the federal judiciary. In England we have a saying, "cometh the hour, cometh the man." For you that hour was 1801, and the man was Chief Justice John Marshall. In the history of the common law, his is one of the greatest and most influential of names. Probably more than any other judge—or to be fair to his brothers, any group of judges—and probably more than any other leader of a group of judges, in the decision in *Marbury v. Madison* his judgment established the constitutional arrangements and defined the role of the judiciary within an infant democracy. It was, in truth, law creation. Even for the moment ignoring the lecture to the Jefferson administration about the rule of law, he in effect returned to Sir Edward Coke in *Bonham's Case* and, as you all know, asserted, that it was for the court to interpret the Constitution. It is just worth repeating my emphasis on the distinction between interpreting the law as expressed in statute or at common law and applying it (the role of the court in England and Wales) and the authority to interpret the very constitution itself (the role of the Supreme Court). It is this that brings into stark focus such issues as the right of a woman to terminate a pregnancy, not as a matter of legal right capable of alteration or amendment through Act of Parliament, but as a matter of constitutional entitle-

ment in an arrangement in which amendments to the Constitution are—and in reality, can only be—events of extreme rarity.

Jean Edward Smith, in his biography of John Marshall, summarised the distinction between the tradition established by John Marshall and our tradition in this way:

> The English tradition held that the great constitutional documents of British history were purely political statements that lay in the realm of Parliament to interpret, not the courts. Jefferson subscribed to that view: so did Jackson and even Abraham Lincoln doubted the authority of the Supreme Court to resolve fundamental constitutional issues in the course of ordinary litigation . . . Marshall took the opposite position . . . he consistently held that the Constitution was law.

But I want to highlight this remarkable feature. This was an infant republic, beset with problems, not bound to survive, fortunate that Britain was concentrating on the defeat of Napoleon who had subjugated the entire mainland of Europe. I am not perhaps wholly able disguise that I do not share the view that Jefferson should be sanctified. Personally I prefer Adams. But, I cannot withhold my admiration for Jefferson's sense of constitutional propriety, that notwithstanding the public lecture on the rule of law, and his profound disagreement with Marshall's decision, after what I regard as a show of defiance, the decision itself was allowed to stand. In the long-term that secured the rule of law in the U.S. I hope that a modern politician, elected to power in our countries, would comprehend why in similar circumstances it would be appropriate to do what Jefferson did.

There remained, of course, the social question. The issue of slavery was not resolved. It still rankles a little that in the first draft of the Declaration, a Virginian slave owner raged against slavery. It is even more ironic, given that at the very time when there were those in Parliament who were supporting the American cause, there were others who were seeking to attack the slave trade. And indeed the great case of James Somersett in 1772—heard before another of my predecessors, Lord Mansfield—following an earlier decision from the reign of Elizabeth I herself, finally and through a complicated process, established that the ownership of a slave in England was incompatible with the laws of England, irrespective of any legal claim which might be valid elsewhere. There could be no property in another human being. But with all that said, it is easy now for us to be critical of failure to address the slavery issue in the early constitutional arrangements. And we know, that it all culminated less than 100 years later in the ghastly catastrophe of your civil war.

May I just return to Shakespeare's early Henry VI plays. They are far from his greatest plays. We all know about his portrayal of human fallibility and frailty in its many manifestations in Macbeth, King Lear,

Othello and Hamlet and the rest. But I venture to suggest that there is nowhere in the entire canon of Shakespeare's plays where the condition of common man is better portrayed than in his description of civil war: none better than the haunting scenes where one soldier pulls a body on to the stage, and then unmasking his enemy, discovers that he has killed his father, followed by another in which another soldier pulls a dead body on to the stage, and after congratulating his opponent on his toughness in the fight discovers that he has killed his son. These are haunting scenes, filled with pity. The son remembers that he will have to tell his mother what he has done, and the father remembers that he will have to tell his wife that he has killed their boy. Although no mother or wife appears on the stage, Shakespeare is able to convey that each of these women is there—but invisible, not actually on the stage—weeping the bitter tears of the lifelong grief that lies ahead, truly part of the dreadful lamentable scene, symbols of the nameless but innumerable victims of the ghastliness of a civil war.

My respectful view is that the founding fathers had little choice. If the slavery issue had been addressed the cause about which they were united would have been paralysed: with such deep seated divisions, we might never have had a "United" States of America, but rather a continent of North America, fragmented to different states. Indeed the history of the world in the last century would almost certainly have been different, and not for the better.

With the greatest of deference I suggest that these appalling sacrifices of this civil war were not in vain, and that all who died must be honoured. Their sacrifices should be regarded as part of the price of your independence, your nationhood, your Constitution, and the greatness of your country, exactly as forecast by John Adams, now carrying the immense burden that it does, as the most powerful nation on earth.

My country once performed this role. It was known as Pax Britannica. That is no longer our role. No one loved us very much for it. Everyone can find fault with it. And of course we made mistakes, but there were a great number of plusses in the ledger too. You too will now attract criticism, even when it is not deserved. If one of your young men or women behaves in a way which all of you would find unacceptable, the pictures flash around the world: there are no pictures of the brave young man or woman who, at great personal risk, steps in to save the life of a child in some foreign country. So your mistakes will be highlighted and magnified, and the blessings you provide will largely be ignored. To be the most powerful nation on earth is indeed a thankless task. Well, you do not, and will not, lack for thanks from me.

LIVING AND DYING WITH A DOUBLE-EDGED SWORD: MENTAL HEALTH EVIDENCE IN THE TENTH CIRCUIT'S CAPITAL CASES

RABINDRANATH RAMANA†

INTRODUCTION

In February 2010, a divided panel of the Tenth Circuit affirmed a federal district court's denial of a habeas corpus petition filed by Billy Ray Alverson, an Oklahoma state prisoner sentenced to death for first-degree murder. Among other allegations, Mr. Alverson contended that an Oklahoma trial court had violated his due process rights under *Ake v. Oklahoma*[1] by denying his request for funding for a neurological examination to assess the possible effects of head injuries that he had suffered as a child.[2] The state trial court had discounted the conclusion of a licensed clinical social worker that Mr. Alverson had shown signs of organic brain impairment and that further testing was warranted. The Oklahoma Court of Criminal Appeals affirmed that ruling on appeal and then denied post-conviction relief.[3]

Judge Paul Kelly dissented. In his view, the state trial court had erred when it failed to approve funds for neuropsychological testing. He reasoned that, "If Mr. Alverson had received a competent [neuropsychological] evaluation, he very well could have presented evidence that he was not a psychopath and that he suffered from an undiagnosed organic brain disorder reducing his culpability for his behavior."[4] In that event, Mr. Alverson would have been able to present this mitigating evidence, and a jury might well have sentenced him to life imprisonment rather than death.[5]

The contrasting opinions about the requested neuropsychological evaluation in *Alverson* reflect an ongoing and evolving debate in the

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† Adjunct Professor of Law, Oklahoma City University; Law Clerk to the Honorable Robert H. Henry, United States Circuit Judge for the Tenth Circuit, 1994-2010. I would like to thank Judge Henry for sixteen rewarding years in his chambers: it was an honor and a privilege to serve with him. I would also like to thank Webster Cash, Lee Fanyo, and the advisors and editors of the *Denver University Law Review* for their tireless work and their guidance. Finally, I am deeply grateful to my wife Sheridan McCaffree, our children Robby and Aidan, and my mother Marjorie Ramana for their love, encouragement, and support. My father, the late Dr. C.V. Ramana, inspired my interest in mental health issues, and this article is dedicated to his memory.

1. 470 U.S. 68 (1985).
2. *See id.* at 83.
3. Alverson v. Workman, 595 F.3d 1142, 1151–52 (10th Cir. 2010) (quoting Alverson v. State, 983 P.2d 498, 511 n.34 (Okla. Crim. App. 1999)).
4. *Alverson*, 595 F.3d at 1170 (Kelly, J., dissenting).
5. *See id.*

Tenth Circuit's capital cases about the significance of evidence regarding the defendant's mental health—which may include not only evidence of organic brain damage but also evidence of cognitive impairments, mental illness without a discrete organic cause, and evidence that the defendant suffered "childhood privation and abuse."[6]

On the one hand, the court has stated that evidence like that concerning Mr. Alverson's alleged organic brain disorder "is exactly the sort . . . that garners the most sympathy from jurors" and that the significance of this kind of evidence cannot be overstated.[7] As a result, when a capital defendant's counsel has failed to conduct an adequate investigation regarding that evidence and has then failed to present it during sentencing, the Tenth Circuit has held that the defendant has been deprived of his right to the effective assistance of counsel under the Sixth Amendment.[8] Engaging in the two-part inquiry required by *Strickland v. Washington*,[9] the court has concluded that (1) defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"[10] and (2) counsel's errors rendered the sentencing proceedings unreliable, thereby warranting a second hearing at which the mitigating mental health evidence could be presented.[11]

On the other hand, the Tenth Circuit has also concluded that this same kind of evidence may constitute an aggravating circumstance that supports the prosecution's contention that the defendant should be sentenced to death.[12] The court has characterized this evidence as "a double-edged sword" and has held that counsel's failure to present it may well be a legitimate strategy designed to save the defendant's life and that the failure to present that evidence was thus not prejudicial.[13]

These conflicting characterizations of mental health evidence present considerable difficulties for capital defendants' counsel seeking to craft an effective strategy during the sentencing phase, as well as for reviewing courts that must assess that strategy under Sixth Amendment standards. In this Article, I outline the mitigating and aggravating sides of that "double-edged sword" by examining three of the Tenth Circuit's decisions that have assessed the effects of counsel's failure to present mental health evidence: *Smith v. Mullin*,[14] *Bryan v. Mullin*,[15] and *Wilson*

6. Smith v. Mullin, 379 F.3d 919, 943 (10th Cir. 2004).
7. *See* Anderson v. Simmons, 476 F.3d 1131, 1147 (10th Cir. 2007) (quoting *Mullin*, 379 F.3d at 942).
8. *See, e.g., Anderson*, 476 F.3d at 1142–48; *Mullin*, 379 F.3d at 938–44.
9. 466 U.S. 668, 687 (1984).
10. *Anderson*, 476 F.3d at 1142.
11. *See, e.g., id.* at 1142–48; *Mullin*, 379 F.3d at 938–44.
12. *See, e.g.*, Gilson v. Sirmons, 520 F.3d 1196, 1244–50 (10th Cir. 2008); Bryan v. Mullin, 335 F.3d 1207, 1222–23 nn.21–22 (10th Cir. 2003) (en banc); McCracken v. Gibson, 268 F.3d 970, 980 (10th Cir. 2001).
13. *See Bryan*, 335 F.3d at 1222 n.21; *McCracken*, 268 F.3d at 980.
14. 379 F.3d 919 (2004).

v. Sirmons.[16] The cases reach different results. *Smith* concludes that it was patently unreasonable for counsel to fail to present the mental health evidence and that there was a reasonable probability that at least one juror would have returned a life sentence if he or she had heard the evidence that counsel failed to present. In contrast, *Bryan* holds that in light of the "double-edged" quality of similar mental health evidence, counsel made a reasonable strategic decision to withhold the evidence from the jury. *Wilson* concludes that, in light of the particular record before it, an evidentiary hearing is required to assess the significance of the mental health evidence.

Each approach is supported by Supreme Court precedent and empirical studies, both of which conclude that mental health evidence may be both mitigating and aggravating. In my view, that ambiguity, or "double-edgedness," suggests a heightened role for the factfinder—either a state court assessing a post-conviction Sixth Amendment claim for ineffective assistance of counsel based on the failure to present mental health evidence or a federal district court adjudicating a 28 U.S.C. § 2254 habeas corpus petition and, in some instances, vested with discretion to conduct an evidentiary hearing on such a claim. In the final section of this Article, I suggest that a more fact-based approach to the assessment of mental health evidence may help to resolve some of the apparent inconsistencies triggered by the doubled-edged characterization.

A. The Mitigating Edge in Smith v. Mullin

The circuit's decision in *Smith v. Mullin* highlights the mitigating edge of mental health evidence.[17] After a jury convicted Roderick Smith of the first-degree murder of his wife and four young stepchildren, recommending sentences of death (which the trial court imposed), Mr. Smith alleged in post-conviction proceedings in both state and federal court that he had received ineffective assistance of counsel at sentencing, in violation of his Sixth Amendment rights. In particular, Mr. Smith asserted that his trial counsel did not understand that his client's borderline mental retardation, mental illness, and organic brain impairment could be presented to the jury as grounds for rejecting a death sentence. Both the Oklahoma Court of Criminal Appeals and the federal district court rejected that claim.

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15. 335 F.3d 1207 (2003).

16. 536 F.3d 1064 (10th Cir. 2008), *aff'd on reh'g en banc sub nom.* Wilson v. Workman, 577 F.3d 1284 (10th Cir. 2009). On rehearing en banc, the Tenth Circuit held:

> [T]he panel in *Wilson* was correct in its holding that AEDPA deference does not apply when, pursuant to [Oklahoma Appellate] Rule 3.11, the [Oklahoma Court of Criminal Appeals] decides an ineffective assistance of counsel claim without consideration of non-record evidence that, "if true and not contravened by the existing factual record, would entitle the petitioner to habeas relief" under *Strickland.*

Wilson, 577 F.3d at 1287 (quoting Miller v. Champion, 161 F.3d 1249, 1253 (10th Cir. 1998)). I do not consider that part of the *Wilson* holding in this Article.

17. *Smith*, 379 F.3d at 939–44.

The federal district court concluded that Mr. Smith's counsel's failure to present mitigating evidence constituted deficient performance, thereby establishing the first component of the *Strickland* inquiry.[18] However, it further concluded that counsel's failure to present mental health evidence was not prejudicial, reasoning that Mr. Smith's mental illness "tend[ed] to portray [Mr. Smith] as an unstable individual with very little control over his impulses" and would have "negated much of the mitigation evidence actually presented to the jury of [Mr. Smith's] good work history and friend's and relatives perception of [Mr. Smith] as a kind hearted person."[19] In short, in the district court's view, the mental health evidence offered by Mr. Smith at the evidentiary hearing was "double-edged" and thus did not warrant the grant of habeas corpus relief.[20]

The Tenth Circuit agreed with the district court that Mr. Smith's counsel's performance was deficient. That conclusion was based in part on the statement of Mr. Smith's trial counsel, who admitted at the evidentiary hearing "[a]stoundingly," that he was unaware that evidence of Mr. Smith's mental illness could be offered in support of the contention that a death sentence was not justified.[21] Because of that misunderstanding, counsel invoked only mitigating circumstances that involved Mr. Smith's surrender and confession to the police, his expression of remorse, the fact that he had not attempted to flee, a lack of stab wounds on some of the victims, and the fact that his life had value to his friends and family.[22]

Despite this rather cursory argument for a life sentence, there was significant evidence regarding Mr. Smith's mental health that his counsel could have presented. At the federal evidentiary hearing, Mr. Smith's counsel established that his client was completely illiterate, that his IQ was in the mentally retarded or borderline mentally retarded range, and that his cognitive abilities and his emotional development resembled that of a twelve-year-old child.[23] In addition, when he was a child, Mr. Smith had nearly drowned, and he had suffered brain damage as a result.[24] At the evidentiary hearing, a neuropsychologist testified that the near drowning could cause damage to those areas of the brain that are in-

18. *See id.* at 939.
19. *Id.* at 943 (second, third, and fourth alterations in original).
20. *Id.* at 943 n.11 (discussing the following Tenth Circuit decisions invoked by the district court in support of the characterization of mental health evidence as "double-edged"); *see also* McCracken v. Gibson, 268 F.3d 970, 980 (10th Cir. 2001); Cannon v. Gibson, 259 F.3d 1253, 1277–78 (10th Cir. 2001); Smith v. Massey, 235 F.3d 1259, 1282 (10th Cir. 2000); Davis v. Exec. Dir. of Dep't of Corr., 100 F.3d 750, 761 (10th Cir. 1996)).
21. *Smith*, 379 F.3d at 939.
22. *See id.* at 940.
23. *Id.* at 941.
24. *Id.*

volved in emotional regulation.[25] About individuals who have suffered such injuries, he explained:

> [T]heir emotional regulation is also disrupted, and so their behavior becomes erratic or out of control or aggressive, and any number of emotional problems can result that are usually not consistent with whatever is going on in the environment around them, and that represents the direct cause of the brain injury, as well as an inability to cope or interact with stress or what's going on in the environment in a way that most of us would see to be reasonable or prudent or understandable.[26]

In addition, Mr. Smith's mother offered testimony at the evidentiary hearing that corroborated the neuropsychologist's conclusions about the effect of the oxygen loss on Mr. Smith's mental functioning. She explained that Mr. Smith became "slower . . . [and] didn't act like he understood whatever I said to him."[27] These changes resulted in Mr. Smith being tormented by other children. He eventually finished high school but lived with his mother until he moved in with his wife and her four children.[28]

In contrast to the district court, the Tenth Circuit concluded that Mr. Smith's failure to present this mental health evidence to the jury at sentencing was prejudicial under the *Strickland* standard—there was a reasonable probability that, if the mental health evidence introduced at the evidentiary hearing had been offered at sentencing, the jury would have concluded that the "balance of aggravating and mitigating circumstances did not warrant death."[29] In that context, a reasonable probability meant less than a preponderance of the evidence, but a probability "sufficient to undermine confidence in the outcome."[30]

The *Smith* panel's conclusions as to deficient performance and prejudice are grounded in Supreme Court precedent regarding the presentation of mitigating evidence in capital sentencing proceedings. Accordingly, in order to elucidate the *Smith* decision as well as subsequent circuit decisions that focus on the mitigating edge of mental health evidence, I briefly outline the precedent that *Smith* applies.

1. Mitigating Evidence After *Woodson v. North Carolina*[31]

The path to the *Smith* panel's conclusion that "evidence of [his] mental retardation, brain damage, and troubled background constituted

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25. *Id.*
26. *Id.*
27. *Id.* (alteration in original).
28. *Id.* at 941–42.
29. *Id.* at 942 (quoting Mayes v. Gibson, 210 F.3d 1284, 1290 (10th Cir. 2000)).
30. *Smith*, 379 F.3d at 942 (quoting Fisher v. Gibson, 282 F.3d 1283, 1307 (10th Cir. 2002)).
31. 428 U.S. 280 (1976).

mitigating evidence"[32] begins with the Supreme Court's decision in *Woodson v. North Carolina*. There, Justice Stewart's plurality opinion concluded that a state statute that made death the mandatory sentence for all persons convicted of first-degree murder violated the Eighth Amendment prohibition against cruel and unusual punishment, in part because the statute "fail[ed] to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death."[33] The Court explained:

> [D]eath is a punishment different from all other sanctions in kind rather than degree. A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration . . . the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.[34]

Two years later, in *Lockett v. Ohio*,[35] a plurality of the Court applied those principles to a state statute that required a death sentence unless the sentencing judge determined by a preponderance of the evidence that one of several specific mitigating factors existed.[36] In concluding that the statute violated the Eighth Amendment, the plurality explained:

> [T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.[37]

Then, in *Eddings v. Oklahoma*,[38] the Court applied *Woodson* and *Lockett* to a sentencing proceeding in which the judge had ruled as a matter of law that he could not consider the circumstances of a sixteen-year-old capital defendant's troubled childhood.[39] The Court held that the re-

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32. *Smith*, 379 F.3d at 942.
33. *Woodson*, 428 U.S. at 303.
34. *Id.* at 303–04 (citations omitted).
35. 438 U.S. 586 (1978).
36. *Id.* at 607 (citing OHIO REV. CODE ANN. § 2929.04(B) (West 1975)). Three of the factors to consider are whether: (1) "The victim of the offense induced or facilitated [the offense]"; (2) "It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation"; (3) "The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity." § 299.04(B)(1)–(3).
37. *Lockett*, 438 U.S. at 604 (footnote omitted).
38. 455 U.S. 104 (1982).
39. *Id.* at 111–14. At sentencing, the defendant's juvenile officer testified that the defendant's parent had divorced when the defendant was five years old, that the defendant had lived without supervision, that his "mother was an alcoholic and possibly a prostitute," and that his father had used excessive physical punishment. *Id.* at 107.

fusal to consider those circumstances violated the Eighth Amendment, as construed by *Lockett*: "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence."[40] The evidence at issue was "relevant mitigating evidence."[41] Although in some cases, the Court stated:

> [S]uch evidence properly may be given little weight. . . . [W]hen the defendant was 16 years old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant.[42]

The Court subsequently explained that even "rather atypical" mitigating evidence may not be excluded, for example evidence that a defendant had a "habit of inhaling gasoline fumes" and "had once passed out" as a result, that after this incident "his mind tended to wander," that he "had been one of seven children in a poor family," "that his father had died of cancer," and, "that he had been "a fond and affectionate uncle."[43]

In *Penry v. Lynaugh*,[44] the Court offered a further explanation of the significance of mental health evidence. The defendant there had presented evidence of his mental retardation and abused childhood, but the trial court's instructions did not adequately instruct the jury on how to consider that information.[45] Concluding that the sentencing proceeding had violated the Eighth Amendment, the Court stated that "[u]nderlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant."[46] "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."[47]

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40. *Id.* at 113–14.

41. *Id.* at 114.

42. *Id.* at 115.

43. Abdul-Kabir v. Quarterman, 550 U.S. 233, 249 (2007) (discussing the mitigating evidence in Hitchcock v. Dugger, 481 U.S. 393, 397 (1987)).

44. 492 U.S. 302 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002).

45. *Penry*, 492 at 312. Instead, the instructions directed the jury to consider only the following questions in determining an appropriate sentence: (1) did the defendant act deliberately when he murdered the defendant?; (2) was there a probability that the defendant would be dangerous in the future?; and (3) did the defendant act unreasonably in response to provocation? *Id.* at 310.

46. *Id.* at 319.

47. *Id.* (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

2. *Williams* and *Wiggins*

Although *Woodson*, *Lockett*, *Eddings*, and *Penry* establish that Mr. Smith was entitled to present evidence regarding his cognitive impairments, brain damage, and difficult childhood, two more recent cases provided the Tenth Circuit with direct guidance regarding his ineffective assistance of counsel claim: *Williams v. Taylor*[48] and *Wiggins v. Smith.*[49]

In *Williams*, the defendant's trial counsel had offered as mitigating evidence at sentencing only "the testimony of the [defendant's] mother, two neighbors, and a taped excerpt from a statement by a psychiatrist."[50] The mother and neighbors described the defendant as a "nice boy" and "not a violent person."[51] The psychiatrist reported a statement by the defendant that during an earlier robbery the defendant had removed the bullets from a gun so that he would not hurt anyone.[52] During closing argument, the defendant's attorney requested the jury to spare his life because the defendant had turned himself in to the police.[53] However, in state post-conviction proceedings, Mr. Williams offered substantial evidence of a "nightmarish childhood" and a diagnosis of "borderline mentally retarded."[54] In addition, post-conviction counsel established that the defendant's parents had been imprisoned for the criminal neglect of their children and that the defendant, Williams had been severely beaten by his father.[55] The defendant also submitted evidence of his good behavior while incarcerated.[56]

Concluding that the Virginia Supreme Court had unreasonably applied federal law, the Supreme Court held that the defendant had established both components of his claim for ineffective assistance of counsel.[57] With regard to counsel's deficient performance, the Court concluded that counsel's failure to introduce voluminous amounts of mitigating evidence was not a tactical decision.[58] As to prejudice, the Court concluded that the Virginia Supreme Court had misread *Strickland*[59] and had also failed to evaluate the totality of mitigating evidence offered by the defendant.[60] In the Court's view, "the graphic description of Wil-

48. 529 U.S. 362 (2000).
49. 539 U.S. 510 (2003).
50. *Williams*, 529 U.S. at 369.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 395–96.
55. *Id.* at 395.
56. *Id.* at 396.
57. *Id.* at 396–97.
58. *Id.* at 396.
59. *Williams*, 529 at 391. In particular, in the Supreme Court's view, the Virginia Supreme Court had erred in holding that *Lockhart v. Fretwell*, 506 U.S. 364 (1993) had modified the standard for ineffective assistance of counsel claims set forth in *Strickland.*
60. *Williams*, 529 at 397.

liams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability."[61] This evidence supported the contention that the defendant's behavior was "a compulsive reaction rather than the product of cold-blooded premeditation."[62]

Similarly, in *Wiggins*, during the state court sentencing proceedings, the defendant's counsel failed to challenge the prosecution's arguments for the death penalty with available evidence regarding the defendant's mental health.[63] In state post-conviction proceedings, the defendant offered a social history report prepared by a licensed social worker and based upon records from social service agencies, medical facilities and schools.[64] The report found that the defendant's mother was a chronic alcoholic who frequently left her children at home, "forcing them to beg for food and to eat paint chips and garbage."[65] The mother's abusive conduct, which included beating the defendant and holding his hand on a hot stove, led to his placement in foster care at age six, where he was subjected to physical and sexual abuse.[66] At sixteen, the defendant ran away from his foster home and began living on the streets.[67]

As in *Williams*, the Supreme Court concluded that the defendant had established both components of an ineffective assistance of counsel claim.[68] As to the deficient performance prong, the Court cited state practice standards[69] as well as the American Bar Association standards for capital defense work, which provide that investigations of mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor."[70] In light of those standards, the Court held that Mr. Wiggins' counsel's investigation of mitigating circumstances was unreasonably narrow in scope.[71] The evidence subsequently compiled in the state post-conviction proceedings (documenting

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61. *Id.* at 398.

62. *Id.*

63. Instead, the defendant's counsel requested bifurcation of the sentencing proceedings. Counsel sought to first argue that the defendant did not kill the victim with his own hand and then to argue, in a second phase of the sentencing, that psychological reports and expert testimony demonstrated that the defendant had limited intellectual capacity and had not engaged in an aggressive pattern of behavior. When the judge denied the request for bifurcation, counsel made a proffer regarding this evidence. Wiggins v. Smith, 539 U.S. 510, 515–16 (2003).

64. *Id.* at 516.

65. *Id.* at 516–17.

66. *Id.* at 517.

67. *Id.*

68. *Id.* at 535.

69. "[S]tandard practice in Maryland in capital cases at the time of Wiggins' trial included the preparation of a social history report." *Id.* at 524.

70. *Id.* (quoting ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES § 11.4.1(C), at 93 (1989)).

71. *Wiggins*, 539 U.S. at 524.

Mr. Wiggins' "excruciating life history") was readily available to his trial counsel.[72]

As to prejudice, the Court observed that the sentencing jury heard evidence of only one mitigating factor—that Mr. Wiggins had no prior convictions.[73] The information in the life history report was a "powerful mitigating narrative."[74] In addition, in contrast to other defendants (particularly the petitioner in *Williams v. Taylor*), Mr. Wiggins did not have a record of violent conduct that could be used to rebut the evidence in the life history report.[75] Accordingly, if the evidence in that report had been introduced to the jury, there was a reasonable probability that at least one juror would have declined to impose the death penalty.[76]

3. *Smith*'s Application of *Williams* and *Wiggins*

In concluding that Mr. Smith had established both the deficient performance and prejudice prongs of the *Strickland* analysis, the Tenth Circuit applied *Williams* and *Wiggins*.[77] Observing that both Supreme Court decisions cited the ABA Guidelines statement that mental health evidence is "of vital importance to the jury's decision at the punishment phase,"[78] the *Smith* panel noted that the defendant's counsel had failed to offer any mental health evidence at sentencing.[79] Thus, his performance was clearly deficient under *Williams*, *Wiggins*, and the ABA Guidelines.[80]

With regard to prejudice, the Tenth Circuit explained that the circumstances in Mr. Smith's case were "quite similar" to those in *Williams*.[81] In both cases, counsel's failure to present mental health evidence meant that the jury never received an explanation for the defendant's conduct.[82] In both cases, the evidence that counsel failed to present was "consistent with the view that [the offense conduct] was a compulsive reaction rather than the product of cold-blooded premeditation."[83] The Tenth Circuit also noted that the evidence presented to the jury in *Williams* in support of the death penalty was quite strong, as it was in Mr. Smith's case.[84] Nevertheless, as in *Williams* and *Wiggins*, the fact that the mitigation case presented by Mr. Smith's counsel at sentencing was

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72. *Id.* at 537–38.
73. *Id.* at 537.
74. *Id.*
75. *Id.*
76. *Id.*
77. Smith v. Mullin, 379 F.3d 919, 942 (10th Cir. 2004).
78. *Id.*
79. *See id.* at 944.
80. *See id.*
81. *Id.* at 943.
82. *Id.*
83. *Id.* (quoting Williams v. Taylor, 529 U.S. 362, 398 (2000)).
84. *Smith*, 379 F.3d at 944.

"pitifully incomplete, and in some respects, bordered on the absurd,"[85]—when combined with the fact that the mental health evidence subsequently presented offered a compelling explanation for his behavior—was sufficient to undermine the Tenth Circuit's confidence in the death sentence and therefore establish prejudice.

4. Supporting Empirical Evidence

In addition to *Williams* and *Wiggins*, the *Smith* panel invoked findings by social scientists regarding the effect of mental health evidence on jurors in capital cases. According to the court, the mental health evidence that Mr. Smith's counsel failed to present "is exactly the sort of evidence that garners the most sympathy from jurors."[86]

First, the court cited the conclusions of a death penalty expert who testified at the federal evidentiary hearing that jurors "respond to and find mitigating [this type of evidence,] and [they] are more likely to vote for life rather than death sentences in cases where there is . . . clear and clearly presented evidence that the defendant has suffered some form of mental illness."[87] Next, the court cited a report from the Capital Jury Project about interviews with 153 jurors from forty-one capital murder cases in South Carolina.[88] With regard to mental health evidence, the jurors in the study were asked about the effects of evidence that: (1) "the killing was committed under the influence of extreme mental or emotional disturbance"; (2) "the defendant had a history of mental illness"; and (3) the defendant was mentally retarded.[89] In reporting the results, Professor Garvey characterized these three categories of mental health evidence as examples of reduced culpability.[90] Within that broad category, he distinguished "proximate reduced culpability" from "remote reduced culpability."[91] "Evidence of 'proximate' reduced culpability is evidence that 'suggests any impairment of a defendant's capacity to control his or her criminal behavior, or to appreciate its wrongfulness or likely consequences.'"[92] Remote reduced culpability involves the defendant's character. It includes evidence that the defendant was abused as a child as well as "other deprivations that may have helped shape the defendant into the kind of person for whom a capital crime was a conceivable course of action."[93] As Professor Garvey explains, "[P]roximate

85. *Id.*
86. *Id.* at 942.
87. *Id.* (alterations in original).
88. *Id.* (citing Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1559 (1998)).
89. Garvey, *supra* note 88, at 1564–65.
90. *Id.* at 1562.
91. *Id.*
92. *Id.* (quoting Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 846 (1992) (book review)).
93. *Id.*

reduced culpability speaks to the defendant's lack of responsibility for what he has *done*; remote reduced culpability speaks to his lack of responsibility for who he *is*."[94] All three questions about the defendant's mental retardation or mental illness involved "proximate reduced culpability."[95]

The jurors' responses indicated that mental retardation had the strongest mitigating effect: 44.3% of them reported that they were much less likely to vote for the death penalty if this factor was present, and 29.5% stated that they would be slightly less likely to vote for the death penalty.[96] A history of mental illness or a particular mental illness that influenced the defendant during the killing were not afforded the same significance as evidence of mental retardation, but those factors were still regarded as having substantial mitigating effect: 26.7% of responding jurors stated that they would be much less likely to return a death sentence if the defendant had a history of mental illness, while 29.5% reported that they would be slightly less likely to do so.[97] If the killing was committed under the influence of extreme mental or emotional disturbance, the responding jurors reported approximately the same mitigating effect: 24.5% stated that they would be much less likely to vote for the death penalty, and 30.1% stated that they would be slightly less likely to vote for it.[98] Notably, the South Carolina jurors described other factors related to the defendant's mental health as significantly less mitigating. Only 18.5% ascribed any significant mitigating effect to the fact that the killing was committed under the influence of drugs and only 18.3% ascribed any such effect to the fact that the killing was committed under the influence of alcohol.[99] Similarly, with regard to evidence that the defendant had been seriously abused as a child and that the defendant had suffered extreme poverty as a child—examples of "remote reduced culpability" in Professor Garvey's scheme—the jurors reported a simi-

94. *Id.* (emphasis added).

95. *Id.* at 1564–65.

96. *Id.* at 1559. 23.5% of the responding jurors reported that they were just as likely to vote for the death penalty if the defendant was mentally retarded; 2.0% reported that they would be slightly more likely to vote for the death penalty in that circumstance, while 0.7% reported that they would be much more likely to vote for the death penalty. *Id.*

97. *Id.* 40.4% of the responding jurors stated that such evidence of mental illness would have no effect, 2.1% stated that such evidence would make them slightly more likely to vote for the death penalty, while 1.4% stated that the evidence would make them much more likely to vote for the death penalty. *Id.*

98. *Id.* at 1555. 37.1% of the responding jurors stated that they would be just as likely to impose the death penalty, 4.9 % stated that they would be slightly more likely to impose the death penalty, while 3.5% stated that they would be much more likely to impose the death penalty in this circumstance.

99. *Id.* at 1565. In particular, 6.2% of jurors reported that they would be much less likely to impose a death sentence if the defendant was under the influence of drugs at the time of the killing, while 12.3% reported that they would be slightly less likely to impose the death penalty in that circumstance. *Id.* at 1555. With regard to a defendant under the influence of alcohol, the percentages were 6.1 and 12.2. *Id.* Both questions involve "proximate reduced culpability" in Professor Garvey's scheme. *Id.* at 1562.

larly limited mitigating effect.[100] A third of the jurors would ascribe some mitigating effect to evidence that the defendant had been seriously abused as a child, while only 15% gave any significance to the fact that the defendant grew up in extreme poverty.[101]

The *Smith* court also cited a study reporting national polling data on attitudes toward the death penalty. The study found the fact that the defendant was mentally retarded "much more" mitigating than other factors.[102]

5. Rejection of the District Court's Double-Edged Sword Analysis

Finally, the *Smith* court rejected the district court's application of circuit precedent to find that evidence of Mr. Smith's mental illness and troubled childhood was "double-edged." The district court had reasoned that this evidence (which was offered at the federal evidentiary hearing) tended to portray Mr. Smith "as an unstable individual with very little control over his impulses" and would have "negated much of the mitigation evidence actually presented to the jury of [Mr. Smith's] good work history and friend's and relatives perception of [Mr. Smith] as a kind hearted person."[103] In the Tenth Circuit's view, these statements failed to acknowledge the fundamental purpose of presenting mitigating mental health evidence: to provide an explanation of how Mr. Smith's mental illness caused him to commit such a horrific crime. In addition, the *Smith* panel reasoned that the district court had misread circuit precedent. In the cases cited by the district court to support the double-edged characterization of Mr. Smith's evidence, the excluded mental health evidence would have placed other evidence of the defendant's aggressive and violent behavior before the jury, thereby undermining the mitigating effect.[104] In contrast, in Mr. Smith's case, the jury had already heard evidence of the "aggravating edge" of Mr. Smith's mental impairments.[105]

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100. *Id.* at 1562.

101. *Id.* at 1565.

102. Smith v. Mullin, 379 F.3d 919, 942 (10th Cir. 2004) (citing Samuel R. Gross, *Update: American Public Opinion on the Death Penalty—It's Getting Personal*, 83 CORNELL L. REV. 1448, 1468-69 (1998)).

103. *Smith*, 379 F.3d at 943 (alterations in original).

104. *Id.* at 943 n.11 (citing McCracken v. Gibson, 268 F.3d 970, 979–80 (10th Cir. 2001); Cannon v. Gibson, 259 F.3d 1253, 1277–78 (10th Cir. 2001); Smith v. Massey, 235 F.3d 1259, 1282 (10th Cir. 2000); Davis v. Exec. Dir. of Dep't of Corr., 100 F.3d 750, 760–61 (10th Cir. 1996)).

105. *Mullin*, 379 F.3d at 943 n.11. In its subsequent decision in Anderson v. Sirmons, 476 F.3d 1131 (10th Cir. 2007), the Tenth Circuit followed *Smith*'s analysis closely in holding that the defendant's counsel's failure to present mental health evidence was both deficient and prejudicial. The mental health evidence there included testimony that the defendant "was raised in an environment of neglect and abuse," suffered from brain damage, and drug use, which the defendant had tried to overcome. *Id.* at 1143–44. The court explained that the defendant's brain damage might be perceived by lay persons as "'meanness' or antisocial behavior, but with expert evaluation and explanation is properly explained as deriving from disruption and impairments to the nervous system." *Id.* "Although the case against [the defendant] was strong and the murders in this case were horrific," the Tenth Circuit stated, "courts have not hesitated to grant relief in similar circumstances where the

B. The Aggravating Edge in Bryan v. Mullin[106]

In *Bryan v. Mullin*, a case decided one year before *Smith*, the Tenth Circuit characterized the mental health evidence in a capital case in much different terms. Like Mr. Smith, Robert Leroy Bryan was convicted of first-degree murder in an Oklahoma state court. The victim was Mr. Bryan's aunt, whose signature Mr. Bryan had attempted to forge on promissory notes and agreements purporting to pay him millions of dollars. Mr. Bryan had a history of organic brain disease, which may have been related to a severe case of diabetes. Four years before the murder of his aunt, Mr. Bryan had been charged with solicitation to commit another murder. In that prior case, the trial judge initially found Mr. Bryan incompetent to stand trial and sent him to a state psychiatric facility for treatment. There, psychiatrists concluded that Mr. Bryan suffered from an organic delusional disorder and was severely psychotic when he was first admitted to the hospital. They further concluded that Mr. Bryan's brain exhibited significant signs of atrophy. The psychiatrists treated him with an antipsychotic drug, and they then determined him to be competent.

After unsuccessfully challenging Mr. Bryan's competency, a public defender filed a notice that he intended to rely on an insanity defense. Mr. Bryan and his parents stated that they did not want to rely on that defense, and Mr. Bryan then hired new counsel. Neither at the guilt phase nor at sentencing did the retained counsel present any mental health evidence on behalf of Mr. Bryan.

After the Oklahoma state courts affirmed Mr. Bryan's conviction and death sentence, Mr. Bryan filed a federal habeas corpus action alleging ineffective assistance of counsel based on the failure to present mental health evidence during the guilt and sentencing phases of the trial. At an evidentiary hearing before the district court, Mr. Bryan offered a report from a psychiatrist that concluded that Mr. Bryan suffered from an "extensive paranoid delusional system [and] fragmentation of thought."[107] Similarly, a psychologist found that Mr. Bryan "suffer[ed] from a serious mental disorder which places into serious question . . . his legal culpability in the crimes for which he is charged."[108] A brain scan revealed that Mr. Bryan suffered from multiple areas of irreversible brain damage.[109]

Despite this information, which seemed to resemble what the *Smith* panel deemed "the sort of evidence that garners the most sympathy from

absence of available mitigation evidence left the jury with a 'pitifully incomplete' picture of the defendant." *Id.* at 1148 (quoting *Smith*, 379 F.3d at 944).

106. 335 F.3d 1207 (10th Cir. 2003) (en banc).

107. *Id.* at 1230 (Henry, J., concurring in part and dissenting in part).

108. *Id.*

109. *Id.* at 1231.

jurors,"[110] the Tenth Circuit, sitting en banc, affirmed the district court's denial of Mr. Bryan's ineffective assistance of counsel claim.[111] As to the guilt phase, the court concluded that the evidence available to Mr. Bryan's counsel at the time of the trial demonstrated that Mr. Bryan did not have a viable insanity defense.[112] As to the sentencing phase, the court held that the record indicated that Mr. Bryan's counsel understood the propriety of introducing mental health evidence as mitigation at sentencing, but that his counsel had made a reasonable strategic decision not to present the evidence—one that was "virtually unchallengeable" under the *Strickland* standard for determining whether counsel's performance was deficient.[113]

In the court's view, counsel had two legitimate reasons not to present the mental health evidence. First, Mr. Bryan's counsel "was concerned that testimony by either [the psychiatrist or the psychologist] might play into the prosecution's case that Bryan was a continuing threat to society."[114] In support of that concern, the court invoked an admission during the cross-examination of one of Mr. Bryan's attorneys during the federal district court hearing. Mr. Bryan's counsel answered in the affirmative to the questions, "[E]vidence of a psychological problem with the defendant . . . sometimes can be a double-edged sword in a capital case?"[115] Mr. Bryan's counsel was asked a second question: "[O]ften a jury might accept evidence of a psychological or emotional problem as evidence of aggravation?"[116] Mr. Bryan's counsel acknowledged that, "I've had that happen in several cases."[117] Second, Mr. Bryan's counsel believed that relying on the mental health evidence would be inconsistent with his defense in the guilt phase—that the prosecution had failed to prove that Mr. Bryan had committed the offense. In the court's view, Mr. Bryan's counsel had a reasonable concern that "an about-face during the penalty phase might compromise Bryan in the eyes of the jurors."[118]

Four circuit judges disagreed with that analysis.[119] However, as with *Smith*, there is Supreme Court precedent that supports the *Bryan* major-

110. *Smith*, 379 F.3d at 942.
111. *Bryan*, 335 F.3d at 1211.
112. *Id.* at 1219–20.
113. *Id.* at 1223–24; *see also* Strickland v. Washington, 466 U.S. 668, 690 (1984).
114. *Bryan*, 335 F.3d at 1222.
115. *Id.* at 1222 n.21.
116. *Id.*
117. *Id.*
118. *Id.* at 1223.
119. In the view of the dissent, "Mr. Bryan's counsel provided the most ineffective defense I have ever seen, amounting to a concession of guilt and relating none of the reams of compelling mitigating evidence." *Id.* at 1225 (Henry, J., concurring in part and dissenting in part). As to the deficient performance component of the *Strickland* inquiry, the dissent concluded that Mr. Bryan's counsel "made no attempt to provide the jury with the 'particularized nature of the crime and the particularized characteristics of the individual defendant.'" *Id.* at 1245 (quoting Gregg v. Georgia, 428 U.S. 153, 206 (1976)). As to prejudice, the dissent concluded that "[t]he compelling and extensive evidence of Mr. Bryan's history of mental illness creates a reasonable probability that the jury

ity's characterization of mental health evidence as an aggravating circumstance.

1. *Strickland v. Washington*, *Burger v. Kemp*,[120] and *Penry v. Lynaugh*

In *Strickland*—the decision that establishes the governing standard for ineffective assistance of counsel claims—the Supreme Court recognized that alleged mitigating evidence may also have an aggravating edge.[121] There, in preparing for a capital sentencing proceeding, the defendant's counsel conducted a very limited investigation. He spoke to the defendant about his background, and spoke by telephone with the defendant's wife and mother. Counsel did not search for character witnesses, and he did not request a psychological report. The defendant's counsel later explained that his conversations with his client did not indicate that the client had psychological problems.[122]

In post-conviction proceedings, the defendant alleged that he had received ineffective assistance of counsel in part because his attorney had failed to request a psychiatric report and had failed to investigate and present character witnesses.[123] The defendant submitted affidavits from friends, neighbors, and relatives as well as reports from a psychiatrist and psychologist stating that although he was not under the influence of extreme mental or emotional disturbance, he was "chronically frustrated and depressed because of his economic dilemma at the time of his crimes."[124]

After announcing a standard for assessing ineffective assistance of counsel claims, the Court applied it and found neither deficient performance nor prejudice.[125] As to prejudice, it reasoned that the evidence proffered in the post-conviction proceedings "would barely have altered the sentencing profile presented to the sentencing judge" and would "[i]ndeed . . . even have been harmful to his case: his 'rap sheet' would probably have been admitted into evidence, and the psychological reports would have directly contradicted [the defendant's] claim [at sentencing] that the mitigating circumstance of *extreme* emotional disturbance applied to his case."[126]

Three years later, in *Burger v. Kemp*, the Court engaged in similar reasoning. The defendant, who was seventeen at the time of the murder

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would have concluded that the mitigating evidence outweighed the continuing threat aggravator and might also be viewed in a mitigating light as to past violent behavior." *Bryan*, 335 F.3d at 1245.

120. 483 U.S. 776 (1987).

121. *Strickland*, 466 U.S. at 700.

122. *Id.* at 672–73.

123. *Id.* at 675.

124. *Id.* at 675–76 (internal quotation marks omitted).

125. *Id.* at 687–99.

126. *Id.* at 700 (emphasis added).

of which he was convicted, alleged that he had received ineffective assistance of counsel because his attorney had failed to present evidence that the defendant had "an exceptionally unhappy and unstable childhood"[127] during which one of his stepfathers had beaten his mother in his presence and the other had encouraged him to take drugs.[128] At the time counsel was appointed, the defendant had an IQ of 82, functioned as a 12-year-old, and had been diagnosed as having psychological problems.[129] Nevertheless, in holding that the defendant had not received ineffective assistance of counsel, the Court concluded that the attorney's decision "not to mount an all-out investigation into [the defendant's] background in search of mitigating circumstances was supported by reasonable professional judgment."[130]

The Court explained that the record at sentencing established that the defendant had no adult criminal record.[131] Information concerning the defendant's troubled childhood could have revealed information about his use of drugs, various encounters with law enforcement, and his violent tendencies. The latter evidence could have undermined the defendant's contention in the guilt phase of the trial that he acted under the influence of a codefendant. The Court endorsed the reasoning of the district judge who conducted a hearing on the defendant's habeas corpus claim:

> On one hand, a jury could react with sympathy over the tragic childhood [the defendant] endured. On the other hand, since [the defendant's] sanity was not at issue in this case, the prosecution could use this same testimony, after pointing out that [the defendant] was nevertheless responsible for his acts, to emphasize that it was this same unpredictable propensity for violence which played a prominent role in the death of [the] victim.[132]

Although it does not involve an ineffective assistance of counsel claim, the Court's decision in *Penry* expresses a similar view of mental health evidence. In holding that a Texas jury was not properly instructed on the significance of mental retardation as mitigating evidence, the Court explained that "[the defendant's] mental retardation and history of abuse [was] thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future."[133]

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127. Burger v. Kemp, 483 U.S. 776, 789 (1987).
128. *Id.* at 790.
129. *Id.* at 811 (Blackmun, J., dissenting).
130. *Id.* at 794.
131. *Id.* at 790.
132. *Id.* at 794.
133. Penry v. Lynaugh, 492 U.S. 302, 324 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002).

2. Tenth Circuit Decisions Supporting *Bryan*'s Double-Edged View

When the en banc panel decided *Bryan*, several circuit decisions had already concluded that evidence of a defendant's mental illness could be double-edged and that counsel's failure to present it was neither deficient nor prejudicial under *Strickland*. The circuit's cases explained the aggravating effects of this evidence in varying terms.

First, according to the court's decisions, the omitted evidence might depict the defendant as impulsive and violent and thus more likely to constitute a continuing threat to society, a characterization often argued by the prosecution as an aggravating circumstance in support of the death penalty. For example, in *Cannon v. Gibson*,[134] cited by the *Bryan* majority,[135] the court concluded that the defendant's brain damage and resulting mental disorder, which prevented him from using appropriate judgment, might "have negated much of the mitigation evidence actually adduced by trial counsel" and might have supported the prosecution's contention that the defendant was a continuing threat.[136]

The circuit has also held that omitted mental health evidence may reveal particular incidents of violent or antisocial behavior, thus undermining the defendant's mitigation arguments.[137] In this sense, the evidence may contradict a particular theme that the defendant has previously asserted. For example, in *Cannon v. Gibson*, the court observed that the defendant had presented mitigation evidence regarding his exemplary work history, acts of kindness, his strong and continuing attachment to his young daughter, his lack of a prior criminal record, and his good conduct as a prisoner.[138] By depicting the defendant as an unstable individual lacking impulse control, the omitted evidence would have undermined those arguments for a life sentence.[139]

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134. 259 F.3d 1253 (10th Cir. 2001).

135. Bryan v. Mullin, 335 F.3d 1207, 1222 (2003) (en banc).

136. *Cannon*, 259 F.3d at 1277–78. Other Tenth Circuit decisions have reached the same conclusion. *See, e.g.*, McCracken v. Gibson, 268 F.3d 970, 978–80 (10th Cir. 2001) (concluding that omitted evidence of the defendant's psychological problems, including a diagnosis of bipolar disorder, substance abuse, borderline and antisocial personality disorders, and multiple severe bouts of depression and had exhibited suicidal thoughts and tendencies would have revealed the defendant's impulsive and violent character and "could have bolstered the jury's conclusion that [the defendant] represented a continuing threat to society (a factor . . . [the defendant] vigorously disputed during the [sentencing] proceedings)").

137. *See, e.g.*, Duvall v. Reynolds, 139 F.3d 768, 782 (10th Cir. 1998) (observing that "[t]estimony concerning [the defendant's] substance abuse would have resulted in the introduction of details of [his] prior convictions and violent conduct, which invariably resulted from his substance abuse" and that "[t]he jury could have perceived such evidence as aggravating rather than mitigating").

138. *Cannon*, 259 F.3d at 1277.

139. *Id.* at 1277–78.

C. Wilson v. Sirmons*: Rounding the Edges*

The circuit's decisions in *Smith* and *Bryan* adopt contrasting approaches to mental health evidence that are difficult to harmonize. As noted above, in post-conviction proceedings both defendants offered evidence of severe mental illness that their attorneys did not present at sentencing. Yet the court viewed the evidence of Mr. Smith's organic brain damage as humanizing him and potentially explaining "a shocking crime."[140] On the other hand, Mr. Bryan's counsel viewed his illness as supporting the prosecution's contention that he was a continuing threat to society and thus deserved the death penalty, and the Tenth Circuit concluded that that assessment was reasonable.[141] Although there are important differences in the facts of the two cases—particularly the resistance of Mr. Bryan and his family to the presentation of the mental health evidence, which was not shared by Mr. Smith and his family[142]—those differences do not seem sufficient to justify such different results.

To be sure, the difficulty is not merely a matter of the circuit's precedent. The Supreme Court's decisions in *Eddings*, *Burger*, and *Penry* characterize mental health evidence resembling that offered by Mr. Smith and Mr. Bryan as mitigating, aggravating, or both. The Court's decisions "call[] for a greater degree of reliability when the death sentence is imposed,"[143] but that degree of reliability seems difficult to obtain when one must assess the effect of omitted mental health evidence on a capital jury.

Although it does not completely resolve the tension between *Smith* and *Bryan*, the circuit's 2008 decision in *Wilson v. Sirmons* offers substantial guidance for assessing mental health evidence in capital cases. I read *Wilson* to call for more thorough scrutiny of counsel's decisions to forgo the presentation of mental health evidence, as well as a more fact-intensive approach to assessing the prejudicial effect of failing to introduce such evidence—including the determination of whether the evidence was indeed a double-edged sword. I first examine the *Wilson* decision and then consider its significance to the law of the circuit.

1. The Decision in *Wilson*

An Oklahoma jury convicted Michael Lee Wilson of first-degree murder and robbery with a dangerous weapon.[144] The victim was a clerk at a convenience store where Mr. Wilson also worked.[145] The jury found

140. Smith v. Mullin, 379 F.3d 919, 943 (10th Cir. 2004).

141. Bryan v. Mullin, 335 F.3d 1207, 1220 (2003) (en banc).

142. As noted above, Mr. Smith's mother testified to his mental illness at the federal evidentiary hearing. *See Smith*, 379 F.3d at 941.

143. Lockett v. Ohio, 438 U.S. 586, 604 (1978).

144. Wilson v. Sirmons, 536 F.3d 1064, 1070 (10th Cir. 2008), *aff'd on reh'g en banc sub nom.* Wilson v. Workman, 577 F.3d 1284 (10th Cir. 2009)

145. *Id.* at 1071.

three aggravating circumstances: "(1) [that] the murder was especially heinous, atrocious, or cruel; (2) [that] the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and (3) [that] it was probable that [Mr. Wilson] would . . . constitute a continuing threat to society."[146] The trial court followed the jury's recommendation and sentenced Mr. Wilson to death.[147]

a. Mental Health Evidence Presented at Trial

Even though Mr. Wilson's counsel was appointed two years earlier, he waited until three weeks before the trial to contact a mental health expert.[148] At that point, counsel hired a clinical psychologist, who then proceeded to interview Mr. Wilson and administer several psychological tests. The psychologist also reviewed school and medical records, and read statements from five of Mr. Wilson's acquaintances.[149]

During the sentencing proceedings, Mr. Wilson's counsel called six witnesses in support of the case for mitigation: the psychologist, two acquaintances from church, two teachers, and Mr. Wilson's mother. The psychologist testified that Mr. Wilson's IQ of 126 placed him in the superior range of intelligence, which meant that Mr. Wilson could "do something with himself."[150] The psychologist only briefly described the results of the other tests that he had administered. In particular, the psychologist informed the jury that Mr. Wilson had experienced "a severe mental disorder with many of the personality scales elevated," and "[t]hat would suggest that he has a severe personality disturbance."[151] The psychologist also presented a brief social history of Mr. Wilson. He described Mr. Wilson's father as someone who was active in drugs and alcohol and not involved in his son's life. The psychologist offered two pictures of Mr. Wilson: "On the one hand, you have the picture of the Sunday school-going child. On the other hand, you have the picture of the gang and the uninvolved father, who did not set a particularly good role model."[152]

The psychologist did not inform the jury of a more specific conclusion that he had drawn from the tests he administered before trial "that Mr. Wilson suffered from generalized anxiety disorder, bipolar disorder (severe without psychotic features), and post-traumatic stress disorder" as well as indications of "paranoid personality disorder . . . with passive-aggressive and schizotypal personality features."[153] During cross-

146. *Id.* at 1072 (citing OKLA. STAT. ANN. tit. 21, § 701.12(4), (5), (7) (West 2002)).
147. *Wilson*, 536 F.3d 1064 at 1072.
148. *Id.* at 1074–75.
149. *Id.* at 1075.
150. *Id.* at 1076.
151. *Id.*
152. *Id.*
153. *Id.* at 1075.

examination—which the Tenth Circuit would later describe as "a train wreck for Mr. Wilson"[154]—the psychologist agreed with the prosecutor that Mr. Wilson's test results supported the conclusion that Mr. Wilson was "a psychopath" and was "the most likely to reoffend, based on the studies."[155] The prosecutor invoked this testimony during closing argument, calling Mr. Wilson a "psychopathic killer based on the evidence."[156]

During the mitigation phase, Mr. Wilson's church acquaintances described him as "mannerable," "respectful," and "intelligent."[157] Mr. Wilson's teachers, who had not seen him for five to six years, described him as "respectful," "fun-loving," and a "very good student."[158]

Finally, Mr. Wilson's mother briefly testified, discussing Mr. Wilson's father and Mr. Wilson's participation in church.

b. New Mental Health Evidence on Appeal

During the direct appeal, Mr. Wilson's new counsel provided the psychologist with additional school and social service records as well as affidavits from Mr. Wilson's mother, sister, brother, and girlfriend (who was also the mother of his child). The psychologist then performed a second series of tests, which supported a diagnosis of paranoid schizophrenia. The psychologist further reported that Mr. Wilson had a "severe psychological disturbance with the possibility of delusions or hallucinations."[159] According to the psychologist, "Mr. Wilson believed that 'evil spirits' possessed him at times, and . . . it was 'possible [Mr. Wilson] could have been delusional at the time of the crime.'"[160] In his view, this information "may have helped the jury better understand [Mr. Wilson's] emotional illness and how he could have participated in the crime."[161]

The family members' affidavits also revealed new information that had not been disclosed to the jury: Mr. Wilson suffered from depression, concentration problems, and delusions. He heard voices and had frequent memory lapses. Throughout his life, Mr. Wilson had experienced violent nightmares, and he often suffered severe headaches that lasted for hours and sometimes days. The affidavits further stated that Mr. Wilson's father and brother were involved with drugs and gangs and that Mr. Wilson had been surrounded by gang activity as he grew up. In an affidavit filed in the direct appeal, the psychologist explained that his trial testimony

154. *Id.* at 1076.
155. *See id.*
156. *Id.*
157. *Id.* at 1075.
158. *Id.*
159. *Id.* at 1077.
160. *Id.* (second alteration in original).
161. *Id.*

"could have been improved upon enormously [if he had] been provided with the additional information [from the family members]."[162]

Based on this new information from the psychologist and the family members, Mr. Wilson argued on direct appeal that he had received ineffective assistance of counsel. The Oklahoma Court of Criminal Appeals rejected that claim, reasoning that the "mere fact [that] more evidence could have been presented is not, in itself, sufficient to show counsel was deficient."[163] Adjudicating Mr. Wilson's 28 U.S.C. § 2254 habeas corpus petition, the federal district court concluded that the Oklahoma court's ruling was not an unreasonable application of *Strickland*.

c. The Tenth Circuit's Analysis of Mr. Wilson's New Mental Health Evidence and His Ineffective Assistance of Counsel Claim

Mr. Wilson's appeal to the Tenth Circuit produced three opinions from the panel: the principal opinion by Judge McConnell, a concurrence by Judge Hartz, and a dissent by Judge Tymkovich.

Judge McConnell concluded that Mr. Wilson had established deficient performance under *Strickland*. As to prejudice, Judge McConnell observed, "It would be difficult, on this record, to conclude with any confidence that the jury's verdict would not have been affected by a proper presentation of the mental health evidence and related family history."[164] Because the federal district court had not reached the question of prejudice and because the facts alleged by Mr. Wilson, if true, would entitle him to a new sentencing proceeding at which the additional mental health evidence could be presented, Judge McConnell concluded that Mr. Wilson's ineffective assistance claim should be remanded to the district court for an evidentiary hearing.[165]

Judge Hartz did not join in Judge McConnell's analysis of Mr. Wilson's claim, but he concurred in the result.[166] In contrast, Judge Tymkovich dissented from Judge McConnell's analysis and the remand to the district court. In his view, Mr. Wilson had established neither deficient performance nor prejudice.[167] Each of the opinions offers a different assessment of Mr. Wilson's mental health evidence.

162. *Id.*

163. Wilson v. State, 983 P.2d 448, 472 (Okla. Crim. App. 1998) (citing Douglas v. State, 951 P.2d 651, 680 (Okla. Crim. App. 1997)).

164. *Wilson*, 536 F.3d at 1093.

165. *See id.* at 1086.

166. *See id.* at 1123–25 (Hartz, J., concurring in part and concurring in the result). After remand, the district court conducted an evidentiary hearing. On February 11, 2011, the court issued an opinion rejecting Mr. Wilson's ineffective assistance of counsel claim. The court concluded that the additional mental evidence offered at the evidentiary hearing would not have affected the jury's decision to impose the death penalty. 2011 WL 744661, at *26.

167. *See id.* at 1125–48 (Tymkovich, J., concurring in part and dissenting in part).

In Judge McConnell's view, the Supreme Court's decisions in *Williams* and *Wiggins*, as well as its 2005 decision in *Rompilla v. Beard*,[168] emphasized "the importance of thorough investigation—in particular, of mental health evidence—in preparation for the sentencing phase of a capital trial."[169] He contrasted the application of the *Strickland* standard in these cases to the narrower application in cases like *Burger v. Kemp*.

In his view, *Williams*, *Wiggins*, and *Rompilla* established three important principles. "First, the question is not whether counsel did *something*; counsel must conduct a full investigation and pursue reasonable leads when they become evident."[170] Second, in determining what constitutes a reasonable investigation, the court should first look to the American Bar Association Standards for capital defense work.[171] Finally, "because of the crucial mitigating role that evidence of a poor upbringing . . . can have in the sentencing phase, defense counsel must pursue this avenue of investigation with due diligence."[172]

From those principles, Judge McConnell concluded that: (a) counsel's failure to hire the psychologist until three weeks before trial, (b) his failure to interview family members, and (c) his failure to fully present to the jury the mental health assessment that the psychologist had already made constituted deficient performance. The first two deficiencies were apparent from the text of the ABA Guidelines, which stated that "preparation for the sentencing phase, in the form of investigation, should begin immediately upon counsel's entry into the case"[173] and that counsel should consider "[w]itnesses familiar with and evidence relating to the client's life . . . , from birth to the time of sentencing."[174]

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168. 545 U.S. 374 (2005). In *Rompilla*, the Court concluded that the defendant had received ineffective assistance of counsel even though counsel had interviewed five family members and three experts who evaluated the defendant's mental health at the time of the offense. However, counsel failed to examine a file regarding a prior conviction on which the prosecution relied in arguing for the death penalty. That file would have led to "a range of mitigation leads that no other source had opened up." *Id.* at 390. The information that counsel could have discovered included the fact that the defendant was "reared in [a] slum environment . . . came to [the] attention of juvenile authorities, quit school at 16, [and] started a series of incarcerations . . . commonly related to over-indulgence in alcoholic beverages." *Id.* at 390–91 (first, third, and fourth alterations in original). "The same file disclose[d] test results that the defense's mental health experts would have viewed as pointing to schizophrenia and other disorders, and test scores showing a third grade level of cognition after nine years of schooling." *Id.* at 391. In the Court's view, "The accumulated entries would have destroyed the benign conception of [the defendant's] upbringing and mental capacity defense counsel had formed from talking with [the defendant] himself and some of his family members, and from the reports of the mental health experts." *Id.* Thus, the defendant had established both deficient performance and prejudice and was entitled to a new sentencing proceeding.

169. *Wilson*, 536 F.3d at 1083.

170. *Id.* at 1084.

171. *Id.* at 1084–85.

172. *Id.* at 1085.

173. *Id.* (quoting ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 11.8.3 (1989)).

174. *Id.* at 1087 (first alteration in original) (quoting ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 11.8.3 (1989)).

As to the mental health evidence that Mr. Wilson's counsel had actually presented, Judge McConnell observed that the psychologist had testified about Mr. Wilson's mental illness in only the most general terms, stating that Mr. Wilson had a "severe mental disorder with many of the personality scales elevated" and that these elevated scales suggested that Mr. Wilson had "a severe personality disturbance."[175] The absence of a more particular explanation of Mr. Wilson's mental illness meant that the jurors could have regarded that illness as antisocial behavior or "meanness,"[176] rather than as providing an explanation for Mr. Wilson's behavior that could support his argument for a life sentence. The lack of specificity also left Mr. Wilson without an effective means of responding to the prosecution's claim that he was a psychopath.

As to prejudice, Judge McConnell's acknowledged that the issue was close. He wrote that "[t]here may well be grounds for skepticism"[177] that the jury could have been convinced to impose a life sentence if the psychologist had provided the more thorough diagnosis at which he later arrived. Yet, invoking Supreme Court and Tenth Circuit cases on the importance of mental health evidence, including *Penry*, *Rompilla*, *Eddings*, and *Smith*, he noted that the court did not "write on a blank slate"[178] and that such evidence could not be summarily discounted.[179]

Mr. Wilson's particular diagnosis added support to his claim of prejudice. In Judge McConnell's view:

> Diagnoses of specific mental illnesses such as schizophrenia or bipolar, which are associated with abnormalities of the brain and can be treated with appropriate medication, are likely to be regarded by a jury as more mitigating than generalized personality disorders, which are diagnosed on the basis of reported behavior, are generally inseparable from personal identity, and are often untreatable through medical or neurological means.[180]

In addition, based on this diagnosis, the psychologist could have testified about the ways in which Mr. Wilson could not conform his conduct to the law. And, the psychologist's testimony could have been buttressed by personal narratives from members of Mr. Wilson's family.[181]

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175. *Id.* at 1091.

176. *Id.* (quoting Anderson v. Sirmons, 476 F.3d 1131, 1144 (10th Cir. 2007)).

177. *Wilson*, 536 F.3d at 1093.

178. *Id.*

179. *See id.* at 1093–94. Like the *Smith* panel, Judge McConnell cited empirical studies demonstrating that "mental health evidence has a mitigating effect on juries." *Id.* at 1096 n.4. He also noted that there were some conflicting studies, that most of the data on which the studies were based was more than ten years old, and that more investigation would be useful. *Id.*

180. *Id.* at 1094.

181. *Id.* (stating that "[t]here is evidence that expert testimony on mental illness is most powerful when combined with narratives from lay witnesses such as family and friends") (citing Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1163–64, 1185 (1997)).

Finally, Judge McConnell's opinion acknowledged the potential "double-edged sword effect" of Mr. Wilson's mental health evidence. Agreeing that "[t]his [double-edged sword effect] could possibly be true,"[182] he added:

> [I]f true[,] the point would apply not just to this case, but also to [the Supreme Court's decisions in] *Williams*, *Wiggins*, and *Rompilla*, as well as [the Tenth Circuit's decisions in] *Anderson*, *Smith*, and many more decisions across the country holding that the failure of counsel to present mental health evidence of this sort was prejudicial.[183]

In Judge McConnell's view, those precedents did not allow the court to reject Mr. Wilson's claim of prejudice on the grounds that the mental health evidence was double-edged. He invoked the Tenth Circuit's statement in *Smith* that this kind of mental health evidence is "exactly the sort of evidence that garners the most sympathy from jurors."[184]

Moreover, in order to establish prejudice, Mr. Wilson was required to show only a reasonable probability that one juror would have voted differently. Although the additional mental health evidence might not have persuaded some jurors, Judge McConnell thought it just as likely that the additional evidence would have led at least one juror to have empathized with Mr. Wilson to the extent of returning a life sentence.

Although Judge Hartz did not join in Judge McConnell's analysis of Mr. Wilson's ineffective assistance claim, he did agree that the case should be remanded for an evidentiary hearing. In his view, Mr. Wilson's allegations, if true, would entitle him to relief. The record did not undermine his claim of deficient performance, and although "[p]erhaps the record undermines the claim of prejudice, . . . that issue was not addressed by the district court and should not be resolved in the first instance by [the Tenth Circuit]."[185]

Judge Hartz did express doubts about the strength of Mr. Wilson's claim. He shared many of Judge Tymkovich's thoughts about the perils of presenting mental health evidence in capital sentencing proceedings. He thought it plausible that Mr. Wilson's counsel might have reasonably decided, in light of the evidence of guilt (including a videotape of Mr. Wilson's conduct during the robbery and murder at the convenience store), that "a claim of mental illness would not get very far with the jury or would even be counterproductive."[186] However, the record did not establish that counsel actually made such a decision, and Supreme Court

182. *Wilson*, 536 F.3d at 1095.
183. *Id.* at 1095–96.
184. *Id.* at 1096 (quoting Smith v. Mullin, 379 F.3d 919, 942 (10th Cir. 2004)).
185. *Wilson*, 536 F.3d at 1124 (Hartz, J., concurring in part and concurring in the result).
186. *Id.*

precedent set a high standard for counsel in investigating and evaluating mental health evidence.

In contrast, in his dissenting opinion, Judge Tymkovich offered a detailed explanation as to why Mr. Wilson's counsel's performance was not deficient. In his view, counsel's pretrial investigation uncovered the bulk of the information that Mr. Wilson later submitted in the direct appeal, and counsel made a reasonable strategic judgment not to delve any further into Mr. Wilson's mental health problems in his sentencing presentation, but instead to emphasize his intelligence and capacity for reform. In contrast, the presentation of a schizophrenia diagnosis to the jury "could have made [Mr.] Wilson's mental health problems appear more intractable and untreatable, . . . add[ing] ammunition to the prosecution's case that [Mr.] Wilson was a dangerously ill person."[187] Judge Tymkovich invoked scholarship recognizing that "a mitigation defense based purely on the defendant's mental health can be risky."[188] As to prejudice, Judge Tymkovich noted that the jury had already heard evidence regarding Mr. Wilson's mental illness; there was no reasonable probability that the additional information from a more specific diagnosis would have led the jury to impose a life sentence.[189]

2. *Wilson*'s Significance

In many ways, the opinions in *Wilson* reflect the same conflict over the proper assessment of mental health evidence as the opinions in *Bryan*. Just as in *Bryan*, one opinion found the mental health evidence that the jury did not hear was highly mitigating, while the another saw in that same evidence a double-edged sword that defense counsel justifiably withheld from the jury to reduce the chance that it would find the defendant "dangerously ill."[190] Moreover, the fact that *Bryan* and *Wilson* come out differently—that the earlier case affirms the denial of relief on the grounds that the unpresented mental health evidence had an aggravating edge while the latter one remands for an evidentiary hearing because of the mitigating effect of that evidence—makes it difficult to discern a standard that can offer guidance in assessing similar evidence in future cases.

187. *Id.* at 1139 (Tymkovich, J., concurring in part and dissenting in part).

188. *Id.* at 1139–40; *see also* RUSSELL STETLER, MENTAL DISABILITIES AND MITIGATION 1 (2001), *available at* http://www.nynd-fpd.org/mental health/mental health mitigation.pdf (noting counsel's task to "overcome juror cynicism toward mental health issues in criminal cases"); James M. Doyle, *The Lawyers' Art: "Representation" in Capital Cases*, 8 YALE J.L. & HUMAN. 417, 442–46 (1996) (noting difficulties of presenting mental illness as mitigation evidence); Leona D. Jochnowitz, *Missed Mitigation: Counsel's Evolving Duty to Assess and Present Mitigation at Death Penalty Sentencing*, 43 CRIM. L. BULL. 1, 1 (2007) (noting tendency of counsel to limit mitigation evidence "because it purportedly undermines residual doubt, because it has a double-edged effect of inspiring jury fears, or because it opens the door to unrevealed criminal history"); Sundby, *supra* note 181, at 1130–39 (explaining capital juror skepticism of mental health expert witnesses).

189. *See Wilson*, 536 F.3d at 1147 (Tymkovich, J., concurring in part and dissenting in part).

190. *Id.* at 1139.

Yet, in our view, there are some significant matters on which the *Wilson* opinions offer meaningful direction. First, Judge Hartz's concurrence agrees with Judge McConnell's view of the importance of thoroughly investigating potentially mitigating mental health evidence.[191] As some scholars have noted, the Supreme Court's older ineffective assistance of counsel opinions—like *Strickland* and *Burger*—permit rather cursory investigation of mental health evidence, reasoning that the unpresented evidence might support the prosecution's argument for aggravating factors.[192] The more recent cases (*Williams*, *Wiggins* and *Rompilla*) require a comprehensive investigation, following the ABA Guidelines view that "[d]ue to the extraordinary and irrevocable nature of the [death] penalty, at every stage of the proceedings counsel must make 'extraordinary efforts on behalf of the accused.'"[193] In its view of counsel's obligations, *Wilson* sides with the newer cases.[194]

Second, *Wilson* emphasizes that a court assessing an ineffective assistance of counsel claim based on the failure to present mental health evidence must examine the particular kind of evidence at issue. Some of that evidence, like that presented by the psychologist at the initial sentencing, may have only limited effect, while other evidence, like that presented after the psychologist had time to review more records and conduct more tests, may be significantly mitigating. Although Judge Hartz's concurrence does not endorse the details of Judge McConnell's analysis of the mental evidence, at the very least one can conclude that he was persuaded to remand the case for an evidentiary hearing based on the difference between the mental health evidence offered at sentencing and the mental health evidence offered subsequently in Mr. Wilson's direct appeal.

Third, Judge McConnell and Judge Hartz agree that the fact that certain mental health evidence may have a double edge does not end the inquiry. Further examination of that evidence may be useful in determining whether the defendant has established an ineffective assistance claim under *Strickland* and is therefore entitled to a new sentencing hearing.

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191. *Id.* at 1124–25 (Hartz, J., concurring) (stating that "Judge McConnell's opinion establishes that the Supreme Court has set a high standard for defense counsel in capital cases with respect to investigating mitigation thoroughly before settling on a strategy").

192. Christopher Seeds, *Strategery's Refuge*, 99 J. CRIM. L. & CRIMINOLOGY 987, 1012 (2009).

193. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 1.1 cmt. introduction (2003), *reprinted in* 31 HOFSTRA L. REV. 913, 923 (2003).

194. Professor Seeds observes that "[the Supreme Court's] new cases emphasize the need for comprehensive life history investigation and endorse the ABA Death Penalty Guidelines, but leave the old law of *Burger* . . . standing." Seeds, *supra* note 192, at 1012.

D. The Double-Edged Sword After Wilson

The *Wilson* opinions also suggest several areas in which the law of the circuit may offer further guidance for assessing mental health evidence at issue in ineffective assistance of counsel claims in capital cases.

1. A Threshold Standard for Assessing Mental Health Evidence

Wilson's careful consideration of the defendant's particular diagnosis and its potential mitigating effect suggests that it may be useful in these circumstances to develop a threshold standard for evaluating mental health evidence—one that explains what sort of mental evidence is potentially mitigating enough to warrant further inquiry.[195] In fact, three Tenth Circuit cases decided after *Wilson* suggest that such a standard may be developing: *Gardner v. Galetka*,[196] *Fairchild v. Workman*,[197] and *Young v. Sirmons*.[198]

In *Gardner*, just as in *Wilson*, a capital defendant alleged in a federal habeas corpus action that a psychologist had been given insufficient time to prepare a presentation at sentencing about the mitigating effects of mental health evidence. Counsel contacted the psychologist only two days before the sentencing proceedings began.[199]

Despite that extreme delay, the Tenth Circuit held that the Utah Supreme Court's conclusion that the delay was not prejudicial was a reasonable application of *Strickland*.[200] Although he had minimal time to prepare, the psychologist had testified at the sentencing about the defendant's unstable background and his family's history of criminal and substance abuse.[201] The psychologist did offer additional testimony in state post-conviction proceedings. However, the difference between that testimony and his testimony at sentencing was unlike the "enormous" difference in the two assessments made by the psychologist in *Wilson*. In *Gardner*, there was nothing close to the "potent . . . form of mitigation" in *Wilson*—evidence of schizophrenia that was associated with abnormalities of the brain and could be treated.[202]

The court made a similar distinction in *Fairchild*, concluding that a capital defendant had presented only a "general and unfocused" argu-

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195. *See* Samy Khalil, Note, *Doing the Impossible: Appellate Reweighing of Harm and Mitigation in Capital Cases After Williams v. Taylor, with a Special Focus on Texas*, 80 TEX. L. REV. 193, 209–18 (2001). The author argues that "once an appellate court finds that a defense attorney has failed to uncover and present a certain 'threshold' amount of mitigating evidence, the court should set aside a death sentence automatically, whatever the aggravating circumstances of a crime." *Id.* at 217. I do not make that argument here.

196. 568 F.3d 862 (10th Cir. 2009).

197. 579 F.3d 1134 (10th Cir. 2009).

198. 551 F.3d 942 (10th Cir. 2008).

199. *Gardner*, 568 F.3d at 880.

200. *Id.*

201. *Id.*

202. *See id.* at 883.

ment in state court proceedings that his trial counsel did not present evidence of conduct that could have caused head injuries (drug use, fighting, and amateur boxing), but that the defendant had then presented a potentially meritorious claim in federal court, one based on the claim that counsel had failed to investigate available evidence that the defendant suffered from organic brain damage.[203]

Finally, in *Young*, the court held that new mental health evidence offered in state-post conviction proceedings would not have had a significant mitigating effect, and it offered some explanation for that assessment.[204] In the post-conviction proceedings, the defendant had presented affidavits from family members, friends, and two psychologists, and he claimed that his counsel should have presented that evidence at sentencing.[205] Concluding that the defendant had failed to establish prejudice under *Strickland*, the court stated that none of the evidence was "so unusual as to place [the defendant] outside the realm of the average person."[206] Unlike many capital defendants, the defendant appeared to have had a generally normal and happy childhood.[207] In the court's view, the two psychologists' affidavits did not establish that the causes of the defendant's emotional distress were "substantially out of the ordinary."[208] One of them concluded that the defendant likely suffered from a "Compulsive Personality Disorder," but he added that "[t]his type of psychiatric disorder is not typically associated with the commission of homicide."[209] That concession deprived the diagnosis of the kind of explanatory power of other kinds of mitigating mental health evidence.[210]

In my view, these decisions are helpful in clarifying the court's assessment of mental health evidence in ineffective assistance claims, and in grappling with its potential double-edged effects. A defendant's evidence may fall short of a threshold standard for mitigating effect for a variety of reasons: because it does not sufficiently explain the defendant's conduct, because it would likely fail to elicit sympathy from a sentencing jury, or, under the Supreme Court's reasoning in *Williams*, because it would not "influence[] the jury's appraisal of [the defendant's] moral culpability" or show that "his [or her] violent behavior was a com-

203. Fairchild v. Workman, 579 F.3d 1134, 1149–51 (10th Cir. 2009). The court therefore remanded the case to the district court for a determination of whether the defendant should be allowed to exhaust his claim. *Id.* at 1155.

204. Young v. Sirmons, 551 F.3d 942, 968–69 (10th Cir. 2008).

205. *Id.* at 961–66.

206. *Id.* at 968.

207. *Id.*

208. *Id.*

209. *Id.* (alteration in original).

210. *See, e.g.*, Smith v. Mullin, 379 F.3d 919, 943 (10th Cir. 2004) (concluding that evidence of the defendant's mental retardation, brain damage, and troubled background could explain "these outbursts of violence and [how they] caused this 'kind hearted' person to commit such a shocking crime").

pulsive reaction rather than the product of cold-blooded premeditation."[211]

By articulating a threshold standard regarding the mitigating effect of mental health evidence, the Tenth Circuit may be able to offer useful guidance to courts adjudicating ineffective assistance of counsel claims. In particular, if the additional mental health evidence falls short of that threshold standard, then courts need not assess its potential aggravating effects. On the other hand, if the evidence meets that standard, then an explanation of why that standard has been met may assist courts in weighing the mitigating and aggravating effects.

2. Assessment of the Aggravating Effects of Mental Health Evidence on an Incremental Basis

Professors John Blume and Shari Lynn Johnson are two of the harshest critics of the courts' application of the double-edged sword analysis in assessing mental health evidence in ineffective assistance claims in capital cases.[212] They write that the doctrine is "[e]mpirically [i]ndefensable and [d]octrinally [d]isastrous."[213] Yet Professors Blume and Johnson acknowledge that some evidence concerning a defendant's mental health can be aggravating. For example, if the defendant tortured his victim, evidence of that conduct, although it indicated mental illness, would more likely support the prosecution's argument for the death penalty than rebut it.[214]

Nevertheless, Blume and Johnson object to the way in which the double-edged sword conception of mental illness evidence can truncate the *Strickland* inquiry. Criticizing the Fourth Circuit's decisions, they observe that "[t]here is no need to calculate prejudice in the context of the case, because the Fourth Circuit simply presumes lack of prejudice by affixing the 'double-edged' label to the unpresented mitigating evidence."[215]

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211. Williams v. Taylor, 529 U.S. 362, 398 (2000).

212. *See generally* John H. Blume & Sheri Lynn Johnson, *The Fourth Circuit's "Double-Edged Sword": Eviscerating the Right to Present Mitigating Evidence and Beheading the Right to the Assistance of Counsel*, 58 MD. L. REV. 1480 (1999).

213. *Id.* at 1501. Professors Blume and Johnson contend that "[t]he double-edged sword doctrine hypothesizes that evidence that seems intuitively mitigating may be, in the minds of some jurors, actually aggravating." *Id.* at 1502. They reason that, for some subset of jurors, "psychological evidence which decreases the defendant's moral culpability may be interpreted as also increasing his future dangerousness, and for some subset of this subset, that that increase in perceived future dangerousness will outweigh the decrease in perceived culpability, thereby increasing the likelihood of a death sentence." *Id.* In their view, even though this empirical proposition is "undoubtedly true," it does not establish that a jury would be more likely to return a death sentence because of this evidence. *Id.* That is because not all jurors will share this view of the connection between mental health evidence and future dangerousness. *See id.* They also argue that the *Strickland* standards are sufficient to analyze deficient performance and prejudice, without the gloss of the double-edged sword doctrine. *Id.* at 1504–07.

214. *Id.* at 1502–03.

215. *Id.* at 1506.

In my view, the Tenth Circuit has sometimes engaged in similar labeling and, as a result, has not undertaken a case-specific analysis of the mental health evidence at issue. As I have noted, in concluding that the mental health evidence that had not been presented until the post-conviction proceedings was double-edged, the court in *Bryan* relied upon testimony from one of the defendant's attorneys that "evidence of a psychological problem with the defendant . . . can sometimes be a double-edged sword."[216] The former counsel admitted that "in several cases" the jury had accepted "evidence of psychological or emotional problems as evidence of aggravation."[217] There is scant discussion in the majority opinion of the particular mental illness suffered by the defendant and whether the jury would have regarded that particular illness as aggravating or mitigating.

As I have noted, the Tenth Circuit's decisions have offered three explanations of the ways in which juries may perceive mental health evidence as an aggravating circumstance. First, the evidence may support the prosecution's contention that the defendant is impulsive and violent, and therefore a continuing threat. Second, it may undermine a theme or contention that the defendant has offered in the guilt phase of the trial or as part of the case for mitigation (for example that the defendant did not commit the crime or played a minimal role in it or that, except for the crime at issue, the defendant has been a good citizen). Third, the mental health evidence may reveal particular instances of other criminal or anti-social behavior that could support the prosecution's arguments that aggravating circumstances justify the death penalty. Yet, for each of these potential aggravating aspects of the mental health evidence, there may be case-specific reasons why a jury might not perceive the evidence to support a death sentence.

Most importantly, the defendant's mental illness may be treatable. Indeed, in remanding for an evidentiary hearing, Judge McConnell's opinion in *Wilson* relies in part on medical literature indicating that the symptoms of the schizophrenia suffered by the defendant there could improve with medication.[218]

Similarly, the commentary to the ABA Guidelines cites studies showing that "future dangerousness is on the minds of most capital jurors, and is thus at issue in virtually all capital trials, whether or not it is argued by the prosecution or is a statutorily mandated sentencing consideration."[219] However, in light of juries' overriding concern with defen-

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216. Bryan v. Mullin, 335 F.3d 1207, 1223 n.21 (10th Cir. 2003).

217. *Id.*

218. Wilson v. Sirmons, 536 F.3d 1064, 1094 (10th Cir. 2008) (observing that "[d]iagnoses of specific mental illnesses such as schizophrenia or bipolar . . . are associated with abnormalities of the brain and can be treated with appropriate medication").

219. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 10.11 cmt. (2003), *reprinted in* 31 HOFSTRA L. REV. 913, 1062 (2003)

dants' future dangerousness, the Guidelines' directive is *not* to avoid the presentation of mental health evidence. Instead, the commentary explains, "[C]ounsel should give serious consideration to making an explicit presentation of information on [the defendant's future dangerousness]."[220] In addition to testimony about the treatment of the mental illness, the evidence could include information about the defendant's adaptation to the prison environment or other evidence rebutting the continuing threat allegation.[221]

With regard to the possibility that mental illness evidence may conflict with other themes or contentions offered by the defense, I note that the Supreme Court addressed this issue in *Wiggins*.[222] There, the defendant's attorney had argued during the guilt stage that the defendant was not directly responsible for the murder.[223] Although the Court stated that it might have been strategically defensible for an attorney to have pursued that theme during the guilt phase, such a strategy was not necessarily inconsistent with the presentation of the defendant's troubled background during sentencing.[224] In addition, in light of the strength of the available mitigation evidence that the defendant's attorney's did not present, a reasonable attorney might have focused on the mitigation case at sentencing rather than the weaker arguments during the guilt phase. Accordingly, with regard to the potential conflict between mental evidence and other defense themes and contentions, there may well be case-specific considerations indicating that the evidence is not double-edged, at least not to the degree that reasonable counsel should completely exclude it from the mitigation case.

Similar case-specific considerations may apply to the instances of criminal or anti-social behavior that mental health evidence may reveal. The Supreme Court's 2009 decision in *Porter v. McCollum*[225] illustrates that point.

In *Porter*, the Court overturned an Eleventh Circuit decision, concluding that the Florida Supreme Court had unreasonably applied *Strickland*, and held that the defendant's counsel's performance was both deficient and prejudicial.[226] Counsel had failed to present evidence that his client had served in horrific battles in the Korean War, had struggled to recover upon return from the war, had a childhood history of physical abuse, and had been diagnosed with brain abnormalities.[227] In rejecting

(quoting John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue"*, 86 CORNELL L. REV. 397, 398–99 (2001)).

220. *Id.*
221. *Id.*
222. Wiggins v. Smith, 539 U.S. 510, 515 (2003).
223. *Id.*
224. *Id.* at 535.
225. 130 S. Ct. 447 (2009) (per curiam).
226. *Id.* at 452–55.
227. *Id.* at 453.

the defendant's ineffective assistance of counsel claim, the Florida Supreme Court had concluded that counsel's failure to offer the military records was not prejudicial because they revealed that the defendant had gone AWOL on several occasions and had been court-martialed.[228] In its view, "These periods of desertion would have significantly impacted upon any mitigating effect that the evidence would have had, and indeed they would have reduced this impact to inconsequential proportions."[229]

The Supreme Court disagreed. It concluded that the evidence that the defendant was AWOL was consistent with the overall theory of mitigation that he had presented in post-conviction proceedings—that his combat experience caused immense stress and substantial emotional and mental difficulties.[230] The Florida Supreme Court's conclusion that the AWOL evidence was merely aggravating "reflect[ed] a failure to engage with what [the defendant] actually went through in Korea."[231]

Porter thus supports the view that even though mental health evidence may reveal instances of criminal or antisocial behavior, that fact may not justify withholding the evidence from the jury. As in *Porter*, the explanatory impact of that mental health evidence may outweigh its aggravating effects.[232] The potential double-edged quality of mental health evidence should therefore trigger a case-specific inquiry rather than foreclose it.

3. *Sears v. Upton*[233]

The Supreme Court's most recent decision on mental health evidence in capital cases offers further support for the fact-specific approach to assessing mental heath evidence. In *Sears*, the evidence that defendant's counsel failed to present included the defendant's childhood experiences of sexual abuse, a severe learning disability, and brain damage caused by several serious head injuries and drug and alcohol abuse. In post-conviction proceedings, the Georgia trial court agreed with the defendant that his counsel's performance was deficient, but it rejected his claim of prejudice, reasoning that because his counsel had presented a reasonable alternative theory of mitigation—involving the impact of the

228. Porter v. State, 788 So. 2d 917, 924–25 (Fla. 2001).

229. *Id.* at 925.

230. *Porter*, 130 S. Ct. at 455.

231. *Id.*

232. The Third Circuit's decision in *Thomas v. Horn*, 570 F.3d 105 (3d Cir. 2009), follows the reasoning of *Porter*. Even though the defendant's mental health history, which his counsel had failed to present, included evidence that the defendant was "a sadistic and dangerous sexual deviate who committed at least one prior act" that resembled the crime at issue, the court concluded that the defendant's mental health history acted "as a common thread that ties all this evidence together." *Id.* at 129. "A single juror may well have believed that this unifying factor explained [the defendant's] horrific actions in a way that lowered his culpability and thereby diminished the justification for imposing the death penalty." *Id.*

233. 130 S. Ct. 3259 (2010).

defendant's execution on the defendant's family—any finding of prejudice would be speculative.

The Court identified two errors in the Georgia court's analysis. First, the state court's finding that the defendant's counsel had formulated a mitigation theory that was reasonable "in the abstract,"[234] did not excuse it from engaging in a fact-specific prejudice inquiry. Second, the court should have considered the new mental health evidence, along with the evidence that counsel actually presented, to determine whether the defendant had established a reasonable probability of a different result.[235] The Supreme Court therefore remanded the case to the Georgia court for a "probing and fact-specific analysis"[236] of the prejudice component of the defendant's ineffective assistance claim.

Significantly, the Court remanded for that inquiry even though some of the omitted mental health evidence was double-edged. As Justice Scalia observed in his dissent, a psychiatrist who examined the defendant found him to be "a narcissist" with a "grandiose" opinion of himself, as well as "arrogant and self-centered."[237] However, even though the dissent concluded that it was more likely that the defendant's "profound personality disorder, . . . made him exactly the kind of person who would commit heinous crimes in the future," a majority of the Supreme Court was not convinced that this assessment of the mental health evidence should foreclose further inquiry. Instead, in the majority's view, competent counsel "should have been able to turn some of the adverse evidence into a positive—perhaps in support of a cognitive deficiency mitigation theory."[238] Although the evidence might not have made the defendant more likeable to the jury, the Court concluded, "it might well have helped the jury understand [the defendant], and his horrendous acts."[239]

The Court's decision in *Sears* thus confirms both the explanatory force of mental health evidence that the Tenth Circuit recognized in *Smith* and the importance of the fact-specific inquiry addressed in *Wilson*.

CONCLUSION

The Constitution requires a heightened standard of reliability in the application of the death penalty. It also entitles the defendant in a capital case to present evidence a broad range of mitigating evidence, including evidence of his or her own mental illness. Yet when courts assess mental

234. *Id.* at 3265.
235. *Id.* at 3265–66.
236. *Id.* at 3266.
237. *Id.* at 3270 (Scalia, J., dissenting).
238. *Id.* at 3264 (majority opinion).
239. *Id.*

health evidence in capital cases, that heightened reliability often seems hard to attain.

Thus, in the Tenth Circuit, Roderick Smith and Robert Leroy Bryan received strikingly different opinions about the impact of the mental health evidence that their trial counsel failed to present. One, Mr. Smith, was informed by the court that the omitted evidence was highly mitigating, that his attorney's failure to present it violated his Sixth Amendment right to effective assistance of counsel, and that he was entitled to a new sentencing hearing. The other, Mr. Bryan, learned that the additional mental health evidence was a double-edged sword that his counsel had made a reasonable strategic decision to exclude. The mental health evidence that Mr. Bryan presented in habeas corpus proceedings was never heard by a jury, and he was executed.

As troubling as those different results may be, the *Smith* and *Bryan* decisions are each supported by Supreme Court precedent. The Court's decisions hold that mental health evidence is sometimes mitigating, sometime aggravating, and sometimes both. How a court will characterize the evidence in a particular case can be quite difficult to predict.

The Tenth Circuit's decision in *Wilson* further illustrates the challenges in assessing mental health evidence. There, the three panel members reached three different conclusions. For Judge McConnell, Mr. Wilson's additional mental health evidence warranted further proceedings, allowing him the opportunity to show a reasonable probability that, with further insight into his mental state, a jury would have returned a life sentence. In contrast, Judge Tymkovich concluded that the evidence proffered by Mr. Wilson in post-conviction proceedings could have supported the prosecution's contention that he was a continuing threat and that, as a result, his trial counsel made a reasonable strategic judgment to exclude it. Judge Hartz, the third member of the *Wilson* panel, agreed only with the result of Judge McConnell's analysis—that a remand for an evidentiary hearing was warranted.

In my view, that narrow point of agreement offers some hope for developing a more coherent approach to mental health evidence in capital cases. The Supreme Court's decisions in this area, beginning with *Williams*, *Wiggins*, and *Rompilla* and continuing through its more recent decisions in *Porter* and *Sears* indicate that the assessment of mental health evidence not presented to a jury may depend on a number of case-specific, fact-intensive considerations: whether the illness is treatable; how the structured prison setting would affect it; whether evidence regarding the illness would have open the door for the prosecution to introduce episodes of violent or antisocial conduct to support its contention that the defendant was a continuing threat; whether the evidence would have undermined another viable theme or argument of the defense; and whether, despite potentially aggravating effects, the explanatory power of additional mental health evidence would have outweighed its detri-

mental impact. As the *Wilson* panel concluded, evidentiary hearings may allow those considerations to be more fully explored.

The Supreme Court's decision in *Sears* supports that view. There, the Court drew a contrast between (1) a state appellate court's conclusion that defense counsel's decision to exclude mental health evidence was reasonable in the abstract; and (2) a probing and fact-specific analysis of that evidence. It concluded that the latter was required. Although the assessment of mental health evidence in capital cases will continue to present enormously difficult challenges, the kind of inquiry required in *Sears* may bring the courts closer to the heightened reliability that they should strive to obtain.

CHAMBER OF COMMERCE V. EDMONDSON: EMPLOYMENT AUTHORIZATION LAWS, STATES' RIGHTS, AND FEDERAL PREEMPTION—AN INFORMED APPROACH

INTRODUCTION

Few issues are as divisive in American politics as illegal immigration. The Republican and Democratic parties are engaged in a virtual stalemate on the issue, and many would argue that the federal government's comprehensive overhaul of immigration law—the Immigration Reform and Control Act of 1986 (IRCA)—has been largely ineffective at stemming the tide of illegal immigration.[1] In response, states and municipalities have begun to enact statutes that seek to address the problem by preventing employers from hiring unauthorized workers.[2] These statutes raise questions about the extent to which state and local governments can regulate in the area of immigration without triggering federal preemption principles. One such example is the recent Tenth Circuit Court of Appeals decision in *Chamber of Commerce v. Edmondson*.[3] In *Edmondson*, the court analyzed a challenge to the Oklahoma Taxpayer and Citizen Protection Act of 2007 (the Oklahoma Act), which seeks to regulate illegal immigration through employment verification.[4]

Part I of this Comment outlines the relevant background information regarding the federal regulation of unauthorized workers and preemption doctrine. It also summarizes *Geier v. American Honda Motor Co.*,[5] which provides a significant framework for determining the existence of federal preemption.[6] Part II summarizes *Edmondson*, and Part III analyzes the Tenth Circuit's decision. This Comment commends the Tenth Circuit's decision in *Edmondson* as consistent with federal preemption jurisprudence by arguing that, in conducting its conflict preemption analysis, the court placed appropriate weight on the goals of IRCA when analyzing whether the Oklahoma Act was an obstacle to the accomplishment of these goals. It then argues that *Edmondson*, and the recently decided Third Circuit case *Lozano v. City of Hazleton*,[7] faith-

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1. Randall G. Shelley, Jr., *If You Want Something Done Right . . . : Chicanos Por La Causa v. Napolitano and the Return of Federalism to Immigration Law*, 43 AKRON L. REV. 603, 612 (2010) (citing Ariz. Contractors Ass'n v. Napolitano, 526 F. Supp. 2d 968, 972 (D. Ariz. 2007)).
2. Rachel Feller, Comment, *Preempting State E-Verify Regulations: A Case Study of Arizona's Improper Legislation in the Field of "Immigration-Related Employment Practices"*, 84 WASH. L. REV. 289, 302–05 (2009) (stating that twelve states have enacted legislation requiring the use of E-Verify, while only one has prohibited its use) (citations omitted).
3. 594 F.3d 742 (10th Cir. 2010).
4. *Id.* at 750.
5. 529 U.S. 861 (2000).
6. *Id.* at 865.
7. 620 F.3d 170 (3d Cir. 2010).

fully employ the implied preemption principles articulated in *Geier* by conducting a thorough conflict preemption analysis after concluding that sections of the state statutes were neither expressly preempted nor field preempted. These decisions stand in contrast to the Ninth Circuit's decision in *Chicanos Por La Causa, Inc. v. Napolitano*,[8] where the court largely ignored *Geier*, and failed to conduct a proper implied preemption analysis.[9] This Comment concludes by discussing the implications of the Third, Ninth, and Tenth Circuit decisions on federal and state immigration laws.

I. BACKGROUND

A. Federal Regulation of Unauthorized Workers

In 1986, Congress enacted IRCA, which created a "comprehensive scheme prohibiting the employment of illegal aliens in the United States."[10] IRCA was the first federal law that sought to decrease illegal immigration by punishing employers for hiring unauthorized workers.[11] At the time Congress enacted IRCA, there were approximately three million illegal immigrants living in the United States.[12]

In 1942, many of the illegal immigrants in the United States were temporary farm workers hired due to the lack of agricultural laborers caused by World War II.[13] In response, Congress enacted a temporary-worker program that allowed employers to hire workers from Mexico for up to nine months of the year.[14] Subsequently, Congress enacted the Agricultural Act of 1949, which expanded the previous temporary-worker program to the Bracero Program.[15] Workers were paid low wages under the Bracero Program, allowing employers to reap greater profits.[16] The program ended in 1965, but during that sixteen year period, over five million Mexican workers immigrated legally to the United States.[17] In the wake of the Bracero Program, employers continued to demand cheap labor, and therefore, continued to hire and employ now illegal immi-

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8. 558 F.3d 856 (9th Cir. 2009), *cert granted sub nom.* Chamber of Commerce v. Whiting, 130 S. Ct. 3498 (June 28, 2010) (No. 09-115).

9. *See id.* at 866–67.

10. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002).

11. Shelley, *supra* note 1, at 627 (citing H.R. REP. NO. 99-682(I), at 52 (1986)). Prior to 1986, federal law did not directly prevent employers from hiring unauthorized workers. Kati L. Griffith, Comment, *A Supreme Stretch: The Supremacy Clause in the Wake of IRCA and* Hoffman Plastic Compounds, 41 CORNELL INT'L L.J. 127, 128 (2008) (citing HR. REP. NO. 99-682(I), at 51–56).

12. Phi Mai Nguyen, Comment, *Closing the Back Door on Illegal Immigration: Over Two Decades of Ineffective Provisions While Solutions Are Just a Few Words Away*, 13 CHAP. L. REV. 615, 627 (2010).

13. *Id.*

14. *Id.*

15. *Id.* The Bracero Program was an agreement between the United States and Mexico to develop a plan to import farm workers. *Id.* at 625 n.65.

16. *Id.* at 625.

17. *Id.*

grants.[18] During the 1970s and 1980s, due to the widespread availability of employment, illegal immigration numbers continued to rise.[19] As illegal immigration increased, so too did anti-immigration sentiment.[20] This sentiment was compounded by a fragile economy with high unemployment and rising costs and inflation.[21] In response, Congress decided to combat illegal immigration by eliminating the "pull" factors.[22] In theory, if eliminated, these "pull" factors—such as increased employment opportunities and higher wages—would significantly reduce the impetus for people to enter or remain in the United States illegally.[23] In 1986, after nearly a decade of debate and compromise, Congress passed IRCA, and President Reagan signed the bill into law.[24]

The Supreme Court has repeatedly stated that IRCA made preventing the employment of unauthorized aliens a central "policy of immigration law."[25] In order to more effectively combat illegal employment, IRCA established an extensive program, known as I-9, to confirm the work eligibility of employees.[26] Employers are required to verify the work eligibility of employees by examining specified documents.[27] If the documents appear to be reasonably legitimate, the employer may not request additional documentation.[28] This provision limits the potential for employment discrimination.[29] In addition, employers who "attempt to comply in good faith" with the requirements of IRCA are exempt from civil and criminal penalties,[30] thus representing Congress's attempt to lessen the burden of verification on employers and minimize disruption of business.[31] Furthermore, IRCA does not require employers to verify the work eligibility of independent contractors.[32]

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18. *Id.* at 626.
19. *Id.*
20. *See* Adam L. Lounsbury, Comment, *A Nationalist Critique of Local Laws Purporting to Regulate the Hiring of Undocumented Workers*, 71 ALB. L. REV. 415, 419 (2008). This anti-immigrant sentiment was based on the assumption that illegal immigrants negatively impacted the "economic, social, and political well-being of the nation." *Id.*
21. *See id.*
22. *Id.* The incentives that drive people to enter or remain in the United States illegally are often referred to as "push" and "pull" factors. Linda Sue Johnson, Comment, *The Antidiscrimination Provision of the Immigration Reform and Control Act*, 62 TUL. L. REV. 1059, 1062 (1988). The "push" factors that cause people to leave their home state include "unemployment, low wages, poor living and working conditions, a depressed or unstable economy, and internal strife." *Id.* The "pull" factors that encourage people to come the United States are "employment opportunities, higher wages, and better working and living conditions." *Id.* at 1062–63.
23. *See* Lounsbury, *supra* note 20, at 419–20.
24. Johnson, *supra* note 22, at 1059.
25. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002) (quoting INS v. Nat'l Ctr. for Immigrants' Rights, 502 U.S. 183, 194 n.8 (1991)).
26. Chamber of Commerce v. Edmondson, 594 F.3d 742, 751 (10th Cir. 2010).
27. *Id.*
28. *Id.*
29. *Id.* at 767.
30. *Id.* at 751.
31. *Id.* at 767.
32. *Id.* at 751.

In enacting IRCA, Congress sought to balance several competing goals: "preventing the hiring of unauthorized aliens, lessening the disruption of American business, and minimizing the possibility of employment discrimination."[33] Congress also added a provision to IRCA expressly preempting "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."[34]

Illegal immigration continued to rise throughout the 1990s.[35] Congress, in an attempt to fight this upward trend, sought to create a more effective and efficient method for verifying employee work authorization that could be used in conjunction with the I-9 forms.[36] In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)[37] which, among other things, created another employment verification system—the Basic Pilot Program (E-Verify).[38] E-Verify differs from I-9 in that it is an internet based system in which information is submitted electronically, and the government then checks the employee's information against an electronic database.[39] Congress, however, explicitly refused to require most employers to use E-Verify, rendering it an entirely voluntary alternative to I-9.[40] According to the U.S. Department of Homeland Security, in 2001, just over one thousand employers used E-Verify, but by 2010, over two hundred thousand employers participated.[41]

B. The Supremacy Clause and Preemption Doctrine

The Supremacy Clause states that the Constitution and the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[42] The Clause has long been interpreted as providing that federal law

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33. *Id.* at 767 (internal quotation marks omitted).
34. *Id.* at 765 (quoting 8 U.S.C. § 1324a(h)(2) (2006)).
35. *See* Elizabeth McCormick, *The Oklahoma Taxpayer and Citizen Protection Act: Blowing Off Steam or Setting Wildfires?*, 23 GEO. IMMIGR. L.J. 293, 301 (2009).
36. *See* Naomi Barrowclough, Note, *E-Verify: The Long Awaited "Magic Bullet" or Weak Attempt to Substitute Technology for Comprehensive Reform?*, 62 RUTGERS L. REV. 791, 797 (2010).
37. *Id.*
38. Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 861 (9th Cir. 2009), *cert granted sub nom.* Chamber of Commerce v. Whiting, 130 S.Ct. 3498 (June 28, 2010) (No. 09-115).. In 2007, the Basic Pilot Program was renamed "E-Verify." *History and Milestones*, U.S. DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP AND IMMIGRATION SERVS. (Feb. 3, 2011), http://www.uscis.gov/e-verify (found under "About the Program" sub-menu).
39. *Edmondson*, 594 F.3d at 752. E-Verify compares information from the employee's I-9 forms to data from the U.S. Department of Homeland Security and Social Security Administration records to determine employment eligibility. *Id.*
40. *Id.* at 768. E-Verify, however, is mandatory for many federal contractors. *Id.* at 772.
41. *History and Milestones*, *supra* note 38.
42. U.S. CONST. art. VI, cl. 2.

preempts contrary state laws.[43] Arising out of Supremacy Clause jurisprudence, preemption doctrine delineates the boundaries of federal supremacy when Congress has enacted legislation, which is otherwise within its enumerated powers.[44] The preemption inquiry "starts with the assumption that the historic police powers of the States are not to be superseded by . . . Federal Act unless that is the clear and manifest purpose of Congress."[45] Therefore, one must look to Congressional intent for enacting a statute to determine if a state law is preempted.

Federal preemption can be either express or implied.[46] Express preemption exists "when Congress 'define[s] explicitly the extent to which its enactments pre-empt state law.'"[47] Some federal statutes exempt state law that would otherwise be expressly preempted by way of a savings clause.[48] There are two types of implied preemption: field preemption and conflict preemption.[49] Field preemption occurs when "the scope of a statute indicates that Congress intended federal law to occupy a field exclusively."[50] Conflict preemption occurs when a state law would make it impossible to comply with both state and federal law, or where state law "stand[s] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[51] Furthermore, when state and federal laws share a common goal, "[t]he fact of a common end hardly neutralizes conflicting means[,]" and the foregoing preemption principles still apply.[52]

C. Geier v. American Honda Motor Company

One of the Supreme Court's most recent and significant pronouncements on the preemption of state law is *Geier v. American Honda Motor Co.* In *Geier*, the Court held that a state tort law claim conflicted with the objectives of Federal Motor Vehicle Safety Standard 208 (FMVSS 208), and therefore was impliedly preempted.[53] The case commenced after one plaintiff was seriously injured in an auto collision.[54] The 1987 Honda Accord that the plaintiff was driving was not equipped

43. *See* McCulloch v. Maryland, 17 U.S. 316, 405–06 (1819).

44. Sandra Zellmer, *Preemption by Stealth*, 45 HOUS. L. REV. 1659, 1665 (2009).

45. Emerson v. Kan. City S. Ry. Co., 503 F.3d 1126, 1129 (10th Cir. 2007) (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992)).

46. Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985).

47. *Emerson*, 503 F.3d at 1129 (quoting Choate v. Champion Home Builders Co., 222 F.3d 788, 792 (10th Cir. 2000)) (alteration in original) (internal quotation marks omitted).

48. *See* Zellmer, *supra* note 44, at 1661, 1668.

49. *Id.* at 1666.

50. Sprietsma v. Mercury, 537 U.S. 51, 64 (2002) (quoting Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995)).

51. Chamber of Commerce v. Edmondson, 594 F.3d 742, 766 (10th Cir. 2010) (quoting Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982)) (internal quotation marks omitted).

52. *See Edmondson*, 594 F.3d at 766 (quoting Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 379 (2000)).

53. Geier v. Am. Honda Motor Co., 529 U.S. 861, 886 (2000).

54. *Id.* at 865.

with an airbag.[55] The plaintiffs sought damages under District of Columbia tort law, claiming that Honda was negligent by not equipping the car with an airbag.[56]

The Department of Transportation (DOT) promulgated FMVSS 208 pursuant to its power under the National Traffic and Motor Vehicle Transportation Act (Safety Act).[57] The Court concluded that the Safety Act's express preemption provision, when read with its savings clause, excluded common law tort actions.[58] However, the Court noted that a savings clause "does *not* bar the ordinary working of conflict preemption principles."[59] In addition, the Court emphasized that it "has repeatedly 'decline[d] to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law.'"[60] Furthermore, the Court declined to find that the existence of a saving clause or express preemption provision would create a "special burden" disfavoring preemption.[61]

Having concluded that the state tort law action was not expressly preempted, the Court then addressed whether the suit was impliedly preempted by FMVSS 208.[62] Although the purpose of FMVSS 208 was to improve automobile safety, it did not require the installation of airbags.[63] The Court explained that FMVSS 208 was not a safety floor, but was developed as a way to give automobile manufacturers a range of choices among different passive restraint systems, all of which promoted FMVSS 208's safety objectives.[64] Therefore, by requiring airbags and taking the choice away from the auto makers, the state tort law stood as an obstacle to the accomplishment of FMVSS 208's objective.[65]

The Court gave significant weight to the history of FMVSS 208 and DOT's explanation of FMVSS 208 in concluding that the state tort action was conflict preempted.[66] The Court deferred to DOT's explanation because of the technical nature of the subject matter and the complex and extensive historical background of FMVSS 208.[67] The Court added, "The agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely

55. *Id.*
56. *Id.*
57. *Id.* at 864.
58. *Id.* at 868.
59. *Id.* at 869.
60. *Id.* at 870 (quoting United States v. Locke, 529 U.S. 89, 106–07 (2000)) (alteration in original).
61. *Geier*, 529 U.S. at 870.
62. *Id.* at 874.
63. *Id.* at 874–76.
64. *Id.* at 874–75.
65. *Id.* at 886.
66. *Id.* at 875–77.
67. *Id.* at 883.

impact of state requirements."[68] In sum, *Geier* provided the appropriate framework with which to analyze whether state and local immigration laws are preempted by federal law.

II. *CHAMBER OF COMMERCE V. EDMONDSON*

A. Facts and Procedural History

In 2007, Oklahoma enacted the Oklahoma Taxpayer and Citizen Protection Act (the Oklahoma Act) to regulate illegal immigration.[69] The Oklahoma Act reflects the judgment of the Oklahoma legislature that "illegal immigration is causing economic hardship and lawlessness . . . ."[70] The Oklahoma Act seeks to prevent illegal immigration by stopping the employment of illegal aliens through the use of mandatory verification systems and various monetary disincentives.[71]

Numerous chambers of commerce and trade associations brought suit challenging three sections of the Oklahoma Act: Sections 7(B), 7(C), and 9.[72] Section 7(B) requires employers to use E-Verify to confirm the employment status of their employees.[73] If an employer refuses to use E-Verify it is barred from contracting with Oklahoma public employers.[74] Section 7(C) "makes it a 'discriminatory practice' for any employer to 'discharge an employee working in Oklahoma who is a United States citizen or permanent resident alien while retaining an employee who the employing entity knows, or reasonably should have known, is an unauthorized alien.'"[75] "An employer who engages in such a discriminatory practice may be investigated by the Oklahoma Human Rights Commission" (OHRC) and can be subject to temporary injunctive relief "and affirmative relief, including reinstatement, back pay, costs and attorney's fees."[76] However, if an employer uses E-Verify, it is exempt from liability under Section 7(C).[77] Section 9 requires all employers to obtain "documentation to verify . . . independent contractor[s'] employment authorization."[78] If the independent contractor does not provide proof of work authorization, then the employer must withhold compensation equal to "the top marginal income tax rate" allowable under Oklahoma

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68. *Id.* (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 496 (1996)).

69. Chamber of Commerce v. Edmondson, 594 F.3d 750, 750 (10th Cir. 2010).

70. *Id.* at 753 (quoting Oklahoma Taxpayer and Citizen Protection Act of 2007, 2007 Okla. Sess. Law Serv. Ch. 112, § 2 (West)) (internal quotation marks omitted).

71. *Edmondson*, 594 F.3d at 753–55.

72. *Id.* at 750.

73. *Id.* at 753–54.

74. *Id.*

75. *Id.* at 754 (citing Oklahoma Taxpayer and Citizen Protection Act of 2007, OKLA. STAT. tit. 25, § 1313(C)(1) (2007)).

76. *Edmondson*, 594 F.3d at 754.

77. *Id.*

78. *Id.* at 754–55 (quoting OKLA. STAT. tit., § 2385.32 (2007)) (alterations in original).

law.[79] Employers who do not withhold the required amount shall be liable to the state for the remaining amount.[80]

The plaintiffs claimed that all three sections of the Oklahoma Act were expressly and impliedly preempted by federal law, and therefore sought a preliminary injunction.[81] The defendants opposed the injunction and moved to dismiss on the basis that the chambers lacked standing, certain defendants were immune from suit under the Eleventh Amendment, and the Tax Injunction Act (TIA) stripped the district court of jurisdiction to enjoin Section 9.[82] The district court denied the motion to dismiss and granted the preliminary injunction as to all three sections.[83]

B. Majority Opinion

The Tenth Circuit affirmed the district court's grant of a preliminary injunction with regard to Sections 7(C) and 9, but reversed the district court's grant of preliminary injunction against the enforcement of Section 7(B).[84] First, the court concluded that the plaintiffs had standing to challenge the three sections of the Oklahoma Act.[85] In finding standing, the court stated that the chambers had sufficiently demonstrated that the injury threatened by the three sections was "real, immediate, and direct[,]" and that the injunction requested would redress their alleged injuries.[86] Second, the court concluded that the Attorney General was not immune from suit under the Eleventh Amendment as to Section 7(B), but that he was immune from suit as to Sections 9 and 7(C) because he was not authorized to enforce those sections.[87] Third, the court found that the TIA did not deprive the district court of jurisdiction to enjoin Section 9.[88] It stated that the Oklahoma Act fell outside of the scope of the TIA because Section 9 was an assessment seeking to regulate illegal immigration and not a tax with the primary purpose of raising revenue.[89] Last, the court undertook a preemption analysis to determine whether the district court's grant of a preliminary injunction as to the three sections was proper.[90] The Tenth Circuit affirmed the district court regarding Sections 7(C) and 9, finding that Section 7(C) was expressly preempted and Section 9 was impliedly preempted.[91] The court, however, reversed the dis-

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79. *Edmondson*, 594 F.3d at 754–755 (quoting § 2385.32(A)).
80. *Edmondson*, 594 F.3d at 755.
81. *Id.* at 750.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 759.
86. *Id.* at 756 (quoting Davis v. FEC, 554 U.S. 724, 734 (2008)).
87. *Edmondson*, 594 F.3d at 759–60.
88. *Id.* at 761.
89. *Id.*
90. *Id.* at 764.
91. *Id.* at 771.

trict court's decision as to Section 7(B), finding that the section was neither expressly nor impliedly preempted by federal law.[92]

The court began its preemption analysis by evaluating whether the three provisions of the Oklahoma Act were expressly preempted.[93] Judge Lucero stated that the proper express preemption analysis asks "whether the state law at issue falls within the scope of a federal preemption provision."[94] "IRCA preempts 'any State law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.'"[95] The court noted that IRCA does not define "sanction" as requiring a punitive component.[96]

The court determined that the penalties under Section 7(C) for firing a legal worker while retaining an illegal worker—cease and desist orders, reinstatement, back pay costs, and attorney's fees—are restrictive measures that fall within the definition of sanctions under § 1324a(h)(2) of IRCA.[97] The court added that the above penalties are consistent with the generally accepted use of the term "sanctions" under federal law.[98] Therefore, because these sanctions are imposed upon those who employ illegal aliens, Section 7(C) falls within the scope of § 1324a(h)(2) and is thus expressly preempted.[99]

Conversely, the court concluded that Sections 7(B) and 9 were not expressly preempted by § 1324a(h)(2) because neither "impos[es] civil or criminal sanctions . . . upon those who employ . . . unauthorized aliens."[100] Section 7(B) simply requires all employers to use E-Verify.[101] An employer violates this section not by employing illegal immigrants, but by refusing to implement the program.[102] According to the court, because sanctions are distinct from the employment of unauthorized aliens, this section does not come within the scope of § 1324a(h)(2) and therefore is not expressly preempted.[103] Likewise, under Section 9, it is irrelevant whether an independent contractor is an unauthorized alien.[104] Under that provision the employer must verify the work status or withhold taxes of all independent contractors.[105]

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92. *Id.*
93. *Id.* at 765.
94. *Id.*
95. *Id.* (quoting 8 U.S.C. § 1324a(h)(2) (2006)).
96. *Edmondson*, 594 F.3d at 765.
97. *Id.* at 765–66.
98. *Id.* at 765.
99. *Id.* at 766.
100. *Id.* (second alteration in original) (emphasis omitted) (internal quotation marks omitted).
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*

Having found that Sections 9 and 7(B) were not expressly preempted, the court set out to determine whether the sections were nonetheless impliedly preempted based on conflict preemption principles.[106] It concluded that, although Section 9 did not make compliance with federal law a physical impossibility, it did stand as an obstacle to accomplishing the goals of IRCA and therefore was conflict preempted.[107] However, the panel split in concluding that Section 7(B), which mandates the use of E-Verify, was not an obstacle to the accomplishment of Congress's goals under IRCA and therefore was not preempted.[108]

In its preemption analysis regarding Section 9, the court found that, although this section did not make compliance with IRCA an impossibility, it stood as an obstacle to the implementation of IRCA because it interfered with the methods chosen by Congress and therefore was conflict preempted.[109] Specifically, Section 9 requires employers to verify the work authorization of independent contractors.[110] In contrast, IRCA explicitly excludes independent contractors from verification requirements.[111] The court noted that this added requirement stood contrary to the goals of IRCA by potentially exposing employers to federal liability for employment discrimination and increasing burdens on businesses.[112] In addition, *Geier* also supported the court's conflict preemption conclusion.[113] The court noted that "Section 9 would create obligations on contracting entities that Congress expressly chose not to impose."[114] Just as state tort law could not hold automakers liable for not installing an airbag in *Geier*, Oklahoma should not be allowed to require the verification of independent contractors.[115]

The last part of the court's preemption analysis addressed the Ninth Circuit case of *Chicanos Por La Causa v. Napolitano*.[116] In *Chicanos*, the court held that the Legal Arizona Workers Act (LAWA) was neither

106. *Id.* at 766–67.

107. *Id.* at 769.

108. *See id.* at 771. Judge Lucero argued that Section 7(B) is conflict preempted because making E-Verify mandatory would stand as an obstacle to the accomplishment of Congress goals in enacting IRCA. *Id.* at 768–70. He stated that Congress has concluded that I-9 "strikes the best balance between preventing employment of unauthorized workers, easing burdens on employers, and preventing employment discrimination." *Id.* at 768. Furthermore, Judge Lucero analogized mandating E-Verify to mandating airbags in *Geier*; Oklahoma should not be allowed to mandate the use of E-Verify because it is voluntary under federal law and mandating its use would restrict employers' choices. *Id.* at 769–70.

109. *Id.* at 767.

110. *Id.* at 769.

111. *Id.*

112. *Id.*

113. *Id.* at 770.

114. *Id.*

115. *Id.*

116. *Id.* at 770.

expressly nor implied preempted by IRCA or the IIRIRA.[117] Like the Oklahoma Act, LAWA was intended to combat illegal immigration by targeting employers who knowingly hire illegal immigrants.[118] The principal sanction of LAWA was the revocation of state business licenses.[119] The Arizona law also mandated the use of E-Verify.[120] The Tenth Circuit reasoned that Oklahoma's reliance on *Chicanos* was misplaced because the provision at issue in that case was a licensing law, and Oklahoma had not asserted that its law is a licensing law.[121] Most significantly, however, the Tenth Circuit opined that the Ninth Circuit's implied preemption holding was based largely on the Ninth Circuit's initial conclusion that LAWA fell within the savings clause of IRCA. [122] The Tenth Circuit expressed reservation with the ruling, stating it "is problematic because it implies that the presence of an express preemption provision precludes the possibility of implied preemption."[123] The court was "unpersuaded" by the Ninth Circuit's holding because its approach stood contrary to *Geier* and generally accepted implied preemption principles.[124]

Last, the court evaluated the remaining factors for granting a preliminary injunction.[125] It found that the plaintiffs would likely suffer irreparable harm absent a preliminary injunction as any monetary damages imposed would be unlikely to be recovered due to the government's sovereign immunity.[126] Additionally, the balance of equities tipped in the chambers' favor because an injunction would serve the public interest and Oklahoma does not have a public interest in enforcing a law that is likely unconstitutional.[127]

C. Concurrence

The concurring opinion, authored by Judge Kelly, offered an explanation as to why Section 7(B) was not conflict preempted.[128] Judge Kelly argued, despite E-Verify's voluntary use on the national scale, "it is not reasonable to assume that a mandatory program choice for state public contractors conflicts with Congressional purpose."[129] Judge Kelly opined

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117. Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 860–61 (9th Cir. 2009), *cert granted sub nom.* Chamber of Commerce v. Whiting, 130 S. Ct. 3498 (June 28, 2010) (No. 09-115). The court also held that LAWA did not violate the employers' rights to due process. *Id.* at 861.

118. *Id.* at 860.

119. *Id.*

120. *Id.*

121. *Edmondson*, 594 F.3d at 770.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* The plaintiffs would have had to demonstrate "a likelihood that they will suffer irreparable harm absent preliminary relief, that the balance of equities tips in their favor, and that the injunction is in the public interest." *Id.* (citing Attorney General v. Tyson Food, Inc. 565 F.3d 769, 776 (10th Cir. 2009)).

126. *Edmondson*, 594 F.3d at 770.

127. *Id.* at 771.

128. *Id.* (Kelly, J., concurring).

129. *Id.* at 772.

that Congress had foreseen the increased use of technology as evidenced by requiring E-Verify for federal contractors.[130] The concurrence concluded "choice is not an end in itself and no evidence suggests that federal standards concerning immigration and employment-verification will be compromised by E-Verify."[131]

D. Dissent

The dissent, authored by Judge Hartz, argued three points. First, the plaintiffs lacked standing to seek an injunction, as to Section 7(B), against the Attorney General because they failed to show an actual and imminent threat of injury traceable to him.[132] Second, the dissent contended that the TIA barred the chambers' Section 9 claim because the TIA bars injunctions against tax-withholding statutes, and Section 9 is a tax withholding statute.[133] Additionally, the dissent argued that it is as reasonable to infer that the purpose of Section 9 is to protect the integrity of the tax system as to infer its purpose is to enforce immigration law.[134] Third, Judge Hartz concurred with the other judges regarding the injunction of Section 7(C), but on narrower grounds.[135] He contended that reinstatement, back pay, costs, and attorney fees are not civil sanctions under IRCA, but rather, compensatory relief, which IRCA does not cover.[136] However, because Section 7(C) imposes other civil fines that do come under the scope of IRCA, the disagreement did not affect his conclusion.[137]

III. ANALYSIS

Part A of the analysis argues that the Tenth Circuit's decision in *Edmondson* was consistent with the three goals of IRCA: preventing employment of unauthorized workers, preventing employment discrimination, and minimizing disruption of business.[138] Specifically, Section 9, independent contractor obligations, conflicted with the goals of IRCA and was preempted; whereas Section 7(B), which mandates the use of E-Verify, does not conflict with the goals of IRCA, and therefore, the court was correct in holding that it was not preempted by federal law. Part B of the analysis contends that the *Edmondson* court more accurately and

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130. *Id.*
131. *Id.*
132. *Id.* (Hartz, J., concurring and dissenting).
133. *Id.* at 774.
134. *Id.* at 776–77. It is worth noting that Judge Hartz believed that the majority wrongly relied on the motive behind the enactment of the Oklahoma Act in arriving at their conclusion that Section 9 imposed an assessment and not a tax and therefore was outside of the scope of the TIA. *Id.* at 776. If more judges put aside motive in determining whether a state enactment imposed an assessment or a tax, more states could disguise efforts to control immigration as tax laws, which are immune from injunction. However, implied preemption principles would likely still bar many of these enactments.
135. *Id.* at 777.
136. *Id.*
137. *Id.*
138. *Id.* at 767 (majority opinion).

faithfully applied the principles of implied preemption than did the Ninth Circuit in *Chicanos*. The Ninth Circuit largely ignored the implied preemption framework articulated in *Geier* by failing to place appropriate weight on the goals of IRCA. Finally, Part C of the analysis discusses the possible implications of the circuit courts' decisions on state and federal immigration laws, and the soon to be issued Supreme Court ruling on the constitutionality of LAWA.

A. Edmondson*: True to the Goals of IRCA*

When Congress enacted IRCA it sought to delicately balance three goals: preventing employment of unauthorized workers, preventing employment discrimination, and preventing undue disruption of business.[139] In *Edmondson*, the Tenth Circuit carefully considered each of these goals in arriving at its decision that Section 9 was conflict preempted, while Section 7(B) was not. The result was an informed holding that demonstrated a superior approach to immigration and employment that was faithful to Congressional intent.

1. Section 9 Was Conflict Preempted

The court properly concluded that Section 9, which requires employers to verify the worker authorization of independent contractors, was conflict preempted. As the defendants argued, both the Oklahoma Act and IRCA share a common goal of preventing unauthorized employment.[140] However, although requiring employers to verify the work eligibility of independent contractors would potentially further the goal of preventing unauthorized workers, Section 9 runs completely counter to the other two avowed goals of IRCA: preventing the disruption of business and minimizing the possibility of employment discrimination.

The construction industry provides an apt example. In order to complete a construction project, a general contractor (employer) will often hire independent contractors to perform work that the general contractor does not specialize in.[141] By requiring the general contractor to verify the work authorization of each independent contractor, the hiring process would slow considerably. Either individuals would have to be taken away from their normal employment duties or the employer would need to hire additional employees to verify the work authorization of independent contractors. Either option results in the disruption of busi-

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139. *Id.*

140. *Edmondson*, 594 F.3d at 767 (citing Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 379 (2000)).

141. *See* Kent W. Collier, Comment, *The Nuts and Bolts of Bankruptcy, Trust Funds, and the Construction Industry: Building a Solution for Subcontractors "Nailed" with an Unpaid Bill*, 21 EMORY BANKR. DEV. J. 623, 624 (2005). The terms "subcontractor" and "independent contractor" are often used interchangeably. *See, e.g.*, David F. Johnson, *Employers' Liability for Independent Contractors' Injuries*, 52 BAYLOR L. REV. 1, 19–20 (2000).

ness—falling behind schedule and paying additional employees both result in increased costs for the employer.[142]

In order to avoid this disruption of business, employers will likely resort to hiring those they know are authorized to work.[143] Although preventing the hiring of unauthorized aliens is one of the goals of IRCA, this objective comes with an increased risk of employment discrimination. In drafting IRCA, Congress took great pains to ensure that the new regulatory scheme did not increase discrimination.[144] For example, IRCA explicitly prohibits discrimination on the basis of citizenship status or national origin,[145] and if a court finds by a preponderance of the evidence that an employer has engaged in a discriminatory practice, the employer may be subject to fines ranging from $100 to $10,000 for each act of discrimination.[146] IRCA, therefore, imposes similar liability for hiring unauthorized workers and discriminating against authorized aliens.[147] In contrast, Section 9 and the Oklahoma Act do not contain a provision imposing liability on those who discriminate against authorized aliens.[148] In and of itself, the failure to incorporate an anti-discrimination provision does not necessarily mean that Section 9 conflicts with IRCA; however, by requiring the verification of independent contractors, Section 9 potentially exposes employers to federal liability as they strive to comply with the additional state requirement.[149] Surely, federal liability qualifies as a disruption of business.

In *Edmondson*, the court downplayed the foregoing argument by noting that, in order to incur federal liability, an employer must act with a specific intent to discriminate.[150] Under Section 9, this possibility is not far-fetched. For example, in many areas of business, contracts are awarded through the use of a bidding system.[151] Typically, in this system, the lowest bidder is awarded the contract.[152] An employer would have a strong incentive under Section 9 to award the contract not necessarily to the lowest bidder, but to the independent contractor whose work eligibility could most easily be verified. It is not hard to imagine that under this

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142. These employers would also need to confirm the work authorization of new hires, which would further disrupt business.

143. Lozano v. City of Hazleton, 620 F.3d 170, 217 (3d Cir. 2010) ("While drafting IRCA, Congress heard testimony that imposing employer sanctions would create economic incentives for employers to discriminate against workers who appeared to be of foreign origin.").

144. Patrick S. Cunningham, Comment, *The Legal Arizona Worker's Act: A Threat to Federal Supremacy Over Immigration?*, 42 ARIZ. STATE L.J. 411, 416 (2010).

145. *Id.* at 417.

146. *Id.*

147. *Id.* The penalties for hiring an unauthorized worker range from $250 to $10,000. *Id.* at 415.

148. Chamber of Commerce v. Edmondson, 594 F.3d 742, 754–55 (10th Cir. 2010).

149. *Id.* at 769.

150. *Id.*

151. *See, e.g.*, Janine McPeters Murphy, Note, *Promissory Estoppel: Subcontractors' Liability in Construction Bidding Cases*, 63 N.C. L. REV. 387, 391 (1985).

152. *See, e.g.*, *id.*

system, independent contracting companies owned and staffed by minorities or recent immigrants would have less opportunity to win a contract than a white-owned business.[153] In the alternative, if the employer opted for withholding taxes instead of verifying eligibility, this again would disrupt business by creating a larger financial burden on the employer—as the employer would still need to pay the contractor their original compensation and simultaneously set aside additional monies for the tax withholding. Additionally, Section 9 could lead to increased litigation between general contractors and subcontractors regarding contract disputes to determine which entity bore the financial burden for the withholding. Because Section 9 would significantly disrupt the balance of goals Congress sought to achieve in enacting IRCA, the court correctly concluded Section 9 was too large an obstacle and was therefore conflict preempted.[154]

2. Section 7(B) Was Not Impliedly Preempted

The Tenth Circuit's conclusion that Section 7(B), which requires the use of E-Verify, was not conflict preempted by IRCA gave proper weight to state sovereignty while not disturbing the goals of IRCA. The Third Circuit, in *Lozano,* and Judge Lucero concluded otherwise.[155] Yet, their arguments are less persuasive because state mandated use of E-Verify does not stand as an obstacle to the accomplishment of the goals of IRCA.[156]

a. E-Verify Will Not Disrupt Business

Mandating the use of E-Verify will not disrupt business. One of Congress's goals in establishing E-Verify was to make the work authorization of employees more efficient.[157] To verify an employee's eligibility using E-Verify, all the employer must do is electronically submit the employee's information over the internet and wait for a confirmation.[158] If the employee information matches the government records, the government instantly notifies the employer of the employee's eligibility.[159] This process certainly does not require more time than examining docu-

153. Johnson, *supra* note 22, at 1069 ("A primary reason for the opposition to the employer sanctions scheme [of IRCA] was the concern that some employers, when threatened with civil and criminal sanctions for hiring undocumented aliens, would discriminate against those applicants who share a number of characteristics with those immigrant groups most commonly perceived as illegal.").

154. *Edmondson*, 594 F.3d at 769.

155. Lozano v. City of Hazleton, 620 F.3d 170, 210 (3d Cir. 2010); *Edmondson*, 594 F.3d at 768–69.

156. At issue in *Lozano* was a Pennsylvania town's licensing law that sought to reduce illegal immigration through, inter alia, the mandatory use of E-Verify. 620 F.3d at 177–79.

157. *Edmondson*, 594 F.3d at 752.

158. *Id.*

159. *Id.*

ments under the I-9 system.[160] If, on the other hand, the employer receives a non-confirmation, it is required to do nothing aside from alerting the employee of the non-confirmation.[161] In fact, the employer is mandated to take no action against the employee pending an appeal of the non-confirmation, which must be initiated by the employee.[162] Additionally, a recent study of E-Verify conducted by an independent research company, Westat, found that "employers are generally satisfied with the program and feel it is non-burdensome."[163]

The Third Circuit contended that mandating the use of E-Verify would increase costs to businesses in the form of set-up and training expenses.[164] This additional burden is *de minimus*. First, the vast majority of businesses have computers and access to the internet. Second, it is estimated that the average implementation cost is $125 and the average yearly cost is under $750, with three-fourths of the employers spending less than $100.[165] The burden imposed by mandating E-Verify does not pose a tangible obstacle to the goal of minimizing the disruption of business.

b. E-Verify Will Not Cause Increased Employment Discrimination

The mandatory use of E-Verify will not lead to increased employment discrimination. E-Verify provides sufficient safeguards against discrimination through its appeals process and as evidenced by the fact that Congress mandates its use for federal contractors.[166] If the employer receives a tentative non-conformation, the employee is notified and then has eight business days to contest the tentative non-confirmation.[167] During this period, the employer may not take any adverse action against the employee.[168] Furthermore, because the employer is shielded from liability during this period, there is no impetus for it to discriminate against the employee.[169]

The *Lozano* court argued that E-Verify's unreliability will lead to increased discrimination.[170] The decision cites a 2007 congressional

160. *Id.* at 751.

161. *Id.* at 752.

162. *Id.*

163. U.S. CITIZENSHIP AND IMMIGRATION SERVS., WESTAT EVALUATION OF THE E-VERIFY PROGRAM: USCIS SYNOPSIS OF KEY FINDINGS AND PROGRAM IMPLICATIONS 3 (2010), *available at* http://www.uscis.gov/USCIS/Native%20Docs/Westat%20Evaluation%20of%20the%20E-Verify%20Program.pdf.

164. Lozano v. City of Hazleton, 620 F.3d 170, 215 (3d Cir. 2010).

165. Shelley, *supra* note 1, at 623–24.

166. Exec. Order No. 13,465, 73 Fed Reg. 33,285 (June 6, 2008).

167. *Edmondson*, 594 F.3d at 752 (stating that the appeals period may also extend up to ten business days).

168. *Id.*

169. *Id.*

170. Lozano v. City of Hazelton, 620 F.3d 170, 214–16 (3d Cir. 2010).

study that found foreign-born workers are thirty times more likely to receive tentative non-confirmations than employees born in the United States.[171] Tentative non-confirmations, however, do not affect the final determination of eligibility,[172] and because the employer may not take action during the appeals period, this non-confirmation will not result in discrimination. Indeed, Congress has repeatedly refused to mandate the use of E-Verify for the vast majority of employers,[173] but nonetheless, many businesses that contract with the federal government are required to use the system.[174] In 2008, President Bush issued an executive order directing all federal departments and agencies to require federal contractors and subcontractors to verify the work authorization of employees performing work under qualifying federal contracts.[175] The particulars of the order are complex, but in short, all federal contractors and subcontractors are required to use E-Verify with the following exceptions: contracts for fewer than 120 days; contracts less than $100,000; contracts where all work is performed outside of the United States; and commercially off-the-shelf items and related services, which includes nearly all food and agricultural products.[176]

President Obama has pledged his support to implement this executive order[177] and has committed significant budget funds toward improving and expanding E-Verify.[178] There also appears to be bipartisan support in Congress for mandating the use of E-Verify for federal contractors and subcontractors.[179] As a proportion of the total national work force, federal contractors may not amount to much, but between January 2011 and the end of March 2011 the list of federal contractors with five or more employees enrolled in E-Verify totaled nearly 2,500 pages.[180] By

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171. *Id.* at 215.

172. *See Edmondson*, 594 F.3d at 752.

173. *Id.* at 753.

174. *Id.*

175. Exec. Order No. 13,465, 73 Fed Reg. 33,285 (June 6, 2008). The executive order took effect September 8, 2009. "Federal contractors and subcontractors will be required to begin using the U.S. Citizenship and Immigration Services' E-Verify system starting September 8, 2009, to verify their employees' eligibility to legally work in the United States." *Federal Contractors Required to Use E-Verify System*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., http://www.uscis.gov/USCIS/Office%20of%20Communications/Press%20Releases/FY%2009/September%202009/far-rule-1-sep-09.pdf (last updated Jun. 4, 2009).

176. Exec. Order No. 13,465, 73 Fed Reg. 33,285 (June 6, 2008).

177. *Secretary Napolitano Strengthens Employment Verification with Administration's Commitment to E-Verify*, U.S. DEP'T OF HOMELAND SEC. (July 8, 2009), http://www.dhs.gov/ynews/releases/pr_1247063976814.shtm.

178. In 2010, the Presidential Budget contained $110 million for E-Verify. OFFICE OF MGMT. & BUDGET, A NEW ERA OF RESPONSIBILITY: RENEWING AMERICA'S PROMISE 72 (2009). The 2011 budget has allocated $137 million for E-Verify and a similar work authorization program. OFFICE OF MGMT. & BUDGET, BUDGET OF THE U.S. GOV'T 82 (2010).

179. *See* Spencer S. Hsu, *Obama Revives Bush Idea to Catch Illegal Workers*, WASH. POST, July 9, 2009, A4.

180. *E-Verify Federal Contractors List "Updated"*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Aug. 30, 2010), *available at* http://www.uscis.gov/USCIS/Verification/E-Verify/E-Verify%20from%20Controlled%20Vocabulary/E-VerifyFedContrListandQueryVol.pdf.

mandating the use of E-Verify for federal contractors, the federal government has implicitly, yet strongly, rejected the argument that the system is an obstacle to limiting employment discrimination. Last, it is important to note that Congress has repeatedly extended E-Verify and has expanded its availability to all 50 states.[181] It seems doubtful that Congress and the Executive Branch would make such a concerted effort to proliferate the use of E-Verify if they believed that E-Verify conflicts with the goals of IRCA.

The federal government actively pursues affirmative action programs designed to increase minority participation in federal business.[182] Under the Small Business Act (SBA), the federal government seeks to increase the number of federal contracts awarded to small businesses "owned and controlled by socially and economically disadvantaged individuals."[183] The act defines socially disadvantaged individuals as those individuals who "have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities."[184] In order to increase the participation of disadvantaged businesses in federal contracting, the SBA set a "government-wide goal for the minimum participation of disadvantaged business enterprises . . . at five percent of the value of all federal government prime contract and subcontract awards in a given year."[185] In addition to this government-wide goal, the SBA requires that each federal agency establish an annual goal that realistically reflects the maximum potential percentage of contracts that could be awarded to disadvantaged businesses.[186]

It is paradoxical, if not utterly illogical, that the federal government would promote the participation of minority owned businesses in federal contracting through the SBA, yet, it would discourage the hiring of minority employees through the mandatory use of E-Verify for federal contractors. Potentially, a minority owned business that benefits from the SBA could then be required to discriminate against minority workers using E-Verify. Such a contradictory situation can only lead to one conclusion; the use of E-Verify does not conflict with IRCA's goal of reducing employment discrimination.

c. E-Verify Will Help Prevent Unauthorized Workers

States requiring the use of E-Verify will likely further the goal of preventing unauthorized workers more effectively than the I-9 system.

181. Lozano v. City of Hazleton, 620 F.3d 170, 200 (3d Cir. 2010).
182. Brian C. Eades, Casenote, *Affirmative Action: The United States Supreme Court Goes Color-Blind:* Adarand Constructors, Inc. v. Pena, 29 CREIGHTON L. REV. 771, 771 (1996).
183. *Id.* at 773 (quoting 15 U.S.C. § 637(a)(6) (1995)).
184. Eades, *supra* note 182, at 773 (quoting 15 U.S.C. § 637(a)(5) (1995)).
185. Eades, *supra* note 182, at 773–74.
186. *Id.* at 774.

One of the goals of Congress in creating E-Verify was to create a system that would more accurately verify an employee's eligibility for employment.[187] As discussed above, E-Verify is not perfect, but it does have advantages over I-9 for determining employee eligibility. E-Verify has "reduced unauthorized employment among participating employers by permitting employers to determine whether the information provided by employees on I-9 forms is consistent with the information on [Social Security Administration] and [Department of Homeland Security] databases."[188] Without this additional verification method, employees can easily forge documents because employers have no way of determining their authenticity aside from their outward appearance.[189] Furthermore, one study found that E-Verify returns a tentative non-confirmation for approximately ten percent of the requests.[190] Out of the ten percent that received tentative non-confirmations, few appealed the determination.[191] Of course, the failure to appeal could be due in part to factors aside from the employee's work authorization status, but at least anecdotally, this statistic would indicate the system is preventing unauthorized workers.

d. Section 7(B) is Not Conflict Preempted According to *Geier*

The conclusion that Section 7(B) was not conflict preempted is in accordance with the preemption analysis in *Geier*. In that case, DOT's decision not to require airbags was part of a deliberate and careful regulatory scheme.[192] DOT even considered an "all airbag" standard, but opted for a "*gradual* phase-in of passive restraints."[193] The agency found that giving automakers a choice of several restraints was best in the short-term and the long-term to accomplish its goals.[194] DOT stated that allowing a choice in passive restraint systems "would help develop data on comparative effectiveness, would allow the industry to overcome the safety problems and high production costs associated with airbags, and would facilitate the development of alternative, cheaper, and safer passive restraint systems. And it would build public confidence."[195] In short, "safety would best be promoted if manufacturers installed alternative protection systems in their fleets rather than one particular system in every car."[196]

At first glance, the Third Circuit's and Judge Lucero's analogy appears sound: refusing to allow employers to choose their work verifica-

187. Chamber of Commerce v. Edmondson, 594 F.3d 742, 752 (10th Cir. 2010).

188. Lozano v. City of Hazleton, 620 F.3d 170, 214-15 (3d Cir. 2010) (quoting U.S. Citizenship and Immigration Servs., *Report to Congress on the Basic Pilot Program*, June 2004, at 3).

189. *Edmondson*, 594 F.3d at 751.

190. Shelley, *supra* note 1, at 631.

191. *Id.*

192. Geier v. Am. Honda Motor Co., 529 U.S. 861, 875 (2000).

193. *Id.* at 879.

194. *Id.* at 878–79.

195. *Id.* at 879 (citations omitted).

196. *Id.* at 881 (citing Brief for United States as Amicus Curiae at 25 (No. 98-1811)).

tion method is the same as negating automakers' passive restraint choice by requiring airbags. However, the voluntariness of E-Verify was not due to calculated assessments like in *Geier*. For example, Congress made no equivalent statement that the goals of IRCA would best be promoted by a choice of verification systems instead of one.[197] To the contrary, Congress strongly encouraged the use of E-Verify by expanding its duration and extending its availability to all fifty states.[198] There is also a strong textual argument against conflict preemption. Congress could have forbid states from making E-Verify mandatory, as it did with regard to state civil and criminal penalties under IRCA's express preemption provision, but opted not to do so.[199] Because E-Verify furthers the goals of IRCA, it does not raise significant conflict preemption concerns.

B. IRCA, Geier, *and the Circuit Split*

In *Edmondson,* the Tenth Circuit more accurately and faithfully applied the principles of implied preemption than did the Ninth Circuit in *Chicanos*. There, the Ninth Circuit concluded that LAWA was not expressly preempted because, as a licensing law, it fell within the savings clause of IRCA.[200] The court determined that the mandatory use of E-Verify and LAWA's potentially harsh sanctions[201] were not impliedly preempted because they were not an obstacle to the accomplishment of the goals of IRCA.[202] The *Edmondson* court distinguished the two cases, because at issue in *Chicanos* was a licensing law and the Oklahoma Act was not a licensing law. Nonetheless, the Tenth Circuit opined that it found the Ninth Circuit's reasoning unpersuasive. After concluding that LAWA was not expressly preempted, and then by conducting a cursory implied preemption analysis, the *Chicanos* approach suggested that the presence of an express preemption provision or savings clause prevents the operation of implied preemption principles. This inferior approach stands in opposition to the approach taken in *Geier*, where the Supreme

197. *See* Chamber of Commerce v. Edmondson, 594 F.3d 742, 752 (10th Cir. 2010).

198. Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 867 (9th Cir. 2009), *cert granted sub nom.* Chamber of Commerce v. Whiting, 130 S. Ct. 3498 (June 28, 2010) (No. 09-115).

199. *Id.*

200. *Id.* at 864. The savings clause states that IRCA preempts all state sanctions "other than through licensing and similar laws." *Id.* (quoting 8 U.S.C. § 1324a(h)(2) (2006)). Furthermore, the Court found that the savings clause should not have been narrowly interpreted because the power to regulate the employment of unauthorized aliens has traditionally been left to the states. *Chicanos*, 558 F.3d at 864–65. This presumption against preemption in the area of employment of unauthorized aliens is debatable, but nonetheless the existence of a presumption against preemption does not negate the need to conduct a robust implied preemption analysis. *Edmondson*, 594 F.3d at 768–69 (Lucero, J., dissenting).

201. LAWA imposes a graduated series of sanctions for violations. *Chicanos*, 558 F.3d at 862. The first infraction "requires the employer to terminate the employment of all unauthorized aliens, file quarterly reports of all new hires for a probationary period, and file an affidavit stating that it terminated all unauthorized aliens and will not intentionally or knowingly hire any others." *Id.* If the employer violates the act during this probationary period the employer's business license is permanently revoked. *Id.*

202. *Id.* at 866.

Court conducted a thorough conflict preemption analysis after concluding that the claim was not expressly preempted.

In *Geier*, the Court repeatedly emphasized that the existence of a savings clause "does *not* bar the ordinary working of conflict preemption principles."[203] After concluding that the express preemption provision of IRCA saved LAWA, the Ninth Circuit appeared to largely ignore this maxim of federal preemption doctrine. In concluding that LAWA was not conflict preempted, the Ninth Circuit downplayed the potential for conflict between the Arizona law and IRCA by stating "a hypothetical situation in which an employer may be subject to conflicting rulings from state and federal tribunals on the basis of the same hiring decision . . . does not provide an adequate basis to sustain a facial challenge."[204] The court concluded that, because a claim had not yet been brought under LAWA, there was no record to demonstrate the effect of the act on an employer. Therefore, the argument was essentially speculative and did not create an implied conflict.[205]

The Ninth Circuit's wait-and-see approach runs contrary to the approach taken in *Edmondson*. The *Edmondson* court concluded that Section 9 was conflict preempted and that the potential risk of increased liability was enough for an injunction when the law "upsets Congress' carefully constructed balance by interfering with its chosen methods."[206] IRCA exhaustively details a specialized regulatory scheme, and clearly, sanctions are an important tool in the scheme.[207] Because it is clear from the text of the legislation that LAWA's sanctions stand as an obstacle to the goals Congress sought to achieve in creating IRCA's sanctions, it is not necessary to wait and see the effects of LAWA prior to deciding whether it is conflict preempted.

The Tenth Circuit's implied preemption analysis was also superior because it placed appropriate weight on the goals of IRCA in arriving at the conclusion that Section 9 stood as an obstacle to the implementation of the regulatory scheme and was therefore conflict preempted. In enacting IRCA, Congress manifested a clear intent to create a comprehensive and overarching regulatory scheme and corresponding civil and criminal penalties.[208] Even assuming that LAWA did fall under the savings clause, the penalties imposed run counter to the enumerated penalties of IRCA, and therefore, there was a considerable likelihood that LAWA could expose an employer to federal liability by following the letter of Arizona law. For example, by filing quarterly reports on all new hires during the probationary period, an employer could come in conflict with the rule

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203. Geier v. Am. Honda Motor Co., 529 U.S. 861, 869 (2000).
204. *Chicanos*, 558 F.3d at 856.
205. *Id.* at 867.
206. Chamber of Commerce v. Edmondson, 594 F.3d 742, 769 (10th Cir. 2010).
207. *Id.* at 751.
208. *See* Lozano v. City of Hazleton, 620 F.3d 170, 210–12 (3d Cir. 2010).

under IRCA preventing employers from asking employees for additional documentation. Additionally, having an employer file an affidavit stating he has fired all illegal employees, and that he will not hire other illegal workers on pain of permanent loss of a business license, could likely lead to firing and hiring decisions based on race or national origin, which is obviously a discriminatory practice in violation of the goals of IRCA and other federal laws. Furthermore, in signing LAWA, then Arizona Governor Napolitano noted that it was problematic that the bill lacked "an antidiscrimination clause to ensure that it is enforced in a fair and nondiscriminatory manner."[209]

Besides potential federal liability, LAWA places other burdens on business owners. Minor burdens include asking employees for additional documentation and requiring employers to sign affidavits. More significantly, the Ninth Circuit wrongly discounted the plaintiffs' argument that LAWA was impliedly preempted because the permanent revocation of a business license is far more severe than IRCA sanctions and therefore it conflicts with IRCA's goals.[210] Other licensing laws, with lesser penalties, may not interfere with the goals of IRCA's sanctioning scheme, but LAWA, by permanently revoking a business's license, imposes the ultimate burden on employers: the loss of livelihood. In finding Section 9 of the Oklahoma Act conflict preempted, the Tenth Circuit placed great weight on the employer's burden to verify the work authorization of independent contractors.[211] The *Edmondson* court stated that the risk of increased employee discrimination and employer burdens under "Section 9 . . . upsets Congress' carefully constructed balance by interfering with its chosen methods."[212] Clearly, both these dangers are present in LAWA.

These types of situations raise serious conflict preemption concerns, yet the *Chicanos* court limited its conflict preemption analysis and invoked *Geier* only to analyze the mandatory use of E-Verify,[213] which is not conflict preempted. In *Geier*, the Court took into account all of DOT's goals in enacting FMVSS 208, but in *Chicanos* the Ninth Circuit only considered the goal of preventing unauthorized workers. Ignoring the goals of preventing employment discrimination and minimizing the burden on employers resulted in an analysis that was overly simplistic. Having wrongly ignored the two foregoing goals, the court's analysis then flowed logically—LAWA was not expressly preempted based on the savings clause as it was a licensing law, and LAWA did not stand as an obstacle to accomplishing IRCA's goal of preventing unauthorized

209. Pratheepan Gulasekaram & Rose Cuison Villazor, *Sanctuary Policies & Immigration Federalism: A Dialectic Analysis*, 55 WAYNE L. REV. 1683, 1716 (2009).

210. *See Chicanos*, 558 F.3d at 867.

211. *Edmondson*, 594 F.3d at 769.

212. *Id.*

213. *Chicanos*, 558 F.3d at 866–67.

workers, and therefore, it was not impliedly preempted. This contrived conclusion, however, contradicts long established federal preemption jurisprudence that "has repeatedly declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law . . . ."[214] And it is undisputed that IRCA is a "careful regulatory scheme." Unless the courts undertake a meaningful implied preemption analysis subsequent to an express preemption analysis, states and municipalities will be able to essentially supplement or bypass IRCA entirely by labeling employment verification laws as licensing laws in order to fall within the savings clause.[215]

C. *Edmondson*, *Chicanos*, and *Lozano*: *The Implications for State Immigration Laws and Federal Lawmaking*

By enacting LAWA, then Governor Napolitano hoped to pressure the federal government into addressing immigration through more effective legislation.[216] It is argued that by enacting their own immigration laws states will pressure Congress to reform federal immigration laws, and this reform will lead to greater and much needed state and federal cooperation on immigration.[217] Additionally, because the federal courts have upheld these two immigration laws, at least in part, this will likely motivate other states to pass similar legislation. Some municipalities and states have already enacted similar legislation, but with mixed results.[218] The longer Congress waits before enacting new, improved legislation the more challenges to state immigration laws will be decided in the courts and the more varied these laws will become.

As more states enact new work authorization statutes, it raises an interesting question. Will Congress base new legislation on successful state statutes, or will courts strip away so much of each state law that none will prove to be effective? In the past the courts have allowed states to operate as small laboratories for developing new and innovative solutions to the problems they face.[219] The courts, however, are resistant to allow states to continue to function as laboratories in areas of traditionally federal law.[220] One of the dangers of allowing states to enact their own immigration laws is that the variety of enforcement approaches taken could result in a "thousand borders," which would certainly be problematic.[221] For example, varied state work authorization laws could

214. *Geier*, 529 U.S. at 870.
215. *See* Shelley, *supra* note 1, at 616–17.
216. *Id.* at 633.
217. *Id.* at 637.
218. *Id.* at 632–33.
219. *See* Gonzales v. Raich, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting).
220. *See id.* (majority opinion) (holding that regulation of marijuana under the Controlled Substances Act is solely within the power of the federal government because of the Commerce Clause).
221. Nchimunya D. Ndulo, *State Employer Sanctions, Laws and the Federal Preemption Doctrine: The Legal Arizona Workers Act Revisited*, 18 CORNELL J.L. & PUB. POL'Y 849, 866

make it very difficult for nationwide businesses to comply in their hiring practices. This could pose a significant disruption to businesses as they face more and more complex immigration laws with potentially harsh penalties for non-compliance. Also, approaches taken by states to combat illegal immigration could result in racial profiling.[222] Federal immigration officers receive extensive training, including courses in immigration and nationality law, but many states lack the funds necessary to provide state agencies with similar training.[223] This lack of training may force state officers to rely on racial profiling to enforce state laws, and undoubtedly in communities where anti-immigrant sentiment already exists, this practice will be exacerbated.[224] Therefore, the courts' determination as to who has the power to regulate work authorization, the states or the federal government, is important to the future of state legislation in the area of immigration.

If the Supreme Court were to follow the implied preemption approach taken in *Chicanos*, which narrowly viewed obstacle preemption in favor of more emphasis on express preemption, there could be significant consequences as a result in this shift of the federal preemption paradigm.[225] For example, if more emphasis is placed on express preemption it may force more positive law making at the federal level.[226] Congress will be required to put more thought into considering the burdens and benefits of a particular piece of legislation if it intends the law to preempt contrary state enactments.[227] One drawback to this approach is Congress already conducts extensive hearings when crafting policy, and spending more time and money on any one piece of legislation will draw resources from other matters. Furthermore, it is not always feasible, or even possible, to predict all the consequences of a law. Therefore, it will be difficult, in some cases impossible, to draft express preemption provisions that account for all possibilities.

Another possible consequence of increased reliance on express preemption is that states would then be free to enact worker authorization statutes where employers are strictly liable for hiring unauthorized workers. Without implied preemption, states could simply label their worker authorization laws as licensing laws, and then they would be free to impose any penalties they felt appropriate. Penalties could range from revocation of business licenses, like in LAWA, to increased costs for license renewal for those who have hired unauthorized workers in the past.

(2009) (quoting Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 995 (2004)).

222. Ndulo, *supra* note 221, at 879.
223. *Id.*
224. *Id.*
225. Gulasekaram & Villazor, *supra* note 209, at 1714.
226. *Id.* at 1713–14.
227. *Id.* at 1723.

Without the "reasonableness" safe harbor of IRCA, employers faced with a law based on strict liability would surely discriminate against those who appear Hispanic, or who speak English as a second language.[228] In addition to this increased motivation to discriminate, employers would also face a greater disruption of business. This disruption would occur not only through the imposition of penalties, but as illegal immigration and the use of fraudulent documents continue to rise, it is exceedingly difficult for an employer to be absolutely certain that it is hiring an authorized worker. When faced with a strict liability offense, employers will surely use all means available to avoid penalties, including discrimination and extending additional resources to verify the work eligibility of employees. Additionally, if the Court was to narrowly interpret conflict preemption, it would represent a shift in the balance of power between states and the federal government; states in the absence of a detailed express preemption provision would be free to craft their own immigration laws, which would likely vary considerably from state to state.[229]

IV. CONCLUSION

Chicanos and *Edmondson* reveal significantly different approaches to federal preemption. *Edmondson* faithfully applied accepted principles of federal preemption, balancing states' rights and the goals of IRCA. Alternatively, *Chicanos* was not consistent with federal preemption precedent, and represented a shift toward increased reliance on express preemption language. The Supreme Court granted certiorari to *Chicanos*,[230] and oral arguments were heard on December 8, 2010.[231] The Court's decision will surely have long standing consequences for immigration and employment in the United States, and perhaps even for preemption doctrine more generally.

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228. Johnson, *supra* note 22, at 1069 ("Although undocumented aliens come from many countries, the public generally identifies illegal immigrants as being Mexican or aliens from other Latin American countries. Due to the porosity of the Mexican border, Mexican aliens find it relatively easy to enter the United States clandestinely. As a result, people who share a number of characteristics with this group, but who are in the United States legally, have a potentially serious problem.").

229. *See id.* at 1108–09.

230. Chamber of Commerce v. Whiting, 130 S. Ct. 3498 (June 28, 2010) (No. 09-115) (granting certiorari).

231. Lyle Denniston, *On Aliens, Arizona May Win—For Now*, SCOTUSBLOG (Dec. 8, 2010, 1:56 PM), http://www.scotusblog.com/?p=110330.

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INCOMPLETE APPROACH, INCORRECT OUTCOME: QUALIFIED IMMUNITY, VIEWPOINT DISCRIMINATION, AND THE TROUBLING IMPLICATIONS OF *WEISE V. CASPER*

INTRODUCTION

The public policy and political rhetoric of the last several decades has reflected a societal interest in efficient government and streamlined state action.[1] Partly as a result of such concerns, the Supreme Court developed the doctrine of qualified immunity.[2] Because constant litigation could significantly burden public officials, qualified immunity was developed to give lower-level public officials a line of defense against lawsuits stemming from their official actions.[3] Over time, this doctrine has evolved through judicial efforts to balance public efficiency with the right to private recompense.[4]

Qualified immunity is a recently developed product of judicial reasoning; freedom of expression, on the contrary, has been a foundational element of constitutional democracy in the United States. As legal and political authorities have routinely noted, the First Amendment's guarantee of free speech has been a treasured and revered cornerstone of America's public discourse.[5] Whereas courts have added a litany of exceptions and caveats to other constitutional guarantees,[6] the First Amendment's Free Speech Clause has remained sacrosanct and largely untouched.[7]

Complications arise, however, when public officials claim qualified immunity for acts that seemingly run contrary to constitutional guaran-

1. *See, e.g.*, Ronald Reagan, A Time for Choosing (Oct. 27, 1964), *available at* http://www.nationalcenter.org/ReaganChoosing1964.html; REPUBLICAN CONTRACT WITH AMERICA, http://www.house.gov/house/Contract/CONTRACT.html (last visited Mar. 5, 2011).

2. *See* Scheuer v. Rhodes, 416 U.S. 232, 241 (1974) ("[I]t is important to note, even at the outset, that one policy consideration seems to pervade the analysis: the public interest requires decisions and action to enforce laws for the protection of the public."); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (noting that actions for damages against public officers involve social costs including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office"); Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (warning that unfettered litigation against public officials "would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties").

3. *Harlow*, 457 U.S. at 807 (emphasizing the importance of "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority" (quoting Butz v. Economou, 438 U.S. 478, 506 (1978))).

4. *See id.* at 813–14.

5. *See, e.g.*, Wilson Huhn, *Compelling Lessons in the First Amendment*, 19 CONST. COMMENT. 795, 798–809 (2002) (reviewing MICHAEL KENT CURTIS, FREE SPEECH, THE PEOPLE'S DARLING PRIVILEGE: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000)).

6. *See, e.g.*, 68 AM. JUR. 2D *Searches and Seizures* § 49 (2010) (listing numerous exceptions to the Fourth Amendment's prohibition on search and seizure in absence of a warrant).

7. *See* David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1701–02 (1991) (tracing the developments in First Amendment interpretation).

tees.[8] In *Weise v. Casper*,[9] the Tenth Circuit Court of Appeals considered a unique factual scenario featuring a clash between First Amendment rights and executive volunteers' claims of qualified immunity.[10] Utilizing an abridged legal analysis, the *Weise* court held that executive officials could eject a citizen from a public speech solely on the basis of that citizen's prior expression on an issue of public concern.[11]

This Comment argues that the Tenth Circuit employed incomplete legal analyses in deciding the qualified immunity and viewpoint discrimination questions in *Weise*. As a result of this incomplete approach, the Tenth Circuit's decision raises troubling concerns for public accountability, active citizenship, and constitutional development. Part I examines the evolution of the qualified immunity standard and describes the modern test used to evaluate immunity claims by public officials. Part II analyzes federal law controlling free speech and viewpoint discrimination issues. Part III outlines the Tenth Circuit's decision in *Weise* and focuses on the majority's legal approach to the qualified immunity and viewpoint discrimination issues present in the dispute. Part IV argues that the *Weise* court used an incomplete approach in evaluating the defendants' qualified immunity claims, and employed a similarly incomplete approach in evaluating the plaintiffs' freedom of expression arguments. Ultimately, the Tenth Circuit issued a ruling with troubling implications for civil rights litigants, politically expressive citizens, and constitutional development.

I. THE QUALIFIED IMMUNITY STANDARD

A. The Origins of Qualified Immunity

A public official's immunity from suit is a concept that finds roots in English common law.[12] The King originally held absolute immunity because English society widely accepted that a citizen could not bring an action against the crown in a court licensed by the King.[13] Eventually, English law evolved to allow suits against the King by royal consent.[14] Absolute immunity for English judges was similarly a feature of English

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8. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389–90 (1971); *see also Harlow*, 457 U.S. at 819.

9. 593 F.3d 1163 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 7.

10. *Id.* at 1165–66.

11. *Id.* at 1170.

12. Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2–4 (1963); Adam L. Littman, *A Second Line of Defense for Public Officials Asserting Qualified Immunity: What "Extraordinary Circumstances" Prevent Officials from Knowing the Law Governing their Conduct?*, 41 SUFFOLK U. L. REV. 645, 648 (2008); Gilbert Sison, *A King No More: The Impact of the Pinochet Decision on the Doctrine of Head of State Immunity*, 78 WASH. U. L. Q. 1583, 1584–1588 (2000).

13. *See* Scheuer v. Rhodes, 416 U.S. 232, 240 (1974); Jaffe, *supra* note 12, at 2, 4.

14. *See* Jaffe, *supra* note 12, at 3 (noting that petitions of right requiring the King's consent allowed English citizens to seek relief against the Crown); *see also* Littman, *supra* note 12, at 648.

common law.[15] Finally—though it involved a long and protracted struggle—the English Bill of Rights of 1689 granted members of Parliament absolute immunity from criminal or civil action related to their official speech and actions.[16]

Such were the norms that dwelled within the minds of America's founding fathers. In the United States, absolute immunity for Congressmen and Senators has constitutional roots in the Speech or Debate Clause, which protects all members of Congress from official reprisal for their political acts.[17] American common law also recognizes absolute civil immunity for the President when the suit stems from official actions.[18] Similarly, common law has granted judges and prosecutors absolute immunity for actions taken in the discharge of their duties.[19]

Apart from the President, judges, and prosecutors, there are countless other public officials. Consequently, qualified immunity developed as a defense for these officials who could not claim the broad protections of absolute immunity.[20] Typically, this defense applies when a state or local official faces individual liability for a constitutional tort in a 42 U.S.C. § 1983 action, or when a federal official faces individual liability for a constitutional tort through a *Bivens* action.[21] Absolute and qualified immunity differ in important ways. While absolute immunity grants high-ranking officials complete immunity from any civil action involving their official duties,[22] qualified immunity shields other officials carrying out their duties only under certain circumstances.[23]

The Supreme Court's first discussion of qualified immunity came in *Pierson v. Ray*,[24] a case where civil rights protestors sued individual po-

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15. *Scheuer*, 416 U.S. at 240 n.4 (describing the civil and criminal immunity for English judges for "abuse of his jurisdiction").

16. *Id.* at 240–41.

17. *See* U.S. CONST. art. I, § 6, cl. 1.

18. Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982) ("[W]e hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts."); *see also* Clinton v. Jones, 520 U.S. 681, 705–06 (1997) (holding that private actions against the President are not precluded by the separation of powers doctrine, even while the President is still in office).

19. *See* Bradley v. Fisher, 80 U.S. 335, 350 (1871) (declaring that judges are held accountable through the possibility of legislative impeachment rather than the possibility of private legal action); *see also* Imbler v. Pachtman, 424 U.S. 409, 427–29 (1976) (holding that prosecutors are completely immune from common law tort and 42 U.S.C. § 1983 actions, and that criminal law is the appropriate remedy for prosecutorial misconduct).

20. *See* Littman, *supra* note 12, at 648–49.

21. 42 U.S.C. § 1983 (2006) (conferring a cause of action against state or local officials acting under color of state law who deprive a person of his or her constitutional rights); *see also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396–97 (1971) (granting an identical cause of action against federal officials who act under color of federal law and commit constitutional torts).

22. *See Nixon*, 457 U.S. at 749–52.

23. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (holding that public officials are entitled to qualified immunity only in circumstances where their conduct does not violate a clearly established constitutional right).

24. 386 U.S. 547 (1967).

lice officers in a § 1983 action.[25] At the time, the common law allowed a defense of good faith for law enforcement officers facing damages actions for torts.[26] The defense gave officers immunity from suit if they believed in good faith and with probable cause that their duty required the actions in question,[27] and in *Pierson* the Supreme Court extended this defense to public officials facing § 1983 damage actions.[28] Seven years after *Pierson*, the Court again confronted the qualified immunity issue in *Scheuer v. Rhodes*,[29] a case involving civil damages stemming from the actions of National Guard officers during the famous anti-war protests of 1970 at Kent State University.[30] In *Scheuer*, the Court referred to the affirmative defense outlined in *Pierson* as "qualified immunity" and explicitly added an objective element to the good-faith defense.[31] Describing the new standard, the Court stated that "[i]t is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."[32] By coupling an official's subjective good-faith belief with an objective requirement of reasonableness, the Supreme Court forged the elements of the modern qualified immunity standard.

B. The Modern Qualified Immunity Standard

The modern standard for the qualified immunity defense first appeared in *Harlow v. Fitzgerald*.[33] Featuring some of the same actors as the landmark executive immunity case, *Nixon v. Fitzgerald*,[34] *Harlow* involved a damages action against presidential aides.[35] The Court rejected the aides' argument of derivative absolute immunity and held that only qualified immunity applied to executive personnel.[36] Moreover, the

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25. *Id.* at 551–52 (1967). The plaintiffs in *Pierson* alleged that, while trying to desegregate a bus terminal, they were unconstitutionally arrested by three Mississippi police officers. *Id.* at 548–50.

26. *Id.* at 555 (citing RESTATEMENT (SECOND) OF TORTS § 121 (1965)).

27. *Pierson*, 386 U.S. at 555 (describing the defendants' claim that an arrest made in good faith should not make defendants liable under § 1983).

28. *Id.* at 557 ("We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983.").

29. 416 U.S. 232 (1974).

30. *Id.* at 234–35 (1974).

31. *Id.* at 247 ("These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.").

32. *Id.* at 247–48.

33. 457 U.S. 800, 813–17 (1982).

34. 457 U.S. 731 (1982).

35. *Harlow*, 457 U.S. at 802. Plaintiff Fitzgerald claimed that defendants conspired to terminate his employment in a manner that violated his constitutional and statutory rights. *Id.*

36. *Id.* at 810–11 ("Petitioners' argument is not without force. Ultimately, however, it sweeps too far. . . . The undifferentiated extension of absolute 'derivative' immunity to the President's aides therefore could not be reconciled with the 'functional' approach that has characterized the immunity decisions of this Court . . . .").

Court expressed concern over the subjective good-faith element of the qualified immunity defense; because many courts regarded a public official's subjective belief as a question of fact, it was therefore conceivable that many insubstantial claims could thwart early dismissal attempts and proceed to trial.[37] Consequently, the Court eliminated the subjective element of the qualified immunity defense and imposed a purely objective standard: "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[38]

Since *Harlow*, the Supreme Court has made notable structural alterations to the qualified immunity standard. *Saucier v. Katz*,[39] a Supreme Court decision addressing qualified immunity in the face of alleged Fourth Amendment violations, crafted a two-pronged test for determining qualified immunity using the elements identified in *Harlow*.[40] First, *Saucier* required that lower courts must examine whether the actions alleged by the plaintiff show an actual constitutional violation.[41] If a court found that a violation had occurred, only then could it consider the second prong of the standard: whether the right was clearly established at the time of the violation.[42] The Court recently modified the ordinal nature of this test in *Pearson v. Callahan*.[43] Acknowledging that the ordered nature of the *Saucier* procedure contradicted an interest in preserving judicial resources, the *Pearson* Court removed the sequential aspect of the qualified immunity standard and allowed courts to address the two prongs in the order of their choosing.[44] Since the *Pearson* decision, courts have thus been free to exercise one of two options: quickly dispose of "close call" cases by addressing the clearly established prong, or examine whether the alleged facts establish a constitutional tort by addressing the violation prong.

While an alleged violation is nearly always a matter of fact and circumstance, the "clearly established" prong presents a more muddled inquiry of law and reasonableness. The essential question, as stated by the Supreme Court, is whether a reasonable public official would have "fair

37. *Id.* at 815–16 (noting the procedural difficulties imposed by FED. R. CIV. P. 56 and a factual finding of good faith).

38. *Id.* at 818.

39. 533 U.S. 194 (2001).

40. *Id.* at 201.

41. *Id.* ("A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry.").

42. *Id.* ("[I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established.").

43. 129 S. Ct. 808 (2009).

44. *Id.* at 818 ("The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.").

notice that her conduct was unlawful."[45] Other cases, both before and after *Pearson*, provide important considerations when considering the question of fair notice.

The most notable consideration in "clearly established" inquiries involves the idea of factual novelty. On one hand, the Court has stated that inquiries regarding whether a constitutional right was clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition."[46] However, the Court has also cautioned that qualified immunity inquiries cannot become an exercise in circumstantial repetition. In *United States v. Lanier*,[47] the Court addressed unique facts involving a state judge accused of sexually assaulting several litigants.[48] The appeals court overturned the ruling against the judge on the grounds that no controlling authority clearly established the rights of the plaintiffs.[49] Despite the novel facts of *Lanier*, the Court reversed the Sixth Circuit and stated that the establishment of a right did not require "fundamentally similar" factual precedent.[50] The Court formalized this concept in *Hope v. Pelzer*,[51] a case where Alabama prison officials handcuffed prisoners to outdoor "hitching posts" for hours at a time.[52] In finding that an Eighth Amendment right existed for the prisoners, the Court stated that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."[53] Thus, *Lanier* and *Hope* stand for the idea that the existence of a right can be sufficiently clear even if the exact actions in question need not have been previously declared unlawful.[54]

Ultimately, all qualified immunity inquiries involving the clear establishment of a right must include two components: (1) an examination of whether a public official has "fair notice" that her conduct is unlawful,

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45. Brosseau v. Haugen, 543 U.S. 194, 198 (2004).

46. *Saucier*, 533 U.S. at 201.

47. 520 U.S. 259 (1997).

48. *Id.* at 261. Though *Lanier* involved a criminal action under 18 U.S.C. § 242 and not a civil action under 42 U.S.C. § 1983 or *Bivens*, the Supreme Court later used the *Lanier* analysis in formulating novelty jurisprudence for qualified immunity claims in § 1983 and *Bivens* actions. *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 731 (2002).

49. *Lanier*, 520 U.S. at 263.

50. *Id.* at 269 ("Nor have our decisions demanded precedents that applied the right at issue to a factual situation that is 'fundamentally similar' at the level of specificity meant by the Sixth Circuit in using that phrase. To the contrary, we have upheld convictions under § 241 or § 242 despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.").

51. 536 U.S. 730 (2002).

52. *Id.* at 733–34, 741.

53. *Id.* at 741.

54. *See Hope*, 536 U.S. at 741; *Lanier*, 520 U.S. at 269; *see also* Anderson v. Creighton, 483 U.S. 635, 640 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . .").

and (2) an examination of whether that conduct manifests itself in novel fact patterns. In balancing fair notice concerns with this novelty inquiry, the modern qualified immunity standard features a refined yet flexible analysis for complicated questions of law and fact.

II. VIEWPOINT DISCRIMINATION UNDER THE FIRST AMENDMENT

It would be fair to characterize the body of law surrounding qualified immunity as complex and nuanced. By contrast, the law concerning viewpoint discrimination under the First Amendment is a veritable model of clarity and consistency. The First Amendment guarantees, in relevant part, that state actors shall not abridge "freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[55] As evidenced by the country's speedy ratification of the Bill of Rights, the new Americans—suddenly free from restrictive British rule—saw these freedoms as essential to a functioning republic.[56] By the mid-Twentieth Century, the judicial system began consistently referring to these freedoms as the singular right to "freedom of expression."[57]

Numerous types of speech are protected under the First Amendment's guarantee of freedom of expression.[58] However, the right to express unpopular views on matters of social concern is perhaps the most well recognized of all First Amendment protections. Born of colonial discontent with England's practice of quashing American cries for political reform, the First Amendment's most invariant and revered feature has been the protection of political and social dissent.[59] In a case protecting the right of Jehovah's Witness students to remain silent during their public school's recitation of the Pledge of Allegiance, Justice Jackson eloquently stated, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or

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55. U.S. CONST. amend. I.

56. *See* Brian J. Buchanan, *About the First Amendment*, FIRST AMENDMENT CENTER (Mar. 7, 2011, 2:47:17 AM), http://www.firstamendmentcenter.org/about.aspx?item=about_firstamd.

57. *See* Poe v. Ullman, 367 U.S. 497, 544 (1961) (holding that freedom of expression is "derived from the explicit guarantees of the First Amendment against federal encroachment upon freedom of speech and belief"); *see also* Byrne v. Karalexis, 396 U.S. 976, 980 (1969) ("[T]he First Amendment did not build on existing law; it broke with tradition, set a new standard, and exalted freedom of expression."); Bridges v. California, 314 U.S. 252, 268 (1941) ("[T]he same standards of Freedom of expression as, under the First Amendment, are applicable to the federal government.").

58. *See* United States v. Stevens, 130 S. Ct. 1577, 1591–92 (2010) (declaring that the First Amendment protects unseemly depictions of animal cruelty from overbroad government censorship); Branzburg v. Hayes, 408 U.S. 665, 681–82 (1972) (holding that reporters are entitled to question public officials and seek the news under the First Amendment); Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969) (protecting speech that promoted violence as a means of accomplishing social reform).

59. *See* Yassky, *supra* note 7, at 1701–02 (arguing that the First Amendment's protections have evolved in response to various historical challenges, such as the Civil War and Great Depression).

force citizens to confess by word or act their faith therein."[60] Over thirty years ago, a circuit judge bluntly noted that a citizen's views on policy and politics is "entitled to the greatest constitutional protection."[61] As the Tenth Circuit recently stated, "[V]iewpoint discrimination is almost universally condemned and rarely passes constitutional scrutiny."[62]

Such statements accurately reflect the judiciary's approach to affirmatively protecting the right to express or disavow a certain point of view. Accordingly, the Supreme Court has shown little reluctance in ruling against state actors that retaliate on the basis of viewpoint. Direct retaliation for viewpoint expression is explicitly prohibited in nearly all circumstances. An example came in *Rankin v. McPherson*.[63] McPherson, a public employee, was dismissed for remarking during a political conversation that she hoped a future assassination attempt against President Reagan would be successful.[64] The Court characterized the employee's speech as a viewpoint on a matter of public concern and held that a citizen's interest in making such statements outweighed any State interest in controlling such remarks.[65] Even actions that merely deprive, rather than retaliate, are often impermissible. The Court held in *Good News Club v. Milford Central School*[66] that a public school's prohibition of a Christian children's club use of school facilities for its after-hours meetings was unconstitutional viewpoint discrimination.[67] Similarly, Congress cannot bar government-sponsored attorneys in welfare proceedings from taking cases that directly challenge certain welfare law provisions.[68]

A review of Supreme Court holdings reveals that viewpoint discrimination is only permissible in a handful of special circumstances. One example of such circumstances involves speech made by public employees during the discharge of their duties; these matters often result in litigation against a public employer, and courts have held that dismissal of a public employee is appropriate if the employee's speech is related to ordinary matters of duty rather than matters of public concern.[69] Another special circumstance involves the expression of public

60. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

61. Glasson v. City of Louisville, 518 F.2d 899, 904 (6th Cir. 1975).

62. Mesa v. White, 197 F.3d 1041, 1047 (10th Cir. 1999).

63. 483 U.S. 378 (1987).

64. *Id.* at 380–81.

65. *Id.* at 391–92. The Court made this determination because McPherson's statement did not disrupt the normal functioning of the office, and because the statement was not public and in no way discredited the office. In the absence of these mitigating circumstances, the Court ruled that a dismissal essentially based on political opinion cannot be maintained. *Id.*

66. 533 U.S. 98 (2001).

67. *Id.* at 120 ("When Milford denied the Good News Club access to the school's limited public forum on the ground that the Club was religious in nature, it discriminated against the Club because of its religious viewpoint in violation of the Free Speech Clause of the First Amendment.").

68. Legal Services Corp. v. Velazquez, 531 U.S. 533, 548 (2001) ("The Constitution does not permit the Government to confine litigants and their attorneys in this manner.").

69. *See, e.g.*, Connick v. Myers, 461 U.S. 138, 154 (1983) (upholding the dismissal of a former deputy prosecutor for distributing an insubordinate questionnaire to fellow employees).

school students.[70] In such matters, the Court again recognized a narrow exception to the general prohibition on viewpoint discrimination, stating that the First Amendment does not require school officials to permit speech reasonably seen as promoting drug use.[71] Absent any special circumstances—such as employment-related or student speech—the First Amendment completely and thoroughly bars viewpoint discrimination of any kind.

III. *WEISE V. CASPER*

A. Facts and Procedural Posture

On March 21, 2005, President George W. Bush delivered a speech at a museum in Denver, Colorado.[72] Tickets were available to the public.[73] Plaintiffs Leslie Weise and Alex Young obtained tickets through a congressman's office and arrived at the event in a personal vehicle with a bumper sticker reading "No More Blood for Oil."[74] Upon approaching the venue, an executive volunteer who had noticed the bumper sticker stopped Weise and warned her against any sort of disruption.[75] The staff and volunteers at the event allowed Weise and Young to enter, but then conferred to discuss a policy set by a White House official that prohibited the presence of political dissenters at Presidential events.[76] After conferring, one of the defendants then ejected Weise and Young from the event.[77] The plaintiffs were not permitted to re-enter the museum, and the executive staff later confirmed that the plaintiffs were ejected due to their bumper sticker.[78] Neither plaintiff disrupted the event at any time, and both claimed that they never had an intention to do so.[79]

Weise and Young brought a *Bivens* action against each of the executive staff volunteers involved in their dismissal from the President's

70. *See* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1132 (2009) (noting that government entities can impose reasonable time, place, and manner restrictions on public speech).

71. *See* Morse v. Frederick, 551 U.S. 393, 397, 409–10 (2007) (holding that a principal's confiscation of a student's banner reading "BONG HiTS 4 JESUS" was permissible given the time and setting of a school function).

72. Weise v. Casper, 593 F.3d 1163, 1165 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 7.

73. *Id.* The procedure for obtaining tickets involved claiming the tickets through a U.S. Representative's office by producing identification and signing one's name onto a ticket list. *Id.*

74. *Id.*

75. *Id.* ("[Defendant] Casper told [Plaintiff] Weise that 'she had been ID'd' . . . and 'that if she had any ill intentions' or 'tried any funny stuff that [she] would be arrested, but that he was going to let [her] in.'") (fourth and fifth alterations in original) (internal quotation marks omitted).

76. *Id.* ("Sometime before the President's speech, the White House Advance Office established a policy of excluding those who disagree with the President from the President's official public appearances.").

77. *Id.*

78. *Id.*

79. *Id.* According to the record, Young would have asked President Bush a question "if given the opportunity." *Id.* at 1165–66.

speech.[80] All defendants named in the action asserted the defense of qualified immunity.[81] In the first series of proceedings, the United States District Court for the District of Colorado granted qualified immunity to the defendants.[82] Plaintiffs made an interlocutory appeal to the Tenth Circuit on the qualified immunity issue, and the appellate court dismissed the appeal due to insufficient facts regarding the defendants' statuses as executive branch officials.[83] Upon remand and after further discovery, the district court found that all defendants named in the plaintiffs' complaint were either executive staff members or volunteers "acting under close government supervision."[84] Based on this finding, the court granted the defendants' motion to dismiss on grounds of qualified immunity, and the plaintiffs appealed the dismissal to the Tenth Circuit.[85]

B. Majority Opinion

A three-judge panel of the Tenth Circuit Court of Appeals reviewed the district court's grant of qualified immunity *de novo*.[86] The majority, in an opinion authored by Judge Kelly, upheld the district court's ruling and declared that the defendants were entitled to the protection of qualified immunity.[87]

The court identified the two-part qualified immunity test as controlling in the matter.[88] Pursuant to the elective approach outlined in *Pearson*, the majority chose to begin its analysis by addressing the "clearly established" prong of the qualified immunity test.[89] At the outset, the court declared that a clearly established right required a "Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains."[90] The court also noted that, per the Supreme Court's reasoning in *Hope*, the specific actions at issue in a case need not have been

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80. *Id.* at 1165; *see also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) (establishing a cause of action against federal officials who, acting under color of federal law, commit a constitutional tort).

81. *Weise*, 593 F.3d at 1166.

82. *Id.*

83. *Id.*

84. *See id.* As a result of the district court's enhanced inquiry, the record in the instant case characterized the defendants as executive actors carrying out executive instructive policies. *Id.* at 1165.

85. *Id.* at 1166.

86. *Id.* at 1165–66.

87. *Id.* at 1165, 1170.

88. *Id.* at 1166–67; *see also* Saucier v. Katz, 533 U.S. 194, 201 (2001) (discussing the "clearly established" and "violation" prongs of the qualified immunity test first articulated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)).

89. *Weise*, 593 F.3d at 1166; *see also* Pearson v. Callahan, 129 S. Ct. 808, 818 (2009) ("The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.").

90. *Weise*, 593 F.3d at 1167 (quoting Cortez v. McCauley, 478 F.3d 1108, 1114–15 (10th Cir. 2007) (en banc)) (internal quotation marks omitted).

previously held unlawful by controlling precedent.[91] However, "in the light of pre-existing law the unlawfulness must be apparent."[92]

The majority then shifted its analysis toward the question of apparent unlawfulness. With little equivocation, the court stated that broad propositions of law alone cannot defeat a claim of qualified immunity; only in exceptional circumstances will such propositions suffice.[93] While the court acknowledged that the plaintiffs were correct in their argument that the government usually cannot discriminate on the basis of viewpoint,[94] its opinion made clear that a more precise inquiry was appropriate. Instead of focusing on the broader context of the First Amendment, the court addressed the narrower question of whether a reasonable public official would know that ejecting the plaintiffs on the basis of their bumper sticker—or, previous expression—was unlawful.[95]

The court concluded that no First Amendment doctrine (1) prohibited the government from excluding the plaintiffs from an official speech open to the public and (2) protected the plaintiffs' presence at the President's speech.[96] Because the speech itself—the plaintiff's bumper sticker—occurred outside the event, the majority found that the plaintiffs were not speakers for the purposes of a First Amendment inquiry.[97] Though acknowledging that a bumper sticker is a protected form of expression, the court held that the plaintiff's past expression was legally unrelated to the plaintiff's actual ejection.[98] The court explored several cases involving the ejection of attendees from Presidential events, but deemed that none of the cases were instructive on the issue of an attendee's previously expressed viewpoint.[99] Because no authority gave the Tenth Circuit direct guidance in considering exclusion based on prior expression, the court concluded that the plaintiffs' attendance was not a clearly established constitutional right.[100] Therefore, the majority granted

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91. *Weise*, 593 F.3d at 1167; *see also* Hope v. Pelzer, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.").

92. *Weise*, 593 F.3d at 1167 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

93. *Id.* ("[E]xcept in the most obvious cases, broad, general propositions of law are insufficient to suggest clearly established law.").

94. *Id.*

95. *Id.* at 1168 ("Plaintiffs simply have not identified any First Amendment doctrine that prohibits the government from excluding them from an official speech on private property . . . .").

96. *Id.* at 1168–69.

97. *Id.* ("At the event itself, Plaintiffs were 'not speakers at all,' as their counsel conceded at oral argument, but rather attendees.").

98. *Id.* The majority stated that, while some precedential authority speaks to the issue of political dissenters being excluded from Presidential events, the critical distinction in the instant case is that Weise and Young did not attempt to express themselves in a public forum. *Id.* at 1169–70. Rather, Weise and Young were excluded on the basis of past expression outside of the public forum in question. *Id.*

99. *Id.* at 1169–70.

100. *Id.* at 1170 (noting that, because the cases cited by Weise and Young dealt with expression in the public forum rather than previously expressed viewpoint, these cases could not constitute clearly established law).

qualified immunity to the executive volunteers and dismissed the plaintiffs' claims.[101]

C. Dissenting Opinion

Judge Holloway dissented from the majority's finding of qualified immunity.[102] In a sharply worded opinion, the judge took issue with the majority's reasoning on both qualified immunity and First Amendment grounds.[103]

First, Judge Holloway's dissent noted that the plaintiffs' bumper sticker "expressed an opinion on a matter of great public concern."[104] In the context of First Amendment precedent, the dissent thus saw this as speech entitled to the maximum level of constitutional protection.[105] As Judge Holloway noted, discrimination between those supporting government policies and those who do not is flatly impermissible.[106] Furthermore, expression on matters of public concern is shielded from official reprisal of any kind.[107]

Judge Holloway's finding of protected expression strongly influenced the remainder of his analysis. Because First Amendment precedent weighed strongly in favor of the plaintiffs' right to express their opinion on a matter of public concern, the dissent argued that the plaintiffs had a "clearly established" constitutional right under the applicable prong of the qualified immunity test.[108] Moreover, the dissent also noted that the Supreme Court's warnings of novelty in *Hope v. Pelzer* made it unnecessary for the plaintiffs to present factually analogous precedent; rather, general statements of the law that apply in obvious ways can fulfill the "clearly established" requirement.[109]

In addressing the second prong of whether a violation actually occurred, Judge Holloway stated that Casper and the other executive volunteers ran directly afoul of the First Amendment.[110] The dissent concluded that the ejection clearly violated the plaintiffs' rights.[111] Weise and Young gave no indication of trouble and made no attempt to disrupt the

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101. *Id.*

102. *Id.* (Holloway, J., dissenting).

103. *Id.* at 1171–72.

104. *Id.* at 1170.

105. *Id.* at 1171 (citing Glasson v. City of Louisville, 518 F.2d 899, 904 (6th Cir. 1975)).

106. *Weise*, 593 F.3d at 1175 (citing *Glasson*, 518 F.2d at 912).

107. *See Weise*, 593 F.3d at 1174–75 (citing Hartman v. Moore, 547 U.S. 250, 256 (2006)).

108. *Weise*, 593 F.3d at 1171 ("I would hold that the rights so violated were clearly established because of the fundamental importance of the right of free speech on topics of public concern . . . .").

109. *Id.* at 1177 (citing Hope v. Pelzer, 536 U.S. 730, 739, 741 (2002)).

110. *Weise*, 593 F.3d at 1171 ("[N]o reasonable officer could have believed that it was permissible under the Constitution to humiliate these Plaintiffs solely because one of them had legitimately exercised her right of free speech at another time and place.").

111. *Id.* at 1172 ("Defendants violated Plaintiffs' rights on a pretext so flimsy that the violation was obvious.").

President's speech.[112] Furthermore, Judge Holloway argued that the plaintiffs were not speakers at the public event, so the defendants' argument—that the President has a right to control his own message—is inapplicable in this instance.[113] Rather, Judge Holloway concluded that the plaintiffs were ejected solely on the basis of Weise's protected expression; therefore, such an ejection, therefore, contrasted starkly with any reasonable application of the First Amendment.[114] Judge Holloway wrote:

> It is simply astounding, that any member of the executive branch could have believed that our Constitution justified this egregious violation of Plaintiff's rights. "*The right of an American citizen to criticize public officials and policies and to advocate peacefully ideas for change is the central meaning of the First Amendment.*"[115]

IV. *WEISE V. CASPER*: A CRITICAL ANALYSIS

In deciding *Weise v. Casper*, the Tenth Circuit made two questionable jurisprudential decisions. First, when considered in light of the novelty concerns in *Hope v. Pelzer*, the court took an incomplete approach to the "clearly established" prong of qualified immunity. Second, the court also took an incomplete approach to the issue of viewpoint discrimination in the context of First Amendment precedent. The Tenth Circuit's incomplete approach to these legal questions ultimately led to an incorrect decision in *Weise v. Casper*. The court set qualified immunity precedent that imposed a higher burden on civil rights plaintiffs. Moreover, the court missed an opportunity to construe the First Amendment in favor of active citizens, and instead offered a precedent that offers increased protections for the questionable actions of government officials. Consequently, the *Weise* decision makes the Tenth Circuit a potential outlier and raises concerns of muted citizenship in light of expanded governmental discretion.

A. An Incomplete Qualified Immunity Analysis

As detailed above, qualified immunity inquiries involve nuanced questions of law and fact. Courts considering a defense of qualified immunity must evaluate the facts in light of two criteria: whether a right was clearly established, and whether a violation of that right occurred.[116] In light of the facts, courts must decide which criterion should be ad-

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112. *Id.* at 1171.
113. *Id.* at 1175–76.
114. *Id.* at 1171.
115. *Id.* (quoting New York Times v. Sullivan, 376 U.S. 254, 273 (1964)) (internal quotation marks omitted).
116. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (quoting Wood v. Strickland, 420 U.S. 308, 322 (1975)).

dressed first.[117] When considering facts related to clearly established rights, courts must also balance concerns of precedential notice with factual novelty.[118]

Following *Harlow* and *Pearson*, the majority in *Weise* employed the two-pronged qualified immunity test and elected to first address the issue of a clearly established right.[119] Relying on precedent, the court noted that a clearly established right exists when the law would put "a reasonable official on notice that his conduct was unlawful."[120] The remainder of the "clearly established" analysis focused on the dispute's factual eccentricities in light of precedential authority. The majority stated that no First Amendment doctrine prohibited executive officials from excluding the plaintiffs from a speech on private property.[121] They further held that no authority spoke to the specific issue of ejection based on noncontemporaneous expression.[122] While the plaintiffs did offer factually similar cases upholding the right of expression at public forums, the court held that these cases were distinguishable because each involved speech within the actual forum. Based on this lack of analogous precedent, the majority concluded that "no specific authority instructs this court (let alone a reasonable public official) how to treat the ejection of a silent attendee from an official speech based on the attendee's protected expression outside the speech area."[123]

While accurate in its conclusions on precedent, the court's full analysis is incomplete because it neglects the novelty considerations outlined by the Supreme Court in *Lanier* and *Hope*. As the Court reasoned in *Lanier*, general statements of law are capable of giving public officials fair warning of unlawful action.[124] The Court then formalized this idea in *Hope* by stating that unlawful conduct can be apparent "even in novel factual circumstances."[125] The *Weise* court briefly noted these concerns when describing the qualified immunity inquiry.[126] However, the court never considered the idea of novelty in the factual context of *Weise*. Af-

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117. *See* Pearson v. Callahan, 129 S. Ct. 808, 815 (2009) (referencing Groh v. Ramirez, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting)).

118. *See* Hope v. Pelzer, 536 U.S. 730, 753–54 (2002).

119. *See* Weise v. Casper, 593 F.3d 1163, 1166–67 (2010), *cert. denied*, 131 S. Ct. 7.

120. *Id.* at 1167–68 (citing Brousseau v. Haugen, 543 U.S. 194, 198–199 (2004) (per curiam)).

121. *Weise*, 593 F.3d at 1168 ("Plaintiffs simply have not identified any First Amendment doctrine that prohibits the government from excluding them from an official speech on private property on the basis of their viewpoint.").

122. *Id.* at 1169–70 (discussing federal cases that upheld expressive activity in public forums absent actual disruptive activity).

123. *Id.* at 1170.

124. United States v. Lanier, 520 U.S. 259, 271 (1997) ("[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful . . . .'" (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987))).

125. Hope v. Pelzer, 536 U.S. 730, 741 (2002).

126. *See Weise*, 593 F.3d at 1169 (noting the controlling concerns of novelty as expressed in *Anderson*, 483 U.S. at 640, and *Hope*, 536 U.S. at 741).

ter concluding that no authority spoke to the facts of the case, the court ruled in favor of the defendants and never examined whether the plaintiffs' ejection from a public speech by the President constituted novel factual circumstances.[127]

This incomplete inquiry ultimately led to an incorrect result on the qualified immunity issue. By failing to examine the novelty question, the *Weise* court overlooked the possibility that First Amendment precedent gave Casper and other volunteers notice as to the unlawfulness of their actions. As the court correctly concluded, no precedent fully encapsulates the factual circumstances of *Weise*; however, the court's analysis never progressed to considerations of novelty. A reasonable observer would likely conclude that absence of fully analogous precedent is itself a strong indicator of novelty. Additionally, the unique facts of Weise and Young's ejection also signal that novelty should be a relevant consideration. However, the majority did not consider whether *Weise* implicates the novelty concerns of *Lanier* and *Hope*. In failing to address this issue, the court employed an incomplete approach to the qualified immunity issue: the court enforced the reasonableness requirement protecting public officials, yet omitted an analysis of the novelty considerations that protect plaintiffs pleading unique factual scenarios. Consequently, the court dismissed the plaintiff's legitimate argument of novelty and issued a ruling that lacks the foundation of a complete qualified immunity analysis.

B. An Incomplete First Amendment Analysis

The First Amendment flatly prohibits government discrimination on the basis of viewpoint.[128] Political opinion is particularly shielded from retaliatory state action,[129] and the body of law surrounding this idea is clear, consistent, and robust.[130] As Judge Holloway accurately remarked in his dissenting opinion in *Weise*, "The prohibition against viewpoint discrimination is unquestionably well established."[131]

The majority in *Weise* acknowledges that viewpoint discrimination is generally prohibited.[132] However, the majority did little else to examine the plaintiffs' claim as a broad question of viewpoint discrimination, even going so far as to say that a general discussion of viewpoint dis-

127. *See Weise*, 593 F.3d at 1168–70.

128. *See, e.g.*, Perry v. Sinderman, 408 U.S. 593, 598 (1972); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

129. *See* Glasson v. City of Louisville, 518 F.2d 899, 904 (1975) ("The right of an American citizen to criticize public officials and policies and to advocate peacefully ideas for change is 'the central meaning of the First Amendment.'" (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273 (1964))); *see also id.* at 912 ("A more invidious classification than that between persons who support government officials and their policies and those who are critical of them is difficult to imagine.").

130. *See supra* Part II.

131. *See Weise*, 593 F.3d at 1177 (10th Cir. 2010) (Holloway, J., dissenting).

132. *Id.* at 1167 (majority opinion) ("At the most general level, Plaintiffs are correct that the government usually cannot discriminate against a speaker based upon that speaker's viewpoint.").

crimination was unwarranted.[133] Instead, the court examined the narrow question of whether the plaintiffs' attendance at a president's public speech was protected from retaliation based on prior speech.[134] The majority found no instructive authority on the issue.[135] Ultimately, the court ruled in favor of the defendants without discussing the ejection in terms of discrimination on the basis of political viewpoint.[136]

As with the district court's qualified immunity analysis, the Tenth Circuit's analysis of the viewpoint discrimination issue was incomplete. In this instance, the incompleteness led to an unsound decision on the First Amendment issues in *Weise*. First Amendment jurisprudence, particularly in the context of viewpoint discrimination, is clear in its prohibition of government reprisal against dissenting citizens. Weise's bumper sticker expressed a dissenting opinion with respect to American foreign policy. As the defendants admitted, the plaintiffs were ejected solely on the basis of Weise's bumper sticker; there was no indication of present or future disruptive activity on the part of either plaintiff.[137] Moreover, the decision to remove the plaintiffs from the museum was made in conjunction with an executive policy designed to bar attendance by political dissenters.[138] Given the circumstances, this ejection can only be described as a retaliatory action against those who held a viewpoint contrary to that of the executive branch. In light of the strong body of law that prohibits such retaliation, obvious problems with the Tenth Circuit's ruling arise. Such a narrow holding that focuses on the mere time an opinion is expressed forsakes the larger demands of the First Amendment. By employing this incomplete approach, the court incorrectly analyzed the case's freedom of expression issues and consequently dismissed a meritorious civil rights claim.

C. Effects of the Tenth Circuit's Ruling

On October 12, 2010, the Supreme Court denied Weise and Young's petition for certiorari.[139] The *Weise* case would likely have produced an interesting result at the Supreme Court, especially given the Roberts Court's expansive interpretation of the First Amendment.[140] The

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133. *Id.* at 1169 ("[The] discussion of impermissible viewpoint discrimination does not amount to clearly established law that provides guidance in these circumstances.").

134. *Id.*

135. *Id.* at 1169–70.

136. *Id.* at 1170.

137. *Id.* at 1165 (noting that the Secret Service told Weise and Young that the bumper sticker prompted their ejection and that Mr. Young would only have spoken at the event if given the opportunity to ask the President a question).

138. *Id.*

139. Weise v. Casper, 131 S. Ct. 7, 7–8 (2010) (Ginsburg, J., dissenting from denial of certiorari).

140. *See, e.g.*, United States v. Stevens, 130 S. Ct. 1577, 1588 (2010) (holding that a statutory ban of animal cruelty videos is overly broad under the First Amendment); Citizens United v. FEC 130 S. Ct. 876, 913 (2010) (holding that the First Amendment bars statutory limits on corporate

fact remains, however, that the Tenth Circuit's decision in *Weise* is realistically the final word on the matter. As such, the decision will leave a major legacy for legal actors in the Tenth Circuit. By employing a narrow approach to the issues in *Weise*, the majority's decision represents a shift in Circuit jurisprudence with respect to qualified immunity and viewpoint discrimination questions. Although the true depth of this shift remain unclear, some conclusions still present themselves: if given the weight of controlling precedent, *Weise* will substantially affect the fortunes of future civil rights litigants, chill the mechanisms of an active citizenry, and stunt the growth of new Constitutional norms.

1. A Shift in Circuit Law

As discussed above, the *Weise* court approached the questions of qualified immunity and viewpoint discrimination in an incomplete manner.[141] If applied to future litigants, this incomplete approach will have a powerful effect on claims of qualified immunity and First Amendment rights within the Tenth Circuit.

First, litigants seeking the enforcement of civil rights against state or federal officials may find that defeating a claim of qualified immunity requires a higher reliance on factual precedent than prior to *Weise*. This heightened burden results from the Tenth Circuit's strict comparison of Weise and Young's claim to previous qualified immunity cases. This stringent analysis represents a genuine departure from the typical consideration of novelty concerns. It is reasonable to see the novelty factor as a balancing component of qualified immunity law rather than a narrow and inconsequential exception.[142] However, the Tenth Circuit's approach in *Weise* treats the idea of novel circumstances with token mention rather than careful balancing. As a result, the court imposes the tremendous burden on Weise and Young to find precedent establishing the right to be present at a public Presidential speech regardless of previously expressed political viewpoint.[143]

If the incomplete qualified immunity approach in *Weise* becomes controlling authority in the Tenth Circuit, future civil rights litigants in the Tenth Circuit will now shoulder the burden of finding factually identical precedent. Courts within the Circuit will, by default, be more per-

electioneering expenditures); *see generally* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1250–73 (2010).

141. *See supra* Part IV.

142. *See* 15 AM. JUR. 2D *Civil Rights* § 111 (2010) (including novel factual circumstances as a preliminary rather than secondary inquiry in qualified immunity cases); Jacob Heller, *Abominable Acts*, 34 VT. L. REV. 311, 316–337 (2009) (arguing for reform of the "clearly established" test because knowledge of wrongfulness can be presumed even in novel circumstances); Paul W. Hughes, *Not a Failed Experiment: Wilson-Saucier Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401, 418–29 (2009) (urging the re-implementation of a subjective qualified immunity inquiry, in part because courts are now less likely to find constitutional violations unless the factual scenario has been clearly established).

143. *Weise*, 593 F.3d at 1169–70.

suaded by factual circumstance rather than Constitutional claim. Consequently, *Bivens* and § 1983 plaintiffs will find that their fortunes are increasingly tied to whether the facts of their claim have been previously litigated. On the other hand, defendants asserting qualified immunity will have the stringent novelty analysis of the *Weise* court as an extra arrow in their litigious quiver.

The second circuit-wide effect of the *Weise* decision relates to the now-diminished protections for expressive citizens from government reprisal. The court's narrow reading of the facts obscured the reality of retaliatory action by government officials on the basis of political viewpoint.[144] Because Weise's expressive activity was not within the confines of the Presidential event, the majority held that it was not protected speech and thus not subject to immediate protection from reprisal.[145] Should this minutiae-driven approach become the circuit norm, it would redraw the traditional battle lines of viewpoint discrimination jurisprudence; the flat prohibition on government reprisal for political expression may become a malleable concept in the Tenth Circuit. What Justice Jackson once called a "fixed star in our constitutional constellation"[146] would become more akin to a traveling comet, drifting in and out of relevance depending on present circumstances.

If claims of viewpoint discrimination become a more fact-specific inquiry, parties to future disputes will encounter altered legal terrain. Public officials who exclude or deprive on the basis of viewpoint will receive greater protections, so long as their actions do not exactly mirror the previous actions of officials who were denied qualified immunity. Where defendants can identify a factual peculiarity involving contemporaneity, proximity, or manner, their actions are much less likely to be considered retaliatory. Conversely, plaintiffs claiming viewpoint discrimination must again plead their case on the basis of factual similarity. If the expressive activity in question presents unique questions of circumstance, future plaintiffs will face an uphill battle in convincing a Tenth Circuit court that their expression should be shielded from governmental retaliation.

2. Cause for Concern

A shift in circuit approach is not in itself a reason for alarm. The *Weise* decision, however, should give pause to practitioners and scholars alike. When courts apply incomplete legal approaches and neglect a complete legal analysis, there is a high risk of contravening well-established legal and societal norms. Judicial tunnel vision, therefore, can carry unfortunate consequences. In *Weise*, the Tenth Circuit falls prey to

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144. *See supra* Part IV.B.

145. *Weise*, 593 F.3d at 1168–70.

146. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

this hazard. The court's incomplete qualified immunity inquiry raises troubling issues of accountability for public officials. By narrowing its First Amendment analysis, the court also eroded judicial protection for active citizenship. Additionally, both of these narrow approaches stymie the development of civil rights within the Tenth Circuit. Ultimately, the *Weise* decision represents a missed opportunity for the court to properly balance legal considerations and move the circuit in a progressive direction on civil rights matters.

First, the qualified immunity approach of the court leads to a troubling situation where public officials can erect an insurmountable wall against a plaintiff's civil rights claim. While the doctrine of qualified immunity exists to protect reasonable public officials from frivolous claims,[147] the defense is not meant to serve as an impenetrable shield against all civil rights claims. If plaintiffs are required to find factually identical precedent, however, qualified immunity remains qualified in name only. The main purpose of *Bivens* and § 1983 claims is to remedy a violation of a plaintiff's civil rights at the hands of state or federal officials.[148] Giving these officials a virtually impenetrable defense does little to serve the purpose of the claim. The absence of meaningful novelty analysis in *Weise*, if used as a template for future cases, gives public officials higher levels of protection by imposing a higher burden of factual persuasion on civil rights plaintiffs; only factual scenarios that have been previously litigated stand a realistic chance of succeeding in court. Consequently, *Bivens* and § 1983 actions become empty remedies for the victims of constitutional torts.

The *Weise* decision is also troubling because it chills the mechanisms of an active citizenry. The majority departed from First Amendment precedent and engaged in a fact-specific analysis that never identified Weise's bumper sticker as expressive of a protected viewpoint.[149] The consequences of this narrow approach are notable. The right to express dissenting viewpoints is central to the purpose and meaning of the First Amendment.[150] In practice, this right assures that citizens are able to speak out on matters of public concern without fear of government repri-

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147. *See* Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974) ("It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."); Littman, *supra* note 12, at 648–49 ("The qualified immunity defense balances the public's interest in effectively vindicating constitutional guarantees with the state's equally strong countervailing interest in protecting officials from the threat of liability when performing official duties.").

148. *See supra* note 21.

149. *Weise*, 593 F.3d at 1168–70.

150. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273–74 (1964); Glasson v. City of Louisville, 518 F.2d 899, 904 (6th Cir. 1975); Buchanan, *supra* note 56.

sal.[151] If the incomplete First Amendment inquiry in *Weise* becomes the circuit norm, political dissent becomes a more loosely protected form of expression. Unless the dissenting expression is clearly made at the time of the alleged retaliatory acts, or unless the expression is made in a traditional manner, plaintiffs will have greater difficulties in proving impermissible viewpoint discrimination. Essentially, this creates a form of second-class citizenship for citizens whose beliefs run contrary to orthodox political thought. These citizens will find the judiciary less able to protect their expression from retaliatory state action, and government officials will in turn have wider latitude to discriminate against those with dissenting beliefs.

Last, there are concerns in the area of legal development. If the Tenth Circuit employs narrow approaches to questions of qualified immunity and viewpoint discrimination, it will be more difficult for new Constitutional rules to emerge. When the novelty factor of *Lanier* and *Hope* is largely bypassed, qualified immunity becomes the default ruling for novel factual situations. If unique facts of time and manner control viewpoint discrimination inquiries, only the most obvious situations of expression and retaliation will warrant constitutional protection. Such circumstances effectively halt the development of legal precedent—only previously litigated disputes involving qualified immunity or viewpoint discrimination will be controlling in the future. Essentially, this means that the constitutional articulation of new rights is suppressed. If every nuance of qualified immunity or viewpoint discrimination law had been explored, this suppression would scarcely be cause for worry. However, the idea that all possible scenarios or substantive rights have been explored in any area of the law is fundamentally unsound. Justice O'Connor, writing for the plurality in *Teague v. Lane*[152] stated that it was unlikely that new due process rights would emerge for criminal defendants.[153] The development of criminal procedure has proven this statement false.[154] In situations of qualified immunity and viewpoint discrimination, it would be similarly unwise to assume that new circumstances warranting a denial of qualified immunity or First Amendment protection will not present themselves. The *Weise* decision, however, is concerning because it precludes new developments in the law and thereby runs contrary to the idea of common law adjudication within the Tenth Circuit.

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151. *See* Yassky, *supra* note 7, at 1710–13 (noting that, while originally crafted to guarantee states' independence, the First Amendment evolved into a source of personal rights following the national controversy over the Alien and Sedition Acts of 1797 and 1798).

152. 489 U.S. 288 (1989).

153. *Id.* at 313.

154. *See, e.g.*, Simmons v. South Carolina, 512 U.S. 154, 161–162 (1994) (finding post-*Teague* that a capital defendant's due process rights were violated when a jury considering the death penalty was not instructed that life imprisonment carried no possibility of parole); *see generally* Linda Meyer, *"Nothing We Say Matters": Teague and New Rules*, 61 U. CHI. L. REV. 423, 459–92 (1994) (arguing that the logic of *Teague* was flawed because new due process rights are inevitable).

CONCLUSION

Weise v. Casper is a case that will affect Tenth Circuit jurisprudence in many ways. Unfortunately, the decision's effects are cause for concern rather than celebration. In foregoing a thorough novelty analysis, the majority diminished the precedential value of *Lanier* and *Hope* within the Circuit. Also, the *Weise* court narrowed its viewpoint discrimination analysis by focusing exclusively on facts of time and manner. If the reasoning in *Weise* is applied in future cases, the effect of these narrow approaches is three-fold. First, plaintiffs seeking to defeat a claim of qualified immunity will now be largely bound by the facts of their claim. This implicates concerns of official accountability for unconstitutional acts. Second, claims of viewpoint discrimination will be handicapped by factual discrepancies from previous cases. This altered legal landscape risks the creation of second-class citizenship for political dissenters. Third, both of these narrow approaches threaten the development of future constitutional law; if litigants are bound to bring claims that are completely identical to previous cases, it is unlikely that new rules and rights will develop when necessary. Overall, *Weise v. Casper* is a case that could mark the beginning of troubling constitutional developments in the Tenth Circuit.

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* J.D. and M.P.P. Candidate, 2012. I would like to thank Professor Alan Chen of the University of Denver Sturm College of Law for his insight on qualified immunity and civil rights litigation. I would also like to thank the entire *Denver University Law Review* Board and editorial staff, as their diligence and input were invaluable during the publication process.

TRIBAL SOVEREIGNTY AND RESOURCE DESTINY: *HYDRO RESOURCES, INC. V. U.S. EPA*

INTRODUCTION

One of the schemes Congress enacted for settling the vast expanses of the western United States was to deed to railroad companies alternating one-square-mile parcels on each side of the planned railroad.[1] Subsequent sales of parcels helped fund railroad expansion, but also created a checkerboard of ownerships, sometimes including tribal sovereign ownership interspersed with private sections.[2] In these areas, Congress attempted to avoid checkerboard jurisdiction with respect to criminal enforcement[3] by adopting 18 U.S.C. § 1151, a criminal statute that extends U.S. federal jurisdiction over "Indian country."[4] Section 1151 defines "Indian country" to mean Indian reservations, dependent Indian communities, and Indian allotments.[5]

In *Hydro Resources, Inc. v. U.S. EPA* (*HRI III*),[6] the Tenth Circuit concluded that land adjacent to "parcels held in trust for the Navajo by the United States"[7] was not a "dependent Indian community" under § 1151(b).[8] As described below, interpretations of § 1151(b) that disregard the word "communities" in the statute result in the same checkerboard jurisdiction that Congress sought to avoid.[9] Such interpretations impact tribal sovereignty by taking from Indian[10] communities the power

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1. *See* Hydro Res., Inc. v. U.S. EPA (*HRI II*), 562 F.3d 1249, 1255 n.3 (10th Cir. 2009).
2. *See* Hydro Res., Inc. v. U.S. EPA (*HRI III*), 608 F.3d 1131, 1136 (10th Cir. 2010) (en banc).
3. *See* Seymour v. Superintendant of Wash. State Penitentiary, 368 U.S. 351, 358 (1962); *see also* Hilderbrand v. Taylor, 327 F.2d 205, 206 (10th Cir. 1964).
4. 18 U.S.C. § 1151 (2006).
5. *Id.* The full text of § 1151 reads:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Id.

6. 608 F.3d 1131 (10th Cir. 2010) (en banc).
7. *Id.* at 1137.
8. *Id.* at 1166.
9. *See* Seymour v. Superintendant of Wash. State Penitentiary, 368 U.S. 351, 358 (1962); *HRI III*, 608 F.3d at 1174 (Ebel, J., dissenting) (citing KENNETH BOBROFF ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.04[2][c][iii], at 194 (Nell Jessup Newton et al. eds., 2005) [hereinafter COHEN'S]).
10. This Comment will use the term "Indian" not out of any disrespect for indigenous populations, but because of "its use in the relevant statutory language and precedents." *HRI III*, 608 F.3d at 1136 n.2.

to control the destiny of valuable natural resources on or under their land: for example, in the context of *HRI III*, uranium and drinking water.

Part I of this Comment briefly describes past impacts of uranium mining on Navajo land, broad principles of Indian sovereignty, the mining process that Hydro Resources, Inc. (Hydro) proposed, the Safe Drinking Water Act (SDWA), and then discusses the two primary interpretations of § 1151(b): the two-step, multi-factor *Watchman* balancing test and the two-part *Venetie* test. Part II summarizes the majority and dissenting opinions in *HRI III*, including the facts and procedural history. Part III explains how principles of stare decisis can lead to encroachments on Native American sovereignty and then discusses how a modified definition of "Indian lands" better aligns with congressional intent, while enabling the Navajo to control the destiny of its land, drinking water, and uranium. This Comment concludes that the *HRI III* holding contradicts Congress's intent in enacting § 1151, but that this and other problems may be avoided in the future.

I. BACKGROUND

Hydro has long intended to mine the disputed New Mexican land for uranium.[11] Past hazards impacting uranium miners, civilians, and the environment[12] led the Navajo to enact a ban on uranium mining in 2005.[13] Such perils suffered by the Navajo include an increase in cancer rates,[14] contamination of structures built with uranium mining waste,[15] and contamination of groundwater.[16] Notably, the largest nuclear tailing spill in U.S. history occurred in 1979 on Navajo land.[17]

Use of the *in situ* leach method that Hydro proposed using can mitigate many of the negative effects associated with conventional uranium mining.[18] It does not "disturb[] the natural surface, generat[e] dust, or

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11. *Id.* at 1138.

12. *See id.* at 1184 (Henry, J., dissenting) (citing Rebecca Tsosie, *Climate Change, Sustainability, and Globalization: Charting the Future of Indigenous Environmental Self-Determination*, 4 ENVTL. & ENERGY L. & POL'Y J. 188, 220 (2009)); *see also* Ezra Rosser, *Ahistorical Indians and Reservation Resources*, 40 ENVTL. L. 437, 441–42 (2010) (detailing the pernicious effects of uranium mining on the Navajo and their land).

13. *See* Diné Natural Resources Protection Act of 2005, NAVAJO NATION CODE ANN. tit. 18, §§ 1301–03 (2005).

14. Judy Pasternak, *Blighted Homeland: A Peril that Dwelt Among the Navajos*, L.A. TIMES, Nov. 19, 2006, at 2, http://articles.latimes.com/2006/nov/19/nation/na-navajo19.

15. U.S. ENVTL. PROT. AGENCY, HEALTH AND ENVIRONMENTAL IMPACTS OF URANIUM CONTAMINATION IN THE NAVAJO NATION: FIVE-YEAR PLAN 13 (2008), *available at* http://www.epa.gov/region09/superfund/navajo-nation/pdf/NN-5-Year-Plan-June-12.pdf.

16. U.S. ENVTL. PROT. AGENCY, *supra* note 15, at 17–18; Tsosie, *supra* note 12, at 220; Pasternak, *supra* note 14, at 11.

17. Tsosie, *supra* note 12, at 220.

18. *See In Situ Leach (ISL) Mining of Uranium*, WORLD NUCLEAR ASS'N, http://www.world-nuclear.org/info/inf27.html (last updated Mar. 2010).

produc[e] waste known as tailings."[19] However, *in situ* leaching involves the injection of chemicals into the groundwater to dissolve the uranium and the subsequent removal of uranium from the recovered solution,[20] creating a risk of groundwater contamination.[21] Despite the risks of uranium mining, regardless of method, uranium and other non carbon-based fuels are poised as the best solutions to the energy needs of the future.[22] Based partly on this potential, the price of uranium is currently more than six times higher than it was a decade ago.[23]

When mining companies seek to extract uranium on or near Indian areas, issues arise of jurisdiction and tribal sovereignty. Under U.S. law, Indian tribes are "domestic dependent nations"[24] that exercise "plenary and exclusive power over their members and their territory subject only to limitations imposed by federal law."[25] Further, "[t]ribal powers of self-government are recognized by the Constitution, legislation, treaties, judicial decisions, and administrative practice."[26] Accordingly, tribes retain authority over matters unless and until relinquished by federal legislation or treaty.[27]

The following section explains how the federal government determines whether it will grant permits for *in situ* leach wells, and then briefly summarizes the relevant law regarding which government has jurisdiction over particular areas of land.

A. Underground Injection Control Permitting Authority Under the Safe Drinking Water Act

The Safe Drinking Water Act (SDWA), enacted in 1974, conferred to the United States Environmental Protection Agency (EPA) the power either to (1) grant Underground Injection Control (UIC) permits, which

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19. *In Situ Leach and Conventional Uranium-Recovery Methods*, TEX. COMM'N ON ENVTL. QUALITY, http://www.tceq.state.tx.us/permitting/radmat/uranium/process.html (last visited Mar. 28, 2011).

20. *See* WORLD NUCLEAR ASS'N, *supra* note 18.

21. *See* INT'L ATOMIC ENERGY AGENCY, GUIDEBOOK ON ENVIRONMENTAL IMPACT ASSESSMENT FOR IN SITU LEACH MINING PROJECTS 18 (2005), *available at* http://www-pub.iaea.org/MTCD/publications/PDF/te_1428_web.pdf.

22. *See* U.S. DEP'T OF ENERGY, *Nuclear*, ENERGY.GOV, http://www.energy.gov/energysources/nuclear.htm (last visited Mar. 30, 2011); *see also* Bruce Finley, *Uranium-Mill Plan Near Naturita Raises Concerns About Toxic Waste*, DENVERPOST.COM (Sept. 16, 2010, 1:00 AM), http://www.denverpost.com/news/ci_16087508 (stating that uranium will be used "for an anticipated nuclear-energy renaissance").

23. *See UxC Historical Ux Price Chart*, UX CONSULTING COMPANY, http://www.uxc.com/review/uxc_PriceChart.aspx?chart=spot-u3o8-full (last visited Mar. 30, 2011). The spot price of uranium was about $10 per pound in 2000. On March 28, 2011, the spot price was $62.50 per pound. *See id.*; UXC NUCLEAR FUEL PRICE INDICATORS, UX CONSULTING COMPANY, http://www.uxc.com/review/uxc_Prices.aspx (last visited Mar. 30, 2011).

24. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

25. COHEN'S, *supra* note 9, § 4.01[1][b], at 210. *See generally* Aaron Huey, *America's Native Prisoners of War*, TED (Nov. 2010), http://www.ted.com/talks/aaron_huey.html (detailing circumscriptions imposed on Native American sovereignty by federal law).

26. COHEN'S, *supra* note 9, § 4.01[1][a], at 205.

27. *See id.* § 2.03, at 128, 131, § 3.04[2][a], at 183, § 4.01[1][a], at 206.

are required for *in situ* wells to "mitigat[e] the risk of contamination to potential drinking water sources"[28] or (2) delegate such authority to the states[29] or Indian tribes.[30] Additionally, the EPA may exempt aquifers from SDWA standards that do not now or will not in the future "serve as a source of drinking water."[31]

In 1982, the EPA delegated primary UIC permitting authority in New Mexico to the State of New Mexico,[32] except for wells "on Indian lands."[33] The EPA has not delegated UIC permitting power to the Navajo Nation for the type of injection wells in this case,[34] so the EPA retains UIC permitting authority over these types of wells. Therefore, the classification as "Indian land" of the land on which the wells will be drilled will determine whether NM or EPA will exercise UIC permitting authority. To define "Indian lands" under the SDWA, the EPA adopted the definition of "Indian country" under 18 U.S.C. § 1151.[35]

B. Section 1151(b)[36]

Section 1151, adopted in 1948, codified language from two Supreme Court decisions to extend federal criminal jurisdiction over "Indian country."[37] In *United States v. Sandoval*,[38] the defendant was criminally prosecuted for "introducing intoxicating liquor into the Indian country," the Santa Clara pueblo.[39] The defendant challenged the validity of the statute upon which the indictment was based, and the Court, therefore, considered whether Congress could criminalize the introduction of liquor onto the Santa Clara pueblo.[40] The Court concluded that Congress could criminalize such conduct and reasoned that the Commerce Clause[41] and "an unbroken current of judicial decisions have attributed to the

28. *HRI III*, 608 F.3d 1131, 1138 (10th Cir. 2010) (en banc); *see* Safe Drinking Water Act, 42 U.S.C. § 300h(d)(1)–(2) (2006).
29. § 300h-1(b)(3).
30. § 300h-1(e).
31. 40 C.F.R. § 146.4(a) (2011).
32. 40 C.F.R. § 147.1600.
33. 40 C.F.R. § 147.1601.
34. *See* Hydro Res., Inc. v. U.S. EPA (*HRI I*), 198 F.3d 1224, 1232–33 (10th Cir. 2000). The type of injection well here is Class III. *Id.* at 1232. Class III wells pertain to the *in situ* mining of uranium. 40 C.F.R. § 144.6(c)(2) (2011).
35. 40 C.F.R § 144.3 (2011). In adopting the § 1151 definition, the EPA stated that it "believe[d] this definition [was] most consistent with the concept of Indian lands as the Agency ha[d] used it in regulations and UIC program approvals to date." Underground Injection Control Program: Federally-Administered Programs, 49 Fed. Reg. 45292, 45294 (Nov. 15, 1984) (to be codified at 40 C.F.R. pt. 144.3).
36. 18 U.S.C. § 1151(b) (2006).
37. *See* § 1151 hist. n.
38. 231 U.S. 28 (1913).
39. *Id.* at 36.
40. *Id.* at 38.
41. U.S. CONST. art I, § 8, cl. 3.

United States . . . the power and the duty of exercising a fostering care and protection over all dependent Indian communities."[42]

The Court addressed a similar question in *United States v. McGowan*.[43] There, the defendant was criminally charged with introducing alcohol into the Reno Indian Colony.[44] Noting that the Colony was "validly set apart for the use of the Indians" and "under the superintendence of the government,"[45] the Court determined that the Colony was established for the "protection of a dependent people."[46]

The text of § 1151(b), a federal criminal statute enacted in 1948, codified the "dependent Indian communities" language from *Sandoval* as interpreted in *McGowan*.[47]

C. Pittsburg & Midway Coal Mining Co. v. Watchman[48]

In 1995, the Tenth Circuit first declared how to determine whether an area constituted a "dependent Indian community" under § 1151(b).[49] Relying on basic definitions of "community,"[50] the court in *Watchman* employed a two-step test.[51] First, a court must determine the appropriate "community of reference" by weighing "the status of the area in question as a community"[52] and "the community of reference within the context of the surrounding area."[53] Second, the court must weigh several factors to determine if the community qualified as a "dependent" Indian community: such factors include whether the United States has retained "title to the lands which it permits the Indians to occupy" and "whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples."[54]

42. *Sandoval*, 231 U.S. at 46.
43. 302 U.S. 535 (1938).
44. *Id.* at 536.
45. *Id.* at 539 (quoting United States v. Pelican, 232 U.S. 442, 449 (1914)).
46. *McGowan*, 302 U.S. at 538.
47. 18 U.S.C. § 1151 hist. n. (2006) ("Definition is based on latest construction of the term by the United States Supreme Court in *U.S. v. McGowan*, 302 U.S. 535, following *U.S. v. Sandoval*, 231 U.S. 28, 46.").
48. 52 F.3d 1531 (10th Cir. 1995).
49. *Id.* at 1543–45.
50. *Id.* at 1544.
51. *Id.* at 1543–45.
52. *Id.* at 1543.
53. *Id.* at 1544.
54. *Id.* at 1545 (quoting United States v. South Dakota, 665 F.2d 837, 839 (8th Cir. 1981)). The other two factors were: "the nature of the area in question, the relationship of the inhabitants in the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area" and whether there is "an element of cohesiveness . . . manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality." *South Dakota*, 665 F.2d at 839 (alteration in original).

If the disputed area passed both the "community of reference" prong and the "dependency" prong of the test, then a court would determine that the area constituted a "dependent Indian community."[55]

D. Alaska v. Native Village of Venetie Tribal Government[56]

Subsequent to *Watchman*, the United States Supreme Court created a test to find a "dependent Indian community" under § 1151(b). In *Venetie*, the land in dispute was a reservation until Congress passed legislation revoking reservation status.[57] After the State of Alaska refused to pay a tax that the Venetie Tribe tried to impose, the district court held that the Tribe did not have the power to impose such a tax.[58] The Ninth Circuit reversed, holding that a six-factor balancing test should be used to determine whether the land constituted a "dependent Indian community."[59] The Ninth Circuit noted that there was only one "significant difference between" its test and the Tenth Circuit's *Watchman* test: the Ninth Circuit "asses[es] the 'degree of federal ownership and control' over the area in question while the [Tenth Circuit] ask[s] whether the United States retains 'title' to the land in question."[60]

A unanimous Supreme Court, in 1998, abrogated the Ninth Circuit's "degree of federal ownership and control" test, holding that the term "dependent Indian communities" describes lands that "satisfy two requirements—first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence."[61] Satisfaction of the set-aside prong would show that an "Indian community" occupied the disputed land.[62] Fulfillment of the superintendence prong would ensure that the "Indian community" was "sufficiently 'dependent' on the Federal Government that the Government and the Indians involved, rather than the States, are to exercise primary jurisdiction."[63] While rejecting the Ninth Circuit's

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55. *See Watchman*, 52 F.3d at 1546.

56. (*Venetie II*), 522 U.S. 520 (1998).

57. *See id.* at 524. Reservations were designed to "restrict the limits of all the Indian tribes upon [American] frontiers, and cause [the Indian tribes] to be settled in fixed and permanent localities, thereafter not to be disturbed." COHEN'S, *supra* note 9, § 1.03[6][a], at 64. Tribal members on Indian reservations are immune to many state taxes. *See* COHEN'S, *supra* note 9, § 8.03[1][b], at 693. Tribes may tax nontribal members in Indian country. COHEN'S, *supra* note 9, § 8.04[2][b], at 715.

58. *Venetie II*, 522 U.S. at 525.

59. *Id.* at 525–26 (citing Alaska v. Native Vill. of Venetie Tribal Gov't (*Venetie I*), 101 F.3d 1286, 1292–93 (9th Cir. 1996)). The Ninth Circuit employed the following factors:

> (1) the nature of the area; (2) the relationship of the area inhabitants to Indian tribes and the federal government; (3) the established practice of government agencies toward that area; . . . (4) the degree of federal ownership of and control over the area; (5) the degree of cohesiveness of the area inhabitants; and (6) the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples.

Venetie I, 101 F.3d at 1294 (alteration in original).

60. *Venetie I*, 101 F.3d at 1292.

61. *Venetie II*, 522 U.S. at 527.

62. *Id.* at 531.

63. *Id.*

multi-factor approach, the Court stated that two factors were "relevant": the "degree of federal ownership" over the area and "the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples."[64] To summarize, the Ninth Circuit's test differed from the Court's two-step test in that the Ninth Circuit analyzed the level of federal ownership and the degree to which the land could be to be considered a "dependent Indian community" as factors in a multi-factor test. The Supreme Court used these factors as elements, allowing for a finding of a "dependent Indian community" only if the federal government had set aside the disputed land and also superintended it.[65]

II. *HYDRO RESOURCES, INC. V. U.S. EPA*

Petitioner Hydro owns the surface and mineral rights[66] to land in northwestern New Mexico, 160 acres of which lie in Section 8, Township 16N, Range 16W (Section 8).[67] The land sits in a checkerboard region, where land ownership alternates by parcel between "the state, the federal government, the Navajo Nation, individual Navajos, and private persons and entities."[68] Although Hydro purchased its Section 8 land outright,[69] it falls within the bounds of the Navajo Church Rock Chapter.[70] The Chapter is a "political and social unit of the Navajo Nation," with its borders determined by the Navajo.[71] In addition, Hydro owns the mineral rights to Section 17, which is adjacent to Section 8 in the checkerboard.[72] However, the "federal government holds the Section 17 land in trust for the Navajos" and retains most of the surface rights.[73]

A. Facts and Procedural Posture

In the 1980s, Hydro, not thinking its Section 8 land constituted "Indian country," applied to the New Mexico Environmental Department (NMED) for its UIC permit.[74] NMED then requested from EPA an "aquifer exemption" to approve Hydro's application, an exemption that Hydro would need in order to mine.[75]

In 1989, NMED approved Hydro's UIC permit for Section 8, and EPA approved NMED's request for the aquifer exemption.[76] In 1992,

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64. *Id.* at 531 n.7.
65. *Id.* at 530.
66. *HRI III*, 608 F.3d 1131, 1141 n.6 (10th Cir. 2010) (en banc).
67. *Id.* at 1136–37.
68. *Id.* at 1136.
69. *Id.* at 1134.
70. *Id.* at 1137.
71. *Id.*
72. *HRI I*, 198 F.3d 1224, 1231 (10th Cir. 2000).
73. *HRI III*, 608 F.3d at 1141 n.6.
74. *Id.* at 1140.
75. *See id.* The SDWA generally prohibits aquifer contamination, but exempts aquifers that do not now or will not in the future "serve as a source of drinking water." 40 C.F.R. § 146.4 (2011).
76. *HRI I*, 198 F.3d at 1234.

Hydro requested that its UIC plan be extended to cover its Section 17 land, and NMED applied for the mandatory aquifer exemption.[77] In the mid-1990s, a jurisdictional dispute between NMED, EPA, and the Navajo Nation led the EPA to find the Section 17 land to be "Indian country" and the status of the Section 8 land to be in dispute.[78] On Hydro's and NMED's appeal of the EPA's determination, the Tenth Circuit held that the EPA did not exceed its authority or abuse its discretion by determining the status of the Section 8 land to be in dispute, and it remanded the matter to the EPA to make a final determination as to whether that land was a "dependent Indian community."[79] Separately, the Tenth Circuit's holding that the Section 17 area constituted "Indian country" under § 1151(a) was not appealed.[80] Therefore, the Section 17 area falls under EPA jurisdiction[81] because the EPA has retained authority over Class III injection wells on Indian country.[82]

On remand, EPA concluded that *Venetie* modified the second step of the *Watchman* test, but that the first step—determining a community of reference—survived.[83] Applying both steps of this test, EPA determined Hydro's Section 8 land to be "Indian country."[84] Hydro appealed EPA's decision, and the three-judge panel upheld EPA's land status determination.[85] Hydro then petitioned the Tenth Circuit for rehearing en banc.[86]

B. Majority Opinion

After finding that it had subject matter jurisdiction,[87] that Hydro had standing,[88] and that it would review EPA's interpretation of § 1151(b) *de novo*,[89] the Tenth Circuit majority turned to the issue of whether EPA

77. *Id.*
78. *See id.* at 1235.
79. *Id.* at 1254.
80. *HRI III*, 608 F.3d at 1141 n.6.
81. *Id.*
82. *See supra* Part I.A.
83. *HRI III*, 608 F.3d at 1142.
84. *Id.* at 1143 (quoting U.S. ENVTL. PROT. AGENCY, LAND STATUS DETERMINATION 13 (2007), *available at* http://www.epa.gov/region9/water/groundwater/determination_comments/hri-signed-land-status-determination-feb-07.pdf).
85. *HRI II*, 562 F.3d 1249, 1267–68 (10th Cir. 2009).
86. *HRI III*, 608 F.3d at 1143. The panel held the Section 17 land to be Indian country under § 1151(a) and, therefore, the EPA retains jurisdiction. *Id.* at 1141 n.6. The Section 17 holding was not appealed. *Id.*
87. *See id.* at 1145.
88. *Id.* at 1144–45. EPA challenged HRI's standing on the basis that the "final land status determination imposed no constitutionally cognizable injury on HRI." *Id.* at 1144. The majority agreed with the panel opinion that "the outlay of funds necessary to secure a second UIC permit from EPA, on top of the one HRI ha[d] already secured from NMED, amply qualifie[d] as a concrete and particularized, actual and imminent injury." *Id.* (internal quotation marks omitted).
89. *Id.* at 1146.

was correct in determining that the *Watchman* "community of reference" test survived *Venetie.*[90]

The majority first looked to *Venetie*'s interpretation of the plain meaning of § 1151(b). The requirement that the federal government set aside the land, the majority explained, "ensures that the land in question is occupied by an 'Indian community.'"[91] Next, the federal superintendence requirement "guarantees that the Indian community is sufficiently 'dependent' on the Federal Government."[92] The majority then applied this test to find that the federal government had not set aside Hydro's Section 8 land, which Hydro owned outright, and did not superintend the land.[93] Therefore, Hydro's Section 8 land did not constitute "Indian country."[94] The court reasoned that if it continued to allow *Watchman*'s "community of reference" test, land that had not been "set aside by Congress for Indians [could] *become* Indian country simply because of its *proximity* to other lands that are federally set aside and superintended."[95] The majority then provided an illustration to demonstrate this flaw of *Watchman*'s "community of reference" test.

The majority hypothesized that a couple popping a bottle of champagne could be charged with a federal crime if they were on land that a "Navajo Chapter ha[d] asserted for itself."[96] The majority reasoned that only a court could determine, by conducting the "community of reference" test *post hoc*, whether the land constituted Indian country.[97] Thus, the "legality of one's actions would . . . become a . . . guessing game."[98] Such a result would disregard Congress's intent and, therefore, the *Watchman* "community of reference" test was no longer valid.[99]

The majority then reviewed the statute's history to determine whether the *Watchman* "community of reference" prong survived *Venetie.* The majority noted the *Venetie* Court's reasoning that § 1151(b)'s "use of the phrase 'dependent Indian community' was intended to codify language from the Supreme Court's decisions in *United States v. Sandoval* and *United States v. McGowan.*[100] The Tenth Circuit reasoned that "[n]othing in *Sandoval* or *McGowan* suggests that . . . 'dependent Indian communities' should be determined by a court's perceptions about local

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90. *Id.* at 1147.
91. *Id.* at 1149 (quoting *Venetie II*, 522 U.S. 520, 531 (1998)).
92. *Id.* (quoting *Venetie II*, 522 U.S. at 531).
93. *Id.*
94. *Id.*
95. *Id.* at 1152.
96. *Id.* at 1161 (explaining that the introduction of alcohol into a dependent Indian community could be a federal crime under 18 U.S.C. §§ 1154, 1156).
97. *Id.*
98. *Id.*
99. *See id.*
100. *Id.* at 1155 (quoting *Venetie II*, 522 U.S. 520, 527–31 (1998)).

social, political, or geographic affinities."[101] Therefore, the court concluded that whether land constitutes a "dependent Indian community" does not depend on the community, but rather on whether Congress has set it aside for Indian use and whether it remains federally superintended.[102]

Finally, the majority examined the statute's structure to determine the "community of reference" test's survival. Indian reservations, classified as "Indian country" under § 1151(a), are "traditionally created by and delineated according to boundaries Congress has set or sanctioned."[103] Similarly, allotments, as recognized under § 1151(c), are "a product of congressional action."[104] Section 1151(b) describes areas that are neither reservations nor allotments, but that are still "explicitly set aside for Indians by congressional mandate and superintended by the federal government."[105] Therefore, the majority reasoned, "the creation of Indian country hinges on some explicit action by Congress."[106] Because Hydro's land did not pass this "explicit action" test, the majority held it was not a "dependent Indian community."[107] Thus, neither the federal government nor the Navajo will have control over the aquifer, and New Mexico will control granting Hydro's UIC permit.

C. Dissenting Opinions

1. Judge Ebel

Judge Ebel disagreed with the majority primarily on the applicability of the *Venetie* test.[108] While agreeing that the *Venetie* two-part test applies to the land in question, Judge Ebel argued that a new "community of reference" test must be used initially to determine the land in question *before* applying the *Venetie* test.[109] Although the Court in *Venetie* rejected the Ninth Circuit's multi-factor test, Judge Ebel read *Venetie* to allow for consideration of "[t]he degree of federal ownership of and control over the area, and the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples."[110]

Judge Ebel propounded a three-step test to determine the appropriate community of reference.[111] This test would analyze whether the pro-

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101. *Id.* at 1156.
102. *Id.*
103. *Id.* at 1157.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 1166.
108. *See id.* at 1168 (Ebel, J., dissenting).
109. *Id.* at 1179.
110. *Id.* at 1177 (quoting *Venetie II*, 522 U.S. 520, 531 n.7 (1998)). The Navajo Nation agrees. *See* Brief of Intervenor-Respondent Navajo Nation at 20, *HRI II*, 562 F.3d 1249 (10th Cir. 2009) (No. 07-9506).
111. *HRI III*, 608 F.3d at 1179.

posed community had "reasonably ascertainable boundaries," the coherence of the land within those boundaries, and the coherence of "the uses to which the land is put and the people inhabiting the land."[112]

Applying this test, Judge Ebel would determine the Church Rock Chapter to be the appropriate "community."[113] Applying the *Venetie* test to the Church Rock Chapter, then, Judge Ebel determined that it was a dependent Indian community and therefore subject to federal jurisdiction[114] because the federal government had set aside most of this community for Navajo use and superintended it.[115]

Judge Ebel also considered § 1151's purpose of avoiding checkerboard jurisdiction to support employment of a "community of reference" test.[116] By looking only to title, Judge Ebel reasoned that the majority's approach "would completely eviscerate this congressional purpose."[117]

Additionally, Judge Ebel argued that the concept of community in § 1151(b) should be afforded "heightened importance" in an environmental context because aquifers extend beyond definite land boundaries.[118]

2. Judge Henry

Judge Henry, who agreed with Judge Ebel, wrote separately to underscore his disagreement with the majority's opinion.[119] Judge Henry noted that the majority is "veer[ing] away from that fundamental concern" of avoiding checkerboard jurisdiction.[120] Judge Henry referenced the "grave consequences," one of which being groundwater contamination, that previous mining operations have had on the Navajo to explain his hesitation in applying § 1151.[121]

III. ANALYSIS

Both *HRI III* and *Venetie* interpreted and applied § 1151(b) because the EPA used that criminal statute to define jurisdictional bounds under the SDWA.[122] But reliance on § 1151 is inappropriate in the mining context given its pedigree. Further, granting UIC permitting jurisdiction to the State of New Mexico for *in situ* wells may lead to the contamination of a Navajo drinking water source. In the alternative, adoption by the

112. *Id.*
113. *Id.* at 1180.
114. *See id.* at 1182.
115. *See id.* at 1181–82.
116. *Id.* at 1172–73.
117. *Id.* at 1172.
118. *Id.* at 1174.
119. *Id.* at 1182 (Henry, J., dissenting).
120. *Id.* at 1184.
121. *Id.*
122. 40 C.F.R. § 144.3 (2011).

EPA of a different definition of "Indian lands" would respect Navajo sovereignty while minimizing checkerboard jurisdiction.

A. Section 1151 is a Weak Basis upon Which to Establish Civil Jurisdiction

The Tenth Circuit in *HRI III* accepted that § 1151 applied[123] because the EPA tied the SDWA "Indian lands" language to the definition of "Indian country" under 18 U.S.C. § 1151.[124] Section 1151, though, is a criminal statute describing where the federal government, rather than a state, retains criminal jurisdiction.[125] Although it is a criminal statute, the court in *HRI III* explained that § 1151 had been used "often" to "define the scope of federal authority over civil and regulatory matters" and cited page 527 of *Venetie* and § 3.04[1] of Cohen's Handbook of Federal Indian Law.[126] First, this section will follow the *Venetie* trail and then pursue the Cohen's authority to determine the precedential strength of applying § 1151 to the context of uranium mining.[127]

1. *Venetie*

Like the Tenth Circuit in *HRI III*, the Supreme Court in *Venetie* stated that § 1151 "generally applies to questions of civil jurisdiction."[128] For authority, the Court looked to footnote two of *DeCoteau v. District County Court for the Tenth Judicial District*.[129] In footnote two, the Supreme Court in *DeCoteau* recognized the application of § 1151 to questions of civil jurisdiction.[130] The *DeCoteau* Court cited there, as authority, footnotes from three U.S. Supreme Court opinions.[131]

First, the Court in *DeCoteau* cited a footnote of *McClanahan v. Arizona State Tax Commission*,[132] a case involving Arizona's attempt to impose an "income tax on a reservation Indian whose entire income derives from reservation sources."[133] This footnote, however, did not refer to § 1151.[134] Rather, both the footnote itself and the sentence that it supports stated that consent of the tribe was required for the state to assume criminal and civil jurisdiction over Indian reservations.[135] Therefore, this authority supports the proposition that tribal sovereignty should be re-

123. *See HRI III*, 608 F.3d at 1134–35 (majority opinion).
124. 40 C.F.R. § 144.3 (2011).
125. 18 U.S.C. § 1151 (2006); *HRI III*, 608 F.3d at 1138.
126. *HRI III*, 608 F.3d at 1138.
127. Judge Ebel, in his dissenting opinion, cites the additional authority of *Enlow v. Moore*, 134 F.3d 993, 995 n.2 (10th Cir. 1998), but this trail merely reaches the same destinations as those of *Venetie* and Cohen's.
128. *Venetie II*, 522 U.S. 520, 527 (1998).
129. 420 U.S. 425 (1975)
130. *Id.* at 428 n.2.
131. *Id.*
132. *Id.* (citing McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 178 n.17 (1973)).
133. *McClanahan*, 411 U.S. at 165.
134. *See id.* at 178 n.17.
135. *See id.* at 178 & n.17.

spected unless the tribe relinquishes it, and not that criminal jurisdiction statutes, such as § 1151, may apply to questions of civil jurisdiction.

Next, the Court in *DeCoteau* cited a footnote of *Kennerly v. District Court of Montana*,[136] a case regarding the attempt of the owner of a grocery store located on an Indian reservation to collect against reservation Indians who "purchased some food on credit.[137] This footnote provided examples of explicit extensions of civil and criminal jurisdiction to states before the passage of the Civil Rights Act of 1968.[138] The examples mentioned neither § 1151 nor the application of federal criminal statutes to civil contexts.[139] Therefore, this footnote does not provide support for the proposition that § 1151 can be applied to civil or regulatory questions.

Last, the *DeCoteau* Court cited footnotes five, six, and ten of *Williams v. Lee*, [140] a case concerning the attempt of an operator of a general store on an Indian reservation to collect against two Indians for goods sold on credit.[141] Footnote five mentioned § 1151, but only because it stated that federal courts have jurisdiction over crimes on Indian reservations committed against Indians by non-Indians.[142] Footnote six did not mention § 1151, but described congressional grants of civil and criminal jurisdiction to states.[143] It did not describe how or when federal criminal statutes have been applied to determine civil jurisdiction.[144] Neither did footnote ten mention § 1151; rather, it described a federal statute that grants federal consent to state criminal and civil jurisdiction over reservation Indians.[145] This footnote did not describe the application of federal criminal jurisdiction statutes to questions of civil or regulatory jurisdic-

136. *DeCoteau*, 420 U.S. at 428 n.2 (citing Kennerly v. Dist. Court of Mont., 400 U.S. 423, 424 n.1 (1971)).

137. *Kennerly*, 400 U.S. at 424.

138. *Id.* at 425 n.1.

139. *Id.*

140. *DeCoteau*, 420 U.S. at 428 n.2 (citing Williams v. Lee, 358 U.S. 217, 220 n.5, 221 n.6, 223 n.10 (1959)).

141. *Williams*, 358 U.S. at 217–18.

142. *Id.* at 220 n.5. Footnote five also cites a previous edition of Cohen's, which discusses federal criminal jurisdiction over crimes committed in Indian country by and against Indians and non-Indians. *See* U.S. DEPT. OF INTERIOR, FEDERAL INDIAN LAW 307 (1958). Crimes committed by Indians against Indians are ordinarily subject to tribal jurisdiction. *Id.* 319. Crimes committed by Indians against non-Indians in Indian country are ordinarily subject to federal jurisdiction. *Id.* at 320. Crimes committed by non-Indians against Indians are ordinarily subject to federal jurisdiction. *Id.* at 323. And crimes committed by non-Indians against non-Indians are ordinarily subject to state jurisdiction. *Id.* at 324.

143. *Williams*, 358 U.S. at 221 n.6.

144. *Id.* Footnote six also cites to the 1958 Revision of Cohen, but only to refer the reader to a discussion of special Indian laws relating to Oklahoma. *See* U.S. DEPT. OF INTERIOR, *supra* note 140, at 985.

145. *Williams*, 358 U.S at 223 n.10. Subsequent to this opinion, "Congress passed the Indian Civil Rights Act which changed the prior procedure to require the consent of the Indians involved before a State was permitted to assume jurisdiction." McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 178 n.17 (1973) (citing 25 U.S.C. § 1322(a)).

tion.[146] Therefore, these footnotes do not provide support for the proposition that § 1151 can be applied in civil or regulatory contexts.

2. Cohen's 3.04[1]

In addition to *Venetie*, the court in *HRI III* also cited Cohen's Handbook on Federal Indian Law to support its proposition that § 1151 has been applied to civil issues.[147] Section 3.04[1] of Cohen's, in relevant part, states that the "modern definition of Indian country is found in the criminal code, but applies in the civil context as well."[148] The footnote to this statement[149] references, as one authority, a footnote from a case[150] which, in turn, cites *DeCoteau*, described above.

As another authority, the Cohen's footnote instructs the reader to see *Oklahoma Tax Commission v. Sac and Fox Nation*,[151] a case regarding the power of Oklahoma to "impose income taxes or motor vehicle taxes on [Indians]."[152] While that case does mention § 1151, the page cited by Cohen's does not. Rather, the case discusses § 1151 as it pertains to the inability of states to tax[153] members living not only on reservations, but anywhere in "Indian country" as defined by § 1151.[154] While this case demonstrates the extension of § 1151 to a civil context, the extension is made out of deference to tribal sovereignty.[155] Therefore, this case supports the proposition that § 1151 can be applied in civil contexts, but only to the extent that states generally do not have jurisdiction to tax within "Indian country." The acceptance in *HRI III* of § 1151's valid application to civil matters illustrates how, by distorting precedent, extensions of § 1151 have progressed from respecting tribal sovereignty to seizing it.

The Tenth Circuit in *HRI III* cited *Venetie* and Cohen's to support the EPA's linkage of "Indian lands" in the SDWA to "Indian country" in § 1151.[156] At bottom, the authorities the *HRI III* majority used to support the application of § 1151 are not persuasive. The *Venetie* and Cohen's trails lead to footnotes that do not justify applying § 1151 to determine jurisdiction for mining purposes. Rather, the precedential cases listed in the various footnotes, at best, apply to the extension of criminal jurisdic-

146. *See Williams*, 358 U.S. at 223 n.10.
147. *HRI III*, 608 F.3d 1131, 1138 (10th Cir. 2010) (en banc).
148. COHEN'S, *supra* note 9, § 3.04[1] at 182.
149. *Id.* at 182 n.333.
150. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 208 n.5 (1987) (citing DeCoteau v. Dist. Cnty. Court, 420 U.S. 425, 427 n.2 (1975)).
151. 508 U.S. 114, 128 (1993).
152. *Id.* at 116.
153. *See id.* at 128.
154. *Id.* at 123.
155. *See id.* at 126.
156. When the EPA, in 1984, linked the definition of "Indian lands" in the SDWA to "Indian country" under § 1151, the Supreme Court had already applied § 1151 in most of the cases discussed in this section.

tion to cover tax obligations and debt collection and to keep states from taxing Indians in Indian country. At worst, reliance on the cited authority allows the federal government to further encroach upon Indian sovereignty, as shown by the *HRI III* holding.

Apparently, the doctrine of stare decisis trumps any injustice leveled against Native Americans through the federal intrusion into tribal sovereignty. Although the Tenth Circuit was bound to apply EPA's definition of "Indian lands" under *Venetie*'s interpretation of § 1151, reliance on the particular authority cited, as shown by *HRI III*, threatens the ability of the Navajo Nation to protect its drinking water sources from contamination.

B. Implications of Granting Jurisdiction to New Mexico

As a result of *HRI III*, the Tribe, despite its ban on uranium mining,[157] will not be able to prevent devastation of tribal land from uranium mining and, more importantly, the contamination of a source of drinking water for its people. Although the EPA has not yet granted UIC permitting authority to the Navajo for Class III wells, it could do so in the future, and thereby give the Navajo control over the fate of the aquifer that Hydro seeks to mine.

Because the court held that Hydro's land is not "Indian country," Hydro must get its UIC permit from NMED rather than the EPA, which controls tribal permits. Although NMED regulations must be as stringent as those of the EPA,[158] Hydro does not have to get approval from the Navajo, who use the aquifer for drinking water[159] and who would have input to the EPA permit process.[160]

When the EPA approved NMED's request for an aquifer exemption in 1989,[161] it concluded that the aquifer did not serve, and would not in the future serve, as a source for drinking water.[162] Currently, however, the aquifer serves as a drinking water source for thousands of people.[163]

157. *See* Diné Natural Resources Protection Act of 2005, NAVAJO NATION CODE ANN. tit. 18, § 1303 (2005).

158. *See* 42 U.S.C. §§ 300h, 300h-1 (2006); *HRI I*, 198 F.3d 1224, 1232 (10th Cir. 2000); *see also* Bradford D. Cooley, *The Navajo Uranium Ban: Tribal Sovereignty v. National Energy Demands*, 26 J. LAND RESOURCES & ENVTL. L. 393, 397 (2006).

159. Brief of Intervenor-Respondent Navajo Nation, *supra* note 110, at 12; E-mail from Chris Shuey, Dir. of the Uranium Impact Assessment Program, Sw. Research & Informational Ctr., to Andrew Brooks, Student, Denver Univ. Sturm Coll. of Law (Sept. 17, 2010, 22:09 MST) (on file with author).

160. *See* Memorandum from Alvin L. Alm, Deputy Adm'r to Assistant Adm'rs et al. 5 (Nov. 8, 1984) (on file with author); *see also* James M. Grijalva, *The Origins of EPA's Indian Program*, 15 KAN. J.L. & PUB. POL'Y 191, 290 (2006).

161. *HRI I*, 198 F.3d at 1234.

162. *HRI III*, 608 F.3d 1131, 1140 (10th Cir. 2010) (en banc).

163. Brief of Intervenor-Respondent, *supra* note 110, at 12; E-mail from Chris Shuey to Andrew Brooks, *supra* note 159. Apparently, the discrepancy exists because the Nuclear Regulatory Commission "averaged good quality groundwater from outside the ore zone with bad quality water from inside the ore zone for an *average* pre-mining water quality that look[ed] bad." E-mail from

Because *HRI III* ruled that New Mexico has jurisdiction over Hydro's land, Hydro will seek its permit from NMED.[164]

Unlike the EPA, New Mexico does not grant "aquifer exemptions," but it will grant "temporary aquifer designation status" for certain Class III wells.[165] Temporary aquifer designation status allows the mining of aquifers that can be used as sources for drinking water as long as the aquifer, in whole or a "portion thereof," (1) does not serve as a "domestic or agricultural water supply"[166] and (2) either is currently situated in a "location which makes recovery of water for drinking or agricultural purposes" impractical[167] or is already so contaminated that "render[ing] that water fit for human consumption or agricultural use" is impractical.[168] In addition, miners must show that, once mining operations are complete, they will restore the groundwater's quality to pre-mining levels or better.[169]

To comply with these regulations, Hydro must show that the portion of the aquifer it seeks to mine is "not currently used" as a domestic water supply.[170] Because thousands of people currently use the aquifer for drinking water,[171] Hydro will have to argue that only the portion it will mine is not currently used for drinking water. Specifically, because New Mexico regulations require measurement of a minimum of one-quarter mile surrounding the well site to determine the toxicity of an aquifer,[172] Hydro must show that the water in the portion of the aquifer within one-quarter mile around the proposed uranium *in situ* injection and recovery wells is too toxic to be used for domestic or agricultural use.

Additionally, Hydro will have to show that it will restore the groundwater's quality. Multiple authorities explain that restoration of groundwater to pre-mining conditions after ISL mining is impossible.[173]

Eric Jantz, Staff Attorney, N.M. Envtl. Law Ctr., to Andrew Brooks, Student, Denver Univ. Sturm Coll. of Law (Sept. 22, 2010, 3:01 MST) (on file with author). The issue is moot, though, because HRI will have to get a new permit from New Mexico before it can mine, and therefore a new calculation would be made. Telephone Interview with William C. Olson, Chief, N.M. Ground Water Quality Bureau (Sept. 17, 2010).

164. E-mail from Eric Jantz, Staff Attorney, N.M. Envtl. Law Ctr., to Andrew Brooks, Student, Denver Univ. Sturm Coll. of Law (Sept. 19, 2010, 10:45 MST) (on file with author).

165. *See* N.M. CODE R. § 20.6.2.5101(C) (LexisNexis 2010); N.M. CODE R. § 20.6.2.5103(A)(2).

166. N.M. CODE R. § 20.6.2.5103(C)(1).

167. N.M. CODE R. § 20.6.2.5103(C)(2)(a).

168. N.M. CODE R. § 20.6.2.5103(C)(2)(b).

169. *See* N.M. CODE R. § 20.6.2.5101(C)(2) (mandating that discharge permits address the manner by which the permit holder will ensure that affected ground water will not have excess levels of toxic pollutants); *see also* N.M. CODE R. § 20.6.2.3103 (listing various pollutants and the acceptable concentrations thereof in New Mexico groundwater).

170. N.M. CODE R. § 20.6.2.5103(C)(1).

171. *See* Brief of Intervenor-Respondent Navajo Nation, *supra* note 110, at 12–15; *see also* E-mail from Chris Shuey to Andrew Brooks, *supra* note 159.

172. *See* N.M. CODE R. § 20.6.2.5202(B).

173. SUSAN HALL, GROUNDWATER RESTORATION AT URANIUM IN-SITU RECOVERY MINES, SOUTH TEXAS COASTAL PLAIN 30 (2009) (concluding that no ISL mine in the U.S. returned post-

The United States Nuclear Regulatory Commission[174] (NRC) admitted as much in an August 2010 report.[175] Responding to comments that "restoration of groundwater to baseline values for all groundwater constituents in any ISL wellfield to date" has not been accomplished, the NRC stated that "to date, *restoration to backgroundwater quality* for all constituents has proven to be *not practically achievable* at licensed NRC [ISL] sites."[176]

Although New Mexico is not certain to grant Hydro's petition for temporary aquifer designation status, approval could result in contamination of a Navajo drinking water source.

C. A Proposal Respecting Both Tribal Sovereignty and Venetie

The decision in *HRI III*, while correct under the SDWA and *Venetie*, undermines the legislative intent behind § 1151 of avoiding checkerboard jurisdiction[177] by reading out the word "communities" from § 1151(b). If New Mexico approves Hydro's permit, *HRI III* will lead to the mining of an aquifer that the Navajo use for drinking water, ignoring the Navajo's uranium mining ban. These problems can be remedied with a simple solution.[178]

Because the EPA chose to equate "Indian lands" in the SDWA to "Indian country," as defined under § 1151,[179] it can simply change its definition of "Indian lands." Disassociation of § 1151 with the SDWA would also dispose of the concomitant problems arising from reliance on *Venetie*, which interpreted § 1151(b).

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mining groundwater to pre-mining conditions based on data from Texas), *available at* http://pubs.usgs.gov/of/2009/1143/pdf/OF09-1143.pdf; *Impacts of Uranium In-Situ Leaching*, WISE URANIUM PROJECT, http://www.wise-uranium.org/uisl.html (last updated Nov. 20, 2010); E-mail from Eric Jantz to Andrew Brooks, *supra* note 164.

174. "[T]he NRC regulates in situ recovery facilities." *Uranium Recovery*, U.S. NUCLEAR REGULATORY COMM'N, http://www.nrc.gov/materials/uranium-recovery.html (last visited Apr. 1, 2011).

175. U.S. NUCLEAR REGULATORY COMM'N, ENVIRONMENTAL IMPACT STATEMENT FOR THE MOORE RANCH ISR PROJECT IN CAMPBELL COUNTY, WYOMING: SUPPLEMENT TO THE GENERIC ENVIRONMENTAL IMPACT STATEMENT FOR IN-SITU LEACH URANIUM MILLING FACILITIES B-36 (2010). Thanks to Eric Jantz for directing me to this report.

176. *Id.* (emphasis added). This statement directly contradicts one that the International Atomic Energy Agency made in 2005. "[W]ith nearly three decades of operations, the [U.S.] ISL mining industry has *never* caused a serious environmental, health or safety risk or *failed to restore an aquifer at one of its projects*." INT'L ATOMIC ENERGY AGENCY, GUIDEBOOK ON ENVIRONMENTAL IMPACT ASSESSMENT FOR IN SITU LEACH MINING PROJECTS 56 (2005) (emphasis added).

177. The holding in *HRI III* was that Section 8 was not "Indian country," *HRI III*, 608 F.3d 1131, 1166 (10th Cir. 2010) (en banc), and therefore New Mexico retains UIC permitting jurisdiction over Section 8. The adjacent Section 17 *was* held to be "Indian country," *HRI I*, 198 F.3d 1224, 1254 (10th Cir. 2000), and, therefore, EPA retains UIC permitting jurisdiction there.

178. The *HRI III* majority suggested such a possibility: "EPA may seek to . . . unhitch[] its UIC permitting authority from § 1151." *HRI III*, 608 F.3d at 1166.

179. 40 C.F.R. § 144.3 (2011).

EPA should change the definition of "Indian lands" to refer to areas that are occupied or substantially surrounded by tribal lands.[180] Two elements should be used to make such a determination, factors that the Supreme Court in *Venetie* implicitly approved, but did not use, in interpreting § 1151(b): "the degree of federal ownership of and control over the area, and the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples."[181] To achieve administrative ease and judicial efficiency, the EPA should set specific targets or thresholds that the areas must meet to constitute "Indian land." For example, an area consisting of land, 50.1% of which is controlled by the federal government and was set aside for Indians, could constitute "Indian lands." Specific thresholds should also be used to define "area," such as requiring an analysis of land within a radius of, for example, three miles of the disputed land. EPA should specify such thresholds after receiving input from all interested parties: namely, the tribes, the states, the federal government, and private landowners. Specificity will allow both Indian communities and private parties to determine whether disputed land constitutes "Indian lands" without the need for courts to undergo an unpredictable *post hoc* analysis. Such specificity would avert the *HRI III* majority's issues with *Watchman* "community of reference" test, while simultaneously conforming to congressional authority.

Hydro's land would constitute "Indian lands" under such a definition. Applying the first element, Hydro's parcel on Section 8 would be subject to EPA jurisdiction because "[t]he government has set aside 78% of the land in the [Navajo Church Rock] Chapter for the use of Indians either as trust land either for the tribe or for individuals in the form of allotments."[182] Similarly, the second element leads to the same conclusion because "the federal government retains title to 92% of the land in the Chapter, and[,] as . . . owner [in fee,] certainly retains superintendence over the land."[183]

Ideally, the EPA would then delegate to the Navajo UIC permitting authority over such land. This would give the Tribe the most respect for its sovereignty and allow it to make its own decisions regarding its land and the resources beneath such land. Even if the EPA retained jurisdiction, the Navajo would be able to provide input when reviewing UIC applications.

The advantages of such a definition would outweigh the disadvantages. First, it would allow courts to avoid the checkerboard jurisdiction problems resulting from *Venetie* and *HRI III* because interested parties

180. The proposal incorporates Indian reservations and Indian allotments as described in § 1151(a) and (c), respectively, into the definition of "Indian lands."

181. *Venetie II*, 522 U.S. 520, 531 n.7 (1998) (quoting *Venetie I*, 101 F.3d 1286, 1301 (9th Cir. 1996)) (internal quotation marks omitted).

182. *HRI III*, 608 F.3d at 1181 (Ebel, J., dissenting).

183. *Id.* at 1182.

would be able to determine upfront whether land constituted "Indian lands." Second, the new definition would allow courts to respect tribal sovereignty. In Hydro's case, if the Navajo were granted UIC permitting authority from the EPA, the permit would be refused. If EPA retained UIC permitting authority, EPA would seek input from the Chapter, and the Chapter would emphasize the Navajo's ban on uranium mining, thus allowing a certain level of respect for Navajo sovereignty.

Although the proposed definition of "Indian lands" breathes new life into the "degree of federal ownership" and "extent set aside" factors abrogated by *Venetie*, it does not resurrect the previous Ninth and Tenth Circuit tests in their entirety. Rather, the proposal consists of the "more relevant [factors]"[184] adopted by the Ninth Circuit. Although courts may analogize the proposed definition to *Venetie*, they would not be bound by it because *Venetie* interpreted § 1151(b) and the proposed definition would no longer be tethered to that section of the federal criminal code. To avoid the § 1151 analogy, the EPA could, in the new definition of "Indian lands," expressly proscribe reliance on § 1151 jurisprudence.[185]

CONCLUSION

The decision of *HRI III* demonstrates the Tenth Circuit's preference for predictability over respect for tribal sovereignty. Although the decision allows property owners and authorities to easily determine which government has jurisdiction, it relies on a criminal statute that was enacted to facilitate consistent enforcement of criminal law by federal authorities. As a result of the opinion, Hydro must obtain temporary designation status not from the Navajo, but from the State of New Mexico for its Section 8 land, in addition to an aquifer exemption from the EPA for its adjacent Section 17 land. Should New Mexico allow Hydro to mine, the Navajo community could suffer the contamination of a primary drinking water source. This result may be avoided if EPA either grants the Tribe UIC permitting authority or unlinks its definition of "Indian

184. *Venetie II*, 522 U.S. at 531 n.7.

185. Alternatively, Congress could amend the SDWA to drop the term "Indian lands" altogether. Because aquifers are underground and do not follow land borders, tying jurisdiction to the land under which the aquifer sits is certain to lead to disputes, as evidenced by *HRI III*. One possibility already exists in the oil recovery context. *See, e.g.*, Cheyenne-Arapaho Tribes of Okla. v. United States, 966 F.2d 583, 585 (10th Cir. 1992). Congress could mandate all overlying landowners to enter into "unitization agreements" before any permits are granted. *See generally* BOSSELMAN ET AL., ENERGY, ECONOMICS AND THE ENVIRONMENT 310–11 (2nd Ed. 2006) (describing such agreements in the oil recovery context and problems with arriving at such agreements). Unitization agreements, however, are not a panacea. Because the Navajo are unlikely to agree to any extraction of uranium from aquifers under Navajo land, Congress may force capitulation if the nation's need for uranium becomes more urgent. Forced capitulation, then, would negate any respect for tribal sovereignty. *See* 25 U.S.C. §§ 396a, 396d (2006) (giving the Secretary of the Interior discretion to approve oil and gas unitization agreements involving Indian tribes). *But see* 25 C.F.R. 211.28(b) (2011) (stating that "the Secretary [of the Interior] shall consult with the Indian mineral owner prior to making a determination concerning [a unitization agreement]").

lands" from § 1151. A two-part test that analyzes the extent to which the federal government has set aside and controls a particular area would both limit checkerboard jurisdiction and, more importantly, allow tribes to retain the power to control the destiny of their valuable resources.

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BERRY & MURPHY, P.C. V. CAROLINA CASUALTY INSURANCE CO.: MALPRACTICE LIABILITY INSURANCE IN THE TENTH CIRCUIT

American journalist and satirist, Ambrose Bierce, once referred to insurance as, "[a]n ingenious modern game of chance in which the player is permitted to enjoy the comfortable conviction that he is beating the man who keeps the table."[1] However, as insurance policies become increasingly complex, and new forms of liability insurance are created, policyholders can no longer feel comfortable with the idea that an insurance policy guarantees them coverage. Instead, "the man who keeps the table" has the luxury of feeling much more comfortable. In *Berry & Murphy, P.C. v. Carolina Casualty Insurance Co.*,[2] the Tenth Circuit interpreted a claims-made malpractice liability insurance policy in favor of Carolina Casualty Insurance Company,[3] resulting in a lack of coverage for Berry & Murphy, P.C.[4] and a windfall for Carolina Casualty.[5] In doing so, the court incorrectly interpreted the term "insured" as defined in the insurance policy,[6] did not adhere to established precedent in Colorado law,[7] and created a highly inequitable result. All attorneys covered by a claims-made malpractice liability insurance policy should take notice of the holding in *Berry & Murphy* due to its potentially damaging effects.

Part I of this Comment examines claims-made insurance policies and how they compare to occurrence policies, the various pitfalls insured parties face under this relatively recent form of coverage, how the judiciary has historically construed insurance policies, and the potential result of an insurance company's arbitrary refusal to defend or pay a claim. Part II summarizes the facts, procedural history, and the court's holding and analysis in *Berry & Murphy*. Part III analyzes *Berry & Murphy*, commends the court on its determination that the facts constitute a single claim, criticizes the majority for its interpretation of the term "insured," and examines the fallacies and potential negative consequences of the ruling. This Comment concludes by arguing that claims-made insurance policies must be written with more precise definitions of key terms, and that clearly defined precedent dictates favorable outcomes for insured parties when insurance companies fail to heed such advice.

1. AMBROSE BIERCE, THE DEVIL'S DICTIONARY 169 (Forum Books 1948) (1911).
2. 586 F.3d 803 (10th Cir. 2009) [hereinafter "Berry & Murphy"].
3. *Id.* at 816.
4. *Id.* at 815.
5. *Id.* at 816 (Lucero, J., dissenting).
6. *See id.* at 814–15 (majority opinion).
7. Ballow v. PHICO Ins. Co., 875 P.2d 1354, 1359 (Colo. 1993) (noting that ambiguous contractual provisions should be "construed against the insurer who drafted the policy and in favor of the insured" (citing Chacon v. Am. Family Mut. Ins. Co., 788 P.2d 748, 750 (Colo. 1990))).

I. BACKGROUND

A. Contrasting Occurrence and Claims-Made Insurance Policies

Historically, "insurance policies have been written on an occurrence basis, providing coverage for events that take place during the policy period . . . ."[8] Under an occurrence policy, the claim against the insured can come at any time, essentially providing unlimited prospective coverage for events occurring while the policy was in effect.[9] As the United States became more industrialized and insurance claims increased, insurance companies discovered that difficulties with the occurrence model were quickly arising.[10] In particular, due to the prospective nature of these policies, unanticipated lag time between occurrences and filing of claims created a "tail" in which the insurance companies could not predict the amount of money they would have to pay out, causing actuarial estimation problems.[11] For this reason, insurance companies sought to avoid liability by arguing that events leading to insurance claims did not take place during the policy period.[12] However, the judiciary was willing to broaden insurers' liability by developing three different theories that worked in favor of the insured.[13] As a result, insurance companies faced increased business costs,[14] which, in turn, were passed on to the insured.[15] A natural consequence of these increased rates was the insurer's inability to obtain such rates due to the unwillingness of the insured to pay a premium that approached the total recovery available.[16]

As insurers began to withdraw from the market due to financial instability,[17] carriers realized that a less expensive policy option would be needed to counteract the rising premiums of occurrence policies.[18] Claims-made policies began to emerge, and this narrower form of coverage began to replace occurrence policies in areas such as professional liability.[19] Claims-made policies provide retroactive coverage[20] for

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8. *See* Carolyn M. Frame, *"Claims-Made" Liability Insurance: Closing the Gaps with Retroactive Coverage*, 60 TEMP. L.Q. 165, 165 (1987).

9. *Berry & Murphy*, 586 F.3d at 809 n.3 (citing 1 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 1:5 (3d ed. 1996)).

10. *See* Frame, *supra* note 8, at 169–70.

11. *Id.*

12. *Id.* at 170.

13. *Id.* at 170–71 (describing the manifestation theory, exposure theory, and triple trigger theory).

14. *Id.* at 171 ("Insurers were faced with inflation rates, escalating jury awards, and the general proliferation of claims. These factors increased the insurer's business costs because the premiums paid at the time of the occurrence were not sufficient to create the financial pool required to pay the 'tail' claim." (footnotes omitted)).

15. *See id.*

16. *Id.*

17. *Id.*

18. *See id.*

19. *Id.* at 177–79 (describing that the proliferation of claims-made policies in the area of professional liability is due, in part, to the policy's relative cost and coverage compared to occurrence policies).

claims that are made against the insured and reported during the policy period.[21] The notable difference between the occurrence policy and claims-made policy is that under a claims-made policy an insured can be indemnified for an event that occurred *before* the policy began, as long as the event is reported during the policy period.[22] Because the insurer's liability ends on a stated date, insurers are no longer exposed to the uncertainty of future claims by the insured, thereby allowing the insurers to calculate premiums with greater accuracy.[23]

B. Problems Associated With Claims-Made Policies

1. Notice-Prejudice Rule

Due to the strict notice and reporting requirements set forth in claims-made insurance policies, commentators have suggested that a more appropriate name for this type of policy should be "claims made and reported."[24] Because an insured party must become aware of the event giving rise to the claim *and* must report the claim within the policy period, limiting the name of this type of policy to claims-*made* seems misleading. The critical requirement of giving notice of a claim to the insurer within the policy period has led to what is commonly referred to as the "notice-prejudice" rule.[25]

This often-overlooked notice requirement[26] has led to litigation in instances where a claim is made against an insured shortly before the policy's coverage expired, not leaving a reasonable amount of time to give notice,[27] and in cases where an insured argues that circumstances made it impractical to give notice to the insurer.[28] However, in cases such as these, courts have been reluctant to add a judicially created "tail" to the end of a claims-made policy and have instead sided with insurance companies in showing "prejudice" when the insured fails to report the claim during the policy period.[29] Due to the inherent differences between occurrence policies and claims-made policies, courts have determined that the notice provision is an essential element of claims-made policies

20. Berry & Murphy, P.C. v. Carolina Cas. Ins. Co., 586 F.3d 803, 809 n.3 (10th Cir. 2009) (citing 1 RUSS & SEGALLA, *supra* note 9, at § 1:5).

21. Steven P. Garmisa, *Claims-Made Policies: Let the Lawyer Beware*, 78 ILL. B.J. 292, 292 (1990).

22. *See id.*

23. *Id.*

24. Reed Millsaps, *Avoiding the "Nightmares"—The "Notice-Prejudice" Rule and Claims Made Policies*, 28 No. 5 INS. LITIG. REP. 165, 165 (2006).

25. *See id.*

26. *Id.*

27. *E.g.*, Gulf Ins. Co. v. Dolan, Fertig & Curtis, 433 So. 2d 512, 513 (Fla. 1983).

28. *E.g.*, St. Paul Fire & Marine Ins. Co. v. Estate of Hunt, 811 P.2d 432, 433 (Colo. App. 1991).

29. *See, e.g.*, *id.* at 435; *Dolan*, 433 So. 2d at 515.

and have held that any judicial extension of the policy period would result in an un-bargained-for extension of coverage.[30]

In *Gulf Insurance Co. v. Dolan, Fertig & Curtis*,[31] the Florida Supreme Court noted the stark differences between occurrence and claims-made policies and cited economic ramifications as the basis for its decision that insurers must show "prejudice" under a claims-made policy.[32] As discussed above, the financial benefit conferred upon the insured in such a policy is a lower premium for comparable coverage.[33] However, this comes at the cost of a shorter reporting period.[34] The court refused to extend the reporting period beyond the end of the policy because it viewed this type of coverage as specifically bargained for between the insurer and the insured.[35] The philosophy of the *Dolan* court was "widely followed by other courts[,]"[36] with some courts extending the economic analysis beyond premium setting, [37] effectively solidifying the notice-prejudice rule.

2. Policy Language Ambiguities

Another problem facing claims-made insurance policies leading to increased litigation is ambiguities in policy language.[38] When insurance companies write policies that lack clear terminology, yet propose to enforce strict notice and reporting guidelines, the interpretation of whether or not an insured is covered often become contentious.[39]

In California, the word "may," in conjunction with the terms of when a claim can be set forth, has led to such an ambiguity.[40] In *Chamberlin v. Smith*, the California Court of Appeals followed precedent set in *Gyler v. Mission Insurance Co.* in determining that the language of the insurance policy was susceptible to two divergent interpretations.[41] The

30. *E.g.*, *Dolan*, 433 So. 2d at 515.

31. 433 So. 2d 512 (Fla. 1983).

32. *See id.* at 516. In a claims-made policy, unlike an occurrence policy, a claim will not arise after the expiration of the policy; therefore, due to this reduced underwriting risk, claims-made policies can be offered at a lower premium than occurrence policies. *Id.*

33. Millsaps, *supra* note 24, at 165.

34. *Id.*

35. *Dolan*, 433 So. 2d at 515.

36. Millsaps, *supra* note 24, at 165 (discussing the holdings of *Textron, Inc. v. Liberty Mut. Ins. Co.*, 639 A.2d 1358 (R.I. 1994) and *St. Paul Fire & Marine Ins. Co. v. Estate of Hunt*, 811 P.2d 432 (Colo. App. 1991) as examples of cases that have followed *Dolan*).

37. *See* St. Paul Fire & Marine Ins. Co. v. Estate of Hunt, 811 P.2d 432, 435 (Colo. App. 1991) (noting that the ability to accurately fix reserves leads to lower policy premiums); Hasbrouck v. St. Paul Fire & Marine Ins. Co., 511 N.W.2d 364, 368 (Iowa 1993) (noting that insurer prejudice allows for more accuracy in setting reserves).

38. *See* Garmisa, *supra* note 21, at 294.

39. *See, e.g.*, St. Paul Ins. Co. of Ill. v. Armas, 527 N.E.2d 921, 925 (Ill. App. Ct. 1988).

40. *See, e.g.*, Gyler v. Mission Ins. Co., 514 P.2d 1219, 1220–21 (Cal. 1973); Chamberlin v. Smith, 140 Cal. Rptr. 493, 497 (Ct. App. 1977).

41. *Chamberlin*, 140 Cal. Rptr. at 497–98 ("First, the phrase might limit coverage to a claim asserted within the policy period and exclude claims asserted afterward, making the words 'which may be' superfluous. Secondly, the phrase might be construed as extending coverage to any claim

pertinent language of the insurance policy read, "[T]o indemnify . . . against any *claim or claims* for breach of professional duty as Lawyers *which may be made against them* during the period set forth in the Certificate by reason of any negligent act, error or omission, whenever or wherever the same was or may have been committed . . . ."[42] The court dismissed the idea that there was unnecessary language in the policy and instead adopted a construction that provided coverage for an injury that took place during the policy period, even when the claim was made subsequent to the policy's expiration.[43] In ambiguous situations such as this, claims-made policies will likely lead to litigation due to the insurer's unwillingness to indemnify the insured[44] and the insured's rightful claim that ambiguities must be construed in their favor.[45]

While many insurance companies have eliminated the word "may" from their policies,[46] even "plain language" policies can be encumbered by ambiguities, leading to disagreements regarding the temporal requirements of notice.[47] For example, in *St. Paul Insurance Co. of Illinois v. Armas*,[48] the Illinois Appellate Court found that the plain language of a malpractice liability insurance policy, in conjunction with a cancellation form, resulted in an ambiguity that could conceivably allow an insured party to report a claim after the expiration of the policy period.[49] In this policy, which lacked a definitional section,[50] the insured was given no guidance in determining what constituted a loss—leading the court to determine that an ambiguity was created as to when a claim had to be reported.[51] The court held that the provisions created confusion, resulting from conflicting terms.[52] Accordingly, the court reversed the trial court's ruling, holding that summary judgment was inappropriate.[53] Such ambiguities in claims-made policies constitute another worrisome complication due to the increased potential for litigation and possibility that the insured will not receive the coverage they thought they had purchased.

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which arose and *could* have been asserted during the policy period, including claims not actually asserted until after the policy's expiration." (quoting *Gyler*, 514 P.2d at 1221)).

42. *Id.* at 497 (second alteration in original).

43. *Id.* at 502.

44. *See, e.g.*, *Chamberlin*, 140 Cal. Rptr. at 495.

45. *See id.* at 498 ("The general rule is that if coverage is available under any reasonable interpretation of an ambiguous clause of an insurance policy, the insurer cannot escape its obligations.").

46. Garmisa, *supra* note 21, at 294.

47. *Id.*

48. 527 N.E.2d 921 (Ill. App. Ct. 1988).

49. *See id.* at 925.

50. *Id.* at 924.

51. *Id.*

52. *Id.*

53. *Id.* at 925.

3. Avoidance of Liability

Due to the restrictive nature of claims-made policies, insurers typically require prospective policyholders to disclose whether they have knowledge of potential claims against them at the time the policy is instituted. This attempt by insurance companies to avoid coverage gives rise to problems regardless of the jurisdiction in which the policy is written and has been interpreted both in favor of and against insured parties.[54]

A series of Illinois state cases illustrate the courts' varying interpretations of whether a lack of disclosure on behalf of the insured at the onset of the claims-made policy is considered misrepresentation.[55] In *Great West Steel Industries v. Northbrook Insurance Co.*,[56] the court held that no misrepresentation had taken place when the insured failed to report a construction accident potentially related to steel it had manufactured because it believed it was not responsible for the accident.[57] Although the insured party was aware of the circumstances that might lead to a claim, it did not believe it was at fault and the court construed the policy language in their favor.[58]

In the malpractice liability context, courts have not been as forgiving when policyholders fail to report potential claims at the inception of the policy.[59] For example, in *Stiefel v. Illinois Union Insurance Co.*,[60] an attorney received a letter informing him of a potential malpractice lawsuit that would be filed against him six months before he took out a claims-made insurance policy.[61] Despite the argument that the attorney believed the claim had been abandoned, the court did not reach a conclusion consistent with *Great West Steel Industries* when the insurance company subsequently denied coverage after a lawsuit was filed against the insured within the policy period.[62] Instead, the court explained that the letter sent to the insured undoubtedly constituted notice of a potential malpractice suit, regardless of the fact that the lawsuit was not filed when the plaintiff claimed they would file it.[63] In contrast to the holding in *Stiefel*, an insurance company's attempt to avoid liability in similar circumstances was unsuccessful when an insured party denied knowledge of a potential claim even though they had received a letter similar to that

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54. *See* Garmisa, *supra* note 21, at 296.
55. *Id.*; Great W. Steel Indus. v. Northbrook Ins. Co., 484 N.E.2d 847 (Ill. App. Ct. 1985); Stiefel v. Ill. Union Ins. Co., 452 N.E.2d 73 (Ill. App. Ct. 1983)).
56. 484 N.E. 2d 847 (Ill. App. Ct. 1985).
57. *Id.* at 853.
58. *Id.*
59. *See Stiefel*, 542 N.E.2d at 76.
60. 542 N.E.2d 73 (Ill. App. Ct. 1983).
61. *Id.* at 74–75.
62. *See id.* at 77.
63. *Id.*

in *Stiefel* four years before the policy term.[64] This departure from *Stiefel*'s holding indicates an increased potential for ambiguity in the interpretation of this temporal aspect of claims-made policy applications, giving rise to further complications with this type of insurance policy.

C. Insurance Policy Jurisprudence

When a dispute arises between an insurance company and a policyholder, Colorado law states that insurance policies should be interpreted based on the principles of contract law.[65] In construing the terms of the policy, courts must attempt to "promote the intent of the parties" as they would with any contract.[66] As evidenced by a multitude of insurance litigation, the intent of the parties is not always clear.[67] In the insurance context, courts seek to resolve disagreements about coverage and terminology used in a written instrument by determining intent based on the plain language of the instrument.[68] When the language is clear and unambiguous, courts should "not rewrite a contractual provision"[69] and must instead "give effect to the plain and ordinary meaning of its terms."[70]

When the language is unclear, however, and uncertainty arises, "courts should construe the policy in favor of the insured."[71] Although a mere disagreement between the insurance provider and policyholder does not give rise to an ambiguity, when the policy "is susceptible on its face to more than one reasonable interpretation" it is determined to be ambiguous.[72] Finally, in determining whether a policy is ambiguous on any point, courts "must evaluate the policy as a whole."[73]

D. Bad Faith on Part of Insurer

When an insurance company is held liable for a claim, state statutes may also allow insured parties to recover reasonable attorney fees, court

64. St. Paul Mercury Ins. Co. v. Statistical Tabulating Co., 508 N.E.2d 433, 436 (Ill. App. Ct. 1987) ("We also recognize that that foreseeability may have been diminished by the intervening time period between the last correspondence between the parties in April, 1980 and the filing of the complaint in February 1983. In our view, whether that period of silence lulled Stat-Tab into a false assurance that there were no prior errors which would give rise to a potential claim, thereby acting as a waiver of prior knowledge of potential claims, is a genuine issue of material fact which precludes entry of a summary judgment.").

65. *See* Carl's Italian Rest. v. Truck Ins. Exch., 183 P.3d 636, 639 (Colo. App. 2007) (citing Chacon v. Am. Family Mut. Ins. Co., 788 P.2d 748, 750 (Colo.1990)).

66. Cary v. United of Omaha Life Ins. Co., 108 P.3d 288, 290 (Colo. 2005).

67. *See, e.g.*, Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co., 855 P.2d 1263 (Cal. 1993); Prof'l Solutions Ins. Co. v. Mohrlang, No. 07-cv-02481-PAB-KLM, 2009 WL 321706 (D. Colo. Feb. 10, 2009).

68. Parrish Chiropractic Ctrs., P.C. v. Progressive Cas. Ins. Co., 874 P.2d 1049, 1055 (Colo. 1994)

69. Wota v. Blue Cross & Blue Shield of Colo., 831 P.2d 1307, 1309 (Colo. 1992).

70. *Id.*

71. Republic Ins. Co. v. Jernigan, 753 P.2d 229, 232 (Colo. 1988).

72. Cary v. United of Omaha Life Ins. Co., 108 P.3d 288, 290 (Colo. 2005).

73. *Id.*

costs, and the covered benefits when an insurer's delay or refusal to pay a claim constitutes bad faith.[74] In Colorado, a first-party claimant in such an action may recover two times the covered benefit.[75] In the absence of a bad faith statute, an insured may typically only recover special damages for the insurance company's refusal to indemnify the loss or the actual amount due to the insured based on the loss.[76]

An insurance company's mere denial of a claim does not necessarily rise to the level of bad faith[77] and, although similar, states differ in the elements of this cause of action.[78] To establish a claim of bad faith in Colorado the plaintiff must have damages or loss, the defendant must have denied or delayed payment without reasonable basis for its action, and the defendant's unreasonable conduct must have been the cause of the plaintiff's damages or loss.[79] Because such statutes are penal in nature, they are to be strictly construed and the burden is on the insured seeking statutory recovery to prove arbitrariness or capriciousness on the part of the insurer for failing to pay a claim.[80] Insurance companies have been held liable for statutory penalties after acting in bad faith in a variety of circumstances,[81] including, among other things, denial of a claim on the grounds that a particular person was not within the coverage afforded by the policy.[82] Illustrating the contentiousness of such litigation, however, courts have also held to the contrary in cases involving similar factual circumstances.[83]

II. *BERRY & MURPHY, P.C. V. CAROLINA CASUALTY INSURANCE COMPANY*

A. Facts

Berry & Murphy, P.C. involves the interpretation of a claims-made insurance policy issued by Carolina Casualty[84] to the named insured "Timothy H. Berry, P.C."[85] The issue in this case stems from a series of disputes beginning with a personal injury lawsuit filed against Joseph Ciri on behalf of Oksana and William Burkhardt.[86] Seth Murphy, a co-shareholder with the law firm of Berry & Murphy, P.C., represented

74. 14 RUSS & SEGALLA, *supra* note 9, at § 207:1 (defining bad faith as "the arbitrary refusal of an insurance company to pay a valid claim").

75. COLO. REV. STAT. § 10-3-1116(1) (2008).

76. George L. Blum, Annotation, *What Constitutes Bad Faith on Part of Insurer Rendering It Liable for Statutory Penalty Imposed for Bad Faith in Failure to Pay, or Delay in Paying, Insured's Claim-Particular Grounds for Denial of Claim: Risks, Causes, and Extent of Loss, Injury, Disability, or Death*, 123 A.L.R. 5TH 259 § 2[a] (2004).

77. *Id.* at § 2[b].

78. *See* 14 RUSS & SEGALLA, *supra* note 9, at § 207:3.

79. COLO. JURY INSTR., 4TH (CIVIL) § 25:4 (2010).

80. Blum, *supra* note 76, at § 2[b].

81. *Id.* at § 2[a].

82. *Id.* at § 3[a].

83. *Id.* at § 3[b].

84. Berry & Murphy, P.C. v. Carolina Cas. Ins. Co., 586 F.3d 803, 805 (10th Cir. 2009).

85. *Id.* at 814.

86. *Id.* at 805.

the Burkhardts in this suit (the Ciri Lawsuit)—filed in January 2005.[87] In March 2006, Mr. Murphy left Berry & Murphy, P.C., taking the Ciri Lawsuit with him to his new firm, Richmond, Neiley, Sprouse, & Murphy, LLC.[88] Over the next several months, the court granted a motion to withdraw as counsel filed by Mr. Murphy and granted, without prejudice, a motion filed by the defendants to dismiss the lawsuit for failure to prosecute.[89] In November 2006, the court then granted a motion to reconsider the order dismissing the Ciri Lawsuit after the Burkhardts hired Cindy Tester as new counsel.[90] Due to various instances in which Mr. Murphy failed to comply with Colorado Rule of Civil Procedure 16.1,[91] which he did not opt out of, Ms. Tester sent a letter (the Tester Letter) to Mr. Murphy in January 2007 at his new place of employment informing him of a malpractice suit she planned to file on behalf of the Burkhardts.[92]

Of great importance to the case is the fact that the Tester Letter was sent only to Richmond, Neiley, Sprouse, & Murphy, LLC and not to Mr. Murphy's former co-shareholder, Timothy H. Berry.[93] Furthermore, Mr. Murphy followed the advice in the Tester Letter and provided his law firm's malpractice insurance carrier with notice of the claim.[94] Nearly a year later, in December 2007, the court granted a renewed motion to dismiss the Ciri Lawsuit,[95] which was followed by a legal malpractice claim (the Malpractice Lawsuit) filed on behalf of the Burkhardts against Mr. Murphy and Berry & Murphy, P.C., in the United States District Court for the District of Colorado.[96] The Malpractice Lawsuit alleged that Mr. Murphy and Berry & Murphy, P.C. "missed the deadline for filing notice to elect exclusion from Simplified Procedures pursuant to [Colorado Rule of Civil Procedure] 16.1 in the Ciri Lawsuit," and that both were "'negligent' and breached their 'fiduciary duty of loyalty' to the Burkhardts."[97] On July 23, 2008, Mr. Berry accepted service of the Malpractice Lawsuit and put Carolina Casualty on notice of the suit the same day.[98] Mr. Berry alleged that he first received knowledge of the

87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 806.
91. COLO. R. CIV. P. 16.1(a)(1) ("The purpose of [simplified procedure] is to provide maximum access to the district courts in civil actions; to enhance the provision of just, speedy, and inexpensive determination of civil actions; to provide the earliest practical trials; and to limit discovery and its attendant expense.").
92. *Berry & Murphy*, 586 F.3d at 806.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 807.
97. *Id.*
98. *Id.*

Malpractice Lawsuit at the time he was served and was unaware of the Tester Letter.[99]

B. Procedural Background

Plaintiffs Berry & Murphy, P.C. and Timothy H. Berry, P.C. filed suit to resolve a dispute with defendant Carolina Casualty regarding defendant's denial of coverage for the Malpractice Lawsuit.[100] Carolina Casualty denied coverage "on the grounds that the alleged malpractice claim was first made against an insured (i.e., Seth Murphy) prior to the inception of the insurance policy (i.e., via the Tester Letter), thereby falling outside the claims-made coverage of the policy."[101]

The plaintiffs and Carolina Casualty filed cross-motions for summary judgment before the district court, which granted Carolina Casualty's motion in its entirety.[102] The district court based its ruling on the fact that Mr. Murphy was an "insured" under the language of the insurance policy, that the Tester Letter constituted notice to the insured, and that the "burden" should not fall on Carolina Casualty for Mr. Murphy's failure to inform his former partner or firm of the claim.[103] As the prevailing party, Carolina Casualty was awarded costs.[104] On appeal, the Tenth Circuit reviewed the district court's decision *de novo* and applied the substantive law of Colorado, the forum state.[105]

C. The Majority Opinion

Writing for the majority, Judge Briscoe began her analysis by examining the language of the insurance policy at issue.[106] The claims-made policy contained the following "Insuring Agreement":

> This Policy shall pay on behalf of the *Insured* all *Damages* and *Claims Expense* that the *Insured* shall become legally obligated to pay, arising from any *Claim* first made against an *Insured* during the *Policy Period* and reported to the *Insurer* in writing during the *Policy Period* or within 60 days thereafter, for any *Wrongful Act,* provided that prior to the inception date of the first Lawyers' Professional Liability Insurance Policy issued by the *Insurer* to the *Named Insured,* which has been continuously renewed and maintained in effect to the inception of this *Policy Period,* the *Insured* did not know, or could

99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 807–08.
105. *Id.* at 808.
106. *Id.* at 808–10.

> not reasonable foresee that such *Wrongful Act* might reasonably be expected on the basis of a *Claim*.[107]

In analyzing this language and the policy's definitions of the terms "Claim,"[108] "Wrongful Act,"[109] "Related Wrongful Act,"[110] and "Notice of Claim and Multiple Claims,"[111] Judge Briscoe did not find any ambiguity and determined that the terms had "plain and ordinary meanings" that could be applied to the language of the policy.[112] Therefore, the majority found that the two essential inquiries were whether (1) the Tester Letter and Malpractice Lawsuit constituted a single claim[113] and (2) whether Mr. Murphy was an "insured" under the language of the policy.[114]

In deciding whether the Tester Letter and Malpractice Lawsuit should be considered as one "claim," the majority began by analyzing the policy's definition of "related wrongful act."[115] To support their position that the claim in the Tester Letter was not "logically or causally connected" to the claims made in the Malpractice Lawsuit, the plaintiffs argued that *Professional Solutions Insurance Co. v. Mohrlang*[116] should control.[117] In *Mohrlang*, the United States District Court for the District of Colorado was faced with a task similar to the one in the current dispute; to determine whether two malpractice claims were "related" by examining the policy's definition of "related acts or omissions."[118] Like

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107. *Id.* at 808–09.

108. *Id.* at 809 ("[A] written demand for monetary or non-monetary relief including, but not limited to, a civil, criminal, administrative or arbitration proceeding . . . . A *Claim* shall be deemed to have been first made at the time notice of the *Claim* is first received by any *Insured*." (internal quotation marks omitted)).

109. *Id.* ("[A]ny actual or alleged act, omission, or *Personal Injury* arising out of *Professional Services* rendered by an *Insured* or by any person for whose act or omission the *Insured* is legally responsible . . . ." (internal quotation marks omitted)).

110. *Id.* ("*Wrongful Acts* which are logically or causally connected by reason of any common fact, circumstance, situation, transaction, casualty, event or decision." (internal quotation marks omitted)).

111. *Id.* at 809–10 (stating in pertinent part: "(A) As a condition precedent to their rights under this Policy, an *Insured* shall give the *Insurer* written notice of any *Claim* as soon as practicable . . . . (C) All *Claims* based upon or arising out of the same *Wrongful Acts* or any *Related Wrongful Acts*, or one or more series of similar, repeated or continuous *Wrongful Act* or *Related Wrongful Acts*, shall be considered a single *Claim*. Each *Claim* shall be deemed to be first made at the earliest of the following times: 1. when the earliest *Claim* arising out of such *Wrongful Act* or *Related Wrongful Acts* is first made").

112. *Id.* at 810 (citing Carey v. United of Omaha Life Ins. Co., 108 P.3d 288, 290 (Colo. 2005) ("An insurance policy is ambiguous if it is susceptible on its face to more than one reasonable interpretation . . . . A mere disagreement between the parties concerning interpretation of the policy does not create an ambiguity. To determine whether a policy contains an ambiguity, we must evaluate the policy as a whole." (internal citations omitted))).

113. *Berry & Murphy*, 586 F.3d at 810.

114. *Id.* at 814.

115. *Id.* at 810–11.

116. No. 07-cv-02481-PAB-KLM, 2009 WL 321706 (D. Colo. Feb. 10, 2009).

117. *Berry & Murphy*, 586 F.3d at 811–12.

118. *Mohrlang*, 2009 WL 321706, at *3 (defining "related acts or omissions" as "all acts or omissions in the rendering of professional services that are temporally, logically or causally connected by any common fact, circumstance, situation, transaction, event, advice or decision").

the Tenth Circuit in the current case, the *Mohrlang* court found no ambiguity in the policy's terms.[119] The district court found that the claim against the attorney for breach of professional duties involving the sale of stock[120] and the second claim for breach of fiduciary duties of loyalty, disclosure, and candor involving the release of promissory notes[121] were not temporally, logically, or causally connected and were not related claims under the language of the policy.[122]

Refusing to adopt the result from *Mohrlang*, the majority distinguished the facts in the current case by using the district court's definition of "logically connected."[123] Because the Tester Letter faulted Mr. Murphy for not opting out of Rule 16.1 and the Malpractice Lawsuit "flows from Murphy's decision to proceed under Rule 16.1[,]" the court found the two claims logically connected.[124]

Both the plaintiffs and Carolina Casualty then discussed the California Supreme Court case, *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Insurance Co.*,[125] which examined insurance policy term definitions specific to a "claims-based" legal liability policy.[126] The two alleged claims of malpractice in this case were an attorney's failure to serve a stop notice on a construction project's lenders and a failure to timely foreclose on a mechanic's lien.[127] Although it was argued that these were two separate claims, both warranting indemnification,[128] the California Supreme Court disagreed and treated them as a single claim.[129] Carolina Casualty argued that the reasoning employed in *Bay Cities* is applicable to the facts at hand and that the Tenth Circuit should reach a similar result.[130] The majority agreed with Carolina Casualty, stating that "it seems logical" to connect multiple acts of malpractice as "related" in this instance because a single client, the Burkhardts, suffered a single injury from a single attorney.[131]

The final argument made by Carolina Casualty regarding whether the Tester Letter and Malpractice Lawsuit constituted a single claim involved a Florida District Court of Appeals case in which "[t]he alleged

119. *Id.* at *9.
120. *Id.* at *2.
121. *Id.*
122. *Id.* at *13.
123. Berry & Murphy, P.C. v. Carolina Cas. Ins. Co, 586 F.3d 803, 812 (10th Cir. 2009) (citing *Mohrlang*, 2009 WL 321706, at *11 (defining "logically connected" as "connected by an inevitable or predictable interrelation or sequence of events")).
124. *Id.*
125. 855 P.2d 1263 (Cal. 1993).
126. *Berry & Murphy*, 586 F.3d at 812.
127. *Bay Cities*, 855 P.2d at 1264.
128. *Id.* at 1265.
129. *Id.* at 1266 ("[W]hen, as in this case, a *single* client seeks to recover from a *single* attorney alleged damages based on a *single* debt collection matter for which the attorney was retained-there is a *single* claim under the attorney's professional liability insurance policy.").
130. *Berry & Murphy*, 586 F.3d at 813.
131. *See id.*

acts of malpractice were the attorney's failure to name a hospital and each individual physician from that hospital as defendants in a medical malpractice lawsuit."[132] Despite the defendant's assertion that his attorney's failure to join several defendants is akin to multiple wrongful acts, and therefore multiple claims, the court held otherwise.[133] Using reasoning similar to *Bay Cities*, the court in *Eagle American Insurance Co. v. Nichols*[134] found that all of the attorney's acts of negligence led to a single injury on the part of the plaintiff.[135] Based on the arguments presented by Carolina Casualty and consideration of the *Bay Cities* and *Nichols* cases, the Tenth Circuit concluded that the Tester Letter and the Malpractice Lawsuit alleged "related wrongful acts" under the insurance policy and were therefore one "claim" for indemnification purposes.[136]

With the "single claim" dispute resolved, the court turned its attention to whether Mr. Murphy was an "insured" under the terms of the insurance policy.[137] The term "insured" had five distinct definitions within the policy, with the pertinent definition stating that "insured" means, "any individual or professional corporation who was a partner, officer, director, stockholder, or employee of the *Named Insured* or *Predecessor Firm,* but solely while acting within the scope of their duties on behalf of the *Named Insured* or *Predecessor Firm* . . . ."[138] Again, finding no ambiguity in the policy language, the court proceeded to analyze the language of this definition in two parts.[139]

The first limitation the definition required was that the individual "*was* a partner, officer, director, stockholder, or employee" of the named insured.[140] The court held it "undisputed" that Mr. Murphy was a co-shareholder in Murphy & Berry, P.C. and that he therefore fit this first requirement.[141]

The second limitation on the definition of "insured" was a much more crucial determination for the court to make and effectively became the decisive interpretation in this case.[142] In the court's analysis of the language, "but solely while acting . . . on behalf of the Named Insured," it stated:

> This clause, when read in context with the rest of this definitional subsection, cannot mean that an individual is an insured only while

132. *Id.* (citing Eagle Am. Ins. Co. v. Nichols, 814 So. 2d 1083, 1084 (Fla. Dist. Ct. App. 2002)).
133. *Nichols*, 814 So. 2d at 1085–87.
134. 814 So. 2d 1083 (Fla. Dist. Ct. App. 2002).
135. *Id.* at 1087.
136. *Berry & Murphy*, 586 F.3d at 814.
137. *Id.*
138. *Id.*
139. *Id.* at 814–15.
140. *Id.* at 814.
141. *Id.*
142. *See id.* at 815.

> acting on behalf of the named insured, but must mean that an individual is an insured only if the claim being made is related to that individual's duties on behalf of the named insured. Otherwise, no former employee of the named insured could ever be an "insured." If "insured" were interpreted to mean that an individual was an insured only while acting within the scope of business of the named insured, it would be paradoxical to define "insured" to include former employees-any individual "who *was* a partner, officer, director, stockholder, or employee of the Named Insured," Timothy H. Berry, P.C.[143]

The court then explained what it believed to be a "better" view of the definition of insured as including "an individual after he has left the law firm if the claim involves that individual's acts or omissions that occurred while at the law firm."[144] Because Mr. Murphy was an "insured" under the court's view of the definition and notice of the "claim" was given to Mr. Murphy as an insured before the policy period commenced, the court held that Carolina Casualty was under no duty to defend or indemnify the plaintiffs.[145] Without a duty to defend or indemnify a claim, the court held that the plaintiffs' claim failed and affirmed the judgment of the district court.[146]

D. The Dissent

Dissenting, Judge Lucero crafted a strongly worded response to the majority, arguing that, by denying Mr. Berry "the very coverage for which he paid premiums," Carolina Casualty received a windfall.[147] By redefining "notice" Judge Lucero asserted that the majority created an "escape hatch" for insurers, allowing them to promise coverage and collect premiums, yet avoid responsibility by failing to uphold their end of the insurance agreement and refusing to indemnify the insured.[148]

The focus of the dissenting opinion centered on the interpretation of the term "insured" and, ultimately, whether notice was given to an insured during the policy period.[149] Through the dissection, and piecing back together, of the policy's definition of insured, Judge Lucero interpreted the term in a more straightforward manner. By extracting the superfluous language unrelated to the facts in the current dispute, he found a better reading to be, "An individual . . . who was a . . . stockholder of the . . . Predecessor Firm is an insured, but solely while acting within the scope of their duties on behalf of the . . . Predecessor Firm."[150] Based on

143. *Id.* at 814–15.
144. *Id.* at 815.
145. *Id.*
146. *Id.*
147. *Id.* at 816 (Lucero, J., dissenting).
148. *Id.*
149. *Id.*
150. *Id.* at 818 (alterations in original) (internal quotation marks omitted).

the dissent's reading of Colorado's caselaw related to contract interpretation,[151] and careful evaluation of the definition of "insured" in the policy, Judge Lucero argued that Mr. Murphy was not an insured when he received notice of the Burkhardts' claim through the Tester Letter.[152]

By applying "the plain and ordinary meaning of [the definition's] terms,"[153] the dissent determined that a former employee, or stockholder in this instance, of a predecessor firm is *not* an insured when acting outside the scope of his duties on behalf of the firm.[154] In this instance, Mr. Murphy was no longer working for Berry & Murphy, P.C. when he received the Tester Letter, cannot be said to have been working on behalf of Berry & Murphy, P.C. at that time, and was therefore not an insured when notice was given to him.[155]

Continuing with its plain language interpretation of "insured," the dissent directly refuted the majority's obscuring of the definition.[156] In response to the majority's "paradoxical" argument,[157] Judge Lucero argued that interpreting the definition according to the words' plain meaning did not render it meaningless but instead made it consistent with what one might expect: that it is unlikely that a former stockholder can receive notice of a claim.[158] After outlining instances in which a former stockholder *can* receive notice sufficient to fulfill the requirement of a claim,[159] Judge Lucero reiterated the majority's careless disregard of Colorado caselaw.[160]

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151. *Id.* at 817 (citing State Farm Mut. Auto. Ins. Co. v. Stein, 940 P.2d 384, 387 (Colo. 1997) (stating that Colorado courts construe insurance policies "to promote the intent of the parties"); Parrish Chiropractic Ctrs., P.C. v. Progressive Cas. Ins. Co., 874 P.2d 1049, 1055 (Colo. 1994) ("Where there is a written instrument, the intent of the parties is determined from the plain language of the instrument itself."); Wota v. Blue Cross & Blue Shield of Colo., 831 P.2d 1307, 1309 (Colo. 1992) (stating that courts should "not rewrite a contractual provision that is clear and unambiguous, but must give effect to the plain and ordinary meaning of its terms"); Republic Ins. Co. v. Jernigan, 753 P.2d 229, 232 (Colo. 1988) ("However, where there is ambiguity or uncertainty as to coverage, courts should construe the policy in favor of the insured.")).

152. *Berry & Murphy*, 586 F.3d at 818 (Lucero, J., dissenting).

153. *Id.* (citing *Wota*, 831 P.2d at 1309).

154. *Id.* at 818.

155. *Id.*

156. *Id.* at 816 ("In construing the policy's definition of 'Insured,' the majority opinion misapplies Colorado law. At a minimum, that definition is ambiguous as to whether a former stockholder is an insured for notice purposes.").

157. *Id.* at 815 (majority opinion) ("[I]t would be paradoxical to define 'insured' to include former employees . . . .").

158. *See id.* at 818 (Lucero, J., dissenting).

159. *Id.* ("Only if it is established that a former stockholder has given notice in fact to his previous employer may an issue of notice in this context be properly raised. . . . An individual can be both a former stockholder and acting on behalf of her former law firm in certain circumstances. An individual might semi-retire from the practice of law and renounce stockholder status, but take occasional cases on behalf of her former firm on a contract basis.").

160. *Id.* at 819 (citing Pub. Serv. Co. v. Wallis & Cos., 986 P.2d 924, 931 (Colo. 1999) (construing policy language in favor of the insured when it is "susceptible to more than one reasonable interpretation")).

In its conclusion, the dissent stated its belief that Mr. Murphy was not an insured at the time he received the Tester Letter, and that the claim was instead first made against an insured when Mr. Berry accepted service of the Burkhardts' complaint.[161] Because Mr. Berry accepted service on July 23, 2008, the claim was made within the policy period and the dissent would therefore reverse the district court's grant of summary judgment in favor of Carolina Casualty.[162]

III. ANALYSIS

In *Berry & Murphy, P.C.*, the Tenth Circuit properly interpreted established precedent in determining that the Tester Letter and Malpractice Lawsuit constituted a single claim, but the majority's interpretation of the term "insured" resulted in a holding that was not only inequitable, but one that could have potentially hazardous effects. By defining the term "insured" to include former employees in instances where the claim involves his acts or omissions while working at his former law firm, the court disregarded Colorado insurance jurisprudence, which, if followed, would have led to a different outcome. The Tenth Circuit has also given such individuals powerful discretion when receiving notice of a claim, leading to potentially damaging effects.

A. Interpretation of "Related Wrongful Acts"

Although not explicitly stated, the court's first determination of whether the Tester Letter and Malpractice Lawsuit constituted related wrongful acts was paramount.[163] Had the court reached the opposite conclusion it is almost certain that the Tenth Circuit would have had to reverse the district court's ruling. If the majority had determined that these were separate claims and adopted the appellant's arguments,[164] the court's subsequent analysis would have proceeded much differently by analyzing whether Mr. Berry, not Mr. Murphy, was an insured. Mr. Berry would therefore likely be entitled to coverage because the dispute over the term "insured" involved Mr. Murphy's status due to the court's finding that the Tester Letter constituted the first claim against the insured.[165]

Instead, the majority devoted the bulk of its opinion to carefully analyzing the arguments on both sides of the issue and interpreting the authority used by both Mr. Berry and Carolina Casualty.[166] Throughout

161. *Id.* at 819.

162. *Id.*

163. *Id.* at 810 (majority opinion) (stating that the first determination to be made is whether the Tester Letter and Malpractice suits are considered one claim, and failing to discuss the ramifications if they are determined not to be related wrongful acts).

164. Brief for Appellant at 21–24, Berry & Murphy, P.C. v. Carolina Cas. Ins. Co., 586 F.3d 803 (10th Cir. 2009) (No. 09-1004), 2009 WL 1064884.

165. *Berry & Murphy*, 586 F.3d at 814.

166. *Id.* at 810–14.

its discussion of these proffered cases, the Tenth Circuit chose not to restate or directly comment on the appellant's arguments and instead opted for a streamlined analysis that simply related the law and previous holdings to the facts at hand.[167] In finding the Tester Letter and Malpractice Lawsuit to constitute "related wrongful acts[,]" the court correctly interpreted *Mohrlang* and *Bay Cities*,[168] while refusing to accept the appellant's coherent but ultimately misguided arguments.[169]

1. The *Mohrlang* Decision

In focusing on *Mohrlang*'s recitation of the clear definitions set forth in Merriam-Webster's Collegiate Dictionary of "logically connected"[170] and "causally connected"[171] the majority properly distinguished Mr. Berry's argument. Because insurance contract cases are so fact-specific, and policies are written in vastly different ways, the court's reliance on the definitions set forth in *Mohrlang* allowed for a well-reasoned decision on this point.[172] Mr. Berry's argument that the Tester Letter and Malpractice Lawsuit were *not* logically connected because the failure to file disclosures was not a "predictable result" of proceeding under Colorado Rule of Civil Procedure 16.1 fell flat due to the appellant's misinterpretation of the definition of the term.[173] The court's search for a "predictable interrelation" rather than a "predictable result" is a more faithful reading of the definition and one that is certainly found in this instance. While Rule 16.1 adheres in principle to the disclosure guidelines of Rule 26,[174] Rule 16.1 also sets forth strict disclosure deadlines.[175] By failing to opt out of Rule 16.1, Mr. Murphy subjected himself to the timeframes dictated by the rule. Although failing to fulfill these requirements may not be a "result" of proceeding under Rule 16.1, as Mr. Murphy may have failed to make disclosures regardless of his course of action, this shortcoming is certainly "interrelated" to Rule 16.1 due to its setting of disclosure deadlines.[176]

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167. *Id.* at 811–14.
168. *Id.*
169. Brief for Appellant, *supra* note 164, at 21–24.
170. Prof'l Solutions Ins. Co. v. Mohrlang, No. 07-cv-02481-PAB-KLM, 2009 WL 321706, at *11 (D. Colo. Feb. 10, 2009) (defining "logically connected" as "connected by an inevitable or predictable interrelation or sequence of events").
171. *Id.* (defining "casually connected" as "connected where one person or thing brings about the other").
172. *Berry & Murphy*, 586 F.3d at 812 (using the definitions of the terms "logically connected" and "causally connected" only in relation to the facts at hand).
173. *See* Brief for Appellant, *supra* note 164, at 22.
174. COLO. R. CIV. P. 16.1(k)(2) (stating that certain provisions of Rule 26 apply to disclosure of expert witnesses).
175. *Id.* ("Written disclosures of experts shall be served by parties asserting claims 90 days before trial; by parties defending against claims 60 days before trial; and parties asserting claims shall serve written disclosures for any rebuttal experts 35 days before trial.").
176. *Id.*

The court's failure to address the "causally connected" argument set forth by the appellant likely stems from the fact that such an analysis was unnecessary.[177] If the Tenth Circuit had applied the *Mohrlang* court's definition, it would have been difficult to find a causal connection between the Tester Letter and Malpractice Lawsuit. Any causal connection that may have existed between proceeding under Rule 16.1, as cited in the Malpractice Lawsuit, and Mr. Murphy's failure to make adequate disclosures, as mentioned in the Tester Letter, was certainly broken by a deliberate choice not to comply with the rule.[178] However, due to the operative word, "or" in the definition of "related wrongful acts" the court's determination that the Tester Letter and Malpractice Lawsuit were logically connected was sufficient to end this inquiry.[179]

2. The *Bay Cities* Decision

In an apparent attempt to add weight to its decision that only one claim had been made, the Tenth Circuit discussed a California Supreme Court case that was also construed in favor of Carolina Casualty.[180] The appellant's argument that "the Tester Letter and the Malpractice Lawsuit did not arise from the same underlying cause"[181] did not persuade the court to find multiple claims because of the straightforward language used in *Bay Cities*.[182] An attempt to argue that the *results* of Mr. Murphy's failures as set forth in the Tester Letter and Malpractice Lawsuit were different[183] was clearly out of line with the reasoning of the *Bay Cities'* court.[184] On this point, the appellant relied on the fact that the claim in the Tester Letter cites dismissal of the Ciri Lawsuit, and the Malpractice Lawsuit cites malpractice that did *not* lead to dismissal of the Ciri Lawsuit.[185] However, as the majority properly pointed out, the circumstances here included a single client, a single attorney, and a single claim for which Mr. Murphy was retained.[186] Regarding the result, it is also true that the Burkhardts suffered a single harm.[187] Again, the Tenth Circuit correctly applied persuasive authority despite the refusal to directly comment on the appellant's argument.

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177. *Berry & Murphy*, 586 F.3d at 809 (defining "related wrongful acts" as logically *or* causally connected).

178. Brief for Appellant, *supra* note 164, at 19–21.

179. *Berry & Murphy*, 586 F.3d at 809 (defining "related wrongful acts" as logically *or* causally connected).

180. *Id.* at 812–13.

181. Brief for Appellant, *supra* note 164, at 28.

182. *Berry &* Murphy, 586 F.3d at 813 (discussing Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co., 855 P.2d 1263, 1275 (Cal. 1993)).

183. Brief for Appellant, *supra* note 164, at 27–28.

184. *See Bay Cities*, 855 P.2d at 1266.

185. Brief for Appellant, *supra* note 164, at 27–29.

186. *Berry & Murphy*, 586 F.3d at 813.

187. *Id.* (agreeing that the single harm which the Burkhardts suffered was "the lost opportunity to recover some or all of their damages in the Ciri Lawsuit").

B. Interpretation of "Insured"

One difficulty faced by the court, and one potential reason for the stark difference between the majority and dissent's interpretations of the term "insured," is that the term's definition varies greatly depending on the type of insurance policy in which it is used.[188] To make matters more difficult, Colorado case law does not set forth a standard definition of "insured" as used in a malpractice liability insurance policy, which is likely due to the variable nature of insurance policies.[189] Additionally, the Colorado Revised Statutes do not provide any guidance because the term "insured" is omitted from the definitions section of Title 10, Insurance.[190] While "insurer" is defined,[191] along with twenty-seven other terms and phrases, the Colorado Legislature did not include a standard definition for "insured."[192]

Faced with these uncertainties, the majority proceeded to improperly craft a definition of this key term. While the Tenth Circuit should be commended for its threshold determination that the Tester Letter and Malpractice Lawsuit constituted a single claim, it should not be similarly lauded for its interpretation of the term "insured." After deciding that the Tester Letter constituted the initial claim, the appellant's right to indemnification hinged on whether Mr. Murphy was considered an insured under the language of the policy at the time he received the letter. In deciding that Mr. Murphy was in fact an insured, the majority created a class of insured individuals that was likely not anticipated by the appellant at the inception of the insurance policy.

1. The Majority's Definition

Mr. Murphy received the Tester Letter prior to the commencement of the insurance policy at issue.[193] Therefore, under the conditions of the claims-made agreement, Mr. Murphy's judicially created status as an insured caused the claim to be made outside the policy period,[194] foreclosing Berry & Murphy, P.C. from receiving indemnification.[195] In the majority's brief discussion of this important issue, the Tenth Circuit's

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188. JOHN W. GRUND, J. KENT MILLER & GRADEN P. JACKSON, 7A COLO. PRAC., PERSONAL INJURY TORTS AND INSURANCE § 47.5 (2d ed. 2010).

189. *See generally id.*

190. COLO. REV. STAT. § 10-1-102 (2006).

191. *Id.* ("'Insurer' means every person engaged as principal, indemnitor, surety, or contractor in the business of making contracts of insurance.").

192. *See id.*

193. *See* Berry & Murphy, P.C. v. Carolina Cas. Insur. Co., 586 F.3d 803, 805–07 (10th Cir. 2009).

194. *Id.* at 806-07. By determining that Mr. Murphy was an "insured" under the language of the claims-made policy effective from February 6, 2008 to February 6, 2009, the court foreclosed Berry & Murphy, P.C.'s opportunity to report a claim during the policy period because Mr. Murphy had received the Tester Letter on January 10, 2007, constituting notice of the Malpractice Lawsuit. Because this notice came before the inception of the claims-made policy, the claim was not made during the policy period and Carolina Casualty avoided liability.

195. *Id.* at 815.

decision turns a blind eye to Colorado precedent and distorts the language of the insurance policy to fit the Court's ideals.

The majority begins its analysis of this topic by determining that there is no ambiguity in the policy's definition of insured.[196] However, after a short discussion of the definition's third subsection and its limitations, the court states what it believes to be a "better" view of the term "insured."[197] What the court appears to have done is rewrite the policy's definition. Colorado insurance law explicitly states that courts should "not rewrite a contractual provision that is clear and unambiguous,"[198] a point of law that the Tenth Circuit did not follow. In the majority's attempt to avoid calling the language ambiguous, which would have led to the court necessarily having to construe the policy in favor of the insured,[199] it instead implicitly decided there was an ambiguity by not only rewriting the language but by acknowledging that it is susceptible to more than one reading.[200] Through making these two points in its holding, the court creates a definition that is neither based on the clarity of the policy language, nor construed in favor of the insured. Instead, the court created a definition that protects Carolina Casualty and all other malpractice insurance policy providers from defending and indemnifying insured parties when a former employee receives notice of a claim.

2. The Dissent's Definition

In response to the majority's reading that was "wholly unmoored from the text of the policy and violates Colorado jurisprudence regarding insurance contract interpretation,"[201] the dissent proposed a reading of "insured" that is perfectly in-line with the policy's language.[202] Due to a lack of technical or specialized meaning in the words of the definition, the dissent agreed that "the plain and ordinary meaning" of the words should be adopted.[203] In determining that Mr. Murphy was *not* an insured at the time he received the Tester Letter,[204] the dissent made a proper determination without having to side-step Colorado law.[205] The dissent's

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196. *Id.* at 814.

197. *Id.* at 815 ("In our opinion, the better view is that 'insured' is defined to include an individual after he has left the law firm if the claim involves that individual's acts or omissions that occurred while at the law firm.").

198. Wota v. Blue Cross & Blue Shield of Colo., 831 P.2d 1307, 1309 (Colo. 1992).

199. Republic Ins. Co. v. Jernigan, 753 P.2d 229, 232 (Colo. 1988).

200. *See Berry & Murphy*, 586 F.3d at 815 n.6. Although the court reiterates the belief that the language is clear and unambiguous, it proceeds to rebut the dissent's opinion that the majority is misapplying the term "insured" in various situations. *Id.*

201. *Id.* at 817 (Lucero, J., dissenting).

202. *See id.* at 818.

203. *Id.* (quoting *Wota*, 831 P.2d at 1309) (internal quotation marks omitted).

204. *Berry & Murphy*, 586 F.3d at 818 (Lucero, J., dissenting) ("Murphy is an insured for the purposes of certain acts (acts committed within the scope of his duties on behalf of his former firm) but not others (acts committed outside the scope of his duties). There is no dispute that Murphy was not acting on behalf of Berry & Murphy, P.C. when he received the Tester Letter; thus notice to him was not notice to an insured.").

205. *See id.* (determining that Mr. Murphy was not an insured).

clear logic[206] not only serves the best interest of public policy, it is also in line with Colorado insurance and contract jurisprudence.[207]

3. Additional Jurisprudence

Because insurance policies take on many forms, determining who is an "insured" under individual policies requires careful interpretation of the policy language. Typically, those named on the declarations page are considered "named insured" and coverage is extended to those individuals and entities.[208] However, beyond those qualified as named insured, discrepancies begin to arise when determining whom the policy covers.[209] In *Berry & Murphy*, the Tenth Circuit was not faced with a particularly unique challenge but nonetheless could have used decisions from the Appellate Division of the Superior Court of New Jersey as guidance.[210]

In *Jolley v. Marquess*,[211] the New Jersey Appellate Court was also faced with the task of interpreting the definition of "insured" in a claims-made malpractice liability policy, albeit under a set of circumstances distinguishable from *Berry & Murphy*.[212] In *Jolley*, Marquess was a former partner and employee of the law firm Marquess, Morrison, and Trimble, P.A. (MMT).[213] After leaving MMT, Marquess retained his title of "senior trial attorney" with MMT and continued to represent one of his former firm's clients on an insurance matter.[214] When a malpractice lawsuit was filed against Marquess, MMT's insurance carrier, Zurich,

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206. *Id.* ("According to the majority, 'but solely while acting within the scope of their duties on behalf of' a predecessor firm 'cannot mean that an individual is an insured only while acting on behalf of' a predecessor firm. Yet that is precisely how 'Insured' is defined in the policy.").

207. *See* Wota v. Blue Cross & Blue Shield of Colo., 831 P.2d 1307, 1309 (Colo. 1992) ("An insurance policy is a contract and should be construed in accordance with general principles of contractual interpretation."); Heller v. Fire Ins. Exch., 800 P.2d 1006, 1008 (Colo. 1990) ("To ascertain whether certain provisions of an agreement are ambiguous, the language used must be examined and construed in harmony with the plain, popular, and generally accepted meaning of the words employed and with reference to all provisions of the document."); Terranova v. State Farm Mut. Auto. Ins. Co., 800 P.2d 58, 60 (Colo. 1990) ("In the absence of an ambiguity, an insurance policy must be given effect according to the plain and ordinary meaning of its terms."); Urtado v. Allstate Ins. Co., 528 P.2d 222, 223 (Colo. 1974) ("Considering the contract as a whole, we cannot say that it is ambiguous. Since it is not, this court may not rewrite it nor limit its effect by strained construction.").

208. John M. Palmeri & Franz Hardy, *Protecting Your Law Practice: Malpractice Insurance Basics*, COLO. LAW., Apr. 2005, at 45, 46.

209. *See* Jolley v. Marquess, 923 A.2d 264, 271 (N.J. Super Ct. App. Div. 2007) (interpreting whether or not a former employee is an insured); *See also* London, Anderson & Hoeft, Ltd. v. Minn. Lawyers Mut. Ins. Co., 530 N.W.2d 576, 578–79 (Minn. Ct. App. 1995) (determining that only named lawyers could be held liable for deductable).

210. *Jolley*, 923 A.2d at 264.

211. 923 A.2d 264 (N.J. Super Ct. App. Div. 2007).

212. *Id.* at 271.

213. *Id.* at 267.

214. *Id.* at 268. The distinguishing fact that Marquess retained his title of "senior trial attorney" does not defeat the fact that the New Jersey Appellate Court was faced with a nearly identical task as the 10th Circuit of interpreting the word "insured" in a claims-made malpractice liability insurance policy. *Id.*

denied coverage arguing that Marquess was not a named insured at the time any alleged malpractice may have occurred.[215] The *Jolley* court then had to determine if Marquess fit the definition of insured as stated in the policy.[216]

In determining that Marquess was in fact an insured,[217] the *Jolley* court analyzed policy language nearly identical to that in *Berry & Murphy*.[218] The provision at issue read, "[t]he unqualified word 'insured', whenever used in this policy means: . . . (d) any former partner, officer, director, or stockholder employee of the firm or predecessor firms named in the Declaration while acting solely in a professional capacity on behalf of such firms."[219] This is strikingly similar to the language in *Berry & Murphy*, with the greatest difference being the substitution of "within the scope of their duties" in the Carolina Casualty policy[220] for "solely in a professional capacity" in the Zurich policy.[221]

The *Jolley* court, unlike the majority in *Berry & Murphy*, determined that this subsection of the definition was ambiguous and focused on construing it in "conformity [with] public policy and principles of fairness."[222] With these principles in mind, the *Jolley* court construed the policy language in favor of Marquess—and to the detriment of the insurance company.[223] Stating that subsection (d) was limited to those former employees who are "representing a party who remains a client of the insured firm,"[224] the *Jolley* court made a ruling that was favorable to the insured in this case and that should have provided guidance to the Tenth Circuit in its attempt to interpret the policy language.

First, this seemingly plain language was determined to be susceptible to multiple interpretations,[225] just as the policy language in *Berry & Murphy* could have been determined to be ambiguous.[226] Had *Berry & Murphy* decided that the language was ambiguous in the same manner, established precedent may have forced a substantially different outcome.

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215. *Id.* at 269. While the argument in this case is opposite that of the argument in *Berry & Murphy*, in that the insurance company in *Jolley* is arguing that Marquess is *not* an insured, the fact still remains that both the New Jersey Appellate Court and the 10th Circuit were faced with nearly identical tasks in interpreting the term "insured" in claims-made malpractice liability insurance policies. *Id.*

216. *Id.* at 271.

217. *Id.* at 272–73.

218. *See id.* at 270–71.

219. *Id.* (emphasis omitted).

220. Berry & Murphy, P.C. v. Carolina Cas. Ins. Co., 586 F.3d 803, 814 (10th Cir. 2009).

221. *Jolley*, 923 A.2d at 271.

222. *Id.* at 272 (quoting Voorhees v. Preferred Mut. Ins. Co., 607 A.2d 1255, 1260 (N.J. 1992)).

223. *Jolley*, 923 A.2d at 273.

224. *Id.* at 272.

225. *See id.*

226. *See* Berry & Murphy, P.C. v. Carolina Cas. Ins. Co., 586 F.3d 803, 816–19 (10th Cir. 2009) (Lucero, J., dissenting). Multiple interpretations are evidenced by the fact that the dissent's interpretation deviated greatly from the majority. *Id.*

Second, the definition employed by the *Jolley* court could have guided the court in *Berry & Murphy*. If the majority interpreted the definition of insured in a similar manner to *Jolley* when it ruled that acting "solely in a professional capacity on behalf of such firms" is limited to instances where a former attorney is representing a party who remains a client of the insured firm,[227] Mr. Murphy surely would not have been considered an insured.

C. Practical Effects of Holding

By creating a class of insured individuals who are no longer partners or employees of a law firm, yet are still considered "insured" when they receive a claim based on acts or omissions that took place while employed at their former law firm,[228] the Tenth Circuit has created a situation in which law firms may not receive coverage for the premiums they are paying.[229] Based on this holding, the Tenth Circuit has developed disturbing precedent with potentially severe consequences for lawyers, law firms, and insurance companies alike. In the wake of this decision a potentially hazardous set of circumstances may arise when former employees are faced with the discretion to notify their former employer of a potential or actual claim.

In light of this holding, law firms are now at the mercy of their former employees when an injured client sends notice of a potential malpractice claim directly to the attorney who is being accused of malpractice, rather than to the law firm itself. As was seen in *Berry & Murphy*, the former employee is then faced with the sole decision of whether or not to tell his former law firm about the claim. Even when the former employee heeds the advice of the client and informs his insurance carrier of the potential lawsuit, the former law firm remains in great danger of being denied coverage.[230] In cases where an employee was fired from his position as an attorney, or decided to leave his law firm as a result of a bad business relationship with his employer, the Tenth Circuit now gives these individuals the power to vindictively withhold knowledge of a claim with the intention of financially damaging his former employer. By simply taking out an individual malpractice liability insurance policy upon leaving a law firm, former employees are able to rest assured that they will be covered in the event a claim is made against them but will also be able to take comfort in the idea that withholding information of a claim against their former employer will not affect them as an individual.

227. *Jolley*, 923 A.2d at 272.

228. *See Berry & Murphy*, 586 F.3d at 814–15.

229. *Id.* at 816 (Lucero, J., dissenting).

230. Although Mr. Murphy took the advice of the Tester Letter and put his malpractice insurance carrier on notice, Carolina Casualty nonetheless escaped liability. *See id.*

1. Curing the Effects

One possible remedy to this unfortunate outcome would be for courts to employ an "impossibility" doctrine in claims-made insurance policies. In *Gulf Insurance Co. v. Dolan, Fertig & Curtis*,[231] the Florida Supreme Court noted that "if an impossibility prevented notice being given to an insurer at the very end of the policy period, it may well be that an insured would be relieved of giving notice during the period of such impossibility."[232] Although that issue was not before the court, it held the possibility open for future cases.[233] It would certainly be in the best interest of insured parties if courts were to recognize the impossibility doctrine when a law firm does not receive notice of a claim within a policy period because notice was first given to a former employee. When situations such as this arise, courts could then look to when the insured law firm, rather than the former employee, received notice of the claim when determining whether a claim was made within the policy period. This recognition of impossibility would be in line with the idea set forth by the Florida Supreme Court but would extend to claims made before the policy period began, rather than notice given after the policy period expired.

An additional approach that can be taken to cure the outcome of *Berry & Murphy* is legislative intervention. In Colorado, claims-made insurance policies are subject to regulation by the Insurance Commissioner under Colorado Revised Statute § 10-4-419, Claims-made policy forms.[234] Within this statute, mandatory disclosures and alerts to the insured are set forth, including the following:

> (A) A description of the principal benefits and coverage provided in the policy;
>
> (B) A statement of the exceptions, reductions, and limitations contained in the policy;
>
> (C) A statement of the renewal provisions including any reservation by the insurer of a right to change premiums;
>
> (D) A statement that the outline of coverage is a summary of the policy issued or applied for and that the policy should be consulted to determine governing contractual provisions.[235]

Beyond these disclosures, § 10-4-419 requires that the policy include numerous additional definitions and provisions and governs vari-

231. 433 So.2d 512 (Fla. 1983).
232. *Id.* at 515 n.1.
233. *Id.*
234. COLO. REV. STAT. § 10-4-419 (2010).
235. *Id.*

ous other aspects of claims-made policies.[236] The term "insured," however, is not set forth in this statute, and insurers are not required to meet any statutory guidelines or follow any regulations when defining this important term in insurance policies.[237] An amendment to this statute requiring clear, unambiguous definitions of key terms such as "insured," and a requirement that such definitions be submitted and reviewed by the Insurance Commissioner would undoubtedly be in the best interest of public policy because such requirements would reduce or even eliminate the risk of litigation. While it may be impractical to list every person covered by the insurance policy as a named insured, all parties involved would benefit from a clearer understanding of exactly who is covered through the use of straightforward explanations of troublesome terms.

A final recommendation for curing the effects of this ruling is for lawyers and law firms to take a proactive approach with their insurance policies. Because the changing structure of a law firm has the ability to negatively impact insurance coverage,[238] partners and stockholders should inform their insurance company when attorneys are no longer employed with the firm. This simple step of informing an insurance company, or inquiring about potential ramifications, can put the carrier on notice that an employee is no longer a member of the firm, and the insured law firm can be confident that former employees who receive notices of claims will have no bearing over their malpractice insurance coverage.

IV. CONCLUSION

In *Berry & Murphy, P.C. v. Carolina Casualty Ins. Co.*, the Tenth Circuit properly construed the insurance policy's definition of "related wrongful acts" but improperly rewrote the definition of "insured" to fit the court's ideals. In doing so, the court failed to follow established Colorado precedent in its analysis and created a class of insured individuals who now carry a dangerous amount of discretion. All attorneys carrying malpractice liability insurance should understand the potential consequences of this ruling, and the judiciary and legislature should begin to take notice of alternative measures that can be taken to cure this inequitable result. It seems clear that when a court rewrites the definition of a term within an insurance policy, an ambiguity has arisen, and the beneficiary of such an ambiguity should be the insured.

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236. *Id.* (including, but not limited to, definitions of events and conditions which trigger coverage, a provision that guarantees the ability to purchase an extended reporting period upon cancellation or nonrenewal, and mandatory submission of new claims-made policy forms to the Insurance Commissioner before such forms are used).

237. *See id.*

238. *See* Susan Saab Fortney, *Legal Malpractice Insurance: Surviving the Perfect Storm*, 28 J. LEGAL PROF. 41, 55 (2004).

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* J.D. Candidate 2012, University of Denver Sturm College of Law. I would like to thank Professor Eli Wald and the entire *Denver University Law Review* Board and staff for their valuable edits and feedback throughout the process of publishing this Comment. I would also like to thank my family for their endless support, regardless of my endeavor. Most importantly, this Comment is dedicated to my wife, Amanda, for inspiring me, believing in me, and providing me with the strength to pursue my goals.

A CIRCUIT SPLIT SURVEY ON VIOLENT FELONIES AND CRIMES OF VIOLENCE: WHERE DOES THE TENTH CIRCUIT STAND?

INTRODUCTION

Criminal recidivism was a buzzword in the media, Congress, and the criminal justice system long before the "crime wave" of the 1980s and the subsequent "War on Drugs." Congress began to target career criminals after social research conducted in the 1970s and 1980s showed a small number of "habitual offenders" were responsible for a large portion of crimes.[1] During the mid-to-late 1980s, Congress and the Federal Sentencing Commission took action to isolate recidivist criminals and ensure their removal from the general public via incarceration. However, it seems that the ambiguity in both Congress's Armed Career Criminal Act (ACCA)[2] and the United States' Sentencing Guidelines (USSG)[3] has largely served to increase litigation and divide the federal court system.

The ACCA increases the mandatory minimum sentence for a felon in possession of a firearm,[4] from 10 years to 15 years if the person has three previous, separate convictions for a "violent felony" or a serious drug offense.[5] Similarly, the USSG increases a person's base offense level depending on previous convictions for a "crime of violence."[6] For example, a person would receive a base offense level of at least 24,[7] if he or she committed the instant offense after having two or more felony

1. James G. Levine, Note, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Toward Consistency*, 46 HARV. J. ON LEGIS. 537, 545 (2009).

2. Armed Career Criminal Act, 18 U.S.C. § 924(e) (2006) (instituting mandatory prison terms of not less than fifteen years for certain repeat offenders).

3. U.S. SENTENCING GUIDELINES MANUAL §§ 2K2.1, 2L1.2(b)(1)(A) (2010) (defining offense levels for crimes related to firearms and unlawfully entering or remaining in the United States).

4. 18 U.S.C. § 922(g) (2006) (defining the unlawful act of felon in possession of a firearm).

5. 18 U.S.C. § 924(e)(1).

6. U.S. SENTENCING GUIDELINES MANUAL § 2K2.1.

7. Base offense levels are points assigned to defendants based on the offense committed, their prior criminal convictions, and specific circumstances of those crimes, i.e. whether the crimes were committed while serving a criminal justice sentence (probation, parole, work release, etc.), *id.* § 4A1.1(d), or with a weapon, *id.* § 4B1.4. These points are designed to reflect the likelihood of recidivism and future criminal behavior of defendants with prior criminal histories. Courts are to determine the relevant offense guideline section from chapter two of the USSG based on the offense of conviction or the offense to which the defendant stipulated. *Id.* § 1B1.1. The base offense level of a crime is determined in chapter two and may be adjusted based on the criteria listed in chapter three (e.g. adjustments related to the victim, the defendant's role in the offense, and whether the defendant accepted responsibility). *Id.* chs. 2, 3, pts. A, B, E. For example, burglary of a residence is given a base offense level of 17 in chapter two, but may be adjusted to 15 because the defendant "clearly demonstrated acceptance of responsibility for his offense." *Id.* §§ 2B2.1, § 3E1.1. However, criminal history of crime of violence may increase the base level according to sections 2K2.1 and 4A1.1.

convictions for a crime of violence or a controlled substance offense.[8] Predictably, the issues that are most often litigated when dealing with the ACCA, the USSG, or both are the definition and scope of "violent felony" and "crime of violence."

In the Tenth Circuit alone, between September 1, 2009 and August 31, 2010, there were six cases addressing the application of the recidivism sentencing enhancements of the ACCA and the USSG.[9] Other circuits faced many of the same legal issues and published their own opinions, sometimes in harmony with the Tenth Circuit, and other times promulgating a different interpretation of the USSG or ACCA, creating a circuit split.[10] Furthermore, cases in all circuits have relied upon various precedents in their opinions, exhibiting a rich body of USSG and ACCA law.

This Comment surveys recent Tenth Circuit ACCA and USSG case law during the period of September 2009 through August 2010, and highlights some of the critical questions dividing the circuits. First, this Comment provides background on the ACCA and USSG. Next, it gives an overview of the law common to ACCA and USSG interpretations and briefs the relevant cases in recent Tenth Circuit jurisprudence. The third section discusses recent circuit splits regarding the characterization of convictions for fleeing a police officer and the definition of "burglary of a dwelling." And finally, this Comment analyzes the controversy of using juvenile adjudications as predicate offenses under the ACCA and predicts how the Tenth Circuit may rule on the issue.

I. THE STATUTES

A. The Armed Career Criminal Act: Violent Felonies

Passed in 1984, the ACCA is just one federal law aimed at recidivists.[11] The text of the ACCA provides:

> In the case of a person who violates section 922(g) of this title [by being a felon in possession of a firearm] and has three previous convictions . . . for a violent felony or a serious drug offense, or both,

8. U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a)(2).

9. United States v. Silva, 608 F.3d 663 (10th Cir. 2010); United States v. McConnell, 605 F.3d 822 (10th Cir. 2010); United States v. Martinez, 602 F.3d 1166 (10th Cir. 2010); United States v. Wise, 597 F.3d 1141 (10th Cir. 2010); United States v. Darton, 595 F.3d 1191 (10th Cir. 2010); United States v. Rivera-Oros, 590 F.3d 1123 (10th Cir. 2009).

10. *See, e.g.*, United States v. Tyler, 580 F.3d 722, 726 (8th Cir. 2010) (declining to interpret a violation of fleeing a peace officer statute as a "crime of violence" under the USSG in contrast to *Wise* and *McConnell*); United States v. Wenner, 351 F.3d 969, 972–73 (9th Cir. 2003) (interpreting the enumerated felony of "burglary of a dwelling" under the USSG in contrast to *Rivera-Oros*).

11. United States v. Strahl, 958 F.2d 980, 985 (10th Cir. 1992); H.R. REP. NO. 98-1159, at 4 (1984) (Conf. Rep.); *see also, e.g.*, 18 U.S.C. § 3559(c) (2006) (federal "Three Strikes Law").

> committed on occasions different from one another, such person shall be fined . . . and imprisoned not less than fifteen years . . . .[12]

The statute defines "serious drug offense," "violent felony," and "conviction," in subsections (2)(A) through (C), respectively[13]:

> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment of such term if committed by an adult, that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and
>
> (C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.[14]

The phrase, "otherwise involves conduct that presents a serious potential risk of physical injury to another," is referred to as the "residual provision" of the ACCA[15] and it is the source of frequent litigation, and the topic of several Supreme Court opinions.[16]

In *Taylor v. United States*,[17] the Supreme Court defined the generic definition of "burglary" under the ACCA as an "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime."[18] When a state statute defines burglary more broadly than this generic definition, a court can look to the charging document and other records to determine if the necessary *Taylor* elements were satisfied.[19]

B. United States Sentencing Guidelines: Crimes of Violence

Three years after the passage of the ACCA, federal sentencing guidelines created a structure for increasing base offense levels[20] accord-

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12. Armed Career Criminal Act, 18 U.S.C. § 924(e)(1) (2006).
13. § 924(e)(2)(A)–(C).
14. § 924(e)(2)(B)–(C).
15. *E.g.*, United States v. Martinez, 602 F.3d 1166, 1168–69 (10th Cir. 2010).
16. *E.g.*, Johnson v. United States, 130 S. Ct. 1265 (2010); Chambers v. United States, 129 S. Ct. 687 (2009); Begay v. United States, 553 U.S. 137 (2008); James v. United States, 550 U.S. 192 (2007); Shepard v. United States, 544 U.S. 13 (2005).
17. 495 U.S. 575 (1990).
18. *Id.* at 599.
19. *Id.* at 602.
20. The Introductory Commentary to chapter four of the USSG states that a defendant with prior criminal history is more culpable than a first time offender, and as such, deserves greater punishment. U.S. SENTENCING GUIDELINES MANUAL ch. 4, pt. A, introductory cmt. (2010). In addition, base offense levels can be increased or decreased based on the adjustment categories enumerated in chapter three and within individual offense guidelines in chapter two. *Id.* ch. 3; *see, e.g.*,*id* § 2A1.2.

ing to previous convictions for "crimes of violence" or a "controlled substance offense."[21] The Application Notes for the USSG cross-reference section 4B1.2(a) for the definition of a crime of violence. Section 4B1.2(a) is strikingly similar to the ACCA definition of crime of violence, and in fact, the biggest difference is the ACCA's enumerated felony of "burglary," versus "burglary of a dwelling" in the USSG.[22] The definition reads:

> The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.[23]

Similar to the ACCA, the "otherwise involves" phrase of the USSG is referred to as the residual clause.[24] As to convictions, the USSG disallows juvenile adjudications as predicate offenses.[25] A crime committed by a person under eighteen does not qualify as a predicate offense unless "it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted."[26]

A key issue of contention among the circuits is whether the ACCA enumerated offense of "burglary" and the USSG enumerated offense of "burglary of a dwelling" are limited to immutable, physical structures. *Taylor*'s general definition of "burglary" is specifically limited to "build-

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21. U.S. SENTENCING GUIDELINES MANUAL § 2K2.1.

22. *Compare* 18 U.S.C. § 924(e)(2)(B) (2006), *with* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a). Interestingly, the USSG also provides for increasing base offense levels if the defendant had been deported after "a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; [or] (iv) a child pornography offense." U.S. SENTENCING GUIDELINES MANUAL §2L1.2(b)(1)(A). Not only does the deportation section provide more enumerated offenses for a level increase, but it also lists twelve enumerated offenses that constitute a crime of violence, as opposed to the four for persons who are not subject to deportation. § 2L1.2 cmt. n.1(B)(iii) (enumerated crimes are: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling). This difference is at issue in the Tenth Circuit case of *United States v. Rivera-Oros*, 590 F.3d 1123 (10th Cir. 2009).

23. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a).

24. *E.g.*, United States v. Wise, 597 F.3d 1141, 1144 (10th Cir. 2010).

25. U.S. SENTENCING GUIDELINES MANUAL § 2K2.1 cmt. n.1. A predicate offense in the context of a discussion about the ACCA and USSG is a prior conviction that qualifies as a "violent felony" or "crime of violence" and thus produces a sentencing enhancement under the Act or the Guidelines, or both.

26. *Id.* Thus, in the state of Colorado, a juvenile convicted of a crime in adult criminal court under the direct file statute, COLO. REV. STAT. § 19-2-517 (2010), would likely be subject to future sentencing enhancements under the USSG.

ing[s] or structure[s],"[27] and specifies that state statutes including automobiles, vending machines, and tents as structures are too broad.[28] In interpreting "burglary of a dwelling," the Tenth Circuit holds that conduct constituting such a crime is a subtype of burglary, and therefore, requires a separate general definition.[29] The Tenth Circuit does not limit the *Taylor* definition to buildings or structures used as dwellings, but defines "burglary of a dwelling" as burglary of "any enclosed space that is used or intended for use as a human habitation."[30] The Ninth Circuit disagrees and applies the *Taylor* definition, limiting the definition of dwelling to buildings and structures not including automobiles, vending machines, and tents.[31] The Ninth Circuit concludes that Washington residential burglary is beyond the scope of a "crime of violence" because the statutory definition of "dwelling" includes places that are not structures.[32]

II. THE CASE LAW

When interpreting crimes of violence and violent felonies, the circuit courts deal with several preliminary issues that are noted here to provide background for discussion of the following opinions. First, whether a prior offense is a crime of violence or a violent felony is a question of law that is reviewed *de novo* by the appellate circuits.[33]

Second, because of the similar language in the definitions of "crime of violence" and "violent felony," the Tenth Circuit and other courts generally look to their own precedent for categorizing a crime as a violent felony under the ACCA when dealing with the same crime under the USSG, and vice versa.[34]

Finally, when deciding whether a conviction for an enumerated felony in a given state is a conviction for the offense as intended by Congress or the Sentencing Commission, courts typically use a categorical

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27. Taylor v. United States, 495 U.S. 575, 599 (1990).
28. *See id.* at 602.
29. United States v. Rivera-Oros, 590 F.3d 1123, 1129 (10th Cir. 2009).
30. *Id.* at 1132 (internal quotation marks omitted).
31. *See* United States v. Wenner, 351 F.3d 969, 972 (9th Cir. 2003).
32. *Id.* at 972–73.
33. *E.g.*, United States v. McConnell, 605 F.3d 822, 824 (10th Cir. 2010); United States v. Martinez, 602 F.3d 1166, 1168 (10th Cir. 2010); *Rivera-Oros*, 590 F.3d at 1125.
34. *E.g.*, *Martinez*, 602 F.3d at 1173 ("This language is very similar to the ACCA language defining the term *violent felony*. And we have looked to interpretations of the ACCA to guide our reading of § 4B1.2(a)."); United States v. Wise, 597 F.3d 1141, 1145 (10th Cir. 2010) ("The residual clause of the ACCA is worded almost identically to that of § 4B1.2(a), and we have held that in interpreting 'crime of violence' under § 4B1.2, we may look for guidance to cases construing the ACCA's parallel provision."); United States v. Tyler, 580 F.3d 722, 724 n.3 (8th Cir. 2009) ("Although the *Gordon* court was analyzing whether an offense constituted a 'violent felony' under the Armed Career Criminal Act, we employ the same test to decide whether and offense constitutes a 'crime of violence' under the Sentencing Guidelines because the definitions of 'violent felony' and 'crime of violence' are virtually identical.").

approach to analyze the state's criminal statute.[35] This categorical approach requires that courts look at the text of the statute to make its determination and not consider the underlying facts of the defendant's case.[36] However, in instances where the offense could have been committed in a number of ways or where the offense includes both conduct that falls under the ACCA or USSG and conduct that does not, courts will look to the charging documents, plea agreements, and other court records to see with what specific crime the defendant was charged.[37] Courts do not consider the specific conduct of the defendant in this modified approach, but rather, consider the record to determine with which subsection of the statute the defendant was charged, and thus, which subsection the court should examine on its face.[38] This paradigm is called the modified categorical approach.[39]

A. Tenth Circuit Survey

The cases discussed below are seven of the most recent Tenth Circuit cases regarding the application of the ACCA and the USSG.

1. *United States v. Strahl*[40]

In 1988, Mr. Strahl pled guilty to possession of firearms after being convicted of a felony. Accordingly, the court then considered his 1968 California conviction for burglary, his 1975 Utah conviction for attempted burglary, and his 1979 Utah conviction for burglary as predicate offenses and increased his sentence from 5 years to 15 years, as required under the ACCA at the time.[41] The defendant appealed his enhanced sentence, arguing that California's definition of burglary is outside the generic definition of burglary, and attempted burglary is not a predicate offense under the ACCA.[42]

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35. *E.g.*, *Rivera-Oros*, 590 F.3d at 1127.

36. *Id.* ("To determine whether a previous conviction satisfies the generic meaning of the offense, ordinarily we apply 'a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.'" (quoting Taylor v. United States, 495 U.S. 575, 600 (1990))). This categorical approach is similar to the approach taken by courts in deciding if a felony was "inherently dangerous" under the Felony Murder Rule. In cases where the Felony Murder Rule has been applied to a defendant who did not commit one of the enumerated felonies (burglary, arson, robbery, rape, or kidnapping), the court views the felony statute in the abstract (language only) and does not consider the underlying facts of the case at hand. If the felony *could* be completed in a safe manner, then, similar to when a crime falls outside of a generic definition of an enumerated offense, the Felony Murder Rule (or the ACCA or USSG), does not apply. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 526–27 (5th ed. 2009).

37. *E.g.*, *Wise*, 597 F.3d at 1144 (The modified approach "look[s] to the statutory elements, the defendant's charging documents, plea agreement and colloquy (if any), and uncontested facts found by the district judge to determine whether the particular defendant's conduct violated the portion of the statute that is a crime of violence").

38. *McConnell*, 605 F.3d at 825.

39. *Id.*; *see also Wise*, 597 F.3d at 1144.

40. 958 F.2d 980 (10th Cir. 1992).

41. *Id.* at 982. At the time Mr. Strahl pled guilty to a felon in possession of a firearm charge, the sentence was five years imprisonment. *Id.*

42. *Strahl*, 958 F.2d at 982–83.

The *Strahl* court found that the district court erred in considering both the California and Utah convictions.[43] The court found the California conviction not to be a "violent felony" because the California definition of burglary is outside the generic definition of burglary given by the Supreme Court.[44] In *Taylor*, the Supreme Court defined burglary under the ACCA as an "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime."[45]

Furthermore, when a state defines burglary more broadly by eliminating the requirement of unlawful entry or including automobiles and vending machines as structures, the court may look to jury instructions and indictment information to determine if the necessary elements of burglary were charged.[46] The *Strahl* court references California case law to show that its definition of burglary is a non-generic definition because it does not require unlawful entry and it includes places other than buildings and structures.[47] Moreover, in reviewing the charging document as per a modified categorical approach, the court found that Strahl's entry into a store with intent to commit a felony or theft did not satisfy the *Taylor* definition because he was not charged with unlawful entry of the store.[48] Therefore, because Strahl's conduct did not fall within the *Taylor* definition of burglary, his prior conviction did not constitute a predicate offense.

As to the issue of attempt, the Tenth Circuit decided that the defendant's attempted burglary conviction was not a predicate offense because Utah's definition of attempt includes attenuated conduct that does not present a "serious potential risk of physical injury to another."[49] After reviewing the legislative history of the ACCA, the court found that Congress included burglary as an enumerated offense primarily because it is a crime that is perpetrated by many repeat offenders and because it poses the serious risk of violent confrontation with investigating officers or occupants of the building.[50] The court noted that a defendant in Utah could be convicted of attempted burglary based on duplicating a key, surveilling the targeted building, or obtaining floor plans, none of which create a "high risk of violent confrontation inherent in a completed burglary."[51] Thus, a conviction for attempted burglary under the Utah statute is not a predicate offense under the ACCA's residual clause.[52]

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43. *Id.* at 984, 986.
44. *Id.* at 983–84.
45. Taylor v. United States, 495 U.S. 575, 599 (1990).
46. *See Strahl*, 958 F.2d at 983–84 (quoting *Taylor*, 495 U.S. at 602). This is an example of a modified categorical approach.
47. *Strahl*, 958 F.2d at 983.
48. *Id.* at 984.
49. *Id.* at 986.
50. *Id.* at 985.
51. *Id.* at 986.
52. *Id.*

2. *United States v. Permenter*,[53] *United States v. Fell*,[54] & *United States v. Martinez*[55]

The *Permenter* court used the *Strahl* analysis to reverse an enhanced ACCA sentence based on an Oklahoma attempted burglary charge.[56] The court found that because the Oklahoma attempt statute provided that "any act" directed toward the completion of the substantive offense constituted attempt, it was not a violent felony.[57] The court reasoned that a defendant's conduct would not pose a serious potential risk to others.[58]

The Tenth Circuit reconsidered its inchoate offense analysis in *Fell* and *Martinez* in light of the Supreme Court decision in *James v. United States*.[59] Contrary to the other cases in this section, *James* found attempted burglary to be a violent felony because Florida case law had limited the definition of attempted burglary to a significant step toward entry of a building or structure.[60] This narrowed definition reflected the main risk of burglary: violent confrontation with the building's occupants or law enforcement.[61]

In its opinion, the *James* Court held that courts should only look at the elements of the predicate inchoate offense to determine whether it presents a serious potential risk of injury to another, not at the elements of the underlying substantive offense.[62] The Tenth Circuit in *Fell* stated that, by holding that only elements of the inchoate crimes should be considered, *James* rejected the Circuit's approach in *Strahl* and *Permenter*.[63]

The Tenth Circuit first applied the *James* methodology in *Fell*. The *Fell* court determined that conspiracy to commit second-degree burglary in Colorado is not a violent felony under the ACCA because—in analyzing the statutory elements of conspiracy rather than second-degree burglary—the court held that, in Colorado, conspiracy does not require an act directed toward entry of a building, and therefore, there is no potential risk of serious injury to another.[64]

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53. 969 F.2d 911 (10th Cir. 1992).
54. 511 F.3d 1035 (10th Cir. 2007).
55. 602 F.3d 1166 (10th Cir. 2010).
56. *Permenter*, 969 F.2d at 915.
57. *Id.* at 913.
58. *Id.*
59. 550 U.S. 192, 202–09 (2007) (finding Florida attempted burglary a violent felony under the ACCA because Florida law defined attempted burglary as a significant step towards entry of the building or structure, and therefore did not criminalize attenuated conduct. The Florida definition also reflected the main risk of burglary—violent confrontation).
60. *Id.* at 202, 209.
61. *Id.* at 203.
62. *Id.* at 208.
63. *Fell*, 511 F.3d at 1039–40.
64. *Id.* at 1041–43.

When the inchoate issue was again considered in *Martinez*, the Tenth Circuit—employing the reasoning in *James*—focused on the parties' arguments as to whether Arizona law had limited the definition of attempted burglary to a significant step towards entry into a building as the Florida courts had done in *James*.[65] The Tenth Circuit was not persuaded in *Martinez* that Arizona attempt law was narrowed to exclude preparatory conduct; the Tenth Circuit found that the Arizona Supreme Court has never used the "substantial step test," and even if that test had been adopted, a substantial step towards the completion of a burglary can still include the attenuated conduct unaddressed by the *James* court and at issue in the *Strahl* progeny.[66]

In line with the cases proceeding from *Strahl*, the Tenth Circuit found that "[i]f one can commit the offense of attempted burglary in many ways without an act directed toward entry of the building, the risk of physical injury to another is too speculative to satisfy the residual provision of [the ACCA]."[67] Once again, only looking at the elements of the inchoate offense, the Circuit concludes that Arizona has not similarly limited its attempted burglary definition because, like *Strahl* and *Permenter*, attenuated conduct such as "casing" a building qualifies as an attempted burglary.[68] Thus, Martinez's Arizona attempt conviction was not a predicate offense under the ACCA.[69]

Martinez, however, had a second holding. On the basis of his Arizona attempted burglary conviction, the defendant challenged both his sentencing enhancement under the ACCA and his increased base offense level under the USSG.[70] In a split holding, the Tenth Circuit held that while attempted burglary was not a violent felony in Arizona, it is a crime of violence under the USSG.[71] To interpret Sentencing Guideline language, the court looked to the Sentencing Commission's commentary, which "is binding and authoritative unless it violates the Constitution or a federal statute, or is inconsistent with . . . that guideline."[72]

The commentary to section 4B1.2—the section defining crimes of violence—states that crimes of violence include their inchoate counterparts.[73] The court goes further to hypothesize that the Sentencing Commission included inchoate offenses because of empirical evidence showing that attempt crimes often pose a similar risk of injury as completed

65. United States v. Martinez, 602 F.3d 1166, 1170–71 (10th Cir. 2010).
66. *Id.* at 1172.
67. *Id.* at 1170.
68. *Id.* at 1172–73.
69. *Id.* at 1173.
70. *Id.* at 1168.
71. *Id.* at 1173, 1175.
72. *Id.* at 1173–74.
73. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 cmt. n.1. (2010) ("'Crime of violence' . . . include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.").

offenses.[74] Therefore, the court found that it "cannot invalidate an application note merely because our view of empirical data differs from that of the Sentencing Commission" and found that attempted burglary was a crime of violence under the USSG.[75]

3. *United States v. Rivera-Oros*[76]

In *Rivera-Oros*, the Tenth Circuit addressed the enumerated felony of "burglary of a dwelling" under the USSG definition of crime of violence.[77] The defendant was convicted of second-degree burglary in Arizona, which is defined as "entering or remaining unlawfully in or on a residential structure with the intent to commit any theft or any felony therein."[78] Mr. Rivera-Oros unlawfully entered the home of his girlfriend's mother and was found on the premises by police; the mother told police that jewelry was missing from her home.[79] On appeal, he challenged the sentencing enhancement for this conviction on the basis that it was improperly characterized as "burglary of a dwelling" under USSG section 2L1.2(b).[80]

Unlike *Strahl*, the *Rivera-Oros* court did not use the *Taylor* definition of generic burglary because *Taylor* addressed the enumerated felony of "burglary" under the ACCA, and the definition at issue here was "burglary of a dwelling" under the USSG.[81]

While the courts generally use precedent analyzing the ACCA to inform decisions regarding interpretation of the USSG,[82] and vice versa, the Tenth Circuit explicitly refused to do so in *Rivera-Oros* because the ACCA enumerates "burglary" while the USSG enumerates "burglary of a dwelling"; in deciding if a previous conviction is a crime of violence, the generic meaning of "burglary of a dwelling" must be used, not "bur-

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74. *Martinez*, 602 F.3d at 1174–75 (quoting James v. United States, 550 U.S. 192, 206 (2007)).

75. *Martinez*, 602 F.3d at 1175. It is this kind of disparate result that leads some authors to conclude that reforms are desperately needed in the ACCA. Levine, *supra* note 1, at 548–66. Levine argues that because the aims of the both the ACCA and USSG are similar, in fact, almost identical, the ACCA should be reformed to reflect certain aspects of the USSG. *Id.* at 549–50. He puts forth that the ACCA has not been amended in over twenty years while the USSG is frequently amended to take into account trends in recidivism and the motivation and controls of criminal behavior. *Id.* at 550. Levine specifically advocates for the ACCA to conform to the USSG in temporal qualities (i.e. if there is more than fifteen years separating the instant offense and a prior felony conviction that conviction should not count as a predicate offense, and juvenile offenses should not count as predicate offenses) and the scope of predicate offenses (i.e. change "burglary" to "burglary of a dwelling" and escape qualifies only if the conduct expressly charged, by its nature, presented a potential serious risk of physical injury). *Id.* at 551–66. Interestingly, these changes could eliminate the circuit splits outlined in this article.

76. 590 F.3d 1123 (10th Cir. 2009).

77. *Id.* at 1126.

78. *Id.* at 1133 (quoting ARIZ. REV. STAT. ANN. § 13-1507(A) (2010)).

79. *Rivera-Oros*, 590 F.3d at 1125 n.1.

80. *Id.* at 1124–25.

81. *Id.* at 1128.

82. *See* United States v. McConnell, 605 F.3d 822, 825 (10th Cir. 2010); *see also* United States v. Wise, 597 F.3d 1141, 1144 (10th Cir. 2010).

glary."[83] Furthermore, the court noted that the defendant was sentenced under section 2L1.2(b), which defines crime of violence differently than the ACCA because of the deportation element.[84]

To form the generic definition of burglary of a dwelling, the court looked to legislative history and the Sentencing Commission's heightened concern for the physical and psychological harms associated with residential burglaries; the historical recognition of those harms date back to Blackstone, and the common understanding of the word "dwelling."[85] The court defined dwelling under section 2L1.2 as "any 'enclosed space that is used or intended for use as a human habitation,'"[86] and noted that its conclusion is in line with the Fifth Circuit in *United States v. Murillo-Lopez*.[87]

The court next considered whether, using the categorical approach, the statute under which the defendant was convicted corresponded to the generic definition.[88] To find that a state statute criminalizes activity outside the generic definition of an enumerated offense "requires a *realistic probability*, not a theoretical possibility, that the state would apply its statute to conduct that falls outside the generic definition of a crime."[89] Arizona case law considers the character and use of a structure in determining if it is a dwelling.[90] Under this analysis, a gift shop in a hotel does not qualify as a dwelling, but a guest room in that same hotel would, in fact, qualify.[91] Thus, the term "residential structure" in the statute in question substantially conformed to the generic definition of dwelling and the *Rivera-Oros* court affirmed the defendant's enhanced sentence.[92]

4. *United States v. Wise*[93] & *United States v. McConnell*[94]

Wise and *McConnell* are concerned with the characterization of failure to stop for, or fleeing from a police officer as a crime of violence under the residual clause of USSG section 4B1.2(a).[95] Both cases were decided within the past year and both considered the characterization in light of the Supreme Court's holding in *Chambers v. United States*[96] that escape crimes are not categorically violent felonies under the ACCA,[97] a

83. *Rivera-Oros*, 590 F.3d at 1128–29.
84. *Id.* at 1129 n.5; *see supra* text accompanying note 21.
85. *Rivera-Oros*, 590 F.3d at 1132.
86. *Id.* (quoting BLACK'S LAW DICTIONARY 582 (9th ed. 2009)).
87. *Rivera-Oros*, 590 F.3d at 1132 (citing United States v. Murillo-Lopez, 444 F.3d 337 (5th Cir. 2006)).
88. *Rivera-Oros*, 590 F.3d at 1126–27.
89. *Id.* at 1133 (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)).
90. *Rivera-Oros*, 590 F.3d at 1133–34.
91. *Id.* at 1133.
92. *Id.* at 1134.
93. 597 F.3d 1141 (10th Cir. 2010).
94. 605 F.3d 822 (10th Cir. 2010).
95. *Id.* at 823; *Wise*, 597 F.3d at 1142.
96. 129 S. Ct. 687 (2009).
97. *Id.* at 692–93.

holding contrary to Tenth Circuit precedent.[98] Furthermore, both *Wise* and *McConnell* use the test promulgated by the Supreme Court in *Begay v. United States*,[99] which declared DUIs are not predicate offenses[100] to determine whether fleeing falls into the residual clause of USSG section 4B1.2(a).[101] The only differences in analysis for these two cases are the text of the state statutes in question: Utah in *Wise* and Kansas in *McConnell*.[102]

The Tenth Circuit Court begins its analysis in *Wise* and *McConnell* by applying the modified categorical approach[103] to the fleeing statutes to determine if they qualify as a crime of violence.[104] In *Begay*, the Supreme Court elaborated upon the method of determining if an offense is a crime of violence under the residual clauses. The *Begay* test requires not only that the offense present a serious potential risk of physical injury to another, but it must also be "roughly similar, in kind as well as degree of risk posed" to the enumerated offenses.[105] A crime is "roughly similar" to an enumerated offense if it "typically involve[s] purposeful, 'violent,' and 'aggressive' conduct."[106]

The next step the *Wise* and *McConnell* courts took in their analysis was to recount prior Tenth Circuit fleeing precedent.[107] In *United States v. West*[108]—where a defendant fled a traffic stop and accelerated through city streets, disregarding traffic signals and ultimately losing control of his vehicle—the Tenth Circuit applied the *Begay* test to the Utah fleeing statute, and found that both subsections constitute a violent felony under the ACCA.[109] The court analogized the conduct of fleeing to an escape offense because both involve conduct that greatly increases the risk of violent confrontation with law enforcement and third parties.[110] The Utah fleeing statute at issue in *West* was the same as the statute at issue in *Wise*, and defines failure to stop at a signal of a police officer as "operat[ing] the vehicle in willful or wanton disregard of the signal so as to interfere with or endanger the operation of any vehicle or person; or at-

98. *McConnell*, 605 F.3d at 828; *Wise*, 597 F.3d at 1145.
99. 553 U.S. 137 (2008).
100. *Id.* at 148.
101. *McConnell*, 605 F.3d at 826–27; *Wise*, 597 F.3d at 1144–45.
102. *McConnell*, 605 F.3d at 825–26; *Wise*, 597 F.3d at 1143–44.
103. The modified approach was used in these cases because both statutes at issue had multiple subsections that could present different "potential risk[s] of physical injury to another," U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2010), and therefore the courts must determine with which subsection the defendants were charged, *McConnell*, 605 F.3d at 824–29; *Wise*, 597 F.3d at 1143–47.
104. *McConnell*, 605 F.3d at 825–26; *Wise*, 597 F.3d at 1144.
105. Begay v. United States, 553 U.S. 137, 143 (2008).
106. *Id.* at 143–45.
107. *McConnell*, 605 F.3d at 827–30 (discussing United States v. West, 550 F.3d 952 (10th Cir. 2008)); *Wise*, 597 F.3d at 1145–48 (also discussing the *West* opinion).
108. 550 F.3d 952 (10th Cir. 2008).
109. *Id.* at 960–65.
110. *Id.* at 964–65.

tempt to flee or elude a peace officer by vehicle or other means."[111] The question *Wise* posed was: Is *West* good law after the Supreme Court held that not all escape crimes are violent felonies?[112] In other words, does *Chambers* implicitly overrule *West*'s reliance on the Tenth Circuit precedent that categorically defined escape as a violent crime under the USSG and ACCA?[113] In response to these questions, both *Wise* and *McConnell* determined that *West* remains good law because the Supreme Court's holding in *Chambers* is narrow, pertaining only to escape crimes involving inaction and no danger to third parties.[114]

Because the Utah statute requires deliberate action by the defendant (willful or wanton disregard), the violation must necessarily be committed in the presence of a police officer (fleeing or eluding a police officer), the violation is likely to endanger third parties, and the violation poses a threat of direct confrontation between the police officer and the defendant(s), there is an increased risk of serious potential injury.[115]

Similarly, the Kansas stautory subsection under which McConnell was charged requires the conduct to be willful and occur in the presence of a police officer.[116] In addition, McConnell's conviction included the element of a car accident or damage to property, a further risk of serious physical injury.[117] The *McConnell* court also notes that there is a circuit split on this issue, but the Tenth Circuit's findings are in accord with the majority of circuits.[118]

5. *United States v. Silva*[119]

The *Silva* case dealt with two separate crimes and their classification as a violent felony under the ACCA. The Tenth Circuit first addressed whether burglary of a shed under New Mexico law is a violent felony.[120] Second, the court turned to whether apprehension causing aggravated assault under New Mexico law is a violent felony.[121]

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111. *Id.* at 961.

112. Chambers v. United States, 129 S. Ct. 687, 689 (2009).

113. United States v. McConnell, 605 F.3d 822, 828 (10th Cir. 2010) (quoting United States v. Springfield, 196 F.3d 1180, 1185 (10th Cir. 1999), for the proposition that all escape crimes are violent crimes under the ACCA and USSG).

114. *McConnell*, 605 F.3d at 829; United States v. Wise, 597 F.3d 1141, 1146 (10th Cir. 2010).

115. *Wise*, 597 F.3d at 1146–47.

116. *McConnell*, 605 F.3d at 828–29. McConnell's charging document stated that he willfully failed to bring his vehicle to a stop at a police officer's command and while fleeing, he was involved in a motor vehicle accident or intentionally caused damage to property. *Id.* at 826.

117. *Id.* at 829.

118. *Id.* at 830 (the Tenth Circuit is in accord with the Fifth, Sixth, and Seventh Circuits, but is in disagreement with the Eighth and Eleventh Circuits).

119. 608 F.3d 663 (10th Cir. 2010).

120. *Id.* at 665–69.

121. *Id.* at 669–75.

a. Burglary of "a Structure, a Shed"[122]

In its analysis, the *Silva* court employed a modified categorical approach because New Mexico's statute—as compared to the *Taylor* definition of burglary[123]—provides for a non-generic definition of burglary.[124] The defendant argued that the shed he burgled did not meet the "building or other structure" element of the *Taylor* definition.[125] Using precedent from the Ninth Circuit, Silva argued that "building or structure" means only those spaces that are permanent and designed for human habitation or business.[126]

The Tenth Circuit rejected Silva's structural permanency argument by finding fault with the Ninth Circuit's reasoning and using Supreme Court precedent to find a broader definition of "building or other structure" as used in *Taylor*.[127] Since the *Taylor* decision, the United States Supreme Court has found that the "building or other structure" component is broader than the Ninth Circuit's requirement of permanency.[128] In *Shepard v. United States*,[129] the Court found that the ACCA makes burglary a violent felony only if committed in a building or enclosed space.[130] In *Silva*, the Tenth Circuit found the Ninth Circuit's analysis, and the defendant's arguments incomplete because they did not discuss *Shepard*.[131] Furthermore, the Tenth Circuit's own precedent in *Rivera-Oros* and *United States v. Cummings*[132] rejected such a narrow reading of "building or other structure" and declined the Ninth Circuit's invitation to find the "or other structure" phrase superfluous.[133] Therefore, the court concluded that the defendant's guilty plea to burglary of "a structure, a shed" under New Mexico law was a violent felony.[134]

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122. *Id.* at 666.

123. "[A]n unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id.* at 667 (quoting Taylor v. United States, 495 U.S. 575, 598 (1990)).

124. *Silva*, 608 F.3d at 665–66.

125. *Id.* at 666.

126. *Id.* The court notes that the defendant presented evidence that the shed had been moved to various points in the victim's yard. *Id.* at 679.

127. *Id.* at 668.

128. *Compare* Shepard v. United States, 544 U.S. 13, 15–16 (2005), *with* United States v. Grisel, 488 F.3d 844, 848 (9th Cir. 2007) (en banc) ("[A] structure designed for occupancy that is intended for use in one place.").

129. 544 U.S. 13 (2005).

130. *Id.* at 15–16.

131. *Silva*, 608 F.3d at 668.

132. 531 F.3d 1232, 1235 (10th Cir. 2008) (rejecting the Ninth Circuit's holding that found the phrase "or other structure" superfluous because the generic definition of burglary broadly construes the settings for burglary and does not include only buildings).

133. These cases interpret *Grisel* as finding the "or other structure" clause of the *Taylor* definition superfluous. United States v. Rivera-Oros, 590 F.3d 1123, 1128 n.4 (10th Cir. 2009); *Cummings*, 531 F.3d at 1235.

134. *Silva*, 608 F.3d at 669.

b. Apprehension Causing Assault

The second charge used for Silva's ACCA mandatory minimum sentence was a conviction for aggravated assault; the district court determined that this conviction had "as an element the use, attempted use, or threatened use of physical force against the person of another."[135] Once again, the Tenth Circuit employed a categorical approach, looking only to the statutory text.

Recently, in *Johnson v. United States*,[136] the Supreme Court found that "physical force" under the ACCA means "*violent* force—that is, force capable of causing physical pain or injury to another person."[137] Under New Mexico statute, assault is defined as "any unlawful act, threat or menacing conduct which causes another person to reasonably believe that he is in danger of receiving an immediate battery."[138] Aggravated assault adds the element of a deadly weapon.[139]

The *mens rea* for aggravated assault is general criminal intent, which the New Mexico Supreme Court has defined as "conscious wrongdoing or purposeful doing of an act the law declares to be a crime."[140] Thus, the Tenth Circuit framed the issue before them as "whether 'apprehension causing' aggravated assault—which requires proof that a defendant purposefully threatened or engaged in menacing conduct toward a victim, with a weapon 'capable of producing death or great bodily harm'—is a violent felony under the ACCA."[141]

The defendant argued that because apprehension causing aggravated assault "does not require proof of 'any intent with respect to the perceived threat [the defendant] has raised in the mind of the victim,' . . . [it] 'does not have as an element the intentional use, attempted use or threatened use of physical force.'"[142] The Tenth Circuit rejected this argument because the defendant's plea of aggravated assault meant that he pled to a general intent crime whereby he consciously or purposefully committed an illegal act.[143] In contrast to the dissent, the majority argued that apprehension causing aggravated assault required more than a "display of dexterity in handling a weapon; [rather] the crime requires proof that a defendant purposefully threatened or engaged in menacing conduct [with a deadly weapon] *toward* a victim."[144]

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135. *Id.* (quoting 18 U.S.C. § 924(e)(2)(B)(i) (2006)).
136. 130 S. Ct. 1265 (2010).
137. *Id.* at 1271.
138. *Silva*, 608 F.3d at 669 (quoting N.M. STAT. ANN. § 30-3-1 (2006)).
139. *Silva*, 608 F.3d at 669 (quoting § 30-3-2(A)).
140. *Silva*, 608 F.3d at 670 (quoting State v. Campos, 921 P.2d 1266, 1277 n.5 (N.M. 1996)).
141. *Silva*, 608 F.3d at 670.
142. *Id.* at 672 (quoting United States v. Zuniga-Soto, 527 F.3d 1110, 1124 (10th Cir. 2008)) (first alteration in original).
143. *Id.* at 673.
144. *Id.* at 674.

c. Dissent in *Silva*

The dissent concurred with the majority as to the defendant's burglary charge, but disagreed with the majority's *reasoning* regarding the apprehension causing assault.[145] Judge Hartz's interpretation of New Mexico law was that one can be guilty of assault "if one causes the victim to reasonably believe that he or she is about to be battered, even if one does not intend to create that belief."[146] The dissent's example was a person who purposefully shows his dexterity with a weapon without the intention of causing fear or apprehension to any bystanders.[147]

This perspective is contrary to Supreme Court and Tenth Circuit precedents that hold an offense does not have as "an element the threatened use of physical force against the person of another" unless it also has as an element that the offender intend that the victim feel threatened.[148] Judge Hartz reasoned that the intent that is important is the intent to use force; one does not accidentally use physical force against something.[149]

Furthermore, Judge Hartz argued that Tenth Circuit precedent states that mere recklessness does not satisfy the physical force requirement. In *United States v. Zuniga-Soto*,[150] the Tenth Circuit held that because the defendant could have been convicted of recklessly assaulting a public servant, the use of physical force was not an element of the crime.[151] Carrying this precedent to the next logical step, Judge Hartz's dissent concluded that the threatened use of physical force requires an intentional threat just as the use of physical force requires the intentional use of force.[152] Thus, because Silva could have been convicted of aggravated assault without the element of an intentional threat, the dissent concluded that his conviction is not a violent felony under the ACCA, and therefore, the mandatory minimum sentence required by that Act does not apply.[153]

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145. *Id.* (Hartz, J., dissenting).
146. *Id.* at 675.
147. *Id.*
148. *Id.*
149. *Id.* (citing Leocal v. Ashcroft, 543 U.S. 1, 9 (2004)).
150. 527 F.3d 1110 (10th Cir. 2008).
151. Id. at 1125.
152. *Silva*, 608 F.3d at 676 (Hartz, J., dissenting).
153. *Id.* at 674, 679.

B. Circuit Splits

The below section builds upon the previous case briefs and describes the current legal splits among the circuits regarding crimes of violence and violent felonies.

1. Burglary of a Dwelling

Currently, the circuits are split regarding the application of the *Taylor* definition of generic burglary under the ACCA to the enumerated offense of "burglary of a dwelling" under the USSG.

a. *United States v. Wenner*[154] vs. *Rivera-Oros*

As explained above, much of the *Rivera-Oros* opinion turned on the court's reasoning that although the *Taylor* definition of generic burglary under the ACCA is useful, it is not controlling when defining the USSG enumerated felony of "burglary of a dwelling."[155] The Tenth Circuit made a careful note that while their analysis aligns with an earlier Fifth Circuit case,[156] its approach is the exact opposite of the one taken by the Ninth Circuit in 2003.[157]

In the Ninth Circuit *Wenner* case, Mr. Wenner was convicted under the Washington residential burglary statute, which is defined as "'enter[ing] or remain[ing] unlawfully in a dwelling other than a vehicle' with the intent to commit a crime."[158] Similar to Mr. Rivera-Oros, Mr. Wenner's charging document stated that he "enter[ed] or remain[ed] unlawfully in a dwelling other than a vehicle, the residence of Mike Jewell."[159] In contrast with the Tenth Circuit, the *Wenner* court reasoned that the *Taylor* definition of "burglary" informs the definition of "burglary of a dwelling" under the USSG.[160] "Thus, the most logical and sensible reading of the Guidelines and the reading that is consistent with our cases is to construe 'burglary of a dwelling' as the *Taylor* definition of burglary, with the narrowing qualification that the burglary occur in a dwelling."[161]

The court then considered the face of the Washington statute defining "dwelling" and concluded that because the definition includes a fenced area, a railroad car, or a cargo container, it is broader than *Taylor*,

154. 351 F.3d 969 (9th Cir. 2003).
155. United States v. Rivera-Oros, 590 F.3d 1123, 1128 (10th Cir. 2009).
156. *Id.* at 1132 (analyzing United States v. Murillo-Lopez, 444 F.3d 337 (5th Cir. 2006)).
157. *Rivera-Oros*, 590 F.3d at 1132–33 (analyzing *Wenner*).
158. *Wenner*, 351 F.3d at 972 (quoting WASH. REV. CODE § 9A.52.025(1) (2003)) (alterations in original).
159. *Wenner*, 351 F.3d at 974.
160. *Id.* at 972–73.
161. *Id.* at 973.

which limits burglary to buildings and other structures, and therefore, is not a crime of violence.[162]

Additionally, the Ninth Circuit distinguishes the Third and Eighth Circuit decisions that expansively define dwelling as any enclosed space used or intended for use as a human habitation.[163] Both of these precedents were used in *Rivera-Oros* for support of the court's generic definition of dwelling.[164] The *Wenner* court distinguishes these cases because neither holds that burglary defined as broadly as "residential burglaries" under Washington law would qualify as "burglary of a dwelling" under the USSG; they merely establish that burglary of hotel rooms and shelters used as weekend fishing retreats are crimes of violence.[165]

b. The *Wenner* Dissent

In his dissent, Judge Wallace followed the same reasoning as the Tenth Circuit—that the *Taylor* definition does not apply to the more precise definition of "burglary of a dwelling" under the USSG—and further reasoned that Washington's residential burglary statute falls under the residual clause of the USSG.[166] Therefore, because the *Taylor* definition of burglary does not apply to the more precise offense of "burglary of a dwelling," the court should have determined whether "burglary of fenced areas, railway cars, or cargo containers used for lodging constitutes burglary of a dwelling under the Guidelines."[167] Similar to the Tenth Circuit—and persuaded by the Fifth and Eighth Circuits' decisions—Judge Wallace then created a general definition of "dwelling."[168] The dissent concluded that "dwelling" is any enclosed space, which is used or intended for use as a human habitation; therefore, Washington's statute should not be considered outside the definition of "burglary of a dwelling" under the USSG.[169]

Alternatively, the dissent argued that the defendant's crime of residential burglary falls under the Guideline's residual clause: "conduct that presents a serious potential risk of physical injury to another."[170] Because the classification of a crime as a "crime of violence" is a question of law the court reviews *de novo*, the dissent stated the court has the option of finding this alternative even if it was not raised in the parties' briefs and the district court did not apply the residual clause.[171] Furthermore, the

162. *Id.* (citing § 9A.04.110(5)).

163. *Wenner*, 351 F.3d at 973–74 (distinguishing the holdings in *United States v. McClenton*, 53 F.3d 584, 587 (3d Cir. 1995) and *United States v. Graham*, 982 F.2d 315, 316 (8th Cir. 1992)).

164. United States v. Rivera-Oros, 590 F.3d 1123, 1131–32 (10th Cir. 2009).

165. *Wenner*, 351 F.3d at 973.

166. *Id.* at 977 (Wallace, J., dissenting).

167. *Id.* at 978.

168. *Id.* at 978–79 (citing *McClenton*, 53 F.3d at 587 and *Graham*, 982 F.2d at 316, respectively).

169. *Wenner*, 351 F.3d at 978 (Wallace, J., dissenting).

170. *Id.* at 980 (quoting U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (2002)).

171. *Wenner*, 351 F.3d at 980 (Wallace, J., dissenting).

Ninth Circuit's precedent and other sources unanimously concluded that burglarizing a residence is a crime that presents a serious potential risk of injury to another because of the very real possibility of violent confrontation with the owner or with an investigating police officer.[172]

c. Discussion

One of the aims of the USSG is to provide a uniform structure for sentencing. However, when both the Tenth and Ninth Circuits were presented with defendants receiving enhanced sentences for unlawfully entering another's house, the courts followed different methods resulting in different outcomes. The Tenth Circuit defined "burglary of a dwelling" and found the defendant's conduct fit within this newly created generic definition and was consequently a prior conviction for USSG purposes.[173] The Ninth Circuit limited the *Taylor* definition of "burglary" to buildings or structures that are used as dwellings and found the defendant's conduct did not constitute a prior conviction under the USSG because the statutory definition of dwelling was too broad.[174]

The Tenth Circuit appears to have adopted a more thorough and logical legal analysis in *Rivera-Oros* because there is a substantive difference between the USSG and the ACCA in this instance and burglary of a house—the conduct at issue in *Rivera-Oros* and *Wenner*—is the quintessential "burglary of a dwelling" imagined by the Sentencing Commission. Both the *Wenner* and *Rivera-Oros* courts make note of the Sentencing Commission's explicit divergence from the ACCA in the area of burglary,[175] but the *Wenner* court merely mentions the divergence in a footnote and does not address it in its analysis. Furthermore, the *Wenner* court does not consider the text of the guideline in question, or the rationale for the differing language.[176]

Although the Tenth Circuit declines to apply the *Taylor* definition, the circuit does not ignore *Taylor* in its analysis. *Rivera-Oros* is an example of a court applying the *Taylor* methodology in creating a generic definition for the enumerated felony at issue. Thus, *Taylor* is given due deference and the court adheres to its procedure and looks at a wide range of sources to determine the generic definition of an enumerated offense.[177]

In contrast, the *Wenner* court merely uses *Taylor*'s generic definition of a similar, but different, enumerated offense, and applies it *in con-*

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172. *Id.* at 981 (relying on United States v. M.C.E., 232 F.3d 1252, 1255 (9th Cir. 2000)).

173. United States v. Rivera-Oros, 590 F.3d 1123, 1132, 1134 (10th Cir. 2009).

174. *Wenner*, 351 F.3d at 972–73, 976.

175. *See Rivera-Oros*, 590 F.3d at 1129; *Wenner*, 351 F.3d at 973 n.2.

176. *But see Rivera-Oros*, 590 F.3d at 1129 ("Our analysis must be attuned to the particular statute or guideline in question.").

177. *See id.* at 1126–27.

junction with Washington's definition of dwelling.[178] In this manner, the court determined that Mr. Wenner's conviction for entering Mr. Jewell's residence falls outside of the enumerated offense and thus is not a crime of violence.[179] Instead of finding a generic definition of "dwelling," the Ninth Circuit used *Taylor*'s limitation to buildings and structures to find Mr. Wenner's conviction of entering or remaining unlawfully in the residence of Mike Jewell outside the scope of burglary of a dwelling.[180]

The Tenth Circuit's approach may mean that the USSG definition of "burglary of a dwelling" encompasses more crimes than the more general ACCA definition of burglary. But, this broader definition emphasizes the increased risk of physical and psychological harm caused by the burglary of one's home, regardless of its architectural form.

In comparison, the Ninth Circuit's approach skips the step of considering what the Sentencing Commission intended by enumerating burglary of a dwelling as opposed to burglary: the physical and psychological harm that befalls victims of a burglary of their living space.[181] Therefore, the Ninth Circuit's approach means that burglarizing a camping tent or motor home, a temporary lodging in Washington, may not be a crime of violence because a tent is not a building or structure under *Taylor*'s burglary definition, and therefore, would not constitute a dwelling.[182]

Furthermore, while the *Wenner* dissent adopted much of the reasoning in *Rivera-Oros*, it did not consider the Supreme Court's ruling that there must be a "*realistic probability*, not a theoretical possibility," that the crime falls outside of the generic definition of an enumerated offense.[183] In *Rivera-Oros*, the Tenth Circuit considered Arizona case law in finding whether the defendant's conviction fell outside the definition of "burglary of a dwelling."[184] Because the state interpreted its statute to necessitate an inquiry into the nature and character of the space burglarized (i.e., was the burgled space a place used for temporary habitation or merely a gift shop in a hotel lobby[185]), the defendant's conviction did not fall outside of the generic definition of "dwelling."[186]

In *Rivera-Oros*, neither the majority nor the dissent made an inquiry into Washington law and whether the state courts consider the "character

178. *Wenner*, 351 F.3d at 973.
179. *Id.* at 976.
180. *Id.* at 972–73, 976.
181. *Rivera-Oros*, 590 F.3d at 1130.
182. *See* Taylor v. United States, 495 U.S. 575, 599 (1990) (citing statutes that were broader than the generic definition because they included places other than buildings, including a Missouri statute that defined burglary as breaking and entering any booth or tent).
183. *Rivera-Oros*, 590 F.3d at 1133 (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)).
184. *Rivera-Oros*, 590 F.3d at 1133–34.
185. *Id.* at 1133.
186. *Id.* at 1134.

of the use of the structure actually entered."[187] Because of this missing analysis, even the dissent's reasoning—that closely parallel's the Tenth Circuit's—is problematic. The *Wenner* dissent presented no authority that Washington considers the nature and character of the space when charging a defendant with residential burglary. Thus, under the Ninth Circuit's approach, courts are left with the text of the statute, which defines "dwelling" as any building or structure used for lodging; there is no evidence that, for instance, unlawfully entering shops housed in an apartment building or nursing home would not constitute burglary of a dwelling as the shops are in a building used by a person for lodging or as a residence.

d. Will the Supreme Court Weigh-In?

Because the conflict between the Ninth and Tenth Circuits is one of procedural application of a Supreme Court case, this split will likely be heard by the High Court. The question posed by this conflict is the scope of *Taylor*'s definition and when a court is to engage in the method of defining the "generic, contemporary meaning"[188] of an enumerated offense under the ACCA and USSG. Clarifying these points may help reduce litigation and identify differences between the ACCA and USSG. A Supreme Court decision on the matter would also be particularly helpful in instances where there are more than four enumerated offenses, such as USSG section 2L1.2(b), where crime of violence is defined by twelve enumerated offenses.[189]

2. Fleeing a Police Officer

Analyzing the circuit court decisions regarding the crime of fleeing the police in a motor vehicle leads to unresolved, contradicting issues. Due to a circuit split, either the Eighth Circuit needs to resolve the issue or the Supreme Court should review.

a. *United States v. Tyler*[190] vs. *Wise* and *McConnell*

In *Tyler*, a case involving a defendant who wrecked his vehicle while fleeing the police at excessive speeds and ignoring traffic signals, the Eighth Circuit concluded that the Minnesota "crime of fleeing a peace officer in a motor vehicle" is not a crime of violence under the USSG.[191] Applying the *Begay* test,[192] the court determined that the de-

187. *Id.* at 1133 (quoting State v. Gardella, 751 P.2d 1000, 1002 (Ariz. Ct. App. 1988)).
188. Taylor v. United States, 495 U.S. 575, 598 (1990).
189. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(iii) (2010).
190. 580 F.3d 722 (8th Cir. 2009).
191. *Id.* at 726.
192. *See* Begay v. United States, 553 U.S.137, 1584–86 (2008). The threshold question in determining if the offense falls within the residual clause of the ACCA is whether it presents a serious potential risk of physical injury to another. *Id.* at 1584. Second, the court must determine if the offense is "roughly similar, in kind as well as in degree of risk posed" to the enumerated of-

fendant's conduct—although purposeful—did not typically involve conduct presenting a serious risk of physical injury to another, or conduct that is violent and aggressive.[193] The court concluded that fleeing a police officer does not pose a serious risk of bodily injury because the Minnesota statute does not require high speed or reckless driving.[194] Furthermore, the statute includes a separate subsection that criminalizes the act of fleeing when it causes death or bodily injury, indicating to the *Tyler* court that simply fleeing a police officer is mere disobedience and normally does not rise to the level of posing a serious risk of physical injury.[195]

Similarly, the offense cannot be said to typically involve violent and aggressive conduct. In defining "flee," Minnesota criminalizes conduct that is not violent and aggressive because "flee" includes turning off headlights and taillights and increasing the speed of the vehicle.[196] Such actions do not reveal the propensity of an offender to act violently towards others.[197] Likewise, these actions do not necessarily lead to chase and/or confrontation as the government contends. The statute does not make confrontation an element of the crime, and in fact, requires no "conduct presenting a serious risk of physical injury to another or conduct that is violent and aggressive."[198]

The Eighth Circuit is aware that its reasoning differs from the decisions in the Tenth, Fifth, and Sixth Circuits, but manages to distinguish or disregard each of these opinions. The court distinguishes *West*, and thus the later decisions of *Wise* and *McConnell*, and the Fifth circuit case[199] because the statutes at issue in those cases do not define "flee" so broadly as to include behavior such as increasing speed and extinguishing headlights and taillights.[200] The Sixth Circuit in *United States v. LaCasse*,[201] however, considered a statute similar to the Minnesota statute at issue in *Tyler* and found that the crime was a violent felony under the ACCA.[202] The Eighth Circuit merely states they disagree with the Sixth Circuit and terminates the discussion, with no further elaboration on the ensuing circuit split.[203]

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fenses. *Id.* at 1585. A crime is "roughly similar" if it "typically involve[s] purposeful, violent, and aggressive conduct." *Id.* at 1586 (internal quotation marks omitted).

193. *Tyler*, 580 F.3d at 725.

194. *Id.*

195. *Id.*

196. *Id.*

197. *See id.*

198. *Id.*

199. *Id.* at 726 (referencing United States v. Harrimon, 568 F.3d 531, 537 (5th Cir. 2009)).

200. *Tyler*, 580 F.3d at 726.

201. 567 F.3d 763 (6th Cir. 2009).

202. *Id.* at 765–67.

203. *Tyler*, 580 F.3d at 726.

Expressing profound concern about the majority's decision in *Tyler*, Judge Limbaugh wrote a dissent that critiqued the majority's failure to consider the actual language of the residual clause and its failure to consider the record of the case at issue.[204] First, the dissent accused the majority of misreading the residual clause; Judge Limbaugh argued that the clause calls for a *potential* serious risk of injury as opposed to an actual risk.[205] The potential serious risk is definitely present when a defendant extinguishes headlights or taillights while fleeing an officer; the lack of vehicle lighting means that other drivers and peace officers cannot see the fleeing car, therefore creating the potential serious risk of vehicle accidents.[206]

Furthermore, the dissent argued that the presence of a separate subdivision creating additional penalty for fleeing an officer that results in death or great bodily injury is an argument for classification of the crime as a crime of violence.[207] The separate subdivision in question criminalizes the exact same conduct if death or serious bodily injury occurs; the subdivision does not add extra requirements of reckless driving or confrontation.[208] The dissent reasoned that because the same conduct is more seriously punished in the instance of death or bodily injury, it points to the offense as one that has potential serious risk of injury to another.[209]

The dissent also used the underlying facts of the defendant's conviction to show the typical way the offense occurs and determine the specific elements for which the defendant was charged.[210] The dissent intended to demonstrate that by isolating only one way the offense may be committed—extinguishing headlights or increasing speed—the majority was directly contradicting the Eighth Circuit's holding[211] in *United States v. Gordon*.[212] Tyler was driving at "excessive speeds" while ignoring traffic signals and signs, and lost control of his car, running into a cemetery gate.[213] Furthermore, even if the majority was correct in "cherry-picking"[214] one way the offense can be committed, its reasoning does not hold because the conduct must be coupled with the intent to

204. *See id.* at 727–29 (Limbaugh, J., dissenting). Judge Limbaugh argued that precedent clearly states the court is within its power to use a modified categorical approach. *Id.* at 730.

205. *Id.* at 727.

206. *Id.*

207. *Id.* at 728.

208. *Id.*

209. *Id.* at 727.

210. *Id.* at 727–28.

211. *Id.* at 729.

212. 557 F.3d 623, 625 (8th Cir. 2009) ("[A] statute can be violated in a number of ways, 'we look to the charging papers for the limited purpose of determining the specific elements for which [the defendant] was convicted.'").

213. *Tyler*, 580 F.3d at 728 (Limbaugh, J., dissenting).

214. *Id.* at 729.

elude a police officer,[215] and therefore, increases the potential serious risk for injury to another in the form of a chase or confrontation.[216]

b. Discussion

The Tenth Circuit and the *Tyler* dissent make the more compelling legal and logical argument for several reasons. First, the residual clause of USSG section 4B1.2 reads: "conduct that presents a serious potential risk of physical injury to another."[217] By ignoring the word "potential" in the residual clause, the *Tyler* majority made a crucial mistake because it disregards the firmly held belief by Congress and the courts that certain crimes increase the probability of violent confrontation. Furthermore, the Supreme Court—in the context of a burglary analysis—has stated that "potential risk" expressed congressional intent to "encompass possibilities even more contingent or remote than a simple 'risk,' much less a certainty."[218] Some form of burglary has been an enumerated offense in the ACCA and the USSG since their promulgation in the mid-1980s. An examination of legislative history and case law has repeatedly shown the rationale behind enumerating burglary is the potential for violent confrontation with the occupant or investigating officers.[219] Generic burglary, like the Minnesota fleeing statute, does not require confrontation as an element, but it is nevertheless considered conduct that presents a potential serious risk of physical harm because of increased risk of violent confrontation. Simply because the Minnesota statute does not require confrontation does not mean that it is not a potential risk of the proscribed conduct. The majority errs in its reasoning when it looks for conduct that "necessarily . . . present[s] a serious risk of physical injury to another;" rather, the question is whether the *potential* for risk exists.[220]

Second, the Eighth Circuit's analysis of the circuit split is misplaced. Given the opportunity—and following its precedent established in *West*, *Wise*, and *McConnell*—the Tenth Circuit would have likely concluded that fleeing a police officer under the Minnesota statute was a crime of violence for two main reasons: (1) similar to the Eighth Circuit, the Tenth Circuit has justified a modified categorical approach and an examination of the charging documents and plea agreement when there is more than one way in which to commit the offense;[221] and (2) the Tenth Circuit has repeatedly affirmed the notion that statutes criminalizing

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215. *Id.*

216. *See id.* at 729–30.

217. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (2010).

218. *James*, 550 U.S. at 207–08; *see also* April K. Whitescarver, Chambers v. United States: *Filling the Gaps When Interpreting the Armed Career Criminal Act*, 13 JONES L. REV. 89, 95 (2009).

219. *E.g.*, *James*, 550 U.S. at 209; *Martinez*, 602 F.3d at 1169–70; *Rivera-Oros*, 590 F.3d at 1130.

220. *Tyler*, 580 F.3d at 725.

221. *Wise*, 597 F.3d at 1144.

flight from a police officer are similar to escape in that they create an increased potential for serious injury to others because the crime is committed in the presence of a police officer.[222]

Because the Minnesota statute can be violated by several types of conduct, the Tenth Circuit would have employed a modified categorical approach and looked to the charging documents for the specific violation with which the defendant was charged and would have likely concluded—similar to the *Tyler* dissent—that Mr. Tyler's charging documents indicate the conduct is a crime of violence.[223] Additionally, the Tenth Circuit emphasizes the potential confrontation and presence of third parties in its decisions addressing both fleeing[224] and burglary.[225] The definition of "flee" in the Minnesota statute would have likely concerned the Tenth Circuit, but the potential for the police officer to pursue the driver who extinguishes his headlights and creates the potential for violent confrontation or traffic accidents would have prevailed; the Tenth Circuit, unlike the *Tyler* majority, would have focused on the *potential* aspect of the residual clause because of its precedent[226] emphasizing potential for confrontation during the commission of a burglary.

In the Fifth Circuit case, *United States v. Harrimon*,[227] a modified categorical approach was not employed because the Texas statute did not have multiple subsections and could only be violated in one way.[228] Thus, the charging documents never become became a relevant line of inquiry for the court. Nonetheless, the Fifth Circuit is in line with the other circuits in determining that fleeing a police officer is aggressive and violent in nature because it is a challenge to the officer's authority and typically initiates pursuit, similar to an escape from custody.[229] The definition of "flee" was not at issue in this case.

The only case that agreed with *Tyler*'s assessment that fleeing does not lead to potential serious risk of injury to another came from the Eleventh Circuit, *United States v. Harrison*.[230] Similar to *Tyler*, *Harrison* held that a statute that criminalizes fleeing without the inclusion of a reckless or high-speed element is not the type of career criminal the USSG or the ACCA intended to punish.[231] The court stated that statistics showing the likelihood of physical injury in willful fleeing crimes that do not have the

222. *E.g.*, *id.* at 1146.
223. *See id.* at 1144.
224. *Id.* at 1147.
225. *E.g.*, United States v. Martinez, 602 F.3d 1166, 1169–70 (10th Cir. 2010); United States v. Rivera-Oros, 590 F.3d 1123, 1130 (10th Cir. 2009).
226. *See Martinez*, 602 F.3d at 1169; *Rivera-Oros*, 590 F.3d at 1130.
227. 568 F.3d 531 (5th Cir. 2009).
228. *See id.* at 533 n.2.
229. *Id.* at 534–35.
230. 558 F.3d 1280, 1296 (11th Cir. 2009).
231. *Id.* at 1295–96.

elements of high speed or recklessness would have been helpful and illustrative.[232]

Given these concurrent holdings, why is it, then, that the *Tyler* court did not mention the Eleventh Circuit's reasoning in its analysis? The answer may lie in the fact that the Eleventh Circuit pursued a modified categorical approach, one that was rejected by the court in *Tyler*.[233] Indeed, in *Harrison*, the Eleventh Circuit differentiated between the different subsections to determine with what, exactly, the defendant was charged.[234] The court in *Harrison* noted that the defendant was not charged with the subsection of the statute requiring high speed or reckless driving.[235] As a result, the defendant was found guilty of the less serious conduct of disobeying a peace officer by driving away at a reasonable speed.[236]

Similarly, the majority in *Tyler* misread the *LaCasse* case because the statute at issue was not in fact similar to that in *Tyler*.[237] According to the *Tyler* majority, *LaCasse* analyzed a statute similar to Minnesota's and found that the defendant's conviction constituted a crime of violence.[238] The defendant in *LaCasse* was convicted of third-degree fleeing or eluding, which requires that the fleeing conduct occur in a thirty-five mile per hour zone or that the violation resulted in an accident.[239] The *LaCasse* court used a modified categorical approach to determine the specific crime of which the defendant was convicted.[240] The court concluded that these requirements translated to purposeful and aggressive conduct that had the potential for serious injury to another and was thus a crime of violence, despite the statute's definition of "flee."[241] The definition of "flee" was not addressed by the court, and consequently it did not decide that a defendant convicted of fleeing by extinguishing headlights and taillights was a crime of violence. Therefore, the *Tyler* court incorrectly cited *LaCasse* as a case dealing with a similar definition of "flee."

Finally, the Eighth Circuit has created an intra-circuit split. The *Tyler* opinion was filed in June of 2009 and a decision was rendered in September of 2009.[242] A second Eighth Circuit case addressing a fleeing statute, *United States v. Hudson*,[243] was filed in April of 2009 and a deci-

232. *Id.* at 1295.
233. *Tyler*, 580 F.3d at 724–25.
234. *Harrison*, 558 F.3d at 1284–85.
235. *See id.* at 1290–91.
236. *Id.*
237. *See* United States v. LaCasse, 567 F.3d 763, 765, 767 (2009) (finding that a fleeing offense under Michigan statute is a violent felony).
238. *Id.* at 765.
239. *Id.*
240. *See id.* at 765–66.
241. *Id.* at 766.
242. United States v. Tyler, 580 F.3d 722, 722 (8th Cir. 2009).
243. 577 F.3d 883 (8th Cir. 2009).

sion was rendered in August of 2009.[244] *Hudson* addressed a Missouri statute and found that a conviction for fleeing was a crime of violence.[245] Interestingly, *Tyler* does not discuss *Hudson*. This is especially odd because *Hudson* explicitly found that resisting arrest by fleeing "inevitably invites confrontation,"[246] creating a direct contradiction with the court in *Tyler*.[247]

It is arguable that the Eighth Circuit has not contradicted itself because the statute at issue in *Hudson* expressly stated that resisting arrest or fleeing must be conducted in such a manner that the person fleeing "*creates a substantial risk of serious physical injury or death to any person*."[248] In *Hudson*, the Eighth Circuit did not question the presence of a potential risk of injury because it was an express element of the statute. The question was one of language as opposed to legal substance. Thus, a new question is presented: whether a state can linguistically create a crime of violence or violent felony by merely inserting key phrases from the ACCA or USSG into its statute.

After summarily dispatching the potential injury question, the *Hudson* court found "purposeful conduct" because the defendant knowingly fled a police officer.[249] Additionally the court found "violent and aggressive conduct" because "[r]esisting arrest by fleeing inevitably invites confrontation" and "resisting arrest by fleeing *in a dangerous manner* involves more violent and aggressive conduct."[250] The *Tyler* court would likely respond that there was no indication that the Missouri statute broadly defined "flee," and that by requiring fleeing in a manner physically harmful to others, the definition of "flee" is narrow and can therefore be considered a crime of violence. This is the same way the *Tyler* court distinguished the Tenth and Fifth Circuits and is subject to the same legal and logistical problems discussed above. Furthermore, the *Hudson* court never addressed the definition of "flee" and had no cause to do so.

c. Will the Supreme Court Weigh-In?

The Eighth Circuit *Tyler* case is an anomaly in ACCA and USSG jurisprudence regarding the crime of fleeing the police in a motor vehicle. *Tyler* splits with the Tenth, Fifth, and Sixth Circuits, and in light of *Hudson*, seems to create an intra-circuit split. Because of these splits and considering the Supreme Court's recent attention to recidivist sentencing issues, the Court would likely grant certiorari in order to clarify the usage

244. *Id.* at 883.
245. *Id.* at 886.
246. *Id.*
247. *Tyler*, 580 F.3d at 725.
248. *Hudson*, 577 F.3d at 885 (emphasis added).
249. *Id.* at 886.
250. *Id.*

of categorical and modified categorical approaches and the potential serious risk involved in fleeing a police officer. In addition, the Supreme Court may hear the issue if the Eighth Circuit does not resolve contradicting opinions: Does fleeing invite confrontation, or not?

3. Juvenile Adjudications as Prior Convictions

In another matter, there is a controversial split regarding the use of juvenile adjudications as predicate offenses for the ACCA. The Ninth Circuit is the outlier in this split and reasons that juvenile adjudications should not be predicate offenses in light of the Supreme Court decisions in *Apprendi v. New Jersey*[251] and *Jones v. United States* (*Jones I*),[252] which imply that facts for sentencing enhancements *must* be subject to the safeguards of a jury.[253] The right to a jury trial accorded to criminal defendants by the Sixth Amendment does not apply to juvenile adjudication proceedings, and therefore, adjudications are not prior convictions to be used for sentencing enhancements under the ACCA.[254]

However, all other circuits that have addressed this issue find that a jury trial is not a prerequisite for using a prior conviction as a predicate offense for the ACCA;[255] all that is required is that the defendant receives all the due process required at the time of his conviction.[256] Due process does not demand jury trials for juvenile adjudications, but juveniles are afforded many other procedural safeguards that make the adjudications sufficiently reliable for *Apprendi* purposes.[257] Therefore, these circuits concluded that juvenile adjudications are predicate offenses for purposes of the ACCA.[258]

The Tenth Circuit has not yet considered this issue, but below is an outline of the major cases defining the circuit split. The next section analyzes the reasoning of these cases and predicts where the Tenth Circuit may fall.

a. *United States v. Tighe*[259]: Adjudications are Not Predicate Offenses

In its solitary decision, the *Tighe* court begins by limiting the applicability of its earlier precedent, *United States v. Williams*,[260] which stated

251. 530 U.S. 466 (2000).
252. 526 U.S. 227 (1999).
253. United States v. Tighe, 266 F.3d 1187, 1193–95 (9th Cir. 2001).
254. *Id.* at 1194.
255. *See, e.g.*, United States v. Smalley, 294 F.3d 1030, 1032–33 (8th Cir. 2002).
256. *See id.*
257. *See id.* at 1033.
258. *See id*; *see also* United Stated v. Matthews, 498 F.3d 25, 35–36 (1st Cir. 2007); United States v. Crowell, 493 F.3d 744, 750–51 (6th Cir. 2007); United States v. Burge, 407 F.3d 1183, 1190–91 (11th Cir. 2005); United States v. Jones, 332 F.3d 688, 696 (3d Cir. 2003).
259. 266 F.3d 1187 (9th Cir. 2001).
260. 891 F.2d 212 (9th Cir. 1989).

the use of juvenile adjudications—as predicate offenses for sentencing enhancements—did not violate due process.[261] The court notes that this decision was made "pre-*Apprendi*" and the nature of the sentencing decision was fundamentally different than the ACCA.[262] In the *Williams* case, the defendant's ultimate sentence was within the statutorily mandated maximum for the offense; in contrast, the ACCA goes beyond the statutory maximum and mandates an additional five years, making the sentence at least fifteen years of incarceration.[263] The Ninth Circuit poses an entirely different question in *Tighe*. There, the court considered the use of juvenile adjudications in light of the Supreme Court's decision in *Apprendi*, which defined the due process requirements when a court seeks to sentence a defendant beyond the statutory maximum.[264]

Tighe analyzes the cases leading up to *Apprendi* to find that jury trials and proof beyond a reasonable doubt are due process requirements for increasing a defendant's maximum sentence.[265] The Supreme Court in *Apprendi* stated that the certainty of procedural safeguards was crucial to the decision of *Almendarez-Torres*, finding prior convictions to be sentencing factors that are not required to be charged in an indictment.[266] Later, in *Jones I*, the Court found that a prior conviction is different from other sentence enhancing facts, and therefore, does not have to be submitted to a jury or proven beyond a reasonable doubt, because it must have been established through procedures satisfying fair notice, reasonable doubt, and jury trial guarantees.[267] The *Tighe* majority takes the three safeguards enumerated in *Jones I* and makes them the necessary elements required for all facts increasing a sentence beyond the statutory maximum: (1) fair notice; (2) proof beyond a reasonable doubt; and (3)

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261. *Tighe*, 266 F.3d at 1192; *Williams*, 891 F.2d at 215.

262. *Tighe*, 266 F.3d at 1192.

263. *Id.* at 1192 & n.2; *see* Armed Career Criminal Act, 18 U.S.C. § 924(e)(1) (2006).

264. *Tighe*, 266 F.3d at 1193; *see* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

265. First, the court looks at *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which labeled prior convictions a sentencing factor that was not a separate element of the crime that had to be charged in the indictment. *Tighe*, 266 F.3d at 1193 (discussing *Almendarez-Torres*, 523 U.S. at 243). Next, the *Tighe* court analyzes *Jones I* to show why the fact of a prior conviction is constitutionally distinct from other sentence-enhancing facts (such as use of a deadly weapon, use of explosives, committing an offense with extreme cruelty, etc.). *Tighe*, 266 F.3d at 1193 (discussing *Jones I*, 526 U.S. 227, 249 (1998)). In *Jones I*, the Court finds that a prior conviction must have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees. 526 U.S. at 249. Lastly, the *Tighe* court turns to *Apprendi* where the Supreme Court created an exception for prior convictions in its due process requirement for facts enhancing a sentence beyond the statutory maximum. *Tighe*, 266 F.3d at 1193–94 (discussing *Apprendi*, 530 U.S. at 490). This is referred to as the *Apprendi* exception. *See, e.g.*, *Tighe*, 266 F.3d at 1194. The exception states: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. Therefore, the issue becomes the definition of "conviction" under *Apprendi*.

266. *Apprendi*, 530 U.S. at 488; *Almendarez-Torres*, 523 U.S. at 243 (citing Graham v. West Virginia, 224 U.S. 616, 624 (1912)).

267. *Jones I*, 526 U.S. at 249.

the right to a jury trial constitute "the fundamental triumvirate of procedural protections."[268]

Thus, the *Tighe* court reads *Apprendi* as requiring a jury trial in order to satisfy the procedural safeguards necessary to constitute a prior conviction that would enhance a defendant's sentence beyond a statutory maximum.[269] In justifying their decision, the Ninth Circuit quotes *Apprendi*:

> There is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.[270]

The *Tighe* court reasoned that the *Apprendi* exception for prior convictions must be limited to convictions that were obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt.[271] In conclusion, the *Tighe* court found that because the Sixth Amendment right to a jury trial is not afforded in juvenile adjudications, those proceedings are not prior convictions that constitute predicate offenses for the ACCA.[272]

The *Tighe* dissent took the diametrically opposed position. The dissent argued that juvenile adjudications are predicate offenses because the language in *Jones I* and *Apprendi* merely means that prior convictions need not be submitted to a jury and proven beyond a reasonable doubt because they have due process procedural safeguards in place that make this sentencing factor sufficiently reliable.[273] The dissent interpreted *Jones I* as holding that prior convictions are merely sentencing factors that are subject to a lesser standard of proof because the defendant received all the process that was due to him when he was convicted of the earlier crime.[274] In *Tighe*, the defendant was adjudicated delinquent with all the due process due to him at the time, and this did not include a jury trial.[275] The fact that there was not a jury trial does not preclude the delinquent adjudication from being a prior conviction and predicate offense under the ACCA.[276]

Furthermore, the dissent contends that if the prosecution has to prove a prior juvenile adjudication beyond a reasonable doubt—as the

268. *Tighe*, 266 F.3d at 1193.
269. *Id.* at 1194–95.
270. *Id.* at 1194 (quoting *Apprendi*, 530 U.S. at 496).
271. *Tighe*, 266 F.3d at 1194.
272. *Id.*
273. *Id.* at 1200 (Brunetti, J., dissenting).
274. *Id.*
275. *See id.* at 1198–99.
276. *Id.* at 1200.

majority requires—this will allow the jury to hear about prior offenses, a procedure that would be unduly prejudicial.[277] The defendant will have to make a choice: stipulate, or allow the jury to hear.[278]

b. *United States v. Smalley*,[279] *United States v. Jones* (*Jones II*),[280] *United States v. Burge*,[281] *United States v. Matthews*,[282] and *United States v. Crowell*[283]

In chronological order, the Eighth, Third, Eleventh, First, and Sixth Circuits found fault with the *Tighe* majority and adopted the reasoning of the *Tighe* dissent. These courts found that juvenile adjudications were constitutionally sound convictions under *Apprendi* and could therefore be considered prior convictions for sentencing enhancement under the ACCA.

Because the post-*Tighe* opinions have strikingly little variation in their reasoning, the following is a summary of the *Smalley* court's opinion.[284]

The *Smalley* court first recounts *Tighe* and then states that it respectfully disagrees with the Ninth Circuit's reasoning and proceeds with its own.[285] The *Smalley* court adopted the certainty of procedural protections language in *Apprendi* and uses it as the foundation of the opinion:

> We think that while the Court [in *Apprendi*] established what constitutes sufficient procedural safeguards (a right to a jury trial and proof beyond a reasonable doubt), and what does not (judge-made findings under a lesser standard of proof), the Court did not take a position on possibilities that lie in between these two poles.[286]

According to the *Smalley* court, the Ninth Circuit erred when it found that the procedural triumvirate was necessary instead of sufficient because *Jones I* did not intend to define the term "prior conviction" as that which had been established through fair notice, reasonable doubt, and trial by jury guarantees.[287]

Moreover, *Smalley* reasoned that the decision should not turn on the "parsing of words" of Supreme Court opinions, but on the reliability of a prior conviction.[288] Juvenile adjudications are reliable because they are

277. *Id.* at 1201.
278. *Id.* at 1200–01.
279. 294 F.3d 1030 (8th Cir. 2002).
280. 332 F.3d 688 (3d Cir. 2003).
281. 407 F.3d 1183 (11th Cir. 2005).
282. 498 F.3d 25 (1st Cir. 2007).
283. 493 F.3d 744 (6th Cir. 2007).
284. Any differences in the other opinions are noted in the following text.
285. *Smalley*, 294 F.3d at 1032.
286. *Id.*
287. *Id.*
288. *Id.* at 1032–33.

afforded the safeguards of right to notice, the right to counsel, the right to confront and cross-examine witnesses, the privilege against self-incrimination, and guilt beyond a reasonable doubt.[289] The court concluded these guarantees "are more than sufficient to ensure the reliability that *Apprendi* requires."[290] To support its conclusion that these procedures are more than sufficient, the court quoted a Supreme Court case from 1971 that found the use of a jury in a juvenile adjudication would "'not strengthen greatly, if at all, the fact-finding function' and is not constitutionally required."[291]

Jones II and *Burge* have conspicuously added little to this analysis; both merely go through the decisions of *Tighe* and *Smalley* and conclude they agree with the *Tighe* dissent and *Smalley*'s reasoning.[292] *Jones II* primarily uses the *Tighe* dissent to justify its analysis; the court finds that the defendant was afforded all the procedural safeguards that he was constitutionally due at the time of his adjudication.[293] *Burge* analyzes *Jones I* and *Apprendi*, but it is largely an amalgamation of quotes from the *Tighe* dissent and *Smalley*.[294] *Crowell* simply combined *Smalley, Jones II*, and the *Tighe* dissent. The *Crowell* court cites *Jones II* and *Tighe* for the proposition that a defendant need only receive all the process he was due when convicted.[295] It also cites to *Smalley* for the proposition of evaluating the realities and procedural safeguards of juvenile court and the resulting reliability of juvenile adjudications.[296] However, the *Crowell* court did not discuss juvenile court procedures or statistics to illuminate the "reality" to which it refers. *Crowell* "join[s] the Third, Eighth, and Eleventh circuits in finding that the imposition of a sentence enhancement under the ACCA based on a defendant's juvenile adjudication without a jury trial does not violate the defendant's due process right or run afoul of *Apprendi*."[297] The court made no further analysis.[298]

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289. *Id.* at 1033.

290. *Id.*

291. *Id.* (quoting McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971) (plurality opinion)).

292. United States v. Burge, 407 F.3d 1183, 1189–90 (11th Cir. 2005); *Jones II*, 332 F.3d 688, 694–97 (3d Cir 2003).

293. *Jones II*, 332 F.3d at 695–96, 698; *see* United States v. Tighe, 266 F.3d 1187, 1200–01 (9th Cir. 2001) (Brunetti, J., dissenting).

294. *See Burge*, 407 F.3d at 1188–90.

295. United States v. Crowell, 493 F.3d 744, 750 (6th Cir. 2007).

296. *Id.*

297. *Id.*

298. *Matthews* is the one case with slight, but insubstantial differences. The defendant in *Matthews* first argued that Massachusetts law did not classify juvenile adjudications as criminal and therefore they could not be predicate offenses under the ACCA. United States v. Matthews, 498 F.3d 25, 33 (1st Cir. 2007). Although the court refused to address this argument because it was not raised and preserved at trial, it gave a succinct insight into what it might have ruled. *Id.* The court noted that: "[The defendant] cites no cases holding that Congress oversteps constitutional bounds by ignoring state law classifications and treating particular juvenile acts as criminal in nature." *Id.* The ACCA only narrowly extended juvenile adjudications into criminal convictions and it saw no basis for denying Congress this prerogative. *Id.* The court in *Matthews* then predictably proceeded to rehash *Tighe*, disagree, and quote *Smalley* for the proposition that the safeguards required in juvenile

c. The Juvenile Adjudication Quandary and the Antiterrorism and Effective Death Penalty Act (AEDPA)[299]

In 2004, the Ninth Circuit heard a case similar to *Tighe*; a defendant appealed his sentence enhancement based on a prior juvenile adjudication.[300] Although the sentencing enhancement in *Boyd v. Newland*[301] was based on California law—as opposed to federal law—and did not involve the ACCA,[302] the Ninth Circuit's reasoning is nonetheless relevant to the juvenile adjudication circuit split.

The *Boyd* court noted that it had previously held that the *Apprendi* exception does not apply to juvenile adjudications, and therefore, such adjudications cannot be prior convictions for sentencing enhancements.[303] However, it then stated, "California courts disagree with *Tighe*. They conclude that *Apprendi* does not preclude the use of nonjury juvenile adjudications to enhance the sentence of an adult offender."[304] The court further noted that the Third and Eighth Circuits also disagree with *Tighe* and found it unpersuasive.[305] In concluding, without overruling *Tighe*, the Ninth Circuit upheld Boyd's enhanced sentence using the procedural situation of the case: a habeas petition under the AEDPA, § 2254(d)(1).[306] The *Boyd* court stated:

> In general, Ninth Circuit precedent remains persuasive authority in determining what is clearly established federal law. But, in the face of authority that is directly contrary to *Tighe*, and in the absence of explicit direction from the Supreme Court, we cannot hold that the California courts' use of Petitioner's juvenile adjudication as a sentencing enhancement was contrary to, or involved an unreasonable application of, Supreme Court precedent.[307]

The phrase "clearly established federal law" and the requirement of a Supreme Court ruling on the issue for a higher court to reverse a lower court's sentencing decision (a habeas matter) is a result of the AEDPA.[308] The relevant provision is § 2254(d)(1), which states:

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adjudications were "more than sufficient" for reliability under *Apprendi* standards. *Id.* at 34–35. The only remaining difference is that the defendant in *Matthews* was offered a jury trial in accordance with Massachusetts law and refused. Thus, the court need not decide the necessity of the jury issue (but strongly implied its decision in dicta). *Id.* at 35.

299. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218–19 (1996) (codified at 28 U.S.C. § 2254).

300. Boyd v. Newland, 393 F.3d 1008, 1016–17 (9th Cir. 2004).

301. 393 F.3d 1008 (9th Cir. 2004).

302. *Id.* at 1016.

303. *Id.* (citing United States v. Tighe, 266 F.3d 1187, 1194 (9th Cir. 2001)).

304. *Boyd*, 393 F.3d at 1017 (citing People v. Bowden, 125 Cal. Rptr. 2d 513, 517 (Cal. Ct. App. 2002), a California case upholding the use of a juvenile adjudication as a predicate offense for the California Three Strikes law).

305. *Boyd*, 393 F.3d at 1017 (discussing *Smalley* and *Jones II*).

306. *Id.* (citing 28 U.S.C. § 2254(d)(1) (2000)).

307. *Boyd*, 393 F.3d at 1017 (citation omitted).

308. § 2254(d)(1).

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted . . . unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .[309]

Thus, as a result of the AEDPA and its cornerstone habeas provision under § 2254(d)(1), the Ninth Circuit cannot follow its precedent in *Tighe* and reverse sentence enhancements based on juvenile adjudications for defendants in state custody because the Supreme Court has not ruled on the issue as required by § 2254(d)(1).[310] Yet, if a defendant in federal court is merely appealing his federal trial court's sentence, the AEDPA does not apply, and *Tighe* remains applicable.

d. Discussion

When reading the above ACCA cases in succession, the lack of unique and independent analysis is jarring. Once *Tighe* and its dissent were published, the subsequent discussions of the *Apprendi* exception and procedural protections in *Jones I* were mirror images of one another with little, if any, variation in arguments. In fact, some courts merely quoted language from other circuits, coming to conclusions without any further justification or examination.[311]

For example, in *Burge*, the court engaged in a summary of *Tighe*, *Smalley*, and *Jones II* and concluded: "After reviewing the record, we conclude that this application was correct. We base our holding on the reasoning of our sister circuits in *Smalley* and *Jones [II]*."[312] Like "the *Smalley* court, we find nothing in *Apprendi* or *Jones [II]*, two cases relied upon by the *Tighe* court . . . that requires us to hold that prior non-jury juvenile adjudications . . . cannot be used to enhance a sentence under the ACCA."[313] Thus, it would seem that both *Jones II* and *Burge* complacently use the *Smalley* decision without questioning its findings or reasoning. *Matthews* and *Crowell* also adopt the *Smalley* analysis without considering the actual procedure of juvenile adjudications as opposed to their theoretical due process protections.[314]

309. *Id.*

310. Similarly, in a one-page memorandum from the Ninth Circuit, the court, citing *Boyd*, again decided that using a defendant's juvenile adjudication for a predicate offense under California's Three-Strikes law was not an unreasonable application of clearly established federal law. Solorzano v. Yates, 264 F. App'x 576, 577 (9th Cir. 2008). The court also notes that *certiorari* was denied in the *Boyd* case. *Id.*

311. *E.g.*, United States v. Burge, 407 F.3d 1183, 1190 (11th Cir. 2005).

312. *Id.*

313. *Id.* (citing *Jones II*, 332 F.3d 688, 696 (3d Cir. 2003)).

314. United States v. Matthews, 498 F.3d 25, 35 (1st Cir. 2007) ("[A]ll of the courts to consider the issue have agreed that 'the question of whether juvenile adjudications should be exempt from *Apprendi*'s general rule should [ ] turn on . . . an examination of whether juvenile adjudications, like adult adjudications, are so reliable that due process of law is not offended by such an

The analysis most pertinent to the prior conviction issue is the assumptions made about the practice of due process in juvenile court and the reliability of adjudications because of that process. Although outlined in more detail below in Part II.C.2,[315] the issue of juvenile adjudication reliability bears mentioning here. The *Smalley* court pointed out the extensive due process protections mandated by the Supreme Court in juvenile proceedings and concluded that the adjudications are reliable because of these procedures.[316] *Smalley* pontificates that the decision should not rest on a "narrow parsing of words," but the "reality of the actual juvenile adjudications to determine whether it is sufficiently reliable so as not to offend" the juvenile's due process rights.[317]

Nonetheless, the court never engages in an investigation of juvenile court realities; it merely notes that juveniles are required to receive sufficient due process rights to make them akin to the procedural certainty of adult criminal court.[318] This oversight ignores the original philosophies of informality and rehabilitation underlying the juvenile court system and the increasingly narrow line between juvenile court and adult criminal court.

More specifically, the *Tighe* dissent and its progeny also have problematic legal arguments regarding the application of *Apprendi* to juvenile adjudications. First, in dismissing the *Jones I*'s enumeration of the procedures making a prior conviction constitutionally distinct,[319] the *Tighe* dissent and its progeny do not consider the syntax of the enumeration. Second, the *Tighe* dissent's worry about unduly prejudicing the defendant by forcing the prosecution to prove adjudications beyond a reasonable doubt to a jury is easily alleviated.[320]

The *Jones I* language that the *Tighe* majority emphasized is as follows:

> One basis for that constitutional distinctiveness [of prior convictions] is not hard to see: unlike virtually any other consideration used to en-

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exemption.' We share that view of the question." (alterations in original) (citation omitted)); United States v. Crowell, 493 F.3d 744, 750 (6th Cir. 2007) ("[W]e join the Third, Eighth, and Eleventh circuits in finding that the imposition of a sentence enhancement under the ACCA based on a defendant's juvenile adjudication without a jury trial does not violate the defendant's due process right or run afoul of *Apprendi*.").

315. *See* discussion *infra* Part II.C.3.

316. United States v. Smalley, 294 F.3d 1030, 1033 (8th Cir. 2002). Procedures include the right to notice, the right to counsel, the right to confront and cross-examine witnesses, the privilege against self incrimination, and a finding of guilt beyond a reasonable doubt.

317. *Jones II*, 332 F.3d at 696; *Smalley*, 294 F.3d at 1033.

318. *Smalley*, 294 F.3d at 1033.

319. The Court in Jones I enumerates three characteristics that make a prior conviction distinct from other facts increasing a defendant's sentence. *Jones I*, 526 U.S. 227, 249 (1999) (noting "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees").

320. *See* United States v. Tighe, 266 F.3d 1187, 1200–01 (9th Cir. 2010) (Brunetti, J., dissenting).

> large the possible penalty for an offense . . . *a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.*[321]

Tighe also emphasized that *Apprendi* identified trial by jury as a requisite procedural safeguard.[322] Many of the post *Tighe* courts noted that *Jones I* did not intend to establish the criteria for the procedures necessary for a prior conviction,[323] but these opinions do not recognize that the language of *Jones I* is a list of procedures joined by the conjunction "and": "procedures satisfying the fair notice, reasonable doubt, *and* jury trial guarantees."[324] Thus, a linguistic analysis reveals that these procedures are all necessary for a prior conviction. Furthermore, *Jones I* uses a serial comma before the "and," indicating that the procedures are three separate and distinct entities that establish the constitutional distinction of a prior conviction.[325] Interestingly, some courts misquote *Jones I* by leaving out this final comma.[326]

The argument that this language is dicta is strong; however, the only court to make this argument is a California state court;[327] none of the federal opinions relying on the *Tighe* dissent or *Smalley* decision make an argument concerning dicta. Yet, even if the *Jones I* language is dictum, the fact that it is a recent Supreme Court case addressing sentencing enhancements that increase the statutory maximum sentence, the exact effect of the ACCA sentencing enhancement, makes the dicta arguably more persuasive and authoritative.[328]

The dissent in *Tighe* further argues that the majority's opinion presents a procedural issue that will unduly prejudice the defendant by putting his prior crimes before the jury.[329] The dissent underscores the significant prejudice created when prior crimes are introduced, and articulates its fear that "a defendant with a prior juvenile adjudication will be

321. *Id.* at 1193 (majority opinion) (alterations in original) (quoting *Jones I*, 526 U.S. at 249).

322. *Tighe*, 266 F.3d at 1194; *see* Apprendi v. New Jersey, 530 U.S. 466, 496 (2000).

323. *See, e.g.*, *Jones II*, 332 F.3d 688, 696 (3d Cir. 2003); *Smalley*, 294 F.3d at 1032 ("We do not think, moreover, that *Jones* [*I*] meant to define the term 'prior conviction' for constitutional purposes as a conviction 'that has been established through procedures satisfying fair notice, reasonable doubt and jury trial guarantees.'").

324. *Jones I*, 526 U.S. at 249 (emphasis added).

325. *See id.*

326. *See, e.g.*, *Jones II*, 332 F.3d at 695; *Tighe*, 266 F.3d at 1193.

327. *See, e.g.*, People v. Nguyen, 209 P.3d 946, 956 (Cal. 2009), a California Supreme Court decision disagreeing with *Tighe*, puts forth the dicta argument.

328. The Third Circuit, home of the *Jones II* opinion, finds Supreme Court dicta to be highly persuasive. In a recently published opinion, the court states: "The Supreme Court grants certiorari in fewer than 85 cases annually, and thus, provides precedent on very few issues. Accordingly, the Court's dicta is highly persuasive and should be treated as binding unless there are indications to the contrary . . . ." United States v. Dupree, 617 F.3d 724, 735 n.1 (3d Cir. 2010) (Cowen, J., dissenting). The persuasiveness of Supreme Court dicta is well-established in the Third Circuit. *See also* Galli v. N.J. Meadowlands Comm'n, 490 F.3d 265, 274 (3d Cir. 2007); Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548, 561 (3d Cir. 2003).

329. *Tighe*, 266 F.3d at 1200–01 (Brunetti, J., dissenting).

put to the Hobson's choice of stipulating to the priors or parading them before a jury."[330] However, as the majority makes clear, such a prejudice can be avoided by a separate jury sentencing phase or other procedural protections.[331] The dissent's objection seems to be *pro forma* as other courts have fashioned procedures for minimizing the prejudice of prior convictions when the prior conviction is a sentencing factor.[332]

C. The Tenth Circuit and Juvenile Adjudications

1. How will the Tenth Circuit Rule?

As of April 2011, the Tenth Circuit had not yet considered the question of juvenile adjudications as predicate offenses under the ACCA. This section aims to predict how the Tenth Circuit may rule on the controversial issue. First, the Tenth Circuit seems to have a different interpretation of ACCA and USSG challenges than the Ninth Circuit. Second, there is no indication that the Circuit will engage in any further analysis than *Smalley* and its progeny. And third, the Circuit has considered the application of *Apprendi* to juvenile law issues and has concluded that *Apprendi* does not apply.[333]

As mentioned, the Tenth Circuit parted from the Ninth Circuit in *Rivera-Oros*, on the issue of the meaning and scope of ACCA and USSG. In *Rivera-Oros*, the Tenth Circuit declined to adopt the Ninth Circuit's approach to defining "burglary of a dwelling" under the USSG. The Tenth Circuit applied the *Taylor* procedure for defining the generic definition of an enumerated crime, but found that *Taylor*'s definition of mere "burglary" under the ACCA should not be applied to "burglary of a dwelling" under the USSG. In contrast, the Ninth Circuit applied *Taylor*'s definition. The Ninth Circuit's reasoning reversed the enhanced sentence of the defendant under the USSG, finding that Washington "residential burglary" is outside the generic definition of "burglary of a dwelling." The Tenth Circuit's analysis found that burglary of a "residential structure" under Arizona law was within the definition of "burglary of dwelling" under the USSG and upheld the enhanced sentence. In fact, all of the above cases decided by the Tenth Circuit upheld the sentence enhancement imposed by the District Court, save *Martinez*, which found that only part of the sentence enhancement, the enhancement under the USSG, could be upheld. Thus, when one considers the Tenth Circuit's prevalent rejection of Ninth Circuit reasoning,[334] and its recent

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330. *Id.*

331. *Id.* at 1195 n.5 (majority opinion).

332. *Id.*

333. Gonzales v. Tafoya, 515 F.3d 1097, 1117 (10th Cir. 2008).

334. *See, e.g.*, *Rivera-Oros*, 590 F.3d at 1132–33 (rejecting the recent Ninth Circuit decision). For splits between the Ninth and Tenth Circuits on other issues, see Unareroro v. Gonzales, 443 F.3d 1197, 1211 (10th Cir. 2006) (declining to follow the Ninth Circuit's per se rule regarding credibility of an immigrant who has lied to gain entry into the United States to avoid persecution); Admin.

trend upholding sentencing enhancements under the ACCA and USSG, it is likely that the court will uphold the hypothetical use of juvenile adjudications as predicate offenses.

Furthermore, even if the Tenth Circuit's hypothetical analysis of this issue favored the *Tighe* majority, or adopted some of the analysis in Part II.C.2[335] below, the AEDPA means the court can only do so if the defendant is in federal custody. If the defendant is in state custody, the Tenth Circuit may find itself restricted by § 2254 as there is no Supreme Court ruling on the issue of juvenile adjudications as prior convictions or predicate offenses under the ACCA.

Nevertheless, the most concrete evidence of the Tenth Circuit's position on the issue is its 2008 decision in *Gonzales v. Tafoya*.[336] Notably, this decision comes after the *Tighe* and *Smalley* progeny. In *Gonzales*, the court considered whether it was a violation of *Apprendi* to have a judge determine that a juvenile is not amenable to treatment or eligible for commitment to a mental health facility under New Mexico law.[337] Mr. Gonzales was a fourteen-year-old boy who accepted a plea agreement to be sentenced to twenty-two years in an adult prison for the crimes of second-degree murder, aggravated residential burglary, aggravated battery with a firearm, and two counts of aggravated assault.[338] New Mexico does not have any mechanism for the transfer of a juvenile to adult criminal court; instead, all juveniles are heard in the Children's Court, which has the ability to issue juvenile and adult sentences.[339]

The Children's Court, after considering many factors, can sentence a juvenile to time in an adult facility if "(1) the child is not amenable to treatment or rehabilitation as a child in available facilities, *and* [2] the child is not eligible for commitment to an institution for the developmentally disabled or mentally disordered."[340] Despite evidence of and expert testimony regarding Mr. Gonzales's mental illness, the court, in an amenability hearing, found that Mr. Gonzales was not amenable to rehabilita-

Comm. of the Wal-Mart Assocs. Health & Welfare Plan v. Willard, 393 F.3d 1119, 1125 (10th Cir. 2004) (declining to follow "the Ninth Circuit's highly restrictive view of the scope of 'appropriate and equitable relief'"); Yerkovich v. Ashcroft, 381 F.3d 990, 994–95 (10th Cir. 2004) (acknowledging the Ninth Circuit's differing view concerning a federal statute barring judicial review of an immigration judge's discretionary decision, but declining to follow it); United States v. James, 257 F.3d 1173, 1178 (10th Cir. 2001) (declining to use the Ninth Circuit's approach to review selective prosecution discovery orders with an abuse of discretion standard, and instead holding that such orders should be reviewed *de novo*); United States v. Sullivan, 255 F.3d 1256, 1262 (10th Cir. 2001) (agreeing with the reasoning of the Eighth, Eleventh, Fifth, Seventh, First, and Fourth circuits and declining to adopt the position of the Ninth Circuit concerning whether application of certain sentencing guidelines violates the *ex post facto* clause); United States v. La. Pac. Corp., 106 F.3d 345, 348 (10th Cir. 1997) (declining to adopt the Ninth Circuit's discrete basis test).

335. *See* discussion *infra* Part II.C.3.

336. 515 F.3d 1097 (10th Cir. 2008).

337. *Id.* at 1104.

338. *Id.* at 1104, 1106.

339. *Id.* at 1103.

340. *Id.* at 1104 (quoting N.M. STAT. ANN. § 32A-2-20(B) (2010)).

tion and not eligible for commitment in an institution for the developmentally disabled.[341] The defendant appealed this decision, arguing that it was a violation of his due process rights under *Apprendi* to have the amenability findings made by a judge and not a jury.[342] The New Mexico Court of Appeals upheld the adult sentence and the defendant submitted a habeas corpus petition to the federal district court.[343] On appeal, the Tenth Circuit reviewed the district court's denial of the habeas petition.[344]

The Tenth Circuit held that the facts leading to Mr. Gonzales's adult sentence were not "fact[s] that increase[d] the penalty for a crime beyond the prescribed statutory maximum" under *Apprendi*.[345] Instead, the court reasoned that the factors the judge had to weigh were not questions of historical fact, as in *Apprendi*, but value judgments as to the juvenile's amenability to rehabilitation and eligibility for treatment.[346] The Tenth Circuit held that value judgments are typically in the purview of judicial discretion and thus, a defendant's right to a jury is never implicated.[347] Although the Tenth Circuit recognized that many of the factors to be weighed by the judge are questions of historical fact, the court found that these factors were not at issue in the case because of Mr. Gonzales's plea agreement.[348]

The court also applied the *Smalley* holding that juvenile proceedings do not require the procedural protection of a jury trial.[349] The *Gonzales* court cites Supreme Court precedent regarding the due process protections afforded to juveniles in the juvenile court system to show that a jury is not required for juvenile transfer proceedings;[350] the juvenile is merely entitled to a hearing, a statement of the reasons for the decision to transfer, and assistance of counsel.[351] Therefore, the court concludes that because the factors determining Mr. Gonzales's adult sentence and lack of amenability are value judgments—not issues of historical fact—and juveniles are not constitutionally entitled to jury findings, *Apprendi* does not apply because it dealt with the determination of historical facts and

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341. *Gonzales*, 515 F.3d at 1107.
342. *Id.* at 1108.
343. *Id.*
344. *Id.*
345. *Id.* at 1101 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).
346. *Gonzales*, 515 F.3d at 1113–14.
347. *Id.* at 1114. Legal scholars have called the distinction between value judgments and historical fact into question. *See* Sam Kamin & Justin Marceau, *The Facts About* Ring v. Arizona *and the Jury's Role in Capital Sentencing* 40–41 (Univ. of Denver Sturm Coll. of Law Legal Research Paper Series, Working Paper No. 10-11, 2010), *available at* http://ssrn.com/abstract=1564465.
348. *Gonzales*, 515 F.3d at 1114.
349. *Id.* at 1114–15.
350. *Id.* (citing McKeiver v. Pennsylvania, 403 U.S. 528, 545–51 (1971) (plurality opinion); *In re* Winship, 397 U.S. 358, 368 (1970); *In re* Gault, 387 U.S. 1, 30–57 (1967); Kent v. United States, 383 U.S. 541, 554–565 (1966)).
351. *Gonzales*, 515 F.3d at 1115.

adult sentences.[352] The Tenth Circuit held that the refusal of the New Mexico Court of Appeals to apply *Apprendi* to juvenile transfer proceedings was not contrary to established federal law.[353]

Because of the Tenth Circuit's interpretation of the applicability of *Apprendi* to juvenile situations, there is little reason to believe that the Tenth Circuit will find that juvenile adjudications are not predicate offenses for sentencing enhancements because of their lack of a jury trial. Similar to the issue in *Tighe* and its progeny, transfer of a juvenile to adult court (or sentencing a juvenile to adult imprisonment) increases the maximum sentence the defendant will endure. The Tenth Circuit has already shown its support for the argument that juvenile adjudications do not constitutionally require trial-by-jury. Nonetheless, the court based its decision on the lack of historical facts found in the amenability hearing and *not* the lack of a jury trial right in juvenile proceedings. Thus, there is still hope that the Tenth Circuit will question Supreme Court precedent from the 1970s because the court's dicta leaves the question open of the importance of the lack of a jury trial right in juvenile proceedings: "[T]he mere fact that juveniles may not have a federal constitutional right to a jury trial in delinquency proceedings does not seem sufficient to distinguish *Apprendi* when the findings at issue authorize an *adult* sentence."[354]

Furthermore, the court seems to ignore the issue of a "constitutional no man's land" in which a juvenile can be denied the benefits of a juvenile justice system and the protections of the adult criminal system.[355] After mentioning this troublesome quandary, the Tenth Circuit distinguished *Apprendi* by stating: "Nevertheless, in our view, the distinction between the kinds of findings made at the amenability hearing and findings traditionally made by juries is a plausible one."[356] The lack of concern for the constitutional no man's land creates little optimism that the Tenth Circuit would be the first court to examine the policies and practices of the juvenile justice system and what they mean regarding the reliability of a juvenile adjudication and its qualification as a prior conviction for ACCA purposes.

2. Juvenile Adjudications Should Not Constitute a Prior Conviction under the *Apprendi* Exception

When taken at face value, the arguments made in both the *Tighe* majority and dissent each have merit and are each based on strong textual interpretations of Supreme Court precedent. The argument seems to largely depend on one's view of the Sixth Amendment right to a jury

352. *Id.* at 1115, 1117.
353. *Id.* at 1117.
354. *Id.* at 1113 (citation omitted).
355. *Id.*
356. *Id.*

trial and the rights afforded to juveniles during adjudications. Unfortunately, it is in this arena that both the majorities and the dissents fail to fully extrapolate the issues. Thorough analysis of the juvenile court system is conspicuously absent from the *Tighe* and *Smalley* progeny. If the courts engaged in such a discussion, the conclusion that juvenile adjudications do not meet the *Apprendi* exception would become obvious simply because they cannot be considered prior convictions.

Juvenile adjudications are not on par with criminal convictions for myriad reasons. This section presents a combined due process and social justice argument for prohibiting juvenile adjudications from constituting prior convictions and predicate offenses under the ACCA. This argument is largely built on the missing analyses in the *Tighe* and *Smalley* progeny: a philosophical and empirical discussion of the differences between juvenile and adult court, and consideration of the rights afforded to juveniles in adjudications versus the "realities" or practices of juvenile court. Moreover, the Supreme Court has indicated in recent decisions that it considers the neurological evidence of juvenile immaturity, underdeveloped sense of responsibility, and poor impulse control as important evidence for tempering the sentences given to juveniles, even those sentenced as adult offenders.[357]

a. The Realities of Juvenile Court

The only "realities" of the juvenile court that the opinions discuss are the supposed reliability of adjudications.[358] Each opinion notes that there are differences between juvenile and criminal courts, but none delve into the philosophy behind those differences or empirical evidence of what the differences actually mean. These courts argue that juveniles are essentially afforded all the due process rights as adults except for the right to a jury trial, which would not enhance the fact-finding function of the court.[359] A judge must still find that the juvenile is delinquent beyond a reasonable doubt.[360] No court, however, addresses what a bench adjudication means to a juvenile.

In 1971, the Supreme Court was optimistic regarding the reliability of judicial fact-finding,[361] but since that time, studies have been published showing that judges are more likely than juries to develop biases favoring police.[362] Studies have also shown that the unique discussion format of jury deliberations enhances reliability, and the diversity of ex-

357. Graham v. Florida, 130 S. Ct. 2011, 2026 (2010); Roper v. Simmons, 543 U.S. 551, 569–71 (2005).

358. *See* United States v. Crowell, 493 F.3d 744, 750 (6th Cir. 2007); *Jones II*, 332 F.3d 688, 696 (3d Cir. 2003); United States v. Smalley, 294 F.3d 1030, 1033 (8th Cir 2002).

359. *See Smalley*, 294 F.3d at 1033.

360. *Id.*

361. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971) (plurality opinion).

362. Recent Case, 116 HARV. L. REV. 705, 709 (2002).

periences among a twelve-person jury "increases the fairness of its evaluations as compared to those of a single judge."[363]

Furthermore, seven years after *McKeiver v. Pennsylvania*,[364] the Court recognized empirical evidence—in a plurality opinion authored by the same Justice as the *McKeiver* opinion—that larger groups of factfinders are more reliable than smaller ones.[365] In juvenile adjudications, the factfinding body is reduced to one, the judge. Moreover, the plurality in *McKeiver* noted that "[t]oo often the juvenile court judge falls far short of that stalwart, protective, and communicating figure the system envisaged."[366] Thus, the reliance on *McKeiver* by *Smalley* and subsequent courts is flawed as it fails to consider the true realities of the juvenile justice system.

In addition to the judicial factfinder issue, the courts do not take into account the considerable evidence that procedural guarantees, although mandated, are not applied with any regularity.[367] Juvenile courts were created at the turn of the twentieth century with a focus on rehabilitation and informality in a *non-criminal* context.[368] However, the line between juvenile and criminal court has become exceedingly gray within the last three decades; juveniles can now be sentenced to a mix of juvenile incarceration and adult imprisonment, juveniles can be charged as adults, avoiding the juvenile justice system altogether, and as the cases above demonstrate, juvenile adjudications now have serious consequences in adulthood.[369] Furthermore, because of the false perception of juvenile courts as lenient entities, juveniles may not dispute a particular accusation because of a lenient judge, inadequate counsel, or because his family thinks treatment—otherwise unaffordable or unattainable—may help the child.[370] Thus, the informal system that promotes discretionary sentencing and creates an atmosphere of factual and procedural laxness, which results in facts that can rarely be classified as undisputed, is the same system that may ultimately lead to a person's sentence of a minimum of fifteen years, or in California's case, an indeterminate life sentence.[371]

363. Id. (citing Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 575–79 (1998)).

364. 403 U.S. 528 (1971).

365. Ballew v. Georgia, 435 U.S. 223, 232–39 (1978) (plurality opinion) (holding that five jurors is too few); *see also* Recent Case, *supra* note 361, at 709.

366. *McKeiver*, 403 U.S. at 544.

367. *See* Richard E. Redding, *Using Juvenile Adjudications for Sentence Enhancement Under the Federal Sentencing Guidelines: Is it Sound Policy?*, 10 VA. J. SOC. POL'Y & L. 231, 243–51 (2002) (discussing the lack of full due process and lack of or poor representation accorded to juveniles during adjudication).

368. *See* Jason Abbott, *The Use of Juvenile Adjudications Under the Armed Career Criminal Act*, 85 B.U. L. REV. 263, 265 (2005); Redding, *supra* note 366, at 231.

369. Redding, *supra* note 366, at 231–32.

370. *See* Abbott, *supra* note 367, at 279.

371. *See id.*

Juvenile adjudications are unreliable not only because of questionable factfinding, but also because of the patchwork of due process rights actually afforded in adjudications, including the inconsistent right to effective counsel at adjudication proceedings. Because of the original goals behind juvenile adjudications, such as individualized and rehabilitative dispositions, in practice, the procedural requirements mandated by the Supreme Court[372] are frequently relaxed; juvenile courts often follow evidentiary and procedural rules less rigorously and are characterized by more frequent procedural errors.[373] Furthermore, a study in 1989 that interviewed 100 juvenile court workers found that one-fourth of the respondents felt that juveniles did not receive a fair trial, judges often admitted clearly inadmissible evidence and failed to consider defense motions, and would often enter an adjudication of delinquency with insufficient evidence of guilt.[374]

The underlying philosophy of juvenile court also leads to unpredictable results between the states and even within a state. This "justice by geography" is the result of juvenile court emphasis on individual consideration of the juvenile's particular situation and, often, their need for treatment and mental health services that are otherwise not available.[375] Thus, if a judge wants to get a juvenile into treatment—as per the philosophy of the juvenile justice system—they may declare them delinquent based on insufficient evidence.[376] But that adjudication can come back to haunt the adult when he or she is given an increased sentenced based on "career criminality." The Bureau of Justice Statistics has concluded that sentencing laws that count juvenile adjudications as predicate offenses "assume that there is some substantive meaning to a juvenile adjudication for a particular offense . . . . Because the juvenile justice system is often treatment-oriented, there is no necessary relationship between the adjudicated offense and the 'sentence' imposed by the court."[377]

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372. McKeiver v. Pennsylvania, 403 U.S. 528, 547, 550 (1971) (plurality opinion); *In re* Winship, 397 U.S. 358, 368 (1970); *In re* Gault, 387 U.S. 1, 30–31(1967).

373. Redding, *supra* note 366, at 243; *see generally* Caterina Ditraglia, *"The Worst of Both Worlds": Defending Children in Juvenile Court*, 63 MO. L. REV. 477 (1988) (arguing that juvenile courts provide a procedural matrix under which few adults would consent to be tried because of the less rigorous adherence to procedural rules, frequent procedural errors, and the less adversarial setting).

374. *See* Joseph B. Sanborn, Jr., *Remnants of Parens Patriae in the Adjudicatory Hearing: Is a Fair Trial Possible in Juvenile Court?*, 40 CRIME & DELINQ. 599, 603–04 (1994).

375. Redding, *supra* note 366, at 244.

376. *See id.* at 244–45. On December 10, 2010, the Supreme Court granted certiorari in *Tapia v. United States*, 131 S. Ct. 817 (2010), a Ninth Circuit case that considers whether a federal judge can give a convicted defendant a longer sentence in order to give the defendant access to drug treatment.

377. Neal Miller, *National Assessment of Criminal Court Use of Defendants' Juvenile Adjudication Records*, *in* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CONFERENCE ON JUVENILE JUSTICE RECORDS: APPROPRIATE CRIMINAL AND NONCRIMINAL JUSTICE USES 27, 29 (1997), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/NCJJR.PDF.

Another assumption that the court made in *Smalley*—and subsequent courts continue to make—is that juveniles are actually meaningfully provided with an attorney.[378] This is not a reality. Many juveniles waive their right to an attorney, but there is strong evidence that such waivers are not made "voluntarily, knowingly, or intelligently."[379] An ABA study found that 46% of public defenders say a colloquy is given only "sometimes" or "rarely" and 45% responded that when the colloquy is given, it is only "sometimes" or "rarely" as thorough as one given to adult defendants.[380] Furthermore, the waivers "are sometimes induced by suggestions that lawyers are not needed because no serious dispositional consequences are anticipated . . . . These circumstances raise the possibility—perhaps the likelihood—that a substantial number of juvenile waivers are not 'knowing and intelligent.'"[381] The thought that serious dispositional consequences are not possible is patently false with the advent of the ACCA. Additionally, studies conducted in the 1980s show that juveniles often fail to understand or appreciate their rights, including their right to counsel.[382]

Assuming juveniles do not waive their right and are provided with counsel, there is also the concern of effective representation. Juveniles appearing for adjudication hearings are often represented by public defenders who have no training in juvenile law, deal with heavy caseloads, and who are criticized for zealous representation.[383] Moreover, there is an extremely low professional status associated with juvenile law that is part of the systemic problem of poor representation at juvenile adjudications.[384] The same ABA study indicated that:

> In some courts, attorneys are subtly reminded by the court, the prosecutor, and other court personnel that zealous advocacy is considered inappropriate and counter-productive. Lawyers who refuse to temper their advocacy . . . may suffer from subtle disapproval or . . . fee reductions or being excluded from the panel of court-appointed attorneys.[385]

In failing utterly to consider the actual realities of the juvenile justice system, *Smalley* and its progeny committed a disservice to juveniles across the United States. The message is one of hypocrisy. As a govern-

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378. *See* Redding, *supra* note 366, at 247 ("Representation rates vary widely within and across states, but in many jurisdictions it is less than 50%, with first-time offenders having the lowest representation rates." (footnote omitted)).

379. *Id.*; *see also* AM. BAR ASS'N, A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 7 (1995), *available at* http://www.njdc.info/pdf/cfjfull.pdf [hereinafter ABA].

380. ABA, *supra* note 378, at 7.

381. *Id.* at 7–8.

382. Redding, *supra* note 366, at 248.

383. *Id.* at 250–51.

384. *Id.* at 250.

385. ABA, *supra* note 378, at 27.

ment and as a court system we proclaim juveniles are the future leaders of America, who are resilient, amenable to rehabilitation and worth protecting; yet, juvenile offenses, which are characterized by the informality and rehabilitative emphasis of the juvenile court, are historical factors leading to the prolonged imprisonment of the adult juvenile offender.[386]

b. Neuroscience of the Juvenile: *Roper v. Simmons*[387] & *Graham v. Florida*[388]

Recently, the Supreme Court has addressed juvenile sentencing and has categorically prohibited sentencing a juvenile to death or life without the "realistic opportunity" of parole for a non-homicide crime.[389] In the analyses, both opinions refer to the lack of maturity and underdeveloped sense of responsibility of defendants under eighteen and their resulting lesser culpability and greater susceptibility to change.[390] Both opinions also found it telling that it is difficult for psychologists to differentiate between an impulsive youthful offender and a habitual criminal.[391] *Roper* recognizes that mental health professionals are not allowed to diagnose a person under eighteen as having antisocial personality disorder (i.e., psychopathy or sociopathy) because of their developing personalities.[392] Similarly, *Graham* argues that psychology and brain science continue to show that parts of the brain involved in behavior control continue to mature through late adolescence.[393]

These conclusions concerning the developing personality of the juvenile and their diminished culpability serve the argument that adjudications should not be treated as predicate offenses for state or federal sentencing enhancements. If the juvenile is not as culpable when he or she is judged to be delinquent by the court, how can such offenses be deemed violent felonies or crimes of violence on par with adult convictions? The Supreme Court relies on evidence that the juvenile's brain is not fully formed in the area of decision-making and impulse control and thus, their adjudications do not have the equivalent *mens rea* of adult convictions.[394] In *Begay v. United States*, the Court recognized the importance of *mens rea* in finding a "violent felony" under the ACCA and concluded that a DUI is not a violent felony because the offense is one of strict liability.[395]

386. *See generally* Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771 (2010) (arguing that the widespread nature of ineffective representation in juvenile adjudications and the serious future consequences of adjudications necessitates a form of legal redress for those harmed by substandard legal representation in juvenile proceedings).

387. 543 U.S. 551 (2005).

388. 130 S. Ct. 2011 (2010).

389. *Id.* at 2033–34.

390. *Graham*, 130 S. Ct. at 2026–27; *Roper*, 543 U.S. at 569–71.

391. *Graham*, 130 S. Ct. at 2026; *Roper*, 543 U.S. at 573–74.

392. *Roper*, 543 U.S. at 573.

393. *Graham*, 130 S. Ct. at 2026.

394. *See id.* at 2026–27.

395. Begay v. United States, 553 U.S. 137, 146–48 (2008).

While juvenile offenses do not completely lack a *mens rea* requirement, the scientific evidence used by the Supreme Court indicates that juveniles do not commit offenses with the same "guilty mind"[396] as an adult offender.

However, the applicability of the neurological evidence used in *Roper* and *Graham* should not be assumed. Both courts made their holdings narrow and confined their decisions to sentences that effectively ended the juvenile's life.[397] The issue of juvenile adjudications as predicate offenses is not always as severe. While an offender could face a very tough sentencing enhancement that results in an indeterminate life sentence (i.e., a Three-Strikes law), others may be sentenced to the minimum under the ACCA, fifteen years. Thus the Supreme Court may see an enhanced sentence as a way to give the defendant "separat[ion] from society for some time in order to prevent . . . an escalating pattern of criminal conduct . . . ."[398] But, the appeal to the Supreme Court would not likely proceed on an Eighth Amendment claim, which makes the length and proportionality of the sentence relevant; the claim is likely to proceed under a Fourteenth Amendment violation of due process and thus, the neurological evidence may be used in a new and unique manner.

The *Tighe* dissent and the *Smalley* progeny rely in large part on the similar reliability of a juvenile adjudication to the adult criminal conviction and the "sufficient" due process rights afforded to juveniles that secures this reliability. However, as the above studies and literature show, the reliability of adjudications and protection from due process procedures are highly questionable. Sentences may be imposed in order to place the juvenile in treatment as opposed to the offense having been proven beyond a reasonable doubt; a single fact-finder is less reliable than a jury; colloquies regarding a juvenile's right to counsel are substandard and juvenile waivers may often not be "knowing or intelligent;" when counsel is present in adjudication proceedings, bars to effective counsel abound; etc. Furthermore, the Supreme Court has stated that juveniles are less culpable than adult defendants. It follows that a less culpable defendant should not later be punished for what the Supreme Court has characterized as impulsive actions.

Thus, a juvenile adjudication cannot be considered on par with the reliability of an adult conviction because the due process rights mandated in juvenile proceedings are not "more than sufficient" to ensure that reliability. The lack of a right to a jury trial emphasized in *Apprendi* is just one of the issues with juvenile adjudications that should legally preclude

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396. BLACK'S LAW DICTIONARY 1075 (9th ed. 2009).
397. *Graham*, 130 S. Ct. at 2034; *Roper*, 543 U.S. at 574–75.
398. *Graham*, 130 S. Ct. at 2029 (internal quotation marks omitted).

an adjudication from constituting a prior conviction and predicate offense under *Apprendi* and the ACCA.

3. Will the Supreme Court Ever Weigh-In?

As some of the cases above have noted, the Supreme Court has denied multiple opportunities to hear this issue. And, traditionally, the Court is reluctant to hear issues on juvenile matters, reasoning that these issues are better left to the police powers of the states. Indeed, juvenile law rarely becomes a federal issue because juveniles are considered part of family law, an issue reserved to the powers of the states. Each of these factors points to the continued silence from the Supreme Court. Nonetheless, there are several factors that might give the Supreme Court the impetus to grant *certiorari*: there is a circuit split; the Supreme Court has recently taken on several issues concerning the application of the ACCA[399] and sentencing of juveniles;[400] and at least one court has based its decision on the fact that there is no clearly established federal law.[401] Furthermore, after forty years,[402] the Supreme Court may feel that it is time to reevaluate the processes and practices of the juvenile court and the necessary procedural protections.

CONCLUSION

In just one year of litigation, a single federal circuit issued six opinions regarding the interpretation of the ACCA or USSG *and* created two circuit splits. The Supreme Court has noted that the resolution of these splits and others like them "could occupy the Court for years."[403] And while the Tenth Circuit seems to conduct a more thorough analysis of the burglary and eluding cases because of their adherence to *Taylor*'s generic definition methodology and consistent use of the modified categorical approach, the Tenth Circuit has yet to address the issue of juvenile adjudications.

The reluctance of the Supreme Court to address the issue of juvenile adjudications as predicate offenses will most certainly have to end in the near future, but at what costs? Will the Court redefine the juvenile court? Will the goals of the juvenile system be eradicated? Will the reliability

399. *E.g.*, Johnson v. United States, 130 S. Ct. 1265, 1268 (2010) (deciding whether the Florida statutory crime of battery constitutes a "violent felony" under the ACCA); Chambers v. United States, 555 U.S. 122, 129 (2009) (deciding whether failure to report to prison constitutes a "violent felony" under the ACCA); *Begay*, 553 U.S. at 139 (deciding whether DUI is a "violent felony" under the ACCA); James v. United States, 550 U.S. 192, 198 (2007) (finding that attempt crimes may qualify as predicate offenses under the ACCA when they involve conduct that presents a serious potential risk to another).

400. *Graham*, 130 S. Ct. at 2017–18; *Roper*, 543 U.S. at 555–56.

401. Boyd v. Newland, 467 F.3d 1139, 1152 (9th Cir. 2006).

402. *In re* Winship, 397 U.S. 358, 368 (1970). *Winship* is a decision in the middle of a line of Supreme Court cases that mandated the due process rights to be afforded to juveniles in the adjudication process. It was decided in 1970, predating *McKeiver* and following *In re* Gault.

403. *Chambers*, 555 U.S. at 122 (Alito, J., concurring).

and due process protection of juvenile adjudications be examined? Or, will the Court simply decide that, contrary to their previous decisions, the ACCA is too vague to continue and thereby force Congress to reform its Act for the first time since 1986. Regardless, as the survey above shows, the ACCA and USSG recidivist sections have created substantial litigation and resulted in many a judicial quandary and disagreement.

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